Dominion Law Reports

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

VOL. 14

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READ THE DOMINION LAW REPORTS

THE ANNOTATED SERIES OF CANADIAN REPORTS.

The Dominion Law Reports were begun two years ago, with the avowed task of properly head-noting and digesting for the profession practically every reportable Canadian case from ocean to ocean, so as to include in the series every point of permanent value as a precedent.

To such of these as required special annotation, scientific and modern annotations were appended. The D.L.R. has faithfully given to the profession, not only all the cases of value as indicated, but also numerous annotations of which an alphabetical index is given herewith. The lawyer has, therefore, enjoyed under his D.L.R. subscription, without collateral research or added expense, the benefit of these ready-made briefs by way of annotations.

In making the D.L.R. what it is, money has been liberally expended for authentic and official copies of decisions rendered, and the best legal skill has been employed in writing annotations and head-notes of a high type to meet the pressing need of the busy lawyer. The support given the work has shewn that these efforts have been appreciated by Bench and Bar.

The Annotations in D.L.R.

Annotating is both a science and an art, and it is of modern development. It is really the indirect (if tardy) outcome of that great law reform movement, to make law a less inexact science.

What are the functions of the modern annotation? Primarily to assist solicitors and counsel in the preparation and consideration of their briefs.

The scope of this annotation service may be illus-

trated by taking a recent D.L.R. annotation on "When injunction lies," as an example. It was published with the case of *Canadian Rubber Co.* v. *Columbus Rubber Co.*, 14 D.L.R. 455 at 460. That annotation embraces, not only an exact definition of its subject-matter and a concise sketch (so far as germane) of the struggle to fuse law and equity, and to abolish meaningless fictions and rules, but also a complete list of all illuminating cases, bringing out clearly the underlying principles which govern as to "When injunction lies." It is merely a type of the numerous annotations which have, through the D.L.R., reached the lawyer and helped him by way of ready-made briefs in his general practice.

It is, perhaps, not going too far to state that the ideal annotation calls for the combined learning, skill and research of the reporter, the headnoter, the text writer, the lawyer, the judge. It gives the precedents as found by the annotator and his criticism of same, and comparison with collateral subjects to which the same legal doctrine might be applied. It brings together the authoritative cases which may not have been mentioned in the judicial opinion, but which may be most important in a later case in which the opinion would be relied upon. Distinguishing features as applied to other circumstances are emphasized. Given a question of law, the beacon value of the annotation is obviously to marshall with method and skill the leading cases pro and con.

The skilful and practical annotator places himself, as nearly as possible, in the lawyer's shoes, and gives him the law with the annotator's reasoning, based, of course, on those sources equally open to Bench, Bar, and annotator.

An extract from the *Canada Law Journal* is of interest: "The value of intelligent and more or less exhaustive annotations on current cases of importance, such as in Canada one finds in the Dom-

inion Law Reports, is emphasized in an article which recently appeared in *Case and Comment*. This article, we notice, was copied into the *Law Times*, long recognized as the leading authority in Great Britain in such matters. Its appearance there is some indication of the approval by that journal of the annotation system, a system which is already popular with the profession on this side of the Atlantic, and which must soon be adopted in more conservative England for the benefit of the profession there. The law is enriched, and not smothered, by its many cases. But the generalizing must be done by careful and accurate methods and with adequate expenditure of time, neither of which the lawyer can be expected to bring to such work. And so it has come to pass that, after the work of the great commentators, and, in sequence, the work of the digesters, have been done, need has developed the modern annotator and his methods."

The Headnotes in D.L.R.

The D.L.R. headnote system calls for a scientific statement, in numbered paragraphs, of the principle, or principles, underlying each case and governing its judicial decision.

The old system of headnoting often missed the mark by incorporating a top-heavy statement with the names of the parties, the minute serial proceedings of the case, the specific sums of money involved or the like incidental details, none of which might in any way contribute as a basis for the judicial decision. Our system aims at giving the principle, and, with it, only such details as are component parts of the reasoning on which such principle is based.

For instance, the reasoning to a principle is the same whether the plaintiff chances to bear the name of Smith, or any other particular name; hence omit it. Again, in a vendor and purchaser case, it may be quite immaterial whether the vendor chances to be

the plaintiff or the defendant; in which event it is obviously needless to shew whether he prosecutes or defends the action.

There may be a dozen distinct circumstances in the case, of which some only are essential to the decision of the particular principle involved in the headnote; hence omit the others in enunciating the principle, making the statement as clear and concise as possible without unnecessary details.

In headnoting, while it is essential to bring out each decided principle under its proper classification, care must, of course, be exercised against including as judicial decisions such opinions as would more properly be classified as mere dicta. Many judicial statements which are not strictly judicial decisions essential to the judgment, are worthy of headnoting under this category.

In the D.L.R. each headnote is classified under the scientific classification system known as the *Standard Law Classification*, with main head and sub-heads for convenient reference, and with bracket citations of cases affirmed, reversed, applied, followed, overruled, distinguished or otherwise specially considered. The same classification has been adopted since 1912 in the Canadian Annual Digest, and has met with general approval.

Where a statute is being construed, the headnote is not encumbered by incorporating the complete text of the section involved, yet a sufficient summary of its nature is given to indicate the gist of the statute-law under consideration, thus enabling the lawyer, without fresh research, to place it instantly.

TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 14 INCLUSIVE
OF THE DOMINION LAW REPORTS.

CASES REPORTED

IN THIS VOLUME

WORDS AND PHRASES

JUDICIALLY CONSIDERED IN THIS VOLUME

CORRIGENDA.

Page 302, line 4, delete the word "but."

Page 302, line 4, insert the word "Local" before the word "Master."

Page 302, line 5, substitute "has" for "does not have."

TABLE OF ABBREVIATIONS

OF CANADIAN LAW REPORTS
AND STATUTES.

[1913] A.C.	Law Reports, Appeal Cases, of the year indicated in brackets.
Allen	Allen's New Brunswick Reports (same as 6-11 N.B.R.).
A.L.R.	Alberta Law Reports.
A.R. (Ont.)	Ontario Appeal Reports.
B.C.R.	British Columbia Reports.
Bert. R.	Berton's Reports (same as 2 N.B.R.).
B.N.A.	British North America Act.
C.A.D.	Canadian Annual Digest.
Can. Com. R.	Canada Commercial Reports.
Can. Cr. Cas.	Canadian Criminal Cases.
Can. Ex. R.	Canada Exchequer Court Reports.
Can. Ry. Cas.	Canadian Railway Cases.
Can. S.C.R.	Canada Supreme Court Reports.
Cart.	Cartwright's Cases on the British North America Act, 1867.
Cassels' S.C. Dig.	Cassels' Supreme Court of Canada Digest.
C.C. (Que.)	Civil Code (Quebec).
C.C.L.C.	Civil Code (Lower Canada).
C.C.P.	Code of Civil Procedure (Quebec).
Ch. Cham.	Chancery Chamber Reports (Ontario).
Chip. R.	Chipman's Reports, New Brunswick (same as 1 N.B.R.).
Clarke & Sc.	Clarke & Scully, Drainage Cases.
C.L.Ch.	Common Law Chambers Reports (Ontario).
C.L.J.	Canada Law Journal.
C.L.P. Act	Common Law Procedure Act (Ontario).
C.L.T.	Canadian Law Times.
C.L.T. Occ. N.	Canadian Law Times, Occasional Notes (Ontario).
Cochran's R.	Cochran's Reports (vol. 3 same as 4 N.S.R.).
Con. Rule (Ont.)	Consolidated Rules of Practice (Ontario).
Coutlée's S.C. Dig.	Coutlée's Supreme Court Digest.
Cr. Code	Criminal Code (Canada).
C.S.B.C.	Consolidated Statutes of British Columbia.
C.S.L.C.	Consolidated Statutes of Lower Canada.
C.S.N.B.	Consolidated Statutes of New Brunswick (1876).
D.L.R.	Dominion Law Reports, commencing with the year 1912.
Dorion	Decisions of the Court of Appeal (Quebec).
Dra.	Draper's Reports (Ontario).

Edw. VII. (Ont.)...Statutes of Ontario in the year of the Reign of Edward VII. as prefixed.
E. & A.....Upper Canada Error and Appeal Reports (Ontario).
E.C. (Ont.).....Election Cases (Ontario).
Gel. & Russ. R.....Geldert & Russell's Nova Scotia Reports (same as 31-45 N.S.R.).
G.O.....General Orders of the Court of Chancery.
3 Geo. V. (Ont.)...Ontario Statutes passed in the third year of the Reign (1913).
Gr.....Grant's Chancery Reports (Ontario).
Han. (N.B.).....Hannay's New Brunswick Reports (same as 12-13 N.B.R.).
H.E.C.....Hodgins' Election Cases (Ontario).
James R.....James' Reports (same as 2 N.S.R.).
Kerr R.....Kerr's Reports (New Brunswick, same as 3-5 N.B.R.).
L.C.G.....Local Courts Gazette (Ont.).
L.C.L.J.....Lower Canada Law Journal.
L.C.J.....Lower Canada Jurist.
L.C.R. .....Lower Canada Reports.
Man. L.R.....Manitoba Law Reports.
M.C.R.....Montreal Condensed Reports (1854), 1 vol.
M.L.R., Q.B.....Montreal Law Reports (1885-1891), Queen's Bench, 7 vols.
M.L.R., S.C.....Montreal Law Reports (1885-1891), Superior Court, 7 vols.
N.B. Eq.....New Brunswick Equity Reports.
N.B.R.....New Brunswick Reports.
N.S.R.....Nova Scotia Reports.
N.W.T. Ord.....Ordinances of the North-West Territories (Canada).
N.W.T.R.....North-West Territories Reports.
O.J. Act.....Ontario Judicature Act.
Oldr. R.....Oldright's Nova Scotia Reports (same as 5-6 N.S.R.).
O.R.....Ontario Reports.
O.S.....Old series of Upper Canada, King's and Queen's Bench Reports (Ontario).
O.W.N.....Ontario Weekly Notes.
O.W.R.....Ontario Weekly Reporter.
Ord. Alta. 1911....Territories Ordinances in force in Alberta as reprinted 1911.
P.E.I.R.....Prince Edward Island Reports.
Perrault.....Perrault's Quebec Reports, 1726-1759, 1 vol.
P.R. (Ont.).....Practice Reports (Ontario).
Pugs.....Pugsley's Reports (same as 14-16 N.B.R.).
Pyke.....Pyke's Quebec Reports, 1810, 1 vol.
Q.L.R.....Quebec Law Reports (prior to Quebec Reports).

Que. K.B.....Quebec Reports, King's Bench (continuation of Quebec Queen's Bench Reports).
Que. Q.B.....Quebec Reports, Queen's Bench.
Que. S.C.....Quebec Reports, Superior Court.
Que. P.R.....Quebec Practice Reports.
Ramsey.....Ramsey's Appeal Cases, (Quebec).
R.E.D.....Russell's Equity Decisions (Nova Scotia).
Rev. de Crit.....Revue de Critique (Quebec 1871-1875, 3 vols.).
Rev. Leg.....Revue Legale (Quebec).
Rev. de Jur.....Revue de Jurisprudence (Quebec).
R.J.Q., K.B.....Reports Judicial Quebec, King's Bench.
R.J.Q., Q.B.....Reports Judicial Quebec, Queen's Bench.
R.J.R.....Mathieu's Revised Judicial Reports (Quebec).
R.S.B.C.....Revised Statutes of British Columbia.
R.S.C. 1906.....Revised Statutes of Canada, 1906.
R.S.M.....Revised Statutes of Manitoba, 1902.
R.S.O. 1897.....Revised Statutes of Ontario (1897).
R.S.O. 1914.....Revised Statutes of Ontario (1914).
R.S.Q.....Revised Statutes of Quebec, 1909.
Russ. & Ches.....Russell & Chesley's Reports (same as 10, 11, 12 N.S.R.).
Russ. E.R.....Russell's Election Reports (Nova Scotia).
Russ. & Geld.....Russell and Geldert's Nova Scotia Reports (same as 13-27 N.S.R.).
S.C. Cas.....Supreme Court Cases (Cameron's) 1905.
S.L.R.....Saskatchewan Law Reports.
Stew. Adm. R.....Stewart's Admiralty Reports (Nova Scotia).
Stock. Adm.....Stockton's Admiralty Reports.
Stuart's Adm.....Stuart's Vice-Admiralty Reports (Quebec 1836-1874, 2 vols.).
Stuart K.B.....Stuart's King's Bench Reports (Quebec 1810-1835, 1 vol.).
Tay.....Taylor's Upper Canada K.B. Reports 1823, 1827, 1 vol.
Terr. L.R.....Territories Law Reports.
Thom. R.....Thomson's Reports (same as 1 N.S.R.).
U.C.C.P.....Upper Canada Common Pleas Reports.
U.C.L.J.....Upper Canada Law Journal (prior to Canada Law Journal).
U.C.Q.B.....Upper Canada Queen's Bench Reports.
U.C.R. .....Upper Canada Queen's Bench Reports.
Vict. (Ont.).....Statutes of Ontario passed in Queen Victoria's Reign in the year of the Reign prefixed.
W.L.R.....Western Law Reporter.
W.L.T.....Western Law Times.
Wood's R.....Wood's Manitoba Reports (1875-1883, 1 vol., prior to Manitoba Law Reports).
Young's Adm.....Young's Nova Scotia Admiralty Reports 1865-1880

INDEX OF SUBJECT MATTER, VOL. XIV., PART 1.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XIV., PART 1.

WILCOX v. WILCOX.

Manitoba Court of King's Bench, Metcalfe, J. October 8, 1913.

1. JUDGMENT (§ IV—220)—ACTIONS ON FOREIGN JUDGMENTS—VALIDITY OF MARRIAGE.

In an action in Manitoba to set aside a conveyance of land made to the defendant in consideration of her marriage to the plaintiff, where the latter pleads a foreign judgment (rendered subsequent to the bringing of the action at bar and between the same parties declaring the marriage null and void *ab initio* but declared to be without prejudice to the rights of the parties under the conveyance), the Manitoba court will not, upon such foreign judgment alone, predicate a failure of consideration for such conveyance as having been made in consideration of the marriage, nor be bound by the findings of fact upon which the foreign judgment was based although certified therewith.

[*Speton* v. *Gilmour*, 14 Man. L.R. 706, referred to; see also Annotation on actions on foreign judgments, 9 D.L.R. 788; as to clearness of proof required to annul marriages, see *Dilts* v. *Warden*, 5 D.L.R. 186.]

2. EVIDENCE (§ II E 3—156)—ABSENCE FOR SEVENTEEN YEARS—PRESUMPTION OF DEATH—FRAUDULENT REPRESENTATION.

In an action against a woman for fraud, involving her alleged widowhood and right to re-marry, proof that for seventeen years, prior to the time of her re-marriage, she had not seen or heard of her former husband, tends to negative a charge against her of fraudulent and false representation of widowhood.

[*R.* v. *Wiltshire*, 6 Q.B.D. 366, considered; see also *Wallace* v. *Potter*, 7 D.L.R. 114.]

Statement

TRIAL of action to set aside a conveyance of land situate in Souris, Manitoba. The action was dismissed, but with leave to plaintiff to bring a new action if so advised.

H. E. Henderson, K.C., for plaintiff.

J. F. Kilgour, for defendant.

Metcalfe, J.

METCALFE, J.:—The plaintiff and defendant both reside at Long Beach, California. In June, 1910, the parties, then domiciled in California, went to Victoria, British Columbia, and there went through the marriage ceremony, apparently legally performed. The plaintiff had already reached the allotted age of three score years and ten, notwithstanding which he had for six months previously been cohabiting with the defendant under circumstances to which I will later refer. During that period he had on various occasions indicated an intention to transfer to the defendant when she became his wife, certain property in Souris, Manitoba, being the property in question in this action.

Immediately after the ceremony the parties went to a

MAN.
K. B.
1913
WILCOX
v.
WILCOX.
Metcalfe, J.

lawyer's office in Victoria where the plaintiff executed a deed of the property. No money consideration passed. The plaintiff now seeks to set aside this conveyance, claiming that there was no consideration, and that there was undue influence, and fraud and misrepresentation.

Notwithstanding that from some standpoints the facts might well remain obscure or unrecorded, and while there are many details which I will avoid where possible, still I think on the whole justice may not be done to the parties unless I find some material facts, and deal at some length with details.

The plaintiff is without education. While he can sign his name, he can neither read nor write. He came to Canada with his family, from England, about 60 years ago. Early thrown upon his own resources he learned the trade of a bricklayer and plasterer. Later he married. In 1882 he came west, homesteading near Souris. He followed his trade and apparently made some money contracting in a small way. His family in the meantime having arrived from Ontario they all moved out to the homestead. At first he did not make a success of farming and moved to Souris where again he followed his trade and built some houses. After some years he moved back to the farm. Notwithstanding his lack of education he succeeded very well in life and as things went became wealthy.

During his first marriage his family relations were exceedingly happy. He became the father of ten children. He lived the simple life, never wandering from the path of virtue. He says so. No attempt was made to contradict this. At an advanced age Mrs. Wilcox became ill. Thankful that he could afford to retire and reside abroad, and being advised on account of his wife's health to go to the Pacific Coast, he left Manitoba for British Columbia. Finding his wife did not improve, he took her to California. There they met a certain Mrs. Young, with whom they at once become friendly.

The plaintiff had been doing his best to nurse his wife, but she was getting no better. Mrs. Young said she had a daughter who was a nurse. The old couple were delighted with Mrs. Young. They also thought they would be delighted with her daughter. So they arranged with the mother to engage this daughter to nurse Mrs. Wilcox. The daughter (who is the defendant) came and was introduced as Mrs. Lehman, a widow. She was engaged to nurse Mrs. Wilcox. The upshot of it all was that Mr. and Mrs. Wilcox and the defendant went to live with Mrs. Young at her house, the plaintiff paying for their lodging and for the nursing. Other than as imparted by Mrs. Young and Mrs. Lehman, their past life was unknown to this trusting old couple.

By reason of an advertisement the defendant met one Bro-

berg in St. Paul, in 1893, and married him. They went to Winnebago, and after a few days she left him. Her story as to this marriage and the reasons she gives for leaving are sordid. But the material facts are that she married Broberg and left him shortly afterwards, since which she has not seen nor heard of him. She does not remember what he looked like, she thinks he was a lineman, she knows he was a brute. She says he committed adultery with the chamber-maid. In 1899 she married Lehman, a farmer. Lehman was evidently well acquainted with the defendant and her family. They went to Lehman's farm in Pennsylvania. She left Lehman. She says he also committed adultery with a servant. However that may be she got the farm and heard no more of Lehman. Then she met one Chandra in Los Angeles and for some time kept house for him, during which time they cohabited. Finally they had a row over some property and she left Chandra. She says she told Wilcox all about this prior life. This Wilcox denies. The evidence of Chandra branded the woman as decidedly loose and unchaste. I cannot believe that she told either Wilcox or his wife the truth concerning Chandra. Neither do I think she told him anything about Broberg.

I, therefore, find that these two old people believed her to be what she represented herself, a hard-working woman, chaste and a widow.

There is no doubt that both the defendant and her mother treated the old people with great kindness and at that time conducted themselves as good women should. The defendant nursed Mrs. Wilcox and gave her such care and attention that the old lady began to love her. Fanciful as it may seem, knowing that she was soon to die, she planned that as soon as she was dead her husband should marry the defendant. One day she told the plaintiff that the defendant would make him a good wife. She advised him to marry her and told him to give her "the property." Just what property she meant does not appear. Mrs. Wilcox then owned this Souris property, however. She left it to Wilcox when she died. It is not unreasonable to infer that she meant the property in question. Shortly before Mrs. Wilcox died she called both the plaintiff and defendant to her bedside and putting her husband's hand in that of the defendant, told him to marry her right away and take her home with him, no matter what people would say, adding that the defendant would make him a good wife and take care of him.

Mrs. Wilcox died on December 5, 1909. The defendant and her mother were kindness itself to the old man. Undoubtedly, a stranger in a strange land, he was grateful. He says the defendant was affectionate and kind and did everything she could to make him comfortable. He considered himself engaged to her.

MAN.
K. B.
1913
WILCOX
v.
WILCOX.
Metcalfe, J.

We also find the plaintiff's cheque book was being used rather freely for the benefit of the defendant and her mother. Whether the plaintiff's conscience began to prick him or not is not recorded, but after a while he said to the defendant, "I don't like living this way, I want to get married." She said it was too soon, that people would talk, that in the meantime she would be just the same as a wife to him. Incidentally she "kept at" him to transfer to her some property. On January 20, 1910, he transferred to her a life interest in some house property in Pasadena for the expressed consideration of ten dollars. No money consideration passed. Although unmarried, they continued to cohabit. One night after they had retired the defendant talked some of her old home, and Wilcox asked her when Lehman had died and where. She then admitted that she did not know, and suggested that she get a divorce. While in this unhappy state the defendant's brother brought them one morning a newspaper giving an account of Lehman's death. They then went to Victoria and the marriage ceremony was there performed. It seems to be conceded that Lehman is dead. The parties returned to California. The happy bridegroom invested in an automobile and was otherwise fairly free with his bank account. Things went swimmingly. Before marriage the lady had received a life interest in the Pasadena property. As the old man put it, she had "kept at" him to give her the Souris property, but he had steadfastly refused, saying he would not do that until her name was Wilcox.

In passing, I may mention that the plaintiff's children and their families resided near Souris, likewise did all his old cronies. The reason for his refusal is, therefore, obvious. It goes a long way to establish that he had full use of his faculties and was not unduly influenced.

But now the defendant was married and had the Souris property. She wanted more. In September, 1910, the plaintiff bought a property at Long Beach (California) for $7,000. The defendant wanted it. At the time of the purchase they went to the lawyers, who told the plaintiff that there was a "nice little way" whereby this, or a share of it, could be made to her. He refused to follow out their suggestion and the deed was made to him. This, to my mind, is another reason against the general charge of undue influence. But she "kept at it" and pointed out that in case of his death his family would make her trouble. On December 19, 1910, for the expressed consideration of ten dollars, he transferred to her this Long Beach property, which was their home. No money consideration passed. The plaintiff admits that all these gifts were reasonable were she his wife, and that after making such gifts he had still enough to live on comfortably. They continued to reside together until October, 1911,

when the defendant raised $1,000 on the Long Beach property and with her mother took a trip east. She said she was sick and wanted to see eastern physicians. The plaintiff did not want her to go. Afterwards he followed, but after visiting her and her relatives a few days, he returned to California. He wired her to come home. She did not come. He sought advice, engaged detectives and soon became aware of her relations with Chandra and other details of her past life. He then decided he would live with her no longer. He left for Canada and did not see her again until his return to California, when he met her by chance. She was then living in the Long Beach property and asked him to return "home." But he would not. He taxed her with her past life. She said she was his wife anyway, no matter what had occurred prior to the marriage. The plaintiff says that he refused to live with her again because of what he had learned relating to her conduct prior to the marriage with him.

He commenced an action in California to set aside the marriage and the California conveyances, and he also commenced this action. It does not appear which action was commenced first. By an amendment before trial he alleges the marriage to Broberg and says that Broberg was at the time of the marriage ceremony between these parties still living, whereby the alleged marriage between the plaintiff and the defendant was a nullity. That the conveyance was made upon the faith of the defendant's representation that she was a widow. That such representation was untrue and was a fraud upon the plaintiff. The case came to trial without any denial of this allegation, but at the trial the defendant's counsel moved for leave to amend, and the plaintiff's counsel consenting, the amendment was allowed and attached to the record.

In support of the said allegation counsel for the plaintiff tendered a record of a judgment of the Superior Court of California for the county of Los Angeles, of January 14, 1913. The judgment not having been pleaded and the defendant's counsel objecting want of notice, I rejected the evidence. Later the defendant's counsel withdrawing that objection only and objecting as to its materiality generally, I allowed the plaintiff to plead the judgment, subject to all objections and reserving all questions as to its materiality or admissibility.

Since the trial counsel for the plaintiff has submitted to me the following in writing as his proposed amendment to the statement of claim:—

7b. In an action instituted and carried on by the present plaintiff against the present defendant in the Superior Court of the State of California, in and for the county of Los Angeles, in the United States of America, a Court of Record having jurisdiction, it was duly and finally

MAN.

K. B.

1913

WILCOX v. WILCOX.

Metcalfe, J.

and conclusively adjudged upon issue joined thereon between the said parties that the said assumed or pretended marriage was a nullity and the said judgment is binding upon the defendant in this action and by reason thereof the said assumed or pretended marriage of the defendant to the plaintiff was and is a nullity in fact and in law.

To this the defendant has not replied. It does not appear that the record has been amended. The California record of the judgment recites that a case between these parties having come on for trial on December 13, 1912, the parties being both represented by counsel, the cause having been tried and submitted to the Court, and the Court having given its decision in writing, and it having ordered that judgment be entered as directed in the said decision, goes on to state, amongst other things as follows:—

It is ordered, adjudged and decreed that the marriage between plaintiff Thomas Wilcox and defendant Carrie Wilcox, then called Carrie Lehman, solemnized at Victoria, British Columbia, Dominion of Canada, in the month of June, 1910, be and the same is null and void and the same is hereby declared annulled. Ordered, adjudged and decreed that this judgment is without prejudice to the rights of the parties as to the Souris property or the action pending in the Canadian Courts with respect to the property at Souris.

The decision in writing referred to, certified under the seal of the Court, is filed. The learned Judge goes into the case in great detail. He finds many facts, none of which findings of fact are pleaded. Amongst others he finds:—

That on or about the year 1893 she was married in the State of Minnesota to one Albert Broberg from whom she has never been divorced and that the said Albert Broberg is still living and that her marriage ever since same was consummated has been and still is in force. . .

That the plaintiff did not then at the time the said marriage ceremony was performed know anything about any marriage between Carrie Lehman and the said Broberg.

But as hereinbefore found the defendant Carrie Lehman had then living a husband named Broberg to whom she had been married and from whom she never had been divorced and that her marriage to the said Broberg was then in force and that her alleged marriage to the plaintiff was invalid.

As a conclusion of law and as a part of the said decision the learned Judge found

that the alleged marriage between the plaintiff and the defendant Carrie Wilcox was and is void and that the same should be annulled.

That the judgment entered herein be without prejudice to the rights of the parties with respect to the said Souris property and without prejudice to the action pending in the Canadian Courts with relation thereto.

Although my attention was not directed to it at the trial, I now find that the California judgment was rendered since the commencement of this action. No authority is cited for the ad-

mission of such evidence on behalf of the plaintiff. I am not aware that it is the practice of this Court to allow the plaintiff to so plead. In view of the case of *Speton* v. *Gilmour*, 14 Man. L.R. 706, and the cases there cited, I am inclined to the view that the plaintiff has not the right to enter the plea which he now submits.

The action is not to declare the marriage null, but is to set aside a conveyance. In view of the cases cited in Holmested on Matrimonial Jurisdiction and the arguments there advanced, pages 1 to 14, I have grave doubts as to the jurisdiction of this Court to deal with the marriage, although it might appear void *ab initio*.

However, unless I find upon the evidence (without admitting the California judgment, or without giving effect to any plea of *res judicata* as to the facts which might be set up), that Broberg was alive, I do not see how, even though I have the jurisdiction, I could declare the marriage null and void *ab initio*.

The plaintiff says that he would not have had anything to do with the defendant had he known the details of her past life. By this, I take it, he means that had he known of the marriage to Broberg and of her conduct with Chandra. That may be so, but as I have already said, he had been cohabiting illicitly with this woman for six months prior to the marriage and prior to the transfer.

I am not impressed with his claim of undue influence. Although uneducated, he appeared to me to be a man exceptionally intelligent, physically vigorous, and with his mental faculties unimpaired. I do not think the conveyance was made wholly in consideration of the representations as to chastity. The man was getting older and desired someone to take care of him. He thought the defendant was admirably adapted for that purpose. Even after the illicit cohabitation and while such continued, he still desired to marry her, renewed his promise to marry her, and promised that as soon as she married him he would transfer the property. Immediately after the marriage the property was transferred. The woman lived with him for more than a year afterwards. I think the transfer was executed in consideration of this marriage and while the marriage stands, ought I to set aside the transfer? I think not.

Unchastity prior to marriage, although concealed and under most aggravating circumstances, appears to be no defence in an action for alimony. Neither does it appear to be a defence in an action to recover from the husband property given to a wife prior to marriage: *A.* v. *A.*, 15 Man. L.R. 483.

Was Broberg alive at the time of the marriage? The plaintiff says that, having proven the marriage to Broberg, notwithstanding that 17 years passed, I must presume him to be alive. If alive, of course she was not a widow. In support of this con-

MAN.

K. B.
1913

WILCOX
v.
WILCOX.

Metcalfe, J.

tention plaintiff's counsel cites *R.* v. *Wiltshire*, 6 Q.B.D. 366. That was a criminal case not left to the jury, and there being on the one hand a presumption of life (after 11 years) and on the other hand the presumption of innocence, it was held that it should have been left to the jury to decide what was the fact.

Here the plaintiff founds his action on fraud. Is there a presumption that Broberg was alive after 17 years? Is it evidence to establish this fraud? Is there not, considering that the plaintiff must prove his fraud to the hilt, an analogy with the principle laid down in *R.* v. *Wiltshire*, 6 Q.B.D. 366, that on the one hand although there may be a presumption of life, on the other hand, if I may use the term, there is a presumption of innocence of fraud?

If I am right in this view, then I must weigh one with the other and find the fact. Under the circumstances I do not think that I should find as a fact that Broberg was alive at the time of the marriage with the plaintiff. I, therefore, dismiss the action.

When the case came to trial, there being no denial of the allegation that Broberg was living at the time of the marriage with the plaintiff, it may be that he would have succeeded upon the pleadings. It was only the amendment of the defendant which made it necessary for the plaintiff to attempt to introduce the California judgment. Under all the circumstances of the case I allow no costs.

In view of the facts decided by the California judgment and as it may be that the plaintiff could succeed in a new action, I allow him to bring such further action as he may be advised.

Action dismissed.

IMP.

P. C.
1913

BRITISH COLUMBIA ELECTRIC R. CO. Limited v. STEWART.

Judicial Committee of the Privy Council. Present: The Lord Chancellor, Lord Dunedin, Lord Atkinson, Lord Shaw, Lord Moulton. July 23, 1913.

1. MUNICIPAL CORPORATIONS (§ II C 3-60)—ORDINANCE — BY-LAW—VALIDITY—APPROVAL BY RATEPAYERS—BY-LAW CONSENTING TO SPECIAL PRIVILEGE OR FRANCHISE CONFERRED BY LEGISLATURE.

A municipal by-law directing the execution of an agreement between the municipality of Point Grey and an electric railway company consenting to the construction of a tramway on certain streets of the municipality and also imposing terms on which cars should be operated, does not confer such a particular privilege, right or franchise as to require the submission of the by-law to the ratepayers for approval under sec. 64 of the Municipal Clauses Act, B.C. Stat. 1906, where the railway company was empowered by ch. 55 of the B.C. Stat. of 1896, to construct and operate a tramway in that and other municipalities subject to the consent of the municipal council being first obtained and to the latter's designation of the streets upon which the tramway should be built, although the permission of the municipal council was further specified by statute to be upon such conditions as to plan of construction and for such period as might be agreed

upon between the company and the council; the purpose of the proviso requiring the consent of the municipality is restrictive and not donative in character, and its function is to circumscribe, or impose conditions upon the exercise of the rights already conferred by the legislature.

[*Re Point Grey Electric Tramway By-law*, 16 B.C.R. 374, reversed.]

2. STATUTES (§ II A—96)—CONSTRUCTION AND EFFECT—LATER STATUTE TO CONTROL—ACTS OF SAME SESSION—REPUGNANCY.

If there be a repugnancy between two statutes passed at the same session of the legislature, the later statute will prevail, and where there is no other mode of distinction as to date, the chapter of the annual statutes bearing the higher number may be presumed to be later in date.

[*R.* v. *Justices of Middlesex*, 2 B. & Ad. 818, approved.]

Statement

APPEALS by special leave from two Orders of the Court of Appeal of British Columbia, dated November 29, 1911, and December 15, 1911, respectively (*Re Point Grey By-law*, 16 B.C.R. 374).

A new franchise agreement having been entered into between the municipality and the railway company pending these proceedings, but the company desiring a ruling upon the validity of the judgments below, the appeal was argued *ex parte*, following an order dismissing the contestant electors therefrom on their own application.

Sir Robert Finlay, K.C., for the company appellant.

Lord Atkinson.

LORD ATKINSON:—By the first of the orders appealed from, leave was refused to the British Columbia Electric R. Co., Ltd., styled in the case the appellant company, to be added as parties in an appeal then pending in the Court of Appeal in which four electors of the municipality of Point Grey in British Columbia were appellants, and the corporation of Point Grey were respondents, and to intervene and prosecute the same.

By the second, the Court of Appeal allowed an appeal against an order of Mr. Justice Morrison, dated February 27, 1911, and decided that a certain by-law passed on September 10, 1910, by the corporation of Point Grey, styled the Electric Tramway By-law, 1910, No. 15, should be quashed as invalid on the ground that it was either *ultra vires* or had not received the assent of the electors of the municipality. [*Re Point Grey By-law*, 16 B.C.R. 374.]

Since special leave to appeal was obtained a new by-law, to practically the same effect as the first, has been passed by the corporation of Point Grey, submitted to a poll of the electors, and approved of by them, but upon the terms that the right of the appellant company to prosecute the appeals which they had obtained special leave to prosecute should not be thereby affected. Neither the corporation nor any of the electors appeared on the hearing of the appeals before their Lordships. The par-

IMP.
P. C.
1913
BRITISH COLUMBIA ELECTRIC R. CO. v. STEWART.
Lord Atkinson.

ticular feature of the by-law which, it was contended, necessitated its submission to the electors for their approval was this, that it, in effect, granted by charter to the appellant company "a right, franchise or privilege" within the meaning of sec. 64 of the Municipal Clauses Act, 1896, of British Columbia. The sole question for decision is whether this construction of the agreement is right.

The facts so far as material to the decision are as follows. Some distance to the south-east of the city of Vancouver, in British Columbia, is situate on the Fraser river the city of New Westminster. To the west of the former city, at the extreme end of the promontory which forms the southern boundary of English bay, is situate the municipality of Point Grey.

The appellant company was incorporated by the Consolidated Railway and Light Companies Act of 1894 and given powers to acquire the franchises, rights, properties, and privileges of other companies. In exercise of these powers it acquired by purchase the property, rights, powers and privileges of three companies, namely, the New Westminster and Vancouver Tramway Co., the Vancouver Electric Railway and Light Co., Ltd., and the North Vancouver Electric Co. In the year 1896 an Act (statutes of British Columbia, 1896, ch. 55) was passed to amend this Act of 1894, to change the name of the appellant company into that of the Consolidated Railway Co., to confirm these purchases and to vest in the appellant company under its new name all the property, rights, privileges, powers and franchises of the three aforesaid companies. This statute, in addition, by its 33rd, 39th, 41st, 52nd, 53rd, and 54th sections enacted, as far as is material, as follows:—

Sec. 33. The company is hereby authorized and empowered to construct, maintain, complete, and operate a single or double track street railway, tramway or railway, with all necessary switches, side tracks and turn-outs, and all other requisite appliances in connection therewith, upon and along such streets within the cities of Vancouver and New Westminster as the mayor and council of the said cities respectively may direct, and under and subject to any by-laws of the corporation of the said cities made in that behalf, and also to construct and maintain a tramway or tramways, railway or railways, between the said cities of Vancouver and New Westminster, and in the districts adjacent to the said cities, and over and upon such lands as the company may acquire, and along such road or roads between the limits of the said cities as may be specified by any municipality through which the same may be constructed.

Sec. 39. The councils of any municipality in the Province of British Columbia and the company are hereby respectively authorized, subject to the provisions of this Act, to make and to enter into any agreement or covenant relating to the construction of the said railway for the paving, macadamizing, repairing and grading of the streets or highways, and the construction, opening of, and repairing of drains or sewers and the laying

IMP.

P. C.
1913

BRITISH COLUMBIA ELECTRIC R. CO. v. STEWART.

Lord Atkinson.

of gas and water pipes in the said streets and highways, the location of the railway, and the particular streets along which the same shall be laid, the pattern of rails, the time and speed of running the cars, the amount of fares to be paid by passengers, the time in which the works are to be commenced, the manner of proceeding with the same, and the time for completion, and generally for the safety and convenience of passengers, the conduct of the agents and servants of the company, and the non-obstructing or impeding of the ordinary traffic.

Sec. 41. The company shall have full power and authority to use and occupy any, and such parts of any, streets and roads and highways as may be required for the purposes of its railway track, the laying of the rails and the running of its cars: Provided always, that the consent of the council of any municipality, when within such municipality, and of the chief commissioner of lands and works for the time being of the Province of British Columbia, when the streets, roads, and highways are not within a municipality, respectively, shall be first had and obtained, who are hereby respectively authorized to grant permission to the company to construct its railway as aforesaid within their respective limits across and along and to use and to occupy, the said streets or highways, or any part of them, for that purpose, upon such conditions as to plan of construction, and for such period or periods as may be respectively agreed upon between the company and such council or the chief commissioner of lands and works aforesaid.

Sec. 52. The company shall have the power to enter into and conclude any agreement with any other tramway or railway company, or any corporation, for leasing or selling to them the property, real or personal, rights, contracts, privileges, powers and franchises of the company or any part thereof, or for the working or managing of any of its lines of railway, or for running powers over the same, or any part thereof: Provided that such agreement shall be approved of by two-thirds in value of the shareholders at any special meeting called for that purpose.

Sec. 53. The company shall have power to enter into contracts with any person or persons, corporation or corporations, and with any municipality in the said province, for building and equipping street railways and for lighting the streets of any municipality and supplying it or them with power and heat, and any such contract shall be valid and binding for the term of years thereby agreed upon on the company and any such person or persons, or any municipality, corporation or corporations, so contracted with.

The powers conferred by these enactments on the appellant company are very wide.

The 33rd and 41st sections are somewhat obscurely worded. They purport to deal with five different classes of railway lines. It was not suggested by Sir Robert Finlay, who appeared for the company, that it was intended by the framers of this Act that municipalities in districts adjacent to either of these cities should not have power to specify the roads, streets and highways, within their limits, upon which railways should be laid, and it would appear to their Lordships that the construction of these ambiguous sections which would confer this power upon them, should, if possible, be preferred. They think it is pos-

IMP.
P. C.
1913
BRITISH COLUMBIA ELECTRIC R. CO. v. STEWART.
Lord Atkinson.

sible, and that the sections can, without doing any violence to their language, be so interpreted. The learned Chief Justice, apparently, held that the statute only authorized the company to construct lines of railway in those districts adjacent to one or other of the two cities which lay between those cities. His words as reported are:—

> The same section (*i.e.*, section 33) also confers upon the respondents power to construct and operate tramways in the districts adjacent to the said cities, but does not expressly confer any rights to construct its lines over the streets and highways of such adjacent districts other than such as lie between the limits of the said two cities. The rights given over streets or highways by the said section are confined to the said cities and to streets lying between them.

Their Lordships cannot adopt this view, as they understand it. They think, as has already been indicated, that where the lines of railway are constructed in districts adjacent to either of the cities, though not lying between them, and are laid along or across the roads, streets or highways, situate within the limits of a municipality, the governing body of that municipality have vested in them all the powers conferred by these sections, in that behalf, upon municipal authorities.

The governing body concerned in the present case is the corporation of Point Grey, and the lines of railway with which the case is conversant are admittedly laid along streets and highways within that municipality.

In their Lordships' view the effect of sec. 33 is to confer upon, and vest in the appellant company every power, privilege, franchise, and right necessary to enable them to construct their lines of railway along any of the streets, roads and highways within the limits of the municipality of Point Grey. They think that the sec. 41 enables the company to use and occupy wholly or partly such of these streets, roads and highways as may be necessary for the purposes of their railway, and that both sections combined vest in the company all the power necessary to enable them to operate these railways when constructed.

These very wide powers, privileges and franchises are, however, limited and restricted in their use and exercise in three different directions. First, by the provision requiring the consent of the corporation to be given to the exercise of the company's powers; secondly, by the provision giving to the corporation the right to specify the streets and highways along which the rails shall be laid; and thirdly, by the provision that the corporation may dictate the manner in which and the terms upon which the railway shall be constructed and operated. These powers of the corporation are, however, of a restrictive, not of a donative character. They do not enable the corporation

IMP.
P. C.
1913
British Columbia Electric R. Co. v. Stewart.
Lord Atkinson.

to give, grant or confer any right, power, or privilege whatsoever upon the company. Their only function is to circumscribe or impose conditions upon, the exercise by the company of the rights, powers and privileges already conferred upon it by the legislature.

It was not, as their Lordships understand, contended that a by-law merely expressing the consent of the corporation to the construction by the company of a railway or tramway over the particular streets or highways in Point Grey selected by the corporation itself, and nothing more would, under the provisions of sec. 64 of the Municipal Clauses Act, 1896, require the approval of the electors. That section runs thus:—

> Notwithstanding any law to the contrary a municipal council shall not have the power to grant to any person or corporation any particular privilege or immunity or exemption from the ordinary jurisdiction of the corporation, or to grant any charter bestowing a right, franchise, or privilege, or give any bonus or exemption from any tax, rate or rent, or remit any tax or rate levied or rent chargeable unless the same is embodied in a by-law which, before the final passage thereof, has been submitted to the electors of the municipality who are entitled to vote upon a by-law to contract a debt, and which has received the assent of not less than three-fifths in number of the electors who shall vote upon such by-law. Any such by-law which does not receive the assent of the electors as aforesaid shall not be valid.

It was, however, decided by the Court of Appeal that the corporation had, by the 31st clause of an agreement in writing, entered into between them and the company on September 10, 1910, touching the construction by the company of their tramway or railway upon certain specified streets in the municipality of Point Grey, done or attempted to do an act prohibited by this section, namely, had granted a charter bestowing upon the company "a right, franchise or privilege" within the meaning of the section. The by-law, held to be invalid, authorized the reeve and clerk of the corporation to affix the corporate seal to this agreement. This was duly done. If the corporation have, by this instrument, bestowed "a right, privilege or franchise" on the company within the meaning of this section, the so-called by-law, which is in reality merely a resolution passed by the corporation, is admittedly invalid since it never was submitted to the electors as required.

This agreement is a very lengthy document. It commences by reciting, that, under the 33rd and 41st sections of the Consolidated Railway Companies Act, 1896, the company are authorized and empowered to construct and maintain a tramway along such roads in the districts adjacent to the cities of Vancouver and New Westminster as may be specified by the council of the municipality in which these roads and highways are situate on the terms to be fixed by that body. It proceeds to

IMP.
P. C.
1913
BRITISH COLUMBIA ELECTRIC R. CO. v. STEWART.
Lord Atkinson.

recite that full power and authority is given to the company to use and occupy any parts of the streets, roads, and highways in the municipality as may be required for the purpose of its railway track, the laying of its rails, and the running of its cars, provided the consent of the council (*i.e.*, the corporation) be first had and obtained, and that the latter body had full power to give such consent upon such conditions as to plan of construction and for such period or periods as might be agreed between them. It further recites that the corporation had requested the company to construct and operate an electric street car system within the district of Point Grey, which the company have expressed their willingness to do on the terms and conditions thereinafter stated, and then proceeds to provide that the council, in exercise of the powers conferred upon it by the statute of 1896, consents to the company's constructing, and for a period of 40 years from the date of the execution and delivery of the indenture, operating an electric street railway or tramway of the kind therein described on the terms therein mentioned, the intention being that they should confer upon the company the consent of the corporation to use the said streets and no other interest therein. These terms are on the whole in their effect very onerous on the company.

The portion of art. 31 of the agreement which is relevant runs thus:—

> 31. In the event of the corporation or any other person or persons or body or bodies corporate proposing or being desirous of constructing a street railway or street railways on any of the streets within Point Grey other than those upon which the company shall have constructed a street railway or have a street railway in course of construction in accordance with the provisions herein contained, the company shall be requested in writing to build such desired or proposed railway and operate the same upon the terms and conditions in this agreement contained, and the company shall within sixty (60) days thereafter notify the corporation whether it is willing to build and operate such street railway, and in the event of the company refusing or neglecting within sixty (60) days from such request to signify its willingness to build and operate on any of said streets, or in the event of the company neglecting or refusing to commence the building of such railway on any of the said streets within six months after expiration of the said sixty (60) days, or to complete same within twelve (12) months from the date when it signified its willingness to build and operate such railway, the corporation shall then have the right to construct and operate the entire line specified on any such street as shall not have been constructed.

This article does not, in the opinion of their Lordships, confer upon the company any authority or power to make any tramway or railway in any street. The company already possessed all necessary power and authority for that purpose. It got them from another source. The corporation could, if so disposed, have *uno flatu* by one deed consented to the exercise by

the company of their powers over every street then existing in the municipality or thereafter to be constructed there, or they could have given that wide consent from time to time by successive documents. What they have done by this agreement is to give their consent to the exercise by the company of their powers over some streets, with a covenant that in certain events, and under certain circumstances, they will consent to the company exercising their powers over other and additional streets, thus giving them a kind of preference over competitors, should an expansion of the railway system be determined upon. This may or may not be a prudent bargain for the corporation to make. It may enable the company to earn great gains and profits by the exercise of its statutory power and privileges, but neither the Court of Appeal nor their Lordships have any concern with such matters. The sole question for their decision is the validity of the by-law in point of law. By the 39th article of the agreement it is expressly provided that it shall not be taken or construed so as to confer "any exclusive right or powers on or to the said company."

The 42nd article of the agreement, providing that the agreement itself was to enure for the benefit of, and be binding on the assignees of the company, was absolutely necessary as the 52nd section of the Railway Companies Act of 1896 expressly confers upon the company the power to lease or sell their undertaking and all their contracts, privileges, franchises, and powers to any railway or tramway, company or corporation. That power, like the others, was conferred by the legislature. The Railway Companies Act of 1896, and the Municipal Clauses Act of 1896 were passed in the same session of the British Columbian Legislature, but the latter was ch. 37 of the statutes of that year and the former ch. 55 and presumably later in date. If there is a repugnancy between them the later statute must prevail: *Rex* v. *Justices of Middlesex,* 2 B. & Ad. 818. The Municipal Clauses Act of 1896 was re-enacted in 1906, but this does not affect a repeal of the Railway Act not repealed by the statute which has been re-enacted.

Their Lordships, are, therefore, with all respect to the learned Judges of the Court of Appeal, unable to concur with them. They think that the agreement and by-law of September 10, 1910, did not amount to a charter bestowing a "right, franchise, or privilege" on the company within the meaning of section 64 of the Municipal Clauses Act of 1896, that the by-law impeached was therefore valid, the judgments and decisions appealed against erroneous, and should be reversed but without costs, and they will humbly advise His Majesty accordingly. There will be no costs of these appeals.

Appeals allowed.

B. C.

S. C.

1913

JACKSON v. CITY OF NORTH VANCOUVER.

British Columbia Supreme Court, Murphy, J. June 27, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ III—30)—TRANSFERS—LANDS—UNREGISTERED AGREEMENT OF PURCHASE—SEC. 104, B.C. LAND REGISTRY ACT CONSTRUED.

Sec. 104 of the Land Registry Act, R.S.B.C. 1911, ch. 127, providing that no instrument purporting to transfer land "shall pass any estate or interest either at law or in equity in such land until the same shall be registered" under the Act, is construed strictly as a registration section and will not bar a purchaser of land under an unregistered agreement of purchase from claiming compensation under sec. 394 of the Municipal Act, R.S.B.C. 1911, ch. 170, from a municipality expropriating such land.

[*Goddard* v. *Slingerland*, 16 B.C.R. 329; *Entwisle* v. *Lenz*, 14 B.C.R. 51, referred to.]

Statement

APPLICATION under sec. 8 of the Arbitration Act, R.S.B.C. 1911, ch. 11, for the appointment of an arbitrator to assess compensation in municipal expropriation proceedings, involving the right of a purchaser of land under an unregistered agreement of purchase and the interpretation of sec. 104 of the B.C. Land Registry Act.

W. Martin Griffin, for claimant Jackson.

W. B. A. Ritchie, K.C., for City of North Vancouver.

Murphy, J.

MURPHY, J.:—In my opinion I ought to appoint an arbitrator herein and counsel may speak further to the matter and suggest names. This is an attempt on the part of the corporation to defeat a just claim by invoking the provisions of sec. 104 of the Land Registry Act. The contention that they may be subjected to a claim by the registered owner is idle, for any such claim would be immediately met by the reply that prior to any damage done he had sold the land and has received his price in full.

The case is not one between two parties setting up conflicting claims to lands or to appurtenances to lands such as was *Goddard* v. *Slingerland*, 16 B.C.R. 329. The corporation has admittedly no claim to this land and admittedly is under a statutory compulsion to pay unless it can defeat same by said section. It appears to me that the legislature in passing the section in question meant its provisions to apply only to such disputes; in other words that it is a registration section and not as it must be, if the corporation's contention herein is to be sustained, a confiscatory section. I think this view is in a measure supported by the case of *Entwisle* v. *Lenz*, 14 B.C.R. 51. There, as stated by the Chief Justice, the solution depends upon a section of the Judgments Act, although a similar contention to the one here raised was set up. Here it depends on sec. 394 of the Municipal Act. That section does not speak of

registered owners or occupiers or persons interested in real property any more than did the section of the Judgments Act considered in the case cited. It seems to me the clear intention of the legislature was that compensation should be made irrespective of registration. Further, to quote the language of the Chief Justice, *mutatis mutandis*, as soon as the municipality became apprised of the true state of facts it became against equity and good conscience for them to insist on damaging Mr. Jackson's property without making compensation as compelled by law. They were fully aware of his interest in this property before they started to work, for they not only assessed it in his name and collected taxes from him, but inserted his name in the list of interested persons to whom they were bound by law to give notice of this very work. On this feature the recent case of *Loke Yew* v. *Port Swettenham Rubber Co.*, 82 L.J.P.C. 89, 108 L.T.R. 466, may be usefully considered.

Order made.

GOULD v. FERGUSON.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell and Sutherland, JJ. June 23, 1913.

1. SOLICITORS (§ II C 1—30)—SOLICITOR AND CLIENT—COMPENSATION OF—BILL OF COSTS—SUFFICIENCY OF—LUMP STATEMENT.

A bill of a solicitor's costs which, although itemized in respect to the services performed, does not state the amounts charged for each service, but instead claims a lump sum, does not comply with sec. 34 of the Solicitors Act, R.S.O. 1897, ch. 174, 2 Geo. V. ch. 28 (R.S.O. 1914, ch. 159).

[*Wilkinson* v. *Smart*, 33 L.T.R. 573, and *Blake* v. *Hummell*, 51 L.T.R. 430, followed; see also *Gundy* v. *Johnston*, 12 D.L.R. 71; *Re Johnston*, 3 O.L.R. 1, distinguished.]

2. SOLICITORS (§ II C 1—30)—SOLICITOR AND CLIENT—COMPENSATION OF—BILL OF COSTS—TAXATION—CHARGES FOR CONVEYANCING—ABSENCE OF TARIFF FOR—EFFECT.

The fact that there is no tariff of charges provided therefor presents no obstacle to the taxation of a solicitor's bill of costs the principal items of which are for conveyancing.

[*O'Connor* v. *Gemmill*, 26 A.R. 27, referred to.]

3. SOLICITORS (§ II C 1—30)—SOLICITOR AND CLIENT—BILL OF COSTS—ACTION ON—JUDGMENT ONLY FOR CHARGES PROPERLY ITEMIZED.

A judgment may be rendered in favour of a solicitor in an action on a bill of costs for such of the charges as are properly itemized and which, therefore, are subject to taxation; but if he takes such judgment to the exclusion of other charges which have not been properly itemized he cannot afterwards deliver and tax a further bill in respect of the latter.

[*Re Davy* (1865), 1 C.L.J. N.S. 213, followed; see also *Gundy* v. *Johnston*, 12 D.L.R. 71, 28 O.L.R. 121.]

Statement

APPEAL by the defendant from the judgment of the District Court of the District of Nipissing in favour of the plaintiff, a

ONT.

S. C.
1913

GOULD
v.
FERGUSON.

Statement

solicitor, in an action to recover the amount of a bill of costs delivered by the plaintiff to the defendant in respect of professional services rendered by the plaintiff.

The District Court Judge held that a proper bill had been delivered more than one month before the commencement of the action, and directed a taxation.

The appeal was allowed in part, with leave to the plaintiff to take judgment for a portion of his claim.

Argument

R. McKay, K.C., for the defendant:—The one question for decision is, whether the document delivered by the plaintiff to the defendant was a bill of costs within the meaning of sec. 34 of the Solicitors Act. While the items of the disbursements are properly stated, the other costs are merely itemised, and the charges in respect of each item are not specified, but merely a lump sum covering the whole, and the Act has, therefore, not been complied with. Reference was made to *Wilkinson* v. *Smart* (1875), 33 L.T.R. 573, at pp. 574, 575, *per* Lord Coleridge, C.J., and *Philby* v. *Hazle* (1860), 8 C.B.N.S. 647, there cited; *Blake* v. *Hummell* (1884), 51 L.T.R. 430; *Re Mowat* (1896), 17 P.R. 180, 183; *Re Pinkerton and Cooke* (1899), 18 P.R. 331; *Re McBrady and O'Connor* (1899), 19 P.R. 37; *O'Connor* v. *Gemmill* (1899), 26 A.R. 27; *In re Pomeroy and Tanner*, [1897] 1 Ch. 284; *Re Solicitor* (1910), 21 O.L.R. 255, affirmed 22 O.L.R. 30. *Re R. L. Johnston* (1901), 3 O.L.R. 1, will be relied on by the other side, but is a special case depending upon special circumstances, and is distinguishable.

A. G. Browning, for the plaintiff, argued that the *Johnston* case covered the point at issue, and, though not binding upon this Court, should be followed. There is no object to be gained by placing a separate sum against each item, and there has been a *bonâ fide* compliance with the Act, which is sufficient under sec. 34. The defendant cannot say that he has been taken by surprise.

McKay, in reply, referred to *Re Solicitors* (1907), 10 O.W.R. 951, *per* Anglin, J., at p. 952; *Re Shilson Coode & Co.* (1904), 90 L.T.R. 641.

Clute, J.

June 23. The judgment of the Court was delivered by CLUTE, J.:—The action is brought for services rendered by the plaintiff, as solicitor, to the defendant. The retainer is not disputed, nor is it disputed that an itemised statement of the work done and disbursements incurred was rendered more than one month prior to the commencement of the action.

The defence is, that, although an itemised bill in respect of the services was rendered, the amount for each service is not stated, but a lump sum charged.

Upon the trial the Court declared that a proper bill had been

delivered, and referred the taxation thereof to the clerk of the Court, reserving further directions and costs.

The Solicitors Act, R.S.O. 1897, ch. 174, sec. 34 (now 2 Geo. V. ch. 28, sec. 34), provides that no action shall be brought for the recovery of "fees, charges or disbursements" for business done by a solicitor, until one month after the delivery of the bill.

No doubt, full justice can be done under the judgment; but the question still remains whether the Act has been complied with.

The weight of authority, English and Canadian, is against the sufficiency of the bill as rendered.

The fact that no tariff is provided for conveyancing, which forms the principal items of this bill, presents no obstacle to taxation: *O'Connor* v. *Gemmill*, 26 A.R. 27, at pp. 39, 40; and *Re Solicitors*, 10 O.W.R. 951.

In *Wilkinson* v. *Smart*, 33 L.T.R. 573, a firm of solicitors had delivered a bill in which the business done was specified in six items; £25 was put down opposite one item, and there stated to be the agreed amount of costs; no sum was opposite the other items. It was held that the case was not brought within the Act of 1870, legalising, under certain circumstances, agreements between solicitor and client for payment of a fixed sum, and that the case must be decided under the earlier Act, 6 & 7 Vict. ch. 73, sec. 37. Lord Coleridge, C.J., after referring to the section corresponding with our Act, which provides that no attorney or solicitor shall commence or maintain an action or suit for the recovery of any fees, charges, or disbursements, etc., said: "There are six separate items in the bill, and the amount is not put opposite each individual item, but they are all summed up in a total of £25. Mr. Macleod did not contend that the first four items and the last were to be looked upon as blank items, for which no charge was made, but he contended that the total of £25 must be taken to be made up of all the six items. I am of opinion that this is not a bill of fees, charges, and disbursements within the meaning of the Act. I should think that, as the Act distinguishes fees, charges, and disbursements, the bill should also distinguish them, and I should have come to this conclusion independently of authority, but the case of *Philby* v. *Hazle*, 8 C.B.N.S. 647, which was cited by Mr. Lockwood in moving for the rule, is clearly in point." Grove and Archibald, JJ., were of the same opinion. Archibald, J., said: "If there had been no authority, I should still have thought that the object of sec. 37 of the Act of 1843 and the following sections, was to secure a mode by which the items of which the total sum was made up, should be clearly and distinctly shewn, so as to give the client an opportunity of exercising his judgment as to

ONT.

S. C. 1913

GOULD v. FERGUSON.

Clute, J.

whether the bill was reasonable or not, and to give the Master an opportunity of taxing it. But the matter is put beyond doubt by the case of *Philby* v. *Hazle*, and on the principle of that case I am clearly of opinion that this bill is not a bill of fees, charges, and disbursements within the meaning of sec. 37." Rule absolute.

This case was followed in *Blake* v. *Hummell*, 51 L.T.R. 430. It was also held in *Blake* v. *Hummell* that where a substantial part of a bill of costs is improperly set out and described, and a substantial part is properly set out and described, the whole bill is not bad, but the solicitor can recover upon those items that are properly described.

The plaintiff relied upon *Re R. L. Johnston*, 3 O.L.R. 1, but that case is quite distinguishable. There a solicitor was engaged to collect claims aggregating $82,000 from eleven different insurance companies. After long negotiations, $70,000 was collected without suit. The client obtained an *ex parte* order referring the bill to taxation, and the Taxing Officer allowed $3,200 in respect of the lump sum charged, having first, with the acquiescence of the parties, conferred with various referees, officers, and members of the profession as to charges usually made in such matters, and then determined the amount to be allowed in the light of his own general knowledge and experience: and it was held that the ruling of the Taxing Officer should be affirmed, and that, after himself issuing the order for taxation, the client could not claim to have the solicitor's remuneration assessed in an action. *In re Attorneys* (1876), 26 C.P. 495, was followed.

See *Re Mowat*, 17 P.R. 180; *Re Pinkerton and Cooke*, 18 P.R. 331; *O'Connor* v. *Gemmill*, 26 A.R. 27.

The items for disbursements were properly given, amounting to $49.12, and I was under the impression that the plaintiff might have judgment for this amount with leave to deliver and tax a further bill; but my brother Riddell has drawn my attention to *In re Davy* (1865), 1 C.L.J. N.S. 213, and cases cited. The effect of giving judgment for the plaintiff for part of the bill would be to give judgment for the defendant for the remainder, so that no further bill could be rendered. If the plaintiff elects, he may have judgment for $49,12, subject to taxation, with costs here and below on the County Court scale without set-off, which would be in full of his bill.

Otherwise, the appeal must be allowed with costs of appeal; no costs below.

Order accordingly.

PORTAGE FRUIT CO., Ltd. v. PORTAGE LA PRAIRIE.

MAN.

K. B.

1913

Manitoba King's Bench, Galt, J. October 8, 1913.

1. MUNICIPAL CORPORATIONS (§ II G 3—237)—DRAINS—OBSTRUCTIONS — SURFACE WATERS—LIABILITY—NOTICE AND OPPORTUNITY.

Where negligence, for want of adequate municipal provision to carry off drainage or overflow highway waters, is charged against a municipality under the Municipal Act, R.S.M. 1902, ch. 116 (sec. 516*a*, added by Man. Stat., 1904, ch. 36, sec. 1), reasonable notice of danger of damage must be brought home to the municipality, and it must be given a reasonable opportunity to avert the danger and prevent the damage.

[*Rice* v. *Whitby*, 25 A.R. (Ont.) 191, applied.]

2. MUNICIPAL CORPORATIONS (§ II G 3—241)—DRAINAGE—AS TO SURFACE WATER—CONTRIBUTORY NEGLIGENCE.

Where negligence for want of adequate municipal provision to carry off drainage or overflow waters from the highway is charged against a municipality, by a contiguous landowner, evidence of such owner's omission to protect his own property from the overflow, where, owing to the level surface of the locality such protection would have been simple and inexpensive, is relevant to shew want of reasonable precaution by the owner himself.

Statement

ACTION against a municipality in damages for want of adequate provision against drainage overflow under the Manitoba Municipal Act.

W. J. Cooper, K.C., and *A. Meighen*, for plaintiffs.

A. B. Hudson, and *A. C. Williams*, for defendants.

Galt, J.

GALT, J.:—The plaintiffs in this action claim damages by reason of the defendants' negligence in permitting large quantities of water to accumulate upon Saskatchewan avenue and Main street in the city of Portage la Prairie and for negligently conducting said water to the property of the plaintiffs.

The plaintiffs are merchants having their place of business on the west side of Main street between Victoria and Alice avenues. The damage in question is said to have arisen during the evening of Saturday, March 29. It appears from the evidence that the defendants' system of drainage along the district in question consists of a drain on Saskatchewan avenue (running from the west to the east) thence to a tile drain on Main street running north along the westerly side of Main street past the plaintiffs' premises, thence crossing over to the easterly side of Main street and continuing north underneath the tracks of two or more railways to Pacific avenue, and there having an outlet into an open drain running to the east. After the evidence had been completed, I had an opportunity of going over the ground with the solicitors for both parties and taking a view thereof. The drain above-mentioned is constructed two feet below the surface of the ground and has a fall of about 18 inches between Saskatchewan avenue and the plain-

MAN.

K. B.
1913

PORTAGE FRUIT CO. v. PORTAGE LA PRAIRIE.

Galt, J.

tiffs' property. The whole surface of the ground in the district in question is very flat and the evidence shews that in the spring of the year melting snow and ice is bound to form pools of water all over the city. The basement of the plaintiffs' premises is constructed to a depth of four feet below the surface of the ground. The entrance to it is from a hatchway at the back. The sides of this hatchway looked to me to be almost even with the general level of the ground surrounding it, but at the present time there is a slight banking up of earth to a depth of perhaps two inches, brought there by the plaintiffs on the night of the flooding. There are several openings to the drain down Main street to admit the carrying off of surface water, including water brought from Saskatchewan avenue aforesaid.

The evidence shews that there was an unusually heavy snowfall in Portage la Prairie during the winter of 1912-13, that a large bank of snow accumulated along Alice avenue to the north of the plaintiff's property extending, perhaps, one hundred yards along the street and most of the way across. It was said that this accumulation of snow was largely due to the presence of a number of engines or trucks placed along the street by the Hart Parr Co. in the fall of 1912. I do not think that anything turns upon this, because if the trucks had not stopped the snow where they did, the same snow must have accumulated against the obstructions belonging to the plaintiffs and their neighbour, Purser, to the west of them.

In the month of January, one of the city water mains burst on Saskatchewan avenue with the result that a large quantity of water escaped over the surface and was speedily frozen. The plaintiffs contend that the city authorities should have removed this ice before spring-time, and that when the spring thaw set in, a day or two before the trouble in question, the melting of this ice added unnecessarily to the melting of the ordinary snow and ice on the street, and imposed an additional obligation on the defendants. I cannot follow this argument at all. The bursting of the main was purely accidental and was repaired as promptly as possible and no inconvenience or danger seems to have occurred to anybody during the winter.

The weather appears to have become warm on the Thursday before the damage in question. One Hancock had been appointed street inspector for the municipality, and he was engaged with 19 men on and about the date of the damage in opening up surface drains and otherwise endeavouring to meet the results of the thaw then setting in. By Saturday afternoon a large amount of water had accumulated throughout the city on the various streets and vacant lots. An additional opening had been made on Saskatchewan avenue near Main street to

permit the escape of the water accumulating there, with the result that some 5 or 6 inches in depth of the water was carried off into the drain; but some stoppage occurred and the water had ceased to flow. It would appear that some other stoppage had occurred between the plaintiffs' premises and Pacific avenue, because between five and six p.m. on Saturday, water was being forced up from the drain opening near the corner of Victoria and Main street and had already risen high enough to reach the sidewalk. This would not require any depth of water, for all the inequalities of ground in the neighbourhood are a mere matter of a few inches. On the other side of Main street there was an open drain along a portion of the road, but the evidence shews that it was full of water. At about three o'clock on Saturday afternoon the plaintiffs' manager (McKay) left the building for the day. At that time he says that there was considerable snow on the plaintiffs' premises and puddles, but no flow of water; that he noticed water standing in front of the Empire hotel, which is on the southwest corner of Main street and Victoria avenue, but did not see any danger and did not think of any trouble. Edward Purser, a C.P.R. baggage-man, resides in a house on Victoria street, at the back of the plaintiffs' premises. He says that he went home to supper at five o'clock on the Saturday and saw water coming through a pipe under the sidewalk at the corner of Main street and Victoria avenue. The natural flow of water from this point was shewn to be in a north-westerly direction across Victoria avenue onto the plaintiffs' property and onwards past Purser's property. Purser says that about six p.m. he saw Hancock, the inspector, and notified him that he had better go over and look after this water or he and the Fruit Company would be drowned out, and Hancock said in reply that he was not any worse off than other people.

The plaintiffs strongly rely upon this conversation between Purser and Hancock to fix the defendants with notice and liability for what happened afterwards. Hancock himself says that he does not recollect any such conversation, but that inquiries and complaints about water were being made by numberless citizens about that time. Another witness said that he thought about one householder out of every three was complaining throughout the city.

At about eight p.m., McKay says he was telephoned for and he went back to the plaintiffs' building and found between four and six inches of water pouring in all around into the hatchway and more than a foot of water in the basement. He then got the assistance of Graham, the plaintiffs' shipper, and they scraped up enough earth around the hatchway to keep the water from coming in.

MAN.

K. B.
1913

PORTAGE FRUIT CO. v. PORTAGE LA PRAIRIE.

Galt, J.

I should myself think that in a locality so flat as the locality in question it would only have been a reasonable precaution for the plaintiffs to have anticipated an accumulation of water whether during the spring thaws or during a summer thunder storm, and if they had protected the hatchway even to the extent of a few inches it would have been a complete protection.

Next morning the water was pumped out of the basement and on Monday following, Hancock and his men cut an opening through the snow bank on Alice avenue and also dug or picked a ditch along the west side of Main street to the north with the result that all the accumulated water was got rid of.

The plaintiffs largely based their claim upon the Municipal Act, as amended in 1904, sec. 516A, which contains, amongst other things, the following provision:—

> Nor shall the council of any municipality dam up, obstruct or leave uncompleted for any unreasonable length of time, or sanction or permit the damming up, construction, or leaving uncompleted for an unreasonable length of time, any road, ditch, drain or other work in or upon any road, highway, street or lane or elsewhere in the municipality, without making full and adequate provision for conveying off the water, and preventing the lodgment of such water on such road, highway, street, lane or other place, or the overflow thereof on contiguous lands, and for the free and uninterrupted use of such road, highway, street or lane.

The obstruction which made itself apparent in the drain shortly after water had been allowed to flow in it, was not in any way explained, and it is said to have disappeared in the course of a few days. Plaintiffs' counsel suggested that probably snow and ice had drifted into the opening near the corner of Saskatchewan avenue and Main street and had blocked up the opening there; but no satisfactory explanation was given by anybody. It would look as though the drain had been stopped by ice, for in a few days the trouble was over.

I do not think it can be said that the council of Portage la Prairie did anything amiss or left the drain obstructed for any unreasonable length of time. I am unable to find any actionable negligence established against the defendants. Nobody appears to have suspected any likelihood of trouble before five or six o'clock on the Saturday afternoon and then everybody seemed to wake up to the situation. Water is a common enemy, and so far as I can see the snow bank might have been cut through, and the pipe under the sidewalk plugged just as well by Purser or the plaintiffs as by Hancock and his men.

But the crux of the situation lies in the fact that the damage was all occasioned before the trouble was or could be dealt with by the defendants. A large number of people were clamouring for assistance at six o'clock, when, in the ordinary course of work, Hancock and his men would go to supper.

Deflecting the water from one property owner would be almost certain to flood the property of some other owner.

Where negligence is charged against a municipality some reasonable notice of the trouble in question must be brought home to the municipality and they must be given an opportunity of setting the matter right. In the present instance, if the plaintiffs themselves had notified the city clerk at six o'clock on the Saturday evening, and if the council had specially met at eight o'clock to consider the matter, still it would have been too late as the damage had already occurred.

The law applicable to this branch of the case is clearly laid down in *Rice* v. *Whitby*, 25 A.R. 191, and cases cited therein.

For the above reasons I think that this action must be dismissed. The defendants are entitled to their costs.

Action dismissed.

CULSHAW v. CROW'S NEST PASS COAL CO.

British Columbia Supreme Court, Trial before Murphy, J. July, 1913.

1. MASTER AND SERVANT (§ II A 4—60)—LIABILITY OF MASTER TO SERVANT—SAFETY AS TO PLACE—ACCIDENT DUE TO SNOWSLIDE.

The fact that a snowslide that struck a building in which an employee of a mining company was working in the mountains was the result of abnormal conditions, will not relieve an employer from liability under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, for his injury or death where the company would have been answerable had the slide been occasioned by normal conditions; the governing factor is the special exposure which would be an incident in either case.

[*Warner* v. *Couchman*, 28 Times L.R. 58, 81 L.J.K.B. 45, distinguished.]

Statement

APPEAL by an applicant for compensation under the Workmen's Compensation Act from the dismissal of his claim.

The appeal was allowed and the application remitted to the arbitrator with a direction to find for the applicant.

A. Macneil, and *A. J. Fisher*, for applicant.

P. E. Wilson, and *S. Herchmer*, for respondent.

Murphy, J.

MURPHY, J.:—In this case I have some difficulty in determining just what are the findings of fact made by the learned arbitrator. He states first:—

> Had this snowslide been occasioned by normal causes, there is no doubt but that I could assume and would assume that the deceased came to his death by accident arising out of and in the course of his employment.

In other words he would have made an award in applicant's favour. Then he concludes his findings thus:—

> The question before me and upon which the whole case turns is, was the shelter in which the man stood, and where he had a perfect right to

B. C.

S. C. 1913

CULSHAW v. CROW'S NEST PASS COAL CO.

Murphy, J.

be at the time in the course of his employment, so situated that persons standing therein ran a peculiar risk from snowslides? I would hold, if the matter were before me for a final hearing, that persons within the shelter ran no special risk from an ordinary snowslide and that the accident was caused by a snowslide occasioned by abnormal conditions of weather, and I would therefore dismiss the application.

Apparently, therefore, the learned arbitrator has directed himself that as a matter of law, because the snowslide was not occasioned by "normal causes" but by "abnormal conditions of weather," therefore he was bound to dismiss the application. I think this is an error. The case relied upon, *Warner* v. *Couchman*, [1911] 1 K.B. 351, 80 L.J.K.B. 526, has been before the House of Lords, *Warner* v. *Couchman*, 81 L.J.K.B. 45, 28 Times L.R. 58, and the decision sustained on the express ground that a finding of fact had been made that the man was not specially affected by the severity of the weather by reason of his employment. Lord Loreburn cites, with approval, Lord Justice Fletcher Moulton, as follows:—

> It is true when we deal with the effect of natural causes affecting a considerable area such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality and whether so employed or not were equally liable. If it is the latter, it does not arise out of the employment, because the man is not specially affected by the severity of the weather by reason of his employment.

If the learned arbitrator had made a straight finding that deceased was not specially affected by reason of his employment by the abnormal weather occasioning the snowslide, that would be, I think, a finding of fact with which I could not interfere. He has found that the cause of the accident was a snowslide and that had it been occasioned by normal causes, the applicant should succeed. He could only succeed, I take it, because he would be specially affected by reason of his employment, that is, exposed to extra hazard because he was at the work where he was. How that position of affairs can be altered by the snowslide being caused by abnormal conditions of weather I fail to see, since the governing factor is the special exposure which would be as operative in the second instance as in the first. I would remit the case stated to the learned arbitrator, with a direction to find for the appellant.

Appeal allowed.

MATHERS v. ROYAL BANK OF CANADA.

ONT.

S. C.

1913

Ontario Supreme Court, Boyd, C. June 20, 1913.

1. BROKERS (§ I—1)—STOCK BROKERS—AUTHORITY TO SELL STOCK—RIGHT TO PLEDGE—RESTRICTIVE ENDORSEMENT.

Power to pledge a certificate of shares of company stock for the total amount thereof is not conferred on a broker by the delivery to him by the registered owner of a certificate for forty-six shares for the purpose of having the broker sell twenty-five of them, where the certificate bore a restrictive endorsement to the effect that "for value received . . . hereby sell, assign and transfer unto . . . twenty-five shares," etc.; since such endorsement gave notice that the broker had authority to deal with only twenty-five shares for the purpose of sale.

[*Colonial Bank* v. *Cady* (1890), 15 A.C. 267, followed; *Smyth* v. *Rogers*, 30 O.R. 256, distinguished.]

2. TROVER (§ II—26)—LIABILITY—OF PLEDGEE—WRONGFUL PLEDGE BY BROKER OF STOCK ENTRUSTED TO HIM FOR SALE.

Where a certificate for forty-six shares of company shares was delivered by the owner to a broker for the purpose of selling twenty-five of the shares, the certificate bearing a restrictive endorsement to the effect that, "for value received . . . hereby sell, assign and transfer unto . . . twenty-five shares," etc., and, instead of selling the shares, the broker pledged the certificate with a bank for its full value for an indebtedness of his own, and the certificate, on the amalgamation of such bank with the defendant bank, came into the possession of the latter, by whom the words "twenty-five" were stricken from such endorsement, and the entire forty-six shares sold in satisfaction of the broker's indebtedness, the defendant bank is answerable as for a conversion to the owner of the shares for their full value in the absence of a proved custom or usage of banks, brokers or of the Stock Exchange justifying the deletion of the words "twenty-five," since the nature of such endorsement was notice that the broker's authority was limited to a sale of the twenty-five shares.

Statement

ACTION for the detention or conversion of certain shares of a company.

Judgment was given for the plaintiff.

W. N. Tilley and *H. D. McCormick*, for the plaintiff.

George F. Henderson, K.C., for the defendants.

The following cases were cited: *France* v. *Clark* (1884), 26 Ch.D. 257; *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267; *Smith* v. *Rogers* (1899), 30 O.R. 256; *Fry* v. *Smellie* (1912), 81 L.J.K.B. 1003; *Lloyd* v. *Grace Smith & Co.* (1912), 81 L.J.K.B. 1140, [1912] A.C. 716.

Boyd, C.

June 20. BOYD, C.:—Apart from decisions cited, I said at the hearing that the plaintiff should succeed. After considering the effect of these, I remain of that opinion.

What is the nature of the transaction which is at the root of this litigation? This, that the plaintiff, being registered owner and holder of forty-six shares of preferred stock in the Lake of the Woods Milling Company, was minded to sell twenty-five shares at the current rate of 124, and so instructed Sparks & Co., Ottawa

ONT.

S. C.
1913

MATHERS
v.
ROYAL
BANK OF
CANADA.

Boyd, C.

brokers, who were not of the Stock Exchange. He handed the certificate for forty-six shares to that firm, and endorsed it in blank, adding in writing the words "twenty-five," as being the number of shares to be dealt with. As it left his hands, the endorsement read thus: "For value received hereby sell assign and transfer unto twenty-five shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint . . . attorney to transfer the said stock on the books of the within named company with full power of substitution in the premises."

The brokers on the 31st March, 1911, gave the plaintiff a receipt for forty shares (a mistake for forty-six), "twenty-five to be sold." The plaintiff applied two or three times to the brokers as to the sale, then went off somewhere, and, on his return, in May, 1912, withdrew the direction to sell, and asked for a return of the certificate. Excuses of one kind and another were made (all at variance with the truth); and the plaintiff did nothing further, except to receive the quarterly dividends, till he heard of the brokers' failure in November, 1912. He then found out that the certificate had been deposited as security by the brokers with the Traders Bank; and, that bank having amalgamated with the defendants the Royal Bank, the certificate passed into their hands. This security was realised by the bank's broker striking out the words "twenty-five" in the endorsement, and selling the stock. By another mistake, the sale was of forty shares and not forty-six, but this matter has been adjusted between the parties, leaving the main question open.

About contemporaneously with the order from the plaintiff not to sell, the brokers assigned to the Traders Bank as collateral security for a prior advance to N. C. Sparks (who was not a member of the brokers' firm) the certificate No. 1362 for forty-six shares obtained by the brokers from the plaintiff. To make good this advance to N. C. Sparks, the shares of the plaintiff were sold. This sale and the deletion of the words of restriction "twenty-five" are sought to be justified by the alleged customs of brokers and of banks and of the Stock Exchange.

The injustice of the transaction appears manifest. The initial wrongdoing began with the brokers using the certificate as a means of securing the private debt of N. C. Sparks to the Traders Bank. An officer of that bank says that he did not notice the words "twenty-five" limiting the endorsement when the certificate was handed to him. His carelessness cannot imperil the plaintiff's rights. The manner of endorsement gave plain notice to all concerned that only twenty-five shares were to be used, and that for the purpose of selling, not of pledging. The owner of the certificate endorses in blank prospectively in view of an intended sale, assignment, and transfer of the twenty-five shares (part of the whole). The emphatic word is "sale;" the assign-

ment and transfer are in view of a previous sale; and power to pledge or to procure a loan is not contemplated by the language of the endorsement. Nor was it the intention of the original parties. To my mind, the obvious meaning of the endorsement as limited expresses that contract of agency. The certificate was endorsed in blank in order that a sale might be made of twenty-five shares for the benefit of the plaintiff. No other or greater power was given to the brokers; and, unless by the introduction of some transforming effect attributable to usage or custom, modifying the contract, no other power should be exercisable by the agent.

In England, the common method of providing for the transfer of stock is by deposit of the original certificate for the shares, accompanied by a transfer in blank, *i.e.*, with a blank left for the name of the transferee and signed by the stock-holder: Palmer's Company Precedents, 10th ed., vol. 3, p. 195. This method leaves it open either to sell, pledge, or get a loan on the certificate, so far as the papers go, and aside from the particular instructions to the broker.

The evidence is, that this was the first occasion on which the plaintiff did business of this kind, and that he knew nothing and was informed nothing as to the customs of brokers or bankers. On the other hand, as to the alleged usages relied on in the pleadings, the witnesses called even by the defendants did not agree—and for the good reason that no custom existed as to certificates with limited endorsement. This particular endorsement was a novel variation from the usual endorsement in blank: as all the witnesses said. This being the plain result according to first principles, I turn briefly to the authorities cited.

Between *Smith* v. *Rogers*, 30 O.R. 256, and the case in hand are two broad distinctions which exclude it as an authority. First, there was in the *Smith* case some evidence "not very strong but uncontradicted" (p. 260, *per* the Chief Justice) of a custom among brokers or a course of dealing which gave a character of quasi-negotiability to the documents in question; and, second, the shares-certificates in the *Smith* case were endorsed in blank as to the entire amount—and not as to a fraction.

No doubt, this second peculiarity gave rise to the conflict of opinion as to the effect of an endorsement affecting twenty-five shares out of forty-six mentioned on the face of the certificate. This form of limited or restricted endorsement was treated as unique by the witnesses, and the result of the evidence is, that no custom was proved or could be proved as to such an isolated transaction.

Gerald Lees, called for the defendants, said: "I think this endorsement would have put any person on inquiry as to the twenty-five shares. I would have asked what they meant . . . I would have believed Sparks." Mr. Baird, called for the plaintiff, said: "With words on face 'twenty-five,' I would regard that

ONT.
S. C.
1913
MATHERS
v.
ROYAL
BANK OF
CANADA.
Boyd, C.

as irregular if a loan was being asked . . . Such a certificate would not pass by delivery. Intention is that twenty-five shares should be used in some way not defined, and there would be some instructions behind it. This certificate is not negotiable with restricted endorsement." Mr. Cambie, also for the plaintiff, said: "I would not make a loan on a certificate endorsed that way; it is restrictive endorsement, and not complete."

So far as I have been able to examine the other cases cited, they are all instances of blank endorsements without any restrictive words; and, having regard to the evidence, as well as to the reason of the thing apart from the evidence, I do not regard them as in point.

The endorsement, critically examined, does not warrant the transfer of anything but the whole amount of stock represented by the certificate. The blank left for the number of shares is meant to be filled up with the same number as appears on the face of the certificate, and then the appointment of the attorney is to transfer "the stock"—*i.e.*, the whole capital stock represented by the certificate—on the books of the company. That is the reason why the Montreal agent of the bank undertook to strike out the words "twenty-five" put in by the plaintiff to define what he was dealing with. This act of hardihood did not change or diminish the plaintiff's rights, however it may have facilitated the effort of the bank to sell the stock.

The experts (Mr. Baird particularly) speak of this certificate, as endorsed, not being in proper form. The technical phrase is "not in order," meaning thereby that business men would not take it without inquiry. In this aspect of the case, the decision of the Lords in *Colonial Bank* v. *Cady*, 15 App. Cas. 267, is applicable in favour of the right of the plaintiff to recover: Lindley's Law of Companies, 6th ed., vol. 1, p. 666.

I may just refer to what sort of inquiry should have been called forth by this endorsement. Mr. Lees says that he would have questioned Sparks. But, seeing that Sparks had attempted to use the whole certificate for forty-six shares, instead of the lesser number of twenty-five shares, confidence in his explanations would be so lessened that resort to the plaintiff himself was the only reasonable and safe course. I adverted to this at the close of the case.

I adhere to the reasons then given; and further consideration and examination have satisfied me that justice is entirely on the side of the plaintiff; and my judgment is, that the bank shall account to the plaintiff for the full value of the shares sold by them. No evidence was given on this head; and, if the parties cannot agree, it will be referred to the Master. The defendant should pay the costs of the action and also of the reference (unless the Master reports otherwise as to the reference).

Judgment for plaintiff.

MOMSEN v. THE "AURORA."
(Decision No. 2.)

CAN.
Ex. C.
1913

Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. September 26, 1913.

1. ADMIRALTY (§ II—8)—PRACTICE—SEIZURE OF RES—RE-ARREST OF VESSEL RELEASED ON BAIL—NON-SATISFACTION OF JUDGMENT.

A warrant may issue for the re-arrest of a vessel to answer an unsatisfied judgment for the claim on which it was originally arrested, where the vessel had been released on bail and execution against the defending owner and sureties had been returned *nulla bona*.

[*The "Freedom"* (1871), L.R. 3 A. & E. 495, followed.]

Statement

APPLICATION for an order under rule 39 for a warrant to issue for the re-arrest of the defendant ship, which had been arrested and released under a bail bond, and later, judgment was recovered against her with costs (*Momsen* v. *The "Aurora,"* 13 D.L.R. 429), but had not been paid, though execution had issued against the owner and sureties, and been returned *nulla bona*.

The application was granted.

E. A. Lucas, for the motion:—On the facts proved I submit the plaintiffs are entitled to the order—see secs. 15 and 22 Admiralty Court Act, 1861; Williams & Bruce, Ad. Prac., 3rd ed., 480. The ship is still within the jurisdiction available to all process of the Court.

No one *contra*.

Martin, L.J.A.

MARTIN, L.J.A.:—There does not seem to be any valid reason why the order should not be granted. In *The "Freedom"* (1871), L.R. 3 A. & E. 495, the ship was re-arrested to answer the costs, though the damages had been paid to the full extent of the bail bond. Here nothing has been paid on either head, so I see no obstacle in the way. She can, at least, be arrested for costs and there is nothing in *The "Freedom"* case to shew that she should not be arrested to answer the judgment in the present circumstances; the reasoning, indeed, in that decision is all in favour of such a course, though, because no one has appeared to present an argument in support of a contrary view, I shall be prepared to listen to one should occasion arise.

Order accordingly.

ALTA.

S. C.
1913

Re CLEARWATER ELECTION.

(Decision No. 3.)

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Stuart, JJ. October 11, 1913.

1. ELECTIONS (§ IV—91*a*)—CONTESTS—JURISDICTION—CLERK'S DUTY UNDER ACT—SCRUTINY.

The official obligation of the clerk of the Executive Council as specifically prescribed by sec. 239 of the Alberta Election Act, Statutes of 1909, ch. 3, not to permit the inspection of any ballot paper in his custody except under an order of a judge of the Supreme Court, constrains such clerk to disregard any order in contravention thereof which may be issued by a District Court judge in an election recount proceeding, requiring such clerk to produce such papers for inspection, and there can be no contempt in such disregard.

[See also, on other points, *Re Clearwater Election*, 11 D.L.R. 353, and 12 D.L.R. 598.]

2. ELECTIONS (§ II C—68)—RESULT—RECOUNTS—CLERK'S DUTY TO RECEIVE RETURN THOUGH PREMATURE.

A premature return by the returning officer to the clerk of the Executive Council is as effective as a regular return, to the extent of imposing upon the latter the duty of receiving the return and documents therewith, and of thereupon performing his other duties, under secs. 233, 234, 236, 237, 238, and 239 of the Alberta Election Act, Statutes of 1909, ch. 3. (*Per* Harvey, C.J.)

3. ELECTIONS (§ II C—70)—BALLOTS—RESULT—RECOUNT—SCRUTINY.

The clerk of the Executive Council in custody of election papers transmitted to him by a returning officer under sec. 234 of the Alberta Election Act, Statutes of 1909, ch. 3, is bound strictly by sec. 239 read with secs. 237 and 238 to guard the secrecy and integrity of such papers as thereby prescribed, and under sec. 239 to prevent any person, even a District Court judge holding a recount from inspecting such papers, except under an order of a Supreme Court judge as thereby provided. (*Per* Harvey, C.J.)

4. ELECTIONS (§ IV—91*a*)—CONTESTS—JURISDICTION—ORDER WITHOUT — CLERK'S DUTY UNDER ACT—SCRUTINY.

In election recount proceedings, the order of a District Court judge basing a subpœna *duces tecum* assuming to require the clerk of the Exeuive Council to produce for inspection upon a recount, certain election ballot papers without the order of a Supreme Court judge provided for by sec. 239 of the Alberta Election Act, Statutes of 1909, ch. 3, being without jurisdiction and null and void; both the order so made and any subpœna issued thereunder may and should be disregarded by the clerk of the Executive Council. (*Per* Harvey, C.J.)

5. ELECTIONS (§ IV—91*a*)—CONTESTS—JURISDICTION—ORDER WITHOUT—PURPOSE OF ORDER, DETERMINING FACTOR WHEN.

In an election recount proceeding, where an order is issued by a District Court judge in direct contravention of sec. 239 of the Alberta Election Act, Statutes of 1909, ch. 3, requiring the clerk of the Executive Council to attend under a subpœna *duces tecum* before the District Court judge with certain election ballot papers and accompanying immaterial documents, the fact that the immaterial documents might legally have been covered by an order of a District Court judge will not serve to validate the order as made. (*Per* Harvey, C.J.)

6. ELECTIONS (§ IV—92)—CONTESTS—RECOUNTS—TIME; ADJOURNMENT; EXTENSION.

The provisions of secs. 224 and 225 of the Alberta Election Act, Statutes of 1909, ch. 3, requiring the hearing and determination of

an election recount on the day fixed and as far as practicable in a continuous proceeding, will be construed so that if from any cause the proceeding cannot be carried on at the time appointed the judge may appoint another time for the purpose, giving to sec. 225 merely the force and effect of requiring the recount (when once begun) to proceed continuously as far as practicable. (*Per* Scott, J.)

7. ELECTIONS (§ II C—71)—RETURN—DECLARATION OF RESULT—CONCLUSIVENESS OF CERTIFICATE.

The return by the returning officer to the clerk of the Executive Council under sec. 234 of the Alberta Election Act, Statutes of 1909, ch. 3, and the subsequent publication thereof in the official Gazette under sec. 236, are final and conclusive, subject to the germane provisions of the Controverted Elections Act, and to the jurisdiction of the Legislature itself. (*Per* Scott, J.)

Statement

APPEAL from the order of District Judge Noel, in an election recount proceeding under the Alberta Election Act, Statutes of 1909, ch. 3, dismissing an application to commit Donald Baker, clerk of the Executive Council of the province, for his refusal to produce for inspection certain ballot papers officially in his custody.

The appeal was dismissed.

For previous decisions in the matter of the same election, see *Re Clearwater Election* (No. 1), 11 D.L.R. 353, and *Re Clearwater Election* (No. 2), 12 D.L.R. 598.

H. A. Mackie, for plaintiff.

Frank Ford, K.C., for defendant.

Harvey, C.J.

HARVEY, C.J.:—I would dismiss the appeal with costs. Whether the returning officer should or should not have made his return when he did, the clerk of the Executive Council could not take on himself the responsibility of determining. It was his duty to receive the return and documents and thereupon perform the duties imposed upon him by the statute. One of those duties is to retain in his possession the documents received from the returning officer as required by sec. 237. With the exception of the ballot papers these may all be inspected under sec. 238, but by virtue of sec. 239 it is his duty to permit no one to inspect the ballot papers except under the authority of an order of a Judge of the Supreme Court. It would be clear, therefore, that if he permitted any one, even a District Court Judge, to inspect the ballot papers without an order of a Supreme Court Judge he would be violating his duty, and any order made by a District Court Judge requiring him to produce them for inspection would be made without jurisdiction and would, therefore, as well as any subpœna issued thereunder, be null and void and should be disregarded and there could be no contempt in such disregard.

Although the subpœna specified all of the documents some of which, of course, could be inspected it was admitted by coun-

ALTA.

S. C.
1913

RE CLEARWATER ELECTION.

sel for appellant that the ballot papers were what he wanted and the whole contest was over them.

Although it is not necessary to consider any of the many other grounds raised I may say that I quite agree that even though the clerk of the Executive Council had mistaken his duty there would be no contempt for the reason stated by my brother Stuart.

Harvey, C.J.

I wish to add also that I dissent from the view expressed by my brother Beck if he means that without any change in the law there is still left jurisdiction in the District Court Judge to proceed with the re-count under the statute.

Scott, J.

SCOTT, J.:—This is an appeal by A. Williamson Taylor, one of the candidates at the election from the order of District Judge Noel dismissing an application to commit Donald Baker, clerk of the Executive Council of the province, for his refusal to produce certain documents in his possession. In order to explain the questions arising on this appeal it is necessary to review the proceedings relating to the election which were had prior to the making of the order appealed from.

The election was held on April 17, 1913. On May 5 following the appellant appears to have duly obtained from Judge Noel, who is the District Court Judge for the district of Athabasca, in which the electoral district of Clearwater is situated, an appointment under sec. 218 of the Election Act for the 23rd of the same month at Clyde in the electoral district for a recount of the ballots cast at the election and also for the hearing of an appeal from the Court of inquiry which had been held in respect of certain disputed ballots. On May 10 the appellant obtained from Beck, J., an order of mandamus directing the returning officer to count certain votes cast at the election, the order containing a direction that the proceedings for the recount and upon the appeal from the Court of inquiry should be stayed until such votes were counted.

An appeal from this order was taken by H .W. McKenney, one of the candidates at the election, to the Court *en banc* which on June 18 allowed the appeal and discharged the order. Upon the discharge of the order the appellant's solicitor owing to the absence of Judge Noel obtained from Judge Crawford one of the District Court Judges for the judicial district of Edmonton an appointment for July 9, at Clyde, for the recount and the hearing of the appeal from the Court of inquiry. The appellant's solicitor having been informed by McKenney's solicitor that he intended to object that Judge Crawford had not jurisdiction in the matter it was arranged between them that the parties should appear before that Judge in the meantime in order that the objection might be disposed of.

They did so appear before him and he then held that he was without jurisdiction. Upon Judge Noel's return the appellant obtained an appointment from him for August 30 at Clyde. He attended there at that time but, owing to the fact that the appellant was unable to serve the returning officer with notice of the new appointment the proceedings were then adjourned until September 8 at the same place. Prior to the last-mentioned date the appellant's solicitor learned, as the fact was, that notwithstanding the fact that the recount had not been held or the appeal from the Court of inquiry heard, the returning officer had on 26th August made a return to the clerk of the Executive Council to the effect that McKenney had been duly elected and had delivered to the clerk the ballot papers and other documents required to be delivered by him on making his return. Appellant's solicitor thereupon attended at the clerk's office and, upon inspecting the return, ascertained that the returning officer had failed to count certain ballots deposited at a certain polling place, the number thereof corresponding to the number of disputed ballots at that polling place. On September 2, he obtained from Judge Noel an order for the issue of a subpœna *duces tecum* directed to the clerk of the Executive Council and thereupon issued from the office of the District Court of Athabasca a subpœna directed to the clerk requiring him to attend at Clyde on September 8, and to bring with him the parcel delivered to him by the returning officer. He duly served a copy of the subpœna and of the order upon him and asked him if he would let him know the following day if he would attend upon it. The clerk notified him by telephone on the following day that he would not attend. He subsequently arranged with McKenney's solicitor that instead of proceeding at Clyde on September 8 they should appear before Judge Noel on that day at Edmonton as of Clyde and he was then informed by the latter that the clerk would attend there but would not have with him the documents called for by the subpœna.

The parties appeared before Judge Noel on that day. The clerk, upon being called upon to produce the documents, stated that they were in his custody as clerk of the Executive Council and that upon the advice of his solicitors, he refused to produce them. Appellant's solicitor thereupon applied to commit the clerk for contempt in disobeying the subpœna. The learned Judge, being in doubt as to his having jurisdiction to make the order applied for, dismissed the application. The clerk of the Executive Council caused to be published in the Official Gazette on August 30 a notice of the receipt of the return and giving the name of H. W. McKenney as the candidate elected.

One of the objections raised by counsel for McKenney on the argument was that, by reason of the fact that the recount and

ALTA.

S. C. 1913

RE CLEARWATER ELECTION.

Scott, J.

the appeal from the Court of inquiry were not proceeded with on May 23, the day first appointed therefor, the District Judge was *functus officio*.

This objection was raised at the hearing before Judge Noel on September 8, and was overruled by him. In my opinion he was right in doing so. Sec. 224 provides that at the time and place appointed the Judge shall hear and determine such appeals and recount the ballots. To hold that, unless these proceedings upon them are commenced on the day first appointed therefor, the candidate who institutes them would be deprived of his right to proceed with them would, in my view, be placing an unreasonably narrow construction upon that provision. If such a construction were upheld the result would be that a candidate might easily be deprived of a right conferred upon him by the Act. The absence of the Judge or the non-attendance of the returning officer with the ballots either by accident or design would be effectual to that end. That unreasonable effect is in itself a strong argument in favour of the more reasonable construction, viz., that if from any cause the proceedings cannot be carried on at the time appointed the Judge may appoint another time for the purpose. Section 225, which provides that the Judge shall as far as practicable, proceed continuously is not opposed to such consideration as, in my view, it means and means only that the hearing of the appeal and the recount when once opened shall proceed continuously.

It does not appear that there was any undue delay on the part of the appellant in proceeding with the appeal from the Court of inquiry and recount. Both parties appear to have accepted the stay of proceedings in the order of Beck, J., as a bar to proceeding with them. Their solicitors attended before Judge Noel and told him not to attend on the appointment for May 23. When that order was discharged by the Court *en banc* the appellant, in the absence of Judge Noel, obtained the appointment from Judge Crawford. It was not contended before him that the appellant had forfeited his right to proceed or that the Judge was *functus officio* by reason of the matters not having been proceeded with on May 23. The only objection then taken was that he was not the proper Judge to hear the matter. Upon Judge Noel's return a new appointment was obtained from him which was duly adjourned until September 8, by reason of the fact that the returning officer could not be served with notice of it.

While I am of the opinion that the appellant has not by any act or omission on his part forfeited his right to appeal from the Court of inquiry or to a recount I am reluctantly forced to the conclusion that he has been effectually deprived of that right by the act of the returning officer in making the return to the

clerk of the Executive Council. Such return and the subsequent publication of notice of it in the Official Gazette appear to be final and conclusive subject, of course, to the provisions of the Controverted Elections Act and to any action on the part of the Legislature.

If I am correct in this view it follows that the clerk of the Executive Council was justified in his refusal to produce the ballot papers before the District Judge at the hearing on September 8. He was bound to receive the return and the documents relating to it when tendered by the returning officer. It was not his duty to inquire into the authority of the returning officer to make it at that time. It is not shewn that when he received it he was aware that it should not have been made at that time. Having received the documents which included the ballot papers they were in his official custody and under sec. 239 his duty was to permit no one to inspect them except by order of a Supreme Court Judge and that section does not appear to authorize such an order being made for their inspection for the purposes of either an appeal from a Court of inquiry or a recount.

Section 220 of the Act provides that the returning officer, after receiving notice of an appeal from the Court of inquiry and of the date appointed for hearing it, shall delay making his return until he receives a certificate from the Judge of the result of the appeal. Having received that notice I can find nothing in the Act which would prevent him ignoring that provision and returning a candidate before the time appointed for hearing the appeal and thus effectually rendering the appeal abortive. The only punishment that he appears to be liable to is the imposition of a fine of $400. That is a dangerous power to place in the hands of such an officer who may be, and (I think I may venture to say) often is a partisan. Legislation to render a return made under those circumstances ineffective or to inflict a very much more severe penalty for an infraction of that provision appears to me to be advisable. I agree in the result arrived at by the other members of the Court that the appeal should be dismissed with costs.

BECK, J.:—As a consultation results in my finding that my views are not those of the majority of the Court I state them quite briefly. Beck, J.

First, I think, that once an application was made to the District Court Judge by way of an appeal or for a recount under sec. 218 of the Alberta Election Act within eight days after that on which the returning officer made addition of the votes, the District Court Judge was seized of the matter and having given an appointment his jurisdiction continued to exist notwithstanding that any particular appointment may have

ALTA.

S. C. 1913

RE CLEARWATER ELECTION.

Beck, J.

lapsed by reason of accident, or mistake or because it was adjourned *sine die*. Sec. 225 as to proceeding continuously clearly applies only when the actual work of recounting has commenced.

The returning officer was served with notice that he was required to attend before the Judge for the purpose of an appeal recount or final addition of the votes given at the election and, therefore, committed a wrongful act in making his return before he received a certificate of the result of the proceedings before the Judge (sec. 233). I think his wrongful act did not deprive the Judge of his jurisdiction and that, therefore, he has still jurisdiction to proceed. Assuming that the return is valid until set aside, there are two tribunals which may set it aside, namely, the Legislative Assembly and the Court in a trial under the Controverted Election Act; and for a just and effective decision by either of these tribunals they should have before them the decision of the District Court Judge. An obstacle is placed in the way of the Judge proceeding to a decision by reason of the clerk of the Executive Council refusing to produce the ballot papers in question which are in his custody. Assuming that he has properly refused to do so, he certainly may be authorized to do so by the Legislature or the Executive Council, who may thus remove the obstacle in the way of the Judge proceeding to determine the question for whom the disputed ballots should be counted and thus determine whether the member returned as elected was in truth elected.

If the Executive Council or the Legislature sees fit to instruct the clerk of the Executive Council to produce the ballots, the Judge would naturally certify the result to the returning officer and to the clerk and the duty of the returning officer would be to do the same. The Legislature would then have before them all the material which would enable them, as they are clearly entitled to do, to declare which of the candidates at the election was in truth elected.

I think the Judge had power to require the attendance of the clerk of the Executive Council as a witness. By sec. 228 he is given all the powers of the returning officer with regard to the attendance and examination of witnesses.

By sec. 215 the returning officer is authorized to summon

> any . . . person before him at a time and place to be named by him with all necessary papers and documents . . . and may examine on oath such . . . person. . . .

However, the provisions of sec. 239, in which the power is given to a Judge of the Supreme Court to order inspection or production of ballot papers in the custody of the clerk of the Executive Council, furnish the only means of obtaining such inspection or production and this power is limited to

> the purpose of instituting or maintaining a prosecution for an offence in

relation to ballot papers or for the purpose of a petition questioning an election or return.

The Judge of the district had, therefore, no power to compel the clerk to produce the ballot papers, and, therefore, there was no contempt.

For this reason alone I think the application should be dismissed and I would give no costs.

Stuart, J.

STUART, J.:—Aside from all other considerations I think it is sufficient for the decision of this appeal to say that there was in fact no contempt. Baker came into Court in obedience to the subpœna, but stated, as a reason for not producing certain documents which the subpœna ordered him to produce, that he held them as clerk of the Executive Council of the Province, that he was not supposed to produce them and that he had been advised by his solicitor not to do so. I see in that position no absence of respect for the Court. He may have been mistaken in his law, but apparently the Judge acquiesced in his view and did not direct him to produce the documents. If he had done so and there had been a direct refusal in the face of the Court then the whole question of law argued so strenuously before us might have come up for decision. But Judge Noel took the view that Mr. Baker did right and did not insist on production. I can find no contempt of the authority of the Court in the course which Baker pursued.

The summons upon which the order was made which is now appealed from did not ask for an order that Baker be directed to produce the documents and there is no appeal from Judge Noel's omission to make such an order.

It seems to me, therefore, impossible for us to make an order committing Baker for contempt. Neither can I discover any ground upon which we can now make an order directing Baker to produce the documents. That would be tantamount to assuming full jurisdiction over the recount. Even admitting that there may be a right of appeal to the Court *en banc* in certain cases from some order made during the course of the recount which I think is doubtful, particularly in view of the provision that there is an appeal given by the statute from the District Judge holding the recount to a single Judge of the Supreme Court, I am decidedly of opinion that we have no jurisdiction to intervene and lay our hands upon the recount proceedings, if there are any in existence, and make an order of our own motion in regard to them.

I think the appeal should be dismissed with costs.

Appeal dismissed.

SASK.

S. C.

1913

PROCTOR v. PARSONS BUILDING CO.

(Decision No. 3.)

Saskatchewan Supreme Court, Lamont, J. October 6, 1913.

1. MASTER AND SERVANT (§ II A 4—67)—LIABILITY OF MASTER TO SERVANT —MASTER'S DUTY TO FURNISH SAFE APPLIANCES—CHAIN FASTENED TOGETHER WITH WIRE.

A master who furnishes a chain which is insecurely fastened together with wire, for the use of his servants in hoisting heavy weights, is liable for an injury sustained by an employee as the result of the breaking of the chain by reason of such defective fastening.

Statement

ACTION for injuries sustained by a servant as the result of the breaking of a defective chain furnished by the defendant for use in the servant's work.

Judgment was given for the plaintiff.

For previous decisions in the case, see *Proctor* v. *Parsons* (No. 1), 9 D.L.R. 692, and *Proctor* v. *Parsons* (No. 2), 10 D.L.R. 30.

P. M. Anderson, and *F. B. Bagshaw*, for plaintiff.

E. L. Elwood, and *J. N. Fish*, for defendants.

Lamont, J.

LAMONT, J.:—This is an action for damages for personal injuries. The defendants were engaged in the erection of a building in the city of Regina; the plaintiff was in their employ as a carpenter. On July 26, 1912, while the defendants were raising into place on the second storey of the building some heavy beams by means of a block and tackle attached to a derrick, the block and tackle came away from the derrick, and, together with the beam which was being raised, fell. The plaintiff, who at the time had hold of the tackle, guiding the beam to its place, was jerked off the timber on which he was standing and thrown to the ground floor, some twenty-eight feet below. He was seriously injured. The plaintiff alleges that the accident was due to the negligence of the defendant company. One of the acts of negligence alleged is that the chain by which the block and tackle was fastened to the top of the derrick "was defective and in an unsafe condition and unfit to be used for the said work." For the plaintiff a number of witnesses testified that the accident was caused by the breaking of the chain which fastened the block and tackle to the derrick. This chain was an endless one. It was not, according to some witnesses, an endless chain to begin with, but was made endless by taking the two ends of the chain and fastening them together with wire. That the ends were fastened together by wire was testified to by three witnesses, including the sub-foreman of the defendant company, who assisted in fastening it. These and other witnesses testified that after the plaintiff's accident this

chain was no longer an endless chain, but that it had broken or come apart. Several witnesses testified that they saw a piece of wire hanging from the chain after the tackle fell.

For the defendants, Charles Lockwood, the foreman in charge at the time of the accident, and who had rigged up the derrick, swore that after the accident he took the chain off the top of the derrick, that it was then in the same condition as when he put it on, that it had not broken or come apart, that the links had not been fastened by wire nor was there any wire on the chain. He gave no explanation of what caused the tackle to fall. In the light of the testimony given by the plaintiff's witnesses, I must reject the evidence of Charles Lockwood.

I find, therefore, that the chain in question was made an endless chain by having the two ends fastened by wire, and that the accident was caused by the chain pulling apart where it was so fastened. Furthermore, on the evidence of Haldenby and Arthur Lockwood, who prior to the accident had been a foreman for the defendants, I find that Haldenby had reported the chain as not being strong enough for the work it was called upon to do, and that Lockwood ordered another chain, which was supplied but not used.

Under these circumstances, were the defendants guilty of negligence causing the accident? I am of opinion that they were.

At common law there was from the earliest times a duty cast upon the master of seeing that the machinery and tackle supplied by him to his servants for the performance of their duties were suitable and proper. A failure to provide suitable equipment and to maintain the same in proper condition when provided was, in case of injury to a servant resulting from such failure, held to be negligence on the part of the master: Halsbury, vol. 20, pp. 129, 130. Here the chain was a material part of the equipment supplied, and in the condition in which it was at the time of the accident it was insufficient for the purpose for which it was required. As a result it came apart, causing the plaintiff injuries. This cast the onus on the defendants of shewing that its defective condition was not due to any negligence on their part. This they sought to do by shewthat the chain used was of the weight ordinarily used for such purpose and that it was perfectly proper to make it an endless chain by fastening the two ends with wire. One of the witnesses swore that if wire of a certain thickness was used and it was wound around the links seven times and properly fastened, the connection would be as strong as in any other part of the chain. The difficulty, however, in the defendants' way is that there is no evidence upon which I can find that wire of the required weight was wound around the links seven times or

SASK.

S. C. 1913

PROCTOR v. PARSONS BUILDING CO.

Lamont, J.

that it was ever properly fastened. The only evidence on the point was that the wire was a piece picked up off the ground and was wound around about four times. There was also evidence that the wire was rusty. The condition of the chain was or should have been known to the defendants. The tackle having been shewn to be defective, and the defendants having failed to shew that its defective condition was not due to their failure to maintain it in proper condition, the plaintiff is entitled to succeed.

The plaintiff sustained serious injury. He has to a great extent lost the sight of one eye, and was injuried in the cheek, back and right shoulder. His hospital and doctor's bills amounted to $154. This I allow him as special damages; and I assess the general damages at $1,500. There will, therefore, be judgment for the plaintiff for $1,654 and costs.

Judgment for plaintiff.

B. C.

S. C. 1913

WANDERERS' HOCKEY CLUB v. JOHNSON.

British Columbia Supreme Court, Murphy, J. September 30, 1913.

1. JUDGMENT (§ IV B 1—232)—FOREIGN JUDGMENT—OF SISTER PROVINCE—JURISDICTIONAL MATTERS—WANT OF SERVICE ON DEFENDANT—EFFECT.

A judgment rendered in the Province of Quebec without personal service of process on the defendant who was out of that province while the proceedings were going on, is not binding on the courts of British Columbia in an action based on the Quebec judgment.

[See Annotation to this case.]

2. CONTRACTS (§ III A—195)—VALIDITY AND EFFECT—CONTRACT OF EMPLOYMENT BY ONE UNDER EXISTING CONTRACT—KNOWLEDGE OF CONTRACTEE—ACTION FOR BREACH.

Under the axiom *ex turpi causâ non oritur actio* an action cannot be maintained for the breach of a contract of employment where the plaintiff, at the time the agreement was made, was aware that it could not be performed without the defendant breaking an existing contract of employment with a third person.

[*Harrington* v. *Victoria Graving Dock*, 47 L.J.Q.B. 594, followed; and see, as to injunctions generally in restraint of personal service, *Chapman* v. *Westerby*, W.N. (1913), 277.]

Statement

ACTION on a judgment of a sister province rendered against an absentee without personal or substituted service, in an action for breach of a contract of employment entered into by one who, to the knowledge of the plaintiff, was already under contract to perform services for another.

The action was dismissed.

Deacon, for plaintiff.

S. S. Taylor, K.C., for defendant.

Murphy, J.

MURPHY, J.:—In so far as this action is based on the foreign judgment, it was proven before me that the defendant was

not served with any process of the foreign Court, nor had he any knowledge that proceedings had been taken against him. It is a fair inference, I think, from the evidence that the plaintiffs knew where the defendant could have been found and, presumably, they could have obtained leave to serve him personally out of the jurisdiction. At any rate they could have sued him in British Columbia. Under these circumstances, I am of the opinion that the judgment should not be acted on in our Court. It is laid down in 6 Halsbury's Laws of England, par. 423, that such judgment will not be acted upon when obtained without personal service, even though under the procedure of the foreign Court substitutional service is permitted, thus making the judgment effective in such foreign jurisdiction. In my opinion, therefore, the defendant can go behind the Montreal judgment.

On the merits of the case I find the facts to be that Patrick had a contract with Johnson for his services for the season 1912-13; that he, Patrick, communicated the fact of his having such contract to the plaintiffs; that the plaintiffs subsequent to obtaining this information influenced Johnson to enter into a contract with them by offering him a higher salary; that Johnson thereupon tore up his contract with Patrick and entered into the contract herein sued upon without in any way arranging for any release from his contract with Patrick. Under these circumstances, I think the axiom *ex turpi causâ non oritur actio* applies. The nearest case I have been able to find in the English Courts is that of *Harrington* v. *Victoria Graving Dock*, 47 L.J.Q.B. 594. In that case though the jury found that the contract sued upon had not, in effect, influenced the employee in his relations to his employer, yet it was held that it might have had that effect, and, consequently, was not enforceable in a Court of law. This case is much stronger inasmuch as whilst the direct object of the contract sued upon was, undoubtedly, to obtain Johnson's services for the plaintiffs' club during the season 1912-13, yet it must have been obvious to both parties that such contract could not be carried out without breaking the existing contract between Patrick and Johnson. The action is dismissed with costs.

Action dismissed.

Annotation—Judgment (§ IV B 1—232)—Actions on foreign judgments.

Annotation

Foreign judgments

A 1913 case of considerable importance on the question of the obligation upon a foreign judgment is that of *Phillips* v. *Batho*, 135 L.T. Jour. 186. The action was tried by Scrutton, J., without a jury. The plaintiff claimed £7,200 against the defendant, being damages awarded to be paid by the defendant to the plaintiff by a judgment of the Bengal High Court

B. C.

Annotation

Foreign judgments

Annotation (*continued*) — **Judgment (§ IV B 1—232) — Actions on foreign judgments.**

in divorce proceedings in which the plaintiff was petitioner and the defendant co-respondent. The defendant replied that before the date when these proceedings commenced he had left India, and the Court pronouncing the judgment had, therefore, no jurisdiction over him, and he was not bound by their judgment. The plaintiff was an Armenian Christian, born in Persia, who for thirty-three years had lived in British India, and who was domiciled there. He was married to his wife in British India. The defendant was a British subject domiciled in England, who resided in India for nineteen years before March 22, 1910, when he left India for England. On April 20, 1910, the plaintiff caused to be issued in the Bengal High Court a divorce petition against his wife, alleging her adultery with the defendant in India in 1909. The defendant was joined as co-respondent, and served with process by registered post in England. He did not appear; the wife defended. At the trial adultery was proved and the defendant was condemned in £7,200 damages. The Indian Divorce Act, 1869, authorizes the Indian Courts, where (*a*) the petitioner professes the Christian religion and resides in India at the time of presenting the petition, and (*b*) where the marriage shall have been solemnized in India—both of which conditions were fulfilled in the present case—to act and give relief on principles and rules as nearly as may be conformable to the principles on which the Divorce Court in England gives relief. By sec. 11 the petitioner is required to make the alleged adulterer a co-respondent; by sec. 34 the husband may claim damages from the co-respondent; and by sec. 50 the petition is to be served on any party to be affected thereby, either within or without British India, in such manner as the High Court shall direct. Rule 25 of Order V. of the High Court rules provides for the service by post of a summons on a defendant resident out of British India. For the plaintiff it was contended that the English Court had jurisdiction to entertain the claim and give judgment for the plaintiff. For the defendant it was contended that the Court had no jurisdiction; that the Courts in England will give effect to the decree only if the parties were domiciled in the place where it was made; and that the decree in this case was separable into two parts, one a decree for the dissolution of the marriage and the other for the payment of a sum of money, and that in so far as it was a judgment for the payment of a sum of money it was merely in the position of the judgment of a foreign Court *in personam*, which in the circumstances of this case could not be enforced in the Courts of this country. The following amongst other cases, were referred to: *Emanuel* v. *Symon*, 98 L.T.R. 304, [1908] 1 K.B. 302; *Rayment* v. *Rayment*, 103 L.T. Rep. 430, [1910] P. 271. Scrutton, J., gave judgment for the plaintiff, and held, that as the English Courts will recognize and enforce the judgments as to status of the Indian Courts in matters within their jurisdiction—marriage and the dissolution of marriage being matters of status—so they will also recognize and enforce the ancillary orders as to damages such as they themselves make in similar cases: *Phillips* v. *Batho*, 135 L.T. Jour. 186.

Mr. Justice Blackburn in *Schilsby* v. *Westenholz*, L.R. 6 Q.B. 155, 24 L.T.R. 93, says the true principle on which the judgments of foreign tribunals are enforced in England is that "the judgment of a Court of compe-

Annotation (*continued*) — **Judgment (§ IV B 1—232) — Actions on foreign judgments.**

B. C.

Annotation

Foreign judgments

tent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action"; and in that case, where a judgment had been obtained in default of appearance in a foreign Court against a defendant who at the time of the commencement of the suit was not a subject of, nor resident in, the country where the judgment was obtained, it was held that the plaintiff could not succeed here as there existed nothing imposing on the defendant any duty to obey the judgment. No territorial legislation can give jurisdiction which any foreign Courts ought to recognize against absent foreigners, who owe no allegiance or obedience to the power which so legislates: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670. Lord Selborne in the *Faridkote* case says that the plaintiff "must sue in the Court to which the defendant is subject at the time of suit"; and again, "when the action is personal, the Courts of the country in which the defendant resides have power, and they ought to be resorted to, to do justice."

In other words (as explained by Mr. Justice Scrutton in *Phillips* v. *Batho*, 135 L.T. Jour. 186, the English Courts will not enforce a German judgment against an Englishman for damages for breach of contract to be performed in Germany, when the Englishman was not in Germany at the issue of the process and had not submitted to German jurisdiction, for the Englishman can be sued on the contract in his own Courts, which will do justice.

These are principles upon which English Courts will not enforce foreign judgments; is it possible to find positive rules upon which such judgments will be enforced? In *Rousillon* v. *Rousillon*, 42 L.T.R. 679, 14 Ch. D. 351, Mr. Justice Fry enumerates five cases in which the Courts of this country consider a defendant bound by a judgment obtained against him in a foreign Court. These are (1) where he is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; (5) where he has voluntarily contracted to submit himself to the forum in which the judgment was obtained.

See also the review of the English and Canadian authorities on the subject of "Actions on Foreign Judgments" contained in an Annotation in vol. 9 D.L.R. 788-799, to which the present note is supplementary.

IMP.
P. C.
1913

CANADIAN PACIFIC R. CO. v. THE "KRONPRINZ OLAV."

THE "MONTCALM" v. BRYDE.

Judicial Committee of the Privy Council, Lord Atkinson, Lord Mersey, Lord Moulton, and Lord Parker of Waddington. August 1, 1913.

1. COLLISION (§ I A—3)—FIXING LIABILITY — OFFENDING VESSEL TAKING WRONG SIDE—OTHER'S DUTY TO REVERSE—LATITUDE ALLOWED.

Where two vessels are meeting in a river and one of them, in violation of the rules, negligently takes the wrong side of a narrow channel from which immediate danger of collision arises, the vessel offended against is not to be held to have been negligent in giving aid to prevent a collision, merely from its miscalculation by a few seconds of the exact juncture at which her engines might effectively be reversed to avoid the danger, since the offending boat's negligence tended to surprise and confuse the other which might reasonably expect the offender promptly to reverse her own engines to escape the danger caused by herself.

2. EVIDENCE (§ II C—121*b*)—DEFENCES — COLLISIONS — SHIPS—BURDEN OF ESTABLISHING DEFENCE BY.

Where two vessels are meeting in a river and one of them negligently turns to the wrong side thereby causing imminent danger of a collision, the onus of proving an allegation that the vessel offended against neglected her duty to reverse her engines promptly in order to avoid a collision, rests on the original offender and can only be discharged by clear evidence.

Statement

CONSOLIDATED appeals from a judgment of the Supreme Court of Canada (not reported), affirming by a majority the judgment of the Deputy Local Judge in Admiralty at Montreal, in two cross-actions for damages by collision.

With the Board sat, as Nautical Assessors, Rear-Admiral Robert N. Ommanney, C.B., and Commander W. F. Caborne, C.B., R.N.R.

The appeals were allowed.

The judgment of the Board was delivered by

Lord Mersey.

LORD MERSEY:—The collision happened on September 24, 1910, in the St. Lawrence river, between two steamers named the "Kronprinz Olav" and the "Montcalm." Both vessels sustained damage and thereupon cross-actions were commenced in which the owners of each vessel alleged that the other vessel was alone to blame. Before the trial took place a wreck inquiry was held, in the course of which a large body of evidence was collected from the crews of both vessels. By agreement, the notes of this evidence were used at the trial of the cross-actions, and they formed the only material before the learned Judge. He saw none of the witnesses. The two cross-actions were tried as one, and in the result, the learned Judge (who was assisted by a nautical assessor) found both ships to blame.

There were then cross-appeals to the Supreme Court, which were heard before the Chief Justice and four other Judges.

Three of these five Judges confirmed the judgment of the Judge of first instance. One Judge was of opinion that the "Olav" was alone to blame, and another Judge was of opinion that the "Montcalm" was alone to blame. The result was that both appeals were dismissed. The present appeal to this Board is brought by the owners of the "Montcalm" only. The owners of the "Olav" no longer contest their liability. Thus, the only question for the determination of their Lordships is, whether any blame attaches to the "Montcalm" in relation to the collision. Blame is imputed to her on one ground only, namely, that she was guilty of negligence in failing to reverse her engines in proper time before the collision.

This narrowing of the issues between the parties makes it unnecessary to deal with the facts at any great length. The material circumstances are as follows: At 4 a.m. of September 24, 1910, the "Montcalm," a screw steamer of 5,500 tons gross register, was proceeding up the St. Lawrence river. At the same time the "Kronprinz Olav," of 3,900 tons gross register, was proceeding down the river. The night was dark but clear, the wind light and the tide flood of the force of 1½ knots. Both vessels entered a narrow channel in the river in which it was the duty of each to keep to the side of the fairway on her own starboard side. The "Olav" did not observe this rule, but negligently made for the "Montcalm's" side of the channel, cutting across the "Montcalm's" bows. A collision became imminent, and thereupon the "Montcalm" reversed her engines, but, unfortunately, not in time to avoid the collision.

It is said on the part of the "Olav" that those in charge of the "Montcalm" ought to have recognized sooner than they did the danger created by the bad navigation of the "Olav" and by a timely reversal of the "Montcalm's" engines ought to have averted it. In considering this question it is necessary to bear in mind that the onus of proving the alleged negligence rests on the "Olav" and that it is an onus which can only be discharged by clear and plain evidence. Very little of the evidence adduced at the trial bore upon this question of the reversal of the "Montcalm's" engines; and an examination of what evidence there was, fails to support the charge. The narrative of the collision covers only a few minutes of time, and according to the finding of the trial Judge, the "Montcalm" reversed and went full speed astern about one minute and a half before the collision took place. That the risk of collision had not been realized and was not apparent before this time seems to be clear from the evidence of the "Olav's" navigating officer Toft-Dahl. This witness appears not to have been in fear of a collision until one minute before the event, for it was not until then that he called his captain on deck, and even after this

IMP.
P. C.
1913
CANADIAN PACIFIC R. CO. v. THE "KRONPRINZ OLAV."
Lord Mersey.

the "Olav" kept her speed, and continued to keep it, until the moment of the collision. It seems to their Lordships impossible to say, in the face of this evidence, that the captain of the "Montcalm" was negligent in not realizing before he did that the risk of collision was imminent; and even if he can be said to have miscalculated the time by some few seconds the very gross negligence in the navigation of the "Olav" was well calculated to confuse him and to cause the error. He was, moreover, fully justified in expecting that the "Olav" would realize the dangerous position into which she had brought herself and would try to remedy it by herself reversing.

It is worth while to examine shortly the grounds upon which the Judges in the Courts below based their judgments in so far as they related to the alleged negligence of the "Montcalm." The trial Judge expresses his opinion that the movements of the "Montcalm" had been proper from the time when the "Olav's" lights were first observed until the moment when the "Olav" sounded a two-blast signal for the second time. According to the evidence from the "Montcalm" (which there appears no reason to disregard) the engines were reversed almost at once after this signal. Yet the trial Judge, after expressing his opinion that there had been no negligence on the part of "Montcalm" up to this point, seems then to have surrendered his judgment to the advice of the nautical assessor who sat with him, and to have adopted and given effect to an expression of that gentleman's opinion that the "Montcalm" had failed to reverse with sufficient promptness. That the "Montcalm" did not reverse in time to avoid collision is, of course, true, but the learned Judge seems to have thought that this bare fact was equivalent to proof of negligence. It was not so. It was consistent with proper care in the navigation of the ship, and in any event it fell very far short of proof of negligence. Turning then to the judgments of the learned Judges in the Court of Appeal, it will be found that the Chief Justice was not satisfied with the judgment of the Court of first instance, and yet, because of the imperfect evidence, he felt himself unable to interfere with it. It can scarcely be said that this amounts to an expression of opinion that the "Montcalm" had been guilty of negligence. The next Judge (Mr. Justice Davies) after an examination of the evidence, came to the conclusion that no blame attached to the "Montcalm." The third Judge (Mr. Justice Idington) made no reference to the question of the failure of the "Montcalm" to reverse earlier than she did. He appears to have been of opinion that the "Montcalm's" navigation was wrong from the first, and he came to the conclusion that she was alone to blame. The advisers of the "Olav" do not seem to have concurred with this opinion for they had not the

courage to attempt to support it at their Lordships' Bar. The fourth Judge (Mr. Justice Duff) contents himself with saying that he concurs in the dismissal of both appeals. The last and fifth Judge (Mr. Justice Anglin) mentions the allegation of negligence on the part of the "Montcalm" in not sooner reversing, and says that there was an implied duty on her part to reverse when the "Olav's" second signal was given. The answer, however, to this observation seems to be that in truth this was when she did reverse.

IMP.
P. C.
1913
Canadian Pacific R. Co. v. The "Kronprinz Olav."
Lord Mersey.

Neither in the evidence nor in the judgments in either Court below are their Lordships able to find satisfactory ground for saying that the "Montcalm" was guilty of any negligence whatever contributing to the disaster. They think that the right view of the matter was taken by Mr. Justice Davies, and that accordingly these appeals ought to be allowed and with costs here and below. They will humbly advise His Majesty accordingly.

Appeals allowed.

MOORE et al. v. CANADIAN FAIRBANKS CO., Ltd.

N. B.
S. C.
1913

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. September 8, 1913.

1. Sale (§ I B—5)—Delivery—Time for—Silence of order as to time of.

Shipment of goods within a reasonable time is sufficient where the written order for their purchase is silent as to the time of delivery.

Statement

Appeal by the defendants from a judgment against them for the price of mill machinery which the plaintiff company alleged it had sold to the defendants.

The appeal was dismissed with costs.

E. P. Raymond, for defendants, appellants.

W. B. Wallace, K.C., for plaintiff, respondents.

The judgment of the Court was delivered by

McLeod, J.

McLeod, J.:—The defendants live at Newcastle, Northumberland Co., and own and operate a sawmill there. On July 25, 1911, the plaintiff's agent was in Newcastle, and offered to sell the defendants certain machinery for their mill. After consultation, the defendants gave an order for a pump and heater, to be used in connection with their mill. The order was in writing, and is dated July 26, 1911, and signed by the defendants. It was an order for a brass-fitted boiler, and feed pump, and a heater, and no time was mentioned for delivery. It called for the machinery to be shipped to David Moore and Stephen Moore, Newcastle.

N. B.
S. C.
1913
MOORE ET AL. v. CANADIAN FAIRBANKS CO., LTD.
McLeod, J.

The plaintiffs' agent immediately forwarded the order to his principals to be filled. The machinery arrived in Newcastle about the 2nd or 3rd of September, 1911. The defendants refused to accept it, and on September 4, 1911, wrote the plaintiff company the following letter:—

> Your pump and heater arrived here Saturday evening, almost a month later than it was promised, we lost both time and money waiting for them, and we arrived at the conclusion that you were not going to send them, so we built a furnace, and we shall not need the pump or the heater. It is at the freight shed.

To that the plaintiff company replied saying, among other things:—

> You have our acknowledgment of your order, and as we heard nothing further from you, we naturally did not think the order was to be cancelled. It is true the order was a little long on the way, but in cases of this sort it is customary, where you have given us a signed order to give the party receiving the order a notification that you are unable to accept so that they could cancel the order with the company furnishing the goods.

And it is further stated in the letter that the plaintiff company did not manufacture the heaters and had to procure one elsewhere, and the company urged the defendant to take the machinery. One or two other letters passed between the parties, but the defendant refused to accept the machinery and this action was brought to recover the price as contained in the order. The defendant pleaded the general issue and gave notice of the two following defences:—

> 1. That the goods were bargained for and sold upon the terms that the plaintiff should deliver the goods to the defendant on or before August 5, 1911, and they were not so delivered.
>
> 2. That the goods were bought and sold upon the terms that the same were for a specific purpose which was well known to the plaintiff while the goods were not fit for the purpose.

At the conclusion of the trial the Judge found a verdict for the plaintiff for the amount claimed. He made no specific finding on facts and gave no reasons for his judgment.

He says as follows:—

> After carefully considering all the facts and the contract of sale in this case I have no difficulty in finding for the plaintiff and assessing the damages at $172.

It would, perhaps, have been more satisfactory if the Judge had found specifically as to the facts, especially on the second notice of defence, that is, that the goods were for a specific purpose known to the plaintiff and they were not fit for it. However, by this general finding it must be taken that the Judge has found in favour of the plaintiff all the facts necessary to be found in order to enter the verdict he did, which would in-

clude a finding against the defendants on the second notice of defence. As to the first notice of defence that the goods were sold to be delivered before August 5, the order itself mentioned no time for delivery, and the only question as to delivery of the goods arises as to whether they were delivered in a reasonable time or not. This question does not appear to have been raised by the pleading, but if it was, the general finding would include a finding that they were delivered in a reasonable time. In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

SYDIE v. SASKATCHEWAN AND BATTLE RIVER LAND AND DEV. CO.

Alberta Supreme Court, Scott, Beck, Stuart, and Simmons, JJ. October 11, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ V—53)—CERTIFICATE OF TITLE — FRAUD WHICH WILL AFFECT REGISTERED TITLE.

The fraud which will prevent a purchaser for value from relying upon his registered title, under the Land Titles Act, Alta. Stat. 1906, ch. 34, as against unregistered rights of a prior vendee must be actual fraud as distinct from mere constructive or equitable fraud; such actual fraud is disclosed where the purchaser so registering has notice of the existence of an unregistered interest and knows that the transaction he is making will have the effect of injuring or destroying that interest.

[*Assets Co., Ltd.* v. *Mere Roihi*, [1905] A.C. 176, 210; and *Syndicat Lyonnais du Klondyke* v. *McGirade*, 36 Can. S.C.R. 251, at 266, followed.]

Statement

APPEAL by the defendant Brown from a judgment requiring him to transfer land to the plaintiff on the ground that it had been acquired in fraud of the latter's rights.

The appeal was dismissed.

A. G. MacKay, K.C., for plaintiff.

Frank Ford, K.C., for the defendant.

Stuart, J.

STUART, J.:—This is an appeal by the defendant Brown from the judgment of Mr. Justice Walsh, rendered at the close of the trial in favour of the plaintiff.

Towards the end of the year 1906, the plaintiff Sydie resided in Orangeville, Ont. At that time the defendant company had its head office at Battleford, Sask. The defendant Brown was secretary-treasurer of the company. The company owned some property known as the Santa Rosa sub-division in the city of Edmonton. Brown and Sydie were well acquainted with each other. Brown went down to Orangeville, and, while there, an arrangement was made, whereby Sydie agreed to buy ten lots in the Santa Rosa sub-division. He had never been in Edmonton, and according to his own story, he left it to Brown to select the lots, but he paid a deposit of $200. It was agreed

ALTA.
S. C.
1913
SYDIE
v.
SASKATCHEWAN AND BATTLE RIVER LAND AND DEV. CO.
Stuart, J.

that at least one should be a corner lot. Brown swore that ten lots in block 9 were discussed. At any rate Brown returned to Battleford and found that the ten lots in block nine which had been, according to him, the subject of some discussion between them in Orangeville were still open for sale except one which was a corner lot, and for which some other lot had, therefore, to be substituted. Without further reference to Sydie, two agreements of sale were sent to him by the company for signature, one covering nine lots in block nine and a separate agreement for lot fifteen in block five, this latter being a corner lot. Sydie executed these agreements and returned them to the company who in turn executed each in duplicate, Brown signing as secretary-treasurer of the company, and then one copy of each was sent to Sydie. This was in January, 1907.

On February 8, 1908, the company wrote to Sydie saying that a fire had recently occurred which had burnt up their records and asking from him information as to the numbers of the lots he had bought, the terms, etc., etc. To this Sydie, by some error, replied saying that he had bought lot fifteen in block fifteen instead of in block five. Some correspondence ensued on that basis. Sydie eventually paid what was due on the agreements, and in March, 1909, the company sent him a transfer for all ten lots including lot fifteen in block fifteen which transfer had been executed on January 28, 1909. No question arises as to block nine. Sydie retained this transfer unregistered. He stated that he noticed the mistake as to the block and that in 1909 he wrote twice to the company about it. The trial Judge disbelieved him in regard to the sending of these letters. He came to Edmonton in June, 1910, and, assuming his story as to the letters to be untrue, for the first time drew the attention of Brown and the company to the mistake. Brown by that time had severed his connection with the company and was living in Edmonton. A man named Detwiller had then become the active representative of the company. The exact facts which occurred and the exact conversation which took place were the subject of much contention at the trial, and upon the appeal.

The learned trial Judge, however, found as a fact that Brown as well as the company knew exactly the specific mistake which had been made, that while knowing this, Brown bought lot fifteen in block five along with all other unsold lots in the sub-division from the company and registered his transfer, becoming thus the registered owner of the lot which the company had really agreed to sell to Sydie. He held that this constituted fraud on the part of Brown, and that secs. 135 and 44 of the Land Titles Act, Statutes of Alberta, 1906, ch. 24, did not furnish a protection. He gave judgment directing

Brown to transfer the lot to the plaintiff and directing the company to discharge a mortgage covering it and the other lots which Brown had given in part payment.

From this judgment Brown alone appeals.

The first question to be decided is whether we ought to reverse the finding of fact upon which the judgment below chiefly rests, viz., the knowledge on the part of Brown and Detwiller of the specific mistake which had been made. For myself I cannot find anything which would, in my opinion, justify us in doing so. I do not think it is necessary to refer in detail to the evidence. I have read it with some care, and it has left the same impression on my mind as it did on the mind of the trial Judge. If I were going to suggest a reversal of his finding, I think it would be incumbent on me to point out with some particularity the exact ground upon which I thought such a course should be taken. But the position is the reverse; and, to put the matter in the mildest form, it is sufficient to say that I have discovered nothing which, in my opinion, could justify us in concluding that the trial Judge was clearly wrong in his finding of fact, and, that being so, his finding ought to stand undisturbed.

I also think that the judgment is right upon the point of law. In *Assets Company Ltd.* v. *Mere Roihi*, [1905] A.C. 176, at 210, the Judicial Committee of the Privy Council, in dealing with a question arising under the similar provisions of the New Zealand Registry Acts, said:—

> By fraud in these Acts is meant actual fraud—*i.e.*, dishonesty of some sort; not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, *must be brought home to the person whose registered title is impeached or to his agents.* Fraud by persons from whom he claims, does not affect him unless *knowledge of it is brought home to him or his agents.* The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not, of itself, prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him. A person who presents for registration a document which was forged or has been fraudulently or improperly obtained, is not guilty of fraud if he honestly believes it to be a genuine document which could be properly acted upon. In dealing with colonial titles depending on the system of registration which they have adopted, it is most important that the foregoing principles should be borne in mind, for if they were lost sight of that system will be rendered unworkable.

ALTA.

S. C.
1913

SYDIE
v.
SASKATCHEWAN AND BATTLE RIVER LAND AND DEV. CO.

Stuart, J.

This passage was cited with approval in the judgment of Nesbitt, J., delivering the opinion of a majority of the Supreme Court of Canada in *Syndicat Lyonnais du Klondyke* v. *McGrade*, 36 Can. S.C.R. 251, at page 266.

In that case the facts were, that the plaintiff McGrade was the holder in due course of two promissory notes made by one McConnell upon which he had, in a former action, recovered judgment. He then sued on behalf of himself and all other creditors of McConnell to set aside a transfer of the lands in question made by McConnell to his wife as being void and fraudulent as against creditors. While this action was pending, the wife transferred the lands to the Syndicat Lyonnais du Klondyke, and a new certificate of title was issued to that company. Prior to this the plaintiff had succeeded in inducing the registrar to register a *lis pendens* and this had been noted on the certificate of Mrs. McConnell. The company were then made parties defendants to the action. Mr. Justice Dugas, the trial Judge, held that the transfer was fraudulent, but that the *lis pendens*, being an irregular document not allowed by the Land Titles Act, 1894, and its amendments, was ineffectual as notice to the company and dismissed the action. This judgment was reversed on appeal to the Territorial Court *en banc* of the Yukon. On appeal to the Supreme Court of Canada, the Chief Justice of Canada was in favour of simply dismissing the appeal, saying that he did not see any reason for doubting that the company took with full knowledge of the danger they were exposing themselves to. Nesbitt, Sedgwick and Davies, JJ., agreed with this, but thought an amendment should be allowed, permitting the company to raise the plea that no debt existed on the note sued on which the plaintiff was entitled to recover and that McConnell's deed to his wife was not for the purpose of defrauding the plaintiff and his other creditors, and they allowed a new trial. Idington, J., also agreed, although he wrote a judgment without having first seen the case of *Assets Co. Ltd.* v. *Mere Roihi*, [1905] A.C. 210. Mr. Justice Nesbitt, after quoting the passage from that case which I have cited, said:—

> I therefore think that, although in this case if the suit had not been commenced, the syndicate could have relied on sec. 126 (the present sec. 135) as a full protection, they cannot do so where the suit has been begun impeaching the conveyance and the syndicate have full notice of it.

Now, the effect of this decision is that the company, having notice, not that there had in fact been a fraud, but that another person was claiming in an action that their vendor's certificate had been obtained by fraud, were not entitled to the protection of sec. 135. Surely that is a much stronger case than the one now in appeal. Certainly the Supreme Court went much

further there than we need to go here to sustain the plaintiff's case. According to the finding of fact, the defendant Brown knew that his own act in buying from the company would deprive the plaintiff of his property.

The exact interpretation to be placed on the section of the New Zealand Act, similar to the section before us was discussed by Richmond, J., in *National Bank* v. *National Mortgage and Agency Co.*, 3 N.Z.L.R. 257, at pp. 262-3-4, a case very like the present one. I agree with his remark that

> it may be an act of downright dishonesty knowingly to accept from the registered owner, a transfer of property which he has no right to dispose of.

As pointed out in that case,

> it is enough to say on which side of a possible line of demarcation the case falls, without pretending to draw the actual line.

It may be very difficult to fix the exact line intended to be drawn by section 135, but I think it is not difficult to decide on which side of the line the present case falls. An interesting discussion of the proper interpretation of the section in question is to be found in Hogg, Australian Torrens System, at pages 835 *et seq.* A very logical distinction is there suggested between mere knowledge of the existence of an unregistered interest which may not necessarily be hurt by the transaction attacked, and knowledge that the effect of that transaction will be to injure or destroy that interest. The knowledge that such will be the effect is obviously something more than mere knowledge of the existence of that interest.

In my opinion the conduct of the defendant Brown does not come within the protection of the Act, and I therefore think the appeal should be dismissed with costs.

Scott, J.
Beck, J.
Simmons, J.

SCOTT, BECK, and SIMMONS, JJ., concurred with STUART, J.

Appeal dismissed.

CORSBIE v. J. I. CASE THRESHING MACHINE CO.

Saskatchewan Supreme Court, Lamont, J. October 6, 1913.

1. EXECUTION (§ I—9)—PAYMENT, SATISFACTION AND DISCHARGE—PROPERTY BID IN AT SALE—WITHDRAWAL FOR INSUFFICIENT BIDS.

Where an execution creditor instructs the sheriff not to sell certain of the property advertised for sale under the execution at a price less than a specified sum, such instruction is equivalent to an offer by the creditor to buy in at the sum so specified and is *pro tanto* a satisfaction of his claim, where it appears that under those instructions the sheriff actually withdrew the property from sale for insufficient bids and turned it over to the creditor, who, by taking it into custody and subsequently offering to sell all and actually selling part, assumed ownership in relation thereto.

[See also, as to negligent forced sale under chattel mortgage, *McHugh* v. *Union Bank*, 10 D.L.R. 562.]

SASK.

S. C.
1913

CORSBIE
v.
J. I. CASE
THRESHING
MACHINE
CO.

Statement

2. SOLICITORS (§ II B—26)—RELATION TO CLIENT—AUTHORITY AT SALE UNDER EXECUTION, HOW LIMITED.

Where an execution creditor places the conduct of the advertised sale under the execution in the hands of his solicitor, this constitutes such solicitor the agent of the creditor, whether the solicitor was, or was not, the solicitor of record in obtaining the judgment basing the execution.

ACTION against an execution creditor for the purchase price of certain property advertised for sale under the execution, but, as alleged, withdrawn from sale by the creditor who subsequently assumed ownership; involving especially the effect of a creditor, of his own motion, fixing a reserve bid, and his resulting obligation to buy at the price he so fixes.

Judgment was given for the plaintiff.

C. D. Livingstone, for plaintiff.

H. Y. MacDonald, for defendants.

Lamont, J.

LAMONT, J.:—The facts of this case are as follows: In October, 1905, the plaintiff purchased from the defendants a threshing outfit, consisting of an engine, separator, caboose and tank, for $2,300, for which he gave the defendants lien notes. As the plaintiff did not meet these notes at maturity, the defendants, in October, 1906, brought an action against him in the Supreme Court of the North-West Territories for the amount of the notes and interest, and the following month obtained judgment for $2,432.90, and issued execution thereon. They then placed the execution in the hands of the sheriff of the judicial district of Yorkton with instructions to levy the amount out of the goods of the plaintiff. In obtaining the judgment and issuing execution, W. R. Parsons, of Yorkton, acted for the Case Co., and was their solicitor on the record. On November 26, 1906, Messrs. Campbell and Bawden, of Dauphin, who were acting as the general solicitors of the defendant company, telegraphed to Parsons as follows: "Re Corsbie. Have sheriff seize at once without fail." Parsons conveyed these instructions to deputy sheriff Mayo, and Mayo sent up his bailiff, who seized a yoke of oxen and also the threshing outfit purchased by the plaintiff from the defendants. Having seized the outfit, Mayo removed it from the plaintiff's farm to Togo, some six miles distant. He then advertised that he would sell the chattels seized on December 20, 1906. On December 12, Campbell and Bawden instructed Parsons that if a reasonable offer was made for the machine at the sale to let it go, but if not, to have it stored with the Togo Supply Co. Before the day of the sale Parsons notified the sheriff that he was not to sell the outfit unless he got an offer of $1,200. Parsons says that any instructions given by him were at the instance of Campbell and Bawden, and on their instructions. At the sale the highest bid made for the outfit was $800,

and the deputy sheriff did not sell for the reason, as he says, that he had instructions not to sell unless he obtained $1,200. After the sale nothing further was done by the sheriff with the machine; he just left it where it was sitting in Togo; and what is left of it is there yet. As a threshing outfit it is now valueless. On December 22, 1906, Parsons wrote Campbell and Bawden that the sheriff informed him that there were three men who would like to purchase the machine, paying part cash and the balance on time, and that he thought it could be sold for $1,200. On January 9, 1907, Campbell and Bawden wrote to Parsons as follows:—

> Re Case v. Corsbie: Your favour herein duly received. We have just seen the general agent for the plaintiffs (Case Co.), and he states that the plaintiffs will not sell the outfit for $1,200, but will take $1,500 for same. This would appear to be a very easy figure, and we would be glad if you would take the matter up with the sheriff and advise us at once.

In the spring of 1907 the defendant's agent offered to sell the machine to one George R. Ross, and in 1909 the defendant company sold or gave the caboose which formed part of the plaintiff's machine to John Radford when he purchased a threshing outfit from them.

In January, 1907, the defendants brought action in the Manitoba Courts on the judgment obtained in the Supreme Court of the North-West Territories, and on June 8 of that year recovered judgment thereon for $2,521.19 and costs. As a result of this process, the defendant company received from the Manitoba sheriff the sum of $1,773.70. In March, 1912, the defendants issued out of the Supreme Court of Saskatchewan an alias writ of execution against the goods of the plaintiff in this action for $2,432.90, and interest from October 16, 1906. On that writ are endorsed three credits, one for $61.15, another for $100, and the third for $1,773.70. In the present action the plaintiff claims that the defendants' judgment has not only been satisfied, but that a large portion of the money received by them from the sheriff in Manitoba rightfully belongs to him. His contention is that as the company instructed the sheriff not to sell the threshing outfit for less than $1,200, they must give him credit for that amount as of the date of the sale. For the defendants it is contended, (1) that Parsons, as solicitor on the record, had no authority to give the instructions to the sheriff not to sell, and (2) even if he had, seizure is not satisfaction of the judgment, and the defendants' judgment not being fully paid, this action is premature.

It is quite clear that unless the defendants are obliged to credit the plaintiff with the $1,200, the sum at which they would permit the sheriff to sell, the judgment is not satisfied and this action is, therefore, premature. Are they obliged to give that

SASK.

S. C. 1913

CORSBIE v. J. I. CASE THRESHING MACHINE CO.

Lamont, J.

credit? A seizure of goods by a sheriff under an execution is not a satisfaction of the execution creditors' debt even to the extent of the goods seized: *Lee* v. *Dangar*, [1892] 2 Q.B. 337. Seizure does not pass any property in the goods to the judgment creditor, nor can the creditor call for the possession of the goods: *Giles* v. *Grover*, 6 E.R. (H.L.) 843. In that case Mr. Justice Alderson said, at 852:—

> Now, I do not believe that it was ever contended that the execution creditor is entitled to the possession of the goods themselves unless under some contract made between the sheriff and him which would be equivalent to a sale under the writ.

The sheriff is not entitled to hand the goods seized over to the execution creditor in satisfaction of the debt. The creditor, however, has a right to have the goods sold and to be paid out of the proceeds thereof: *Re Clarke*, [1898] 1 Ch. 336; and he may at the sale purchase the goods: Hals., vol. 14, p. 56. To obtain property in the goods, and, therefore, to be under the obligation to give the debtor credit for their value, the creditor must either purchase them at the sale or, as said by Alderson, J., in *Giles* v. *Grover*, he must "make some contract with the sheriff equivalent to a sale under the writ." Do the facts in this case establish that there was, between the sheriff and the defendant company, a sale under the writ of the goods seized or the equivalent thereof?

To start with, we have the fact that Parsons instructed the sheriff not to sell unless he got an offer of $1,200, and also the fact that Campbell and Bawden, general solicitors for the defendants, wrote Parsons to have the machine stored with the Togo Supply Co. unless a reasonable offer was obtained at the sale, which letter Parsons forwarded to the sheriff. Parsons, however, it is said, had no authority; and numerous cases were cited to shew that a solicitor on the record has no authority to act for a plaintiff in an action after judgment was obtained and execution issued. These authorities have no bearing on this case. Parsons, in giving instructions to the sheriff not to sell unless he received $1,200, was not acting by virtue of any implied authority arising from the fact that he was the solicitor on the record, but was acting under the express instructions of Campbell and Bawden, who purported to act on behalf of the company. That Campbell and Bawden had authority to do as they did is amply shewn in the examinations for discovery of Carmon and Mustard, two officers of the defendant company, who say over and over again that the matter was in the hands of their solicitors to deal with. Mustard furthermore admits that the sheriff had instructions not to sell unless he received a certain price. It is, therefore, amply established that the instructions not to sell unless an offer of $1,200 was received were the instructions of the defendant company.

SASK.

S. C.
1913

CORSBIE
v.
J. I. CASE THRESHING MACHINE CO.

Lamont, J.

Not getting a bid of $1,200, the sheriff did not sell, nor did he do anything further in the matter. He appears to have considered that from the day of the sale the machine belonged to the defendant company. The company also appears to have taken the same view, for shortly afterwards they endeavoured to sell it to Ross, and subsequently did actually dispose of the caboose. These acts are consistent only with their taking over the machine. The instructions to the sheriff by the company not to sell for less than $1,200 are equivalent to an offer by them of that amount. That offer, being the highest one made, must in the light of the sheriff's conduct and of the defendant's letter of January 9, 1907, and their offering to sell the machine to Ross, and their subsequent disposal of a part of it, be held to have been accepted by the sheriff, and the machine to have been sold to the defendants. Certainly the defendants, after conduct such as theirs, cannot now be heard to deny that there was a sale to them of the machine, or, at least, a contract with the sheriff equivalent to a sale. That being so, the plaintiff is entitled to have a credit of $1,200 on his judgment as of the date of the sale. This, in addition to the credits admitted and endorsed on the execution, shews that the defendants have collected more than sufficient to satisfy their claim, and the plaintiff is entitled to have judgment against them for the excess. That excess amounts to $294.

There will, therefore, be judgment for the plaintiff for $294, and interest thereon from January 16, 1903, and costs.

Judgment for plaintiff.

PRICE v. PARSONS.

ALTA.

S. C.
1913

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Walsh, JJ. October 11, 1913.

1. VENDOR AND PURCHASER (§ I B—5a)—CONTRACT FOR SALE OF LAND—ACCELERATION CLAUSE—ELECTION TO INVOKE—NOTICE OF—SUFFICIENCY—CLAIM OF IN PLEADINGS IN ACTION FOR SPECIFIC PERFORMANCE.

Notice of a vendor's election to invoke an acceleration clause in a contract for the sale of land and to declare the whole of the purchase money to be due and payable, may, on the vendee's default in making stipulated payments, be given by the vendor in the pleadings in his action for the specific performance of the agreement, where the contract provides that notice of such election may be given the vendee by personal service, registered letter or such other means as might appear likely to bring it to his attention.

Statement

APPEAL by the defendant from a judgment against him in an action for the specific performance of a contract for the sale of land.

The appeal was dismissed with costs.

ALTA.

S. C.
1913

PRICE
v.
PARSONS.

Walsh, J.

Frank Ford, K.C., for plaintiff.
S. W. Field, for the defendant.

HARVEY, C.J., SCOTT, and BECK, JJ., concurred with WALSH, J.

WALSH, J.:—This is a specific performance action brought by the vendor. At the date of the writ, two instalments of the purchase money were overdue, and a third instalment fell due on that very day. The payment of the balance was spread over a number of months, the last one falling due on October 20, 1913. The agreement contains the following clause:—

4. That, upon default of payment of any sum for principal or for taxes, assessments or charges as aforesaid, the whole balance of principal due hereunder shall forthwith at the option of the vendor and upon notice to the purchaser become due and payable.

Another clause provides that any notice required to be given under the provisions of the agreement shall be given by personal service or by registered letter or by such other means as might appear likely to bring it to the purchaser's attention.

The statement of claim after setting out the particulars of the agreement makes the following allegation:—

4. By the said agreement it is further provided that if the purchaser shall make default of payment of any sum for principal or for taxes, assessments or charges as aforesaid, the whole balance of principal due hereunder shall forthwith, at the option of the vendor, become due and payable.

It then sets out the date and amount of each payment made by the defendant and alleges that "there is now overdue and unpaid and owing by the defendant $17,718.07," full particulars of which follow, one item being "principal due $16,000," which was the full amount of principal money then actually unpaid including not only the sums then actually in arrear, but the sums, the payment of which was, by the terms of the agreement, set for later dates.

The action was tried before Simmons, J., who gave judgment for the plaintiff, declaring that the agreement ought to be performed, and ordering that upon payment by the defendant of the whole amount of the plaintiff's claim within three months, the plaintiff should transfer the land to the defendant. From this judgment the defendant appeals upon the sole ground that, at the time of the issue of the writ, the plaintiff was not entitled to exercise any rights under the acceleration clause above set out because the plaintiff had not given the notice called for by it. The argument before us proceeded upon the assumption that this notice had not been given, although there is absolutely nothing whatever in the case to indicate whether

or not it had been. I will deal with it upon this same assumption.

I am of opinion that the defendant's contention is not entitled to prevail. The plaintiff had a perfect right to bring his action when he did for there were instalments of the purchase money which were then overdue, having regard only to the dates set by the agreement for their payment, and without invoking the aid of the acceleration clause. His right in that action, if he was otherwise entitled to succeed, was to a judgment declaring that, upon the payment by the defendant within a certain period, of the amount due and payable under the agreement at the date of the judgment, and of the subsequent instalments as they fell due, the plaintiff should transfer the land to him. Some of the purchase money had fallen due between the date of the writ and the date of the judgment, and he was entitled to have the same taken into the account of the amount then payable even though he could not have brought his action when he did in respect of them, because they had not then matured. In like manner I think that it was quite competent for him to insist upon having taken into the account sums, the payment of which, though not due according to the tenor of the agreement before the issue of the writ, had been accelerated either upon or subsequent to its issue. The statement of claim was in itself a perfectly good notice to the defendant of the exercise by the plaintiff of the option given to him by clause 4 of the agreement above quoted, to make the whole of the purchase money due and payable, and it undoubtedly came to his notice through the service of the writ. If such a notice as it is had been served upon the defendant before the commencement of the action, he could not have been heard to complain of lack of notice. If, contemporaneously with, or subsequently to the service of the writ, such a notice was given, I think that it would entitle the plaintiff upon the taking of the accounts to insist that the whole of the purchase money was then due and to a judgment accordingly, just as he could have insisted upon instalments, which had subsequently matured, being so taken into account. In other words, the giving of the notice was not a condition precedent to the plaintiff's right to bring the action for the defendant was then in default and being properly brought without notice, the claim which the plaintiff made by his pleading for payment of the full amount then unpaid was a notice to the defendant which enured to the plaintiff's benefit when the action ripened into judgment.

I would dismiss the appeal with costs.

Appeal dismissed.

ALTA.

S. C.
1913

STONE v. THEATRE AMUSEMENT CO.

Alberta Supreme Court, Scott, Beck, Simmons and Walsh, JJ.
October 11, 1913.

1. CORPORATIONS AND COMPANIES (§ V E 2—220)—RIGHTS OF SHAREHOLDER —ACTION BY—ACCOUNT OF UNDUE PROFITS MADE BY DIRECTORS PERSONALLY.

An individual shareholder may maintain an action against directors of a company to require them to account for undue profits made for themselves while dealing on behalf of the company with a partnership consisting of such directors.

[*MacDougall* v. *Gardiner*, L.R. 1 Ch. D. 13, 21; and *Burland* v. *Earle*, [1902] A.C. 83, applied.]

Statement

APPEAL by the plaintiff, a company shareholder, from a judgment refusing to compel the directors to account, at the suit of an individual shareholder for certain profits made by them.

The appeal was allowed.

Frank Ford, K.C., and *D. M. Stirton*, for plaintiff, appellant.
W. F. W. Lent, for defendants, respondents.

Scott, J.

SCOTT, J., concurred in the disposition of the case indicated by BECK, J.

Beck, J.

BECK, J.:—My brother Simmons has set out the facts. Two points were involved in the case: (1) the question of the directors having received a salary in contravention of the articles of association, and (2) the question of their dealings with the partnership, the Canadian Film Exchange, and the profits made by the latter, of which all the shareholders except the plaintiff were the sole partners.

The learned trial Judge found in favour of the plaintiff on the first question and directed the defendants to account for the amounts they received as salaries. On the second question he dismissed the plaintiff's claim on the ground that the plaintiff as a shareholder was not entitled to raise the question in an action by himself. It appears, however, that it was not pressed upon him in argument that the evidence shewed that the conduct of the defendants was not merely a matter of internal management which the majority of the shareholders could rightfully decide upon as they did, but was a fraud upon the minority. The evidence so far as it has gone shews that what was done by the defendants was a fraud on the plaintiff. In Lindley on Companies, 6th ed., p. 769, where the rules as to parties in the case of incorporated companies are laid down it is said:—

Where a company is incorporated, and its directors or some shareholders have done or are doing that which other shareholders desire to bring an action to redress or prevent, the following rules are to be observed:—

1. If the matter complained of is one which gives a right of action to

the company as a collective whole, the company ought to sue in its corporate name, and an action by one member on behalf of himself and others is improper, but leave may be given to add the company as a co plaintiff.

2. Again, if the complaint relates to some matter of internal management as to which a majority is competent to decide, the action should be brought by the majority in the name of the company.

3. But if those who have the management of the affairs of the company will not bring an action in its name when the shareholders require it, having a right so to do, or if directors or shareholders have done or are about to do that which is a fraud on the minority or is wrong, even if sanctioned by a majority, then an action by some of the members on behalf of themselves and others, or in the last case by a member suing alone, may be sustained, for otherwise the dissentients would be without redress.

Again at p. 772 it is said:—

The cases above referred to shew that it is competent for one shareholder to institute an action on behalf of himself and co-shareholders, for the purpose of obtaining relief in respect of illegal acts done or contemplated by directors; moreover, an action in this form is sustainable to prevent or set aside a transaction which is a fraud by a majority on a minority.

And on p. 765 it is said:—

And if a plaintiff sues alone where he ought to sue on behalf of himself and others (*i.e.*, all shareholders other than the defendants) an amendment would probably be allowed.

I should apply this if necessary. It is not necessary because the plaintiff himself is the only shareholder other than the defendants.

For the reasons stated I think the action properly constituted to entitle the plaintiff on the evidence as it stands to an account of the profits in connection with the company's dealings with the Canadian Film Exchange beyond such as may be justified on the basis of the agreement of March 25, 1912. As, however, the learned trial Judge dealt with the case without hearing evidence on the defendants' behalf the defendants are, if they wish it, entitled to have a new trial on this branch of the case. If they do not wish a new trial there should be judgment directing an account on this question as well as the other and the defendants should pay the costs in the Court below and the costs of the appeal and the costs of the reference should be reserved to be dealt with by a Judge after its conclusion. If the defendants wish a new trial, it should be so ordered, the costs of the appeal to be paid by the defendants and the costs of the former trial to be dealt with by the Judge on the subsequent trial. The defendants should be required to make their election within two weeks.

SIMMONS, J.:—The plaintiffs Barney Allen, Julius Allen, and Jay Junior Allen, carried on business as a partnership under the

Simmons, J.

ALTA.

S. C.
1913

STONE
v.
THEATRE
AMUSEMENT
CO.

Simmons, J.

firm name of the Canadian Film Exchange, the business of which was renting films to moving picture theatres. Subsequently on September 30, 1910, the parties incorporated the Theatre Amusement Co., Ltd., for the purpose of conducting moving picture theatres. Barney Allen was elected president, Jay Junior Allen, vice-president, Julius Allen, secretary, and L. B. Stone, treasurer of the company. Each of them were made directors, and Julius Allen was made managing director of the company.

No articles of association of the company were registered and, therefore, "table A" of the Companies' Ordinance became the articles of association of the company. Section 57 of "table A" provides that the office of director shall be vacated if he holds any other office or place of profit under the company or if he is concerned in or participates in the profits of any contract with the company. The capital of the company was ten thousand dollars divided into one hundred shares of one hundred dollars each.

The plaintiff alleges that the directors on October 3, 1911, declared a dividend of ten thousand dollars and appropriated this sum towards payment of all shares of the company, although no such sum was available for distribution at that date, the funds of the company having been previously converted into capital by the purchase of assets on its behalf.

The plaintiff alleges that in contravention of their powers the directors have since March 26, 1912, carried on business with themselves, to wit, the Canadian Film Exchange. It appears that on the said 26th day of March, 1912, the Allens purchased the plaintiff's interest in the partnership of the Canadian Film Exchange, and on the same date the plaintiff ceased to be a director of the Theatre Amusement Co., Ltd., but continued to be a shareholder, owning one-fourth of the shares and the Allens three-fourths of the shares in the said company. The agreement under which the plaintiff retired from the partnership provided that:—

> The Canadian Film Exchange for the space of one year from the date hereof will supply, and hereby agrees to supply the Theatre Amusement Co., Ltd., with films to be operated at the Monarch Theatre in Calgary for the weekly rental not exceeding two hundred dollars ($200) per week; at the Monarch Theatre, Edmonton, at the weekly rental not exceeding two hundred and twenty-five dollars ($225) per week; and at the Monarch Theatre, Winnipeg, for the weekly rental not exceeding one hundred dollars ($100) per week, so long as the said Winnipeg theatre shall run first run films without extra charge; the above figures being all based on a daily change and first run films.

The agreement also provided that the Theatre Amusement Co. should pay the Canadian Film Exchange fifty dollars per month for the use of the latter's office in Calgary. The Theatre

Amusement Co. also agreed to furnish the plaintiff with weekly statements of the receipts and pay-outs of the theatre business, and on the request of the plaintiff advise him of the stock in hand of the Theatre Amusement Co. The plaintiff says that prior to the said 26th day of March, 1912, the Canadian Film Exchange dealt with the Theatre Co. for the purpose of renting films to the company and occasionally for the supply of goods, but charged no profit in connection with these dealings, but since said date the said partnership has charged exorbitant profits in dealing with the company and that such dealings were a breach of trust and a violation of the duties of the directors of the company. The plaintiff claims also that the defendants improperly voted salaries to themselves as directors.

The plaintiff claims a refund by the directors of the salaries so taken by them, and also that the directors be disqualified and a receiver appointed to carry on the business of the company, and an accounting of the moneys improperly received by the directors while dealing with themselves.

The learned Chief Justice found that the directors had voted salaries to themselves without authority and that they must account to the company for the same. He also found that the directors as agents or trustees were liable to account to the company for any profits made by dealing with themselves, but that the shareholders could, if they wished, ratify what the directors had done, and in the meantime that the Court should not interfere because interference should be for the benefit of the company and not for the benefit of a single shareholder and in this case the interests of the defendants as shareholders in the company are much greater than the interests of the plaintiff as a shareholder, and on this account he held that the plaintiff failed on this branch of his case.

I am of the opinion that the Chief Justice has quite correctly enunciated the general rule laid down by James, L.J., in *MacDougall* v. *Gardiner*, L.R. 1 Ch. D. 13, at p. 21:—

> I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in *Mozley* v. *Alston*, 1 Ph. 790, and *Lord* v. *Copper Miners Company*, 2 Ph. 740, and *Foss* v. *Harbottle*, 2 Hare 461, should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder, on behalf of himself and others, unless there be something illegal, oppressive or fraudulent.

He has not, however, found as a fact that the ground of application of the qualification existed, namely, "illegal, oppressive or fraudulent acts." The rule is clearly laid down in *Burland* v. *Earle*, [1902] A.C. 83, that the company must sue as a company to redress a wrong done to it; but if a majority of its shares are controlled by those against whom relief is sought, the complain-

ALTA.

S. C. 1913

STONE v. THEATRE AMUSEMENT CO.

Simmons, J.

ing shareholders may sue in their own names, but must shew that the acts complained of are either fraudulent or *ultra vires*.

With great respect I am of the opinion that if the acts complained of have a foundation in fact that fraud is the proper class within which to place them. I refer particularly to the course of dealing between the Canadian Film Exchange and the Theatre Company after March 26, 1912.

The plaintiff gives specific instances of undue profits and applying the rule above set out, he has a right to bring the action as an individual shareholder and is entitled to an accounting by the defendants as to all dealings between the Canadian Film Exchange subsequent to March 26, 1912.

Having reached this conclusion, I agree, after consultation, with the disposition of the case proposed by my brother Beck.

Walsh, J.

WALSH, J., concurred in the result.

Order accordingly.

ALTA.

S. C. 1913

EDMONTON SECURITIES, Ltd. v. LEPAGE.

Alberta Supreme Court, Harvey, C.J., Stuart, and Beck, JJ.
October 11, 1913.

1. BROKERS (§ II B 1—13)—REAL ESTATE BROKER—COMPENSATION—TRANSACTION EFFECTED WITHOUT BROKER'S AID.

A real estate broker cannot recover a commission, on the sale of land by his client before the expiration of the period for which the broker had the exclusive listing, by procuring, before notice of such sale, a prospective purchaser, unless it appears that the latter had decided or promised to buy the land before becoming aware of its prior sale.

[See Annotation on real estate agent's commission, 4 D.L.R. 531.]

2. NEW TRIAL (§ II—7)—FOR ERRORS OF COURT—ADMISSION OF EVIDENCE—PERMITTING ONE PARTY TO SHEW MISTAKE IN WRITTEN CONTRACT AND REFUSING OPPOSITE PARTY SAME PRIVILEGE.

Where one party to an action is permitted to give oral evidence in his own favour to shew a mistake in a written contract and the same right is refused the opposite party, a new trial will be granted.

3. EVIDENCE (§ VI H—562)—PAROL OR EXTRINSIC CONCERNING WRITINGS—MISTAKE.

Parol evidence is admissible, in an action on a written contract, under a plea that it was executed under a mistake as to its contents, to shew all of the circumstances surrounding the making and execution of the agreement, from which is to be determined whether the signer is to be bound by it.

Statement

APPEAL by the defendant from a judgment against him in an action to recover commission for the sale of land.

The appeal was allowed and a new trial ordered.

H. H. Parlee, K.C., for plaintiff, respondent.

Corbett, for the defendant, appellant.

STUART, J.:—In their original statement of claim the plaintiffs allege that, by an agreement in writing, the defendant listed the property for sale exclusively with them for a period of three months, that by the agreement the defendant agreed to pay the plaintiff $1 per acre commission on all sales of said property either effected by the plaintiff or by the defendant or anyone for him, and that the defendant, prior to the expiration of the period sold the property himself.

In his defence to this, after a denial of the agreement the defendant proceeded as follows:—

2. If the defendant made any agreement with the plaintiff it was only to pay the plaintiff commission in the event of a sale by the plaintiff.

3. There never was any consideration for the alleged promise by the defendant to pay the plaintiff commission on a sale by the defendant or the only consideration, if any, wholly failed.

4. If the defendant signed the agreement sued upon he did so under a total mistake as to its nature and in the belief that it embodied only the agreement set forth in paragraph 2 hereof.

Subsequently the plaintiff amended his claim by alleging that, prior to the expiration of the period of three months, and while the agreement was in full force and effect he had found and introduced to the defendant two intending purchasers for the lands who were each ready, willing and able to purchase the lands at the price and terms set forth in the agreement. This the defendant denied.

At the trial the plaintiffs proved first, the defendant's signature to the following document:—

Edmonton Securities, Limited.

Exclusive Listing Blank.

Memorandum of Agreement: For and in consideration of the efforts of Edmonton Securities, Limited, Edmonton, to sell the hereinafter described property, I hereby list the same exclusively with Edmonton Securities, Limited, Edmonton, for a period of three months from this date, and for said period I authorize said Edmonton Securities, Ltd., to effect the sale thereof for me at the price and terms described hereinafter.

District, Fort Sask. No. of acres 339.

Section, R. lot 4, township 55, range 22, mer. 4.

Location, 2 mile Fort Sask.

Miles from school, ½; post office, ½; shipping point, 2; church, ½.

No. of acres arable, all. No. of acres broken, 200.

How watered, river. How fenced, all fenced.

Buildings, value $1,500.

House, log. Stables, log.

Granaries, frame.

How does land lie, slopes south.

Remarks, fine land.

Price per acre, $30 (altered from 29).

Cash payment $1,000. Terms on balance, $2,100 mort. 2 years, bal. $1,000 per year, 7 per cent. after 2 years.

ALTA.

S. C.
1913

EDMONTON SECURITIES LTD.
v.
LEPAGE.

Stuart, J.

I agree to pay said Edmonton Securities, Limited, 1.00 per cent. commission on all sales of said property, whether effected by the said Edmonton Securities, Limited, or by myself or anyone for me, or I agree to accept for the said property $29 net.

Dated at Edmonton, in the Province of Alberta, this 7 day of Dec. (altered from Nov.) 1911.

Witness (Sgd.) NAPOLEON LEPAGE.

P.O. Address, Lamoreau.

We hereby agree to advertise and use our best efforts to sell the said property.

EDMONTON SECURITIES, LTD.,
Per.....

The plaintiffs also proved that they had on two occasions taken prospective purchasers to view the land, but that these had not decided to buy; that on a third occasion within the three months they had taken two men named Spinks and Robert down to the land to see it and had gone to the defendant's house, whereupon the defendant had informed them that the land was sold. [The learned Judge here reviewed the evidence at length.]

The defendant admitted he had himself sold the place prior to the expiration of the three months for $25 an acre.

In the examination in chief of Armstrong, the chief witness for the plaintiffs, his counsel, without objection, asked him the following question:—

I understand you were to get a dollar per acre if you sold. A. Yes.

It will be observed that the written agreement says that the commission was to be "1.00 per cent." which, even if we read 1.00 as meaning $1.00 is clearly nothing more than 1 per cent. The learned district Judge held that Spinks and Robert were ready and willing to buy, and that they had only been prevented from doing so by the fact that the defendant had already sold. Apparently, on the strength of verbal evidence, outside the written contract and in direct contradiction to it he held that the agreement was for a commission of $1 per acre, not "1.00 per cent.," and gave judgment for $339, the acreage being 339 acres. He rested his judgment upon the ground that the plaintiffs had found purchasers and had earned their commission. With much respect I am unable to see how, in the face of the evidence both of Spinks and Robert, this finding can be supported. It is clear from their evidence that they had not yet decided or promised to buy before they found that the land was sold. For all that appears in their evidence, they might eventually have decided not to buy.

This leaves for consideration, the question whether the plaintiffs are not entitled to hold their judgment on the ground that the defendant had agreed to pay the commission in case of

a sale, even by himself, within the three months. This question involves two points which have an intimate bearing upon each other: First, the question of the refusal of the trial Judge to admit evidence from the defendant to shew that he never agreed to pay the commission except in case of a sale by the plaintiffs themselves; second, the question of the ground upon which the expression "1.00 per cent." was corrected so as to read "$1.00 per acre."

It may be that something occurred at the trial on the argument which we have not before us in the appeal book, but on the face of the record, it appears that the plaintiffs were allowed to correct a mistake in the agreement by oral evidence, while the defendant was not accorded a similar privilege. It might be argued that, because $30 an acre is mentioned as the price, and then a special clause is inserted to the effect that the defendant agreed to accept $29 an acre net, we must take the "1.00 per cent." to be a patent error on the face of the document. It may be that this circumstance would raise a strong suspicion of a mistake, but the document is not insensible as it stands, and, although it presents a rather improbable agreement, I do not think the Court would be justified in the face of objection by the defendant, in correcting the mistake without recourse to oral evidence. As I have pointed out, oral evidence was in fact given, quite obviously for the purpose of correcting the mistake. In my opinion, we do not therefore need absolutely, for the purpose of the appeal, to decide the question whether, supposing the plaintiff had given no oral evidence to correct the written agreement, the course taken by the learned trial Judge in excluding the evidence offered by the defence in regard to another mistake was, in strictness, correct. It is sufficient to say that, when once the evidence had been allowed to go beyond the written document in the plaintiff's favour, and the plaintiff asked that effect be given to such evidence, the whole agreement was put at large and the defendant should have been given a similar privilege. The statute requiring such agreements to be in writing was not pleaded, so that there was no difficulty on that score.

But I think we can go further and say that in any case the learned trial Judge applied too strict a rule in excluding the evidence which the defendant intended to adduce. The defendant pleaded specifically that he signed the document under a mistake as to its contents. In such a case, I think the rule is clear that the party is entitled to shew all the circumstances connected with the making and signing of the agreement, and then it becomes a question in each case considering all the circumstances whether he should be held to be bound by the document he has signed. One of the circumstances would be

ALTA.

S. C. 1913

EDMONTON SECURITIES LTD. v. LEPAGE.

Stuart, J.

the fact that he had not really made the agreement contained in the clause which he claims to have been inserted by mistake, assuming that fact to be established. Even if he should establish that fact, it would not necessarily follow that in every case he should be relieved from the consequence of his having signed the agreement. But this does not prevent him, where he pleads his mistake, from giving oral evidence of the circumstances, including in these the verbal negotiations which resulted in an agreement between the parties. A particular circumstance in this case is that the document was obviously drawn up by the plaintiffs which makes the case stronger even than *Ball* v. *Storie*, 1 Sim. & St. 210, 57 Eng. Rep. 84. See also Kerr on Fraud and Mistake, 4th ed., 496.

This case presents a fairly good example of the injustice that sometimes results from the too frequent practice upon non-jury trials of making objections to evidence at too early a stage. The question asked of his client by the defendant's counsel was in itself quite unobjectionable. No doubt, counsel may be justified in a jury trial in being very keen to prevent the admission of inadmissible evidence, but where the trial is by a Judge alone, the possibility of something inadmissible slipping in is not nearly so dangerous as the possibility of having the real contest as to admissibility never reached at all on account of the examining counsel being diverted from his purpose, and from asking quite proper questions by objections at too early a stage.

I think the appeal should be allowed with costs and the judgment below set aside and a new trial ordered. I think that, in the circumstances, the defendant should also have the costs of the first trial.

Harvey, C.J. Beck, J.

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

New trial ordered.

ALTA.

S. C. 1913

MAVES v. GRAND TRUNK PACIFIC R. CO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. October 11, 1913.

1. RAILWAYS (§ IV A 4—105)—INJURIES TO ANIMALS—CONTRIBUTORY NEGLIGENCE—ONUS.

Under the provisions of sub-secs. 4 and 5 of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, the onus of establishing that horses were at large through the negligence of their owner or custodian, is upon the railway company seeking to avoid liability for their getting upon the right-of-way and being run down by a train.

2. EVIDENCE (§ XII D—944)—NEGLIGENCE—CARE OF ANIMALS—HORSES GETTING UPON RAILWAY.

The onus of proof upon the defendant company, under sub-secs. 4 and 5 of sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, to establish

negligence against the plaintiff in an action for injury to animals on the track, is not displaced by a finding that the plaintiff was careless in looking after the injured animals, if the nature of such carelessness was not determined.

3. WITNESSES (§ II A—33)—EXAMINATION—LEADING QUESTIONS.

In examining one's own witness, leading questions must not be put to the witness on material points, but are proper on points that are merely introductory and form no part of the substance of the inquiry. (Dictum *per* Beck, J.)

4. WITNESSES (§ II A—33)—EXAMINATION—WHERE NON-LEADING QUESTION INSUFFICIENT TO ENABLE WITNESS TO RECALL THE CIRCUMSTANCE.

The rule against leading one's own witness will be relaxed where non-leading questions fail to bring the mind of the witness to the precise point on which his evidence is desired, and where it may fairly be supposed that this failure arises from a temporary inability of the witness to remember. (Dictum *per* Beck, J.)

Statement

APPEAL by defendants from judgment of Walsh, J., allowing the plaintiff's claim for damages for the killing of his horses by a train of the defendants, upon the defendants' right-of-way, not at a highway crossing.

The appeal was dismissed.

J. Cormack, for plaintiff, respondent.

O. M. Biggar, K.C., for defendant, appellant.

Harvey, C.J.
Scott, J.

HARVEY, C.J., and SCOTT, J., concurred in dismissing the appeal for the reasons given by STUART, J.

Stuart, J.

STUART, J.:—Under the provisions of sec. 294, sub-secs. 4 and 5 of the Railway Act, it was necessary for the defendants, in order to avoid liability, to establish that the animals got at large through the negligence or wilful act or omission of the plaintiff or his agent. The trial Judge found that the defendants had not satisfied the burden cast upon them by these provisions.

The appellants contended that the evidence was sufficient to justify a finding of negligence, and they asked the Court to make such a finding. For about a month prior to the accident the horses had been running in a field of the plaintiff's, 120 acres in extent, which was surrounded by a wire fence of two wires, the highest of which was something over three feet, but probably under four feet above the ground. The posts were about 16 feet apart.

There was a gateway leading to the highway at a point about three-quarters of a mile from the point where the highway crossed the railway. This gateway had an upright post at either side, and the gate consisted of an extension of the two wires, after their attachment to one post, across the gateway, first being attached to an upright stake or pole near this first post, and then to another stake near the further post. A third

ALTA.
S. C.
1913
MAVES
v.
GRAND TRUNK PACIFIC R. CO.
Stuart, J.

wire was stretched across these posts and stakes as part of the gate. At the other end, the gate was loose and was attached to the other post by means of an adjustable rope. The exact method of adjusting the rope was not made plain, but in the absence of clear evidence as to this, which it lay upon the defendants to adduce, I am unable to say that the gate was negligently fastened. It is well known that a very firm attachment can be made by inserting the lower end of the stake at the loose end of the gate into a loop of rope or wire at the ground fastened to the lower end of the gatepost and then by prying the top of the stake tight to the post by a sort of pry made by the attaching rope. It does not appear that this was not what was done here. I do not think it possible, on the evidence, to find that the gate was negligently fastened.

The chief ground upon which we were asked to find negligence on the part of the defendant was, that the evidence shewed that the horses had frequently got out of the field to the knowledge of the plaintiff, that he either knew, or ought to have known, that the fence was therefore inadequate to retain them, and that, therefore, it was negligence on his part to put the horses into a field with such an inadequate enclosure. The learned trial Judge found that they had got out of the field four different times, but I think there must have been some misapprehension. Atkinson swears to seeing them out of the field twice, once a week before the killing and once about ten days before. One reading of his evidence would give three times, but I rather incline to the view that he meant only twice altogether. Stott swore to seeing them at least three weeks before the killing. It is probable this was a time distinct from those mentioned by Atkinson. It is not clear that the occasion of Thinnell's sight of them shortly before the killing was different from one of the other three.

There is no evidence as to how they got at large on these occasions, except the plaintiff's statement that they were out on only one occasion, and that on that occasion he had left the gate open. He did not admit ever leaving the gate open on other occasions and on the night before the killing he swore that the gate was properly closed, which evidence the trial Judge believed.

In the absence of evidence to shew how the horses got out on the two other occasions which were clearly proven, I am unable to see how we can assume that they did not get out, for instance, by the unauthorized act of some third person. Even the finding of the trial Judge that the plaintiff was careless in looking after his horses leaves the question open as to what that carelessness consisted of. If it meant that a two-wired fence, constructed as this fence was shewn to be constructed, was in-

ALTA.

S. C. 1913

MAVES v. GRAND TRUNK PACIFIC R. CO.

Stuart, J.

sufficient, which I do not think the Judge did mean, then I should hesitate to follow him. If it meant that the gate was improperly constructed it is inconsistent with his express finding in another part of his judgment, with which I am disposed to agree. On the other hand, if it meant that he left the gate open too frequently, then we have the direct finding that in this case at least the gate was closed so that the carelessness was not in this case repeated. We are left with the bald proposition that, because the horses got out three times before, on one of which occasions the gate was left open by the plaintiff, and on the other two of which no light is thrown by the evidence as to cause at all, therefore we ought to infer inadequacy in the fence, known to the plaintiff, and therefore negligence in leaving the horses there.

I am unable to assent to this argument, and as it was really the only ground of appeal, I think the appeal should be dismissed with costs.

I may say that I agree in the main with what my brother Beck has said on the question of evidence.

Beck, J.

BECK, J.:—On the evidence as given, I think the judgment is fully justified and should stand. The grounds of appeal stated in the notice of appeal raise questions grounded only upon the evidence. Mr. Biggar, during the course of his argument, did raise another ground, namely, the refusal of the trial Judge to allow him to continue the examination of his own witness in a certain way, but I gather that, even if he were allowed to amend his notice of appeal so as to set up this ground and it were given effect to, he had little, if any, hope of securing a different verdict on a new trial; but rather wished some expression of opinion of the Court for the benefit of the profession with regard to the points of practice involved. As it seems to me quite worth while to do so, I venture to express my own opinion upon these points.

I find the general subject of leading questions dealt with in a most satisfactory way in Best on Evidence, 11th ed., 624 *et seq.* I quote, italicising what I wish to emphasize:—

> The chief rule of practice relative to the interrogation of witnesses is that which prohibits "*leading questions*," *i.e.*, questions which directly or indirectly suggest to the witness the answer he is to give. The rule is, that *on material points* a party must not lead his own witnesses, but may lead those of his adversary; in other words, that leading questions are allowed in cross-examination, but not in examination-in-chief. This seems based on two reasons: first, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent; secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or, at least, is expected to prove; and that, consequently, if he were

ALTA.

S. C.
1913

MAYES
v.
GRAND
TRUNK
PACIFIC
R. CO.

Beck, J.

allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole.

I think a third reason may be added, namely, that a witness, though intending to be entirely fair and honest may, owing, for example, to lack of education, of exactness of knowledge of the precise meaning of words or of appreciation at the moment of their precise meaning, or of alertness to see that what is implied in the question requires modification, honestly assent to a leading question which fails to express his real meaning, which he would probably have completely expressed if allowed to do so in his own words.

The author proceeds as follows (Best on Evidence, 11th ed., 625):—

On all matters, however, which are *merely introductory, and form no part of the substance of the enquiry*, it is both allowable *and proper* for a party to lead his own witnesses, as otherwise much time would be wasted to no purpose. It is sometimes said that the test of a leading question is, whether an answer to it by "Yes" or "No" would be conclusive upon the matter in issue; but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No" would be conclusive on any part of the issue, the question would be equally objectionable; as if, on a traverse of notice of dishonour of a bill of exchange, a witness were led either as to the fact of giving notice, or as to the time when it was given. So leading questions ought not to be put when it is sought to prove material and proximate circumstances. Thus, on an indictment for murder by stabbing, to ask a witness whether he saw the accused, covered with blood and with a knife in his hand, coming away from the corpse, would be in the highest degree improper, though all the facts embodied in this question are consistent with his innocence. In practice, leading questions are often allowed to pass without objection, sometimes by express, and sometimes by tacit, consent. This latter occurs where the questions relate to matters which, though strictly speaking, in issue, the examining counsel is aware are not meant to be contested by the other side; or where the opposing counsel does not think it worth his while to object.

On the other hand, however, very unfounded objections are constantly taken on this ground. A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned, *e.g.*, on a question whether A. and B. were partners, it has been held not a leading question to ask if A. has interfered in the business of B.; for even supposing he had, that falls far short of constituting him a partner. . . . It should never be forgotten that "leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract—for the identical form of question which would be leading of the grossest kind in one case or state of facts, might be not only unobjectionable, but the very fittest mode of interrogation in another.

So that the *general* rule is that in examining one's own witness, not that no leading questions must be asked, but that *on*

material points one must *not* lead his own witness but that on points that are *merely introductory and form no part of the substance* of the inquiry one *should* lead.

And the author remarks:—

Although not to lead one's own witness when that is allowable is by no means so bad a fault as leading improperly still *it is a fault;* for it wastes the time of the Court, has a tendency to confuse the witness, and betrays a want of expertness in the advocate: p. 627.

Upon the propriety of applying the second branch of the general rule, the remarks of Lord Ellenborough in *Nicholls* v. *Dowding*, 1 Starkie 81, are instructive: In order to prove that the defendants were partners a witness was asked whether the defendant Kemp had interfered in the business of Dowding. The question was objected to as a leading one. Lord Ellenborough said:—

I wish that objections to questions as leading might be a little better considered before they are made. It is necessary, to a certain extent, to lead the mind of the witness to the subject of enquiry. If questions are asked, to which the answer yes or no would be conclusive, they would certainly be objectionable, but in general, no objections are more frivolous than those which are made to questions as leading ones.

To the general rule, as just stated, against leading, there are several well recognized exceptions which the author puts as follows:—

There are some exceptions to the rule against leading. 1. For the purpose of identifying persons or things, the attention of the witness may be directly pointed to them. 2. Where one witness is called to contradict another as to expressions used by the latter, but which he denies having used, he may be asked directly, "Did the other witness use such and such expressions"? The authorities are not quite agreed as to the reason of this exception; and some strongly contend that *the memory of the second witness ought first to be exhausted* by his being asked what the other said on the occasion in question. 3. The rule which excludes leading questions being chiefly founded on the assumption that a witness must be taken to have a bias in favour of the party by whom he is called, whenever circumstances shew that this is not the case, and that he is either hostile to that party or unwilling to give evidence, the Judge may, in his discretion, allow the rule to be relaxed. And it would seem that, for the same reason, if the witness shews a strong bias in favour of the cross-examining party, the right of leading him ought to be restrained; but the authorities are not quite clear about this. 4. The rule will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from defective memory; or, 5. From the complicated nature of the matter as to which he is interrogated.

The controversy, which arose in the present case, arose, I think, from a want of a full appreciation of the fourth stated exception; which I should prefer to put thus: "That the rule against leading ought to be relaxed where non-leading questions

ALTA.

S. C.
1913

MAVES
v.
GRAND
TRUNK
PACIFIC
R. CO.

Beck, J.

fail to bring the mind of the witness to the precise point on which his evidence is desired, and it may fairly be supposed that this failure arises from a temporary inability to remember."

I give some instances: In an action for slander in saying of a tradesman that "he was in bankrupt circumstances, that his name had been seen in a list in the Bankruptcy Court, and would appear in the next Gazette," a witness—having deposed to a conversation with the defendant, in which he made use of the first two of these expressions—was asked, "Was anything said about the Gazette?" This was objected to as leading, but was allowed by Tindall, C.J., *Rivers* v. *Hague* (1837), cited Best, 11th ed., 626. A witness called to prove the partnership of the plaintiffs could not recollect the names of the component members of the firm, so as to repeat them without suggestion, but said he might possibly recognize them if suggested to him. Lord Ellenborough, alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names ruled, that there was no objection to asking the witness, whether certain specified persons were members of the firm: *Acerro* v. *Petroni*, 1 Starkie 100.

To contradict a witness who had sworn that a lost letter did not contain any reference to a certain matter, several witnesses were produced to whom the letter had been read when it was received. One of these having stated all that he recollected of it, was asked

if it contained anything about the plaintiff having been offered eight shillings for a pair of cotton stockings by a custom-house officer.

This being objected to, Lord Ellenborough ruled,

that *after exhausting the witness' memory* as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side; otherwise it would be impossible ever to come to a direct contradiction: *Courteen* v. *Touse*, 1 Camp. 43, 10 R.R. 627.

In Wigmore on Evidence, sec. 777, the rule as to the relaxation of the rule against leading questions is put thus:—

Where the witness is unable without extraneous aid to revive his memory on the desired point—*i.e.*, where he understands what he is desired to speak about, but cannot recollect what he knows—here *his recollection, being exhausted*, may be aided by a question suggesting the answer,

and sec. 778:—

Where there is as yet no exhaustion of memory, but the witness merely does not appreciate the tenor of the desired details and thus is unable to say anything about it, a question calling attention specifically to the details may be allowable, when other means have failed. It may not be necessary to name all the details; the mention of one or more of them may suffice, by association, to stimulate the recollection of the remainder. The

common situation of this sort, running, perhaps, throughout the person's entire testimony, is that of a child, or an illiterate or alien adult.

A case which not infrequently arises in practice is that of a witness who recounts a conversation and in doing so omits one or more statements which counsel examining him is instructed formed part of it. The common and proper practice is to ask the witness to repeat the conversation from the beginning. It is often found that in his repetition he gives the lacking statement—possibly omitting one given the first time. This method may be tried more than once, and as a matter of expediency—so as to have the advantage of getting the whole story on the witness' own unaided recollection—counsel might pass on to some other subject and later revert to the conversation, asking him to again state it. But when this method fails, the trial Judge undoubtedly ought to permit a question containing a reference to the subject-matter of the statement which it is supposed has been omitted by the witness. If this method fails, then and not till then—that is when his memory appears to be entirely exhausted, the trial Judge should allow a question to be put to him containing the supposedly omitted matter. It will be, of course, for the jury, or the Judge if there be no jury, to draw a conclusion as to the truthfulness of the witness; although the permitting of a question in a certain form is largely —though I think not wholly—in the discretion of the trial Judge. I should think that, with regard to the class of leading question I have been considering, they should, in every case, be permitted after all the steps which appear to shew the witness' memory to have been exhausted have been taken. If not permitted, great injustice may result. If permitted, the jury or Judge acting as a jury, may, of course, as I have said, disbelieve the answer elicited.

I think that, in the case under consideration, counsel should have been permitted first to call the witness' attention to the one of the topics—not of the supposedly inconsistent statement which he had been instructed the witness had made; for that statement was irrelevant to the issue and was not then admissible but—of the conversation, incident or other matter, which according to the statement had taken place; if this failed to stimulate the witness' memory, then to other topics of the conversation, incident or other matter if there were more than one. If this failed, then that counsel should have been permitted to read from his brief his instructions as to the conversation, incident or other matter. If the witness affirmed the account given of it the feebleness of his memory or his unreliability on any ground was a matter for observation to the trial Judge on the question of his credibility.

In the result I think counsel was not allowed to advance far

ALTA.

S. C.
1913

MAVES
v.
GRAND
TRUNK
PACIFIC
R. CO.

Beck, J.

enough to bring out the facts of the supposed conversation, incident or other matter so as to get the witness' mind distinctly directed to it, and to get either his refusal to admit or his denial of it and thus lay down the proposition with respect to which he hoped to be allowed to prove an inconsistent statement. And it therefore seems to me that this was not a case to which the provision of the Evidence Act as to inconsistent statements has any application.

Our Evidence Act (ch. 3 of 1910), sec. 23, is as follows:—

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or *if the witness, in the opinion of the Judge or other person presiding, proves adverse*, such party may, by leave of the Judge or other person presiding, prove that the witness made, at some other time, a statement inconsistent with his present testimony, but before such last-mentioned proof is given, the circumstances of the proposed statement, sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

The wording of this section is slightly different from the corresponding English, but merely improves the language of the latter so as to make it say what it was held it must be taken to mean: *Greenough* v. *Eccles* (1859), 5 C.B.N.S. 786; Stephen's Dig. Evidence, art. 131, note 47, and makes clear what a doubt was expressed about by Grove, J., in *Rice* v. *Howard* (1886), 16 Q.B.D. 681, namely that the opinion of the Judge that the witness is adverse applies only to the question of inconsistent statements. The section of our Act is clear that it is only upon the Judge being of the opinion that the witness—where the witness is under examination by the party producing him—is adverse, that is hostile (*Rice* v. *Howard, supra*), that he can be shewn to have made an inconsistent statement.

It is now suggested that the means—or at least a means—of satisfying the Judge that the witness is adverse (*i.e.*, hostile) is to state to him the alleged inconsistent statement with its circumstances and to ask him if he made it.

It seems to me, however, that it is quite clear that this is an incorrect interpretation of the statutory provision. As I have said, what counsel ought to have been allowed to bring out, for the purpose of getting leave to apply the statutory provision, was the distinct thing which he had been instructed the witness had made an inconsistent statement about.

It is quite true that the words, "if the witness in the opinion of the Judge or other person presiding, proves adverse" are, so far as the words of the section go, a condition precedent to the proof of the inconsistent statements only and not to the asking of the question of the witness whether he made the

statement which is alleged to have been made by him and to be inconsistent with his previous evidence, and which it is afterwards, by other evidence, proposed to be proved he did make. But the fact that the witness did himself make any statement is not a fact relevant to the issue, and is, on that ground, not admissible in evidence, and can be proved only by virtue of the provisions of the section.

The confusion at the trial arose, as I have indicated, from a failure fully to appreciate the difference between the question of the extent to which the learned trial Judge should have permitted counsel examining his own witness in chief to go, by way of leading questions with regard to his own knowledge of matters relevant to the issue, and the question of attacking the witness' credibility by evidence of extraneous and otherwise irrelevant matter, namely, his own inconsistent statement, proof of the latter being permissible only by virtue of and under the conditions imposed by the statute.

Appeal dismissed.

LAROSE, BELL & PARR v. WEBSTER.

(Decision No. 2.)

Alberta Supreme Court, Harvey, C.J., Stuart, Beck, and Walsh, JJ. October 11, 1913.

1. CONTRACTS (§ II D 4—185)—CONSTRUCTION CONTRACT—MEDICAL AND HOSPITAL EXPENSE—RIGHT OF SUB-CONTRACTOR TO REIMBURSEMENT.

An agreement by a contractor to supply medical and surgical attendance for the employees of a subcontractor cannot be inferred from a letter written by the contractor to the latter stating that a certain physician had been appointed to attend to the medical work in connection with the construction of a line of railway, and requesting the subcontractor to collect a stated sum monthly from each of his employees, and to remit it to the contractor, who would deliver it to the medical department. (*Per* Stuart and Walsh, JJ.)

[*Larose, Bell & Parr* v. *Webster*, 11 D.L.R. 319, affirmed.]

2. CONTRACTS (§ II D 4—185)—CONSTRUCTION CONTRACT—MEDICAL AND HOSPITAL EXPENSES—RIGHT OF SUBCONTRACTOR TO REIMBURSEMENT —CONTINUING LIABILITY FOR.

Even though a contractor may be liable for medical and surgical services supplied the employees of a subcontractor by virtue of a letter written the latter to the effect that a certain physician had been appointed to attend to the medical work in a certain district in connection with the construction of a line of railway, and requesting the subcontractor to collect a stated sum monthly from each employee and to remit it to the contractor to be turned over to the medical department, where such physician afterwards notifies the contractor and subcontractor that after a certain day he will not continue to serve at the old rate, and the subcontractor subsequently pays for such services at a sum in excess of the contract price, the contractor, who was not informed by the former that he was paying such extra charge, is not bound to reimburse the subcontractor therefor. (*Per* Stuart and Walsh, JJ.)

[*Larose, Bell & Parr* v. *Webster*, 11 D.L.R. 319, affirmed.]

ALTA.

S. C.
1913

LAROSE, BELL & PARR v. WEBSTER.

Statement

3. HEALTH (§ III A—10)—REGULATIONS TO PROTECT HEALTH—EMPLOYMENT OF MEDICAL ATTENDANCE FOR EMPLOYEES ON PUBLIC WORKS—WHO LIABLE FOR—CONTRACTOR OR SUBCONTRACTOR.

The duty imposed by the Public Works Health Act, R.S.C. 1906, ch. 135, and the regulations adopted thereunder by order-in-council, to provide medical and surgical attendance for men employed in the construction of any public work, rests on the company or person owning the work and not on a contractor or subcontractor employed in its construction.

APPEAL by the plaintiff from the judgment of Simmons, J., *Larose, Bell & Parr* v. *Webster*, 11 D.L.R. 319, dismissing an action to recover expenses incurred by the plaintiff as subcontractor, in connection with medical and hospital services furnished to men working for them in the construction of a railway line.

The appeal was dismissed on an equal division of the Court.

C. C. McCaul, K.C., for plaintiffs.

L. W. Brown, for defendant.

Harvey, C.J.

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

Stuart, J.

STUART, J.:—I have read the judgment of Mr. Justice Walsh and I concur in what he says. I think the plaintiffs were under no obligation either by statute or otherwise to supply the medical attendance in question. Certainly the regulations under the statute imposed no liability upon them. Neither do I think the fact that they withheld 75 cents per month per man from the men's wages created in the plaintiffs any liability to the men. The regulations impose the liability upon the company and the company or contractor is authorized to withhold 50 cents per man per month from the men's wages. This according to the evidence had by a general understanding among all concerned in railway building been increased to 75 cents. But it seems clear to me that the men must have known perfectly well that the money so retained from their wages was intended to go eventually to the persons liable under the statute to supply the services. The statute and regulations give to the men the right to demand the services from the person bound to supply them and I cannot see that, because the subcontractors are made the machine for collecting the fee, therefore the men had a right to look to them for the services as well as to the person bound under the law to supply them.

Even supposing that Webster had been obliged by the statute to supply the services I am unable to see how, in the absence of a contract between him and the plaintiffs creating an obligation towards them, and in the absence of any legal liability on the plaintiffs to supply them, the plaintiffs could claim the right to perform voluntarily an obligation resting upon Webster alone and then seek to be reimbursed by Webster. On a refer-

ALTA.

S. C.
1913

LAROSE, BELL & PARR v. WEBSTER.

Stuart, J.

ence to the original exhibits it appears that Webster paid the $391.50 into Court on August 4, 1911, after Dr. Milne had sued the plaintiffs and himself jointly. It was not until the following January that he retained this sum from the plaintiffs. He may have been wrong in paying it into Court and the plaintiffs might perhaps have insisted, in the settlement, on his paying it directly to them, that is, on his not withholding the sum from the amount due them, but I cannot see how his action in that respect, whether right or wrong, can affect the question of his liability to reimburse the plaintiffs for the payments sued for.

I have added these remarks as further reasons for concurring with Mr. Justice Walsh in dismissing the appeal in addition to what is said in his judgment.

Beck, J.

BECK, J.:—The plaintiffs' claim is for moneys paid for medical attendances and services procured by them as railway contractors, *i.e.*, as subcontractors under the defendant, on the ground that by agreement between them and the defendant the defendant should furnish medical attendance and services for all the men, on condition that the plaintiffs deducted 75 cents per man per month from the men's wages and paid it to the defendant and that the plaintiffs did, but the defendant did not perform his part of the agreement. The learned trial Judge held that the agreement alleged was not proved.

R.S.C. 1906, ch. 135, an Act for the preservation of health on public works (the Public Works Health Act), authorizes the Governor-in-council to make regulations to accomplish the objects of the Act.

Regulations were passed for this purpose by order-in-council of March 3, 1906 (bound with the statutes of that year). These regulations define the expression "the company" as follows:—

> 3. The expression "the company" means and includes any company, persons or person contemplating the construction or engaged in the construction of any work within the meaning of the said Act, whether such work is to be constructed or is being constructed by them or him directly as proprietors or proprietor or for them or him by contractors or otherwise.

So that the word company means the proprietor of the work and does not mean any one in the chain of contractors or subcontractors. The regulations among many other things provide that there shall be one or more medical men engaged by the company to attend to the men employed on the work; that where there is no hospital or no hospital with suitable or sufficient accommodation within reasonable distance of the work the company shall establish or lease temporary hospitals, etc. Clause 11 of the regulations is as follows:—

ALTA.

S. C.
1913

LAROSE, BELL & PARR v. WEBSTER.

Beck, J.

11. The company or contractor may charge 50 cents per man per month and deduct the same from the employee's wages, to recoup it to him for the cost of medical attendance, hospitals, medicine and the expenses incident thereto directed by said regulations and such employee shall be entitled to the medical service and attendance herein directed without further charge.

(*a*) The company shall be liable for the payment of any medical officer employed under the regulations to attend any employee or employees on such works for the removing, housing, nursing and maintenance of such employee or employees and for medical, surgical and other supplies required for him or them and the government will not on any condition be responsible for the payment of the same.

Although these regulations impose an obligation only upon the proprietor of the work, yet undoubtedly in consequence of this and similar legislation a custom has grown up under which, in the case of the building of lines of railway and other similar works of large proportions, each contractor and subcontractor undertakes a responsibility the same as or similar to that by these regulations imposed on the proprietor.

Now for the purposes of this case it seems to me unimportant to determine whether the custom referred to was such a custom as to be implied as a term of the contract between the plaintiffs and the defendant or was merely a custom to make such a term one of the terms of the contract. But both the statutory regulations and the existence of the custom were some of the very material facts and circumstances surrounding the making of the contract. The defendant as a contractor had undertaken the construction of the part of the grade of the Tofield-Calgary branch of the Grand Trunk Pacific Railway between Huxley and Trochu in the province of Alberta, and the plaintiffs by arrangement with the defendant undertook to construct, as subcontractors, that portion of the work commencing at a point about three miles north of Trochu and extending thence northerly a distance of twelve miles to locality called Quill Lakes.

This was in the spring of 1910; work on the subcontract was begun in April, 1910, and continued during the "season" of 1910 and a large part of the season of 1911—the season being from the time in the spring when work of this nature could be profitably begun "until the freeze up."

The arrangement between the plaintiffs and the defendant was never reduced to writing. In making it Parr acted for the plaintiffs. Parr appears to be an illiterate man. A portion of his evidence is as follows:—

Mr. McCaul:—Did you have any verbal arrangement with him? Do you understand what I mean by verbal? A. No, sir, I don't think there was nothing filled up about hospital fees at all, until he wrote to us that he——

THE COURT:—Never mind what he wrote you.

Mr. McCaul:—He wrote you a letter on that subject, did he? A. Yes, sir.

Q. Have you got that letter?

The letter referred to is as follows:—

Jno. Parr, Esq., Alix, Alta., May 14, 1910.
Trochu, Alta.

Dear Sir,—Dr. J. D. Milne has been appointed to look after the medical work in the Trochu district, and is supposed to visit the camps and can be called on at any time. He has a hospital at Trochu for use of any patients requiring treatment in a hospital. Please collect seventy-five cents per month from each man. The full amount of medical fees are chargeable to a man who works three days or more in any month. Kindly report the amount collected each month to me and I will remit to the medical department.

Yours truly,
(Sgd.) GEO. H. WEBSTER.

The arrangement between the defendant and Dr. Milne had been preceded by the following letter from the latter to the former:—

Mr. Geo. Webster, Trochu, April 26, 1910.
Alix, Alberta.

Dear Sir,—I have been informed by Mr. D. F. MacArthur that you have the contract for the building of Grand Trunk Pacific branch line from Camrose to Calgary. I am practising medicine at Trochu, 40 miles south of Alix, and on the above named line. I have here a hospital which will accommodate eight patients, with trained nurses in attendance. We have the best of water, having six flowing (artesian) wells, with these to help me. I think I am in a good position to look after the men you have working on the grade—and if you haven't already made arrangements with a doctor, I would like you to consider my application.

Kindly let me hear from you at your earliest convenience.

I am, yours truly,
JOHN D. MILNE.

The plaintiffs' "contracting outfit" was worth about $30,000. He had from 50 to 70 men employed on the work. There was only one camp on the work. Dr. Milne lived at Trochu and the nearest hospital to the work was at Trochu and was conducted by the Sisters of Charity. Dr. Milne began his attendance on the plaintiffs' workmen as soon as he was appointed—apparently the 14th May; but the plaintiffs deducted the 75 cents per man per month from their workmen from the month of April as well as for each subsequent month. On June 23, 1910, Dr. Milne wrote to the defendant the following letter, sending at the same time a copy to the plaintiffs:—

Trochu, Alta., June 23, 1910.

Mr. Geo. Webster,
Alix, Alberta.

Dear Sir,—Enclosed please find statement for May, which I would be glad if you would look after at once.

ALTA.

S. C. 1913

LAROSE, BELL & PARR v. WEBSTER.

Beck, J.

Would also like to know if you wish me to look after two small camps south of Trochu, one Moore's and the other Swanson's, each consisting of about five men.

After June 30, 1910, I cannot look after your camps for 75 cents per man per month. It isn't enough unless one has 500 or more men to attend. You see I have just as much driving to do as if I were attending five times as many men, and I find that I am really losing both time and money by doing it at that rate—and if you wish me to continue after end of June, you will have to make other arrangements with me. I would like to be paid something definite over and above my hospital and drug expenses.

Kindly let me hear from you at once and oblige.

Yours respectfully,

Dr. J. D. MILNE.

Notwithstanding this letter both the plaintiffs and the defendant went on as before without having any communication on the subject with each other. The plaintiffs continued to make the deductions from their men's wages and the men when needing it were given medical attendance by Dr. Milne and hospital service by the Sisters of Charity. The result however was that in July, 1911, both Dr. Milne and the sisters in separate actions sued both the plaintiffs and the defendant alternatively for their accounts for attendance and services to some of the plaintiffs' men during the season of 1910 and the earlier part of 1911.

Inasmuch as I am differing in my opinion from some of my learned brothers, I think it necessary to set forth clearly and completely all the details of the case which in my view call for consideration. [The learned Judge here set out the pleadings in an action brought by Milne against the present defendant as well as the present plaintiff.]

The two actions of Milne and the Sisters against Larose, Bell & Parr and Webster related to claims which arose after Dr. Milne had withdrawn from his arrangement with Webster and the learned Judge who tried those cases decided no doubt quite rightly that so far as the plaintiffs were concerned Larose, Bell & Parr alone were liable directly to them. Webster had not been notified regularly from time to time by Larose, Bell & Parr of the monthly deductions made by them from their workmen for the purpose of the amounts being taken into account between Larose, Bell & Parr and Webster. He seems to have been notified at the end of June, 1910, and in December after the end of the season of 1910 and certainly in April, 1911. These sums amounted for the season of 1910 to $391.50 and this amount as has been seen he paid into Court in the Milne action. This amount was consequently deducted from the amount for which Larose, Bell & Parr were found to be liable and judgment was given against them for the balance and costs.

In a statement of account rendered by Webster to Larose, Bell & Parr on January 9, 1912 (stated by mistake as 1911) this item appears as a charge: "1911, May—To 1910 medical dues $391.50," as also the following item: "1911, Nov. —To medical fees per statement $262.75." So that the entire sums collected for medical attendance and service by the plaintiffs from their workmen for the season of 1910 and the season of 1911 at the rate of 75c. per man per month was actually paid by the plaintiffs to the defendant. The $391.50 apparently was not entered as a debit item by the defendant until about the time that it was paid into Court in the *Milne* case.

Parr in his evidence explains that at the end of June, 1910, Webster refused to accept the amount for the months of April, May and June, making $153.75 or rather to debit the plaintiffs with that amount and gives Webster's reason to be this: Webster said that he had engaged Dr. Milne for the season to look after the men for 75 cents per man per month and that Dr. Milne "couldn't quit—he could work for two months for him or three months and then quit and put in his bill so much from the office."

As to the season of 1911, during which the plaintiffs collected $262.75 this amount as has been stated was paid to Webster. [The learned Judge here referred to the evidence of Parr and of Webster.]

In this statement the salient facts for consideration are:—

(1) The supposition on the part of both the plaintiffs and the defendant that the Public Works Health Act applied; (2) the custom; (3) the facts that the plaintiffs collected the amounts from their workmen; paid them to Webster; Webster accepted them for the entirety of both seasons; Webster employed Dr. Milne; Webster took the position that Milne could not break his contract—which was a contract with him—to supply the plaintiffs' men with all necessary medical attendance and services with the consequence in Webster's mind that the plaintiffs were entitled to have all necessary medical attendance and services for their men without further liability; that Parr swears and Webster does not deny that the sums collected and paid over to Webster and accepted by him for the season of 1911 were more than sufficient to pay the medical man for that season, with the reasonable conclusion that the same principle was intended to apply to the season of 1910 where the amount was insufficient. Webster's statement that the medical business is always handled at a loss—to whom? obviously to the man—Webster—who collected the fund for the purpose of paying the medical man, but who is also called upon to meet other expenses such as railway fares and board.

ALTA.

S. C.
1913

LAROSE, BELL & PARR v. WEBSTER.

Beck, J.

The facts and the evidence as I have set it out satisfy me that the plaintiffs and the defendant, having in their minds what was customary in such cases and both supposing that the Public Works Health Act or the regulations under it applied not only to the proprietor of the work but to every contractor or sub-contractor as well and both recognizing, as a thing universally admitted, that 50 cents per month was inadequate and the 75 cents had been substituted by custom, so dealt with each other that it became a term of the agreement between them for the grading to be done by the plaintiffs—a term to be "implied" (Jud. Act, rule 124) from conversations, custom and letters —that in consideration of the plaintiff retaining and paying over to the defendant 75 cents per man per month the defendant would furnish medical attendance and services for the men whether the cost was more or less than the total of the sums thus paid over.

If a majority of the Court is not of the same opinion then I think there should be a new trial because it seems clear that the learned trial Judge either excluded evidence of any agreement beyond the letter from the defendant to Dr. Milne or by the expression of his view of the effect of that letter led the plaintiffs' counsel to suppose that he intended to exclude such evidence and counsel having acted on this supposition the trial was unsatisfactory.

If there is no necessity for a new trial I would allow the appeal with costs and direct judgment for the plaintiffs for the amount claimed with costs.

Walsh, J.

WALSH, J.:—I favour the dismissal of this appeal. The plaintiffs claim as disclosed by their pleadings is that it was a part of the arrangement between them and the defendant that he would supply medical and surgical attendance and hospital accommodation and nursing and other services of a like character for their employees for seventy-five cents per month for each man employed by them. The evidence entirely fails to satisfy me that any such arrangement was ever made. On the contrary, I think it reasonably clear that it never was made. The plaintiff Parr, who was the plaintiffs' only witness, says that no arrangement was made beyond that contained in or evidenced by the letter from the defendant to the plaintiffs of May 14, 1910, and therefore upon the plaintiffs' own shewing, unless we can spell out from that letter the arrangement upon which they rely, they have failed to establish it. That letter in my judgment falls very far short of proving the plaintiffs' contention. It shews the appointment of Dr. Milne to look after the medical work in the Trochu district and the terms of

his employment and instructs the plaintiffs to collect seventy-five cents per month from each man and report monthly to the defendant who would remit to the medical department. It is quite clear from this that the defendant interested himself in the matter but I do not think that we are entitled to surmise that he did so because he was under some legal obligation to do it as the result of an arrangement between him and the plaintiffs, especially when the plaintiff Parr's own evidence shews that no such arrangement was made. He apparently rests his view of the defendant's liability more upon a custom which he says prevails both in Canada and the United States that the head contractor furnishes medical attendance to the men employed in railway construction than upon any express contract to that effect with the defendant. The defendant was not the head contractor, but merely a subcontractor, so that even if any liability could rest on any one because of this custom (and that was not, as I remember it, contended for in argument) it could not attach to the defendant. The defendant denies that he bound himself in any way to the plaintiffs in this matter. He explains the fact that it was he who made the arrangement with Dr. Milne by saying that "Parr could have done it himself but I happened to be there and did it, that is all." The trial Judge has found that

> there was at no time either prior to June 30, 1910, or subsequent thereto any undertaking by Webster to do more than pay over to whomsover might be in charge of the medical department the sum of seventy-five cents per man, per month as, and when collected by the plaintiffs.

This is a finding of fact which should not lightly be disturbed.

Then there is another phase of the matter. The plaintiffs say that Dr. Milne refused to go on under his original agreement after June, 1910, and that all of the money for which they sue is money which they had to pay to him and others in excess of his contract price and in excess of the sums which they retained from the wages of the employees. I think it clear from the evidence that no communication was ever made to the defendant that they were paying these extra charges. They seem to have gone on and incurred these additional expenses entirely upon their own initiative. They were under no legal liability to their men to supply them with medical treatment and they, therefore, could not have been compelled to do so. They seem to have voluntarily assumed this liability. If there was any arrangement with the defendant such as they allege, he certainly was entitled to know from them what was being done so that he might have been given a chance to discharge his liability in a less expensive form. I do not see how they having voluntarily assumed a liability which was not theirs

ALTA.

S. C.
1913

LAROSE, BELL & PARR v. WEBSTER.

Walsh, J.

could under any circumstances compel the defendant to reimburse them.

I do not attach any importance to the admissions contained in the present defendant's statement of defence in the action brought by Dr. Milne against him and the present plaintiffs to recover part of the sums now in controversy. The principal admission in this statement is that he was responsible for the medical attendance upon these men by virtue of the Public Works Health Act, R.S.C. 1906, ch. 135, and the Public Health Ordinance. That is an admission of a supposed legal liability under force of these statutes and nothing more, and in my judgment it was erroneously made for I have been unable to find anything which imposes any such liability on him. His solicitor seems to have thought that he was so liable and in framing his defence has said so but unless his liability is otherwise established I do not think such an admission as this should impose it on him.

Appeal dismissed on an equal division.

ALTA.

S. C.
1913

SANDERS v. EDMONTON, DUNVEGAN and B.C. R. CO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Simmons, JJ. October 11, 1913.

1. EMINENT DOMAIN (§ II A—80*a*)—PROCEDURE—WARRANT OF POSSESSION—VALIDITY—NON-COMPLIANCE WITH STATUTORY REQUIREMENTS.

A warrant of possession, issued under sec. 217 of the Railway Act, R.S.C. 1906, ch. 37, will be valid until set aside, although all of the statutory requirements were not strictly complied with, as section 220 of the Act provides that the proceedings are to be continued in the court which issued the warrant.

[*Marson* v. *Grand Trunk Pacific R. Co.*, 2 A.L.R. 43; and *Canadian Pacific R. Co.* v. *Little Seminary of Ste. Thérèse*, 16 Can. S.C.R. 606, considered.]

2. TRESPASS (§ I C—17)—DEFENCES—WARRANT OF POSSESSION.

In an action against a railway company for a trespass, a warrant of possession for the *locus in quo*, issued under sec. 217 of the Railway Act, R.S.C. 1906, ch. 37, will be a good defence, although some of the statutory requirements pertaining to the issue of the warrant were not complied with, as the regularity of the warrant can be inquired into only in the proceeding in which it was issued.

3. EMINENT DOMAIN (§ II A—80*a*)—PROCEDURE—WARRANT OF POSSESSION—NOTICE OF APPLICATION FOR—SERVICE OF ON REGISTERED OWNER AFTER SALE.

The service on the registered owner of land of notice of an application, under sec. 217 of the Railway Act, R.S.C. 1906, ch. 37, for the issuance of a warrant of possession, is a sufficient compliance with sec. 220, requiring that such notice shall be served on "the owner . . . or the persons empowered to convey the lands, or interested" therein, notwithstanding that before the warrant was granted, the registered owner sold the land to and it was then in the possession of a third person, whose transfer had not been registered, and whose interest was not disclosed by caveat or otherwise. (*Per* Harvey, C.J., and Scott, J., affirming the decision appealed from on an equal division of the court.)

ALTA.

S. C.
1913

SANDERS
v.
EDMONTON,
DUNVEGAN
and B.C. R.
Co.

Statement

APPEAL by plaintiff from the dismissal of his action. The plaintiff by his statement of claim alleged that he was the owner in possession of certain lands and that at that time the defendant railway company "wrongfully and unlawfully entered upon the said lands" and did certain damage; and claims (1) damages for the wrongful acts complained of; (2) an injunction; (3) in the alternative, if the railway is authorized to be constructed through the lands, damages for the land taken and to the remaining land.

The defendants deny the plaintiff's allegations, and set up that they went upon the land in pursuance of a warrant of possession duly obtained from a Judge of the Supreme Court.

The appeal was dismissed.

E. B. Edwards, K.C., for plaintiff.

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

Harvey, C.J.

HARVEY, C.J.:—Even if it is open to the plaintiff under the pleadings to contest the validity of the warrant of possession, which is doubtful, I am of opinion that he has failed in his attack upon it. He contends that the Judge, in making it is acting as a *persona designata*, and that any failure to comply with the express provisions of the Act would result in rendering his act a mere nullity.

In *Marson* v. *Grand Trunk Pacific R. Co.*, 2 A.L.R. 43, this Court expressed some doubt of the applicability of *C.P.R. Co.* v. *Little Seminary of Ste. Thérèse* (1889), 16 Can. S.C.R. 606, in which it was held that a Judge was acting as *persona designata*, in view of the change of the law since that case was decided. As the law then stood there was no provision similar to sec. 220 of the present Railway Act, which provides that

> Any proceeding under the foregoing provisions of this Act relating to . . . the delivery of possession of lands taken . . . shall, if commenced in a Superior Court having jurisdiction, be continued in such Superior Court, or if the proceeding is commenced in a County Court having jurisdiction, it shall be continued in such County Court.

The section under which the warrant of possession was given is number 217. It appears to me clear that, by virtue of sec. 220, the proceedings under which the warrant of possession was obtained are proceedings in Court, and the Judge in granting the warrant is acting as a Judge of the Court. Under these circumstances, orders made by him will be effective according to the usual practice of the Court, and are subject to appeal. It follows that the warrant of possession having been granted by a Judge who had general jurisdiction, cannot be treated as a nullity, but must be considered effective for the purpose intended, unless and until set aside in the regular way, and even though there had been a failure to comply with some of the statutory provisions it would still not be void but only irregular.

ALTA.

S. C.
1913

SANDERS
v.
EDMONTON, DUNVEGAN and B.C. R. CO.

Harvey, C.J.

The defendants having entered in pursuance of a warrant of possession, the plaintiff fails to establish that they entered "wrongfully and unlawfully" as alleged. In view of this conclusion, it is, perhaps, not strictly necessary to deal with the alleged irregularities of the warrant of possession, but, inasmuch as the judgment below deals with that question alone, and the matter was fully argued before us, in view of its importance, it would appear advisable to consider at least the contention that the proper notices were not given. A portion of the land had been purchased by the plaintiff from the registered owner and had been paid for in full and a transfer had been made to him at the time the warrant of possession was granted, but such transfer was not registered until after, and the title was then in the name of the plaintiff's vendor, without any notice by caveat or otherwise of the interest of the plaintiff and the warrant recites that notice had been given, and upon hearing counsel for Paul Auve (the vendor), "the only person appearing from the abstract to have any interest in the said lands."

Plaintiff's counsel contends that it is not necessary that the plaintiff should have a registered interest, but that the fact of his having a beneficial interest in the lands entitles him to a notice of the application for a warrant, and also a notice under sec. 193, which is spoken of as a notice to treat, neither of which notices was received by the plaintiff. If this contention is sound, one can see that it would impose a heavy burden on the company, and in some cases might render it impossible for them to obtain possession by reason of their inability to ascertain who all of the persons so interested were.

The warrant in this case was granted under sec. 217, before the compensation had been paid, and sec. 218 provides that such warrant shall not be granted unless (1) 10 days' previous notice of the application "has been served upon the owner of the lands, or the person empowered to convey the lands or interested in the lands," and (2) a sum of money has been paid into Court which shall be "not less than 50 per centum above the amount mentioned in the notice served upon the party, stating the compensation offered." It is admitted that this last-mentioned notice is the notice under sec. 193, and a reference to the Act in the Revised Statutes of 1886 shews that this is correct.

The notice of the application is to be served on "the owner, or the person empowered to convey the lands or interested in the lands." It is unnecessary to consider whether this expression means "the owner or in other words the person empowered to convey, etc.," or means "the owner, or some other person empowered to convey, etc.," because if it means the latter, it would be sufficient if either were served, and therefore, service on the owner would be sufficient.

By a reference to the interpretation clauses of the Act we find sec. 2 (18), "owner" defined as "any person who, under the provisions of this Act . . . is enabled to sell and convey the lands to the company," but this definition is limited to two special cases, viz.:—

1. When, under the provisions of the Act, any notice is required to be given to the owner of any lands,

and

2. When any Act is authorized or required to be done with the consent of the owner.

Section 218 is one of the cases to which the definition is applicable, and by turning to sec. 183 we find who is the person enabled to sell and convey. That section provides that all tenants in tail or for life, guardians, curators, executors, administrators, trustees and all persons whomsoever seised, possessed of, or interested in any lands, may contract and sell and convey to the company all or any part thereof, as well for and on behalf of themselves, their heirs and successors, as on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, femes-covert or other persons.

Section 186 provides that any conveyance by a person authorized by sec. 183 shall vest in the company the fee simple in the lands described, freed and discharged from all trusts, restrictions and limitations whatsoever.

In *Young* v. *Midland R. Co.*, 19 A.R. (Ont.) 265 (affirmed on appeal, 22 Can. S.C.R. 190), it was not doubted that a tenant for life could convey a good title in fee simple but the question was whether he was entitled to receive the whole compensation. In that case, Osler, J.A., says, at p. 272:—

The policy of the Act undoubtedly was to enable the company to acquire the whole interest by dealing with the person or persons in possession, and having some immediate freehold estate in the land,

and at p. 274:—

The power conferred upon the life tenant is an extreme instance of interference with the rights of property. Manifestly it is given in the interests of the company to enable them to acquire speedy possession of the land and to prevent the delay in carrying out the undertaking which a search for those entitled in remainder might often involve.

By virtue of the definition and sec. 183, it appears that, for the purposes of sec. 218, the owner is any person seised of the land. Under our law the only person who could be seized of the land would be the registered owner and consequently by serving the registered owner, the company complied with the requirements for service of the notice of application.

The provisions for service of the notice under sec. 193 are somewhat confused and incomplete, but it appears to me that

ALTA.

S. C.
1913

SANDERS
v.
EDMONTON, DUNVEGAN and B.C R. CO.

Harvey, C.J.

the same conclusion is to be reached with reference to it. Having in view what Mr. Justice Osler declares to be the manifest purpose of the Act, and the fact that notice of the application for the warrant need only be given to the registered owner, it would seem not reasonable to conclude that it was intended to impose on the company in giving the other notice, which must be given as a foundation for the application, the burden of making a long and perhaps unsuccessful search to ascertain who had interests not disclosed by the records of a land titles or registry office. Section 193 is in the following terms:—

193. The notice served upon the party shall contain (*a*) a description of the lands. . . . (*b*) a declaration of readiness to pay a certain sum. . . .

A search through the Act fails to reveal any express provision for this notice or as to "the party," but as already indicated, sec. 218 impliedly requires a notice which complies with this section, and it is necessary to determine who is meant by the expression "the party." If it means the "owner" as defined, one naturally wonders why the word "owner" is not used since this is one of the cases to which the definition would apply. Notwithstanding that it would seem to be simpler to use the word "owner" if it meant "owner," I am still of opinion that it does mean "owner," and there is perhaps some reason for the use of the word "party." Section 191 provides that, after certain things have been done

Application may be made to the owners of lands or to persons empowered to convey lands or interested in lands . . . and thereupon such agreements and contracts as seem expedient to both parties may be made with such persons touching the said lands. . . .

2. In case of disagreement between the parties or any of them, all questions which arise between them shall be settled as hereinafter provided.

Then follows sec. 192 which provides that the filing of the plan shall be a general notice to all parties and shall fix the time for determining the compensation, and sec. 193, above quoted, and other sections providing for arbitrators, etc., in which proceedings the company is the party of the one part and the person specified in sec. 191 the party of the other part, and the word "party" is constantly used through the sections and appears to represent, when not applying to the company, the person specified in sec. 191. As will be seen, the word "parties" is used twice in sec. 191, and in both cases clearly refers to the company, and the person or persons with whom it is empowered to contract, the first applying to the case of an agreement, and the second to the case of a disagreement in case of which the provisions following are to apply.

In the section under consideration which is the next but one

following, the term "party" is used. Since the notice is to be given by the company, the party to receive it cannot be the company, and, apparently, therefore, must be the other person who might, but would not enter into a contract, or in other words, the person or persons comprised in the expression "owners of lands or persons empowered to convey lands or interested in lands," used in sec. 191. This section appears to provide an instance of the other case in which the word "owner" has the definition given by the Act for it authorizes something to be done, to wit, the making of an agreement with the concurrence or consent of both parties, and, therefore, necessarily with the consent of the owner.

This view is also supported by a consideration of the first part of the provision of sec. 191, which makes it clear that the intention is to give the company power to make effective agreements for the land without searching out and dealing with every person interested in the land. A railway company or any other person could, without the aid of any statutory provision, make an effective agreement for the land, if he dealt with all the persons interested, but, under this section, the company is empowered to make effective agreements only after it has deposited the plan, etc., which, under sec. 192 is constructive notice to all parties, and has advertised in a newspaper or newspapers, which would probably be an actual notice to all persons interested. These conditions must have been imposed on the company for the purpose of enabling it to do something it could not otherwise do. The word "owner," therefore, must have some restricted meaning as I have indicated.

The term "party," as used in sec. 193, being synonymous with the expression of sec. 191, "owners of land or persons empowered to convey lands or interested in lands," which is the same expression as that of sec. 218, what I have said about notice under that section will apply to notice under this section, and whether notice to any other person would satisfy the statute or not, notice to the owner, *i.e.*, for this section, the registered owner, is all that the section expressly requires.

There is only one other point for consideration, viz., the claim for compensation. In view of the fact that no question as to this is raised by the notice of appeal, perhaps this should properly be ignored, but, inasmuch as the proceedings for arbitration were instituted, and the appellant directed to have notice and would, no doubt, have proceeded but for the action, it appears to me that the arbitrator is the proper person rather than the Court to deal with that matter, even if the Court could deal with it in the event of arbitration proceedings not being taken.

For the reasons stated, I think the appeal should be dismissed with costs.

ALTA.

S. C. 1913

SANDERS v. EDMONTON, DUNVEGAN and B.C. R. CO.

Stuart, J.

SCOTT, J., concurred with the Chief Justice.

STUART, J.:—I agree with the view expressed by the learned Chief Justice, and for the reasons he gives, that the warrant of possession was good until set aside and that it furnished a good defence to an action for trespass. It may be true that the plaintiff when he launched his action did not know of its existence, but whatever effect might have been given to that circumstance with regard to costs if he had, on receiving the defence, applied for leave to discontinue and had turned to an application to set the warrant aside, I do not think we should now let it interfere with the result as to costs when the plaintiff after knowing of the warrant persisted in going on with the action and has persisted even to the extent of an appeal.

On the other hand I hesitate to adopt the view that, under sec. 218 of the Railway Act it is sufficient to serve the registered owner only. I think the Court should give a fair and reasonable interpretation of the section keeping in view both of the two often conflicting objects of the Act, viz.: to protect the rights of people interested in the lands desired by the company and to remove obstacles in the way of rapid construction of the railway. Section 218 says that notice of the application for a warrant of possession must be served "upon the owner of the lands or the person empowered to convey the lands interested in the lands sought to be taken."

I think we are bound to consider as much what Parliament meant by "the person interested in the lands" as we are to consider what it meant by "the owner of the lands." Meaning must be given to all the words of the section. I do not see what advance is to be made by fixing attention only upon the true meaning of the word "owner" even if it does turn out that it means the same thing as "the person empowered to convey." That still leaves the words "person interested in the lands" untouched. And the interpretation clauses throw no light upon them. Still, they are there. Can we read the section as meaning that notice may be served *either* upon the "owner" *or* upon "the person interested"? If we could, then service upon a "person interested," even though he were not the registered owner and even though his interest might be slight, would be sufficient.

Even with respect to "the person empowered to convey," it must be observed that, under sec. 183, even the person interested has power to convey because it says all persons whomsoever . . . seised, possessed of or interested in any land may contract and sell and convey to the company all or any part thereof. I confess I cannot obtain any light whatever from the somewhat obscure wording of sec. 183.

It appears to me to be worthy of consideration whether the

reasonable interpretation to be given to sec. 218 should not be that notice must be given to any and all persons who happen to be the owners (whatever interpretation may be given to that word) or who are empowered to convey or who are interested in the land.

I see no real objection to this from the point of view of the company. I agree that an application for a warrant is an application in Court, and I think the applicant ought to present to the Judge by affidavit all the knowledge he has in his possession as to registered owners or persons interested, and that if the Judge hearing the application is satisfied that reasonable enquiries have been made, then the persons so known to be interested and shewn on the material before the Judge to be interested, would be, *for the purposes of the application and of the section under which it is made*, "the persons interested" within the meaning of the section.

Suppose a statute required service of some proceeding in an estate to be made upon the next of kin of a deceased, surely for the purpose of the proceeding, those shewn by the material to be the next of kin, provided all reasonable enquiries had been made, would be treated by the Judge for the purpose of the application *as* the next of kin. If there appeared a contingency that there might be others, the Court would protect them, perhaps, by having the fund paid into Court, just as here the payment into Court would protect other unknown parties interested. Simply because the Court has no all-seeing eye is no reason why it should not act upon what it does see.

Perhaps the interpretation I suggest involves a modification of the words of the statute which the Court would not be justified in making, because it would amount to reading "and" for "or" in sec. 218. But the circumstance that, by adhering to the reading "or" we leave it open to the company to say that they have served a person whom they have discovered to have merely a slight interest in the land, and are, therefore, entitled to a warrant, points to what I take to be the true rule to be adopted. The matter is in Court, and the Judge has a discretion to exercise. I think that it should be laid down as a rule of practice of the Court, under the Act, that a Judge, on hearing an application for a warrant of possession, should insist upon the company revealing, by affidavit, the knowledge in its possession as to the parties interested in the land, and the efforts which it has made to discover them, and that he should consider the circumstance of each case and direct service upon such persons as appear to be interested, and as might, without unreasonable trouble and delay, be discovered and served.

In the present case, assuming that defendants knew of the plaintiff's interest, which seems probable upon the evidence,

ALTA.

S. C.
1913

SANDERS
v.
EDMONTON, DUNVEGAN and B.C. R. Co.

Stuart, J.

I think the plaintiff should have been notified of the application of a warrant of possession. I think he should have been notified of the application to appoint an arbitrator, and that he should still be given the right, which, no doubt, he would not at all wish to exercise, to object to the particular arbitrator appointed. This, however, is a matter which can be adjusted by the exercise of a reasonable amount of consideration on the part of the solicitors.

On the ground first stated, I think the appeal should be dismissed with costs.

Simmons, J.

SIMMONS, J.:—I concur in the views of the Chief Justice that this appeal should be dismissed on the first ground set out by him, namely that the order or warrant for possession, while the same was not attacked, was a good defence to an action for trespass, brought by an unregistered claimant to an interest in the lands.

I do not, however, assent to the proposition, that a railway has in all cases discharged the obligation resting upon them by recognizing only the registered owner.

I am of the opinion that the applicant, as a matter of practice when applications of this character are made, under the Railway Act, should satisfy the Judge to the same extent as in applications outside the Act, that all parties who are interested in the lands have been notified of the intended application. The Judge dealing with such application will not impose unreasonable terms upon the railway company, having in view the main purpose of the Act to enable the company to obtain possession in the most expeditious way consistent with the proper protection of the parties interested in the lands. If the person who appeared on the register as the owner was the only one with whom the company was bound to deal, a great injustice might be done to the beneficial owner, because the person who appeared on the register might have no beneficial interest in the lands, having parted with the same under an agreement for sale, and consequently would be able to make a very improvident bargain with the company, and thus defeat the interests of the beneficial owner. I do not think it is at all necessary for the proper working of the Act to give such a restricted application to the sections of the Act which are so fully set out and discussed in the judgment of the learned Chief Justice.

Appeal dismissed.

THOMSON v. STIKEMAN.

ONT.

S. C.
1913

Ontario Supreme Court, Middleton, J. June 20, 1913.

1. INTEREST (§ III—75)—COMPOUND INTEREST—BANK—AGREEMENT FROM COURSE OF DEALING ACQUIESCED IN.

Where a bank takes to a trustee for itself a mortgage from its customer as collateral to his indebtedness then past due, as represented by the customer's bills and notes, a series of statements of account by the bank to the customer in which the latter is charged with interest compounded from time to time on his debit balances and to which the customer, with full knowledge of the mode of computation, gave his written assent (although marked "E. & O.E."), must be taken as constituting a stated account in respect of such interest claim and as evidence of an agreement to allow compound interest, although the original authorization of interest merely fixed the rate and was silent as to compounding, where the bank might have closed the account had the customer declined to assent to the compound interest charge.

[*Stewart* v. *Stewart* (1891), 27 L.R. (Ir.) 351, followed.]

2. PAYMENT (§ IV—31)—APPLICATION—BETWEEN SECURED AND UNSECURED CLAIMS—INTENTION.

Payments credited in a running account are not necessarily to be credited on an earlier and secured part of the account so as to leave the balance unsecured; the appropriation of the payments is a question of intention, and the presumption in favour of appropriating the credits to the earlier debits may be rebutted by shewing a contrary intention.

[*Griffith* v. *Crocker* (1891), 18 A.R. 370; *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692; and *Cory Bros. & Co.* v. *Owners of 88, "Mecca,"* [1897] A.C. 286, followed; *Deeley* v. *Lloyds Bank Ltd.*, [1912] A.C. 756, distinguished; *Clayton's Case* (1816), 1 Mer. 572, considered; and see Falconbridge on Banking, 2nd ed., 284.]

3. PAYMENT (§ IV—31)—APPLICATION—SECURED AND UNSECURED CLAIMS—BANK'S SUSPENSE ACCOUNT.

A bank is not to be held, by reason of an apportionment or allotment of its receipts as between earnings and capital in its "suspense account" kept for its own purposes and not communicated to the customer, to have fixed the application as between the bank and a customer of payments made by the customer which might be applied by the bank either upon a secured or an unsecured claim; and this rule will be applied where interest charges on doubtful accounts are carried to a suspense interest account instead of to the earnings account of the branch bank and proceeds of the sale of customer's securities including both principal and interest are carried to the credit of capital account so as to throw any eventual loss upon the earnings account rather than on the capital until the bank's total outlay should have been refunded to it, and the bank may, notwithstanding, claim, as against the customer, the right to credit him primarily upon the unsecured claim.

4. MORTGAGE (§ III—45)—VENDEE OF MORTGAGOR—RIGHTS ACQUIRED BY—EFFECT OF REGISTRY ACT.

One who purchases encumbered lands from a mortgagor takes subject to the true state of the mortgage indebtedness, having regard to the application of payments made between the mortgagor and mortgagee; and the purchaser acquires no better rights, by virtue of the Ontario Registry Act, 10 Edw. VII. ch. 60, R.S.O. 1914, ch. 124, than the mortgagor himself had.

ONT.

S. C.
1913

THOMSON
v.
STIKEMAN.

5. BANKS (§ VIII B—172)—LAND MORTGAGE—MORTGAGE TO SECURE PAST INDEBTEDNESS—EFFECT OF INCLUDING FUTURE ADVANCES.

A mortgage taken by a bank on land as security for a large past due indebtedness is not invalidated as to the past indebtedness because it purports to be also for such further and future advances as should be made from time to time to the mortgagor, or which might be represented by bills or notes made or endorsed by the latter, or any renewals thereof, by reason of the prohibition of sec. 76 of the Bank Act, R.S.C. 1906, ch. 29, 3-4 Geo. V. (Can.) ch. 9, against lending money on land, where the instrument was not intended by the parties as a mere colourable or collusive scheme to defeat the restrictions of the Act, and no future advances were contemplated or made except in so far as they might be incidental to the working out of the past due account.

[See Falconbridge on Banking, 2nd ed., 188, 202, 210.]

Statement

ACTION by the son and son-in-law of Joseph E. H. Stratford, who was a customer of the Bank of British North America at Brantford and became indebted to the bank and gave security and continued to deal with the bank, against the defendants, as trustees for the bank, to compel the discharge of certain mortgages upon land made by Joseph E. H. Stratford to the bank, or for an account and redemption, the lands having been conveyed to the plaintiffs by Joseph E. H. Stratford, who, at the trial, was added as a party.

J. W. Bain, K.C., for the plaintiffs.

W. N. Tilley and *G. L. Smith*, for the defendants.

Middleton, J.

June 20. MIDDLETON, J.:—Joseph E. H. Stratford, prior to the 31st May, 1895, had been for many years dealing with the Bank of British North America at its branch in the city of Brantford. As the result of his transactions, he was then indebted to the bank in a very large amount.

Stratford had been, and possibly was, a wealthy man, involved in many business enterprises and owning large property; but his ventures had not been altogether successful; and the fact that much of his property consisted of unproductive real estate, a portion of which was charged with the payment of an annuity of $4,000 to his brother's widow, made him "land poor."

At that time real estate in and near Brantford could not readily be realised upon. The city was not upon the main line of the railway, and many persons did not look for any improvement in the financial condition for years to come.

Stratford's indebtedness was either past due, or in a position in which it could be called in at any time; and the bank insisted upon receiving security; otherwise it would have resorted to the Courts to enforce its claim. Stratford, in one sense, had no alternative, and had to place himself in the hands of the bank; but it is clear that he was then a man not only in full possession of his faculties, but of unusual business experience and ability.

He had to make his choice, either to give the bank the security it demanded or take the consequences. He chose to give the

security; and, as the result, executed three separate mortgages, covering most of his available property. These mortgages are dated, two on the 31st May, 1895, and the third on the 9th March, 1896. All these mortgages were made to the defendant Stikeman, then the general manager of the bank, and have since been assigned to the defendant Mackenzie. Both Stikeman and Mackenzie hold as trustees for the bank. The mortgages of 1895 recite the indebtedness of the mortgagor to the bank for money advanced and promissory notes past-due and unpaid, and his agreement to execute the mortgages to the manager in trust as collateral security for payment of such past-due indebtedness, "and also as collateral to any further or future advances which may from time to time be made by the said bank to the said mortgagor or which may be represented by bills of exchange or promissory notes made or endorsed by the said mortgagor from time to time held by the said bank or for any renewal or renewals thereof." The proviso for redemption follows the terms of this recital.

The mortgage made in 1896 recites that the properties therein mentioned were omitted from the former securities by mistake, and that the mortgagor is indebted to the bank for certain advances now past due and unpaid, and has now agreed to execute the mortgage as security, not only for the past indebtedness, but for future advances; the same terms being employed as in the earlier mortgages.

From the time of the making of these mortgages, Stratford has continued to deal with the bank. From time to time, parcels of land have been sold and other securities have been realised. Statements have been prepared from time to time, which were submitted to Stratford and signed by him, shewing the balance due to the bank.

These statements included interest charged upon the balance owing. In the first place, interest was charged monthly; but in February, 1905, at the foot of a statement, Stratford signed the following memorandum: "The above statement is correct; and I hereby request the Bank of British North America to charge me interest on above balance every three months from 31st December, 1904, at the rate of 6% per annum."

Interest was accordingly charged upon his balances at the end of every three months from that time on. Annual statements were submitted, examined by Stratford, and found correct. This continued until 1911, when, on the 11th February, Stratford wrote the superintendent: "I will be glad to know what you can do in the matter of interest, which at present appears to be compounded monthly at 6%. Could you not kindly arrange for a rebate and reduction to a 5% rate, calculated yearly or half-yearly?"

Following this request, the bank agreed to reduce the interest

ONT.
S. C.
1913
THOMSON
v.
STIKEMAN.
Middleton, J.

to six per cent., to be paid annually upon the balance for each year, instead of quarterly, as theretofore; Stratford being quite wrong in his letter when he states that it was then being compounded monthly.

On the 2nd January, 1912, Stratford conveyed certain parcels of the land covered by the mortgages, known as "Glenhurst" and "Idlewild," to his son Graham and son-in-law Thomson; the deed stating a consideration of $1 and other valuable consideration. This conveyance was registered on the 16th January, 1912.

The "other valuable consideration" is said to have been a promissory note of the son and son-in-law for $16,000, payable three years after date to Stratford, and still in his possession. This note, it is said, was held in escrow, and was given representing the balance of $20,000, after deducting $4,000 due to the Canada Life Assurance Company upon a prior mortgage; this sum being the price at which the property was to be conveyed by Stratford.

This transaction was followed by a request on the part of Stratford to the bank to release these two properties from the mortgage securities, for that amount. The request being declined, this action followed. These properties are by far the most valuable individual assets covered by the bank's securities as yet unrealised.

On the 18th April, 1912, Stratford signed a memorandum for the purpose of better enabling his son and son-in-law to attack the bank. By this memorandum, in consideration of $1, he agreed to sell to them his interest in certain other securities held by the bank, namely, mortgages which form part of the estate charged with Mrs. Stratford's annuity, "on the basis of promises to pay $35,000 with interest, the whole spread over a period of ten years' maturity; interest to accrue from the date of delivery by me of a good title."

Armed with this title, the son and son-in-law began this action on the 26th June, 1912. They alleged ownership of certain of the parcels of land held by the bank as security; that the mortgage was security not only for past debt but for future advances; that the past debt has long since been fully paid and satisfied; and that, as a bank was prohibited from taking security on lands for future advances, the mortgages of the bank are now satisfied and form a cloud upon the plaintiffs' title and ought to be discharged. In the alternative, an account is asked; the plaintiffs submitting to pay what may be found due upon an account taken for any balance of the old indebtedness that may be still existing. The allegation is then made that the bank has been in possession and is liable to account as mortgagee in possession; and that, as the bank held other securities for portions of the indebtedness, the securities should be marshalled and the amount chargeable against the lands should be ascertained.

At the trial, although no amendment was made, an attempt

was made to charge the bank with the price which it is said ought to have been realised upon the sale of certain portions of the lands. Stratford was not a party to the action, but was added at the trial.

The plaintiffs also contended, feebly, that the mortgage was bad in its entirety, as the invalidity with respect to future advances vitiated the entire security.

The bank, on its part, contends, first, that it did not "lend money or make advances upon the security, mortgage, or hypothecation of" the lands in question; secondly, that there were not in fact any new advances made after the date of the mortgage within the meaning of the Act; and, thirdly, that all the transactions taking place after the date of the mortgage were such that the debits and credits in these transactions should be set off one against the other, leaving the original debt still outstanding. Upon the accounts, they contend that the transaction between Stratford and the bank amounted to a stating of the accounts, and that all the realisations were made by Stratford, the proceeds being paid to the bank.

Before dealing with these matters in detail, it is perhaps desirable to outline more fully the course of dealing between the parties.

At the time of the making of the mortgage, Stratford was indebted to the bank in the amount of a demand note, on which $45,768.50 was due, and an overdraft of $2,413.62 and other sums, making a total of $61,185.88. This is outside of another large indebtedness for moneys advanced in connection with insurance carried on Stratford's life, not involved in this litigation, now amounting to over $50,000. These demand notes were held as collateral to the account; and on the 31st May, 1895, the notes were presented for payment, and on that date a letter was written to Stratford notifying him of this fact, and formally demanding payment of the total indebtedness. This was, no doubt, in a measure formal, but was intended to make free from doubt the fact that the indebtedness was past due.

Contemporaneously, Stratford wrote the bank a letter, also dated the 31st May, 1895, reciting that, in consideration of the bank making advances to him of various sums named, payable on demand with interest at six per cent., he has assigned to the bank as collateral security 400 shares of the Farmers Binder Twine Company and 85 shares of the Stratford Curling and Skating Rink Company of Brantford, and 180 shares of the Stratford Opera House Company. This letter then sets out the terms upon which the bank holds this stock.

Prior to this, Stratford had been sued on some small claims in the Division Court, and expected other financial difficulty. He had sold his household furniture to the bank, and an arrangement was made by which he was allowed to use the furniture, the

ONT.
S. C.
1913
THOMSON
v.
STIKEMAN.
Middleton, J.

bank charging him as rental for it a sum equivalent to interest upon the amount. Whether this transaction was valid against creditors or not is not material in this action. This amount constitutes "the furniture rent account" above mentioned; and the debt undoubtedly was a real debt and still exists.

A new account was opened in the bank in April, 1896, called "The J. Stratford agency account." In this account most of Stratford's transactions appear. It consists largely of current business. Small deposits were made, and small cheques were issued against the deposits. The aggregate amount of the account is large, but this arises from the multitude of items. Nothing in this account is material to the matters really in issue.

In the meantime the general account had been continued from the 31st May, 1895, opening with a debit balance on that date of $2,413.62, the amount already named as included in the debt due at the date of the mortgage. In this account appear a large number of items upon both sides; and in it are charged up the interest from time to time accruing upon the general indebtedness, and items connected with the carrying of the property. The balance against Stratford grew to the sum of $24,392.69 at the end of November, 1912.

Graham Stratford, the son, and Thomson, the son-in-law, are both bankers of experience, employed in a rival bank. They have undertaken and made an exhaustive analysis of the books of the Bank of British North America, particularly in connection with this account. It appears that, included in this general account for the period mentioned, $65,830 is charged to interest. There are a great many entries which are most obviously cross-entries. Notes were discounted and not paid at maturity. In many cases the result of these transactions was to increase the total indebtedness. According to the plaintiffs' analysis, the debits falling under the head of cross-entries amounted to $40,559, and the credits to $36,896. In addition to the sums included in these cross-entries, there are other entries which the plaintiffs contend are really new advances, amounting to $11,566. Besides these new advances, there are payments amounting to $2,104 which, it is admitted, are properly chargeable against the lands, being advances for taxes, etc.

The bank answers this attack by the statement that, although the amount of the indebtedness is increased, there were no new advances made upon the strength of the mortgage; that from the beginning the bank's position was to insist on a reduction of the account if possible; that from time to time Stratford brought in moneys which he had collected, and deposited them at the bank and drew his cheque against the deposit for the purpose of making remittances. Stratford was agent for insurance companies and steamship companies, and the money taken in in the course of this business had to be remitted to his principals.

Many instances are given in which it is made plain that the transactions were really of this character. In other cases he had urgent need, and the bank honoured his cheque on his undertaking to cover the advance in a short time. Sometimes the amounts can be so grouped as to demonstrate the real identity of items appearing upon opposite sides of the account. In other cases the amounts are only approximately equal, there being a small balance either one way or the other.

If the interest charges are eliminated from this general account, and the explanations given by the bank are accepted, the increase not susceptible of ready explanation is comparatively small.

I am not able to follow all of the grouping put forward by the bank; but in a great majority of instances, I think, the grouping reasonably indicates the true nature of the transaction; and I think that the account demonstrates the substantial accuracy of the bank's contention, namely, that the increased indebtedness is not a new advance at all, in any true sense of that term, but rather a resulting balance arising from the multitude of transactions in which the bank assisted Stratford and accommodated him.

I have not checked the figures; but the witness Watt stated that the sum of the evidence which he was unable to group as constituting the opposite sides of individual transactions, or groups of transactions, amounted to about $900.

The plaintiffs, on the other hand, criticising Mr. Watt's evidence and statements, pick out items aggregating $2,741. Some of these items, *e.g.*, payments to the Ætna Insurance Company, probably represent moneys received by Stratford and constituting some part of his deposit. Other items, *e.g.*, water rates, etc., may well have been payments in connection with the properties.

In the statement of 1905, already referred to, Stratford assented to such an appropriation of payments as made the balance due upon the mortgage $52,527.94, and the overdrawn current account $9,008.01. In addition to this, there was the furniture account, $1,113.13. As the interest included in the current account greatly exceeded the $9,008, this really meant an assent on his part to such a way of treating the account as to leave the entire balance then due, outside of the insurance indebtedness a charge upon the land. From that time on, annual statements were signed by Stratford, each commencing with the balance carried forward from the previous statement; the last shewing a balance due on the 31st December, 1909, of $105,088. These statements it is easy to analyse in such a way as to separate the insurance premium account. This has been done in exhibit D, and shews the present indebtedness at $85,723.04, outside of that secured upon the policies.

At the trial an endeavour was made on behalf of the plaintiffs to attack these accounts by the statement that there were moneys

ONT.
S. C.
1913
THOMSON
v.
STIKEMAN.
Middleton, J.

received for which no credit had been given. Pending an adjournment, Mr. Watt examined these, and satisfactorily explained all of the items. Mr. Stratford himself said that he had no complaint to make against the accounts save as to the mode in which interest was charged. I am quite satisfied that, except as to the questions of interest and of the application of payments in satisfaction of what are called future advances, yet to be discussed, the accounts are absolutely accurate.

Stratford complains that in all that he did he was not a free agent; that he acted under duress, and ought not to be held in any way accountable for his acts. There is not the least foundation in fact for this contention. His position I have indicated. He was a debtor seeking for indulgence at the hands of his creditor, and grateful for the favours he received. No doubt at times, possibly on many occasions, he had to subordinate his own views to the views of the bank and its advisers. This resulted from his unfortunate financial position. He knew the situation and appreciated it. If he did not fall in with the wishes of the bank as to realisation, at prices which the bank thought should be accepted, he could not expect the bank to stand still and do nothing. Throughout, there was nothing in any way approaching duress or oppressive conduct on the part of the bank. It has "nursed" the account through a long period of stringency, and carried the properties, whilst the values have increased to a sum which makes them worth more than the amount claimed as due. The realisation has been only with respect to minor properties, and in each case Stratford has himself made the conveyance, though the money has been paid to the bank before it discharged its security. In all this the bank has acted in a way above reproach, and Stratford has every reason to regard himself as fortunate in having an exceptionally lenient creditor.

In fact, a letter from Stratford to the local manager as late as the 31st December, 1908, indicates not only the situation but Stratford's sense of the generosity of the bank. He writes: "I'm making that little deposit this morning to cover account. Permit me to thank you for your many kindnesses during your incumbency. I was often among the poor and needy, and you took me in. My appreciation you are sure of, if there is any doubt about my prayers." And this letter by no means stands alone; the sentiment is repeated time and again.

Stratford now says that he knew that the effect of the mortgage was to entitle the bank to six per cent. simple interest, and that all the statements, etc., that he signed, were signed by him with the mental reservation which he thought was sufficiently expressed in some instances by the letters "E. & O.E." preceding his signature. The case falls as to this within the principle of *Stewart* v. *Stewart* (1891), 27 L.R. (Ir.) 351, where it is said "that inasmuch as accounts were regularly stated and settled by S.

with full means of knowledge of his rights, and considering the fact that if S. had insisted upon these rights and refused to pay compound interest at the bank rate on the whole debit balances the bank might have closed the account, it would be inequitable to allow the executors of S. to open up the settled transaction."

I do not believe Stratford when he says that he intended all along to reopen the question of interest. I think that he was then too honest to sign the statements save as an acknowledgment of the debt, and that his present position is accounted for by the fact that he has now in advancing years become the tool of the younger and less scrupulous plaintiffs, who are carried away by the hope of gain, and fail to understand rightly the real nature of the contention they put forward.

In this case, quite apart from the principle indicated, the proper inference from the facts proved is, that there was an agreement by Stratford to pay interest in the way in which it was charged.

Assuming that the mortgage is good for the past debt and is not security for any debt arising after its date, can the bank now apply the money secured by it in satisfaction of the unsecured debt? The transactions which are in the nature of cross-entries may be regarded as quite outside of this inquiry.

In *Griffith* v. *Crocker* (1891), 18 A.R. 370—a case where it was contended that *Clayton's Case* (1816), 1 Mer. 572, compelled payments credited in a running account to be credited on an earlier secured account so as to leave the balance unsecured—the Court of Appeal held that "appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received, and crediting and charging notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness."

Similarly, in *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692, where there was a guarantee of an account for two years, and the account ran beyond the two years, it was held that "the presumption that, where a variety of transactions are included in one general account, the items of credit are to be appropriated to the items of debit in order of date in the absence of other appropriation, may be rebutted by circumstances of the case shewing that such could not have been the intention of the parties."

In *Cameron* v. *Kerr* (1878), 3 A.R. 30, the principle was applied to an account almost precisely the same as that in hand.

In *Cory Brothers & Co.* v. *Owners of S.S. "Mecca,"* [1897] A.C. 286, Lord Halsbury (p. 290) says of the rule in *Clayton's Case:* "This is not an invariable rule of law; but the circum-

ONT.
S. C.
1913
THOMSON
v.
STIKEMAN.
Middleton, J.

stances of a case may afford ground for inferring that transactions of the parties were not so intended as to come under this general rule." Lord Herschell, after stating that not only had payments been credited in the creditors' books, but that a copy of the running account had been sent to the debtor, proceeds (p. 292): "It is clear that if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payments as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise. What, then, was the effect of bringing the items of debt into a single account, and transmitting it to their debtors in the manner they did? . . . I have come to the conclusion that the appellants did not intend to make any such appropriation, and that the respondents were not entitled so to regard it." Lord Macnaghten spoke to the same effect, adding (p. 294): "It has long been held and it is now quite settled that the creditor has the right of election 'up to the very last moment.' "

Election was allowed in the witness box in *Seymour* v. *Pickett*, [1905] 1 K.B. 715.

If that is still the law, there is little trouble with the case in hand. Stratford says that the running account was not communicated to him (see his affidavit in reply); and the statement signed by him shews the assent of both parties to the money being so applied as to leave the balance due on the mortgage.

But it is said that *Deeley* v. *Lloyds Bank Limited*, [1912] A.C. 756, has changed all this. I do not so read the case. The holding there was not an affirmance of the old and rejected view that *Clayton's Case* had established an inflexible rule, but that the rule "was not excluded by the conduct of the parties" in that case. The facts, as I understand them, are in no way similar to the facts here; and this case falls rather within the decision of the Lords in 1897. "The rule laid down in *Clayton's Case* is not a rule of law to be applied in every case, but rather a presumption of fact, and this presumption may be rebutted in any case, by evidence going to shew that it was not the intention of the parties that it should be applied:" *per* Lord Atkinson, [1912] A.C. at p. 771.

Apart from the fact that I think there is ample evidence to shew that it never was intended to apply the money in discharge of the mortgage debt, but, on the contrary, to keep it on foot, I can see no reason why the same rule should not apply as in cases of merger, and that an intention beneficial to the holder of the securities should not be implied, when there is nothing in the facts shewing any express intention, *e.g.*, if the case did not go beyond a mere entry in the bank books.

An attempt was made to shew an application of payments by

reason of entries made in "Suspense Interest Account." This account was one kept for the bank's own purposes, and was not in any way communicated to the customer.

Dividends could only be paid by the bank to its shareholders out of earnings. So long as the security is ample, the interest charged to a current account might be regarded as "earnings," for the purpose of dividends. Stratford's account was not regarded as beyond question; so the bank carried to this suspense account the interest charged, and did not credit it to the earnings of the branch. When money was received resulting from the sale of part of the land held as security, the head office insisted that this should be placed to the credit of capital rather than interest in the accounts of the branch, so that if, in the end, there was a loss, this loss would be borne by the "earnings" and not be cast upon the bank's capital. This was no application of payments as between the bank and its customer, but was an adjustment as between capital and income in the accounts of the branch of the bank, which was required to keep the capital intrusted to it intact.

Then it is said that the bank must account as a mortgagee in possession. The bank never was in possession. All the sales were made by Stratford, and he signed the conveyances. True, the bank insisted on receiving and did receive the purchase-money, and, no doubt, insisted on Stratford realising as the price of the delay granted; but all this did not make the bank responsible for the sales.

Rent was paid by the tenants of the property to the bank; but this was not because the bank was in possession. Stratford was in possession, made the leases, sold the timber, etc. The bank insisted on this money being paid into Stratford's account by the tenants. Stratford fully assented. He was allowed to retain possession and control, on the terms that the tenants should pay the rent into the bank. It was all part and parcel of the same scheme. Stratford was allowed to nurse his property, on the terms of applying the income to the debt. His letters from time to time shew this. See the series in exhibit O, under dates July 13, 1894; November 11, 1895; January 13, 1896; April 22, 1897; December 6, 1898; December 9, 1898; January 18, 1899; December 28, 1901; March 27, 1902; July 8, 1902; August 19, 1902; August 23, 1902; January 4, 1904; February 27, 1905; April 11, 1905; April 28, 1905; May 22, 1905; January 6, 1906; July 27, 1906; December 24, 1906; December 10, 1907; March 4, 1908; May 29, 1908; June 27, 1908.

At the trial, the original plaintiffs took the position that they had better rights by virtue of the Registry Act than Stratford, the mortgagor, himself had. In this, I think, they were wrong. The sole effect of the Registry Act is to render invalid a prior unregistered conveyance as against a subsequent registered

ONT.
S. C.
1913
THOMSON
v.
STIKEMAN.
Middleton, J.

conveyance. The purchaser from the mortgagor, where the mortgage is registered, takes subject to the true state of account as between the mortgagor and the mortgagee. The Registry Act affords him no protection. He is bound by any stated accounts, and has no greater or other rights than the mortgagor himself has.

Quite apart from this, these young men are not *bonâ fide* purchasers for value without notice, in any sense of the term. Their deed is in escrow; their note is in escrow; and the whole transaction between Stratford and them is plainly a scheme by which they thought to obtain some position of vantage in this litigation.

This is probably enough, and more than enough, to dispose of the case; but the bank presents another contention upon which it asks findings of fact. What the Bank Act has rendered *ultra vires* is the lending of money or the making of advances upon the security, mortgage, or hypothecation of lands. Such lending is, by an independent section, made penal, and so may be regarded as illegal: *Brown* v. *Moore* (1902), 32 S.C.R. 93. The bank, however, contends that what was done here is not the thing prohibited by the statute; that the indebtedness of Stratford to the bank was a debt due to the bank in the course of its business; and that the distinction suggested by Chief Justice Robinson in *Commercial Bank* v. *Bank of Upper Canada* (1859), 7 Gr. 423, is sound.

I do not feel called upon to discuss this legal question; but, if that distinction can be drawn, then I find as a fact that the mortgage in question here was not taken for the purpose of enabling the bank to make a loan upon real estate, but for the purpose of securing the indebtedness of Stratford to the bank, and was in no sense a colourable and collusive scheme for the purpose of defeating the restriction imposed by the Act. The whole idea at the time of giving the mortgage was to secure the large past-due indebtedness and such further indebtedness as might arise in connection with the working-out of the account, which it was the intention both of Stratford and the bank to reduce, and not to increase, save as any increase might be incident to the carrying of the security and the small allowance contemplated to Stratford for his actual maintenance.

On all grounds, I think, the action fails, and should be dismissed with costs, save in so far as redemption is sought. The amount due to the bank should be fixed in accordance with Mr. Watt's computation, and the costs of the action should be added.

Judgment for redemption and reference directed.

BADENACH v. INGLIS.

ONT.

S. C.
1913

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. June 23, 1913.

1. WILLS (§ I D—36)—WHO MAY MAKE—DEGREE OF MENTAL CAPACITY—PERSON SUFFERING FROM GENERAL PARESIS—LUCID INTERVALS.

Notwithstanding the fact that a testator at the time of executing his will, was suffering from general paresis, the instrument will be upheld, where it appears that persons so afflicted frequently have lucid intervals; and that the testator was able to frequently transact business, and was capable of understanding the nature of the instrument executed by him, which was a simple one.

[*Badenach* v. *Inglis*, 10 D.L.R. 294, affirmed; *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, applied.]

2. EVIDENCE (§ II E 5—172)—BURDEN OF PROOF—TESTAMENTARY CAPACITY—ATTACKING GRANT OF PROBATE IN INDEPENDENT ACTION.

Where the party propounding a will in the Surrogate Court has adduced *primâ facie* evidence on a contest there raised as to the testator's capacity, and has been granted probate thereof, other persons not made parties to such proceeding, who thereafter attack the will by an independent action to declare its invalidity on the ground of lack of testamentary capacity, have thrown upon them the onus of proof; although the contestant in the Surrogate Court had, for a consideration, withdrawn the opposition there raised.

[See also *Sproule* v. *Watson*, 23 A.R. (Ont.) 692; *Taylor* v. *Yeandle*, 8 D.L.R. 733, 27 O.L.R. 531; *Mutrie* v. *Alexander*, 23 O.L.R. 396.]

Statement

APPEAL by the plaintiff from the judgment of Falconbridge, C.J.K.B., in *Badenach* v. *Inglis*, 10 D.L.R. 294, dismissing the action.

The appeal was dismissed.

The action was for a declaration that neither a document alleged to be the last will and testament of Edgar A. Badenach, deceased, nor a former testamentary document, was the true will of the deceased, because, when he signed the documents, he was not of testamentary capacity.

C. H. Porter, for the plaintiff.

A. F. Lobb, K.C., for the defendant Inglis.

Argument

G. H. Watson, K.C., and *C. H. Porter*, for the plaintiff:—Edgar A. Badenach was of unsound mind, to the knowledge of every one who knew him, at the time he made the wills in question, and the learned Chief Justice who tried the case erred in holding that the burden of proof was on the plaintiff. We prove the insanity of the deceased, and the procuring of the will by the widow; and under these circumstances the onus is shifted to her to shew that the will was properly made. There was no evidence of any periods of remission in the disease from which the deceased suffered such as would establish his testamentary capacity at the time the will was made. They referred to *Boughton* v. *Knight* (1873), L.R. 3 P. & D. 64, *per* Sir J. Hannen, who says at p. 72 "that the highest degree of all, if

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Argument

degrees there be, is required in order to constitute capacity to make a testamentary disposition:" see also on the same page, a note of *Burdett* v. *Thompson*, decided by the same Judge, who also refers, at pp. 73 *et seq.*, to *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549. Reference was also made to *Wilson* v. *Wilson* (1875-6), 22 Gr. 39, 24 Gr. 377; *Re Fraser* (1911), 24 O.L.R. 222, *per* Mulock, C.J., at pp. 252-254, and *Dew* v. *Clark* (1826), 3 Add. Eccl. R. 79, 90, there referred to; *Harwood* v. *Baker* (1840), 3 Moo. P.C. 282, 290; *Baker* v. *Batt* (1838), 2 Moo. P.C. 317; *Barry* v. *Butlin* (1838), 2 Moo. P.C. 480; *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448, *per* Lord Hatherley, citation in head-note; *Tyrell* v. *Painton*, [1894] P. 151; *Low* v. *Guthrie*, [1909] A.C. 278; *Wilson* v. *Wilson*, *supra*, *per Blake*, V.-C., 22 Gr. at pp. 81 *et seq.*; *Baptist* v. *Baptist* (1894), 23 S.C.R. 37; *Collins* v. *Kilroy* (1901), 1 O.L.R. 503; *Malcolm* v. *Ferguson* (1909), 1 O.W.N. 77.

A. F. Lobb, K.C., for the defendant Inglis, the widow and executrix of the deceased:—The only question in this case is as to the capacity of the deceased Edgar A. Badenach to make his will. The evidence shews that he died from influenza, and but for that might have lived for years. The case of *Ingoldsby* v. *Ingoldsby* (1873), 20 Gr. 131, in our own Courts, following the English case of *Banks* v. *Goodfellow*, *supra*, is strongly in favour of the respondent. There is no suggestion of fraud or undue influence. There is no presumption of incapacity on the part of the deceased, and no presumption against the occurrence of remissions in the disease from which he was suffering. There is nothing in the document itself to suggest incapacity, and no evidence has been given of any fact which calls for rebuttal on the part of the respondent, or which shifts the burden of proof clearly lying upon the appellant to make out his case.

Watson, in reply, argued that there was no evidence of remissions in the disease from which the deceased suffered. On the question of onus, he referred to *White* v. *Driver* (1809), 1 Phillim. 84, 88; *Waring* v. *Waring* (1848), 6 Moo. P.C. 341, 342; *Smith* v. *Tebbitt* (1867), L.R. 1 P. & D. 398.

At the close of the oral argument it was arranged that counsel should hand in a written argument on the questions of the jurisdiction of the High Court and the defence of *res judicata* which had been raised on behalf of the defendant. The following is a resumé of the arguments and authorities submitted:—

Watson, K.C., for the plaintiff:—The jurisdiction of the High Court to try the validity of last wills and testaments is provided for by sec. 38 of the Judicature Act, and the jurisdiction of the Surrogate Court is now and always has been subject to the jurisdiction of the High Court. The Court of Chancery

and the High Court have always had jurisdiction to try the validity of wills, and may make a finding or declaration thereupon which is binding upon the parties, and will govern and be acted upon by the Surrogate Court. *Foxwell* v. *Kennedy* (1911), 24 O.L.R. 189, is manifestly quite distinguishable, dealing with the act of an executor in connection with the issue and renunciation of probate, and does not in any way derogate from the jurisdiction of the High Court to try the validity of wills. Reference was made to the following cases: *Re Reith* v. *Reith* (1908), 16 O.L.R. 168; *Mutrie* v. *Alexander* (1911), 23 O.L.R. 396; *Thomson* v. *Torrance* (1881), 28 Gr. 253; *Stewart* v. *Walker* (1903), 6 O.L.R. 495; *Brown* v. *Bruce* (1859), 19 U.C.R. 35; *Martin* v. *Martin* (1869), 15 Gr. 586; *Wilson* v. *Wilson*, 22 Gr. 39, 24 Gr. 377; *Re White, Kersten* v. *Tane* (175), 22 Gr. 547; *Sproule* v. *Watson* (1896), 23 A.R. 692; *Connell* v. *Connell* (1904), 4 O.W.R. 360; *Cornwall* v. *Cornwall* (1908), 12 O.W.R. 552.

Lobb, K.C., for the defendant:—The whole matter involved in this appeal is testamentary, and the Surrogate Court of the County of York alone has jurisdiction. The defendant pleads by way of estoppel the former action in the Surrogate Court between the defendant herein as plaintiff and Sarah H. Badenach, the mother of the testator, as defendant, in which action the issue of letters probate to the defendant herein was decreed. As to the jurisdiction of the Surrogate Court, reference was made to the *Mutrie* case, 23 O.L.R. 396; the *Foxwell* case, 24 O.L.R. at pp. 194, 204; *Bélanger* v. *Bélanger*, 24 O.L.R. 439; *Taylor* v. *Yeandle*, 8 D.L.R. 733, 27 O.L.R. 531; *Re Graham* (1911), 25 O. L.R. 5; *Barraclough* v. *Brown*, [1897] A.C. 615. Only a limited jurisdiction is conferred by sec. 38 of the Judicature Act, and it must be confined strictly to its express words. The Supreme Court of Ontario has jurisdiction under that section only to try the validity of last wills, and cannot revoke the grant of letters probate granted by the proper Surrogate Court. For such relief the plaintiff must apply to that Court, and the Supreme Court can only set aside for "fraud and undue influence or otherwise." The section does not state that a will may be set aside for want of testamentary capacity; the words "or otherwise" are to be interpreted as *ejusdem generis* with "fraud" and "undue influence." If the Court cannot revoke the probate, a declaration of the invalidity of the will cannot be made.

Mulock, C.J.

June 23. MULOCK, C.J.:—This is an appeal from the judgment of the Chief Justice of the King's Bench dismissing the plaintiff's action, in so far as it seeks to set aside two wills made by the testator, Edgar A. Badenach, deceased, one bearing date the 24th August, 1908, and the other the 10th June, 1909.

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Mulock, C.J.

The latter will purports to revoke all prior wills or testamentary dispositions of the testator. If, therefore, it is valid, it is unnecessary to inquire as to the validity of any earlier will.

The will of the 10th June, 1909, was signed by the testator on that day, and it is attacked on one ground only, namely, alleged testamentary incapacity, so that the only issue in respect of that will is, whether Edgar A. Badenach was on the 10th June, 1909, competent to make a will. This is a question of fact.

In *Wilson* v. *Wilson*, 22 Gr. 39, are collected many of the leading cases which discuss what constitutes testamentary capacity, and it is unnecessary here to quote judicial definitions, it being sufficient, for the purposes of this case, to adopt as the standard the test applied in *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, which has been generally acquiesced in, namely, "whether, at the time of making his will, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it. The mere fact of his being able to recollect things, or to converse rationally on some subjects, or to manage some business, is not sufficient to shew he was sane. On the other hand, slowness, feebleness, and eccentricities are not sufficient to shew he was insane. The whole burden of shewing that the testator was fit at the time is on the defendant in this case." (The defendant in that case was the party propounding the will.)

One question raised before us was, where the burden of proof lay. The will was admitted to probate in the Surrogate Court, after contestation by the testator's mother, who withdrew opposition to the will, in consideration of a conveyance to her by the executrix of certain lands formerly owned by the testator; but the present plaintiff, the testator's brother, was not a party to the Surrogate Court proceedings. Nevertheless, that Court granted probate of the will.

In *Sutton* v. *Sadler* (1857), 3 C.B.N.S. 87, at p. 98, the rule is stated thus: "The party propounding a will is bound to shew that it was executed by the testator and that he was of a sound and disposing mind. . . . If, indeed, a will, not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will; and, if the party opposing the will gives some evidence of incompetency, the jury may, nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the will; and in each case the presumption in favour of competency would prevail. But that is not a mere presumption of law; and,

when the whole matter is before the jury on evidence given on both sides, they ought not to affirm that a document is the will of a competent testator, unless they believe that it really is so."

See also *Smee* v. *Smee* (1879), 5 P.D. 84.

But in this case, the defendant having given such proof of the testator's capacity as to satisfy the Surrogate Court, it is for the plaintiff now, who alleges incapacity, to prove it.

The plaintiff's contention is, that as early as the month of February, 1907, the testator was suffering from general paresis, and that he continued a paretic, deteriorating mentally, until his death, and was in consequence incompetent to make either of the wills in question.

Different classes of evidence were adduced at the trial, namely, evidence of experts as to the testamentary capacity of a paretic, and in regard to the testator's probable capacity, evidence of his actual capacity as exhibited by him in his business affairs, and evidence as to his general conduct and demeanour.

It appears that the plaintiff, Clarence Badenach, and the testator, Edgar A. Badenach, were sons of the late William Badenach; that the father and his son, the testator, were partners in the Toronto agency business of the Union Insurance Society of London, England, until the father's death in the year 1897. William Badenach left him surviving, his widow, and two children only, namely, the plaintiff and the testator, the latter being two years older than the plaintiff. The mother and the two sons continued to reside together at the family home, 56 St. Mary street, Toronto; and in June, 1907, Edgar A. Badenach married the present defendant, bringing her to the common home, where they all resided until the month of April, 1908, when the defendant and her husband withdrew and lived in St. George street until Edgar's death on the 5th February, 1910.

On the death of his father, Edgar A. Badenach continued to carry on the business of the Union Insurance Society until the 1st October, 1908, when one Mr. Martin Merry, who had known the testator for years, purchased from him the goodwill of the insurance business, for valuable consideration. By this agreement the testator resigned his agency in favour of Mr. Merry, agreed to recommend him as his successor, and to give him such assistance as his health permitted in retaining the business.

Thereupon the testator, so far as appears, withdrew from business of all kinds.

The will of the 24th August, 1908, was drawn by Mr. Donald, a Toronto solicitor, whose firm had been solicitors for the insurance company and for the Badenach family, and Mr. Donald had personally known the testator for some twenty years. According to Mr. Donald's evidence, the testator personally came

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Mulock, C.J.

to his office and gave instructions for that will, and on a subsequent day executed it. Mr. Donald at the time entertained no doubt as to the testator's testamentary capacity: as he said, "I would not have had a man execute a will in whose capacity I had not the utmost confidence."

By this will the testator made certain provision for his mother, his wife, and children, if any. Until the sale of the business the testator continued to give more or less attention to it. His health did not permit of strenuous exertion, and his attendance at his office was somewhat intermittent; and when there, according to the plaintiff, he attended to routine work only, such as signing cheques.

In March, 1908, the testator purchased a house in St. George street, moving into it in April, 1908. The plaintiff was in the habit of going there from time to time to see the testator on business matters, bringing with him for such purposes books and papers. On other occasions the plaintiff made friendly calls on the testator at his home.

Until September, 1908, the plaintiff had continuously desired to be admitted into partnership with the testator, and as late as the month of September, 1908, they discussed the subject. On that occasion the testator informed the plaintiff that he was then worth about $40,000, and the plaintiff says, in his own evidence, that that was about the correct estimate.

In his evidence the plaintiff says that from time to time he had been urging the testator to take him into partnership, but that the latter, whilst not refusing, "kept shoving it off. He wanted to let things stand off, and after a while there was not much chance, and I tried other means."

According to the plaintiff, the testator in June, 1908, telephoned the plaintiff requesting him to discontinue his visits at the house, and on the following morning the testator, at his office, repeated that request. In consequence, the plaintiff's subsequent interviews with the testator in regard to partnership matters took place elsewhere, probably at the office, where the testator was in the habit of attending until he sold out his business in September of that year.

On the 9th June, 1909, the testator made his wife the beneficiary of three policies on his life, for about $10,000, and on the 20th July, 1909, he conveyed to her a section of land in the Province of Alberta. On the 10th June, 1909, he executed his last will, being one of those in question, whereby he gave the whole of his estate to his wife, absolutely, and appointed her sole executrix.

This will was prepared by Mr. Hassard, a reputable member of the legal profession in Toronto. It seems that, after the making of the will of the 24th August, 1908, the testator desired

to make another will more favourable towards his wife, and for such purpose attended at Mr. Donald's office and discussed the subject with that gentleman. Mr. Donald was a friend of the Badenach family, and seems not to have encouraged the testator in his desire to make a new will which would be less favourable to his mother than that of August, 1908.

At this time Mr. Donald does not seem to have questioned the testator's testamentary capacity; and at the trial he expressed the opinion that, in consequence of his attitude in regard to the testator's wish to make a new will more favourable to his wife, the testator did not see Mr. Donald further professionally on the subject of the proposed new will.

Mr. Hassard's evidence in regard to the will of the 10th June, 1909, may be summarised as follows. At the request of the testator's wife, Mr. Hassard attended at the house and first prepared certain documents on the wife's behalf. He then received instructions to draw the will. Mr. Hassard was slightly acquainted with the testator, and received instructions for the will in the testator's bedroom, the testator being in bed. Mr. Hassard says: "He appeared to be very bright and entered into conversation;" and he enumerated a number of circumstances that were discussed. It appears that the wife was present when Mr. Hassard received instructions in respect of the will.

Mr. Hassard's evidence at this stage is as follows:—

"Mr. Lobb: Q. You have said both were present? A. Yes, they were both present, and I discussed the making of the will with them, because I went back to the office and drew the will there.

"Q. You said you discussed the will with them; what was said by either or by both as to the will on the 9th June? A. I think it was Mrs. Badenach who introduced the subject and said she wanted his will drawn, and I was there in the room beside him and asked him if that were so; he said 'yes;' and I asked him how he wanted his property left, and he said, 'Everything to his wife;' I think those were almost his identical words —to leave everything to his wife or leave everything to her.

"Q. Did you take down instructions at that time in writing? A. I do not recall; I think I must have taken them down.

"Q. Do you produce them? A. No.

"Q. At that time, on the 9th June, what was his state of mind? A. He was bright, he appreciated everything that I said to him, and he answered all my questions with intelligence.

"Q. As to his will, what did you conclude was the state of his mind as to that? A. That he was perfectly capable of appreciating what was being said, and everything in connection with it.

"Q. On the second day you went again; and had anything been said about coming the next day, on the 9th? A. Yes, I

ONT.
S. C.
1913
BADENACH v. INGLIS.
Mulock, C.J.

said I would go back to the office and draw the will and come the next day.

"Q. You said you would come the next day? A. Yes, and bring the will with me.

"Q. The next day you attended again? A. Yes, and I told his wife that I would like to have their family doctor as one of the witnesses.

"Q. Why did you suggest that, may I ask? A. As I told Judge Winchester previously, my reason was because I had been discussing the making of the will briefly with a fellow practitioner, and I mentioned it to him, and he said in a case where a man was in bed it would be a good idea to have the doctor act as a witness. I saw no reason for it myself so far as his mental condition was concerned."

Mr. Hassard stated that there was a delay in obtaining the attendance of the doctor, and in the meantime he carried on a conversation extending over half an hour with the testator, and says: "All of that time he was very bright and cheerful and carried on the conversation as before with intelligence, answering most, if not all, of my questions, in an intelligent manner, thoroughly appreciating all I said."

"Q. Any suggestions from himself or all answers to your questions only? A. Once, when I read the will over, I left a space for his second name, and I asked him his second name in full, and his wife got the pen and ink.

"Q. You asked his second name, and what reply was made to that? A. He told me his name; I think it was Alexander; and I inserted that with the ink."

About five o'clock in the afternoon, Dr. Brown arrived; and Mr. Hassard says that when, Dr. Brown being in the bedroom, Mr. Hassard came to the beside, telling Dr. Brown that he was desired to witness the will, Mr. Badenach "raised himself up in the bed, and I handed him the pen, having dipped it in the ink, and he signed his name. I remember one thing very distinctly about his signing his name, and that is, he took the pen, my recollection is, dipped it again in the ink, but I know he took the pen a second time, and he made that stroke at the bottom of his name very definitely after he had signed, and with a distinct stroke of the pen himself; my recollection is that he reached over and dipped the pen in the ink, I holding the ink bottle over to him, and he made that stroke separately and by himself. . . .

"Q. When do you say the will had been read over? A. I read the will over to him before Dr. Brown came in, shortly after I went into the room first, because it was long before Dr. Brown came in that I inserted the name Alexander.

"Q. After Dr. Brown came in, was it read again? A. That I do not recall: I just asked Mr. Badenach to sign, and then I handed Dr. Brown the pen and then he signed his name. . . .

"Q. Any comment from him? A. He said that was right.

"Q. As to his ability to comprehend what he was doing; the capacity to make his will, on the second day, what do you say? A. I say that he thoroughly appreciated what he was doing, and in my mind fully understood it."

The plaintiff fixes the commencement of the testator's alleged mental incapacity as early as February, 1907, when he was taken with a seizure in church, but from that time until the 10th June, 1909, the testator appears to have transacted important business and other affairs in the usual way, without those who dealt with him suspecting him of being mentally defective.

In June, 1907, as already stated, he married, and, though in feeble health, continued to attend, though irregularly, at his place of business, until he sold his business in September, 1908.

For all that appears to the contrary, he made a prudent purchase of property in St. George street in the year 1908; and, in view of his impaired health, appears to have acted with good judgment in retiring from and disposing of his insurance business. Until then the plaintiff had treated him as in his right mind, for he was continually anxious to form a partnership with him.

Mr. Donald, when he prepared the will of 1908, was fully satisfied as to the testator's testamentary capacity; and Mr. Merry, who had known him for years, entered into a serious business contract with him whereby Mr. Merry became liable to pay to the testator a considerable sum of money.

It appears to me that where many different persons have many business dealings with a man whom they well know, and whom they honestly believe to be fully qualified to transact such business, the inference is, that he is so qualified. That the testator as late as September, 1908, was regarded by the plaintiff as in the full enjoyment of his mental faculties, is shewn by the plaintiff's admission that the testator resisted all the plaintiff's appeals to be admitted into partnership. He says: "I tried from that on at different intervals to try and get him to take me into partnership with him, but I could not. I had no control of him."

It is not shewn that any of these various important business and other transactions were improvident, foolish, unwise, or characterised by bad judgment. Nor was any attempt made to shew that, throughout, the testator failed to exercise the judgment of a prudent man in the full enjoyment of his faculties. Still the plaintiff charges that the testator was of such unsoundness of mind from the time he says he became a paretic until his death as to have been incapable of making a valid will in August, 1908, or subsequent thereto.

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Mulock, C.J.

For the plaintiff, Dr. Davidson, an eminent Toronto physician, gave evidence stating that he had attended the testator professionally from 1887 until June 1908, and that he died of general paresis; that it is a disease extending over a number of years; that its presence was manifested in the case of the testator as early as 1907; and that, when he ceased attending him in June, 1908, the testator was then incapable of making a will. He mentioned that the testator, in or about the autumn of 1907, had lost the use of the sphincter muscle of the bladder, and wet his trousers, but appeared to be unconscious of it; that at that time the testator, in Dr. Davidson's opinion, was a hopeless paretic, and in consequence incapable of transacting business. Nevertheless, he did successfully transact business until a much later period; and, therefore, his actual conduct in affairs disproves the correctness of Dr. Davidson's opinion.

Dr. Davidson further gave his opinion of a paretic as follows: "Q. Is there such a thing as a lucid interval in dementia, or does it progress steadily? A. It is a steadily progressive disease. I do not think there are lucid intervals. There are periods, but the progress of the disease is steadily downward. It is a disease in which they go steadily downward."

Further on, Dr. Davidson, referring to such "periods," says: "Q. What you mean is, the patient never comes back to his original soundness of mind? A. Never. Q. In that halting of the disease, has he lost all capacity to do business? A. Not all capacity, but not fit to do business or make a will. Q. Do you say that a paretic when one of these haltings comes in his disease, and for a month he appears not to be going down, do you say that in that interval a paretic cannot make a will? A. I should not think so."

Dr. E. E. King, of Toronto, also gave evidence on the plaintiff's behalf. He had also attended the testator professionally and had known him intimately since the year 1879. Dr. King says that prior to 1907 the testator had paresis; and he agrees with Dr. Davidson's views in regard to that disease, and that the testator was incapable of making a will on the 24th August, 1908, or later.

Dr. King attaches some importance to the fact that the testator's father had also died of paresis, suggesting that it was a transmissible disease. Dr. King stated that in the autumn of 1906 the testator came into his office with his trousers wet from urine, but apparently unconscious of the fact; that on another occasion he was dishevelled in his clothing, whereas formerly he had been neat in his dress; and he gave it as his opinion that as early as the time when the testator appeared with his trousers wet, viz., 1907 or earlier, he was incapable of making a will. He further said: "Paresis being a progressive disease, I do not

believe that a man has capacity after it is well developed, as it was well developed in 1907. Q. In January, 1907? A. The early part of 1907. Q. In this case, if any doctor called in January, 1907, would say there were periods of remission when the patient's mind was clear, when he was able to make a will, when he was able to do business, you would say that that could not be the testator's case? A. Yes, that would be my opinion, that that could not be E. A. Badenach's case."

Against the expert evidence of these two medical gentlemen, Doctors Charles K. Clarke and Goldwin Howland were examined. Dr. Clarke is an expert in mental diseases, having spent a great portion of his life in hospitals for the insane, and is a well-recognised authority in regard to mental diseases. He attached no importance to the circumstance that the testator's father had died of paresis.

It appears that the testator had been addicted to the excessive use of alcohol, and Dr. Clarke stated that alcoholic excess produced a condition called pseudo-paresis, and appreciates the doubt of Dr. Howland (who in consultation with other medical men examined the testator in September, 1908) as to whether the testator was suffering from paresis or pseudo-paresis.

The following are extracts from Dr. Clarke's evidence:—

"Q. If the doubt lay on the side of pseudo-paresis from alcohol, what opinion do you express as to the likelihood of improvement? A. The likelihood would be very much greater in the alcoholic form than in the other, in fact you might have recovery. . . .

"Q. As to the rapidity of the deterioration, what is the percentage, if you can make one, between the rapidity and the progress of the disease? A. Alcoholic is a much more chronic thing than the ordinary case of general paresis.

"Q. But here again you have a wonderful difference. The ordinary case of paresis? A. Is a very short thing, but not always.

"Q. What life would you give for a paretic course of disease? A. An average life? Q. Yes? A. After the disease is recognised: of course, I might explain that my belief is from my experience that paresis is nearly always a slowly developing disease; you can always look back to the development of that disease for some time before it is recognised.

"Q. How long do you put? A. Five, ten, fifteen, twenty years. . . .

"Q. There is a mass of evidence in this case, and from it I take two or three circumstances that I want you to consider for me; it is shewn in evidence here by physicians who had some opportunity to examine Mr. Badenach as his attending physician, that there was difficulty in walking, that there was a

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Mulock, C.J.

slurring of words; it is put in this way, that there was loss of the power of control of the sphincter muscle of the bladder, and consequently incontinence of the urine; that there was indifference to personal appearance, apparent carelessness about appearance in a man who had formerly been natty and trim in regard to his dress; that these circumstances pointed, in the minds of these physicians, to paresis; this is my question to you, that these symptoms having occurred—and let me add by the way one other illusion, that of grandeur—there was no possible capacity, or rather there was no possibility of capacity, after that, in that patient to transact business or make a will; what would you say? A. I would say that does not accord with my experience or with the experience of any author of repute who has written on that subject.

"Q. What is your quarrel with it? A. Assuming it were a case of general paresis, for example, that you might have a very remarkable remission in which the mental symptoms might be in abeyance altogether, or so nearly so you could not distinguish.

"When you speak of mental symptoms you mean the mental irregularities? A. Yes. . . .

"Q. In your practice and your own experience in the asylum work and otherwise, have you had cases of remission? A. I think you might safely say that in cases of the grandiose type, we divide these cases into certain groups, where you have in possibly twenty-five per cent. of these cases, you have marked remissions of varying degrees. . . .

"Q. Do you say that Mr. Badenach, from what you have heard, did not have general paresis? A. I have not said so, no.

"Q. You have not said one way or the other, and I suppose do not care to? A. I could not express an opinion, because, as far as we learn, some procedures were omitted which would have made the diagnosis absolutely certain. . . .

"Q. If what Dr. King and Dr. Davidson say about it, that the disease developed in September, 1906, or the early part of 1907, and he died on the 5th February, 1910, if as a matter of fact the malady was general paresis, what would you say about his condition at that time, would it be well developed or not? A. It might or it might not, because some cases I have known, one case has run over thirty years under my own observation.

"Q. If what Dr. Davidson and Dr. King say, that in the early part of 1908, it had been so well developed that he could not make a will, what would you say as to that? A. I would not express an opinion in regard to what they said; I might form my own opinion in my own way."

Dr. Goldwin Howland, a specialist in nerve work, gave evidence. He examined the testator in September, 1908. The following are extracts from his examination:—

"I found the patient in bed when I arrived there, and I examined him to find what signs of disease of the nervous system he had, and I found that they were mainly physical, that is to say, they had to do with his motor powers mainly; he had difficulty in walking, he staggered walking; it is what we call an ataxic spastic gait; he had increased knee-jerks, one jerk being more increased than the other." And he further described the testator's disabilities, and was of opinion that the testator, when examined by him, was competent to make a will.

"Q. Dr. Davidson and Dr. King yesterday stated that, once paresis was diagnosed, mentally the patient was unfit thereafter to transact his business or make his will for want of capacity; that is the proposition those two physicians gave us yesterday; what do you say as to that? A. I would certainly say they were absolutely incorrect." And, in support of his opinion, Dr. Howland cites from the book of Dr. Mercier, whose views are referred to with approval in the judgment of the learned Chief Justice.

In view of the evidence of Dr. Clarke and Dr. Howland, it is not necessary to quote further from other medical testimony. Those gentlemen are specialists and of recognised standing; and, therefore, their opinions are entitled to greater weight than those of Dr. Davidson and Dr. King, who are general practitioners, both gentlemen of excellent professional standing, and unquestioned integrity, but nevertheless have not given such special study to brain diseases as have Doctors Clarke and Howland.

I am of opinion that, not only has the plaintiff failed to shew testamentary incapacity on the part of the testator, but the defendant has affirmatively established his capacity, at least as late as September, 1908; and there is no evidence shewing incapacity when the will of June, 1909, was executed.

If I entertained any doubt as to the weight to be attached to the medical testimony, that doubt would disappear in favour of testamentary capacity, when the evidence furnished by the business dealings of the testator, above referred to, were cast into the scale. Opinion evidence as to the testator's incapacity is unconvincing in the face of his capacity as proved by his actual conduct.

For these various reasons, I think the judgment of the learned Chief Justice was right, and that this appeal should be dismissed with costs.

Clute, J.
Sutherland, J.
Leitch, J.

CLUTE, SUTHERLAND, and LEITCH, JJ., concurred.

Riddell, J.

RIDDELL, J.:—Edgar A. Badenach was an insurance agent in Toronto; the plaintiff is his brother. He intermarried with the

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Riddell, J.

defendant on the 5th June, 1907, and thereafter continued (with his wife) to live with his mother at 56 St. Mary street. He left in March or April, 1908, and thereafter with his wife lived in St. George street, in a house No. 297, bought by him early in March of that year. On the 24th August, 1908, he executed a last will and testament whereby he directed all his estate to be turned into money and invested, one-quarter of the income to be paid to his mother for her lifetime and the remainder to his wife for life for the support of herself and her children, if any; if the mother should predecease the wife, all the income was to go to the wife for life, and *vice versâ* for the support of the survivor and the testator's children. Upon the death of both, the children, if any, became entitled in equal shares—and, were there no children, "among my heirs in the way they would have taken in case I died intestate and unmarried." It will be seen that the plaintiff, a brother and next of kin, has an interest (if this will be sustained) in the event which has happened, as the testator had no children.

On the 1st October, 1908, he transferred the insurance business to Martin H. Merry, resigned his agency in the Union Assurance Company (merged in the Commercial Union Assurance Company), agreed to assist Merry as the state of his health would permit, etc., etc., receiving in payment the value of his chattels and a payment of $50 per month to continue for four years.

On the 10th June, 1909, he made another will whereby he revoked all former testamentary documents and left everything to his wife, the defendant. He had on the preceding day, the 9th June, "transferred" three insurance policies to his wife—these were for about $1,000. On the 15th June, 1909, he executed a general power of attorney in favour of his wife: on the 20th July, 1909, he transferred to his wife a section of land he owned in Alberta, worth, it is said, some thousands of dollars.

He died on the 5th February, 1910; and the defendant, his widow, tendered the last will for probate. The mother filed a caveat, and an action came down for trial in the Surrogate Court of the County of York, wherein the mother was defendant and the defendant herein plaintiff. After some evidence had been taken, an agreement was come to between the parties, whereby the will was admitted to probate—the defendant herein to transfer the Alberta lands to the plaintiff in that action, and pay her $200. Probate accordingly was granted on the 28th September, 1910.

The plaintiff, who was not a party to the action in the Surrogate Court, brought this action in the High Court, on the 9th August, 1912, making both his mother and the widow of his deceased brother, now become Mrs. Inglis, defendants. (The

mother takes no part in the proceedings, and it will be convenient to call the widow the defendant, as I have done). The statement of claim sets out the two wills, alleges that the deceased, at the time of their execution, was not of testamentary capacity—and claims "a declaration that the said alleged wills . . . are invalid and that the said Edgar A. Badenach died intestate or that the second of the said wills is invalid;" also "administration of the estate . . . or administration . . . of the estate . . . with the first of said wills annexed . . .:" the appointment of adminstrators . . . and general relief.

There is added a claim based upon an alleged partnership between the plaintiff and the deceased; but that is not now in question.

The defence sets up that the will of the 10th June, 1909, is the valid last will and testament of the deceased; that the will was attacked on the same grounds in the Surrogate Court; that the plaintiff was well aware of the proceedings, and took an active part in assisting his mother therein; that the will was in that action adjudged to be valid; and the plaintiff is estopped by the judgment in the Surrogate Court.

The trial came on before the Chief Justice of the King's Bench in November, 1912; that learned Judge, after reserving his decision, delivered judgment on the 30th January, 1913, dismissing that part of the action; the plaintiff now appeals.

In addition to the grounds urged before the Chief Justice at the trial, it was suggested before us for the defendant that the High Court has no jurisdiction in the premises, and written arguments have been put in on that point.

I think that the express words of sec. 38 of the Judicature Act* cannot be got over by any implication arising from the omission upon the last revision in 1910—10 Edw. VII. ch. 31, sec. 19—of the final clause in R.S.O. 1897, ch. 59, sec. 17.† The

*R.S.O. 1897, ch. 51, sec. 38: "The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments."

†Section 17 of the Surrogate Courts Act, R.S.O. 1897, ch. 59, is as follows: "All jurisdiction and authority, voluntary and contentious, in relation to matters and causes testamentary, and in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons having estate or effects in Ontario, and all matters arising out of or connected with the grant or revocation of probate or administration, shall continue to be exercised in the name of Her Majesty in the several Surrogate Courts; but this provision shall not be construed as depriving the High Court of jurisdiction in such matters." In the revised Surrogate Courts Act, 10 Edw. VII. ch. 31, sec. 17 of the former Act appears as sec. 19, with the last clause omitted, and the words "Subject to the provisions of the Judicature Act," inserted before the opening words, "All jurisdiction and authority," etc. There are also some other changes in the wording, not material here.

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Riddell, J.

same section also disposes of the plea of *res adjudicata*, under the circumstances of this case.

A decree of a Court of Probate establishing a will is said to be a judgment *in rem*, binding all the world: Halsbury's Laws of England, vol. 13, p. 328, sec. 460; *Noell* v. *Wells* (1668), 1 Lev. 235; *Douglas* v. *Cooper* (1834), 3 My. & K. 378; *Beardsley* v. *Beardsley*, [1899] 1 Q.B. 746; *Emberley* v. *Trevanion* (1860), 4 Sw. & Tr. 197; *Concha* v. *Concha* (1886), 11 App. Cas. 541. The statute, however, gives jurisdiction to the High Court to try the validity of wills even after probate has been granted—the result, therefore, is, that the grant of probate is removed from the category of judgments *ad rem*. The plaintiff in this action was not a party to the proceedings in the Surrogate Court, and cannot be bound by the result. "The defendant was not a party in the sense that he was entitled to be heard, or to take an appeal, and unless he had that right, he was not concluded by the adjudication of facts:" *Brigham* v. *Fayerweather* (1886), 140 Mass. 411, at p. 416, and cases cited. And he is not shewn to have taken any part in the proceedings in the Surrogate Court so as to raise any equity against him, even if any participation could have such effect.

The plain issue in this case is, whether the deceased had, at the time of making the two wills or either of them, testamentary capacity—there is no charge on the pleadings of undue influence, and there is no evidence of anything of the kind.

In the recent case of *Low* v. *Guthrie*, [1909] A.C. 278, Lord James of Hereford says (pp. 282, 283): The "principle . . . laid down . . . in *Barry* v. *Butlin*, 2 Moo. P.C. 480, . . . only requires that, where a person is interested, vigilance shall be exercised in seeing that the case, if he has to meet one, of undue influence, is fully met." And the Lord Chancellor (Lord Loreburn), at pp. 281, 282: "I should be very sorry if the rule adopted by Lord Cairns in *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448, 461, were used as a screen behind which one man was to be at liberty to charge another with fraud or dishonesty without assuming the responsibility of making that charge in plain terms"—and he wholly disapproves of "veiled charges of dishonesty."

In the matter of capacity, the appellant relies before us, as he did at the trial, upon a large amount of evidence, both lay and medical—the respondent also produced much evidence of both kinds.

It is clear that the deceased, about February, 1907, was taken with a fainting spell, which was diagnosed as epilepsy; that he had thereafter attacks of an epileptic character, and finally he lapsed into general paresis—by June, 1908, he had arrived at the paretic stage. There is no doubt that a paretic deterior-

ates mentally, his capacity for doing business is impaired, and that some amount of what fairly may be called unsoundness of mind is present. Some of the medical men called say that general paresis is a gradual malady, progressing downward from the beginning from the first symptoms till the death; that there are no "lucid intervals," although sometimes the disease may stand still or appear to stand still for a time; that, once a man has had general paresis, he never has the mind which would enable him to recognise the proper objects of his bounty and to know what his property is, no matter how simple may be the proposed disposition of it by will. Others say that, while there is never a recovery from true paresis, there are remarkable remissions in which the patient is apparently normal so far as mental conditions are concerned—that there are instances (one was named in answer to an inquiry by counsel) in which the paretic have had remissions and transacted business successfully afterward for a time.

The evidence of a medical character called for the defence has been preferred by the learned Chief Justice, and I wholly agree with him.

I pass over a great deal of evidence giving the opinion of medical men as to the capacity of one suffering from this disease to make a will—this is not a medical but a legal question. What the medical witness should give the Court is not so much his opinion of the capacity to make a will as the capacity to understand the nature of the act and its effects, the extent of the property he is disposing of, to appreciate the claims to which he should give effect, etc. (paraphrasing *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, at p. 565).

Before examining into the particular as opposed to general evidence, it may be well to consider the condition of mind recognised by our law as enabling its possessor to make a valid will.

We were much pressed on the argument by a *dictum* of Sir James Hannen (afterwards Lord Hannen) in *Boughton* v. *Knight*, L.R. 3 P. & D. 64, at p. 72: "Whatever degree of mental soundness is required for any of these things—responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness,—I must tell you . . . that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition." This has often been misunderstood—it has been supposed or at least argued that the learned Judge meant that it required a higher degree of soundness of mind to make a will than to do anything else. Sir James Hannen himself repudiates this interpretation in *Burdett* v. *Thompson*, cited in the note to *Boughton* v. *Knight*, at pp. 72, 73; "I never said, and I never meant to say so." He concludes by saying: "Whatever degrees there may

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Riddell, J.

be of soundness of mind, the highest degree must be required for making a will."

This very general statement seems to be more a matter of terminology or definition than a proposition of law. It certainly does not mean that an insane person cannot make a will: hundreds of persons who were insane—some within an asylum—have made perfectly valid wills, *e.g.*, *Cartwright* v. *Cartwright* (1793), 1 Phillim. 90. It as certainly does not mean that when a person's faculties are dimmed by the advance of old age or of disease he is incapacitated from making a will—if that were so, as has been said by more than one eminent Judge, the lot of those whose faculties are failing would be doubly unfortunate. Becoming a burden to those about them, they would be unable to reward kindness and attention—the next of kin, relieved of the fear of an adverse will, would have no pecuniary inducement to treat the aged feeble and infirm with becoming kindness and attention.

The law has been authoritatively laid down more than once that, if the testator is able to understand the nature of the act and its effects, the extent of the property he is disposing of, to comprehend and appreciate the claims to which he should give effect—and if no insane delusion influences his will or brings about a disposition of it which if the mind were sound would not have been made, then he is competent: *Banks* v. *Goodfellow*, L.R. 5 Q.B. at p. 565; *Harwood* v. *Baker*, 3 Moo. P.C. at p. 290; *Wilson* v. *Wilson*, 22 Gr. at p. 83.

In *Sproule* v. *Watson*, 23 A.R. 692, it was held that letters probate issued by the proper Surrogate Court are *primâ facie* evidence of testamentary capacity of the testator—and that must be so on principle here; for, if the plaintiff at the trial of this action omitted to give evidence, judgment must have been entered for the defendant. I do not think that the case turns on the *onus probandi*, but that, if the onus did change at any time, and so was cast upon the defendant, she has abundantly met it. For that reason I do not discuss the rules as to "lucid intervals:" *Bannatyne* v. *Bannatyne* (1852), 16 Jur. 864; *Cartwright* v. *Cartwright*, 1 Phillim. 90; *Banks* v. *Goodfellow*, L.R. 5 Q.B. at p. 558.

The evidence seems to my mind to prove that in January, 1908, the testator's solicitor, Mr. Donald, drew a will for him which provided for the conversion of all his property into money, its investment, and the payment to his mother of one-half of the income for life and the other half to the wife for life, with remainders over as in the first will attacked; afterwards Mr. Donald was sent for, and the testator gave instructions for the change; this change was made accordingly. From the evidence of Mr. Donald, I can see room for no kind of doubt of the testator's capacity at this time.

Afterwards Mrs. Badenach telephoned for Mr. Donald to come up again—it seems worth while to note the fact that it was Mrs. Badenach, the defendant, who did the telephoning for Mr. Donald, as it was strongly pressed as a suspicious circumstance that she sent for Mr. Hassard on the subsequent occasion—and that that indicated that Mr. Hassard was in reality her solicitor and not the testator's. Donald says, "Of course I was not Mrs. Badenach's solicitor." Badenach told Mr. Donald that the disease was going to finish him (apparently this was the occasion); and Mr. Donald says: "The impression I have in my memory is that he wished to make a will more favourable to his wife." "I did not speak to Mrs. Badenach." And he adds: "I think, at the time I got instructions to draw this August will, that the intent and desire on his part was to make a more drastic will in favour of his wife at that time; and I had been a friend of the family, and I rather discouraged that, and this will was the outcome of it."

It seems not at all unlikely that Mr. Donald's theory or conjecture is right, and that it was his resistance to the desire of his client that led to another solicitor being employed to draw up the last will. He says, however, that he did not refuse to draw another will.

The evidence of the defendant agrees with Mr. Donald's recollection. The testator did not think that he was going to get better, and told his wife that he had better look after her. Mr. Donald was sent for to change the will, and he and the testator discussed the matter, but nothing was done. Later on, the attending physician thought it better for her to have a power of attorney, and a telephone message was sent (probably by her) to Mr. Hassard, whom she had known in a friendly way, but who had not been her solicitor in any sense. A power of attorney was drawn by him at the testator's house, and then he received instructions for a will, both husband and wife being present. He had a conversation with the testator, who was lying in bed, the items of which, with a trifling exception, he cannot recall, but "he appeared very bright;" "It impressed me just as being a man who was lying in bed there and wanted to make his will leaving everything to his wife." They spoke about past political relationships—a friend, one Johnston. This is the account given of the instructions: "I think it was Mrs. Badenach who introduced the subject and said he wanted his will drawn, and I was there in the room beside him and asked him if that were so; he said, 'yes;' and I asked him how he wanted his property left; and he said, everything to his wife; I think those were almost his identical words, to leave everything to his wife or leave everything to her." "He was bright, he appreciated everything that I said to him, and he answered all my questions with intelligence."

ONT.
S. C.
1913
BADENACH
v.
INGLIS.
Riddell, J.

The following day Mr. Hassard again went to the testator's house, this time with the will drawn, asked for the family physician to be sent for to act as a witness, though this he did not see any reason for, so far as the mental condition was concerned. "Then Mrs. Badenach went and some person telephoned, and I had a long wait there; it was around 5 o'clock, and I had to wait a good half hour, during which time I sat in the room beside him, carrying on a general conversation. All of that time he was very bright and cheerful and carried on the conversation as before with intelligence, answering most, if not all, of my questions, in an intelligent manner, thoroughly appreciating all I said.

"Q. Any suggestions from himself or all answers to your questions only? A. Once, when I read the will over, I left a space for his second name, and I asked him his second name in full, and his wife got the pen and ink.

"Q. You asked his second name, and what reply was made to that? A. He told me his name; I think it was Alexander; and I inserted that with the ink, using the pen that his wife had brought." "I read the will over to him before Dr. Brown came in; shortly after I went into the room first, because it was long before Dr. Brown came in that I inserted the name Alexander . . . Dr. Brown came in, and I came around to the side of the bed and shook hands with him and spoke to him, but the nature of the conversation I do not recall; it did not impress itself upon my mind at all, because it was so general and simple; and then I told Dr. Brown that I wanted him to witness the will. Then Mr. Badenach raised himself up in the bed, and I handed him the pen, having dipped it in the ink, and he signed his name. I remember one thing very distinctly about his signing his name, and that is, he took the pen, my recollection is, dipped it again in the ink, but I know he took the pen a second time, and he made that stroke at the bottom of his name very definitely after he had signed, and with a distinct stroke of the pen himself; my recollection is that he reached over and dipped the pen in the ink, I holding the ink bottle over to him, and he made the stroke separately and by himself. I say that he thoroughly comprehended what he was doing, was perfectly intelligent, thoroughly appreciated what he was doing, and in my mind fully understood it."

The evidence of the defendant is very strong as to the capacity of the deceased; and, bearing in mind the simplicity of the will, and that it was along the lines he had some time before discussed with his solicitor Mr. Donald, I see no ground for doubting his testamentary capacity.

Much was said before us as to the suspicion to be attached to the whole transaction. The plaintiff does not venture in

his pleadings to charge undue influence, nor did he do so explicitly in argument, but rather by hint and innuendo. There is, as I have said, no shadow of evidence of misconduct on the part of the wife—nor can it be said that she procured the will to be drawn. It is true that Mr. Hassard says that he was acting for both husband and wife—that, I think, refers to the former day's proceedings; but, in any case, Mr. Hassard can, by no stretch of language, be fairly said to have been acting for the wife in drawing the will so as to make her the drawer. But, even if that were so, I think she has met any onus cast upon her by such cases as *Mitchell* v. *Thomas* (1847), 6 Moo. P.C. 137: *Dufar* v. *Croft* (1839), 3 Moo. P.C. 136.

The fact that the last will leaves everything to the wife is of trifling if any importance—I have drawn a score of wills of like import, even in cases where there were children and (or) other reasonable objects of bounty.

I refer to *Boyse* v. *Rossborough* (1857), 6 H.L. C. 2; *Sefton* v. *Hopwood* (1855), 1 F. & F. 578; *Lovett* v. *Lovett* (1857), 1 F. & F. 581; *Wingrove* v. *Wingrove* (1885), 11 P.D. 81; *Browning* v. *Budd* (1848), 6 Moo. P.C. 430.

Appeal dismissed with costs.

VIPOND v. SISCO.

Ontario Supreme Court (Appellate Division), Clute, Riddell, Sutherland, and Leitch, JJ. June 25, 1913.

1. COSTS (§ I—2)—LIABILITY FOR—DEFENDANT—ON DISMISSAL.

A defendant cannot be required to pay the general costs of an action for damages which wholly fails.

2. SALE (§ I B—7)—WHAT CONSTITUTES—PASSING OF TITLE—SHIPMENT F.O.B.—BILL OF LADING ATTACHED TO DRAFT.

The title to goods delivered to a carrier under an order for shipment f.o.b. and shipped in the name of the seller, with a draft for the purchase price attached to the bill of lading, which was sent a bank with instructions to deliver the bill of lading to the purchaser only on payment, does not pass to the latter until the condition is fulfilled or the purchaser offers to fulfil it, and demands the bill of lading.

[*Scott* v. *Melady*, 27 A.R. 193; and *Graham* v. *Laird Co.*, 20 O.L.R. 11, followed.]

3. SALE (§ I B—7)—SALE F.O.B.—DELIVERY TO CARRIER—BILL OF LADING TO SELLER'S ORDER.

If the bill of lading for goods to be shipped f.o.b. is taken in the name of the seller, *primâ facie* he retains the disposing power over and the property in the goods.

4. SALE (§ I B—7)—PASSING OF TITLE—BUYER'S REFUSAL TO CONSENT TO DELIVERY OF BILL TO PLAINTIFF OUT OF COURT, ON DISMISSAL OF SELLER'S ACTION.

The refusal of the defendant, after judgment in his favour in an action on a draft for the value of goods shipped to him, which he had

ONT.

S. C.
1913

VIPOND
v.
SISCO.

refused to accept because of a shortage, to consent to the delivery to the plaintiff of the bill of lading out of court, does not amount to a claim by the defendant to the bill, or to the goods represented by it.

5. SALE (§ III A—54)—RIGHT TO REJECT—INCOMPLETE SHIPMENT—F.O.B. SALES BY WHOLESALER.

A buyer of goods to be shipped f.o.b. at the dispatching point, with settlement by sight draft, with bill of lading attached, is justified in rejecting the goods if, on inspection of same with the carrier on their arrival, it is found that a part of the goods contracted for have not been included; the buyer in such case is justified in declining to accept the goods or pay the draft until the shipment is complete.

6. SALE (§ III A—51)—RIGHTS AND REMEDIES OF PARTIES—RIGHT OF ACTION—GOODS SHIPPED WITH DRAFT ATTACHED—REFUSAL TO ACCEPT FOR SHORTAGE.

Where goods are purchased for shipment f.o.b., and are billed in the seller's name, and the bill of lading, with a draft for the purchase money attached, sent a bank for delivery to the purchaser only on payment of the draft, the seller's right of action on the buyer wrongfully declining to accept the draft and take delivery, would not be an action for the price, but for damages for refusal to accept. (Dictum *per* Riddell, J.)

7. COSTS (§ I—2)—LIABILITY FOR—ON DISMISSAL—AMENDMENT OF PLEADINGS AT TRIAL.

While the court may, on allowing the defendant to amend his pleading at the trial, by setting up the Statute of Frauds, impose terms for the payment of the costs so far incurred, and may relieve against such costs if it turns out that there was a good defence *dehors* the added plea, the court cannot impose costs on the defendant where such leave was granted unconditionally and the action was dismissed, particularly where there was a good defence apart from the Statute of Frauds.

Statement

APPEAL by the defendant from the judgment of the Judge of the County Court of the United Counties of Stormont, Dundas, and Glengarry.

The following statement of the facts is taken from the judgment of Riddell, J.:—

The plaintiff, a wholesale merchant in Montreal, received through his traveller, from the defendant, a merchant in Port Arthur, an order for certain goods f.o.b. at Montreal, against a sight draft. The goods were selected from stock and loaded on a steamship at Montreal; the bill of lading, being taken in the name of the seller, was by him endorsed in blank and sent to a bank at Port Arthur with draft attached and with instructions to deliver the bill of lading to the defendant upon payment of the draft. When the shipment arrived at Port Arthur, the defendant found by examination that part of the goods, a case of cheese, was missing. He for that reason refused to pay the draft, and accordingly was not given the bill of lading. Some correspondence took place between the parties, the plaintiff urging the defendant to pay the draft and make his claim for the missing goods, the defendant declining to pay until the cheese was forthcoming, although he expressed his willingness to pay as soon as the shipment was complete. The bill of lading was re-

ONT.
S. C.
1913
VIPOND v. SISCO.
Riddell, J.

turned with the unaccepted draft to the plaintiff, who brought his action in the County Court of the United Counties of Stormont, Dundas, and Glengarry.

At the trial, the County Court Judge held that but for the Statute of Frauds the plaintiff had made out a case for judgment for $154.17 "for damages for non-acceptance of the goods"—but thought that the statute was an absolute bar. He dismissed the action, but directed that the plaintiff should have all his costs.

The learned County Court Judge gave leave to appeal from this disposition of the costs; and the defendant now appeals.

The appeal was allowed.

C. A. Moss, for the defendant, contended that the Judge had no power to order the costs to be paid by the successful party.

C. H. Cline, for the plaintiff, argued that the judgment as to costs was supportable on the ground that the plaintiff was entitled to succeed in the action.

THE COURT called upon counsel for the defendant to support the judgment dismissing the action, on the merits.

Argument

Moss, for the defendant:—The bill of lading was to Vipond's order, and instructions were given to the bank not to give it up till the draft was accepted. Thus the property in the goods remained in the vendor: *Graham* v. *Laird Co.* (1909), 20 O.L.R. 11; *Scott* v. *Melady* (1900), 27 A.R. 193. There was no real offer of all the goods; and it is not necessary to rely on the Statute of Frauds. [RIDDELL, J., referred to *Atkinson* v. *Plimpton* (1903), 6 O.L.R. 566; *Browne* v. *Hare* (1858-9), 3 H. & N. 484, 4 H. & N. 822; Blackburn on Sale, 3rd ed. (1910), pp. 48 *et seq.*]

Cline, for the plaintiff:—The question of price was never in dispute. The trial Judge did not find that Sisco had paid the freight on the goods in dispute. The defendant's letter and the draft constitute a complete memorandum under the Statute of Frauds. The contract called for a sight draft with bill of lading attached. Although the defendant did not accept the goods, the property in them passed by the shipment. *Graham* v. *Laird Co.*, 20 O.L.R. 11, must be distinguished, because there the vendor did not assign to the purchaser but to the bank. [RIDDELL, J.:—This is but delivery to your agent, enabling him to assign: *Royal Canadian Bank* v. *Carruthers* (1870), 29 U.C.R. 283.] It was a sight draft with a bill of lading attached, and the contract specified that it must be sent through a bank. [RIDDELL, J.:—The goods were not to be handed over until paid for: *Dupont* v. *British South Africa Co.* (1901), 18 Times L.R. 24; *Jenkyns* v. *Brown* (1849), 14 Q.B. 496.] Counsel referred to *Gilmour* v. *Supple* (1858), 11 Moo. P.C. 551; *Cowas-jee* v. *Thompson* (1845), 5 Moo. P.C. 165; *Craig* v. *Beardmore* (1904), 7 O.L.R. 674; *Stock* v. *Inglis* (1884), 12 Q.B.D. 564, and in appeal *Inglis* v. *Stock* (1885), 10 App. Cas. 263; *Ex p. Rosevear*

ONT.

S. C.
1913

VIPOND
v.
SISCO.

Argument

China Clay Co., In re Cock (1879), 11 Ch. D. 560; *Tregelles* v. *Sewell* (1862), 7 H. & N. 574. The shipping bill was tendered to the defendant, and he refused to accept it. By declining to consent to the delivery out of Court of the bill of lading to the plaintiff, the defendant laid claim to the bill and the goods. On the question of breach of contract, see Falconbridge on Banking, p. 548. On the Statute of Frauds, see *Richards* v. *Porter* (1827), 6 B. & C. 437, 30 R.R. 392; *Cooper* v. *Smith* (1812), 15 East 103; *Bailey* v. *Sweeting* (1861), 9 C.B.N.S. 843; *Wilkinson* v. *Evans* (1866), L.R. 1 C.P. 407; *Gibson* v. *Holland* (1865), L.R. 1 C.P. 1.

Riddell, J.

June 25. RIDDELL, J. (after stating the facts as above):—It has been recently held by this Division that there is no power to direct the defendant to pay the general costs of an action which wholly fails. We are bound by that decision. But the plaintiff endeavoured to support his judgment for costs on the ground that the Judge might and should have given him judgment for his claim.

We recently in this Division decided that, the appeal being against a judgment and not against the reasons therefor, an order against a successful defendant for costs may, without a cross-appeal, be supported, if, on the evidence, he should not have succeeded. It was accordingly open to the plaintiff to contend that the judgment for costs was right, though the discretion of the Judge was exercised under the belief that he had a discretion when dismissing the action to direct the defendant to pay the costs. The plaintiff contended that he was entitled to judgment for the value of the goods sold, on the ground that, although the defendant had not accepted the goods, the property in them had passed by the shipment. This, however, is not the law.

The law as to shipment f.o.b. is thoroughly settled, and may be stated in a few propositions.

If, upon an order for undetermined goods to be shipped f.o.b., the seller delivers to the designated common carrier, goods which answer the order, without more, the property passes forthwith to the purchaser—and this is the case also if a bill of lading is taken, and taken in the name of the purchaser. If, however, the bill of lading is taken in the name of the seller, *primâ facie* he retains the disposing power over and property in the goods. He may, indeed, endorse it over to the purchaser forthwith, and send it forward for delivery to the purchaser; in that case the taking of the bill of lading to his own order is a mere form, and the transaction is equivalent to taking the bill of lading in the name of the purchaser. The seller may endorse in blank and send forward to his agent, bank, etc., for delivery to the purchaser upon payment for the goods, acceptance of a draft, or performance of some

other condition—in that case, the goods remain in the control and are the property of the seller, at least until the condition is fulfilled or the purchaser offers to fulfil it and demands the bill of lading: Benjamin on Sale, 5th ed., pp. 398, 388; *Wait* v. *Baker* (1848), 2 Ex. 1; *Van Casteel* v. *Booker* (1848), 2 Ex. 691; *Turner* v. *Liverpool Docks Trustees* (1851), 6 Ex. 543; *Browne* v. *Hare*, 3 H. & N. 484, 4 H. & N. 822; *Stock* v. *Inglis*, 12 Q.B.D. 564, 573; *Cowas-jee* v. *Thompson*, 5 Moo. P.C. 165; *Ogg* v. *Shuter* (1875), L.R. 10 C.P. 159, 1 C.P.D. 47; *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex. D. 164 (C.A.); *Scott* v. *Melady*, 27 A.R. 193; *Graham* v. *Laird Co.*, 20 O.L.R. 11. In the case last-named the authorities are carefully and accurately discussed by the Chancellor.

Under the facts of this case, I think there can be no question that the property did not pass to the defendant at any time. The action of the plaintiff, if any, must be for refusal to accept goods—and here his difficulty is twofold. He did not and could not tender the whole of the goods ordered, and the defendant was perfectly justified in declining to accept a draft for the whole order, when part of it was not forthcoming. The other difficulty is, that there is no evidence of damage.

The result, in my opinion, is, that the learned County Court Judge was in error in holding that but for the Statute of Frauds the case was made out. If the plea of the statute had not been raised at all, the defendant would have been entitled to a dismissal of the action.

As a rule, costs should follow the result. It is not uncommon to treat the question of costs as unimportant—in my view, this is not proper. The refusal to award costs is, in no small number of cases, a refusal of justice—a defendant wrongfully brought into Court on a wholly baseless charge has double wrong done him when he is forced to pay for the luxury of being sued, if he has done nothing to invite the litigation and has not acted improperly in it.

I can find nothing in this defendant but courtesy and an honest desire to carry out his contract; and he should have his costs unless the raising of the Statute of Frauds makes a difference.

When, at the trial, an application is made to amend by pleading the Statute of Frauds, a not unusual course is to allow the amendment only on an undertaking to pay the costs so far incurred. If this plea puts an end to this action, as was the case in *Wall* v. *McNab*, referred to in 9 O.W.R. at p. 362 (*cf. Kendrick* v. *Barkey* (1907), 9 O.W.R. 356), the undertaking may well be enforced; but, if the action proceeds, it may be relieved against if it turns out that there is a perfect defence *dehors* the statute.

In the present case, the plea was allowed to be added with-

ONT.
S. C.
1913
VIPOND
v.
SISCO.
Riddell, J.

out the imposition of terms—and I do not think that the defendant should be punished for raising the defence.

If the conclusion of the learned Judge was correct, and the only defence the statute, I should not have been disposed to allow an appeal had the judgment gone without costs. Here, however, the disposition of costs is wholly wrong; the defendant has a perfect defence on the merits; and I can find no reason why he should not have his costs. In my opinion, the judgment dismissing the action should stand, but the plaintiff should pay the costs of the County Court and in this Court.

There was one contention raised by the plaintiff which I should not have considered worthy of notice, but that it was vigorously and with apparent earnestness pressed upon us.

It seems that the defendant, upon being asked after judgment for a consent to the delivery out of Court of the bill of lading, declined to give such consent. This, it was argued, was a claim to the bill of lading and the goods represented by it. It must be obvious that it is nothing of that nature—but merely a declining to assist the opposite party in a proceeding wholly for his own advantage. There was no claim by the defendant to the bill of lading or to any interest under it; he did not claim to have it delivered out to him. Of course, if the plaintiff wished to have the document out of Court, he could have applied to the Court for an order; he did not do so, his counsel informs us, because he thought that he was in better position without such an order.

Sutherland, J.
Leitch, J.

SUTHERLAND and LEITCH, JJ., concurred.

Clute, J.

CLUTE, J., agreed in the result.

Appeal allowed.

ONT.
S. C.
1913

JOHNSON v. FARNEY.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

1. WILLS (§ III G 2—125)—NATURE OF ESTATE OR INTEREST CREATED — LIFE OR FEE—REDUCING ABSOLUTE GIFT TO LIFE ESTATE—EXPRESSION OF TESTATOR'S WISH.

An absolute gift under a will is not to be cut down to a life interest merely by an expression of the testator's wish that the donee shall, by will or otherwise, dispose of all the property possessed by her in favour of individuals or families indicated by the testator; since a wish or desire so expressed is no more than a suggestion to be accepted or not by the donee, and does not amount to a mandate or obligatory trust.

[*Johnson* v. *Farney*, 9 D.L.R. 782, affirmed; *Re Atkinson*, 80 L.J. Ch. 370, 373; and *Re Adams and Kensington Vestry* (1884), 27 Ch.D. 394, 410, referred to.]

ONT.

S. C.
1913

JOHNSON
v.
FARNEY.

2. TRUSTS (§ I B—8)—WILL—PRECATORY WORDS—INTERPRETATION.

The leaning of the courts is against construing precatory words used in a will, not being words of a strict definite legal character or words that are beyond doubt, as creating a trust.

[*Re Atkinson* (1911), 80 L.J. Ch. 370, followed.]

Statement

APPEAL by the plaintiff from the judgment of Boyd, C., *Johnson* v. *Farney*, 9 D.L.R. 782, upon the question of the construction of the will only.

Argument

J. H. Rodd, for the plaintiff, argued that the words used by the testator created a precatory trust: Jarman on Wills, 5th ed., p. 357; *Shearer* v. *Hogg* (1912), 6 D.L.R. 255, 46 Can. S.C.R. 492. [MEREDITH, C.J.O., referred to *Farrell* v. *Farrell* (1867), 26 U.C.R. 652.]

H. E. Rose, K.C., for the defendants, pointed out that the clause in question was to operate only if the wife died soon after the testator, whereas she died five years afterwards; that the words "to leave all you die possessed of," used in the will, shewed clearly that no precatory trust was intended. In support of his contention that the word "wish" was not strong enough to create a precatory trust, he referred to *Lechmere* v. *Lavie* (1832), 2 My. & K. 197; *In re Atkinson*, 80 L.J. Ch. 370, at p. 373; *Eade* v. *Eade* (1820), 5 Madd. 118; *McMillan* v. *McMillan* (1900), 27 A.R. 209; Theobald on Wills, Can. ed., p. 753; *Hill* v. *Hill*, [1897] 1 Q.B. 483; *In re Williams*, [1897] 2 Ch. 12, at p. 20. Upon the question of the uncertainty of the subject-matter, he referred to *Mussoorie Bank Limited* v. *Raynor* (1882), 7 App. Cas. 321, at p. 331.

Rodd, in reply, referred to *Wilson* v. *Graham* (1886), 12 O.R. 469; *Re Bethune* (1904), 7 O.L.R. 417; *Gravenor* v. *Watkins* (1871), L.R. 6 C.P. 500; *Bibbens* v. *Potter* (1879), 10 Ch. D. 733.

Meredith, C.J.O.

June 26. The judgment of the Court was delivered by MEREDITH, C.J.O.:—The appeal is limited to so much of the judgment as declares what is the true construction of the will of the testator.

We are of opinion that the judgment is right and should be affirmed.

As the Chancellor points out, the earlier cases on precatory trusts have been departed from, and a stricter rule now obtains.

As was said by the Master of the Rolls in *In re Atkinson*, 80 L.J. Ch. 370, 372: "The leaning of the Courts is now not to construe words used in a will, not being words of a strict definite legal character or words that are beyond all doubt—equivalent words in short—as creating a trust."

What the Court has to do is to find out what, upon the true construction, was the meaning of the testator, rather than to

ONT.
S. C.
1913
JOHNSON
v.
FARNEY.
Meredith, C.J.O.

lay hold of certain words which in other wills have been held to create a trust, although on the will before them it is satisfied that that was not the intention; and, in construing the will in question, in the language of Cotton, L.J., in *In re Adams and Kensington Vestry* (1884), 27 Ch.D. 394, 410, "what we have to look at is the whole of the will . . . and if the confidence is that the widow will do what is right as regards the disposal of the property," we "cannot say that that is, on the true construction of the will, a trust imposed upon her."

"The Court ought to be very careful not to make words mandatory which are a mere indication of a wish or a request. The whole will must be looked at, and the Court must come to a conclusion as best it can in construing, not one particular word, but the will as a whole, as to whether the alleged beneficiary is or is not a mere trustee or whether he takes beneficially with a mere superadded expression of a desire or a wish that he will do something in favour of a particular object, but without imposing any legal obligation:" *per* the Master of the Rolls in *In re Atkinson*, 80 L.J. Ch. 370, at p. 373.

Reference may also be made to the statement by Fletcher Moulton, L.J., in the same case (p. 374), of the principle on which the Courts act in determining whether or not a precatory trust is created, and to the statement of Buckley, L.J. (pp. 375-6), of the general principles to be applied in such cases.

Applying these rules and principles, it is reasonably clear that the testator did not intend that the wish which he expressed as to the way in which his wife should dispose of her property should be mandatory, but intended that his wife should take beneficially, with a mere superadded expression of a desire or wish that she should dispose of it in the way indicated by him.

The expression of this wish is contained in a group of what may properly be termed suggestions which the testator makes as to his wife's future actions. These he begins with, by counselling her "not to fret after" him, as he has left her in good circumstances, and with a little care she "can get along" without him; then follows an expression of his desire that she shall sell the store property and "go and live" with her mother or in her own house and get a lady companion to live with her. Then follows this expression: "Don't get married again as you might get some one that will take all I have made for you;" then, after an exhortation to be good to her mother, his desire is expressed that she should keep "old Nellie until she dies or put her in good hands so that she won't be abused;" then follow some other recommendations which it is not necessary to quote; and then comes that which is relied on by the appellant as creating the trust: "I also wish if you die soon after me that

ONT.
S.C.
1913
JOHNSON v. FARNEY.
Meredith, C.J.O.

you will leave all you are possessed of to my people and your people equally divided between them, that is to say your mother and my mother's families."

Looking then at the will as a whole, and particularly at that part of it to which reference has just been made, it is impossible to conclude that the testator intended to make it obligatory on his wife to leave all she was possessed of in the way in which he wished that she should leave it, and the proper conclusion is that reached by the Chancellor, that his wish is "no more than a suggestion, to be accepted or not" by his wife, "but not amounting to a mandate or an obligatory trust."

The language in which the expression of the wish is couched strongly supports that view; it is only if his wife "dies soon after" him that he wishes the disposition to be made. If it had been intended to impose an obligation on her to make the disposition, one would have expected more certainty as to the event in which his wish was to be carried out.

In addition to all this, it is not the property he leaves to her, but all the property she is possessed of, that he wishes her to dispose of in the way he points out. That circumstance alone is decisive against the appellant's contention: *Eade* v. *Eade*, 5 Madd. 118; *Lechmere* v. *Lavie*, 2 My. & K. 197; *Parnall* v. *Parnall* (1878), 9 Ch.D. 96; Theobald on Wills, Can. ed. (1908), p. 490.

Appeal dismissed.

INGLIS v. JAMES RICHARDSON & SONS LIMITED.

ONT.
S.C.
1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

1. SALE (§ I B—9)—WHAT CONSTITUTES—PASSING OF TITLE—SUFFICIENCY OF DELIVERY.

Title to a quantity of grain stored in a grain elevator will pass from the seller to the buyer, where it appears that the buyer had made several purchases of grain from the seller, who carried a stock of grain in the elevator, by placing several orders through the elevator agent and then accepting a draft drawn by the seller for the purchase price each time a purchase was made, the seller in each instance executing an order on the elevator agent requesting him to deliver to the buyer the amount of grain purchased, and where it appears that the grain remained in the elevator subject to the buyer's right to remove any part of it at any time, and that some of the grain had been actually withdrawn by him, notwithstanding that no separation of the grain sold had ever been made from the rest of the grain belonging to the seller and that the elevator agent was not employed by the seller to make such sales, but the parties acted through him as a matter of convenience.

[*Inglis* v. *Richardson*, 10 D.L.R. 158, reversed on other grounds; *Heath* v. *Moore*, 11 A.C. 350; *Coffey* v. *Quebec Bank*, 20 U.C.C.P. 110; *Martineau* v. *Kitching*, L.R. 7 Q.B. 436; *Pew* v. *Lawrence*, 27 U.C.C.P. 402, referred to.]

ONT.

S. C.

1913

INGLIS v. JAMES RICHARDSON & SONS LIMITED.

2. ACCESSION AND CONFUSION (§ I—1)—CONFUSION AND INTERMIXING OF GOODS IN BULK—SALVAGE SALE—CONVERSION.

Where a part of a quantity of grain stored in a grain elevator was sold to the plaintiff without severance or actual delivery of the part so sold, and where, after the sale and before severance or delivery, the greater part of the entire bulk was destroyed by fire, but a portion equal to the quantity so sold was merely damaged if injured at all, it appearing that an adjustment of the resulting insurance claims under a "blanket policy" between the seller and his insurers was made with a proviso for a salvage sale, the plaintiff is entitled to select his quantity out of the salvage, and if, at such salvage sale, his original seller buys-in the whole of such grain, both damaged and undamaged, he is liable in damages for conversion in a case where the subject-matter involved had been excluded from the protection of the "blanket policy."

[*Inglis* v. *Richardson*, 10 D.L.R. 158, reversed.]

Statement

APPEAL by the plaintiff from the dismissal of the action brought for the return of the price or for damages for conversion of a quantity of wheat in an elevator, *Inglis* v. *Richardson*, 10 D.L.R. 158.

The appeal was allowed and judgment entered for the plaintiff for damages to be assessed on a reference to a Local Master.

Argument

W. D. McPherson, K.C., for the appellant:—The contract called for delivery on the tracks, and until such delivery the title did not pass: *Craig* v. *Beardmore* (1904), 7 O.L.R. 674; *Halbutt* v. *Hickson* (1872), L.R. 7 C.P. 438, at p. 449; *Wilson* v. *Shaver*, 3 O.L.R. 110, at p. 114. If the title did pass, then the plaintiff was entitled to the grain salvaged in the elevator, and the defendants are liable for conversion in buying this grain from the insurance companies: *Page* v. *Cowasjee Eduljee* (1866), L.R. 1 P.C. 127, at pp. 145, 146.

J. J. Maclennan, for the defendants, the respondents:—The property had passed to the appellant before the fire. All the course of dealing shews that that was the intention of the parties; and intention is the test that determines the passing of property. And so the purchaser must bear the loss: *Martineau* v. *Kitching* (1872), L.R. 7 Q.B. 436; Benjamin on Sale, 5th ed., pp. 307, 320; *Russell* v. *Carrington* (1870), 42 N.Y. 118. "Track Owen Sound" means that the cars in which to receive the wheat were to be provided by the plaintiff: *Marshall* v. *Jamieson*, 42 U.C.R. 115.

McPherson, in reply.

Hodgins, J.A.

June 26. The judgment of the Court was delivered by HODGINS, J.A.:—The 3,000 bushels of grain in question were at the time of the fire in bin "B," with about 17,000 other bushels of the same kind, and of course no specific grain had been physically separated and appropriated to the appellant. What the appellant was entitled to get, when he chose to apply for it, was 3,000 bushels out of a larger quantity owned by the re-

spondents, and his receipt and retention of the orders on the Canadian Pacific Railway agent did not in any way prevent the respondents from selling the rest of the grain.

If the property in this 3,000 bushels had passed to the appellant, then, subject to the situation created by the subsequent salvage sale, he must bear the loss, whereas if it had not, the respondents are bound to perform their contract or pay damages.

The course of dealing shews that everything in the way of appropriation by intention had been done, short of a physical separation of specific bushels of grain. The quantity and price were settled, and the latter was paid in full. The respondents gave the appellant orders addressed to the agent of the Canadian Pacific Railway Company, in whose elevator the whole quantity of wheat was stored, directing him, on presentation, to deliver the wheat. One of these orders was acted upon, and 1,000 bushels delivered under it. The respondents, upon giving the orders, deducted 3,000 bushels from the account in their books, shewing what they had in store in the elevator. They also notified their insurers, the effect of this being that insurance on this 3,000 bushels was automatically cancelled, as they put it. They had allowed as a deduction from the purchase-price the charges which the elevator had against this exact quantity of wheat; and, by so doing, and by giving the order, they delegated to the Canadian Pacific Railway agent the duty of measuring out the 3,000 bushels and to the appellant the duty of paying the charges due the elevator. From the previous course of dealing, from the receipt of the 1,000 bushels, and from the evidence in the case, it is clear that both parties treated the duty of the respondents themselves as at an end, and that the subsequent acts necessary to place the grain in cars were to be done by the Canadian Pacific Railway agent, at the request of the appellant, but at the cost of the respondents. The allowance to the appellant of the elevator charges was, if assented to by him, equivalent to payment of this expense by the respondents (*Coleman* v. *McDermott* (1856), 1 E. & A. 445); and the words "track Owen Sound," if treated as imposing a duty to deliver on the track, would not prevent the property passing, if, under all the other circumstances, it would do so: *Bank of Montreal* v. *McWhirter* (1867), 17 C.P. 506; *Craig* v. *Beardmore*, 7 O.L.R. 674. Treated purely as a matter of intention, the property would pass, if, in what was done, there was any unconditional appropriation of specific grain, but not if it were conditional, as by a bill of lading in favour of the seller and not the buyer: *Graham* v. *Laird Co.* (1909), 20 O.L.R. 11. But there was not, nor could there be, any such appropriation of separated bushels of grain, in the sense in which these words are used when dealing with specific goods.

ONT.
S. C.
1913
INGLIS
v.
JAMES RICHARDSON & SONS LIMITED.
Hodgins, J.A.

While the appellant says, "It was not my grain till it was on the track," yet later he adds: "They knew perfectly well at the C.P.R. that I had grain bought from them. I suppose they got orders to ship any time I wanted them, and any time I telephoned in, they loaded me a car. They knew that I was buying grain all the time." "Q. Of course they necessarily would, because it was through them that the telegraphic order went? A. Yes. Q. You could take it out when you liked? A. I guess they could load it when they liked and could make me take it. I was not their master. I am their servant." One of the respondents, J. A. Richardson, says that they had no further control over the grain after the draft was paid, and that he considered that the respondents' responsibility was over when the order went into the possession of the buyer, and that they were never billed for that grain again. He also said that Simpson, who was in charge of the Canadian Pacific Railway elevator, and Seaman, his assistant, were supposed to send them daily reports of the clearances. There was a difference between the appellant and the respondents as to whether Seaman had anything to do with the last order for 2,000 bushels, but the appellant swears that he ordered it through Seaman. Upon the whole, it may, I think, be taken as proved that the agent of the Canadian Pacific Railway Company had always treated these orders when presented as requiring him to deliver the grain represented therein to the holder, and that, if the appellant had presented them promptly before the fire, they would have been honoured, and that the agent was aware of the various transactions, either through his intervention in placing the order, or by subsequent notice from the respondents. The appellant swears that Seaman was the Canadian Pacific Railway grain clerk, and that he was talking to the respondents every day about the grain, selling the grain and everything else for them. It was proved that the respondents were in the habit of paying Seaman a commission on sales of grain made through his intervention.

Intention is the test finally applied as determining the passing of the property, and there is authority for the position that, when everything has been done that, having regard to the situation of the parties and the position of the goods in question, could be done, on the one hand to part with the dominion over the goods and on the other to accept the right to demand the goods from a third party in lieu of actual present delivery, the intention to pass the property will be presumed.

Benjamin, in his 5th edition, p. 312, says: "Nothing prevents the parties from agreeing . . . that the property shall pass in a thing which remains in the seller's possession, and is not ready for delivery, as an unfinished ship . . . as a cargo of corn, in bulk, sold at a certain price per pound, or per bushel."

But an examination of such cases as *Swanwick* v. *Sothern* (1839), 9 A. & E. 895; *Greaves* v. *Hepke* (1818), 2 B. & Ald. 131; *Turley* v. *Bates* (1863), 2 H. & C. 200; *Young* v. *Matthews* (1866), L.R. 2 C.P. 127; *Whitehouse* v. *Frost* (1810), 12 East 614 (now no longer an authority); *Snell* v. *Heighton* (1883), 1 Cab. & Ell. 95; *Boswell* v. *Kilborn* (1862), 15 Moo. P.C. 309; *Seath* v. *Moore* (1886), 11 App. Cas. 350: leads one readily to accept the statement (Benjamin, p. 338) that it is impossible to deduce a consistent doctrine as to when the property passes, from the reported cases in England, on the sale of part of a larger bulk, which, he says, are in hopeless conflict.

In *Coffey* v. *Quebec Bank*, 20 C.P. 110, where the jury had found that there was an appropriation by reference to the two bins, Galt, J., says that without going very far the Court might assume that there was an equal amount in both bins, and upon that assumption holds that the property in the wheat had passed to the purchaser. Hagarty, C.J., says that there is nothing unreasonable in looking on the warehouseman as acting for and under the presumed authority of the vendee in arranging and preparing the goods for delivery, and adds that at all events such a course ought to be unexceptionable where neither he (the warehouseman) nor the vendor contests the vendee's right, and the objection is only advanced by a wrongdoer. Gwynne, J., puts it upon the acceptance of the order by the warehouseman, and the acquiescence of the purchaser in suffering it to remain for seven weeks in his custody.

In the case of *Coleman* v. *McDermott* (*ante*) this Court held that, as the order for the grain was not accepted by Hackett, in whose warehouse it lay, it was not binding on him, and that, therefore, it did not pass the property so as to put it beyond the control of the sellers. In that case it was decided that property in grain unappropriated did not pass, because something remained to be done by Hackett as the seller's agent. Here the last order given by the respondents was not presented by the appellant before the fire, though the earlier one had, no doubt, been handed in, as it was partly filled. In *Bank of Montreal* v. *McWhirter* (*ante*) and in *Wilson* v. *Shaver*, 3 O.L.R. 110, cited in the judgment, the contract was for specific goods.

In *Ross* v. *Hurteau* (1890), 18 S.C.R. 713, the property in 1,500,000 ft. of lumber, part of 4,000,000 ft. not separated, and kept insured by the vendor, was held not to pass.

In *Box* v. *Provincial Insurance Co.*, 18 Gr. 280, the Court held that "the property was not absolutely vested in them (the purchasers) because the wheat bought was mixed with a larger quantity" (judgment of Draper, C.J., p. 289); but that the purchaser's right, derivable out of the contract, was an insurable interest. The quotation in the judgment of Sutherland, J., in this case, is from the dissenting judgment of Spragge, C.

ONT.

S. C.
1913

INGLIS
v.
JAMES
RICHARDSON
& SONS
LIMITED.

Hodgins, J.A.

It would, therefore, seem that the Courts here have not advanced beyond the point of holding that an accepted order or the proved assent of the warehouseman will be a sufficient appropriation to allow the property to pass.

This accords with the judgment of Chapman, J., in *Cushing* v. *Breed* (1867), 96 Mass. 376, which, however, suggests that after the sale, and assent of the warehouseman, the vendor and purchaser become tenants in common of their respective quantities. He says: "The use of elevators for the storage of grain has introduced some new methods of dealing, but the rights of parties who adopt these methods must be determined by the principles of the common law. The proprietors of the elevator are the agents of the various parties for whom they act. When several parties have stored various parcels of grain in the elevator, and it is put into one mass, according to a usage to which they must be deemed to have assented, they are tenants in common of the grain. Each is entitled to such a proportion as the quantity placed there by him bears to the whole mass. When one of them sells a certain number of bushels, it is a sale of property owned by him in common. It is not necessary to take it away in order to complete the purchase. If the vendor gives an order on the agents to deliver it to the vendee, and the agents accept the order, and agree with the vendee to store the property for him, and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee. The vendor has nothing more to do to complete the sale, nor has he any further dominion over the property. The agent holds it as the property of the vendee, owned by him in common with the other grain in the elevator. It is elementary law that a tenant in common of personal property in the hands of an agent may sell the whole or any part of his interest in the property, by the method above stated, or by any other method equivalent to it. Actual separation and taking away are not necessary to complete the sale. As to the property sold, the agent acts for a new principal, and holds his property for him. The law is the same, whether the proprietors are numerous or the vendor and vendee are owners of the whole. If the vendee resells the whole or a part of what he has purchased, his vendee may, by the same course of dealing, become also a tenant in common as to the part which he has bought."

This would not be altogether an innovation. For in *Coffey* v. *Quebec Bank* (*ante*), Mr. Justice Gwynne thinks that the judgment in that case might be supported upon a like principle, namely, that the necessities of the trade might justify the Court in holding, for the protection of *bonâ fide* purchasers of grain stored in a public warehouse, and not perhaps conveniently capable of separation until finally removed from the warehouse,

that, when the vendor of a part who is paid in full, or the vendee in possession of a receipt with a delivery order endorsed thereon, communicates the particulars of the sale and purchase to the warehouseman, he *eo instanti* becomes the bailee for the purchaser of an undivided part of all the property of a like description and quality of the vendor then in the same warehouse.

In appeal, *S.C.* (1870), 20 C.P. 555, Draper, C.J., referred with regret to the absence of evidence as to the common course of dealing in similar transactions, which might, he thought, have been clearly proved, and speaks of the endorsement of the owner's receipt, and the proper notification to the warehouseman and his assent, as being sufficient to transfer the right and interest of the vendor in the specified quantity of grain without severance; and, on the facts of that case, he held that the jury might and ought to have presumed that the vendor and the purchasers were tenants in common of the whole quantity in their respective proportions.

On the facts of this case it is not a long distance to go, to find that the warehouseman assented to hold the 3,000 bushels for the appellant. One of the orders was presented and acted upon; and, while the subsequent order was not formally communicated, the evidence leads to the conclusion that either Simpson, the man in charge of the elevator, or Seaman, his clerk, were in constant communication with the respondents and aware through them of the various sales and the amounts thereof, as well as of the names of the purchasers.

In this case it also appears that the parties intended the price to be paid before the grain was delivered, or put in a deliverable state, or appropriated, and this in itself affords a strong argument in favour of an intention by the parties that the property was to pass before the goods were in a deliverable state or appropriated.

It is further quite reasonable to conclude that, when the appellant paid for the goods, it was to his benefit that the property should pass; for, if the respondents had become insolvent, the appellant would, if the property had passed, have the goods as the security for his money. The respondents, so far as they could, parted with the dominion over the goods, deducted the 3,000 bushels from their account with the elevator, and allowed the appellant the elevator charges for delivery on the track. The appellant, in pursuance of a well-known course of dealing, acted upon one order and left the rest of the wheat in the elevator, and, in the case where he presented the order, actively assented to the performance by the elevator man of the duty of delivery on the track. The appellant says that he ordered the cars up. The respondents state that they were not billed for this grain by the elevator man after the sale, which is important

ONT.
S. C.
1913
INGLIS
v.
JAMES
RICHARDSON
& SONS
LIMITED.
Hodgins, J.A.

in view of the decision in *Jenner* v. *Smith* (1869), L.R. 4 C.P. 270.

I think, therefore, that it is reasonable to hold that, under all the circumstances, the property had passed to the appellant before the fire.

But another view of the case makes the question of the passing of the property less important. Whatever the intention of the parties was, there can be no doubt of this, that the respondents intended to divest themselves of all dominion over the wheat, leaving it for the appellant to demand it from the elevator when he wanted it. It was obviously convenient to deal with the wheat in this way, so that, when the appellant resold it, he could ship it direct to his purchaser. The respondents had marked it out of their books and had ceased to insure it. If then it should be held that the risk was in the respondents because the property had not passed, it would subject them to a liability, the duration and extent of which could only be determined by the length of time which the appellant took before he required delivery, and by the fluctuation of price during that period.

In *Martineau* v. *Kitching*, L.R. 7 Q.B. 436, it was held by three of the Judges that, whether the property has passed or not, yet as, by the terms of the contract of sale, it was provided that the risk, after the lapse of two months, was to be in the buyer, the latter must bear the loss by fire, which occurred after the two months had elapsed.

In that case Mr. Justice Blackburn points out that the property and risk "are not inseparable. It may be very well that the property shall be in the one and the risk in the other." He expresses the opinion, though not necessary for the decision of the case, in view of the express stipulation of the contract, that when the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass, even if there were no express stipulation about risk, yet because the non-completion of the bargain and sale which would absolutely transfer the property was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed.

In *Pew* v. *Lawrence* (1877), 27 C.P. 402, Hagarty, C.J., quotes the law as stated in Benjamin on Sale, 2nd ed., p. 583, thus: "Even where the property has not passed, and the price is to become payable only on delivery, yet if the buyer has assented to assume the risk of delivery, he must pay the price if the goods are destroyed before delivery."

All the number one northern wheat was in bin "B," and it was not, as stated by the learned trial Judge, destroyed, but only damaged. After the fire, the appellant demanded his

wheat. He was met with a refusal both by the Canadian Pacific Railway agent and by the respondents, the latter alleging that they had bought it at the sale of the salvage by the insurance companies. That sale vested no title to the appellant's wheat in the respondents. The appraisal of the loss had gone forward as if respondents alone were interested in all the wheat. On this assumption, afterwards discovered to be erroneous, the evidence is clear that the appellant did not assent to the proceedings to adjust the loss, was not notified, and was not a party to the sale. He is not in any way bound by its result. The insurers could not sell nor could the respondents buy the appellant's wheat.

In the view I take, the appellant's wheat, though damaged, was his own. He had paid for it, and was entitled to receive it, and the respondents were wrong in refusing to let him have it. Their mistake in law forms no justification for their conversion of it. They learned during the adjustment of the insurance loss that the appellant's grain was included; but, as they had a large amount involved, they went ahead and guaranteed the trustee who distributed the salvage.

The appellant swears that after the fire he tested the bin in which this wheat was, and that there was sufficient there undamaged, of which he produced a sample, to allow him to receive the 3,000 bushels he had bought. The respondents claim that it was all damaged partly by fire and partly by smoke. But at the trial the latter refused to disclose the price at which they had sold the salvage, which included this bin, although the trial Judge pointed out that it was material. If they had done so, there might have been sufficient evidence to have enabled this Court to assess the damages, or at all events to have offered the appellant the choice between accepting that price or proving his damages on a reference.

I think that the judgment must be reversed, and that judgment should be entered for the plaintiff directing the respondents to pay him such damages as are found by the Local Master at Owen Sound, to whom a reference must be had.

The respondents should pay the costs of the trial and of this appeal, and of the reference.

Appeal allowed.

N. B.

S. C.
1913

BOUCHER, defendant, appellant v. BELLE-ISLE, plaintiff, respondent.

New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White and McKeown, JJ. September 8, 1913.

1. MECHANICS' LIENS (§ VIII—66a)—ENFORCEMENT—TIME OF FILING LIEN OR GIVING NOTICE—CERTIFICATE OF COURT, EFFECT.

The certificate which may be granted by the judge under the saving provisions of sec. 41, read with secs. 22, 38, 39 and 40 of the Mechanics' Lien Act, C.S.N.B. 1903, ch. 147, is the commencement of the lien proceedings against an owner.

2. MECHANICS' LIENS (§ VIII—73)—ENFORCEMENT—STATUTORY DIRECTIONS AS TO TRIAL—DISTINCT HEARING ON EXISTENCE OF LIEN.

In a mechanics' lien proceeding, where, under sec. 45 of the Mechanics' Lien Act, C.S.N.B. 1903, ch. 147, a notice disputing the plaintiff's lien is filed, the existence of the lien must, as a distinct preliminary proceeding under secs. 45 and 46, be first and separately determined by the court.

3. APPEAL (§ VII K 3—457)—HEARING AND DETERMINATION—ERRORS WAIVED OR CURED BELOW—AS TO EVIDENCE—EXCLUSION.

A defendant in a mechanics' lien proceeding under the Mechanics' Lien Act, C.S.N.B. 1903, ch. 147, who files the dispute notice which imposes on the court the duty of determining, as a distinct preliminary proceeding, the question raised by the notice, is not estopped by waiver from reviewing on appeal the error of the court in assuming to determine such question without duly taking the evidence therein, even though the defendant may not have urged the necessity of due proof nor otherwise interposed any objection to the omission at the trial.

4. MECHANICS' LIENS (§ VIII—66a)—ENFORCEMENT—EXISTENCE OF LIEN—ACTION BROUGHT TOO LATE.

Where the question is whether an alleged lien under the Mechanics' Lien Act, C.S.N.B. 1903, ch. 147, is in existence, an order made by the trial judge assuming to determine such question without taking the evidence thereon, will on appeal be vacated, if it appears that the lien was not prosecuted within the statutory period as prescribed by sec. 22 of the Act.

Statement

APPEAL from the judgment of a County Court in a mechanics' lien action.

The appeal was allowed.

W. A. Trueman, for the defendant, appellant.

A. T. LeBlanc, for plaintiff, respondent.

McLeod, J.

The judgment of the Court was delivered by MCLEOD, J.:—This is a matter arising under the Mechanics' Lien Act, C.S.N.B. 1903, ch. 147.

In October, 1911, the plaintiff and defendant entered into a written contract whereby the plaintiff was to build a house in the town of Campbellton for the defendant. Nothing turns on the construction of the contract.

The plaintiff was to build a house on a foundation prepared by the defendant. The house was to be 30 feet by 22 feet and 20 feet high and built of concrete, for the sum of $900, and he was to put on a cottage roof and finish the interior for $1,755.75. The plaintiff commenced work in November, 1911, and continued during the winter and until about the middle of March,

N. B.
S. C.
1913
BOUCHER v. BELLE-ISLE.
McLeod, J.

1912. The defendant paid on account as the work was being done $2,065.15. In February or March disputes arose between the parties as to the way the work was being done. The defendant complained that the lumber used in finishing the house inside was not good and he also complained of the concrete work. After some dispute the plaintiff left the work, claiming that the defendant had taken the work off his hands, and refused to let him complete it. The defendant denied this and claimed that the plaintiff had voluntarily left the work unfinished. The amount of concrete price unpaid was a little over $500. On August 18, 1912, the plaintiff registered a lien under the Mechanics' Lien Act on the house and lands of the defendant and on July 16, 1912, he filed his statement of claim duly verified by affidavit and obtained from the Judge of the County Court of Restigouche a certificate of time and place to take the account. In and by the certificate the Judge appointed Wednesday, July 31, at 10 o'clock in the forenoon, as the time to determine whether the plaintiff was entitled to a lien, in case his right thereto was disputed, and he appointed 2 o'clock in the afternoon as the time, in case his right to a lien was not disputed, or if disputed his right was established, to proceed and take all necessary accounts and tax the costs.

The defendant filed an answer disputing the plaintiff's right to a lien on the following grounds:—

(*a*) That a lien has not been prosecuted in due time as required by the statute.

(*b*) That there was nothing due the plaintiff.

(*c*) That the plaintiff's lien had been vacated and discharged.

(*d*) Shortly stated, that the plaintiff had abandoned the work and had not completed his contract.

(*e*) Practically to the same effect, that is, that the plaintiff did not complete the contract and the defendant was obliged to complete it and there is nothing due the plaintiff.

As the Judge of the County Court appears not to have complied with the provisions of the Act in this case, I will state shortly what it is necessary to do in order to establish a lien.

The lien must be registered with the registrar of the county within 30 days after the completion of the work or supplying and procuring of the machinery.

By sec. 22 of the Act,

every lien which has been duly registered under the provisions of this chapter shall absolutely cease to exist after the expiration of 90 days after the work has been completed or materials or machinery furnished or wages earned, or the expiry of the period of credit where such period is mentioned in the claim of lien filed, unless in the meantime proceedings are instituted and are being prosecuted without delay to realize the claim under the provisions of this chapter and a certificate of such proceedings which may be granted by the Judge is duly registered.

N. B.

S. C.
1913

BOUCHER
v.
BELLE-ISLE.

McLeod, J.

Sec. 38 of the Act is as follows:—

Any person claiming a lien under this chapter may enforce the same by means of the proceedings hereinafter set forth.

Sec. 39:—

No writ of summons shall be necessary but the claimant may file a statement of claim with the Judge.

Sec. 40 provides that

such statement of claim shall be verified by affidavit and upon the filing of such statement of claim and affidavit the Judge shall issue a certificate in duplicate.

Sec. 41 is as follows:—

Upon the registration of such certificate in the office of the Registrar the action shall be deemed to have been commenced as against the owner and all other parties against whom the lien is claimed.

The certificate issued by the Judge on July 16, 1912, is the certificate required under this section and is the commencement of the proceedings against the owner.

Sec. 45 of the Act is as follows:—

In case a notice disputing the plaintiff's lien is filed the Judge shall, before taking any further proceedings, determine the question raised by the notice, and, if so required by any of the parties, may thereupon issue a certificate of his finding.

Sec. 46 provides that if the Judge is not required to issue a certificate he may enter on his book a note of his findings. When, however, the defendant disputes the plaintiff's lien the onus is on the plaintiff to shew that he has a lien then in existence, and that question must first be tried by the Judge. The plaintiff should then prove all that is necessary to shew that the lien is in existence, and if the Judge, after hearing what evidence may be given for the plaintiff and defendant, finds that the lien is in existence and has been duly prosecuted, he, at the subsequent hearing, takes from the owner an account of what is due; if, however, he finds that the lien is not in existence, the claim is dismissed. In the present case it appears from the returns before this Court that this course was not pursued. I copy from the reports all that appears to have taken place.

Notice of appointment July 16, 1912, and returnable July 31, at 11 a.m. at Chambers of the Judge at Campbellton. A. T. LeBlanc, Esq., appears for plaintiff, W. A. Trueman appears for defendant. Objection A overruled. The case not ripe to be heard on merits, that is prove accounts. Adjourn till 2 p.m.

Neither of the counsel asks for a certificate of the Judge's finding, and at 2 o'clock in the afternoon the Judge proceeded to take the account, the same counsel appearing, and no objection was taken. Assuming that the entry "Objection A over-

ruled" means that the Judge determined that the lien had been prosecuted in due time as required by the statute and that it was then in existence, he so determined without any evidence whatever and this he should not have done. The plaintiff should have been called upon to prove the existence of the lien he claimed and that it had been prosecuted in due time, or he might have shewn that for good cause the time for prosecuting the lien had been extended under sec. 72 of the Act. The only question that can arise in this case is whether the defendant by making no objection to the proceedings taken waived the necessity of proof that the lien existed. On consideration I think that he did not. It was clearly the duty of the plaintiff to prove his whole case, and part of that case was that the lien had been properly prosecuted and was then in existence. Therefore, I think the order of the County Court Judge cannot stand, and as it appears by the return before this Court that the lien was not prosecuted in due time, that is, within ninety days from the time the last work was done on the building, it would seem that the plaintiff had lost his lien, if any existed. The last work done on the building appears to have been about March 15. Although the lien was filed on April 18, it does not appear to have been prosecuted until July 16, which is more than ninety days after the time the last work was done on the building.

This, in my opinion, disposes of the case and therefore I do not discuss the other objections that were raised. I think the appeal must be allowed and the finding of the Judge of the County Court set aside with costs.

Appeal allowed.

SIEMENS v. DIRKS.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 21, 1913.

1. RECORDS AND REGISTRY LAWS (§III B—15)—REQUISITES AND SUFFICIENCY OF RECORD—DEPOSIT OF MORTGAGE WITH REGISTRAR—STATUTORY REQUIREMENTS OF REGISTRATION—PRIORITIES.

The mere deposit of a mortgage with the registrar of titles, although he did not endorse thereon a certificate as to the day and hour of registration as required by sec. 50 of the Manitoba Registry Act, R.S.M. ch. 150, amounts, under sec. 49 of the Act, to a registration of the instrument so as to give it priority over a subsequently executed deed conveying the encumbered land to a purchaser for value, who did not have notice of the existence of the mortgage, although a certificate of registration in compliance with the Act was endorsed on the deed prior to the endorsement of a similar certificate on the mortgage.

[*Siemens* v. *Dirks*, 1 D.L.R. 757, reversed.]

Statement

APPEAL by the plaintiff from the judgment of Macdonald, J., *Siemens* v. *Dirks*, 1 D.L.R. 757, dismissimg an action for the foreclosure of a mortgage.

The appeal was allowed.

MAN.

C. A.

1913

SIEMENS v. DIRKS.

Richards, J.A.

A. E. Hoskins, K.C., for defendant, Long.
E. K. Williams, for plaintiff.

RICHARDS, J. A. :—On April 5, 1905, the defendant Dirks mortgaged certain lands, the title to which is under the old system, to Peter Siemens, whose executrix the present plaintiff is.

On April 26, 1906, Siemens, the mortgagee, took that mortgage to the proper registry office, being that for the registration division of Manchester, and delivered it, apparently, to the registrar or his deputy.

On May 7, 1906, the deputy registrar put upon the mortgage the certificate of registration required by sec. 50 of the Registry Act, stating therein that the mortgage had been

> duly entered and registered in the registry office in and for the registration division of Manchester at 10.04 o'clock a.m. on the April 26, 1906, as No. 26084.

On January 20, 1906, Dirks executed a deed of grant of the same lands to the defendant, Long.

On May 1, 1906, Long delivered this deed to the registrar for registration, and on said 1st May, there was placed on the deed the certificate of registration required by sec. 50, stating that the deed had been duly entered and registered in the registry office "at 10 o'clock a.m. on May 1, A.D. 1906, as No. 26063.

This action was brought to foreclose the mortgage. The defendant Long claimed priority of registration for his deed over the mortgage, and set up that he was a purchaser for value and without notice. No attempt was made to impeach Long's claim that he had bought for value and without notice.

The issue, therefore, narrows down to one question, whether the mortgage was registered on April 26, or was not registered until May 7, when the certificate was put on under sec. 50.

The learned trial Judge held that the putting on of the certificate by the registrar, under sec. 50, was an essential part of the registration, and that, as that did not take place, as to the mortgage, until after the registrar had indorsed the certificate on the deed, the deed had priority. This question of what constitutes registration has been discussed in a number of cases at different times, but I see no reason for referring to them in dealing with the present case.

A great object of the Registry Act is to enable persons, *bonâ fide* holding instruments affecting land under the old system, to protect themselves by their own diligence; and an interpretation of the Act, which would cause a party, who has done all he can to so protect himself, to nevertheless lose his priority through negligence, or carelessness, on the part of the registrar, should not, I think, be put upon the Act, unless it appears certain that such was the intention of the Legislature.

Sec. 27 of the Act, after referring to the manner of registering certain instruments, not including either a mortgage or a deed of grant, uses this language:—

> And all other instruments excepting wills shall be registered by the deposit of the original instrument or by the deposit of a duplicate or other original part thereof with all the necessary affidavits.

It has been argued that the above is affected by the heading under which sec. 27 appears, which heading reads: "Evidence and requisites for registration." I cannot see how any part of the language quoted above, except the final words "with all the necessary affidavits," can be held to refer to *evidence* for registration. It does comply with the word "requisites" in so far as directing that the instrument shall be registered by the deposit of the original, or of a duplicate, or other original part.

Sec. 49 of the Act, in so far as applicable to the present case, says that instruments

> shall be registered by the production to the registrar of the original instrument when but one is executed, or, when such instrument is in two or more original parts, by the production of one such part.

The heading under which secs. 49 to 56 appear is "Registration—duties and entries of registrar." Sec. 49 expressly purports to say what shall constitute "registration," and, in so doing, adds, to the words above quoted, nothing applicable to the case of a mortgage. The sections that immediately follow 49 refer to "duties and entries." None of them purport to add anything to the requisites of registration stated in sec. 49 unless sec. 50 does, which I shall presently consider. I take it that "deposit" in sec. 27 and "production" in sec. 49 mean the same thing.

In the present case it is apparent, from the fact that the certificate was afterwards put on without any further action by Siemens than producing the mortgage to, or depositing it with, the registrar on April 26, that he so produced, or deposited, it for the purpose of having it registered, and that the registrar, at the time of Siemens so producing or depositing it, received it for the purpose of registration.

Dealing with this case, it is only necessary to consider that condition of affairs, and I express no opinion as to what would be the position if the mortgage had been produced to, but not received by, the registrar. I further express no opinion as to the effect of non-payment of fees by the party producing, or depositing an instrument. In this case the money to pay the fees was already in the hands of the registrar.

The difficulty arises under sec. 50, which provides for the registrar, upon production of the instrument, indorsing the certificate provided by the Act, and mentioning therein the year, month, day, hour and minute *in which such instrument is registered*, and the number of registration, followed by the words

MAN.

C. A.
1913

SIEMENS
v.
DIRKS

Richards, J.A.

and when such certificate is so indorsed and signed by the registrar on the original or any duplicate original, . . . the instrument or document bearing such certificate shall be deemed to be registered as of the time mentioned in such certificate; which certificate shall be taken and allowed in all Courts as *primâ facie* evidence of the registration.

It will be noticed that there is a provision that, when the certificate is endorsed, the instrument shall be deemed to be registered as of the time mentioned in it (the certificate), and that there is a separate provision that the certificate shall be, in all courts, *primâ facie* evidence of the registration. It is argued that, because of these separate provisions, we should not treat them as both referring to evidence, but should consider the first one as stating a requisite of registration, and the second as making the certificate evidence. It is contended that, otherwise, these consecutive clauses would simply mean the same thing, and the second would be a useless repetition of the first.

On the other hand, there is to be considered the policy of the Act, to enable people to protect themselves by their own diligence, and the express provisions, quoted above, of secs. 27 and 49. These distinctly state that instruments, such as are in question here, shall be registered by the deposit of the instrument, or by the production to the registrar of the instrument, which I think mean the same thing. They do not refer to any other action as requisite to, or forming part of, the registration.

Sec. 50 does not say that the registrar is to state in the certificate the date of his putting the certificate on the instrument, but that he is to state in it the date of "registration" which would imply that, at the time of the putting on of the certificate, registration had previously taken place. The words "shall be *deemed* to be registered as of the time mentioned in such certificate" would, even without secs. 27 and 49, be reasonably open to the interpretation of merely making the certificate a matter of evidence. They say that "it shall be deemed to be registered *as of the time mentioned in such certificate*." They do not say "as of the time of the putting on of such certificate."

If I am right in the above, then the words "which certificate shall be taken and allowed in all Courts as *primâ facie* evidence of the registration," do create, in effect, a repetition of part of what is provided for by the previous clause. But, in view of the recognized policy of the law, that protection is to be got by diligence, and of the provisions of secs. 27 and 49, I do not see how we can, because of a contrary construction creating a repetition, put upon sec. 50 the interpretation given by the learned trial Judge.

It seems to me that, in spite of sec. 50, the law, as to what constitutes registration, has not changed, in so far as it is applicable to this case, since the decision in *Harris* v. *Rankin*, 4 Man. L.R. 115.

When that case was decided the only provision of the Registry Act, as to the effect of putting on the certificate of registration, was in the then sec. 32, which, after providing (in words which, for present purposes, may be said to be similar, in effect, to those used in the present sec. 50) for its being put on the instrument, and what it should state, used the further words: "which certificate shall be taken and allowed as evidence of such respective registrations in all Courts."

It will be noticed that sec. 32 only made the certificate evidence of the fact that the instrument had been registered. The changes and additions made in, and to, the above quoted words by the present sec. 50, were only, it seems to me, intended—so far as registration is concerned—to make the certificate evidence of the time of registration as well as of the fact of registration.

With the utmost deference, I would allow the appeal with costs, and declare that the plaintiff's mortgage has priority over the deed to the defendant Long, and direct the taking of the usual foreclosure proceedings.

If the defendant Long desires to redeem the mortgage he shall, in addition to the mortgage money, pay the costs of the action and of this appeal. In case he does not redeem he shall pay the above costs less the costs that would have been incurred if he had not defended.

Haggart, J.A.

HAGGART, J.A. :—I agree that the appeal should be allowed. The mortgagee had done everything required by the statute. He produced the instrument and the registrar had money in his hands for the fees. The statute, sec. 49, ch. 150, R.S.M. says:—

> All instruments that may be registered under this Act shall be registered by the production to the registrar of the original instrument.

This is in no way modified or qualified by following sec. 50, which directs the indorsement of the certificate and enacts that

> When such certificate is so indorsed and signed by the registrar . . . the instrument or document bearing such certificate shall be deemed to be registered as of the time mentioned in such certificate.

I cannot read the statute that the indorsement of the certificate was necessary to constitute registration. Any other interpretation would leave the property rights of registered owners liable to be defeated by a dishonest or incompetent official, which was not the object or intention of the Legislature.

The mortgage was registered prior to the deed to the defendant Long.

Howell, C.J.M.
Perdue, J.A.
Cameron, J.A.

HOWELL, C.J.M., PERDUE, and CAMERON, JJ.A., concurred.

Appeal allowed.

ALTA.

S. C.
1913

FRIEDMAN v. MAYER.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Walsh, JJ. October 11, 1913.

1. SPECIFIC PERFORMANCE (§ I E—30)—WRITTEN CONTRACT OF SALE—ADJUSTMENT OF REBATE CLAIM—SMALLER SUM ACCEPTED IN LIEU OF LARGER.

Where the first deferred payment on a sale of lands was settled between the parties by the acceptance of a promissory note for a lesser sum in satisfaction thereof as an adjustment of the purchaser's claim for a rebate founded upon equitable grounds, the purchaser may obtain specific performance of the written contract as varied by the adjustment so made.

Statement

APPEAL from the judgment of Simmons, J., at the trial without a jury.

The appeal was dismissed.

H. H. Parlee, K.C., for the plaintiff, respondent.

C. C. McCaul, K.C., for the defendant, appellant.

Harvey, C.J.
Scott, J.

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

Beck, J.

BECK, J.:—The statement of claim alleges, in effect, that Friedman, the plaintiff, employed the defendant Mayer as his agent, to purchase the land in question; and $400 being stated by Mayer to be the down payment required, Friedman paid that sum to Mayer; that then Mayer presented Friedman a form of agreement dated November 10, 1911, for the sale and purchase of the land in which Mayer was named as vendor and Friedman as purchaser, explaining to Friedman, that for convenience, he was paying the owner $1,800, the full purchase price mentioned in the form of agreement, and was thus becoming Friedman's vendor on the terms of payment therein stated; that Friedman consequently signed the form of agreement; that the truth was that Mayer and his co-defendant Gurevitch had conspired together to defraud Friedman, Gurevitch buying for and on behalf of Mayer from the owner for $1,500 and Gurevitch assigning the agreement to Mayer, Mayer thus defrauding Friedman of $300; that Friedman entered into possession by receiving the rents for the months of November and December, 1911; that Mayer repudiated the agreement and collected the rents for January, 1912. The form of agreement stated the terms of payment to be $400 cash down; $400 on January 28, 1912; the balance in further deferred instalments; the unpaid purchase money bearing interest at 8 per cent. per annum.

The plaintiff claimed a declaration that the agreement of November 10, 1911, was valid and binding, but that he was entitled to deduct the $300 from the stated purchase price, and specific performance.

Gurevitch did not defend the action.

The statement of defence of Mayer, besides denials of a

number of the allegations of the statement of claim and a rescission of the agreement, set up by way of estoppel, that the plaintiff and the defendant Mayer entered into an agreement in writing, dated November 20, 1911, whereby all matters in dispute between them were referred to the award of certain persons who made an award,

whereby they decided and awarded that the plaintiff purchase the lands in question in this action from the defendant for the sum of $1,725—payable in accordance with the agreement drawn up between them on November 10, 1911.

The learned trial Judge directed that the plaintiff have specific performance of the contract of November 10, 1911, with the variation agreed upon by virtue of the award, that is, that the purchase price be reduced from $1,800 to $1,725; the plaintiff to be entitled to the rents from the date of the agreement and to have his costs.

There was no reply to the defence of estoppel, and no amendment was asked or made by the plaintiff of his statement of claim.

Mr. McCaul, K.C., for the defendant Mayer, urged that, in strictness, the defendant was entitled to a dismissal of the action, on the ground that the defence of the award being, as he submitted, established as a fact, the plaintiff could not succeed upon his statement of claim based solely upon the agreement for sale, and that an amendment should not be allowed or be treated as having been made because the trial was so conducted that it does not appear that all the evidence was brought out which would have been brought out if the pleadings had been drawn so as to state a case justifying the judgment. It seems to me, however, quite clear that all the material facts were brought out during the course of the evidence. I have a good deal of doubt whether the award is not invalid, perhaps, on its face, in view of the questions which were, in truth, in dispute between the parties.

The award is in these words:—

Edmonton, Alta., Nov. 24, 1911.

We, the undersigned arbitrators in the arbitration between H. Mayers and Mr. S. Friedman, have decided that Mr. S. Friedman purchase the said property on Griesbach street from Mr. H. Mayers, for the sum of $1,725, seventeen hundred and twenty-five dollars, payable in accordance with agreement drawn up between them on November 10, 1911. Said Mr. Mayers to produce receipts on mortgage on said property amounting to not less $250, two hundred and fifty dollars, by Tuesday evening Nov. 28, 1911, providing Mr. Bolster is in the city. Should said Mr. Mayers not fulfil this agreement, sale is void.

(Sgd.) A. H. GOLDBURG.
(Sgd.) J. S. BERGMAN.

Referee,
A. CRISTALL.

ALTA.

S. C.
1913

FRIEDMAN
v.
MAYER.

Beck, J.

I think, however, it is not necessary to consider the validity of the award because I think we must accept all findings of fact of the trial Judge in view of the contradictory character of the evidence and the conduct of each of them in connection with the transactions between them. The learned Judge has found that, in acquiring the land Mayer acted as agent for the plaintiff and consequently as a matter of law the plaintiff had the right either to repudiate the agreement and demand back from Mayer his down payment of $400; or, to accept the benefit of the agreement with an abatement of $300 from the purchase price. The learned Judge also found that, both parties accepting the decision or opinion, or suggestion of the arbitrators, agreed, in effect, that the agreement of November 10, 1911, should be taken to be binding upon both parties with a reduction of $75, and that this agreement was in fact carried out. The evidence in this regard is briefly this:—

There is in evidence a note for $325, made by the plaintiff in favour of the defendant Mayer, payable January 25, 1912, with interest. This note was originally dated January 6, 1912, but this date was changed, as more fully explained further on, to November 10, 1911, so as to bear interest from that date. This note was drawn by Mr. McCaffrey, an employee in the office of Mr. Canniff, then solicitor for the plaintiff. It was drawn for the purpose of being given to Mayer in settlement of the first deferred payment under the agreement, that is $400, less deduction of $75 indicated by the award. The plaintiff and the defendant Mayer had seen Mr. McCaffrey together a few days before the 6th January and had discussed a settlement of their dispute. Another action in respect of the same matter by Friedman against Mayer had been commenced and was then pending. The only thing which appears to have prevented a perfected settlement at this time was the question of the small amount of the costs of this former action. This note was left with Mr. McCaffrey. Mayer subsequently called on Mr. McCaffrey. He saw the note and objected to the date, January 6. Mr. McCaffrey called the plaintiff by telephone, and was authorized by him to change the date to November 10, and Mr. McCaffrey then and there made the alteration. He immediately gave it to Mayer who took it away. Some ten days later Mayer sent the note back to Mr. McCaffrey's office without, apparently, any explanation. At the maturity of the note, a cheque for the amount of the note and interest was offered to Mayer but he refused to accept it. The natural inference to be drawn from the giving of the note for $325 by Friedman to Mayer, and Mayer taking it and keeping it for some ten days, would, no doubt, be that both parties had accepted the arbitrators' award and that there was a perfected settlement between them, ex-

cept that so far as I have stated the evidence, the question of the costs of the former action was not disposed of.

This question seems, however, to have been settled or at all events to have ceased to be a matter in dispute, for it appears that Mayer's solicitor, on receiving a notice of discontinuance of the former action, on January 17, 1912, sent his bill of costs to Friedman's solicitor, who, in a letter in reply on January 24, 1912, merely discussed the reasonableness of the items.

There was therefore it seems to me a new agreement whereby both parties recognized the original agreement, with the sole modification that $325 was to be accepted in satisfaction of the $400, the first deferred payment. This new agreement was actually carried out and executed by the giving of the $325 and it was effective and binding, notwithstanding the objection that it amounted to the payment by a smaller sum of a larger by reason of the provision of the Judicature Ordinance, Con. Ordinances N.W.T. 1898, ch. 21, sec. 10, sub-sec. 7, which says:—

> Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation;

and I think it was effective and binding quite apart from this provision.

Viewed in this way, I see no difficulty by reason of the Statute of Frauds. The agreement sued on, instantly the first deferred payment of $400 was paid, as I hold it was, by Mayer's acceptance of the $325 note—which could not be returned by him without Friedman's acceptance of it so as to effect the contractual rights of the parties—contained accurately all the terms of the real agreement; proof of payment of the down payment and the first deferred payment surely being admissible in spite of the statute and as doing so was at the time assented to and recognized by both parties.

Reuss v. *Picksley*, L.R. 1 Ex. 342, makes it clear that the subsequent oral recognition of a memorandum previously signed, as containing all the terms of the contract is a sufficient compliance with the statute.

In this view, the aspect the plaintiff puts upon the case was, it seems to me, right, but, at all events, believing as I have said that all the material facts have been brought out in evidence, I think the judgment of the learned trial Judge should stand. I would dismiss the appeal with costs.

WALSH, J., concurred. Walsh, J.

Appeal dismissed.

MAN.

K. B.
1913

HILL v. STAIT.

Manitoba King's Bench, Galt, J. October 10, 1913.

1. LIENS (§ I—3*a*)—FOR LABOUR—MANITOBA THRESHERS' LIEN ACT—LIBERAL CONSTRUCTION OF.

The Manitoba Threshers' Lien Act, R.S.M. 1902, ch. 167, being remedial in its nature, will be liberally construed.

2. STATUTES (§ II B—117)—CONSTRUCTION—STRICT OR LIBERAL—THRESHERS' LIEN ACT.

A remedial statute giving threshers a lien for their services on grain threshed (R.S.M. 1902, ch. 167) is to be liberally construed.

3. LIENS (§ I—3*a*)—FOR LABOUR—THRESHERS' LIEN—SUFFICIENCY OF AGREEMENT AS TO RATE OF COMPENSATION.

A stipulation that grain will be threshed at the same rate as is charged by another person is a sufficient agreement that it shall be done "at or for a fixed price or rate of remuneration" so as to satisfy such requirement of the Threshers' Lien Act, R.S.M. 1902, ch. 167.

[*Delbridge* v. *Pickersgill*, (Sask.) 3 D.L.R. 786, considered.]

4. LIENS (§ I—3*a*)—FOR LABOUR—THRESHERS' LIEN—RIGHT TO BREAK OPEN BUILDING TO OBTAIN POSSESSION.

Under the Threshers' Lien Act, R.S.M. 1902, ch. 167, which creates an active and not a passive lien, a locked granary may be broken open in order to take possession of grain for the purpose of acquiring a lien thereon.

[*Prinneveau* v. *Morden*, 11 D.L.R. 272, considered; *Hodder* v. *Williams*, [1895] 2 Q.B. 663; and *Brown* v. *Glenn*, 16 Q.B. 254, 117 Eng. Rep. 876, referred to; and see *American Concentrated Meat Co.* v. *Hendry*, [1893] W.N. 68, 82.]

5. BAILMENT (§ III—17)—LIABILITY OF BAILEE—LOSS OF GOODS BY THEFT.

A person holding grain under a thresher's lien is liable merely as a bailee for the safekeeping thereof; and is not answerable for grain stolen from his custody in the absence of negligence on his part.

[*Finnicane* v. *Small*, 1 Esp. 315, followed.]

6. LIENS (§ I—1)—LIABILITY OF LIENOR IN POSSESSION FOR LOSS OF PROPERTY BY THEFT.

The liability of a thresher holding grain under a statutory lien for his services in threshing it, is that of a bailee, and he is answerable for grain stolen while in his custody only where he is guilty of negligence.

[*Finnicane* v. *Small*, 1 Esp. 315, followed.]

Statement

ACTION to recover damages for an alleged unlawful seizure of grain in satisfaction of a thresher's lien.

Judgment was given for the defendant.

W. J. Cooper, K.C., and *A. Meighen*, for the plaintiff.

A. B. Hudson, for the defendant.

Galt, J.

GALT, J.:—This action was tried before me at Portage la Prairie on September 23rd and 24th last.

The plaintiff, Hill, resides at Brook, Indiana, and is the owner of certain lands in the Province of Manitoba, which he had rented to the plaintiff Chrisler during the year 1912, and the plaintiffs were together entitled to the crop for that year.

Upon the lands were a dwelling-house and four outhouses used for storing grain, implements and vehicles, etc.

The principal claim alleged by the plaintiffs is for damages in respect of a seizure and sale of grain by the defendant, and there is a further item of $110.10 for goods supplied and services rendered to the defendant.

The defendant denies any indebtedness or liability for damages and pleads a set-off of certain moneys realized by him from a seizure and sale of the plaintiffs' grain under the provisions of the Threshers' Lien Act. The plaintiff has filed an answer to the defendant's supposed counterclaim, but the defendant merely claimed a set-off.

The circumstances out of which the action arose are as follows: Shortly before the harvest of 1912 the plaintiffs employed the defendant to thresh their grain, and Hill left the matter of arranging terms to Chrisler. Chrisler says that Stait agreed to thresh the plaintiffs' grain and charge for his services at the same rate as a man named Smith, who was the principal thresher in the neighbourhood.

Stait was examined for discovery, and said "they asked me if I would thresh for them, and I said I would, and that is all the bargain we ever made." Besides being a thresher he was a farmer in the neighbourhood, and doubtless well acquainted with the charges usually made. I cannot imagine any reason why Chrisler should have invented such a statement as that the charges were to be at the same rate as those charged by Smith, and I think that this reference to Smith's charges must have been made at the time of Stait's employment, but that he forgot about it. I therefore assume the arrangement to be as Chrisler put it.

This man, James Hamilton Smith, was called as a witness for the defence, and stated that if he did the whole thing (that is to say, furnished the machines, men, teams and board for both men and teams, as the defendant did in this case) his charges would be 10c. per bushel for barley and oats and 12c. for wheat. He also stated that these were the usual prices in the neighbourhood.

Stait did not personally interview Smith with regard to his charges, but he probably knew, at least approximately, what they were, and in the result he decided to charge 10c. per bushel for all the grain he threshed for the plaintiffs.

The threshing began on October 19, and was completed on October 25. Stait then made up his bill as follows:—

Wheat,	3,276 bus. at 10c	$327.60
Oats,	1,650 bus.	
Barley,	2,510 bus. at 10c	416.00
	7,436	$743.60

MAN.
K. B.
1913
HILL
v.
STAIT.
Galt, J.

Shortly after the threshing was completed Stait handed Chrisler his bill and requested some money, but Chrisler explained that he had not yet got the returns and some of the grain had been shipped in Hill's name, so he could not pay the bill at the time; but Stait says that Chrisler made no objection to the charges at any time. On several subsequent occasions Stait endeavoured to collect the amount of his bill, but Chrisler always put him off.

The plaintiff Hill had arranged for a sale of his stock in the neighbourhood to be held on November 8. Shortly before the sale Stait met Hill and spoke about his account. Hill objected to the amount charged, and said that anyway he could not pay until after the sale. Chrisler says that he did object to the defendant's charges on several occasions.

The plaintiffs had shipped 2 carloads of wheat and 1 of barley. Deducting the contents of these 3 cars from the amount threshed by the defendant, there should remain (according to my calculation) 1,064 bushels of wheat, 1,222 bushels of barley, and 1,650 bushels of oats. The plaintiffs say that in addition to the grain of 1912 there was about 500 bushels of oats from the season of 1911 remaining on their property. Chrisler says that when he went away from the property a day or two before Hill's sale, he nailed up the doors and windows of the buildings in which the balance of the grain was stored.

On November 8 the sale of Hill's stock place and an appointment was made between Stait and Hill to meet in Portage la Prairie on the following Wednesday with a view to settling up accounts. Stait attended on the day named, but found that Hill had gone south to his home in Indiana a day or two previously, and that Chrisler had also vanished without leaving any address.

The following evidence given by the plaintiff Hill is very material as indicating a perhaps unwilling acceptance of Stait's charges and an intention that Stait should pay himself by shipping a sufficient quantity of the plaintiffs' grain for the purpose:—

Q. Was Chrisler here when you left for Brook? A. Yes.

Q. Where was he going? A. He was going down to the place.

Q. What for? A. To see Stait about seeing to hauling this grain off and getting his money. He said Stait owed him $12 hauling. I said, "You go down and have Stait haul that grain out and get his money."

Q. And so far as you know Chrisler went to carry out those instructions? A. Yes, sir.

Q. And those were all the instructions you did give him? A. That is all.

THE COURT:—Was that the day you were in town? A. The day I went away from town. I started for home on Monday morning, and he started down to the farm.

The defendant, finding that the plaintiffs had vanished, without paying his bill, consulted his solicitor with a view to

placing a thresher's lien on the balance of the grain, which he thereupon did by nailing up notices in conformity with the Act on the various buildings containing the grain, and claiming remuneration at the rate of 10c. per bushel. This was done on November 16. By letter dated the same day and addressed to the plaintiff Hill at Brook, Indiana, the defendant notified him that he had that day seized the grain as a protection against his charges for threshing, amounting to $743 and that unless he received the amount before the expiration of five days he would proceed to sell the grain under the Threshers' Lien Act.

Hill acknowledged this letter on November 22. On November 27 the defendant went to the property in question, broke open the out-houses or granaries, and began removing the grain which he found there to the elevator at Oakville. The detailed account of all the grain which he removed is set forth in the defendant's evidence and pleadings, by which it appears that he took and sold 179 bushels of wheat, 712 bushels of barley and 1,544 bushels of oats. Deducting these amounts of grain from the grain which should have been stored in the premises, there is a discrepancy (according to my calculation) of the following amounts: Wheat, 885 bushels; barley, 510 bushels, and oats, 106 bushels, not taking into account the 500 bushels of oats said by the plaintiffs to have been left from the season of 1911.

So far as the $110.10 item is concerned, there is practically no dispute in reference to it. About one-half of it was admitted on behalf of the defendant at the trial and the other half of it was proved by the plaintiffs, and the defendant merely stated that he could not remember as to the amount of teaming which was charged for. The plaintiffs are therefore entitled to this item of $110.10.

The real contest at the trial was upon other branches of the case, the plaintiffs contending that the seizure of their grain was wholly illegal and that in any case the defendant must be held liable for the large amount of grain which disappeared, amounting to some 1,500 bushels all told, together with 500 bushels of oats left over from the crop of 1911.

Whatever the legal rights of the parties may be found to be, the plaintiffs certainly behaved very badly towards the defendant in having their entire threshing done by him at his own expense and then both of them leaving the country as they did for the whole winter without paying the defendant a dollar. In such circumstances the defendant was well justified in enforcing whatever rights he could in order to collect his remuneration.

The first question which arises for determination is, what rights, if any, the defendant had to place a thresher's lien upon the grain. The Threshers' Lien Act, R.S.M. 1902, ch. 167, contains the following provisions:—

MAN.

K. B.
1913

HILL
v.
STAIT.

Galt, J.

2. In every case in which any person threshes, or causes to be threshed, grain of any kind for another person at or for a fixed price or rate of remuneration, the person who so threshes said grain, or causes the same to be threshed, shall have a right to retain a quantity of such grain for the purpose of securing payment of the said price or remuneration.

3. The quantity of grain which may be so retained shall be a sufficient amount, computed at the fair market value thereof, less the reasonable cost of hauling the same to and delivering the same at the nearest available market, to pay when sold for the threshing of all grain threshed, by, or by the servants or agents of, the person so retaining the said grain, for the owner of the said grain within thirty days prior to the date when such right of retention is asserted.

4. Such grain shall be held to be still in the possession of the person by whom or by whose servants or agents it is threshed, and subject to the right of retention herein provided for, although the same has been piled up or placed in bags or other receptacles, unless and until said grain is sold and delivered to a *bona fide* purchaser and value received therefor and removed from the premises and vicinity where the said grain was threshed, and out of the possession of the person for whom the threshing was done.

5. The right of retention hereinbefore provided for shall prevail against the owner of such grain, any and all liens, charges, incumbrances, conveyances and claims whatsoever.

6. The right of retention shall be held to be asserted by any person entitled thereto when such person declares his intention of holding such grain either verbally or in writing, or does any act or uses any language indicating that he has taken or retained, or is about to take or retain possession of such grain, etc.

Sec. 7 enables the thresher, at the expiration of five days from the time when such right of retention is asserted, to sell said grain at a fair market price, the proceeds thereof to be applied first in payment of the reasonable cost of transporting said grain to market, and next in payment of the price or remuneration for threshing and the balance to be paid on demand to the owner.

Mr. Meighen, on behalf of the plaintiffs, contends, firstly, that the Threshers' Lien Act should be strictly construed, as being in derogation of the common law, and he cites in support a case of *Elsom* v. *Ellis*, 16 W.L.R. 373, where Brown, J., so held as regards the Threshers' Lien Act in force in Saskatchewan. A perusal of our own Threshers' Lien Act satisfies me that ours is distinctly remedial and the need for such an Act is amply illustrated in the present case. But apart from this, our Interpretation Act, R.S.M. 1902, ch. 89, sec. 8 (*aaa*), provides that every Act of the Manitoba Legislature and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the

attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

Plaintiffs' counsel next argue that there was no "fixed price or rate of remuneration" as required by sec. 2 as a condition precedent to the right of lien, and he refers, in support of this point, to *Delbridge* v. *Pickersgill*, 3 D.L.R. 786. This decision also was based upon the Saskatchewan Act. Johnstone, J., says, in finding against the defendant's right of seizure:—

> There was no agreement, I find as a fact, to pay 28 cents a bushel, as claimed by the defendants, and they had no right or power under the Act to make the seizure they did, nor for the amount they did. I can arrive at no other conclusion, on the evidence, than that there was a contract to thresh; but, in so far as the rate per bushel was concerned, there was no definite arrangement. It was agreed that the rate should be determined by the yield per acre, namely, sixteen cents per bushel, should the yield be as much as ten bushels per acre, but twenty cents per bushel should the yield be less than ten. The yield was greater than ten bushels per acre, and the defendants were entitled to be paid only at the rate of sixteen cents per bushel on 3,718 bushels, or $594.88.

In that case the defendants had charged almost double the amount to which they were entitled, which, of itself, would, of course, invalidate their lien. The learned Judge had no difficulty in finding the proper amount to which the defendants were entitled as previously fixed by their agreement. Unless, therefore, the Act in force in Saskatchewan requires the thresher to fix a rate per bushel (which our Act certainly does not require) I cannot follow the learned Judge's view. To all such cases I would apply the maxim *certum est quod certum reddi potest.*

There are many ways in which the price or rate of remuneration might be fixed. It might be at a certain rate per bushel of all the various grains to be threshed (as it was in this case), or it might be a lump sum for a given field of grain, or it might be at so much per day, or it might be a separate charge per bushel of various grains.

In the present instance I think that the rate of remuneration was sufficiently fixed within the meaning of this statute when Stait (as Chrisler admits) said that his charges would be similar to those charged by Smith. If Stait chose to charge a little less than Smith did surely the plaintiffs could not complain, and it appears on the evidence that Stait's original charge of 10c. per bushel on all the grain was well within the figures charged by Smith. It is quite true that the defendant has since reduced his charges somewhat, by charging only 9c. per bushel for the barley and oats which he threshed; but he says he did this simply because there was not sufficient grain to pay his original charges, and he found upon inquiry that some of the threshers in the neighbourhood were charging at this lower rate. I think that the beneficial provision of the Act would be rendered abortive, in perhaps a majority of instances, if the strict construction

MAN.

K. B.
1913

HILL
v.
STAIT.

Galt, J.

apparently adopted in *Delbridge* v. *Pickersgill*, 3 D.L.R. 786, were applied.

I think therefore that the defendant had a right to a thresher's lien.

The next point urged by Mr. Meighen was that the right given to the unpaid thresher was merely a passive lien and certainly not a right to break into a man's barns and seize and sell his grain. In support of this contention the learned counsel relied upon *Prinneveau* v. *Morden*, 11 D.L.R. 272. That case was decided under the Threshers' Lien Ordinance of Alberta. Stuart, J., held (1) that the Ordinance does not confer upon the lienor the right to seize grain by breaking open the granary of the owner and sell the same without resorting to legal process; (2) that the lienor's right is only one of retention and he is guilty of conversion if he sell the grain without resorting to a suit for foreclosure or sale. The Ordinance must differ from our statute, because the latter, in sec. 7 above quoted, clearly gives the right of sale without taking legal proceedings in Court. For the same reason I find that under our Act a lienor has not merely a passive lien or right of retention.

Whether the lien-holder has a right to break open the granaries or barns of the owner is a more difficult question. In *Hodder* v. *Williams*, [1895] 2 Q.B. 663, the Court of Appeal in England held that a sheriff may, for the purpose of executing a writ of *fieri facias*, break open the outer door of a workshop or other building of a judgment debtor not being his dwelling house or connected therewith.

In *Brown* v. *Glenn*, 16 Q.B. 254, 117 Eng. Reps. 876, the Court of Queen's Bench held that a landlord cannot break open the outer door of a stable to levy an ordinary distress for rent. Lord Campbell, C.J., in delivering judgment, says:—

> In *Penton* v. *Browne*, 1 Sid. 186, it was decided, on demurrer, that the outer door of an outhouse might be broken open for the purpose of executing a *fieri facias*. This, however, is not inconsistent with our decision; for a distinction may reasonably be made between the powers of an officer acting in execution of legal process and the powers of a private individual who takes the law into his own hands and for his own purposes. There is another well-known distinction, that a landlord cannot distrain at all hours, whereas the sheriff is under no such restriction.

The present case is not the levy of an execution by a sheriff nor is it a distress executed by a landlord.

The apparent object of the statute is to enable the unpaid thresher to pay himself promptly out of the proceeds of the grain which he has threshed. Under sec. 7 the person who asserts such right of retention may forthwith house or store the grain so retained in his own name and if at the expiration of five days from the time when such right of retention is asserted by the person entitled to the same the price or remuneration for which

the said grain is held as security be not paid such person may sell the said grain at a fair market price, etc. Then sec. 8 provides that in all cases the grain retained as security as above shall be sold within thirty days after the right of retention is asserted, unless the owner thereof consents in writing to the same being held unsold for a longer time.

Now suppose, as indeed happened in the present case, that the owners have their grain threshed, a large part of it sold and paid for and the remaining grain stored in granaries, the doors and windows of which are all nailed up, and then the owners go away for the winter. Mr. Meighen boldly argues that such a line of action on the part of the owners entirely prevents an effectual seizure by the unpaid thresher. I cannot accede to such an argument. I think the statute, by implication, warrants the lien-holder in taking possession of the grain in question whether it is locked up or not, and it does not lie in the mouth of the absent owners to complain if their barns or granaries have to be broken into for the purpose.

The view I take of the defendant's right to break into the granaries is supported by the cases cited in Maxwell on Statutes, 4th ed., 536. In treating of implied powers in statutes, the learned author says:—

> In the same way when powers, privileges or property are granted by statute everything indispensable to their exercise or enjoyment is impliedly granted also, as it would be in a grant between private persons. Thus as by a private grant or reservation of trees the power of entering on the land where they stand and of cutting them down and carrying them away is impliedly given, or reserved, and by the grant of mines, power to dig them.

Where the ownership of property is held in common, the law applicable in England to the rights of commoners would seem also to support the view I take. In *Arlett* v. *Ellis* (1827), 7 B. & C. 346, it was held that a commoner is justified in pulling down, without doing any unnecessary damage, any erection which obstructs the exercise of his right of common.

In the present case the statute gave a lien and right of possession of the grain in question to the defendant and obliged him to sell the grain within thirty days from asserting his right of lien. It was impossible for the defendant to exercise his statutory rights without breaking into the buildings in question, and there is no suggestion that in doing so he did more damage to the buildings than was necessary.

The next item to be dealt with is the plaintiffs' claim in respect of about 500 bushels of old oats remaining over from the season of 1911. The evidence is conflicting as to whether any of these old oats remained on the premises at the date of the defendant's taking possession. One of the witnesses, Clyde Clevinger, declares that none were left. David Lynch states that he was in the granaries and did not see any old oats there

MAN.
K. B.
1913
HILL
v.
STAIT.
Galt, J.

before he began to thresh, and that he certainly would have noticed if there had been 100 bushels, or any to speak of. On the other hand, several witnesses on behalf of the plaintiffs state that there were some old oats, estimated at about 500 bushels, still remaining when the new oats were deposited in the granary.

Assuming that there were some old oats at the time of the threshing, the plaintiffs, by depositing the newly threshed oats on the top of them, so intermingled the grain that it would be impossible for anyone to separate them, and the most one can do in reference to these old oats would be to place them in the same category as the oats which are said to have disappeared. The question is, which of the parties should bear the loss of the grain which has disappeared?

If the missing grain had been taken away before the date of the seizure by the defendant it is clear that the defendant cannot be held liable for it. I am quite satisfied that the defendant himself did not take away any of this missing grain, and that he has accounted for all the grain he did take away. There is no evidence to shew that either of the plaintiffs took the grain. Still, it was stolen by somebody.

Assume, now, that the grain was stolen after the date of the defendant's seizure. The defendant had appointed Clyde Cleinger, in the immediate neighbourhood, to keep an eye on the property with a view to protecting the grain, and he was there all of November and December while the grain was being shipped. The defendant, having taken possession of the grain under his lien, was in the position of a bailee. In Beal on Bailments, p. 148, I find the following statement of the law, taken from Story on Bailments, 9th ed., sec. 338:—

> The true principle supported by the authorities seems to be that theft *per se* establishes neither responsibility nor irresponsibility in the bailee. If the theft is occasioned by any negligence the bailee is responsible; if without any negligence, he is discharged. Ordinary diligence is not disproved even presumptively by mere theft, but the proper conclusion must be drawn from weighing all the circumstances of the particular case. This is the just doctrine to which the learned mind of Mr. Chancellor Kent has arrived after a large survey of the authorities; and it seems at once rational and convenient.

In *Finnicane* v. *Small* (1795), 1 Esp. 315, the defendant, a bailee for hire, had received a trunk containing valuables. The valuables were stolen, possibly by some employee of the defendant, but without any imputable negligence of the defendant, and it was held that the plaintiff was not entitled to recover.

For this reason I am of opinion that whether the missing grain was stolen before or after the defendant's seizure, the loss must fall upon its owners, namely, the plaintiffs.

Mr. Cooper, K.C., on behalf of the plaintiffs, pointed out

certain discrepancies in the account claimed by the defendant in his set-off, one being an item of $1.19, another being that the defendant charged $5 for each load of grain he carried to the station, whereas it appeared that one or more of the teamsters had only been paid $3.60 per load. Then Stait charged himself with 150 bushels of grain, whereas he got 163, the difference being about $4.00.

On the other hand, sec. 7 provides that the lien-holder may sell the grain at a fair market price. It was shewn in the present case that the market price of oats during the period in question was about 24c., but the defendant was able to procure about 30c. per bushel from farmers in the neighbourhood who otherwise would have had to purchase and carry their oats from more distant points

I think it is therefore not worth while to take these three or four small items into account, as I have not sufficient material before me to make the account exactly accurate.

If the plaintiff Hill instructed Chrisler, as he said he did, to employ Stait to haul out the grain and get his money, undoubtedly Stait would have charged $5.00 a load, for that was shewn to be the ordinary charge in the neighbourhood.

To summarize my conclusions, I find:—

1. That the defendant's rate of remuneration for threshing was fixed between the parties.

2. That the defendant acquired a thresher's lien in accordance with the Act.

3. That the plaintiffs having left the premises and neighbourhood the defendant was justified in breaking into the outhouses for the purpose of seizing and selling the grain therein.

4. That the plaintiffs must bear the loss of any grain which disappeared or was stolen, including the old oats of the year 1911.

5. That the defendant is entitled to retain the amount he received for the grain which he sold.

6. That the plaintiffs are entitled to the sum of $110.10 above mentioned.

With regard to the question of costs, the plaintiffs have succeeded on a small and almost undefended item of their claim. On the main questions involved in the action the defendant has succeeded.

In *Forster* v. *Farquhar*, [1893] 1 Q.B. 564, at 568, Bowen, L.J., delivering the judgment of the Court of Appeal, says:—

> It has become usual in cases which arise under this rule to cite to us language of the late Master of the Rolls, Sir George Jessel, in the case of *Cooper* v. *Whittingham*, 15 Ch.D. 501, as if it contained an exhaustive definition of "good cause" under O. LXV., r. 1. The case of *Cooper* v. *Whittingham* was not a decision on the meaning of the term "good cause." It was an enunciation of a principle upon which, in the opinion of the Master of the Rolls, Judges should exercise their discretion under the earlier portion

MAN.

K. B.
1913

HILL
v.
STAIT.

Galt, J.

of the rule which relates to actions tried before a Judge without a jury. Against any attempt on the part of any Court to impose by definition or otherwise a fetter on the discretion which the law has left to a Judge in any particular case this Court has always protested. . . . Although he has won the action, he may have succeeded only upon a portion of his claim under circumstances which make it more reasonable that he should bear the expense of litigating the remainder than that it should fall on his opponent. The point is not merely whether the litigant has been oppressive in the way he waged his suit or prosecuted his defence, but whether it would be just to make the other side pay. We can get no nearer to a perfect test than the inquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that the costs should follow upon success.

See also *Lowe* v. *Holme*, 10 Q.B.D. 286; and *Lund* v. *Campbell*, 14 Q.B.D. 821.

In the present instance I think that justice will be done by adopting, *mutatis mutandis*, the order made in *Lund* v. *Campbell*, 14 Q.B.D. 821, at 830, and by entering judgment for the defendant with costs of action and by further ordering that the plaintiffs have the costs of the issue relating to the $110.10, the amount of which debt and costs will be deducted from the defendant's costs.

Judgment accordingly.

MAN.

K. B.
1913

MATTHEWS v. OMANSKY.

Manitoba King's Bench, Prendergast, J. October 16, 1913.

1. TRADE NAME (§ I—2)—WHAT MAY BE—DESCRIPTIVE TERM—"THE CLEANERS"—CLOTHES CLEANING ESTABLISHMENT.

An exclusive right to the use of the words "The Cleaners," which are merely descriptive of a well-known business, cannot be acquired by one engaged in the business of clothes cleaning, unless it appears that the words have ceased to have their primary meaning as descriptive of a business, and have acquired a secondary meaning specially descriptive of the claimant.

[*Cellular Clothing Co.* v. *Maxton*, [1899] A.C. 326, referred to.]

2. TRADE NAME (§ I—9)—PROTECTION OF—UNFAIR COMPETITION—USE OF DESCRIPTIVE NAME.

Where the term "The Cleaners" was adopted as a trade name by a cleaner of clothing, with the first word in small letters and the last more prominently displayed in the form of an inverted crescent, the subsequent use of the words "Fort Rouge Cleaners" by a business rival will be restrained, where the first two words were used in smaller type and the last so arranged as to appear more prominently in a form similar to that adopted by the plaintiffs, if the similarity has created confusion between the two establishments, so as to mislead a number of the plaintiffs' customers.

[*Lee* v. *Haley*, L.R. 5 Ch. 155; *Hendricks* v. *Montagu*, 17 Ch. D. 638, 646; *Taylor* v. *Taylor*, 23 L.J. Ch. 255; and *Knott* v. *Morgan*, 2 Keen 213, 48 Eng. Reps. 610, referred to.]

3. INJUNCTION (§ I M—121)—PROTECTION OF TRADE NAME—DESCRIPTIVE TERM—UNFAIR USE OF.

The use by a clothes cleaning establishment of the descriptive term "Fort Rouge Cleaners," with the last word prominently displayed

in the form of an inverted crescent and the first two in smaller type will be enjoined as a wrongful imitation of the trade name "The Cleaners," previously adopted by a competitor, with the word "The" in small letters and the word "Cleaners" prominently displayed in the peculiar form adopted by the defendant, where the defendant's use of such name results in confusion between the two establishments so as to mislead a number of the plaintiff's customers.

[*Lee* v. *Haley*, L.R. 5 Ch. 155; *Hendricks* v. *Montagu*, 17 Ch. D. 638, 646; *Taylor* v. *Taylor*, 23 L.J. Ch. 255; and *Knott* v. *Morgan*, 2 Keen 213, 48 Eng. Reps. 610, referred to.]

Statement

ACTION to restrain the defendant from using the plaintiffs' trade-name.

Judgment was given for the plaintiffs.

F. M. Burbidge, for plaintiffs.

W. H. Trueman, for the defendant.

Prendergast, J.

PRENDERGAST, J. :—This is an action to restrain the defendant from using the plaintiffs' trade-name.

The plaintiffs for the last ten years have been carrying on, at the corner of Jessie and John streets, Fort Rouge, in this city, a clothes cleaning business, which, developing from its more humble beginnings, has become an important establishment of that class.

The business of clothes cleaning, when carried on in all its branches, comprises dry cleaning, renovating or spotting, and steaming and pressing. Dry cleaning, which is by far the more elaborate process, requires special apparatus for the purpose, and I understand that there are only four establishments, of which the plaintiffs' is one, doing that special work in this city. But there are quite a number of concerns engaged in the rudimentary process of renovating, spotting and pressing, which is work carried on by hand with the simple aid of cloths, brushes, etc.

From the beginning the plaintiffs have called themselves "The Cleaners" and whenever using their name graphically have used it so arranged and devised that under the word "The" in smaller letters, the word "Cleaners" was made to appear more prominently displayed in what was called an inverted crescent.

This name, displayed as stated, they caused to appear on the exterior walls of their building, on the sides of their three motor vehicles, on their letter-heads and price lists, on business cards, of which they caused a great number to be distributed among their patrons, and on eleven 20 x 12 feet ad. signs distributed in different parts of the city.

On February 14 last, the defendant, who had previously been doing clothes cleaning in other parts of the city as The Dominion Renovating House, The American Star Dry Cleaners, The A.B.C. Renovating Company, and The Imperial Cleaners, started business at 123 Osborne Street, which is also in Fort Rouge. He caused signs to be put up outside the building with the words, "Fort Rouge Tailors and Furriers, Cleaning and Pressing a Specialty,"

MAN.
K. B.
1913
MATTHEWS
v.
OMANSKY.
Prendergast, J.

and on the window another sign reading "The Fort Rouge Cleaners." It would appear that the work that he did at that place as tailor or furrier was very little.

On May 15 the defendant opened another place on the corner of Corydon and John streets, which is just 140 feet north of the plaintiffs' establishment. There he put up a sign "Branch of Fort Rouge Cleaners—Receiving Office." This last place was a very small one, something like an office. No actual work of any kind was ever done there, and the defendant says he opened it "just so as that the people would think he was doing a big bu iness."

I should add that nowhere on those signs at the two different places, did the defendant use his ordinary name.

Now, ever since starting business in Fort Rouge, the defendant caused cards and letter and bill-heads to be printed with the words "Fort Rouge Cleaners" so arranged and devised that under the two first words in smaller type the word "Cleaners" is made to appear more prominently and also displayed in the so-called inverted crescent disposition. Some of these cards he gave to canvassers, and caused 2,000 of them to be distributed—the greater number, as I have no doubt from his own evidence, in Fort Rouge.

The defendant admits that when he had those cards and letter-heads printed he had seen the device on the walls of the plaintiffs' establishment. He was willing to admit that the two signs or advertisements are liable to create confusion.

That the similarity in the two devices is likely to cause confusion, seems to me manifest from bare inspection. That it has in fact created confusion, is established by the evidence. It is significant that three of the defendant's canvassers, called by him as witnesses, should have shewn in their examination in chief, although with another purpose, that they each had on several occasions to dispel the confusion which existed in the minds of would-be customers as to the identity of the two firms.

As to intention, without relying specially on the testimony of one witness who says that one of the defendant's canvassers represented himself as an agent for The Cleaners, I take it that the evidence as a whole leads forcibly to the conclusion that the defendant in adopting the particular device and opening up the second stand so near that of the plaintiffs', meant to divert that which was intended to be the plaintiffs' patronage and business to his own use and advantage.

The appellation "The Cleaners" adopted by the plaintiffs, is descriptive of a well-known trade and so cannot be exclusively appropriated by them.

It is moreover descriptive of the defendant's business as well as of that of the plaintiffs', for, although the former has not the necessary apparatus to do dry cleaning, he nevertheless does

clothes cleaning in some if not in all its branches, and it is moreover shewn to be customary for those cleaners who only do renovating, spotting and pressing, to almost invariably take in orders for dry cleaning and have it done by the larger establishments.

It was open to the plaintiffs to establish an exclusive right to the use of the name which they have adopted by shewing that the word has ceased to have its primary meaning as descriptive of a business and has acquired a secondary meaning specially descriptive of their firm—although they would have to establish this not only with respect to the surrounding locality but also to the larger territory where both firms find their clients. But the plaintiffs have not shewn that—not at all events as to the name considered strictly as a trade name, to which I am just now confining myself.

In *Cellular Clothing Co.* v. *Maxton*, [1899] A.C. 326, Lord Davey refers to the difficulty meeting one who takes upon himself to prove that words which are merely descriptive of goods have acquired such a secondary meaning; and this will apply with so much more force than with respect to a line of goods, in a case as the present one where the description is of a trade, and is so broad and comprehensive.

This case, however, is not one having to do with a trader's exclusive right to use a particular name, but rather comes within the principles governing deceptive signs and advertisements where the name, when it is an element, should not be considered by itself but together with the particular use which is made of it, as well as all other circumstances which render deception likely either in intent or in fact.

It is fraud on the part of one person to attract to himself the custom intended for another, by false representations, direct or indirect, that the business carried on by himself is identical with the business of the other: *Lee* v. *Haley*, L.R. 5 Ch. 155.

In *Hendricks* v. *Montagu*, 17 Ch.D. 638, at 646, James, L.J., said that in such cases, all that the Court requires is to be satisfied that the names are so similar that one will likely be deceived.

Sebastian, in his work on the Law of Trade-Marks, 5th ed., says at 151:—

> The infringement may consist in the imitation of the general appearance of the plaintiff's mark, and where both trade-marks are of a composite character it is possible that, though no one particular mark has been exactly imitated, or the principal mark which has been reproduced cannot, for some reason or other, be protected as a trade-mark, the combination may be very similar and likely to deceive and will therefore be restrained by injunction.

It thus appears that it is not necessary in cases of this class that the plaintiffs, to be protected, should have an exclusive right to the name.

> There is infringement if ordinary purchasers purchasing with ordinary

MAN.

K. B.
1913

MATTHEWS
v.
OMANSKY.

Prendergast, J.

caution is likely to be misled; on the one hand the Court will not strain its jurisdiction to protect fools and idiots; on the other hand, it will not require such minuteness of imitation as to deceive persons of unusual sagacity and information: Sebastian, cited *supra*, 5th ed., p. 11.

Resemblance is of the very greatest importance in such matters, and if the Court cannot find any other reason for the resemblance, it will infer that it was adopted for the purpose of misleading: *Taylor* v. *Taylor*, 23 L.J. Ch. 255.

And so I must infer in the present case.

The plaintiffs having, however, adopted as a trade name a word which is *publici juris*, the defendant cannot be restrained from using such a name which is common property. He can only be restrained in the particular use he has made of it, wherein the deception lies.

In *Knott* v. *Morgan*, 2 Keen 213, 48 Eng. Rep. 610, the defendants were not restrained from using the particular words "London Conveyance," etc., but only from using them as they had done, in "such manner as to be a colourable imitation of the plaintiffs' name and device."

The relief in the present case cannot go further.

As to costs, I am not quite sure what disposition I might otherwise have made of the same, as the relief granted is not exactly the relief sought, and the reference to the defendant's cards and device in the statement of claim seems only to be made with the secondary object of pointing to fraudulent intent in the adoption of the trade name as such. But as there can be no doubt in my mind of the defendant's intention to deceive, and all the necessary averments being contained in the statement of claim, I think that the costs should, as in the usual course, follow the result of the action.

The defendant will be restrained from using the words or names "The Cleaners" and "The Fort Rouge Cleaners" in such manner as to form or be a colourable imitation of the words "The Cleaners" as used by the plaintiffs. Costs to the plaintiffs.

Judgment for plaintiffs.

ONT.

S. C.
1913

Re COOPER.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. October 22, 1913.

1. WILLS (§ III A—75)—CONSTRUCTION—WORD PARTLY ERASED—PROBATE.

Upon a question of construction of a will the original will may be looked at, not to vary or cut down the words of which probate has been granted, but simply to enable such words to be interpreted by the court, and the exception is applicable where it appears that a vital word was partly erased by inadvertence in the original will, but was retained intact with its context in the probate standing unrecalled by the Surrogate Court.

[*Re Cooper*, 13 D.L.R. 261, reversed in this respect; *Re Harrison*, 30 Ch.D. 390, referred to.]

ONT.

S. C.
1913

RE COOPER.

2. WILLS (§ III A—78)—CONSTRUCTION—MISSING WORD, WHEN SUPPLIED.

In construing a will, the court has power in a proper case to supply a missing word, and where the contents shew that a word has been undesignedly omitted and demonstrate what addition by construction will fulfill the intention with which the document was written, the addition will by construction be made, especially where the provision at issue would be absolutely meaningless, unless the missing word were supplied.

[*Re Cooper*, 13 D.L.R. 261, reversed in this respect; *Pride* v. *Fooks*, 3 DeG. & J. 252, 266; *Key* v. *Key*, 4 DeG. M. & G. 73, 84, 43 E.R. 435, 439; *Re Holden*, 5 O.L.R. 156, referred to.]

Statement

APPEAL by Barry S. Cooper and his adult children from the order of Kelly, J., *Re Cooper*, 13 D.L.R. 261, 4 O.W.N. 1360, upon an originating notice, determining questions of construction of the will of Francis Cooper, deceased.

The appeal was confined to the question of the proper construction of the residuary clause.

H. T. Beck, for the appellants.

J. R. Meredith, for the Official Guardian, representing the infant child of Barry S. Cooper.

J. R. Code, for the executors.

J. Tytler, K.C., for Margaret J. Fulton and others, the respondents.

Garrow, J.A.

The judgment of the Court was delivered by GARROW, J.A.:—The residuary clause is the only one now calling for attention.

The judgment is reported in 4 O.W.N. 1360, and at p. 1361 the residuary clause, as it appeared to the learned Judge, is set forth, but, as the appellants contend, improperly omitting the very material word "my" immediately before the words "three nieces and five nephews."

The will had been duly proved in common form in the proper Surrogate Court, and in the probate copy certified by that Court the word "my" appears, as part of the contents of the will. This conclusion, while it stands unrecalled by the Surrogate Court, is, I think, conclusive upon all parties to this proceeding as to the contents of the will. And the construction of the clause in question must, therefore, be as if this word "my" immediately preceded the words "three nieces and five nephews."

Upon a question of construction the original will may be looked at, not to vary or cut down the words of which probate has been granted, but simply to enable such words to be interpreted by the Court. See *In re Harrison*, 30 Ch. D. 390. And, looking at the original will, which was produced, apparently without objection, at the hearing and again before us, it is at least apparent, I think, how the learned Judge came to omit the word in question. There had, it appears, on the face of the will been an extensive erasure immediately pre-

ONT.

S. C.
1913

RE COOPER.

Garrow, J.A.

ceding the word in question, and the erasing stroke extended to and in part upon the word "my" but did not actually pass through it, and the learned Judge apparently assumed, without referring to the probate copy, that the word was included in the erasure.

It is obvious that the introduction of the word "my" presents such a wholly different case from that which the learned Judge considered, that no good purpose would now be served by entering upon a full consideration of his reasons for the conclusions at which he arrived. I shall rather, as more to the purpose, deal with the question—not a difficult one, it seems to me—as if it was, as in fact it is, now presented for the first time.

The facts are very few and uncomplicated. The testator was unmarried. He left two brothers surviving, namely, Barry S. Cooper and William F. S. Cooper. Barry S. Cooper had eight children, of whom three were females and five males. William F. S. Cooper, so far as appears, was unmarried. The testator also left other nephews and nieces to the number of more than eight, but the exact number is not stated—the children of deceased brothers and sisters. The testator was apparently well disposed towards his brother Barry S. Cooper, to whom he left in his will a substantial bequest.

The contention of the appellants is, that the Court should, under these circumstances, supply the word "children" after the word "nephews" to make the clause read "my three nieces and five nephews, children of Barry S. Cooper." And with that contention I entirely agree.

That the Court has power in a proper case to supply a missing word cannot be disputed. The rule is stated in many cases: among others by Knight Bruce, L.J., in *Pride* v. *Fooks*, 3 DeG. & J. 252, at p. 266, in these words: "Again, all lawyers know that if the contents of a will shew that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfil the intention with which the document was written, the addition or rejection will by construction be made."

Similar remarks by the same learned Judge occur in the earlier case of *Key* v. *Key*, 4 DeG. M. & G. 73, at p. 84, 43 Eng. R. 435, at 439. See also *Mellor* v. *Daintree*, 33 Ch.D. 198; *Re Holden*, 5 O.L.R. 156, at p. 162.

The Court must, of course, first be satisfied from the language of the will what was the real intention of the testator; for it is only to give effect to such intention that the implication can be made.

In the present instance, upon the facts, the matter does not, it appears to me, admit of a reasonable doubt. The testator had some eighteen or more nephews and nieces. Out of these

ONT.

S. C.
1913

RE COOPER.

Garrow, J.A.

he selected as the special subjects of his bounty in the clause in question, three nieces and five nephews—exactly the number and description of the children of his brother Barry S. Cooper; and he coupled with the gift—for some purpose, it must be assumed—the name, not of his other surviving brother, who had no children, but of his brother Barry S. Cooper; a conjunction absolutely meaningless unless the word "children" is to be supplied, as the appellants contend.

I would allow the appeal and declare accordingly. Costs of all parties out of the estate.

Appeal allowed.

ALTA.

S. C.
1913

REX v. THOMPSON.
REX v. HAMMOND.
REX v. CHURCHILL.
REX v. AHERNS.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck, Simmons, and Walsh, JJ. October 11, 1913.

1. CRIMINAL LAW (§ II A—33)—CONSENT TO PROSECUTE—FIAT GRANTED BY "ACTING ATTORNEY-GENERAL"—LORD'S DAY ACT.

A fiat for the commencement of a prosecution for a violation of the Lord's Day Act, R.S.C. 1906, ch. 153, signed by a member of a Provincial Executive Council as "Acting Attorney-General" is valid, and his authority need not be shewn; since it will be presumed that he was properly appointed to act in such capacity. (*Per* Harvey, C.J., Stuart, and Walsh, JJ.)

2. EVIDENCE (§ II M—364)—BURDEN OF PROOF—CRIMINAL CASES—VIOLATION OF LORD'S DAY ACT—NECESSITY OF PROSECUTION SHEWING CONSENT OF ATTORNEY-GENERAL.

It is not essential that a fiat from the Attorney-General authorizing the commencement of a prosecution for a violation of the Lord's Day Act, R.S.C. 1906, ch. 153, should be put in evidence on the trial as a part of the case for the prosecution; the absence of such consent being a matter of defence. (*Per* Harvey, C.J., and Stuart, J.)

[*Rex* v. *Canadian Pacific Railway*, 12 Can. Cr. Cas. 549, distinguished.]

3. CERTIORARI (§ II—21)—PROCEDURE—HEARING—ADMISSIBILITY OF AFFIDAVIT OF MAGISTRATE.

On an application for a writ of *certiorari* to set aside a conviction for a violation of the Lord's Day Act, R.S.C. 1906, ch. 153, on the ground that it had not been shewn that a fiat had been obtained under the Act, an affidavit of the convicting magistrate in answer is admissible to shew that, before information was laid, he had received the fiat of the Attorney-General to the prosecution being instituted as the statute requires, and that it was in his possession during the trial. (*Per* Harvey, C.J., and Stuart, J.)

4. CRIMINAL LAW (§ II A—33)—CONSENT OF ATTORNEY-GENERAL TO PROSECUTION—SUFFICIENCY OF—DUPLICITY.

Notwithstanding the fact that the fiat or consent of the Attorney-General to prosecute for a violation of the Lord's Day Act, R.S.C. 1906, ch. 153, a person, upon a charge that he "provided, engaged in, or was present at" a forbidden performance on Sunday, states three

ALTA.

S. C.
1913

REX
v.
THOMPSON.

separate offences, it is not bad on that account, and a prosecution may be maintained thereunder for any one of the offences mentioned. (*Per* Harvey, C.J., and Stuart, J.)

5. SUNDAY (§ II—5)—AMUSEMENTS—THEATRICAL PERFORMANCE—LORD'S DAY ACT—ACCEPTING CONTRIBUTIONS BUT NOT CHARGING ADMISSION.

Where tickets of admission were not sold on Sunday to a moving picture show, nor an admission fee charged, nor any person requested to pay one, but a plate, near which an employee of the theatre was stationed, was placed near the entrance, and on which any person who desired to do so might place contributions, the performance was not one "at which any fee is charged directly or indirectly" in violation of sec. 7 of the Lord's Day Act, R.S.C. 1906, ch. 153. (*Per* Beck, Simmons, and Walsh, JJ.)

Statement

REFERENCE to the Court *en banc* in regard to points of law arising on an application for a writ of *certiorari* to bring up convictions for the violation of the Lord's Day Act, R.S.C. 1906, ch. 153, (*a*) whether a fiat signed by one as "acting Attorney-General" was sufficient to permit the prosecution; and (*b*) whether the accused charged an admission fee directly or indirectly to a Sunday moving picture show, by accepting such contributions as the spectators might see fit to make.

The first question was answered in the affirmative, and the last in the negative.

L. F. Clarry, Deputy Attorney-General, and *C. A. Grant*, K.C., for the Crown.

Geo. B. O'Connor, K.C., and *H. A. Mackie*, for defendants.

Harvey, C.J.

HARVEY, C.J.:—I agree with the conclusion reached by my brother Stuart, and with the reasons stated by him and have little to add.

The word "collection" ordinarily suggests a voluntary contribution because that is the kind of collection which is most frequently in evidence. But, at a certain time of the year, we realize that the collection made by the tax collector has sufficient force behind it. Every large law office also has its collection department, contributions to which have little spontaneity or voluntariness.

It is necessary to be careful not to be misled into forming a wrong conception from the use of the word "collection."

On the other hand, as pointed out by my brother Stuart, a counsel fee in England cannot be collected by process of law, but it is nevertheless thought of, and, I think, quite properly, thought of as a charge made to and which must be borne by the litigant.

In the present case, instead of a definite sum being stated by the management as the compensation to be made for the prospective entertainment, as is done on other days, a plate was placed at the door in charge of an employee, in which people

ALTA.

S. C.
1913

REX
v.
THOMPSON.

Harvey, C.J.

entering were expected to place a contribution. Is there, however, any substantial difference between this method of procedure and the usual one on other days further than that no specific sum is named by the management? On a week day, the fact that the doorkeeper allowed persons to pass in without paying would scarcely be a reason for saying that no fee was charged. Certainly no fee was charged to them, but it was to many others. On the occasion in question, it appears to me clear, and it is so stated in the reference, that those who attended or the majority of them were intended to pay a fee though the amount of it was left to them.

Knowing the usual fee, which is a small one, it could confidently be expected that the spectators would, in most cases pay that amount. Though there could, perhaps, be no legal compulsion to enforce that payment and though, perhaps, admission might not be refused if it were not made, yet there was a force consisting of the spectators' sense of common decency or honesty, coupled with the stationing of a person at the plate, to observe whether a contribution was made or not, which would, in most cases, be quite as effective as any legal right or remedy.

There seems to me no reasonable room for doubt that the act comes within the spirit of the prohibition, and for the reasons I have stated, I think it comes fairly within the letter of it as well.

Stuart, J.

STUART, J.:—These are references made to the Court *en banc* by Mr. Justice Beck, in regard to certain points of law arising before him on four applications for writs of *certiorari* to bring up convictions made against the several defendants for violations of the Lord's Day Act, R.S.C. 1906, ch. 153. In the first three cases, the facts are stated by Mr. Justice Beck in a stated case. In *Rex* v. *Aherns*, the whole material which was before him, including the evidence, is also before us.

The reference so far as material, in view of admissions on the argument, is in the following terms:—

These questions: that is, the grounds upon which the several convictions are attacked, are as follows:—

1. By sec. 17 of the Act, no prosecution for a violation of the Act can be commenced without leave of the Attorney-General of the province.

No fiat was put in evidence. On the return of these applications before me, an affidavit of the magistrate was filed, stating that a fiat for the prosecution of (naming the defendant) for violation of the Lord's Day Act was issued and signed by the Acting Attorney-General for the Province of Alberta, on June 27, 1913; that the fiat was delivered to and in the possession of the magistrate before the information was laid, that the information was laid on June 30, 1913, and that at the time of the trial, the fiat was annexed to the information and that both were on the magistrate's desk during the whole of the trial.

ALTA.

S. C.
1913

REX
v.
THOMPSON.

Stuart, J.

The fiats were in the following words:—

Province of Alberta:

I, Charles Richmond Mitchell, Acting Attorney-General for the Province of Alberta, give leave for a prosecution to be issued against (naming the defendant), of the city of Edmonton, in the Province of Alberta, for a violation of the Lord's Day Act, being ch. 153 of the Revised Statutes of Canada, 1906, in that the said ..... did on Sunday, the 8th day of June, 1913, provide, engage in, or was present at a performance or public meeting in the ..... theatre in the said city of Edmonton contrary to the provisions of the said Act, sec. 7.

Dated at Edmonton, this 27th day of June, 1913.

(Sgd.) C. R. MITCHELL,
Acting Attorney-General.

In respect of the fiat, I ask the opinion of the Court as follows:—

(*a*) Was it essential that the fiat should be put in evidence as part of the case for the prosecution?

(*b*) Can it, under the circumstances stated in the magistrate's affidavit, be taken to have been put in evidence, it not appearing that it was brought to the notice of the defendant or his counsel?

(*c*) Is the fiat effective, being signed by the "Acting" Attorney-General and not by the Attorney-General in person? If it be, is it necessary to shew the authority of the person purporting to act for the Attorney-General?

(*d*) Does the fiat, having regard to its terms, justify (1) the information, and (2) the conviction?

(*e*) Ought the magistrate's affidavit to be received in answer to the summons for a *certiorari*?

2. The effect of the evidence is that in each of the three theatres a moving picture show was given on the Sunday, designated in the conviction. As to Thompson, he was not the licensee of the theatre, but manager only; the licensees were called a company, but, apparently, were a partnership, of which Thompson was not a member; as to Hammond, he was in precisely the same position; as to Churchill, he was personally the licensee. The evidence in each case shewed that no tickets of admission were sold—no one entering the theatre was charged anything—no one was asked by anyone to pay or contribute anything—some entered without giving anything—a plate was placed upon a stand near the entrance in which people entering were expected to place a contribution, and most of the people entering did so—an employee stood near the plate. The defendants were respectively present at the shows given on the day in question at the respective theatres with which they were connected.

In respect of this evidence I ask the opinion of the Court as follows:—

1. Does this evidence disclose an offence against the provisions of sec. 7 of the Act? More precisely can it be said that the performance was one "at which any fee is charged, directly or indirectly, either for admission to such performance or public meeting or to any place within which the same is provided, or for any service or privilege thereat"?

2. If so, in view of the terms of the fiat and of the information, were the defendants Thompson and Hammond properly convicted?

The *Aherns* case stands in the same position as the others, and generally the same questions arise with respect to it.

With respect to the question of the position of Mr. Mitchell and his authority to issue the fiat, it seems a little difficult to find a satisfactory basis upon which to dispose of it. There is nothing stated in the facts before us to shew the origin of Mr. Mitchell's authority, and it is a question how far we can take judicial notice of any customary practice in the arrangements for the performance of the duties of the members of the Executive Council. I think, however, we are entitled to take judicial notice of the fact that Mr. Mitchell is and was at the time in question, a member of the Executive Council of the province. See Halsbury, vol. 13, p. 492; Taylor on Evidence, 10th ed., vol. 1, p. 19. Now, sec. 2 of the Attorney-General's Act, ch. 6, of the Statutes of Alberta, 1906, reads as follows:—

> There shall be a department of the civil service of the province to be called the department of the Attorney-General, over which the member of the Executive Council appointed by the Lieutenant-Governor under the seal of the province to discharge the functions of the Attorney-General for the time being shall preside; and the said Attorney-General shall *ex officio* be His Majesty's Attorney-General in and for the province.

In my opinion, the Court ought, in the present case, to apply perhaps with especial force the maxim *omnia præsumuntur esse rite acta*. We know that Mr. Mitchell was a member of the Executive Council of the province. We find him discharging one of the functions of the Attorney-General. I think we ought to presume that he was appointed to do so "by the Lieutenant-Governor under the seal of the province." The fact that he was apparently only doing so "for the time being" and that this temporary nature of his duties was indicated by him by inserting before his official title the word "acting" cannot, in my opinion, be held to derogate from his authority or to indicate that he was not really Attorney-General. He was certainly acting in that capacity. We ought, I repeat, in my opinion, to presume that he was rightly appointed to do so, and the statute says in effect, that the person so appointed to do so "shall *ex-officio* be His Majesty's Attorney-General in and for the province." I therefore think that the first part of question 1 (*c*) should be answered in the affirmative, and the second part in the negative.

With regard to question 1 (*a*) I am of opinion that it was not essential that the fiat should be put in evidence as part of the case for the prosecution.

The case of *Rex* v. *Canadian Pacific Railway*, 12 Can. Cr. Cas. 549, is clearly distinguishable. In that case the judgment went specifically upon the ground that the magistrate, before taking the information, had no communication of any kind from the Attorney-General indicating that his consent had been given. A careful examination of that case will shew that

ALTA.

S. C.
1913

REX
v.
THOMPSON.

Stuart, J.

the exact effect of the decision is, that before receiving an information, the magistrate must have had communicated to him in some way or other, the consent of the Attorney-General. The case does not decide what would or would not be a sufficient communication. It merely decides, that where there is no communication at all there is no jurisdiction in the magistrate to proceed.

If that case is right in laying down the rule that absence of the proper consent destroys the jurisdiction of the magistrate, then it seems clear to me, at least, that a complainant in offering evidence at the trial in support of an information laid by him, should not be expected to begin by proving the jurisdiction of the magistrate who is hearing the case. That is not usually considered a necessary thing for a prosecutor to do. In my opinion, if that question was to be raised at all, it was for the accused to raise it, and this they do not seem to have done.

Thinking, as I do, that question 1 (*a*) must be answered in the negative, it becomes unnecessary to answer question 1 (*b*).

With regard to the admission of the affidavit of the magistrate in answer to the summons for *certiorari*, I think it was clearly admissible.

The usual procedure when a person applies for a summons asking for an order for the issue of a writ of *certiorari* to bring up a conviction, is that he applies to the magistrate for copies of all the proceedings and makes these copies exhibits to his affidavit upon which the summons issues. Surely this affidavit is not to be considered conclusive as to what the material in possession of the magistrate is. If it can be shewn that a copy of some important document has not been obtained and exhibited, surely those opposing the summons should be allowed to produce it and so to supply the defect. The very principle upon which a motion to quash without the issue of the writ proceeds, is that all the material is already before the Court, and the issue of the writ is an unnecessary formality. If it is suggested that all the material has not been exhibited, then, the only alternatives are either to supply the defect by another affidavit or to let the writ issue so that everything will be returned.

In my opinion, question 1 (*c*) should be answered in the affirmative.

Question 1 (*d*) refers to the circumstance that the consents as signed by the Acting Attorney-General purport to consent to a prosecution for a violation of the Act in that the accused did "provide, engage in, or was present at" the forbidden performance. It is suggested that three separate offences are referred to here, and that the consent must be limited to one specific offence. For myself, I am unable to appreciate an argu-

ment by which it is contended that, because a person consents in one document to three separate or distinct acts, he does not thereby consent to each act individually. The consent follows the wording of sec. 7 of the Act. One does not need to go so far as to say that it would be proper for the Attorney-General to give a general "blanket" consent to the bringing of any or all charges under the Act. That question may remain until it comes up for decision. But here we have what is obviously a consent to lay a charge for either one of three different forms of what is put into one section of the Act as a thing to be generally prohibited. I see no reason for placing such a strict limitation upon the form of the consent as is here contended for, and I would therefore answer the question in the affirmative.

The question whether the performances in question come within the description given in sec. 7 as being performances or public meetings "at which any fee is charged directly or indirectly," was the chief question of contention upon the argument.

Upon consideration, I think the true point of view from which to examine the matter is this. The statute forbids the providing a performance at which a fee is charged. It forbids also being present at such a performance. Both the person who provides it and the person who is present, for whom it is provided, and who ordinarily pays a fee therefor, are guilty of an offence. Before they can be considered guilty, the performance must be one "at which a fee is charged directly or indirectly." Can both the person providing the performance and the person present at it avoid liability by a tacit understanding between them that there will be an outward pretence made that what is paid by the one to the other is paid voluntarily, and does not therefore become "a fee charged"? To my mind, one might as well say that a licensee under the Liquor License Act does not "sell" liquor after hours if after hours he hands out glasses of beer to a crowd and leaves it to their option to pay even when most of them do put down on the bar the price of their drinks although an odd one now and then takes his drink and does not pay. Of course, other sections and provisions of the Liquor License Act would probably create liability, just as here the accused would probably be liable under sec. 5 for carrying on their ordinary calling on Sunday. But it seems to me the parallel is close and that just as in the one case no magistrate would hesitate to convict for selling, so a magistrate here ought not to hesitate in deciding that a fee was really charged. In the one case, who would listen to an accused who attempted to say, "I didn't sell liquor. I just gave it to them and they gave me some money"? So here, how can we listen to the accused

ALTA.
S. C.
1913
REX
v.
THOMPSON.
Stuart, J.

when they say, "I did not sell entertainment. I did not charge for it. I just provided it and they just paid"?

It may be said that I have gone too far in stating that there was a tacit understanding between the accused and those entering the theatres, that something should be paid, but, for myself, I think that is the only proper inference of fact to be drawn from the facts laid before us. On the one side there was an expectation that the people would pay. On the other, in most cases, there was an actual payment. Certainly those who paid can properly be said to have themselves expected to pay. Certainly both must be held to have known the law. Can it be said here, any more than in the case of the distribution of liquor, that there was not a tacit understanding that something would be paid?

Take the case of a barrister or physician in England, mentioned during the argument. Their fee is supposed to be purely an *honorarium* and it cannot be sued for. After doing work for a client or patient they might say, "I will charge you nothing" and take nothing. But if the client or patient offers money and it is retained, he generally considers he is "charged a fee" even though it could not have been sued for and the payment was purely voluntary. It will not do to argue that the analogy is false because the barrister would refuse to act unless the fee was paid. Because, in the present case, unless a substantial proportion of those going in did in fact pay I feel certain there would have been no performance. At any rate there would certainly not be a second one.

I wish to add that I cannot appreciate the force of the argument, that, if we hold a fee to have been indirectly charged in these cases, it would mean that, but for the especial exception contained in the section, an ordinary church service, where a collection plate is passed or left at the door, would be within the meaning of the Act. In the first place one might argue that that was possibly just what Parliament thought, and that it was for that reason that the exception was made. But aside from that, the argument overlooks the fact that there is a wide distinction between those ceremonies in churches on Sundays, which, according to the views of the persons conducting them at any rate, whether priest, curate, minister or pastor, are ceremonies of worship of a Supreme Being of which the making of an offering is considered part even though many who contribute do so only as a matter of custom, and a performance which merely has the double object of amusing the spectators and bringing gain to the managers: see *Baxter* v. *Langley*, L.R. 4 C.P. 21.

In Murray's New English Dictionary, the verb "charge" is said to mean "to impose, claim, demand or state as the price

or sum due for anything." I feel, no doubt, that the silent hint given by the plate with a person beside it should be treated as an indirect "claim or demand."

For these reasons I am of opinion that what was done constituted a charging of a fee at any rate indirectly within the meaning of sec. 7, and that question 2 (*a*) should be answered in the affirmative.

BECK, J.:—I stated a case in three of these matters for the opinion of the Court *en banc*. Of the questions, an answer to which was asked, it was agreed that only two need be answered. These two substantially are:— Beck, J.

(1) Is a Minister of the Crown for a province, who is not the Attorney-General for the province, but is "acting Attorney-General" authorized to give leave for the commencement of a prosecution under sec. 17 of the Lord's Day Act?

My answer to this question is in the negative.

The Lord's Day Act says, "the Attorney-General of the province." No provincial enactment can interpret the meaning of words in a Dominion enactment; and, therefore, it is irrelevant to consider any provincial legislation, having reference to the exercise by any one else of the powers of the provincial Attorney-General. There cannot be two Attorneys-General at the same time. If there is an Attorney-General he is the Attorney-General, and anyone acting for him is not the Attorney-General; and, in my opinion, an Attorney-General is an essential officer of Government, both Dominion and Provincial, under the Constitution of Canada, and the Provinces, and our existing system of laws.

Then, although the Dominion Parliament has, of course, power to interpret the expression, "the Attorney-General of the province," as used in any Dominion Act, Parliament has not done so. The Dominion Interpretation Act, when referring to Ministers of the Crown, refers only to Ministers of the Dominion Government: *Re Criminal Code*, 43 Can. S.C.R. 434.

> The Attorney-General is the chief law officer of the Crown and a great officer of the State . . . and he is *ex officio* head of the Bar for the time being. . . .
>
> The Attorney-General is the only legal representative of the Crown in the Courts: Encyc. of Laws of England, vol. 1, pp. 624, 625.

In *Re Criminal Code*, Idington, J., says:—

> It might well be observed that the Attorney-General is a person generally known to the public and so much in the public eye as to be probably responsive to such just criticism for neglect of duty as his deputy clearly might not be: p. 444.

A somewhat similar observation, with, no doubt, somewhat less force, may, I think, be made while contracting the position

ALTA.

S. C.
1913

REX
v.
THOMPSON.

Beck, J.

of the Attorney-General and anyone else, even another Minister of the same Government acting merely temporarily or *ad hoc* in relation to a question upon which the opinions of the electors are much divided, and the question of the extent to which many of the provisions of the Lord's Day Act should be enforced is eminently an instance of just such a case.

The second question to which an answer is asked, is, in substance, whether, on the findings of fact stated on the case, there was any *fee charged*, directly or indirectly, for admission.

My answer to this question is also in the negative.

In my opinion it is not necessary to consider any word other than the word "charged." That word involves, to my mind, the idea of obligation, and, on the facts stated, I see no ground for finding any obligation of any kind.

The statute under consideration is a penal statute creating an offence. It is a case not of *malum in se* but of *malum quia prohibitum*.

There is a difference of opinion between the members of this Court as to the interpretation of the words to which I have referred, and this, I suppose, may be taken to indicate that there is some doubt as to the meaning Parliament intended to express.

The Judicial Committee of the Privy Council, in *The "Gauntlet"* (1872), L.R. 4 P.C. 184, at 191, VIII. Moo. N.S. 428, at 439, 17 Eng. Reps., at 377, said:—

> No doubt all penal statutes are to be construed strictly—that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and the Court must not strain words on any notion that there has been a slip or *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

In the fourth case, that against Aherns, the summons was adjourned to be heard before the Court *en banc*, and on the argument, all four cases being argued together, it was agreed by all parties concerned, with the consent of the Court, including myself, that the three other cases should be treated as if the summonses had been likewise adjourned, and I then and there adjourned them accordingly to be dealt with by the Court *en banc* on the facts reported by me, which it was admitted were accurately and completely reported.

ALTA.

S. C.
1913

REX
v.
THOMPSON.

Simmons, J.

SIMMONS, J.:—These are three applications by way of summons for writs of *certiorari* to remove and quash convictions against the defendants for breaches of the Lord's Day Act, R.S.C. 1906, ch. 153, for that the defendants did, respectively, on Sunday, June 8, 1913, provide a performance or public meeting in certain theatres in Edmonton, contrary to the provisions of sec. 7 of the Act. Certain questions involved in each of these cases were reserved by Beck, J., for the opinion of this Court.

The most important question submitted is, whether the acts complained of constitute an infringement of the Act under sec. 7 rendering the parties liable under this section.

Counsel have agreed that we shall deal with this question upon the facts as found by Beck, J., which are as follows:—

(2) The effect of the evidence is that in each of the three theatres a moving picture show was given on the Sunday designated in the conviction. As to Thompson, he was not the licensee of the theatre but manager only; the licensees were called a company, but, apparently, were a partnership, of which Thompson was not a member; as to Hammond, he was in precisely the same position; as to Churchill, he was personally the licensee. The evidence in each case shewed that no tickets were sold—no one entering the theatre was charged anything—no one was asked by any one to pay or contribute anything—some entered without giving anything—a plate was placed upon a stand near the entrance in which people entering were expected to place a contribution, and most of the people entering did so—an employee stood near the plate. The defendants were respectively present at the shows given on the day in question at the respective theatres with which they were connected.

I have no doubt but that the owners or managers of the theatres and the majority of their patrons were accomplishing the same result as would have happened if an admission fee had been charged in the regular way. There was surely a moving picture show conducted by the owner or manager for his own benefit and profit, and probably the usual price of admission was paid by a majority of the patrons. By virtue of an implied understanding between the defendants and their patrons, a moral obligation existed on the part of the patron to pay for the entertainment. No legal obligation, however, was called into existence, and I am of opinion that the words of the section, "at which any fee is charged, directly or indirectly," apply to a legal obligation, and the word "indirectly" does not modify this effect, but provides for such circumstances as arise under sub-section 2—where a sum is exacted or charged from the patrons under some other guise.

If there is nothing to modify, nothing to alter, nothing to qualify the language which the instrument contains it must be construed in the ordinary and natural meaning of the words and sentences (Maxwell, on Statutes, p. 3); *vide* Lord Halsbury, in *St. John's Hampstead* v. *Cotton*, 12 A.C. P.C. 1, at 6.

ALTA.

S. C.
1913

REX
v.
THOMPSON.

Simmons, J.

However laudable the result aimed at in these prosecutions, I see no reason for reading into the words of the section an interpolation quite beyond the "ordinary and natural meaning of the words." This view, it seems to me, receives added force by the fact that, in sub-section 5, Parliament has prohibited the carrying on for gain of "any business of his ordinary calling," and, on the facts as submitted to us, the onus would seem to be on the defendants of shewing that they were not carrying on their ordinary calling or business for gain.

I am, therefore, of the opinion that convictions should be set aside.

Walsh, J.

WALSH, J.:—In my opinion it is quite competent for the acting Attorney-General to grant a fiat for a prosecution under the Lord's Day Act, and I think that we are entitled to assume that a member of the Executive Council who signs such a fiat in that capacity has been properly appointed to that office. The appointment presupposes either a vacancy in the office which the appointee is but temporarily filling, or an absence from the province or an incapacity from illness or some other cause in the regular incumbent of it to discharge its duties. The temporary holder of the office is, in my judgment, during his incumbency of it, clothed with all the authority vested in him whose place he is filling. He is, for the time being, the Attorney-General.

I am of the opinion that the words "at which any fee is charged, directly or indirectly," mean exactly what they say. The word "charged" is the governing word in this sentence, and in its ordinary meaning it is not broad enough, in my view, to cover a payment which is not imposed upon, but is voluntarily assumed by him who makes it. There is nothing in the facts as stated in the reference to indicate any degree of compulsion on the part of those attending the performance to pay an admission fee to it, and it is this entire absence of compulsion to contribute that leads me to the conclusion that no "fee is charged" for admission to performances given under the circumstances described in the reference.

Judgment accordingly.

MAN.

P. U. C.
1913

Re WINNIPEG and ST. BONIFACE.

Manitoba Public Utilities Commission, Hon. H. A. Robson, Commissioner. October 16, 1913.

1. MUNICIPAL CORPORATIONS (§ II F 1—170)—POWERS—AS TO LIGHTS — MUNICIPAL PLANT—SUPPLYING ELECTRICITY BEYOND LIMITS.

It is not *ultra vires* for a city owning an electric light and power plant to supply power to consumers in other municipalities.

2. MUNICIPAL CORPORATIONS (§ II F 1—170)—POWERS—AS TO LIGHTS — MUNICIPAL PLANT—SUPPLYING ELECTRICITY BEYOND LIMITS.

A city which owns an electric light and power plant, in supplying electricity to consumers in another municipality, is to be regarded as a private corporation operating a public utility.

3. ELECTRICITY (§ I—1)—MUNICIPAL REGULATIONS OF—REFUSAL OF PERMISSION TO ERECT POLES AND WIRES—REVIEW BY PUBLIC UTILITIES COMMISSION.

In the absence of a need, so extensive as to create a public interest, for the introduction of additional electricity and power into a town, the refusal of a city council to grant permission to place a system of poles and lines for the distribution of electricity throughout the entire settled portion of the city will not be interfered with by the Public Utilities Commission (Man.).

Statement

APPLICATION by the city of Winnipeg in respect of its light and power department, by way of appeal from the refusal of the council of St. Boniface to grant to the city of Winnipeg permission to use the public roads and streets of the city of St. Boniface for the purpose of extending its electrical system into the city of St. Boniface, and to have fixed the conditions upon which the city of Winnipeg may exercise such rights within the city of St. Boniface. The appeal is made under 5 & 6 Edw. VII. ch. 95, sec. 4 (*j*), being the enactment upon which Winnipeg's authority for its electrical works depends. Clause (*j*) as amended by 3 Geo. V. ch. 88, sec. 16, is as follows:—

(*j*) In the event of the city and any other municipality failing to agree as to the terms upon which the city shall be allowed to exercise any of its franchises or rights by this section conferred, there shall be an appeal to the public utility commissioner, who shall have the right to determine any dispute and fix the conditions upon which the city may exercise such rights within such other municipality, and grant the necessary consent thereto, and the decision of the public utility commissioner in any such case shall be final and binding on all parties.

Sec. 19 of the Public Utilities Act provides:—

(*d*) In all cases arising when a public utility having the right to enter a municipality for the purpose of placing therein, with or without the consent of the municipality, its rails, posts, wires, pipes, conduits or other appliances, upon, along, across, over or under any public road, street, square, watercourse, or part thereof, cannot come to any agreement with such municipality, as to the use, as aforesaid, of the roadway or of the watercourse in question, or as to the terms and conditions of such use, and applies to the commission for permission to use such roadway or watercourse, or to fix the terms and conditions of such use; and in such case the commission may permit, as aforesaid, the use of such roadway or watercourse, and prescribe the terms and conditions thereof.

Theodore Hunt, K.C., and *J. Preudhomme*, for the city of Winnipeg.

H. P. Blackwood opposed the application on behalf of St. Boniface.

E. Anderson, for the Winnipeg Electric Railway Company, also opposed the application.

MAN.

P. U. C. 1913

RE WINNIPEG AND ST. BONIFACE.

Commissioner Robson.

COMMISSIONER ROBSON:—The objections taken were:—

1. That the city of Winnipeg had no power to carry on a light and power business beyond the limits of that city.

2. That the dominion of the city of St. Boniface over the streets in that municipality should not be interfered with in the manner proposed.

3. That in any event there is satisfactory provision at present for the needs of that community, that is to say, by the service of the Winnipeg Electric Railway Co., who established a system there, under terms imposed by St. Boniface.

The first objection raises the question of the legal capacity of the city of Winnipeg to supply electric power to consumers in other municipalities. This must not be confounded with the question of the right against the will of another municipality to erect poles and other means of distribution on its streets. I have already expressed the view that it is not *ultra vires* for Winnipeg to pass beyond its territorial bounds to do this class of business. How it shall procure permission to use the property of others for that purpose is another matter. As to this question of corporate capacity I append a memo. of my views.

The third objection is really an argument supporting the second, and these two have to be considered generally.

This is not a case of Winnipeg's acting within its own borders. It has, in this case, to be considered merely as a private corporation operating a public utility.

The city of Winnipeg, by its counsel, takes the position that its powers are so complete under its charter, as amended, that all that is left to an outside municipality is a voice as to terms (see clause (*j*)), and that the appeal is confined to disputes as to terms. In short, that all I have to do now is prescribe reasonable terms for the use by Winnipeg of the highways of St. Boniface, and reference was made to the case of *Bell Telephone Co.* v. *Owen Sound*, 8 O.L.R. 74. Other similar cases might be cited. The legislation there concerned left nothing to the consent of any municipality (unless more than one line of poles were desired), the right to enter a municipality and use highways was unqualified, but certain directions as to the work were given by the statute, and local supervision was authorized. The case of *British Columbia Electric Co.* v. *Stewart*, 14 D.L.R. 8, was also cited. That shews that the consent of the municipality is not a franchise right or privilege requiring a vote of the electors under the provincial statute there in question, that the consent is not a donative, but a restrictive provision, and that the function of the municipality under such restrictive provisions is to circumscribe or impose conditions upon the exercise by the company of the powers given it by the Legislature.

By refusal of municipal consent the company's powers are to that extent restricted or circumscribed. Clearly, municipal

councils have a discretion to refuse the consent, and it is not merely a matter of terms. It happens that under the Acts referred to there is an appeal from the refusal. These appeal clauses of the Acts quoted must have some purpose. I think resort to such provisions would be reasonable where a municipality had refused to give "way leave" in cases:—

1. Where a utility finds it necessary to pass through a municipality in carrying out its general scheme.

2. Where there is a present demand for the service of a utility in a municipality for which provision is not made on reasonable terms.

And these with proper regulation would be fair instances for the extension of permission to any utility to enter a municipality. Refusal of municipal consent in such cases might well be evidence that the council had not fairly exercised its discretion.

When the matter was up before I stated that a plan should be filed shewing the work proposed to be done by Winnipeg on the streets of St. Boniface. At that time the demand indicated was for power for certain factories, the street interference being comparatively slight. But now is adduced a plan shewing a general system of poles and lines broadcast over the settled part of St. Boniface. The demand now alleged consists of promises from power users who are otherwise supplied at rates that are not said to be unreasonable.

It is alleged that certain rate reductions can be made by Winnipeg or may be brought about by its introduction there. These are not so extensive as to create a public interest, such as would justify overruling the policy of the St. Boniface council.

There is certainly no case made for interference with the discretion of the St. Boniface council in refusing to permit another electric distribution system to be extended over the whole of its inhabited area. If application were made by Winnipeg merely to extend its lines to consumers requiring the service who could not be reached without interruption of main thoroughfares, St. Boniface would, probably, look at the matter differently, and it would be a different case for an appeal. The present application must stand as St. Boniface left it.

Order accordingly.

N.B.

S. C.
1913

ST. JOHN and QUEBEC R. CO. (appellant, defendant) v. BULL (respondent, plaintiff).

New Brunswick Supreme Court, Barker, C.J., Landry, White, and Barry, JJ. June 20, 1913.

1. APPEAL (§ II C—50)—JURISDICTION—SECOND APPEAL AFTER APPEAL FROM ARBITRATORS TO JUDGE.

No further appeal lies to the court *en banc* from an order of a judge of the Supreme Court of New Brunswick setting aside an award on an appeal to him under sec. 17, sub-secs. (20) and (21) of C.S.N.B. 1903, ch. 91, which permit an appeal on questions of law or fact to a judge of such court from an award made by arbitrators in an expropriation proceeding.

[*Birely* v. *Toronto, Hamilton & Buffalo R. Co.*, 25 A.R. (Ont.) 88; *Canadian Pacific R. Co.* v. *St. Thérèse*, 16 Can. S.C.R. 606; *Ottawa Electric Co.* v. *Brennan*, 31 Can. S.C.R. 311; and *Armstrong* v. *James Bay R. Co.*, 12 O.L.R. 137, affirmed 38 Can. S.C.R. 511, affirmed, [1909] A.C. 624, followed.]

Statement

APPEAL from the order of McKeown, J., setting aside expropriation proceedings before arbitrators under the New Brunswick Railway Act, C.S.N.B. 1903, ch. 91.

The appeal was dismissed for want of jurisdiction.

P. A. Guthrie, for appellant.

F. B. Carvell, K.C., and *W. P. Jones*, K.C., for respondents.

Barker, C.J.

The judgment of the Court was delivered by BARKER, C.J.:—This is an appeal from an order made by Mr. Justice McKeown setting aside expropriation proceedings, before arbitrators, under the New Brunswick Railway Act, C.S. N.B. 1903, ch. 91, in connection with the Valley Railway, so called.

No witnesses were examined; but the arbitrators seem to have acted on their own judgment in the matter, and made an award, which was set aside. The parties have appealed to this Court to rescind the order made by Mr. Justice McKeown.

Preliminary objection was taken that this Court had no jurisdiction in the matter; that there was really no appeal to this Court; that the Judge sitting hearing it, although a member of this Court, did not represent the Court in any way, and that therefore there was no appeal from his decision to this Court.

Several cases were cited, two or three from Courts in Ontario, which have been sustained by the Supreme Court at Ottawa, and by the Privy Council on an Act in force in Ontario at that time: *Birely* v. *Toronto, Hamilton and Buffalo R. Co.* (1898), 25 A.R. (Ont.) 88; *Canadian Pacific Railway Co.* v. *The Little Seminary of St. Thérèse* (1889), 16 Can. S.C.R. 606; *Ottawa Electric Company* v. *Brennan* (1901), 31 Can. S.C.R. 311; *Armstrong* v. *James Bay Railway Co.* (1906), 12 O.L.R. 137, (1907) 38 Can. S.C.R. 511, [1909] A.C. 624. This Act has been altered since, but at that time it was precisely the same as the section under which the appeal is sought to be made in this case. It was held by all those Courts that there was no appeal, for the reasons I

have mentioned. In deference to these cases we therefore hold that we have no jurisdiction in this matter.

There were other grounds upon which the appeal was sought to be sustained. I do not mention them with a view to determining them in any way, but simply so that there will be no dispute hereafter as to their having been determined.

One ground was with reference to the right of the arbitrators to go on and assess damages simply on their own observation of the land, and their own knowledge with reference to it, without summoning witnesses. Upon that we express no opinion whatever, one way or the other. The only point we determine is that this Court has no authority to act, by way of appeal, and this application is therefore dismissed, with costs.

Objection sustained.

OLIVER v. LAURENT.

Alberta Supreme Court, Beck, J. October 17, 1913.

1. COURTS (§ II A 3—161)—JURISDICTION—AS DEPENDENT ON AMOUNT — ALBERTA DISTRICT COURTS.

The jurisdiction conferred by sec. 23 of the District Courts Act, Alberta Statutes, 1907, ch. 4, on District Courts embracing the trial of certain causes "in relation to land or any legal or equitable interest therein," covers an action to deal with land by way of sale or foreclosure where the plaintiff's claim does not exceed $600, but the land affected exceeds in value the amount stated.

Statement

REFERENCE for an interpretation of a statutory clause on Alberta District Court jurisdiction as to the sale or foreclosure of lands.

P. L. McNamara, the registrar in person.

E. H. D. Wilkins, contra.

Beck, J.

BECK, J.:—The registrar has referred the question of the jurisdiction of a Judge of a District Court in an action in a District Court to deal with land by way for instance of sale or foreclosure, where, while the plaintiff's claim is less than $600, the land exceeds in value the sum of $600, or where the claims of subsequent incumbrancers raise the amount of the charges against the land to a sum exceeding $600.

I have consulted my brother Judges, and they all agree with me that, in such a case, the action is properly brought in the District Court, that there is no need at any stage to transfer the action to the Supreme Court, but that the action may be proceeded with to its conclusion in the District Court.

Direction accordingly.

QUE.

MEMO. DECISIONS.

1913

COUSINS v. BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

(Decision No. 2.)

Quebec King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. February 22, 1913.

[*Cousins* v. *Brotherhood, etc.*, 6 D.L.R. 26, 42 Que. S.C. 110, affirmed.]

BENEVOLENT SOCIETIES (§ III—11)—*Statutory conditions affecting insurance—Withdrawal from membership—R.S.Q.* 1909, *article* 7028.]—Appeal by the plaintiff from the judgment of Greenshields, J., in the Superior Court, *Cousins* v. *Brotherhood etc.*, 6 D.L.R. 26, 42 Que. S.C. 116, dismissing an action on a mutual benefit certificate, involving a withdrawing member's right to indemnity benefits accruing after his withdrawal but before the efflux of an unexpired term covered by his assessment payments.

THE COURT OF KING'S BENCH affirmed the judgment below and held that a mutual benefit society under obligation to pay an indemnity to the personal representatives of its members upon their death, based on monthly assessments imposed upon the members during their lives, does not renew its contract with them, within the meaning of article 7028, R.S. Que. 1909, each time it receives such monthly dues, and that article 7028 does not apply to members admitted before its enactment. A member of a mutual benefit society, who upon admission agrees to conform to its constitution and laws present as well as future, is bound by amendments to the effect that upon withdrawal a member forfeits all rights to indemnity benefits thereafter accruing, although such accrual may arise during the balance of a term covered by his assessment payments.

Oral evidence of a member's withdrawal from a mutual benefit society is admissible under Quebec law where it appears (*a*) that his letter of resignation was destroyed by the secretary of the society as of no further use, (*b*) that a withdrawal card was sent him, (*c*) that he understood its effect, (*d*) that he accepted it with thanks, and (*e*) that his legal representative (the plaintiff) refuses upon due demand to produce the withdrawal card although in his custody.

Appeal dismissed.

INDEX OF SUBJECT MATTER, VOL. XIV., PART 2.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XIV., PART 2.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

ALTA.

S. C.

1913

Alberta Supreme Court, Harvey, C.J., Beck, Simmons, and Walsh, JJ. October 11, 1913.

1. DAMAGES (§ III L 2—241)—MEASURE OF COMPENSATION—CONDEMNATION OR DEPRECIATION BY EMINENT DOMAIN—VALUE—ESTIMATE AS OF WHAT TIME—LAND TAKEN BY RAILWAY TO OBTAIN GRAVEL.

Compensation for land taken by a railway company under sec. 180 of the Railway Act, R.S.C. 1906, ch. 37, to obtain a supply of material for the construction, maintenance or operation of a railway, is to be made as of the time when the company takes possession of the land. (*Per* Harvey, C.J., Simmons, and Walsh, JJ.)

2. RAILWAYS (§ II—10)—CONSTRUCTION—FILING PLANS WITH RAILWAY BOARD—NECESSITY—PLAN FOR TAKING LAND TO OBTAIN CONSTRUCTION MATERIALS.

Sec. 160 (2) of the Railway Act, R.S.C. 1906, ch. 37, providing that copies of the plans, etc., of a railway, when sanctioned by the Board of Railway Commissioners, shall be deposited in the office of the registrar of deeds for the district or county to which they relate, does not apply to or require the registration of plans prepared under sec. 180 of the Act, for the compulsory taking of land to obtain stone, gravel, earth, etc., for construction or maintenance purposes. (*Per* Harvey, C.J., Simmons, and Walsh, JJ.)

3. EMINENT DOMAIN (§ II D—101)—APPEAL—WHERE EVIDENCE SUFFICIENT TO SUSTAIN AWARD.

Where, in an arbitration proceeding, the appellant's evidence was directed to establishing damages on a wrong basis, and, on appeal, he does not seek a rehearing on that ground, but insists that such evidence was proper, the award will be upheld if there is any evidence to sustain it. (*Per* Harvey, C.J., and Walsh, J.)

Statement

APPEAL by landowners from an award of arbitrators for land taken by a railway company in order to obtain a supply of gravel for construction purposes.

The appeal was dismissed.

Frank Ford, K.C., for the Trusts and Guarantee Co., Ltd.

A. B. Cunningham, for the Saskatchewan Land and Homestead Co.

O. M. Biggar, K.C., and *Geo. A. Walker*, for the Calgary and Edmonton R. Co.

Harvey, C.J.

HARVEY, C.J.:—I am of opinion that the arbitrators were right in concluding that the time of taking possession by the railway was the time with reference to which the compensation should be fixed. I agree with them that sec. 192 of the Railway Act, R.S.C. 1906, ch. 37, with the amendment, 8-9 Edw. VII. ch. 32, sec. 3, which provides the time, in cases to which it applies, has no application here. The plan, etc., referred to in that section are quite clearly the same as in the previous section, which shews that the deposit referred to is in a registry office, and the same as the plan, etc., of 160 or in other words the plan, etc., sanctioned by the Board and thereafter deposited

ALTA.
S. C.
1913
SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.
Harvey, C.J.

with the Board. Sec. 180 under which the gravel land in this case is being taken distinctly provides for a plan to be prepared and served on the owners or occupiers of the lands, but for no other plan whatever and further provides that the company shall not be required to submit such plan for the sanction of the Board.

Sec. 160, sub-sec. 2, provides that copies of the plan, which has been sanctioned by and thereafter deposited with the Board, certified by the secretary, shall be deposited in the offices of the registrars. Inasmuch as the plan under sec. 180 does not require the sanction of the Board it appears to me to follow necessarily that the provisions of sec. 160 which apply only to plans which have been sanctioned cannot apply to it, and consequently, there being no other provision requiring deposit in a registry office there is nothing in this case for sec. 192 to operate on. It would follow for the same reason that the first sub-section of sec. 191 would have no application to the present case, but there would seem to be no sufficient reason why it should, for as I have pointed out in *Sanders* v. *Edmonton and Dunvegan R. Co.*, 14 D.L.R. 88, decided at this sittings, the purpose of this section is to enable the railway company to acquire the control of lands without dealing with all of the persons interested so as not to impede seriously the construction of the railway. The purpose of sec. 180 is so entirely subsidiary and limited that the need for the powers of sec. 191 is much less pronounced.

There being then, in my opinion, no statutory provision determining the time with reference to which the compensation is to be ascertained, the other provisions of the Railway Act appear to me to have little significance in this regard.

The railway company obtained possession of the land under a warrant given by a Judge upon the consent of the owners, having first paid into Court, as required, by sec. 218, a sum of money which was determined by the Judge on the concurrence of all parties as "sufficient to cover the probable compensation and costs of the arbitration." What compensation could there possibly be in the minds of the Judge and the parties except the compensation for the land as it then was, and how would it be possible to determine what would be a sufficient amount otherwise than by reference to its then or earlier value.

This section, however, is of general application and in most cases would be governed by sec. 192, which declares that the value shall be ascertained as of the date of deposit of the plan which would be a date prior to the warrant. It appears to me, therefore, that it has less significance than if section 192 did not exist.

In my view, however, inasmuch as the warrant was obtained by the consent of the owners, it is much the same as if possession

had been taken with the consent of the owners except that, perhaps, the owners could not be deemed to have waived any rights they might have in respect to arbitration to determine the compensation. The warrant of possession could only be obtained under sec. 217, if possession was necessary to carry on some part of the railway with which the company was ready to proceed. The possession was wanted in order to permit the railway company to use the gravel in its work of construction or operation. The company was, therefore, put into possession for the purpose of using the land in a way which would be inconsistent with any other condition than that of ownership. The company then had practically paid for the land by the deposit of the money in Court, since the price had not yet been ascertained and it had all the evidences of ownership, except the bare evidences of title and it was in a position to obtain those. It did in fact commence to remove the gravel, the immediate need for which was an essential condition of its rights to obtain possession. I am unable to see why, under these conditions, anyone but the railway company could be deemed to be interested in the lands. Section 213 provides that the compensation for any lands which may be taken without the consent of the owner shall stand in the stead of such lands. The money paid into Court while not in terms the compensation is a sum "to cover the compensation," and, therefore, may properly be considered as including the compensation, and the interest of the owners, therefore, has been transferred from the land to the money. If, as I suggest, the possession is to be considered as taken with the consent of the owners, the case appears to me to be even stronger, considering that the land from the time of the taking possession is to be treated as the land of the railway company for all purposes under consideration.

This view appears to me to be supported by the English cases under similar expropriation provisions.

In *Carnochan* v. *The Norwich and Spalding R. Co.* (1858), 26 Beav. 169, 53 E.R. 861, before the Master of the Rolls, Sir John Romilly, it appeared that notice had been given to a tenant at will, and possession was taken, and the line built. The plaintiff subsequently to the taking of possession acquired a one-ninth interest by purchase from the owner. The Master of the Rolls says of the plaintiff, "He was in truth but the purchaser of an interest in the purchase money." That case was cited for approval of that statement in *Mercer* v. *Liverpool, St. Helen's and South Lancashire R. Co.*, [1903] 1 K.B. 652, at 662.

The latter decision was affirmed on appeal to the House of Lords, reported in [1904] A.C. 461, where, at p. 465, Lord Lindley says:—

The broad principle appears to me to be that it is not competent for

ALTA.

S. C.
1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

Harvey, C.J.

an owner of land who has received notice to treat to deal with any of his land either taken or injuriously affected by the company so as to increase the burdens of the company as regards the compensation to be made in respect of such land or any of it.

It is contended, however, that because of the provisions of sec. 207, the railway company had the right to abandon everything it had done, including the taking of possession until the arbitration was completed, and, therefore, could not be considered as owner.

Section 207 is as follows:—

Where the notice given improperly describes the lands or materials intended to be taken, or where the company decides not to take the lands or materials mentioned in the notice, it may abandon the notice and all proceedings thereunder, but shall be liable to the person notified for all damages or costs incurred by him in consequence of such notice and abandonment, which costs shall be taxed in the same manner as costs after an award.

In *C.P.R. Co.* v. *Little Seminary of Ste. Thérèse* (1889), 16 Can. S.C.R. 606, in which the facts were similar to those of the present case, Mr. Justice Patterson, with the concurrence of Mr. Justice Gwynne, at p. 614, says:—

This abandonment of the notice for lands, or notice of intention to take lands, must take place while the notice is still a notice and before the intention has been executed by taking the lands.

The abandonment is of the notice, not of the lands, and the damages and costs to which the company remain liable are those consequent on the notice, and the abandonment of the notice. Mark again the language. There is not an allusion to damages caused by taking and holding possession of lands that are afterwards abandoned.

The section of the then Act was somewhat different from the present sec. 207, and is as follows:—

Any such notice for lands, as aforesaid, may be abandoned, and a new notice given with regard to the same or other lands and to the same or any other person; but, in any case, the liability to the person first notified for all damages or costs by him incurred in consequence of such first notice and abandonment shall subsist.

It is argued that, while under the former section, only the notice could be abandoned, under the present section not only the notice, but all proceedings thereunder may be abandoned, and that by reason of that, even possession may be abandoned. There appear to me to be several reasons why such a contention is not sustainable. In the first place, it appears to me that the word "proceedings" does not cover an act of taking possession, certainly, if without opposition, as in the present case. It is an individual act of the railway company, something entirely different from the proceedings between the parties provided for by the Act, such as the arbitration proceedings and the proceedings to obtain the warrant.

Then the wording of the present section seems to make it perfectly clear that it must be something preceding the taking of possession, because the company may only abandon when "it decides not to take the land or materials." After having taken them, it is, of course, too late to decide not to take them. I can see no justification for giving the word "take" the technical meaning of acquiring title. If one speaks of taking a book he has in mind the physical act of taking it into one's possession, regardless altogether of any right or title. As far as land is concerned, the equivalent act is that of putting oneself upon or in possession of it. This appears to me to be the natural meaning of the word, and is the sense in which the Judges took it in the *Little Seminary of Ste. Thérèse* case (*C.P.R.* v. *Seminary, etc.*, 15 Can. S.C.R. 606).

In the present case the material, the gravel, was actually taken and removed in part and possession was obtained in order that that might be done. In the section the same word "take" is used with reference to both land and materials, and I find myself at a loss to understand how anyone could seriously contend that, though the gravel had been removed by the company and used in other places, it had not been taken, because the company had no title to it.

In the present case there is another consideration which, in my opinion, makes the contention ineffective. The warrant of possession and the possession thereafter, even if such possession could be deemed a proceeding, were not proceedings under the notice. The warrant was made on the consent of the owners and contains no suggestion that it depends upon any notice, or is made in pursuance or in consequence of any notice, and it is only proceedings under the notice that the section authorizes to be abandoned. The section (207) therefore seems to have no application to the present case, and the English authorities would appear to apply.

Having then concluded that the railway company should be treated as the equitable owner of the land, at least from the time it went into possession, and that the compensation should be for the land at its then value, it becomes necessary to consider whether the award is based on proper evidence.

The proceedings opened before the arbitrators by the railway company filing the notice given to the owners in July, 1908, of its intention to take the lands and offering $733.05 as compensation, which notice was accompanied by a certificate of a land surveyor, that the amount was a fair compensation. They also filed the order or warrant of possession, and the orders appointing arbitrators.

The record does not shew whether any discussion then took place, but the owners thereupon called witnesses whose evid-

ALTA.

S. C.

1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

Harvey, C.J.

ence in chief was entirely limited to the quantity of gravel taken and the quantity left, and its value at the time the evidence was given. When they had completed their evidence, the railway company called witnesses whose evidence was almost exclusively confined to meeting the case made out by the owners' witnesses. After this evidence was concluded, the owners, though not without objection from the opposing counsel, called another witness, whose evidence, however, was of the same character.

It does not appear from the record whether the owners appreciated, in giving their evidence, that the railway company would contend that the value in July, 1908, was what was to govern. They did, however, apparently acquiesce in the view that the railway company had satisfied the burden on it by merely putting in the offer. Also, in the cross-examination of Mr. Cunningham, who had been general manager of the appellant company since some years before the warrant of possession, Mr. Biggar, counsel for the railway company, went into the question of the relation between the amount of money paid in as security and the value of the land. The sum of $1,150 was the amount paid in as security for the compensation and the costs, which Mr. Cunningham admits was agreed to by the solicitors of his company.

During the examination of the railway company's first witness, some discussion took place between counsel and the Board on the subject of expert witnesses and the conduct of the proceedings. Mr. Biggar intimated that, in addition to calling witnesses to meet the evidence given by the other side as to the quantity and quality and value of the gravel, he desired to call witnesses to give evidence of the agricultural value of the land, and asked leave to call more expert witnesses than specified in the Act. Objection was made by Mr. Ford, and the Board decided to allow Mr. Ford to call witnesses to meet the evidence on the second point given by Mr. Biggar's witnesses.

During the discussion Mr. Biggar said:—

> The arbitration has been begun by us. Now, what is before the Board is the notice of expropriation and the certificate. That is to be set aside by the owner, and some other valuation substituted. All that we have got to do now is to rebut what they have said.

Mr. Ford, in reply, said:—

> Mr. Biggar did put in the formal document shewing what had taken place up to the time of the sitting so far as the formal proceedings were concerned, then, without putting in any evidence, he naturally put the onus on us to support the claim which we make.

The only witness Mr. Biggar called to give evidence as to value for agricultural purposes, was one McKenty, his third witness, who stated that for 12 years he had been in the real estate

business in the neighbourhood of the land in question. When Mr. Biggar asked him,

> Can you tell me from your experience to what extent, if at all, the existence of gravel under land adds to or subtracts from their value. I want to know that particularly with reference to the summer of 1908.

Mr. Ford objected that the witness had not shewn that he was competent to give an answer.

During the discussion, Mr. Ford said:—

> An attempt is being made to establish an alternative principle of fixing compensation. There isn't anything else involved in it but the question of time which is quite apparent now.

The witness later stated that

> farm lands underlaid with gravel were not as valuable, and that lands in the district that he had worked in within his knowledge hadn't had any value other than for farm purposes.

The owners called no witness to meet the evidence of this witness.

The finding of two of the then arbitrators was

> that the land in question in 1908 possessed no value as land for gravel purposes, and there has been no evidence to shew that the land possessed any greater value than the sum offered by the railway company, namely, $733.05, being the amount mentioned in the engineer's certificate accompanying the notice of expropriation served upon the owners,

and they awarded that sum as compensation for the land and for the damage.

Two questions arise: first, is the award in accordance with the evidence, and, secondly, should it be allowed to stand in view of the fact that the owners confined their evidence to an aspect, which, in the view taken, and, in my opinion, properly taken by the arbitrators, proved to be immaterial, and in consequence gave no evidence on the point to be determined?

The evidence of McKenty, it appears to me, furnishes no evidence whatever of the value of the land. It merely goes to the effect of shewing that the land, having no value for gravel purposes, the evidence of all the other witnesses as to the value of gravel in general, and this in particular, could be ignored.

I have had some doubt as to whether the certificate of the surveyor, put in evidence by the railway company is evidence of value, inasmuch as it was not evidence given under oath. I have come to the conclusion, however, that it is evidence against the railway company and in favour of the owners as any admission would be. If Mr. Biggar had stated that his clients admitted that the land was worth a certain sum that, I think, would clearly be evidence as against his clients at least. The fact also that the solicitors for the owners agreed to $1,150 as

ALTA.

S. C.
1913

SASKATCHEWAN LAND AND HOMESTEAD CO.
v.
CALGARY AND EDMONTON R. CO.

Harvey, C.J.

the sum to be paid into Court as security for both the compensation and the costs of the arbitration, is, I think, also some evidence as against the owners, though, perhaps, not very strong, since they might naturally consider that the railway company would be good for the value, whatever it might be, but, nevertheless, stronger than it would be if the amount had not been arrived at amicably between the parties.

The cross-examination of Mr. Cunningham also furnishes some evidence, for he stated in answer to Mr. Biggar, that he looked upon the amount of $1,150 as an amount proportionate to the value of the land.

It is true that Mr. Biggar, in trying to improve this, succeeded in getting him to say that he considered it greatly disproportionate, but that merely affects the weight of the evidence.

I think, that in what I have stated, there was evidence from which the arbitrators could conclude, that in July, 1908, the value of the land was the sum admitted by the railway company to be its value, and I take their finding to mean that.

As the owners gave no evidence to meet this, and there was no evidence to shew that the land, at the time when its value was to be ascertained, exceeded in value the sum admitted to be its value other than what I have referred to in Mr. Cunningham's cross-examination, to which, in view of his directly contradicting himself, the Board might reasonably have attached little weight, it appears to me that there is no ground in law for setting aside the award. Inasmuch as the appellants have not, either in their notice of appeal, or in their argument before us, asked that by reason of their mistaking their legal rights, they should be given another opportunity to give evidence directed to the real issue, but have, on the contrary, contented themselves by persisting in maintaining that they have not mistaken their legal rights, there appears to be no necessity of considering whether the Court could or should remit the matter to the arbitrators on proper terms as to costs. It is true that one of the grounds of appeal is that

> the Board of Arbitrators erred in refusing to allow Mr. J. E. Cunningham, the managing director of the Saskatchewan Land and Homestead Co., Ltd. to give evidence as to the value of the land in question in the year 1908.

A search of the record fails to reveal any basis of fact to support this ground. It fails to shew that any attempt was made to even ask him any question on the point. It is true that, during the discussion to which I have referred, about the evidence of agricultural value, counsel for the appellants then objecting, stated that they had been barred from giving evidence of agricultural value through Mr. Cunningham. The Board

stated that it must be a mistake as there had been no intention to exclude such evidence and also stated that if Mr. Biggar gave such evidence, Mr. Cunningham might be recalled.

Though evidence was given by the witness McKenty after this, Mr. Cunningham was not recalled, nor was any other evidence offered by appellants on this feature.

For the reasons stated, I would dismiss the appeal with costs.

BECK, J.:—This is an appeal in pursuance of sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, from the award of two of the three arbitrators chosen to fix the compensation to be paid by the railway company, for certain land taken by the company, to the owners. The award fixed the amount of compensation at $733.05.

The first question calling for an answer is, with reference to what date is the compensation to be ascertained? The notice to treat, dated June 30, 1908, was served on the owners early in July, 1908. An order for possession was made on July 24, 1908, and the company forthwith took possession. An order appointing three arbitrators was made by a Judge on January 8, 1912. On August 22, 1912, by an order of a Judge, other arbitrators were appointed in lieu of two of those first appointed. The award was made on October 18, 1912.

Section 192 of the Railway Act says:—

> The deposit of a plan, profile and book of reference, and the notice of such deposit shall be deemed a general notice to all parties of the lands which will be required for the railway and works.
>
> 2. The date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained.

The two arbitrators who joined in the award, His Honour Judge Carpenter and Mr. A. H. Clarke, K.C., expressly held that this section was not applicable to the present case, and that the date with reference to which the compensation should be ascertained was the date at which possession was taken by the railway company under the warrant of possession of July 24, 1908.

Mr. E. B. Edwards, K.C., the other arbitrator, declined to join in the award, on the ground that, whether or not sec. 192 was applicable or made applicable, the compensation should be ascertained as of the date of the hearing before the arbitrators.

The difficulty in the matter arises from the fact that the purpose for which the railway company proposed to take the land was, as stated in the notice to treat,

> the purpose of taking and removing stone, gravel, earth, sand, water and other materials required for the construction, maintenance, and operation

ALTA.

S. C.
1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

Beck, J.

of their railway, and of laying any necessary tracks spurs or branch lines, water pipes, or conduits over or through the said lands.

Section 180 of the Railway Act, says:—

Whenever—

(a) Any stone, gravel, earth, sand, water or other material is required for the construction, maintenance, or operation of the railway or any part thereof; or

. . . . .

(c) The company desires to lay down the necessary tracks, spurs or branch lines, water-pipes or conduits over or through any lands intervening between the railway and the land on which such materials or water are situate or to which they have been brought;

The company may, if it cannot agree with the owner of the lands for the purchase thereof, cause a land surveyor, duly licensed, to act in the province, or an engineer, to make a plan and description of the property or right-of-way, and shall serve upon each of the owners or occupiers of the lands affected, a copy of such plan and description or of so much thereof as relates to the lands owned or occupied by them respectively, duly certified by such surveyor or engineer.

2. All the provisions of this Act shall, in so far as applicable, apply, and the powers thereby granted may be used and exercised to obtain the materials or water, so required or the right-of-way to the same, irrespective of the distance thereof; provided that the company shall not be required to submit any such plan for the sanction of the Board.

A certified copy of a plan of the lands required was served with the notice to treat.

For the purpose of arriving at the solution of the preliminary and fundamental question upon which the arbitrators differed it seems to be necessary to begin the examination of the provisions of the Railway Act at sec. 157, which is the first of a number of sections which fall under the caption, "Location of line."

That section, with the exception of the interpretation section (sec. 2, clause (19) which defines "plan"), seems to be the first in which a map is mentioned.

Section 157 provides for the making of

a map shewing the general location of the proposed line of railway, the termini and the principal towns and places through which the railway is to pass, etc.

I shall call this the "location map."

The section further provides for the approval, on application, of this map in duplicate, by the Minister of Railways, with such changes and alterations as he may deem expedient.

Then "the map when so approved, and the application, shall be filed in the Department of Railways and Canals, and the duplicate thereof with the Board." Then it is declared that the provisions of this section shall only apply to "the main line and to branch lines over six miles in length."

Section 158 provides that, after compliance with the pro-

visions of the last preceding section, the company shall make a plan, profile and book of reference of the railway.

Section 159 provides that such plan, profile and book of reference shall be submitted to the Board, which, if satisfied therewith, may sanction the same.

Section 160 says:—

The plan, profile and book of reference, when so sanctioned, shall be deposited with the Board, and each plan shall be numbered consecutively in order of deposit.

2. The company shall also deposit copies thereof, or of such parts thereof as relate to each district or county through which the railway is to pass, duly certified copies by the secretary, in the offices of the registrars of deeds for such districts or counties respectively.

Section 164 provides for the filing and registering of a plan and profile of the completed road.

Section 167 provides for alterations in the plan, etc., in cases of changes or deviations.

Sections 169, 170 and 171 are placed under the caption "Mines and Minerals."

Then follows the caption. "The taking or using of lands"

Section 172 deals with Crown lands; section 173 with public beaches and lands covered with water.

Section 174 with naval and military lands; sec. 175 with Indian lands; sec. 176 with lands of other companies. In the case of Crown lands, naval or military lands, and Indian lands they cannot be taken without consent. In the case of public beaches or land covered by the waters of any river or lake the extent of the land taken shall not exceed the quantity afterwards limited in the Act in the case of lands which may be taken without the consent of the owner. In the case of lands of other railway companies, there must be the approval of the Board.

Then sec. 177 provides that the lands which may be taken without the consent of the owner shall not exceed—

(*a*) for the right-of-way, 100 feet in breadth, except, etc.

(*b*) for stations, depots and yards—a certain quantity.

Section 178 says:—

Should the company require *at any point on the railway* more ample space than it possesses, or may take *under the last preceding section* (*i.e.*, for right-of-way or for stations, depots, and yards) for, etc., etc., it may apply to the Board for authority to take the same for such purposes, without the consent of the owner.

Then, after 5, sub-sections is this sub-section:—

7. All the provisions of this Act applicable to the taking of lands without the consent of the owner for the right-of-way or main line of the railway shall apply to the lands authorized under this section to be taken, except the provisions relating to the sanction by the Board of the plan, profile and book of reference of the railway, and the deposit thereof, when so sanctioned, with the Board and with registrars of deeds.

ALTA.

S. C.
1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

Beck, J.

Section 179 provides for the temporary *occupation and use* of land within 600 feet from the centre of the located line of the railway, and provides that:—

All the provisions of law at any time applicable to the taking of land by the company and its valuation and the compensation therefor, shall apply to the case of any land so required.

Then comes sec. 180, which is the section directly in question in the present proceedings, and which I have already quoted so far as its provisions are material for the decision of the question before us.

Then, after a number of sections, which seem to throw no light on the question in dispute, comes—still under the same caption, "the taking or using of lands"—sec. 191, which says:—

After the expiration of ten days from the deposit of the plan, profile and book of reference in the office of the registrar of deeds, and after notice thereof has been given in at least one newspaper, if any published, in each of the districts and counties through which the railway is intended to pass, application may be made to the owners of lands, or to persons empowered to convey lands, or interested in lands, which may be taken, or which suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway; and, thereupon, such agreements and contracts as seem expedient to both parties may be made with such persons, touching the said lands or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained.

2. In case of disagreement between the parties, or any of them, all questions which arise between them shall be settled as hereinafter provided.

Then follows the caption, "Compensation and damages," sec. 192, which I again quote in part, says:—

The deposit of a plan, profile and book of reference, and the notice of such deposit, shall be deemed a general notice to all parties of the lands which will be required for the railway and works.

2. The date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained.

By ch. 32 of the Dominion Statutes of 1909, sec. 3, sub-sec. 2 of section 192 was amended by adding thereto the following:—

Provided, however, that if the company does not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation or damages shall be ascertained; and provided, further, that the foregoing proviso shall not prejudice the operation of any award, or of any order or judgment of any Court of competent jurisdiction, heretofore made, or any arbitration now pending and any appeal from any such award, order or judgment shall be decided as if the foregoing proviso had not been enacted.

Then follow provisions relating to notice to treat, arbitration and award. Then in secs. 215 and 216, provision is made

for a warrant of possession on payment or tender or payment into Court of the compensation awarded or agreed upon, and, in sec. 217, in the absence of an award or an agreement upon (sec. 218), ten days' notice and deposit to meet the compensation to be subsequently determined.

Sections 221-228 deal with branch lines not exceeding in any case six miles in length from the main line of the railway or from any part thereof.

Section 222 provides for the *submission* to the Board of a plan and the *authorization* of the Board.

Section 224 in part is as follows:—

> There shall be deposited with the Board the authority and the duplicate of such plan, profile and book of reference, together with such papers and plans as are necessary to shew and explain any changes directed by the Board, under the provisions of the last preceding section.
>
> 2. The company shall deposit in the registry offices of the counties or districts through which the branch line is to pass copies, certified as such by the secretary, of the authority, and of the papers and plans, shewing the changes directed by the Board.

Section 225 is as follows:—

> Upon compliance with the requirements of the last four preceding sections, all the other provisions of this Act, except those relating to the sanction by the Board of the plan, profile and book of reference of the railway, and the deposit thereof with the Board, and in the offices of the registrars of deeds for the districts or counties through which the railway is to pass, shall, in so far as applicable, apply to the branch lines so authorized, and to the lands to be taken for such branch lines.

The numerous sections to which I have referred seem to be the only ones which can assist in a solution of the question in dispute.

Sec. 157 expressly applies only to main line and branches over six miles.

158-168, were it not for subsequent provisions, would by their terms and order of concurrence, also apply only to the main line and to branch lines over six miles in length.

These sections are, as I have pointed out, placed under the caption, "Location of line."

Secs. 169-171 are immaterial to the question under consideration.

Secs. 172-191, are, as I have also pointed out, placed under the caption, "The taking or using of lands"; and sections 192-214, under the caption, "Compensation and damages." These captions to groups of clauses are of importance in interpreting the meaning of the various sections comprised in the group: Beal's Cardinal Rules of Legal Interpretation, 2nd ed., tit. "Heading," pp. 261 *et seq.*

Sec. 176 requires the approval of the Board, but clearly does not necessarily require the deposit of any plan.

ALTA.
S. C.
1913
SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.
Beck, J.

Sec. 177 applying as it clearly does to the main line and branches over six miles in length, makes no mention of plans for the obvious reason that plans in such cases are already provided for.

Sec. 178 requires a plan and the "authority" of the Board —what is covered by the section being the acquiring of more ample space, something not covered by the plans of the main line and branch lines over six miles in length. Sub-sec. 7 of this section, says:—

All the provisions of this Act applicable to the *taking of lands* without the consent of the owner for the right-of-way or main line of the railway shall apply to the lands authorized under this section to be taken *except* the provisions relating to the *sanction* by the Board of the plan, profile and book of reference of the railway and the *deposit* thereof, when so sanctioned, with the Board and with registrars of deeds.

Sec. 179—which, it is to be noted, is the case of the temporary *use* of adjoining lands—does not explicitly mention plans but provides that

all the provisions of law at any time applicable to *the taking of land, and its valuation* and *the compensation therefor*, shall apply to the case of any land so required.

There seems no reason for requiring a plan or its deposit or the authority or sanction of the Board in such a case, and a very excellent reason for dispensing with a plan—besides the fact that there is not a taking of the land, but only a temporary use and occupation—is that there is no right of entry except after an application to a Judge (sub-sec. 2 (*a*)).

I think that the words I have italicized in these two secs. 178 and 179 refer only to the sections comprised under the captions, "The taking or using of lands," and "Compensation and damages," and that the deposit of a plan (sec. 192) is no necessary part of the proceedings under these two groups: sec. 194 dealing with the "notice to treat" appearing to make this plain by the words

which certificate shall state (*a*) that the land, *if the notice relates to the taking of land on the said plan* is required for the railway, or (*i.e.*, if the notice does not relate to the taking of land on the plan, that it) is within the limit of deviation allowed by this Act.

Both of these secs. 178 and 179 deal, I think, with "deviations." Now, although no plan is necessary in such a case, it seems necessary to hold that a part of sec. 191 applies, namely, that which provides for the giving of notice (not including the directions as to time); for attempts at agreement and for arbitration in case of failure to agree. In other words here are two instances where general words of reference make applicable parts only of the provisions of a section.

Then comes sec. 180—the section directly in question—the words here are very much wider and more general than the words of reference in the preceding section. The provisions of the Act made applicable are not

> all the provisions of this Act applicable to the taking of lands (sec. 178),

or

> all the provisions of law at any time applicable to the taking of land and its valuation and the compensation therefor (sec. 179),

but

> *all the provisions* of this Act shall in so far as applicable, apply, and the powers *thereby* granted may be used and exercised to obtain the *materials* (this includes gravel) or water, so required, or the right-of-way to the same, irrespective of the distance thereof; provided that the company shall not be required to *submit* any *such plan* for the *sanction* of the Board.

The *making* of a plan and a description and the *service* of a copy of both is provided for in the preceding sub-section.

This section then introduces into the procedure under sec. 180, a number of the provisions of the Act which relate to plans and which are found under the group intituled, "Location of the line." The "location map" is not a *plan*. Section 158 calls for the *making* of a plan; sec. 159 for its *sanction* by the Board; sec. 160, sub-sec. 1, for the *deposit* with the Board of the plan "when so sanctioned," and sub-sec. 2 for the *deposit* of copies "thereof" "duly certified as copies by the secretary" (of the Board) "in the office of the registrar of deeds." Section 165, sub-sec. 4, contemplates the depositing with the Board of plans which are not sanctioned because not requiring sanction; the words are:—

> Unless and until such plan, profile, and book of reference is so made satisfactory to the Board, the Board may refuse to sanction the same or to allow the same to be deposited with the Board.

Ordinarily a plan is *submitted* (sec. 159) to the Board, then *sanctioned*, then *deposited*. It would be unreasonable to suppose that the provision quoted was intended to enable the Board to refuse, as unsatisfactory, for deposit, a plan which it had already sanctioned. I am, therefore, of opinion that, in the case of a plan required to be *made* under sec. 180, and which, by virtue of that section does not require the *sanction* of the Board, still must be deposited—the effect of the doing away with the necessity for the sanction being to make only the references to sanction in sec. 160 inapplicable, but to make the rest of the section applicable; and this view seems to be in accordance with the principle that, where there is an inconsistency between two provisions of an Act the later is to be given the greater weight and to be taken as modifying the earlier (Beal's Cardinal Rules

ALTA.

S. C.
1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

Beck, J.

of Legal Interpretation, 2nd ed., p. 325). Again sec. 191, on which I have commented specially in relation to secs. 178 and 179 as exhibiting an instance similar to sec. 160, of the application of a section in a modified form, will apply in its entirety.

Section 225 is open to the similar observations as secs. 178, 179 and 180.

The reasoning which I have applied and the conclusion to which I have come—that it was a condition precedent to the railway company's right to take the lands in question, that it should deposit a plan—are, it seems to me, in accordance with the decision of the Judicial Committee of the Privy Council, in the case of *The Corporation of Parkdale* v. *West* (1887), 12 A.C. 602.

In the case before us the railway company did not deposit any plan. It gave a "notice to treat," and followed this by a notice of an application for a warrant of possession under sec. 217 of the Railway Act. On July 24, 1908, on the application coming on before a Judge an order was made for immediate possession. The order contained this recital:—

> Upon the application of the Calgary aad Edmonton R. Co., and upon hearing read the affidavit of William Pentlowe Taylor, sworn this day, filed herein, and the telegram of J. A. W. Aikens, accompanying the said affidavit, shewing the consent of all the parties to this order being made and upon hearing read the certificate of the clerk of this honourable Court for the judicial district of Calgary that the sum of $1,150 has been paid into Court by the above-named applicant in the matter of this application and upon hearing counsel.

It also contained this clause:—

> The Calgary and Edmonton R. Co. having, by its counsel, undertaken to abide by any order which the Court may make as to damages in case of it appearing that all interested parties have not given their consent as alleged.

Much discussion took place over the effect of this order. The railway company contended, that, assuming that the deposit of a plan was a condition precedent to the giving of a notice to treat, which itself is a condition precedent to the obtaining of an order for immediate possession, the appellants' consent to the order was a waiver of the condition.

It seems to me that nothing appears to enable us to draw any larger conclusion than this: that the railway company having, under the Railway Act, the power to institute proceedings for the compulsory *taking* of the land in question, that is, the acquiring of title thereto, and, in the course of such proceedings to take interlocutory proceedings for the purpose of obtaining *possession* before acquiring *title*, the owners expressed their willingness, on payment into Court of a certain sum, and irrespective of the question of the company's right at the moment to

permit the company to take *possession* only; that possession and title are two quite distinct things, and that consent to the former does not necessarily touch the latter, and that nothing appears to shew that it was in fact intended to do so. By reason of the consent, the company's possession was lawful. It might, in my opinion, for the reasons I shall state, subsequently abandon possession, being, of course, liable to damages, and might never proceed to acquire title. Numbers of cases have come before this Court where a railway company has taken possession, that is, constructed its grade over lands sometimes without either authority or consent, sometimes with consent; the plans on which the company proceeded were, in some instances, invalid or ineffective, but I think it has never been supposed that the date of taking possession in any way prevented the full effect of the express provision of the Act which, when it comes to be a question of fixing the amount of compensation provides that it shall be fixed with reference to the date of the filing of a plan which justifies the compulsory taking.

Thus, in my opinion, neither the order for possession nor the consent upon which it was grounded have any bearing upon the question with regard to the date with relation to which compensation for the passing of the ownership of the land is to be ascertained.

Then it is urged on behalf of the company, that, if this position is reached, the whole proceedings in relation to arbitration are nugatory. I do not accept this as the result. It might be so if the method of ascertaining the compensation were some arbitrary and artificial method; but arbitration is pre-eminently the most natural method of doing so. There is no reason why entirely independently of any statutory enactment, the parties might not have agreed that the compensation should be so ascertained. Similarly, it seems to me that, arbitration being the method provided by the Act, the parties either expressly or impliedly by their conduct, were at liberty to accept the method of arbitration with all the attendant methods of bringing it about and of enforcing it, with equal liberty to dispense with any of these incidents, while yet leaving the proceedings, in all other respects, subject to the provisions of the Act. I think then that though no plan was deposited, yet a "notice to treat" having been served, the applicant, by agreeing to the appointment of arbitrators, in pursuance of the notice to treat, without protest and by proceeding with the arbitration without protest, waived nothing but the deposit of the plan. This view is not, to my mind, in any way inconsistent with the decision in *Inverness R. and C. Co.* v. *McIsaac*, 37 Can. S.C.R. 134. Then, if this is so, it seems to me it must follow that sec. 192, which fixes the date of the deposit of the plan as the date

ALTA.

S. C.

1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

Beck, J.

with reference to which the value of the land is to be ascertained, has no application. But, if this is so, with reference to what date is the value to be ascertained? Only two dates seem to be open for consideration—the date of taking possession, and the date of the hearing before the arbitrators.

I have already endeavoured to emphasize the difference between taking possession and taking the land. I have also, in that connection, said that, in my opinion, the possession could be abandoned. In contrast with this, it seems quite clear that once the award is made, it is, so long as it stands, final and conclusive: sec. 197, sub-sec. 2; sec. 209, sub-secs. 1 and 4.

In *Grimshawe* v. *G.T.R. Co.*, 15 U.C.Q.B. 224, 19 U.C.Q.B. 493, it was held, that a notice might be desisted from and a new notice given, even after the arbitrators had met and were engaged in the arbitration; and an award subsequently made was set aside.

The same conclusion was reached in *Cawthra* v. *Hamilton and Lake Erie R. Co.*, 35 U.C.Q.B. 581, where two arbitrators had agreed on the amount of the award and had given notice to the other to meet and sign the award when notice of desistment and a new notice were given.

In the Supreme Court of Canada, in the case of *The Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse*, 16 Can. S.C.R. 606, Patterson and Gwynne, JJ., expressed the opinion that an abandonment of a notice to take lands must be given, "while the notice is still a notice," and before the intention stated has been acted upon by taking possession of the lands; and this view was followed in *Re Haskell and the G.T.R. Co.*, 3 Can. Ry. Cas. 389.

The Act has, however, since these two last-mentioned decisions been amended. Section 180 contemplates *taking* the lands, *i.e.*, acquiring title "for a term of years or permanently" for the purpose of getting materials.

Section 207 says:—

> . . . Where the company decides not to *take* (*i.e.*, acquire title to—not merely get possession) the lands or materials mentioned in the notice, it may abandon the notice *and all proceedings thereunder* (not, I think, the award—for the reasons I have given) but shall be liable to the person notified for all *damages* and costs incurred by him in consequence of such notice and abandonment.

It seems to me that taking possession before the making of the award being a thing distinctly contemplated by the Act to be of common occurrence, and in respect of which an interlocutory procedure is provided, comes within the meaning of the words, "and all proceedings thereunder," and the injury occasioned by taking possession is one of the things in respect of which the owner is entitled to "damages."

In this view, it seems to me that the date of taking possession cannot, in the absence of statutory provision, be taken to be the date with reference to which the compensation is to be fixed. The only alternative is the date of the hearing, or, equivalently, the making of the award which, as I have pointed out, is final and conclusive and which can be enforced by the owner as awards made on voluntary submissions and can itself be made effective by the company as a conveyance: secs. 210, 211.

In the result, I am of opinion that the two arbitrators who made the award, acted upon a wrong principle inasmuch as they fixed the compensation with reference to the date of taking possession. Consequently, in my opinion, the award must be set aside, but I think, that, instead of this Court attempting itself to fix the compensation, the question should be referred back to the arbitrators.

I would give the appellants the costs of the appeal.

Simmons, J.

SIMMONS, J.:—The southeast quarter, section 21, township 39, range 27, west of the 4th meridian, contained gravel lands and a notice of expropriation, dated June 30, 1908, was served upon the Saskatchewan Land and Homestead Co., Mary Isabel Leadley, Percy Leadley, and Annie A. Moore, as the parties interested in the said lands, and with it was a notice of an application returnable on July 20, 1908, for a warrant for immediate possession of the said lands.

On July 24, 1908, an order was made, pursuant to sec. 217 of the Railway Act, Revised Statutes of Canada, 1906, ch. 37, for immediate possession of the said lands upon payment into Court by the Calgary and Edmonton R. Co. of $1,150. The order recites:—

> Upon the application of the Calgary and Edmonton R. Co., and upon hearing read the affidavit of William Pentelowe Taylor, sworn this day, filed herein, and the telegram of J. A. M. Aikens, accompanying the said affidavit, shewing the consent of all parties to this order being made, and upon hearing read the certificate of the clerk of this honourable Court for the judicial district of Calgary, that the sum of $1,150 had been paid into Court by the above-named applicant, etc., etc.

and concludes as follows:—

> The Calgary and Edmonton R. Co., having, by its counsel, undertaken to abide by any order which the Court may make as to damages in the event of it appearing that all interested parties have not given their consent as above alleged.

The area provided to be taken contained 48.87 acres, and the railway company were proceeding, under sec. 180 of the Act, to expropriate the same to be used by them as a gravel pit or bed, from which they proposed to take gravel for their railway. The railway company then entered on the lands and have con-

ALTA.

S. C.
1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

Simmons, J.

tinued to occupy them for the aforesaid purpose up to the present time. No further proceedings were taken by any of the parties interested from July 24, 1908, until December 19, 1911. In the meantime, the Leadleys and Annie E. Moore ceased to have any interest in these lands, and the Trusts and Guarantee Company, Limited, became the registered owners as trustees for the Saskatchewan Land and Homestead Co., and were made parties to the proceedings which are the subject of this appeal.

On January 8, 1912, pursuant to notice of December 19, 1911, and upon the application of the Saskatchewan Land and Homestead Co. and the Trusts and Guarantee Co., Ltd., an order was made appointing arbitrators to determine the compensation payable to the applicants by the railway company for said lands. The order refers to the notice of the railway company of June 30, 1908, of its intention to take said lands. Upon the application of the railway company, this order was varied on August 22, 1912, by substituting new arbitrators for two of the arbitrators named in the former order.

On September 9, 1912, the arbitration proceeded, and the evidence of both parties was almost exclusively directed to the value of the lands for gravel at the date of the arbitration.

A majority of the arbitrators held that the compensation should be fixed as of July 24, 1908, and that the lands at that date possessed no value for gravel purposes, and that there was no evidence to shew that the lands possessed any greater value than $733.05, being the amount mentioned in the engineer's certificate, which accompanied the notice of arbitration. The minority arbitrator held that the compensation should be as of the date of the arbitration, but made no finding of fact as to the amount of compensation of that date.

The appeal is from the majority award. The Saskatchewan Land and Homestead Co. and the Trusts and Guarantee Co., Ltd., appellants, contend that the railway company were bound to file with the registrar of titles a plan of the said lands taken with the result that sec. 192 of the Act governs as to fixing the date on which compensation should be assessed. The appellants say that this was a condition precedent to the right of the railway company to proceed with the arbitration, and that though appellants by applying for an arbitration may have waived their rights to require the railway company to file a plan prior to the arbitration proceedings, yet that the railway company acquired no rights to the property, the title still remaining in the appellants.

Section 180 of the Act provides that if the company and the owner cannot agree upon the purchase price, the company shall cause a land surveyor to make a plan and description of the property, and serve each of the owners or occupiers with a certified copy of the same, and then provides that

All the provisions of this Act shall, in so far as applicable, apply, and the powers thereby granted, may be used and exercised to obtain the materials or water so required, or the right-of-way to the same, irrespective of the distance thereof; provided that the company shall not be required to submit any such plan for the sanction of the Board.

Section 160 provides that, when the location plan of the proposed railway line is sanctioned by the Board, the company shall deposit certified copies in the office of the registrars of deeds for such districts or counties in which proposed line is located.

Secs. 172 to 191 inclusive then provide for the obtaining of possession and title by the railway company of lands required by them.

Sec. 177 defines the extent of the lands which may be taken without the consent of the owner for right-of-way, stations, etc.

Sec. 178 makes special provision for increasing the width of the lands where necessary for the railway and requires the company to furnish the Board with a plan, profile and book of reference in duplicate, of the portion of the railway affected, and shewing the additional land required. Sub-sec. 7 of sec. 178, then provides that

all the provisions of the Act applicable to the taking of lands without the consent of the owner for the right-of-way or main line of the railway shall apply to the lands, authorized under this section to be taken, except the provisions relating to the sanction by the Board of the plan, profile and book of reference of the railway, and the deposit thereof when so sanctioned with the Board, and with the registrar of deeds.

Sub-sec. 4 of the same section also provides for the hearing before the Board of the parties interested, and fixing of terms and conditions under which the additional lands may be taken by the company, and sub-sec. 5 provides, that, after the Board have authorized, in writing, the lands that may be taken pursuant to this section, a duplicate of such authority, plan, and book of reference shall be deposited with the registrars of deeds. It seems clear that "terms and conditions" mentioned in sub-sec. 5 do not relate to the compensation for taking lands, but to questions affecting "the convenient accommodation of the public, etc."

Section 180 provides for the taking of stone, gravel, etc., for the construction, maintenance and operation of the railway, and provides that the company shall cause a licensed land surveyor to make a plan of the lands proposed to be taken and serve a certified copy of same on the owners or occupiers of the lands affected.

Sub-sec. 2 of sec. 180 is as follows:—

All the provisions of this Act shall, in so far as applicable, apply, and the powers thereby granted may be used and exercised to obtain the mat-

ALTA.

S. C.
1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. CO.

Simmons, J.

erials or water so required, or the right-of-way to the same, irrespective of the distance thereof; provided that the company shall not be required to submit any such plan for the sanction of the Board.

Secs. 185-191 inclusive, provide for the making of contracts between the owners (or persons interested in the lands required by the company) and the company, and, in case of disagreement, all questions which arise between them shall be settled as set out in the following secs. 192-219 inclusive. Secs. 192-214 are under the caption, "Compensation for damages."

Sec. 192 is as follows:—

The deposit of the plan, profile and book of reference shall be deemed a general notice to all parties of the lands which shall be required for the railway and works.

Sub-sec. 2:—

The date of such deposit shall be the date with reference to which such compensation for damages shall be ascertained.

This sub-section was amended in 1909 to provide that, when the company does not actually acquire title within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation for damages shall be ascertained. The amendment provides that it shall not affect proceedings pending at the date of passing of the amendment.

Secs. 193 and 194 provide for service by the company of a notice on the party of the amount the company is willing to pay as compensation for the lands or for damages as the case may be.

Secs. 196-208 prescribe for the method of arbitration and 209 for an appeal from the award of the arbitrators to a superior Court.

Consideration of the general purview of the Act and of the sections above referred to indicates that the approval of the Board and the filing with the Board and with the registrar of deeds, of a plan, were not made applicable, and were not required to be done when lands were proposed to be taken by the company under sec. 180. The number of the parties interested in the property proposed to be taken for the railway right-of-way readily suggests the necessity of a general notice, while the cases in which the company would, in the ordinary course, require lands, under sec. 180, are so few that the Act provided under sec. 180 a convenient means of dealing somewhat more directly with the owner, by requiring a personal notice to be served upon him of a plan of the lands proposed to be taken.

Sub-section 5 specifically provides that the company shall not use the tracks, spurs or branch lines constructed under this section for any other purpose than in the section mentioned without the sanction of the Board under such terms and conditions as the Board may impose.

Parkdale v. *West* (1887), 12 A.C. 602, cited by the appellants, seems to me to be in favour of the respondents, because the decision there, requiring the corporation to file a plan, rested upon the ground that no other means had been provided in the Act for serving notice upon the owners. In the present case, express provision is made in sec. 180 for service upon the owners, and it seems to me that the effect of that decision, in so far as it bears on the case before us, is this, that the railway company must strictly comply with all the requirements of the Act which are conditions precedent to their right of possession.

Lord Macnaghten observes, at 613:—

> Compensation must be paid before the land is taken or the right interfered with. This appears to be clear from sub-secs 27 and 28. On payment or *legal tender* of *compensation*, which may be arrived at by arbitration or by agreement, the award or agreement vests in the company "the power forthwith to take possession of the lands, or to exercise the right to do the thing for which such compensation . . . has been awarded or agreed upon," and resistance or forcible opposition is then to be put down by the strong arm of the law. But, before the award or agreement, although immediate possession of the lands, or of the power to do the thing which is to be the subject of compensation, may be urgently required, no warrant is to be granted for quieting possession and putting down opposition unless ten days' notice has been served on the parties interested, and the prescribed security is given for payment of the probable amount of compensation. If the contention of the appellants were correct, the payment of the compensation, or the giving of security as prescribed by the Act, is not a condition precedent, there would be this singular result, that the railway company might be legally in possession of land, or legally interfering with the rights of individuals, and yet they would not be able to obtain the protection of the law unless and until they had taken certain steps, which, according to the contention of the appellants, are not required to give legal validity to their acts.

I conclude, therefore, that the provisions of sec. 180 do not make applicable to said sec. 180 the provisions of sec. 160, and that it was not necessary for the company to file the plan with the registrar of deeds.

The result is that there is no specific provision providing for the period to which compensation shall refer, unless by analogy sec. 192 can be held to apply.

Sub-sec. 2 of sec. 192 provides that the date of deposit shall be the date with reference to which compensation or damages shall be ascertained.

Under sec. 192, the filing of the plan in the office of the registrar of deeds is a general notice to all parties interested in the lands required to be taken. The special notice required to be served upon the party interested under sec. 180 is plainly the notice which, under this section is substituted for the filing of the notice with the registrar of deeds as provided for in sec.

ALTA.

S. C.
1913

SASKATCHEWAN LAND AND HOMESTEAD CO. v. CALGARY AND EDMONTON R. Co.

Simmons, J.

160, and sec. 192 should, by analogy, apply to the notice required to be served under sec. 180.

This interpretation is consistent with the general conception, aim, and scope of the whole Act.

To reject this view would in effect leave the Act a complete blank in so far as indicating the date with reference to which compensation shall be ascertained.

The true meaning of any passage, it is said, is to be found, not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used and what was the object of appearing from those circumstances: Maxwell on Statutes, 5th ed., p. 34.

I conclude then that the date with reference to which compensation should be made was the date of the order of July 24, 1908, as this was a consent order in pursuance of the notice of June 30, 1908.

The course which the arbitrators took clearly indicates that the evidence of the appellants was directed to establishing the value of the property as a gravel proposition in 1912, when the arbitration took place, and no indication during the hearing was given by the majority of the arbitrators as to the date with reference to which compensation was to be fixed, and that for this reason the case should go back to the arbitrators so that the evidence may be directed to the proper issue.

The appellants, in their notice of appeal, also object to the finding of the arbitrators on the ground that

the appellants are entitled to compensation for the potential value of the sand and gravel in question, and the majority of the Board of arbitrators erred in allowing no compensation therefor.

Counsel for the appellants in the appeal directed a somewhat extensive argument to this ground of appeal, and cited a large number of cases. In view of the fact that the arbitrators will have to deal with this question on the rehearing, I am of the opinion that they should have the direction of this Court on the question. I assume that, by the term "potential values," is meant values which at the date in question have not been disclosed in the form of probable demand for the gravel at that date.

The principle enunciated in the *Bwlffa and Merthyr Dare Steam Collieries Limited and The Pontypridd Waterworks Co.*, [1903] A.C. 426, is urged by the appellants as the proper one to apply. The House of Lords, however, in that case proceeded upon the ground that there was no sale, but merely a continuing prohibition against the owner working his own coal as the same was necessary for the support of the Waterwork Company's works. The principle enunciated by Lord Halsbury in *Re Aspatria Silloth and District Joint Water Board*, [1904] 1 K.B.

417, is the proper one to follow, namely, that where land is compulsorily taken for a given purpose, the fact that the land has peculiar natural advantages for supplying a district or area, apart from any value created or enhanced by the Act, may be taken into consideration in the assessment of compensation, and it is not necessary to prove a specific market at that date for the particular purpose.

If there is evidence adduced before the arbitrators that, in June, 1908, these lands had (aside from the fact of the construction of respondents' railway adjacent to them) peculiar natural advantages for supplying a district or area with gravel, and that conditions of settlement and development in the area in question warranted a reasonable expectation of a demand for gravel in that area in the near future, that would be a circumstance which the arbitrators should properly consider as an element in determining the value at the date specified.

The appellants must bear the burden of the miscarriage of the arbitration and of this appeal as they did not direct their evidence to the proper issue.

The appellants should pay the costs of this appeal and of the arbitration proceedings.

WALSH, J., concurred with the Chief Justice. Walsh, J.

Appeal dismissed.

PEACOCK v. CRANE.

ONT.
S. C.
1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. May 5, 1913.

1. PRINCIPAL AND AGENT (§ II C—20)—AGENT'S FRAUD OR WRONG—SALE OF LAND—AGENT OF VENDEE RECEIVING SECRET PROFIT FROM VENDOR —PRINCIPAL'S RIGHT TO RECOVER.

A secret arrangement between the respective agents of the vendor and the purchaser of property that a price larger than that which the vendor is willing to accept, shall be demanded from the purchaser, and that the surplus shall be paid by the vendor to the agents, will not be upheld by the courts; and the purchaser, having paid the money in ignorance of such agreement, may recover the amount of such secret commission from the vendor.

[*Peacock* v. *Crane*, 3 D.L.R. 645, affirmed; *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233; and *Mayor, etc., of Salford* v. *Lever*, [1891] 1 Q.B. 168, followed.]

APPEAL by the defendants Crane, Otis, Morse, Bruce, and Cotton, from the judgment of Britton, J., *Peacock* v. *Crane*, 3 D.L.R. 645, 3 O.W.N. 1184. Statement

I. F. Hellmuth, K.C., and *G. B. Balfour*, for the appellants:—Whatever fraud, if any, in the procuring of the $50,000 as commission Moore may have been guilty of, he cannot pre- Argument

ONT.

S. C. 1913

PEACOCK v. CRANE.

Argument

judice the rights of the appellants, as the commission was already earned when the transfer to Eames of the right to the commission was made.

M. K. Cowan, K.C., for the plaintiffs, the respondents:—The money should be paid to the plaintiffs, as the appellants have no right to it. A scheme was devised, by an arrangement between the vendors and their agents, and the agent of the purchasers, to get $50,000 additional commission out of the purchasers. Such a transaction cannot be upheld: *Myerscough* v. *Merrill*, 12 O.W.R. 399; *Manitoba and North-West Land Corporation* v. *Davidson*, 34 S.C.R. 255. When purchase-money is increased by a sum which, without the knowledge of the purchaser, is to be paid to the purchaser's agent, it is a bribe, and can be recovered back by the purchasers: *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233, *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339, at p. 357; *Andrews* v. *Ramsay & Co.*, [1903] 2 K.B. 635.

Hellmuth, in reply.

Hodgins, J.A.

May 5. The judgment of the Court was delivered by HODGINS, J.A.:—In *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233, it is said by A. L. Smith, L.J., that when a vendor sells property subject to a commission the commission is added to the price asked by the vendor, *i.e.*, the purchase-money is loaded with the amount of the commission to be paid. In this case the $50,000 in question was added to the purchase-price of $500,000, which itself included $25,000 stipulated to be paid as commission. The $50,000 was by arrangement to be paid by the vendors to Eames, so that he, or both he and Jeffery and Moore, should get it as "commission."

In the case cited it is laid down very clearly that when the purchase-money is increased by a sum which, without the knowledge of the purchaser, is to be paid to the purchaser's agent, it is a bribe, and, as such, can be, if quantified, recovered back by the purchaser either from his agent who was bribed or from the vendor and agent jointly and severally.

The vendors have paid this particular $50,000 into Court, and the respondents, who are the purchasers, have been held entitled to it, and rightly so, in my opinion, unless the appellants can claim it free from the disability which attaches to any right or title of the agents Eames, Jeffery, and Moore. The latter two admit that they have no title to it; but the appellants contend that, if this money is paid to the respondents, Moore in some way will benefit by it; probably, as it is asserted, by arrangement before or pending this proceeding. In fact, a conspiracy is alleged between Moore and Eames to defeat the appellants' claim (see p. 59 of the evidence).

Moore and Jeffery appear first as "empowered to act as agents for the proposed purchasers" (see pp. 13, 14, and 16). Crane, after that, and on the 4th June, 1909 (p. 29), claimed Moore as his agent (pp. 24, 25, 90); and Moore knew this (p. 25). The price was increased by $50,000 at his request (pp. 17, 18); and this was originally to have been paid to him (p. 18). A draft of a letter, agreeing to pay this $50,000 (in addition to $25,000), was sent to him with the agreement of sale, and he afterwards desired the letter to be given and addressed to Eames. This was done, and Moore released any claim he had for the commission. Crane says that previous to the sale and on the 4th June, 1909, he met Fraser, the vendors' solicitor, in New York, and was told by him not to interfere, that the sale would go through, and that he (Crane) would be protected as to commission (p. 57). He, therefore, let Moore continue the negotiations. Fraser thinks this conversation highly improbable, but does not deny it (p. 92). Crane admits that he knew the net price to the owners was $500,000; and he told Moore so, and that the owners were to protect him as to this $50,000. He says that his instructions to Moore were to sell for $550,000; but his final instructions appear to be a little more elastic: "Do not let the deal fall through. Sell that property so we can make some money" (pp. 54 and 61). Crane's option had expired previous to the 19th April, 1909, and he could only consummate a sale by offering a price satisfactory to the vendors and adding his profit to that price (p. 90).

The sale was closed on the 12th June, 1909, on the same date that the release just spoken of and the commission letter were delivered. Eames afterward got $25,000 commission, but the $50,000 was not paid over, owing to the embargo placed upon it by the appellants on the 3rd August, 1909 (p. 21).

I do not think that the signing of the agreement for sale by the purchasers in Pittsburg on the 10th June, 1909, nor the making of a cheque on the 11th June, 1909, to pay part of the purchase-money, affects the question as to when the commission was earned. The commission is payable only out of the "proceeds of the sale," and is for negotiating the sale, afterwards consummated for $550,000.

This agreement of the 12th June, 1909, was one which, under the circumstances disclosed in evidence, might have been rescinded by the purchasers, or under which they could have recovered back the $50,000. The procuring of this agreement by Moore is the consideration for the letter, addressed, at Moore's request, to Eames, and is the only consideration as between the vendors, Eames, Jeffery, and himself.

It is in itself, by reason of the bribe it contains . . . which is included in the purchase-price . . . a "corrupt

ONT.
S. C.
1913
PEACOCK
v.
CRANE.
Hodgins, J.A.

bargain," to use the words of A. L. Smith, L.J., in the case already cited, and one which entitles the purchaser to rescind or to recover from the agent or vendor, or both, the bribe which formed an ostensible part of the purchase-money.

It is, therefore, difficult to understand the argument on behalf of the appellants, that Moore could not prejudice their rights, as the commission was already earned when the transfer to Eames of the right to the commission was made. The appellants' right cannot be put higher than as principals or assignees of Moore; and, granting that the latter could not defeat the appellants' claim by an assignment or transfer of the right to commission, the fundamental fact remains that the commission itself is money that, notwithstanding the form of the contract, belongs to the purchasers and could be recovered by them either in the hands of Moore or from the vendors. No claims based on the contract or dependent on its validity can defeat the purchasers' right, which arises from the infirmity of the contract itself. See the remarks of Bacon, V.-C., in *Bagnall* v. *Carlton* (1877), 6 Ch.D. 371, at p. 385, based upon *Imperial Mercantile Credit Association* v. *Coleman* (1873), L.R. 6 H.L. 189.

Nor does the fact that the vendors' agent, Fraser, may have said that he would protect the appellants, carry the matter any further. The vendors agreed to the price being increased, so that Moore and Eames would get the increase as commission. They therefore did all that they could do to enable Moore and Eames to collect the $50,000, and to that extent "protected" the appellants.

It is this very arrangement, however, which gives rise to the purchasers' rights and enables them to rescind the agreement or as an alternative to claim back the amount by which the purchase-money was increased.

If, as is well settled, an agent ceases to be entitled to any remuneration when he puts himself in a position where his interest necessarily conflicts with his duty to his principal, then neither Moore nor Jeffery nor Eames would be entitled to this $50,000. See *per* Bowen, L.J., in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, 39 Ch.D. 339, at p. 364. The right of the purchaser to recover it is but the natural outcome of the application of this principle, because it treats the commission as an improper increase of the purchase-price, induced by the fraudulent act of both vendor and agent: *Mayor, etc., of Salford* v. *Lever*, [1891] 1 Q.B. 168; *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233.

The extent to which the Court will go in protecting a purchaser is well shewn in *Beck* v. *Kantorowicz* (1857), 3 K. & J. 230, where the ultimate purchaser or transferee of the mine was held entitled to the shares set apart by way of secret com-

ONT.

S. C. 1913

mission by the vendors to one of a group of co-adventurers who bought and then sold to the company.

I think the judgment of the trial Judge should be affirmed and that the appeal should be dismissed.

Appeal dismissed.

ONT.

S. C. 1913

REX v. VINCENT.
REX v. FAIR.

Ontario Supreme Court, Middleton, J., in Chambers. October 17, 1913.

1. BAIL AND RECOGNIZANCE (§ I—16)—ORDER ON HABEAS CORPUS—PRIOR TO COMMITTAL FOR TRIAL.

Although sec. 698 of the Criminal Code does not confer jurisdiction upon a judge of a superior court to grant bail in respect of an indictable offence until the accused has been committed for trial, a defendant has his remedy by way of *habeas corpus* upon the return of which the court may order bail pending a remand by a magistrate, and this remedy is applicable as well where the charge upon which the remand was made is a subject of summary conviction and not indictable.

[*Rex* v. *Hall*, 12 Can. Cr. Cas. 492; *R.* v. *Cox*, 16 O.R. 228, referred to.]

Statement

MOTION by the defendants for bail or for a writ of habeas corpus.

W. M. German, K.C., for the defendants.

J. R. Cartwright, K.C., for the Crown.

Middleton, J.

MIDDLETON, J.:—The accused were arrested and committed for trial upon a charge of fraud; and upon this charge they were admitted to bail. An information was then laid against them, charging them with vagrancy, and upon this charge they have been remanded four or five times, no evidence being taken before the magistrate. The magistrate refuses to grant bail except for a prohibitive amount—$5,000 for each prisoner.

An application is now made for bail upon the vagrancy charge.

I do not think that, under the Criminal Code, a Judge of the Supreme Court has jurisdiction to grant bail until the accused has been committed for trial. See Criminal Code, sec. 698. Nevertheless, a prisoner is not without remedy. Under the Habeas Corpus Act, upon the return of a writ the Court may "determine touching the discharge, bailing, or remanding the person."

In *Rex* v. *Hall* (1907), 12 Can. Cr. Cas. 492, Craig, J., in the Yukon Territorial Court, held the contrary; but he evidently misread the case of *Regina* v. *Cox*, 16 O.R. 228. The section of the statute referred to there by MacMahon, J., has been eliminated and is not now found in the corresponding section of the

ONT.

S. C. 1913

REX v. VINCENT.

Middleton, J.

Code as it now stands. Compare R.S.C. 1886, ch. 174, sec. 83, with the present sec. 699 of the Code.

I think the alternative course suggested by MacMahon, J., is the proper one to follow; and I, therefore, grant the writ of habeas corpus, and upon its return will admit the prisoners to bail.

To save the further attendance of counsel on the return of the writ, the amount of bail was discussed; and I think that cash bail $500 for each is adequate.

The facts surrounding this case suggest that the charge of vagrancy is laid, and the remand granted, because the magistrate and police officials disapprove of the bail granted upon the more serious charge. It is obvious that, if this is so, such conduct cannot be too strongly condemned.

Habeas corpus granted.

ALTA.

S. C. 1913

RIDDELL v. RIDDELL.

Alberta Supreme Court, Beck, J. October 17, 1913.

1. DIVORCE AND SEPARATION (§ V B—50)—ALIMONY ACTION IN DEFAULT UNDER SEPARATION AGREEMENT — INTERIM ALIMONY AND DISBURSEMENTS.

An order for interim alimony and disbursements may be made, although the plaintiff sets up in her statement of claim a separation agreement and defendant's default in making the stipulated payments for her support and claims, in addition to future alimony, arrears due her under the agreement.

2. DIVORCE AND SEPARATION (§ VIII A—81)—AGREEMENT FOR SUPPORT AND MAINTENANCE—SEPARATION—ENFORCEMENT OF—ARREARS OF ALIMONY—RECOVERY—DEFENCE.

Notwithstanding that ordinarily an agreement between husband and wife for a separation without sufficient cause, is *primâ facie* a defence to an alimony action, yet where the breaches of the agreement are substantial, such as the refusal of the husband to make payments to a substantial amount thereunder so as to virtually amount to a repudiation of his obligation to pay, the agreement will not be recognized as a defence to the action.

[*Kennedy* v. *Kennedy*, [1907] P. 49, referred to.]

Statement

MOTION for interim alimony and disbursements.

Harvie, for plaintiff.

C. C. McCaul, K.C., for defendant.

Beck, J.

BECK, J.:—Some little time ago I gave an *ex parte* injunction restraining the defendant from dealing with some of his land. An application is now before me for interim alimony and disbursements. It is opposed by the defendant.

The case set up by the statement of claim is briefly this:—

1. The plaintiff is the wife of the defendant.

2. In 1908, the plaintiff instituted proceedings in the Province of Quebec, where both were then residing, for a divorce *à mensa et thoro*.

3. Thereupon a settlement was arranged by writing dated April 5, 1908—the plaintiff to live separately from the defendant; the defendant to give the plaintiff half the price on the sale of certain property belonging to him and pay her regularly as an alimentary allowance $20 per month.

4. They have ever since lived separate.

5. The defendant never paid any alimentary allowance.

6. The defendant has not since April, 1908, lived with or supported the plaintiff, and during all that time the plaintiff has been deserted by the defendant.

7. The defendant is the owner of certain property in Edmonton.

8. The defendant is of very intemperate habits and is dissipating his property.

The plaintiff claims:—

(*a*) Payment of $1,260, being the amount due by way of alimentary allowance under the agreement.

(*b*) Alimony at the rate of $20 a month.

(*c*) Injunction.

The application is opposed on the ground that in such a case there is no jurisdiction to grant it—that the action is not one for alimony but to enforce a separation agreement, and that the most the plaintiff is entitled to is to recover as in an action of debt. Having taken time to look into the matter, I think this Court has jurisdiction to grant alimony on the case stated, and that I should make the order asked.

The Supreme Court Act (ch. 3 of 1907), sec. 16, says:—

> The Court shall have jurisdiction to grant alimony . . . to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights.

The jurisdiction in this respect in England is thus stated in *Weldon* v. *Weldon*, 9 P.D. 52:—

> The principle derived from the law on which the Ecclesiastical Courts proceeded, was, that it is the duty of married persons to live together, and that this duty should be enforced by the decree of the Court, unless it could be shewn that the complaining party had been guilty of some matrimonial offence for which a judgment authorizing living apart might have been obtained by the other.
>
> Authority for this proposition is not needed, but I may quote the words of Blackstone:—
>
> "The suit for the restitution of conjugal rights is brought whenever either the husband or wife is guilty of the injury of subtraction or lives separate from the other without any sufficient reason, in which case they will be compelled to come together again, if either party be weak enough to desire it, contrary to the inclination of the other."

The plaintiff's right depends not on desertion but upon actual separation only. Where the separation is in pursuance of an agreement, the agreement may or may not be a bar to the action. The question is dealt with at length in *Kennedy* v. *Kennedy*, [1907] P. 49.

ALTA.

S. C. 1913

RIDDELL v. RIDDELL.

Beck, J.

The result is this. Inasmuch as the foundation of the action is separation without any sufficient reason, an agreement for separation is *primâ facie* a bar as furnishing a sufficient reason; but if the breaches of the agreement on the defendant's part are substantial, for instance, where the payments agreed to be made have, to a substantial amount, not been paid, so that virtually there is a repudiation of the obligation to pay, the Court will not recognize the agreement as being a defence to the action.

This, therefore, in my opinion, is an action justified under the provision conferring jurisdiction on the Supreme Court, which I have quoted.

I cannot try the facts on this application, but, having evidence merely of the marriage, as in the ordinary alimony case, must make the order asked.

Order granted.

ALTA.

S. C. 1913

FIDELITY TRUST CO. v. SCHNEIDER.

Alberta Supreme Court, Beck, J. October 17, 1913.

1. DEPOSITIONS (§ IV—15)—FOREIGN COMMISSION—REFUSING LEAVE TO USE ON TRIAL—GROUNDS.

Leave to use a deposition of the president of the plaintiff company, taken in the United States, for use on the trial "unless a Judge shall otherwise order," will be denied, where to permit its use would work an injustice to the defendant, as it appeared that the plaintiff to the action was a mere nominal party, while the real plaintiff was guilty of fraud in the transaction in relation to which the note sued upon was given; and that the cross-examination of the witness, by reason of foreign counsel being retained to take it, and the difficulty of giving him adequate instructions, was not conducted so as to properly develop such phase of the case.

[*Union Investment Co.* v. *Perras*, 2 Alta. L.R. 357; and *Park* v. *Schneider*, 6 D.L.R. 451, followed.]

Statement

APPLICATION by the plaintiffs for leave to use as evidence at the trial, depositions of the president of the plaintiff company taken at Kansas city, Missouri, U.S.A., under order which contained a provision that the depositions could not be used by the plaintiff company at the trial, "unless a Judge shall otherwise order."

The application was refused.

O. M. Biggar, K.C., for plaintiffs.

I. B. Howatt, for defendant.

Beck, J.

BECK, J.:—The action is on a promissory note made by the defendant in favour of McLaughlin Brothers. The defence sets up among other things, that the note was part of the consideration for the sale of a stallion by McLaughlin Bros. to the defendant and that the sale was induced by the fraudulent re-

presentations of the McLaughlins' agent. It also sets up that the defendant recovered a judgment against McLaughlin Bros. in this Court for a large sum in respect of this very fraud which is unsatisfied, and that the plaintiff company is really suing for the benefit of McLaughlin Brothers. McLaughlin Bros. have been prominent figures in the Courts of the western provinces of Canada for a good many years, and, in dealing with this application, I frankly confess I do so—as I think I am entitled to do—in the light of the several cases which have come before this Court, some only of which are reported. One of these, *Peters* v. *Perras*, appears as the first case on the first page of the first volume of the Alberta Reports; and in appeal to the Court *en banc* on page 201. A decision in favour of the defendant was reversed by the Supreme Court of Canada, 42 Can. S.C.R. 244, virtually on the ground that a trial Judge must accept the evidence of any witness taken by way of depositions if there is nothing in the case to contradict it (see *Park* v. *Schneider*, 6 D.L.R. 451, also a McLaughlin note case). The result of that decision upon the practice of this Court has been either to refuse to allow evidence on behalf of a plaintiff to be taken by way of deposition where it appears that the veracity of the witness is to be attacked as I did in *Union Investment Company* v. *Perras*, 2 A.L.R. 357, also a McLaughlin note case, or to let the order go as in the present case with a term that the depositions are not to be used without leave of a Judge.

The headnote in *Union Investment Co.* v. *Perras*, 2 A.L.R. 357, correctly expresses my view in that case:—

> Where it appeared that the veracity and honesty of the proposed witnesses would be attacked, order (to examine them out of the jurisdiction) was refused on the ground that it was practically impossible to instruct foreign counsel with such particularity as to enable him to cross-examine in such a way as to avoid the application of the rule laid down by the Supreme Court in *Peters* v. *Perras*, 42 Can. S.C.R. 244.

Park v. *Schneider*, 6 D.L.R. 451, already noted, was a case in which an order similar to that in question here had been made. The Court *en banc* there laid down the rule that,

> where a plaintiff applies for a commission to take his own evidence abroad or for leave to adduce his depositions taken abroad as evidence at the trial, the principle upon which the application should be granted or refused is that of justice to the defendant as well as the plaintiff; and the Court should consider what would be the result of allowing or refusing the order.

The order was refused.

In the present case I have read over the whole of the depositions, leave to use which at the trial is asked.

The plaintiff company's president swears: That one of the members of the firm of McLaughlin Bros. on March 10, 1909, proposed to *sell* to the company the note in question, and a

ALTA.

S. C.
1913

FIDELITY TRUST CO. v. SCHNEIDER.

Beck, J.

large number of other notes; that they agreed to *buy* them so as to net them interest at the rate of 8 per cent. per annum; that they paid for them on March 27, 1909, the sum of $16,920.21; that the notes were "purchased outright"—he seems to make some distinction between discounting and purchasing. Nevertheless, he says that they have the endorsement of McLaughlin Bros., who are financially good and who, the note itself shews, have waived "demand notice of non-payment and protest,"—and to whom they are entitled to look for payment and that there is no agreement that they should first look to the makers; that they have not asked McLaughlin Bros. for payment; that the bank through which the note was sent for presentment for payment reported that payment had been refused and that the maker had a judgment against McLaughlin Bros.; that they then put the note in the hands of a firm of solicitors for collection; that these solicitors were not their regular solicitors, but a firm who "they knew did some business" for McLaughlin Bros., but had made no collections for the bank except of McLaughlin notes, and they put these notes in the hands of this firm of solicitors "because we knew they had made a specialty of collecting these notes (*i.e.*, McLaughlin Bros. notes) for various banks;" that before buying the notes they made no enquiries whatever about the consideration or anything else, but relied solely on McLaughlin's statement that the notes were good, and on McLaughlin Bros.' endorsement. In an examination for discovery, taken at the same time, the president admitted that, on purchase of previous lots of notes they had had to sue in a considerable number of cases, and, as I understand, had to call upon McLaughlin eventually to pay some of the notes.

The president was asked as to his company's arrangement with the firm of solicitors, and the latter's arrangement with McLaughlin Bros. as to the costs in the action. He didn't know or couldn't remember what the company's arrangement with the solicitors was. He suggests that there was an arrangement between the solicitors and McLaughlin Bros., but doesn't know what it was.

The president was not asked whether the agreement for the sale and purchase of these notes was in writing or whether there were any terms agreed upon between McLaughlin Bros. and the company other than the bald fact of the sale and purchase and the price, and there is no evidence as to the precise relationship between McLaughlin Bros. and the solicitors. The agents for the defendant's solicitors did not, in my opinion, conduct the cross-examination of the president at all satisfactorily. As I said in a previous case to which I have referred, it is practically impossible fully to instruct foreign counsel in

ALTA.

S. C.
1913

FIDELITY TRUST CO. v. SCHNEIDER.

Beck, J.

such a case as this, and I may add it may often, and I think would, in this case, if I were to admit the depositions, work an injustice to the defendant, if he were held responsible for the unskilfulness of such foreign counsel as he engages, necessarily, no doubt, without knowledge of their qualifications.

It is to be remembered that there is a defence pleaded to the effect that the plaintiff company is merely a nominal plaintiff and that the real beneficial plaintiffs are McLaughlin Bros. against whom the defendant has a large judgment in respect of the very notes sued on. Some of the evidence that was not given and which the president didn't give, and some of which he ought to have been in a position to give would have had an important bearing upon this defence.

I haven't a doubt, after reading the evidence, that what the defendant sets up is the truth in fact, though, perhaps, even if we had all the facts, it would not be effective in law. The justice of the case is with the defendant, and I shall decline to do anything to enable the plaintiff to commit an injustice against him. There is no substantial injustice to the plaintiff company for they have their remedy against McLaughlin Bros., and these latter will be prevented once more from practically stealing money from a resident of this jurisdiction.

The application for leave to use the depositions taken on behalf of the plaintiff company is refused with costs.

Application refused.

CLARE & BOCKEST, Ltd. v. EVANS.

BLAKE, claimant v. CLARE & BOCKEST, Ltd.

SASK.

S. C.
1913

Saskatchewan Supreme Court, Haultain, C.J. October 16, 1913.

1. FRAUDULENT CONVEYANCES (§ IV—17)—INTENT TO DELAY AND DEFRAUD —CHATTEL MORTGAGE—INTENT OF BOTH PARTIES.

A chattel mortgage made with intent on the part of both mortgagor and mortgagee to delay and defraud the mortgagor's creditors will be declared invalid as against a writ of execution against the mortgagor on the trial of an interpleader issue following the seizure of the mortgaged goods by the sheriff.

Statement

INTERPLEADER issue as to goods seized under an execution in the action of *Clare & Bockest* v. *Evans*, to which the claimant Blake laid claim under a chattel mortgage from Evans to him.

Judgment was given for the execution creditor, defendant in the issue.

T. A. Lynd, for claimant.

C. L. Durie, for execution creditor.

Haultain, C.J.

HAULTAIN, C.J.:—The property in question in this interpleader issue was seized by the sheriff under a writ of execution

SASK.

S. C.
1913

CLARE & BOCKEST v. EVANS.

Haultain, C.J.

issued in an action wherein the defendant to the issue, Clare & Bockest, Ltd., was plaintiff, and Evans & Co., defendants. The plaintiff Blake claims the property under a chattel mortgage for $1,040, made by Evans to him on September 15, 1912. The question to be decided is, whether or not the chattel mortgage is a valid and *bonâ fide* security as against execution creditors. After a full consideration of the evidence, I have come to the conclusion that the chattel mortgage is void as against creditors. Evans was undoubtedly insolvent at the time the mortgage was given. This is amply shewn by the evidence. Blake must have known, and I find from his evidence that he did know, that Evans was insolvent at the time the mortgage was given. He says, in his own evidence, that he went to Merid where the business was being carried on to see "what he was putting his money into." The mortgage was given on the same day, and shortly after Evans had been served with several writs in actions brought against him by creditors. Blake was living with Evans at the time. The evidence with regard to the several advances alleged to have been made by Blake to Evans, the total amount of which make up the consideration for the chattel mortgage, is extremely unsatisfactory except for one item. No account of these transactions was kept by Evans, and the letters and documents produced by Blake were not originals, but copies furnished to him by Evans for the purposes of these proceedings; while the alleged originals were, according to Blake, in the custody of his brother in England. Both in his examination for discovery and his examination in chief on the trial, Blake produced and swore to these letters and documents as originals, and it was only after being pressed on cross-examination that he admitted that they were copies. The fact that Evans was not brought to give evidence on behalf of Blake, although quite available, does not improve the claimant's general position.

On the evidence before me I find that there was not valuable consideration to support the mortgage, and, in any event, that the mortgage is void, having been given with intent on both sides to delay and defraud creditors.

There will be judgment, therefore, for the defendant on the issue, with costs, including sheriff's costs and costs of proceedings prior to and leading up to the issue.

Judgment for judgment creditor.

RURAL MUNICIPALITY OF THOMPSON v. BRETHOUR.

MAN.

K. B.

1913

Manitoba King's Bench, Mathers, C.J.K.B. October 21, 1913.

1. LEVY AND SEIZURE (§ III B—45)—MONEY REALIZED FOR COSTS—NECESSITY OF HOLDING FOR DISTRIBUTION AMONG OTHER EXECUTION CREDITORS.

Money realized on an execution, although for costs only, must be held by the sheriff for three months and advertised, under sec. 25 of the Executions Act, R.S.M. 1902, ch. 58, which provides that at the end of that period such money, together with any other money realized on other executions against the defendant, shall be then distributed rateably among such persons as may have unsatisfied executions in force in the sheriff's hands.

[*Thordarson* v. *Jones*, 18 Man. L.R. 223, explained and distinguished.]

Statement

APPLICATION by a municipality for an order to a sheriff to pay over a sum of money realized upon an execution.

The application was refused.

F. M. Burbidge, for municipality.

No one *contra*.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—Upon an execution against one Oscar B. Brethour, placed in his hands by the municipality of Thompson, the sheriff of the eastern judicial district realized the sum of $282.10. The execution was for costs only.

The sheriff proposes to retain this money for three months and advertise it as required by sec. 25 of the Executions Act, R.S.M. 1902, ch. 58, unless ordered by a Judge to pay it over at once. The municipality now applies for such an order.

The application is based upon the fact that the money in the sheriff's hands is for costs only. I am informed that orders of this kind have been made on several occasions, and one recently made by my brother Galt was mentioned. I have spoken to my brother Galt, and he informs me that in making the order referred to he believed he was following a judgment of my own in *Thordarson* v. *Jones*, 18 Man. L.R. 223. I probably did not in that case express my meaning as clearly as I should have done. All that was before me, and all that I intended to decide in *Thordarson* v. *Jones*, was that as against an assignee for creditors under the Assignments Act, the lien which an execution creditor has upon the debtor's goods, by virtue of having placed his execution in the sheriff's hands, is preserved to him by sec. 8 of the Assignments Act to the extent that the execution is for costs, and that the sheriff is not bound to hand over to the assignee, goods which he has seized under the execution, until he has been paid his own and the execution creditor's costs. I still adhere to the opinion, which I intended to, but probably did not, clearly express in that case. It did not deal

MAN.

K. B.
1913

RURAL MUNICIPALITY OF THOMPSON v. BRETHOUR.

Mathers, C.J.

with the question of what disposition the sheriff should make of the money after it has come to his hands. After the money has been realized, it is to be dealt with as directed by sec. 25 of the Executions Act, R.S.M. 1902, ch. 58. That section says that when the sheriff "realizes any money under a writ of execution" he shall publish notice thereof in the Manitoba *Gazette*, giving certain particulars. He shall thereafter "hold the said moneys for a period of three months," at the expiration of which time he shall distribute these and any other moneys realized on other executions against the same debtor "rateably amongst the persons having unsatisfied executions in force in the said sheriff's hands at the date of distribution."

The Assignments Act, R.S.M. 1902, ch. 8, provides for a rateable distribution of all the debtor's assets amongst all his creditors, whether they have judgment and execution or not. The Executions Act only provides for rateable distribution amongst execution creditors having executions in the sheriff's hands. Sec. 8 of the former Act preserves to the execution creditor the lien that he has acquired by placing his writ in the sheriff's hands, to the extent of his costs as against the assignee. The lien exists only because the creditor has an execution in the hands of the sheriff (Executions Act, sec. 11), and only as against the assignee for creditors. If he withdrew his execution from the sheriff's hands after the assignment, his lien would be gone and he could not then claim his costs as a preferential creditor: *Gillard* v. *Milligan*, 28 O.R. 645. When there has been no assignment, sec. 8 of the Assignments Act does not apply. There is no other provision in either that Act or the Executions Act which creates in favour of an execution creditor, a preferential claim for his costs of suit, or which differentiates in any way between the part of the execution creditor's claim which is for costs and that part of it which is for debt. It is argued that it would be most unfair that the costs which a plaintiff has incurred, when realized by the sheriff, should be distributed *pro rata* amongst other execution creditors. I agree that the question is one which might well receive the attention of the Legislature. It was probably thought that, as the distribution was to be only amongst execution creditors, the costs of all would be about equal, and that nobody would suffer by bringing all into hotchpot. The debts, however, might greatly vary in amount, which would make the distribution as to costs unequal. It seems to me a more just and equitable provision would be to make all the execution creditors' costs payable *pro rata* as preferential claims and the distribution of the balance in proportion to the debts only.

I can see nothing which, in the absence of an assignment, entitles an execution creditor to be paid his costs as a preference

claim, or to be paid such moneys before the time for distribution fixed by sec. 25 of the Executions Act. I may add that, in my opinion, a Judge has no power to relieve the sheriff from the necessity of holding all moneys realized by him for the prescribed time, and of then distributing them as directed, and an order purporting to do so would be no protection to him.

What I have said does not, of course, touch the question of a solicitor's lien for costs. If the application were by the solicitor by whom the judgment was recovered, to have it declared that he had a lien upon the moneys, different considerations entirely would arise.

The application for an order to the sheriff to pay over the moneys in question must be refused.

Application dismissed.

Re SOLICITORS.

Ex parte OULD.

Saskatchewan Supreme Court, Newlands, J., in Chambers. September 9, 1913.

1. SOLICITORS (§ II C—30)—FEES—TAXATION—SOLICITOR AND CLIENT — TARIFF.

Rule 736 of the Saskatchewan Consolidated Rules of Practice, 1911, providing for solicitors' fees as set out in schedule 1 of the tariff of costs, applies to control the fees chargeable by a solicitor to his client in respect of the court proceedings to which the tariff applies.

2. SOLICITORS (§ II C—30)—TAXATION—COUNSEL FEE—ALLOCATUR.

The allocatur of a judge is necessary for the taxation of increased counsel fees under the Saskatchewan tariff of costs, 1911, even as against the client on a solicitor and client taxation.

[*Hamilton* v. *McNeill*, 2 Terr. L.R. 151; and *Re McCarthy*, 4 Terr. L.R. 1, referred to.]

Statement

APPLICATION to review a taxation of costs between solicitor and client.

A. Benson, for applicants.

C. J. Lennox, for solicitors.

Newlands, J.

NEWLANDS, J.:—A number of items are objected to on the ground that the local registrar allowed the solicitors a larger amount than is provided for in the tariff of costs. The solicitors took the ground that this tariff does not apply between solicitor and client. I am, however, of the opinion that it does. Rule 736 provides that

> In all causes and matters in which duly enrolled solicitors holding certificates as such and resident in Saskatchewan are employed, they shall be entitled to charge and be allowed such fees as are set out in schedule number 1 of the tariff of costs.

This is the same provision as was in the Consolidated Ordin-

SASK.
S. C.
1913
RE SOLICITORS.
Newlands, J.

ances, rule 533. In *Hamilton* v. *McNeill* (No. 2), 2 Terr. L.R. 151, decided by the Supreme Court of the Territories *en banc*, the question was submitted to the Court, "Is the tariff of fees as prescribed by the rules of Court binding between advocate and client respecting counsel fees?" and the answer was, "The Judge may grant an allocatur for such counsel fees only as are prescribed by the tariff." The Court also refused to allow attendances on a *quantum meruit* and taxed them on the scale allowed in the tariff. Following that case are *Re McCarthy* (No. 2), 4 Terr. L.R. 1, and *Ex parte Day and Henwood*, 8 W.L.R. 536. Several of the items objected to are attendances and consultations with the client. These are provided for by item 49 of the tariff as follows:—

A consultation or conference with client, on taxation between solicitor and client, to be increased in the discretion of the taxing office, $1.

I will not therefore interfere with these items as it was in the discretion of the taxing officer to allow the amounts he did. There are, however, several items of attendances on the client by a student in the solicitors' office; these can only be allowed as ordinary attendances at 50 cents each, as fees in the nature of counsel fees cannot be allowed to a person who is not a solicitor.

I have also allowed attendances on other persons by the solicitors in gathering information, etc., as attendances in special matters at $2 each. The other items objected to I have taxed down to the amounts allowed by the tariff.

As to the counsel fee on trial, I am of the opinion that the taxing officer has no authority to allow this and that there should have been an allocatur from a Judge. After hearing the parties, I am of the opinion that the counsel fee allowed, $250, is not too much, and I will grant an allocatur for that amount. The solicitors will have to pay the costs of the review, and they cannot be allowed the costs of the taxation before the taxing officer, as more than one-sixth of the bill was taxed off.

Order accordingly.

ONT.
S. C.
1913

Re SCHOFIELD and CITY OF TORONTO.

Ontario Supreme Court, Meredith, C.J.C.P. October 3, 1913.

1. CRIMINAL LAW (§ II A—31)—PROCEDURE—PRELIMINARY EXAMINATION—MUNICIPAL CORPORATION AS DEFENDANT—LEAVE TO PREFER INDICTMENT.

A private prosecutor seeking to criminally charge a municipal corporation with maintaining a nuisance in respect of a part of the municipality's sewage system should ordinarily initiate the proceedings before a magistrate and not be granted leave by a superior court to prefer an indictment against the municipal corporation where no preliminary enquiry has been held by a magistrate.

ONT.

S.C.

1913

RE SCHOFIELD AND CITY OF TORONTO.

Argument

APPLICATION by Richard Schofield and others, residents of the city of Toronto in the vicinity of Ashbridge's Bay, for leave to prefer an indictment for a nuisance against the Corporation of the City of Toronto.

The application was dismissed.

W. E. Raney, K.C., for the applicants:—Sections 221 to 223 of the Criminal Code deal with common nuisances. Section 222 provides that "every one is guilty of an indictable offence and liable to one year's imprisonment," etc. Sections 916 to 920 provide for "Proceedings in Case of Corporations." The only proceeding indicated in these sections is by indictment. The law is well settled that where an offence is indictable, and in respect of it there could not be a summary conviction against any individual under Part XV. or a summary trial under Part XVI. of the Code, there is no jurisdiction in a magistrate to hold a preliminary inquiry in a proceeding against a corporation. In *Re Chapman and City of London* (1890), 19 O.R. 33, *Regina* v. *Eaton Co.*, 2 Can. Cr. Cas. 407, 29 O.R. 591, and *Regina* v. *City of London* (1900), 32 O.R. 326, prohibition was granted against Police Court proceedings by way of preliminary inquiry. The last-mentioned case was a decision of a Divisional Court. The subsequent amendments to the Code have left these decisions untouched. By sec. 720 A, which was introduced into the Criminal Code in 1909 (8 & 9 Edw. VII. ch. 9), the doubt that had previously existed as to the jurisdiction of a magistrate over corporations in cases where there might be a summary conviction against an individual (see *Re Regina* v. *Toronto R. Co.* (1898), 30 O.R. 214, and *Ex p. Woodstock Electric Light Co.* (1898), 4 Can. Crim. Cas. 107), was resolved in favour of such jurisdiction. By sec. 773 A, also introduced into the Criminal Code in 1909, provision was made for the summary trial of corporations in the cases of indictable offences where individuals might be tried summarily. The list of cases which may be thus tried is contained in sec. 773, and does not include a common nuisance. Whenever an offence is triable summarily under the Criminal Code, that fact is indicated by the section itself. Note the language, "Every one is guilty of an offence and liable, on summary conviction," of secs. 537, 542, etc.; and compare sec. 222. Crankshaw in his Criminal Code, at the end of Part XV., p. 878, gives a list of offences triable summarily. The nuisance sections are not included. Note also sec. 291, for an example of cases triable both summarily and on indictment. The annotators of the Code are all agreed that where an offence is not triable summarily there is no jurisdiction in a magistrate to hold a preliminary inquiry. *Vide* Crankshaw's annotations under secs. 916-920, 720 A, and 773 A.

E. E. A. DuVernet, K.C., for the Crown, and *G. R. Geary*, K.C., for the city corporation, were not called upon.

ONT.
S.C.
1913
RE SCHOFIELD AND CITY OF TORONTO.
Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—It is plain that the policy of the criminal law is to require a somewhat thorough preliminary investigation of every indictable offence. That is very apparent from many of the provisions of the Criminal Code. And the purposes of it are obvious. For one thing, it lays the facts in a proper manner before this Court so that they can be in a proper manner laid before the grand jury. It has been the practice in some cases not to make such an investigation, but to do what has been called "waive examination." I find no warrant for any practice of that character; it seems to me to be quite improper. What the law requires is a preliminary investigation; and it is only upon the facts thus brought out that ordinarily an indictment can be laid. The Code provides that there may be an indictment for the offence for which the accused has been committed for trial; and that there may be an indictment for any other offence founded on the facts disclosed in the preliminary inquiry. The policy of the law plainly is, that cases should pass through an inquiry of that sort before being presented to the grand jury. It is true that power is given to the Attorney-General, and to the Judges, to permit an indictment in cases which have not come up in that manner; but I cannot think that that power was intended to be exercised in any but unusual cases. It is necessary sometimes where magistrates have not done their full duty, not made that inquiry into the case which the law required; and there are other cases in which it is plain that, if there were no provision of that character, there might be delay in the administration of criminal justice, if not eventually a miscarriage. That being so, I am not to authorise a departure from the ordinary course without good cause; I am not to permit a departure simply because some person may desire it for his own convenience or any other selfish purpose. There is no royal road for any one; every one must take the common road up to this Court. The only excuse that I can imagine for seeking to proceed in the manner here sought is based upon the assertion that an indictment cannot be had in any other way. It is easy to say that, but I would be very much better satisfied with an application in a case in which the ordinary way had been tried and in which some difficulty had been encountered. The private prosecutors are, I think, beginning at the wrong end. But it is not necessary that I should consider that question yet. It is my duty to turn them back to the Police Court and let them begin there.

There should not be any difference in the criminal law applicable to a person and that applicable to a corporation—fish should not be made of one and flesh of another. Reading the Code from one end to the other, no substantial indication of any other intention will be found. Then what is the difficulty?

There is no dispute as to the jurisdiction of the preliminary Court; the only point made is in the assertion that a corporation cannot be compelled to come there. But the corporation may be quite willing to go there, and to have the case investigated there. It will be time enough to take these troubles seriously when they really arise; and they have not arisen in this case. I think it clear that I should refuse this application; that I should say to these persons, who desire to lay a criminal charge: "Take the same course which every one else has to take, and then, if you meet with difficulty in that way, and cannot get over it, come to me, or go to the Attorney-General and get leave to lay a bill of indictment before a grand jury.

Some reference has been made to amendments of the Code. The object of those amendments is very plain. It was to put it beyond any shadow of doubt that corporations stand in the same position as others against whom criminal prosecutions are taken; that they were not sheltered by technicality or otherwise in any way. But it is said, that, if that be so, then Parliament has omitted to provide for a case in which there is to be an indictment. If so, such a provision may have been left out because it was not deemed necessary. Of course, Parliament may be mistaken in its views of what the law is; but I do not purpose to determine now whether it was or not, if such were the cause of the omission.

Raney:—I directed your Lordship to three cases, two of them cases in the Divisional Court.

MEREDITH, C.J.C.P.:—You had better wait till you have gone to the Police Court.

Raney:—What would be the use of going to the Police Court? They would refer me to these cases and say there is prohibition here.

MEREDITH, C.J.C.P.:—Have you any objection, Mr. Geary, to this case taking the ordinary course?

Geary:—Not at all, your Lordship.

MEREDITH, C.J.C.P.:—I should also point out how inconvenient it would be, if any one who wanted to avoid going to a preliminary inquiry could come here. How would the presiding Judge proceed? Some preliminary inquiry must necessarily be made, and one may think that, in these days, it should be of the same character as that which the Code expressly requires in the preliminary investigation it expressly provides for; and how would anything of that kind be possible while grand jurors, petit jurors, officers, and litigants are waiting for the ordinary business of the Court?

ONT.
S. C.
1913
RE SCHOFIELD AND CITY OF TORONTO.
Meredith, C.J.C.P.

To those at all familiar with the practice and constitution of the Courts, the cases referred to, even if no differences of opinion were expressed in them, could not be safe guides to-day. The early difficulty arising from the want of power in corporations to appoint attorneys, general or special, in some of the criminal Courts, has assuredly, in these days, no weight. It is now part of the birthright of all corporations to sue and be sued, and to appoint attorneys and agents, just as human entities may; that power is generally given, expressly, in the legislation under which they are incorporated, and given with express provision also for the manner in which they may be served with process. The merger of all the High Courts of the Province in the Supreme Court of Ontario would do away with the old need of a writ of certiorari, if the provisions of the Code had not done so.

Regarding *Chapman's* case (*Re Chapman and City of London*, 19 O.R. 33), it may be added that, since it was decided, one of the strongest points made in it in support of the prohibition has been turned the other way by the legislation now contained in the Code, expressly making its provisions applicable to corporations: sec. 2, sub-sec. (13); so that it is difficult for me to imagine any good reason why, to-day, a corporation may not be duly summoned to and appear at a preliminary investigation of a criminal charge against it taken under the provisions of the Criminal Code.

But, as I have said, it is not necessary to determine the question; in view of the willingness of the corporation, expressed by counsel, that the ordinary course of procedure be taken, there is no good reason that I can perceive for pressing this application further; it is dismissed.

See *Regina* v. *Birmingham and Gloucester R. Co.* (1840), 9 C. & P. 469; and *Pharmaceutical Society* v. *London and Provincial Supply Association Limited* (1880), 5 App. Cas. 857.

Application dismissed.

ONT.
S. C.
1913

BEER v. LEA.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

1. CONTRACTS (§ I E 5—101)—FORMAL REQUISITES—STATUTE OF FRAUDS—SUFFICIENCY OF WRITING—ACCEPTANCE AS PER PAROL VARIATION OF OFFER.

A contract is not sufficiently shewn against the vendor so as to satisfy the Statute of Frauds where the written acceptance was of the written offer as alleged to have been modified by a parol arrangement varying material terms of the original offer as to the terms of payment.

[*Beer* v. *Lea*, 7 D.L.R. 434, 4 O.W.N. 342, affirmed.]

ONT.

S.C.
1913

BEER
v.
LEA.

2. TIME (§ I—3)—MEANING OF "DAYS"—EXPIRATION OF OPTION.

An option to exercise a right within ten days will expire, in the absence of some custom, usage or express agreement to the contrary, at midnight of the last day, and not at the end of ten consecutive periods of 24 hours each from the hour at which the option was given.

[Dictum of the Court disagreeing in this respect with the Court below, *Beer* v. *Lea*, 7 D.L.R. 434; *Startup* v. *Macdonald*, 6 Man. & G. 593, 134 Eng. R. 1029, followed; *Cornfoot* v. *Royal Exchange Assurance Co.*, [1903] 2 K.B. 363, [1904] 1 K.B. 40, distinguished.]

Statement

APPEAL from the judgment of Middleton, J., *Beer* v. *Lea*, 7 D.L.R. 434, in favour of the defendant in an action for the specific performance of a contract for the sale of land.

The appeal was dismissed.

Argument

E. F. B. Johnston, K.C., *M. H. Ludwig*, K.C., and *S. W. McKeown*, for the appellants:—The defendant Lea contended that the thirty-day option given to Doolittle at 4 p.m. on the 12th February, 1912, expired at the same hour on the 13th March, 1912. It was never asserted that he had revoked or intended to revoke the option; his only contention being that it had expired, as the acceptance after 4 p.m. was too late. It was Lea's own action that prevented the plaintiffs from completing the transaction at 2.30 p.m. on Wednesday the 13th March, and Lea intentionally absented himself at the hour agreed upon. He induced the plaintiffs to rely upon him, and knew that he had done so, and should not profit by his own bad faith. There was, moreover, a verbal acceptance by Doolittle at 1.30 p.m. on the Wednesday, which is sufficient. On the question of time, the case cited by the learned trial Judge, *Cornfoot* v. *Royal Exchange Assurance Corporation*, [1903] 2 K.B. 363, [1904] 1 K.B. 40, is not applicable to the circumstances of the case at bar, and it is clear that the plaintiffs had until midnight of the 13th March to accept the option. On the question of time they referred to 2 Bl. Com. 241; *In re Railway Sleepers Supply Co.* (1885), 29 Ch.D. 204; *Lester* v. *Garland* (1808), 15 Ves. 248, 257; *Goldsmiths' Co.* v. *West Metropolitan R.W. Co.*, [1904] 1 K.B. 1, 5. On the question of Doolittle's agency and his right to become a purchaser, they referred to the recent case of *Kelly* v. *Enderton*, [1913] A.C. 191, 9 D.L.R. 472.

A. W. Anglin, K.C., and *H. A. Reesor*, for the defendant Lea:—The plaintiff Doolittle was attempting as agent to make a concealed profit, and had failed to get rid of his obligation as agent, as he was bound to do, before becoming entitled to a purchaser's rights: *Bentley* v. *Nasmith*, 3 D.L.R. 619, 46 Can. S.C.R. 477; *Livingstone* v. *Ross*, [1901] A.C. 327. The option was without consideration and was merely a revocable offer. They referred to *McIntyre* v. *Hood* (1884), 9 Can. S.C.R. 556; *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555. There is no question of a completed contract here, but simply of a revoc-

ONT.
S. C.
1913
BEER
v.
LEA.
Argument

able option, with regard to which all the defendant had to do was to say that it was at an end, which he did.

Glyn Osler, for the defendant Ogilvie, argued that, on the question of time, the *Cornfoot* case was applicable, and that, as regards the alleged verbal acceptance of the option, his client should not have to meet that, as he only bought with notice of the written acceptance, and that was all that Doolittle relied on. He referred to *McKay* v. *Wayland* (1911), 2 O.W.N. 741; Anson on Contracts, 13th ed., p. 87, on the question of consideration, and the necessity of stating it in the agreement.

Johnston, in reply, argued that the defence of the Statute of Frauds had no application to that part of the transaction which turned on the question of commission, and that the transaction must be looked at as a whole. There was an acceptance of the offer as a matter of fact, and it is a question of fact. There was to be first the exercise of the option, and then the payment, and they were not to be considered as contemporaneous.

Meredith, C.J.O.

June 26. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment, dated the 18th November, 1912, which Middleton, J., directed to be entered, after the trial before him, sitting without a jury, at Toronto, on the 4th day of that month.

The action is for specific performance of an alleged agreement between the respondent Lea and the appellant Doolittle for the sale by the former to the latter of a tract of land in the township of York, and to set aside and vacate the registration of a conveyance of the land from the respondent Lea to the respondent Ogilvie.

The facts of the case are fully stated in the reasons for judgment of Middleton, J. [*Beer* v. *Lea*, 7 D.L.R. 434], and it is unnecessary to repeat them.

In the view I take, it is unnecessary to consider several of the questions argued at the bar, as, in my opinion, the action fails because no agreement sufficient to satisfy the Statute of Frauds was established.

The appellants' case is based on the theory that there was an acceptance by the appellant Doolittle of the offer of the respondent Lea of the 12th February, 1912 (exhibit 4), which constituted an agreement sufficiently evidenced to satisfy the Statute of Frauds.

It is beyond doubt that the letter of acceptance of the 13th March, 1912 (exhibit 7), was in any view of the case too late, as it was not received by the respondent Lea until the following day.

The appellants must, therefore, in order to succeed, estab-

lish the acceptance in some other way, and that they attempt to do by the letter of the 13th March, 1912 (exhibit 6), which was handed by Doolittle to Lea on the same day, and by the verbal communications between them which took place on and before that day.

Assuming that the contention of the appellants that Doolittle was not required by the terms of the offer to pay the $10,500 within the thirty days for which the option was to run, a contention with which I do not agree, is well-founded, one of the terms of the verbal arrangement between the parties, when they met in Toronto, was, that this payment should be $10,000, and that it should be made in three instalments, $5,000 in cash on the execution of the agreement, $2,500 in sixty days thereafter, and $2,500 in six months from the date for payment of the second instalment (exhibit 13); and that was manifestly a substantial change in the terms of payment contained in the option, and there were other important variations and additions discussed, and probably verbally agreed on. Among these was a provision that the purchaser should have the right to have any part of the land released from the mortgage which was to be given for the residue of the purchase-money on payment of a sum on account of the principal which should be at the rate of $2,000 per acre together with interest on that sum up to the date of payment, and there was also discussed a provision for Lea retaining possession of part of the property after the execution of the conveyance.

The acceptance of the 13th March, 1912 (exhibit 6), reads as follows:—

619 Sherbourne St., Toronto, March 13, 1912.

Joseph H. Lea, Esq.

Dear Sir,—I hereby accept the option I hold on your property at Leaside, and the payments will be made on execution of deed on the lines agreed on.

Yours very truly,
P. E. DOOLITTLE.

It is plain, I think, that the reference to the "lines agreed on" is to the verbal arrangement as to the terms of payment which I have mentioned, and this is apparent not only from the language used but also from the fact that a tender was made of a marked cheque for $5,000, the amount of the first payment according to the terms of that arrangement.

This was not an unqualified acceptance of the offer, but an acceptance of it as modified by the verbal arrangement which had been made. If the verbal arrangement had passed beyond the stage of negotiation and had resulted in a bargain, but for the Statute of Frauds that bargain might have been enforced; but, the statute being pleaded, it is not enforceable.

ONT.

S. C. 1913

BEER v. LEA.

Meredith, C.J.O.

There was no unqualified acceptance of the offer; but, as I have said, an acceptance of it with the modification I have mentioned as having been verbally made, as to the terms of payment of the purchase-money; and, therefore, no acceptance sufficient to constitute a contract the terms of which were sufficiently evidenced by a writing signed by the respondent Lea to satisfy the Statute of Frauds.

The verbal communications relied on do not carry the case any further. They, at the most, evidenced the readiness of the appellant Doolittle to accept the offer subject to the modifications as to the terms of payment, and probably also as to the other matters which were discussed in connection with the carrying out of the sale.

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

I should not have made any further reference to the points discussed in argument and passed upon by my brother Middleton but for his conclusion that the option expired at 4 o'clock in the afternoon of the last of the thirty days for which it was to run.

The view of my learned brother was that, as the option was given at 4 o'clock of the afternoon of the day on which it is dated, the thirty days expired at the same hour on the last of them.

I am unable to agree with that view. *Cornfoot* v. *Royal Exchange Assurance Corporation*, [1903] 2 K.B. 363, [1904] 1 K.B. 40, is, I think, distinguishable. It was a case of marine insurance, and was decided on the terms of the contract which were held to mean that the thirty days for which the risk was to continue were thirty consecutive periods of twenty-four hours, beginning at the time of the ship's safe mooring in the bay.

The law applicable to the computation of time where an act is to be done on a certain day or within a certain period was fully discussed in *Startup* v. *Macdonald* (1843), 6 Man. & G. 593. Alderson, B., stated the general rule to be that "wherever, in cases not governed by particular customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day, to perform their obligation" (p. 622); and the rule was thus stated by Parke, B. (pp. 623-4): "The law appears to have fixed the rule; and it is this, that a party who is bound, by contract, to pay money, or to do a thing transitory, to another, anywhere, on a certain day, has the whole of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day, has expired, no action will lie against him for the breach of such contract."

ONT.

S. C. 1913

BEER v. LEA.

Meredith, C.J.O.

The statement of the law in Leake on Contracts, 6th ed., p. 613, is in accordance with the opinions expressed in *Startup* v. *Macdonald*, and I know of no case which is in conflict with it.

No doubt, the application of the general rule may be excluded by the terms of the contract, as in *Cornfoot* v. *Royal Exchange Assurance Corporation*, as well as in the other ways mentioned in *Startup* v. *Macdonald*, but there is no reason why it should not be applied in the case at bar.

In the view of my brother Middleton, there is no reason why the meaning which he gave to the option "should not be attributed to the expression in all contracts," and "any attempt to give any other meaning would create difficulty." With that view I disagree.

To treat the expression "day" as meaning twenty-four hours, and "days" as meaning consecutive periods of twenty-four hours, would add to the difficulties to be met with in determining the rights of parties, the difficulty of ascertaining the exact hour at which the time began to run and the exact hour at which the act or thing to be done was done.

With great respect for the contrary opinion of my brother Middleton, I prefer what was said as long ago as in 27 & 28 Eliz., *Clayton's Case*, 5 Co. R. 1a., as the reason for resolving that a lease delivered on the 20th June at 4 o'clock in the afternoon, the *habendum* of which was for three years from henceforth, should end the 19th day of June in the third year, "for the law in this computation doth reject all fractions and divisions of a day for the uncertainty, which is always the mother of confusion and contention."

Appeal dismissed.

LAURSEN v. CORPORATION OF SOUTH VANCOUVER.

B.C.

S. C. 1913

British Columbia Supreme Court, Murphy, J. September 19, 1913.

1. ARBITRATION (§ III—17)—REVIEW—SETTING ASIDE AWARD — GROUNDS FOR—MUNICIPAL ACT (B.C.).

Rulings on points of law arising in the arbitration in expropriation proceedings under the Municipal Act, R.S.B.C. 1911, ch. 170, are to be reviewed upon a case stated by the arbitrators prior to the award being made, and not by an application after the award is made to set the same aside on the ground that the arbitrators had made a mistake of law.

2. ARBITRATION (§ III—17)—AWARD—CONCLUSIVENESS — MUNICIPAL ACT (B.C.).

Section 396 of the Municipal Act, R.S.B.C. 1911, ch. 170, is a restrictive and not an enabling statute as regards the enactment that applications to set aside awards on the class of arbitrations for which the Act provides, are to be made, (1) on the ground of misconduct of the arbitrators, and (2) for awarding compensation on a wrong principle.

B. C.

S. C.
1913

LAURSEN
v.
CORPORATION OF
SOUTH
VANCOUVER.

Murphy, J.

MOTION to set aside an award of arbitrators made in an expropriation proceeding.

The motion was dismissed.

McPhillips, K.C., and *Wood*, for Laursen.

Harris, *Bull* and *Hannington*, for South Vancouver.

MURPHY, J.:—This award being good on its face it is hardly argued that under the general law and the Arbitration Act it can be set aside on the ground here set up, viz.: that the arbitrators have made a mistake of law. But it is said first that Laursen has waived this ground because of affidavits filed by him made by the arbitrators setting out how in fact they did apply the law, and second, that sec. 396 of the Municipal Act (B.C.) alters the law. As to the first contention, I do not think as a matter of fact Laursen intended any waiver. The affidavits were filed merely to meet those filed by the corporation, should it be held the Court could go behind the award. Again I think it extremely doubtful that parties to an arbitration can by agreement alter the law. There is a method provided by means of a case stated which arbitrators can be compelled to give whereby the ruling of the Court on any point of law can be obtained. If this is not adopted, I question whether parties even by mutual agreement can re-open the matter before the Court to review rulings on points of law after the arbitrators have made and published their award. This virtually amounts to an appeal and that right I think can only be given by express legislation.

As to the second ground, this is based on the argument that sec. 396 is an enabling and not a restrictive enactment. In my view its object is to cut down the ground on which an award may be set aside, and not to alter the practice as laid down by judicial decisions dealing with such applications. It expressly states that applications to set aside awards in the Act provided for may be made "on the following grounds and no other," namely, misconduct and compensation on a wrong principle. Now, both these were, apart from this section, under the general law and the Arbitration Act, grounds on which an award could be set aside, the first without reference to the form of the award, and the second if it so appeared on the face thereof. There were, apart from the section, other grounds for such setting aside, for instance, if the arbitrators had made a mistake and so requested, or on the discovery of new evidence, etc. Sec. 396 seems to me, as stated, to be aimed at eliminating such other grounds, and as making the award final beyond question, except on the grounds stated. This being my view, I hold I cannot go behind the award, and that it must stand.

Motion dismissed.

RAMAGE v. DEYOE.

SASK.

S. C. 1913

Saskatchewan Supreme Court. Trial before Newlands, J. February 18, 1913.

CONTRACTS (§ III G 2—300)—*Remedies—Illegality — Statutory prohibition in public interest.*]—Action to set aside a contract for the purchase of a steam boiler, as being void, and for the return of certain promissory notes given in payment thereof.

G. E. Taylor, for plaintiff.

A. Benson, for defendant.

Newlands, J.

NEWLANDS, J.:—At the trial I found that the plaintiff had not proved that the defendant had made a material representation that was false to his knowledge and that therefore the contract was not void unless it was so under sec. 15, sub-sec. 1 of ch. 22, R.S.S. 1909, being the Steam Boilers Act.

This section provides "that no boiler which has been in use for two or more seasons shall be sold or exchanged for subsequent use as a boiler unless it is accompanied by an inspection certificate issued within one year next preceding the date of such sale or exchange." The boiler in question had been in use more than two years and had not been inspected within a year of the time of its sale. The statute forbids the sale of such steam boiler in the interests of the public and therefore such a sale is illegal and therefore void. The plaintiff has set out this section and claims in the alternative that by reason of such sale being void under the same he is entitled to have his notes returned. I do not think that this is one of the class of cases where the contract being illegal the Courts will order the return of the securities given by one party to the other and I am of that opinion for the reason that the plaintiff is one of several parties who purchased the steam boiler in question. The plaintiff's co-purchasers still have this boiler and the plaintiff is therefore not in a position to return the same to the defendant which I think he should do to be entitled to have his notes returned to him. This is one of those cases where the contract being illegal the Courts will help neither party. The action is, therefore, dismissed without costs.

Action dismissed.

ONT.

S. C.
1913

Re NICHOLLS, HALL v. WILDMAN.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

1. TRUSTS (§ I D—24)—CREATION—RESULTING TRUST—TRUSTEE'S APPLICATION OF SECURITIES AS.

Testamentary trustees, who were directed by will to invest the proceeds of an estate in such manner as they should deem most advisable, cannot be said to have set apart and appropriated shares of stock belonging to the estate so as to create a specific trust in respect of the income thereof as distinguished from the general trust created under the will, in favour of a legatee to whom the interest on a certain sum was payable for life, where it does not appear that there was any definite allocation of the shares, and the evidence tends to shew that the trustees always treated them as an asset of the estate.

2. TRUSTS (§ II B—51)—TRUSTEES—LIABILITIES—LOSSES—SHARE HELD BY THEM—DEPRECIATION—NEGLIGENCE.

Trustees who retain shares of stock until they become worthless after becoming aware of their rapid depreciation in value under a discretionary power of retention without making an effort to dispose of them, are answerable for the resulting loss although they acted in good faith; nor are they entitled to protection under sec. 36 of the Trustee Act, 1 Geo. V. (Ont.) ch. 26, R.S.O. 1914, ch. 121.

[*Re Brogden*, 38 Ch.D. 546; and *Grayburn* v. *Clarkson* (1868), L.R. 3 Ch. 605, referred to; *Re Nicholls; Hall* v. *Wildman*, 10 D.L.R. 790, 4 O.W.N. 930, varied.]

3. LIMITATION OF ACTIONS (§ II J—80)—WHEN STATUTE RUNS—DECEDENT'S ESTATE—REMAINDERMEN.

The Statute of Limitations does not begin to run against a remainderman until he becomes entitled to possession.

[*Re Dive*, [1909] 1 Ch. 328 at 336, referred to.]

4. TRUSTS (§ II B—51)—TRUSTEES—LIABILITY—EXTENT OF—NEGLIGENCE IN HOLDING BANK SHARES—SHAREHOLDER'S DOUBLE LIABILITY.

Trustees who retain bank shares long after knowledge of their rapid decline in value, are answerable to the estate for the amount of a claim proven against it on the insolvency of the bank by the liquidator in respect of shareholders' double liability, notwithstanding a discretionary power conferred by the will appointing them to invest in such manner as they deem advisable.

[*Grayburn* v. *Clarkson*, L.R. 3 Ch. 605; and *Sculthorpe* v. *Tipper*, L. R. 13 Eq. 232, specially referred to; *Re Nicholls; Hall* v. *Wildman*, 10 D.L.R. 790, 4 O.W.N. 930, varied.]

5. TRUSTS (§ II B—49)—INVESTMENTS—DISCRETION OF TRUSTEES.

A provision in a will that the trustees appointed thereby should invest the proceeds of the real and personal estate "in such manner as they shall deem most advisable" is not restricted to investments authorised by law to be taken by trustees generally.

[*Re Smith*, [1896] 1 Ch. 71, applied.]

6. TRUSTS (§ II B—49)—POWER TO INVEST IN STOCKS—RETENTION OF STOCK HOLDINGS OF TESTATOR.

A general power to invest in stocks at the discretion of the testamentary trustees will authorize the retention as investments of stocks of the same class held by the testator.

[*Fraser* v. *Murdock*, 6 A.C. 855; *Re Chapman*, [1896] 2 Ch. 763; and *Rawsthorne* v. *Rowley*, [1909] 1 Ch. 409*n*, considered.]

ONT.

S. C. 1913

RE NICHOLLS, HALL v. WILDMAN.

7. SUBROGATION (§ III—10)—ON PAYMENT OF DEBT—DEPRECIATION OF SHARES—PAYMENT OF LOSS BY—RIGHT TO SHARES.

Trustees who make good a loss in respect to shares of stock held by them in breach of trust, until they became valueless, are entitled to the benefit of the securities.

[*Re Lake*, [1903] 1 K.B. 439; *Re Salmon*, 42 Ch.D. 351; and *Re Turner*, [1897] 1 Ch. 536, referred to.]

8. TRUSTS (§ II B—55)—TECHNICAL BREACH—TRUSTEE ACTING IN GOOD FAITH.

The rule to be applied under the Trustee Act, 1 Geo. V. ch. 26, sec. 36 (R.S.O. 1914, ch. 121), as to relieving trustees from liability for technical breaches of trust, is that if it be found that the trustee has acted both honestly and reasonably the court is then to determine upon the circumstances whether the trustee ought fairly to be excused.

[*National Trustees Co.* v. *General Finance Co.*, [1905] A.C. 373, followed; *Whicher* v. *National Trust Co.*, 5 D.L.R. 32, [1912] A.C. 377; and *Whicher* v. *National Trust Co.*, 22 O.L.R. 460, referred to.]

Statement

APPEAL by the defendant Mariana Wildman, from an order [10 D.L.R. 790] confirming the report of the Local Master at Peterborough, upon a reference under an order for administration taken out by the executors, Hall and Innes, declaring that the executors were not liable to indemnify the appellant against a judgment obtained by the Royal Trust Company as liquidators of the Ontario Bank, and dismissing her claim that the executors should account to her for $200 which they retained from her in 1881 to meet possible contingencies, and as to which the learned Master held her claim barred by sec. 47, sub-sec. 2, of 10 Edw. VII. ch. 34.

The appeal was allowed in part.

Argument

H. T. Beck, for the appellant, contended that the plaintiffs, the executors, were liable to the appellant in respect of the loss upon their investment.

G. H. Watson, K.C., and *L. M. Hayes*, K.C., for the plaintiffs, argued that the case should be decided on the words "honestly and reasonably" and "fairly to be excused," contained in the Trustee Act, 1 Geo. V. ch. 26, sec. 36* They cited *In re Turner*, [1897] 1 Ch. 536; Anglin on Trustees, p. 116 *et seq.*; Lewin on Trusts, 12th ed., p. 1170; *Chapman* v. *Browne*, [1902] 1 Ch.

*36. If in any proceeding affecting a trustee or trust property it appears to the Court that a trustee . . . is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, the Court may relieve the trustee either wholly or partly from personal liability for the same.

ONT.

S. C.
1913

RE NICHOLLS, HALL v. WILDMAN.

Argument

785; *Dover* v. *Denne* (1902), 3 O.L.R. 664; *Whicher* v. *National Trust Co.* (1910), 22 O.L.R. 460, reversed in P.C., *National Trust Co.* v. *Whicher*, [1912] A.C. 377, 5 D.L.R. 32; *In re Grindey*, [1898] 2 Ch. 593; *In re Dive*, [1909] 1 Ch. 328; *Re Waters*, [1889] W.N. 39. Section 36 of the Trustee Act was intended for the relief of trustees, and this case is a fit subject for such relief. The Master held that the Limitations Act, 10 Edw. VII. ch. 34, sec. 47, was a complete answer to the appellant's claim: see *Lacons* v. *Warmoll*, [1907] 2 K.B. 350; *Gardner* v. *Perry* (1903), 6 O.L.R. 269.

Beck, in reply, referred to and distinguished *Lacons* v. *Warmoll*, [1907] 2 K.B. 350. This was a case where the executors came into Court to pass their accounts; see *In re Blow*, [1913] 1 Ch. 358; *In re Marsden* (1884), 26 Ch. D. 783, where the executors were not allowed to set up their own wrong by way of *devastavit* under the Statute of Limitations. He also referred to and distinguished *Dover* v. *Denne*, 3 O.L.R. 664.

Hodgins, J.A.

June 26. The judgment of the Court was delivered by HODGINS, J.A.:—Ann Nicholls died on the 18th August, 1878. Her will was proved by the respondents, the executors, and devised all her estate, both real and personal, whatsoever and wheresoever situate, except as thereinafter mentioned, unto the respondents upon trust "to invest the proceeds thereof in such manner as they should deem advisable." Apart from a devise of the dwelling-house, furniture and chattels therein, and the lot upon which it stood, the testatrix disposed of her estate by leaving as legacies various sums of money upon which interest was to be paid, and by disposing of the sums so left after the death of the life-tenant or after the expiry of a certain time.

The first difficulty in the case arises from the following bequest: "I give devise and bequeath to Mary Jane Bryson the interest of six thousand dollars during her life the rate of interest to be the same as my trustees may receive from my investments said interest to be paid six months after my decease and on the decease of said Mary Jane Bryson the said principal sum of six thousand dollars is to be paid to my niece Mariana Kennin one year after the decease of Mary Jane Bryson."

The testatrix directed the respondents to appropriate a sum not exceeding $600 to be expended for a monument, and directed them to pay, two years after her decease, one-third of the residue of the estate to two nieces and a nephew, the appellant, Mariana Kennin, now Wildman, being one of the nieces.

From the statements filed before the Master it would appear that distribution of most of the estate was made on or about the 12th October, 1881. The estate originally consisted of six items: (1) cash in Ontario Bank, $1,132.92; (2) cash with Messrs.

J. & J. Stewart, $2,025.22; (3) United States gold bonds, par value $14,500; (4) fifty shares Federal Bank stock, par value $5,000; (5) one hundred and twenty-five shares Ontario Bank stock, par value $5,000; (6) Nos. 69, 71, 73, Broadway, Brooklyn, valued at $28,500: total $56,158.14.

On or about the 12th October, 1881, the estate consisted of the items shewn in the following statement filed on the reference:—

Assets.

Cash		$27,877.74
D. Hopkins Mortgage	$10,000.00	
Accrued interest thereon	683.69	
		10,683.69
G. Leigh's bond	3,000.00	
Accrued interest thereon	20.13	
		3,020.13
125 shares Ontario Bank stock at 66c.		3,300.00
		$44,881.56 $44,881.56

The statement then continues:—

"To be disposed of as follows:—		
"To be invested for Mrs. Rackham		$10,000.00
"To be invested for Miss Bryson		6,000.00
"To be invested for infant legatees		4,000.00
"Legacy payable to Mr. Kennin		10,000.00
"Balance of interest payable to Mrs. Rackham	$407.39	
"To Mr. Kennin	707.39	
"To Miss Bryson	244.43	
"To infant legatees	602.95	
		1,962.16
"Reserved for a monument		600.00
"Reserved for solicitor's charges and loss on bank stock		319.40
		$32,881.56
"And the residue now divisible is		$12,000.00

Upon this basis a partial distribution appears to have taken place. In the above there is an item reserved for solicitor's charges and loss upon bank stock of $319.40. In the other statements prepared about the same time, exhibit 10, the reserve on Ontario Bank stock is spoken of as $819.40; while in exhibit 8 appears the following:—

"October 12th, 1881. Balance in hand per statement after payment of legacies, etc., as shewn therein, $319.40" (which is obviously the above item), "to which add further amount retained as reserve Ontario Bank stock, $600 ($919.40)."

ONT.

S.C.

1913

RE NICHOLLS, HALL v. WILDMAN.

Hodgins, J.A.

The calculations in exhibit 8 are as follows:—

Balance assets after payment of legacies, etc.		
Cash		$ 5,018.53
Hopkins mortgage	$10,000.00	
And accrued interest	683.69	
		10,683.69
G. Leigh's bond	3,000.00	
And accrued interest	20.13	
		3,020.13
125 shares Ontario Bank at 66c.		3,300.00
		$22,022.35

For the following purposes:—

Mrs. Rackham	$10,000.00	
Miss Bryson	6,000.00	
Infant legatees	4,000.00	
Interest	602.95	
Reserve on Ontario Bank stock	1,419.40	
		$22,022.35

It would, therefore, appear that there was an anticipated loss on Ontario Bank stock, and that the reserve, which originally included solicitor's charges, had increased from $319.40 to $1,419.40, for some unexplained reason.

In the book produced, exhibit 2, the appellant signed the following receipt: "$3,800. Peterboro', 7th October, 1881. Received from Richard Hall and Robert Innes, executors and trustees in the last will and testament of the late Ann Nicholls, the sum of $3,800, being the amount due to me from their statement of the 12th inst., less $200 retained as further reserve on Ontario Bank stock, which they are to pay to me as soon as same can be sold so as to realise 66c. on the dollar net. Mariana Kennin."

The statement above referred to, as produced, shews the following item: "To Miss Kennin, her share of residue, $4,000."

In all these statements the same item appears: "125 shares Ontario Bank stock at 66c., $3,300;" and the reserve already spoken of, together with the residue, shews that the exact value of the Ontario Bank stock was doubtful; and that the respondents were not intending to sell the same until they could realise 66c. on the dollar net, and that the appellant was satisfied to leave $200 of the residue as a further reserve until the stock was sold at the figure named.

It does not appear that the appellant knew anything about any other amount reserved beyond her $200 when arriving at the amount of the residue on which her receipt is based. I do not see that in any of the statements there is any appropriation of the Ontario Bank stock to the legacy of $6,000 to which the appellant claims to be entitled after the death of the life-tenant.

In exhibit 9, which is the draft account of the 12th October, 1881, it is put in with the other assets and appears side by side with 50 shares of Federal Bank stock, and is treated in a similar way in exhibit 10.

From the accounts filed it would appear that in 1878, 1879, 1880, 1881, and 1882, the dividend from the Ontario Bank stock was at the rate of $300 per annum. In 1882 the stock was reduced by one-half. In 1883 the account does not give the dividend separately, but in 1884 it appears to have dropped to $150 a year, and so continued to the end of 1886. In 1887 one dividend, on the 1st June, is credited at $87.50, and a similar amount on the 13th December, 1889; also in 1890, 1891, 1892, 1893, and 1894; but in 1895 the dividend on the 5th June is given as $75, and on the 2nd December as $62.50; and in 1896 two receipts of dividends are shewn of $41.66 each, and that rate was maintained in 1897, while in 1898 it appears to have dropped to $80 per year; but in 1899, 1900, 1901, and 1902 it increased to $96, and continued at that rate during 1903, 1904, and 1905; and at the beginning of 1906 a dividend was paid on the 1st June of $56, which appears to be the last dividend received.

In looking at the receipts in the book, exhibit 2, Miss Bryson, who under the will was to receive interest upon the sum of $6,000, appears to have been paid at the rate of six per cent. on $6,000, namely, $360, until 1886, and thereafter at the rate of $300 for some time. The receipts are expressed as "interest on $6,000." Smaller payments were made during later years.

The last two receipts dated the 3rd January, 1910, and the 4th July, 1910, are receipts for interest "on bequest from Ann Nicholls estate" to the 31st December, 1909, and the 30th June, 1910, respectively. In a statement filed, also dated the 12th October, 1881, appears the following paragraph: "It will be seen, therefore, that the income on the amount realised for the estate has been at the rate of 7% per annum. The following amounts are, therefore, payable for interest." And thereafter appear calculations of interest on the legacies, at seven per cent. These calculations were no doubt made in pursuance of the provision in the will that the rate of interest to be paid was to be the same as the executors "may receive from my investments," but there is no explanation as to why Miss Bryson received less than the seven per cent. A reference to the accounts filed by the executors shews that before the 12th October, 1881, they had converted into money the gold bonds, at a loss on par value of about $2,300, and had sold No. 69 Broadway, in Brooklyn, and that, under date the 12th October, 1881, they had sold and received the purchase-money for numbers 71 and 73 Broadway, Brooklyn, and also the proceeds of the sale of fifty shares of Federal Bank stock, which realised $2,625 over the par value.

ONT.

S. C.
1913

RE NICHOLLS, HALL v. WILDMAN.

Hodgins, J.A.

In 1882 and 1883 they received payments of G. E. Leigh's bond of $3,000 shewn in the statement of the 12th October, 1881. From the accounts it further appears that everything originally forming part of the estate had been turned into cash and re-invested or used to provide for legacies on the 12th October, 1881, except the shares of Ontario Bank stock, the sale of which was, as I have mentioned, deferred. Turning to the evidence given by the respondent Hall, it would seem that both he and his co-executor were shareholders in the Ontario Bank and were advised by Mr. Robert Nicholls, a brother of the testatrix, one of the wealthiest and shrewdest men in Peterborough, to hold on to the stock in question; that it would be all right; that it would improve. The respondent Hall further says that, after he had paid all the legatees, the $6,000 was just held in the estate, and that in providing for the legacies there was the Ontario Bank stock, and that they set it aside as part of the investment to secure the $6,000 legacy, and that it was estimated to be of the value of $3,300. On cross-examination he is unable to give the date of setting it apart, but says that it was not done within a year from the death of the testatrix, and that he set it apart and counted it as part of the estate because he held it from the beginning, and that he had not set it apart when he first began to pay interest to Miss Bryson, but that he paid her the specific amount of the dividend each half year, adding interest on other moneys to make up the balance. He had shares of Ontario Bank stock himself.

Mr. Innes, the other executor, corroborates Hall as to the advice given by the late Robert Nicholls. He says that, after the death of Miss Ann Nicholls, he became a shareholder in the Ontario Bank, purchasing sixty-eight shares from time to time, twenty-two of which were purchased at a premium of 120 after 1896, when the capital, having been twice reduced, was increased from one million to one and a half million. Neither of the executors appears to have consulted any one subsequent to the death of Robert Nicholls, who died in November, 1881, and the dates at which Innes purchased the other forty-six shares are not given.

The stock of the Ontario Bank was cut down on the 21st May, 1882, for the first time by one-half, and the second time on the 31st May, 1896, it being then reduced by one-third, and the respondent Innes says that he held shares at the time it was cut down. The respondents took no steps to realise upon the stock. They never put it on the market; never put it into a broker's hands; and are not able to say whether it ever reached a figure which would enable them to sell at 66 cents on the dollar net.

The appellant does not seem to have been consulted as to its sale or retention. Three witnesses were called for the respond-

ents. George W. Hatton, a barrister and solicitor, practising since 1881 in Peterborough, says that, from what he knew of the standing of the bank at the time of Miss Nicholls's death in 1878, when he was a law student, he would have continued the investment. William H. Moore, also a barrister and solicitor, practising in Peterborough for about forty years, says that, if distribution was not required, he would have retained the stock, but he admitted that the first reduction gave it a sort of "black eye." Adam Hall, engaged in general retail business and manufacturing for thirty-four years in Peterborough, and a stockholder of the Ontario Bank, says that he would have held these shares as a safe investment in 1878.

The learned Master has found that the respondents acted honestly; and I think that there can be no doubt that his finding is correct and entirely warranted by the evidence.

He has also found that they acted reasonably, but that holding is based upon the fact that they were advised by Robert Nicholls to hold the stock, and that Ontario Bank stock was, particularly by the citizens of Peterborough, looked upon as being absolutely safe and good—a finding which relates to the original retention rather than the continued holding from the year 1878 down to 1882, and later.

I cannot agree that this stock was ever set apart and appropriated for this legacy so as to set up a trust for the appellant, as distinguished from the general trusts under the will in question. There is no satisfactory evidence given by the respondents of any actual definite allocation. The contemporary statements negative this position; and in the accounts filed, and in the affidavit of Hall for the purpose of obtaining the administration order, the legacy is dealt with as if payable out of the assets of the Ann Nicholls estate. Under the will in question, the real and personal estate was devised to the trustees "upon trust to invest the proceeds thereof in such manner as they shall deem most advisable."

This is a similar power to that found in *In re Smith*, [1896] 1 Ch. 71, "to invest in such stocks, funds, and securities as they should think fit." Kekewich, J., read these words as not confined to such "proper" stocks, etc., because to give them a narrow construction would be in effect to strike them out of the will. He treated them as meaning such securities as the trustees "honestly thought fit" to invest in, and held that the debentures, in the nature of a floating security, of a limited company, payable to bearer, were an investment within the power. The power to invest given in this will is equivalent to a power to retain such securities as they might invest in. As Lord Langdale says in *Ames* v. *Parkinson* (1844), 7 Beav. 379, the executors were under no obligation to sell or realise securities existing at the testator's

ONT.
S.C.
1913
RE NICHOLLS, HALL v. WILDMAN.
Hodgins, J.A.

death and afterwards to invest the proceeds again in the same sort of securities. He also held that, under a direction to invest out of his personal estate, within twelve months after the testator's decease, £1,500 on mortgages, the executors were entitled to appropriate proper securities belonging to the testator in performance of that trust.

Lord Watson in *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855, at p. 877, says: "A general power to retain stocks in which the testatrix has already invested, does not differ, in its scope, from a general power to invest in these stocks. What the trustees can do in the one case by making a new, they can effect in the other case by retaining an old, investment."

I think this is also the result of the judgments in *In re Chapman*, [1896] 2 Ch. 763, and in *Rawsthorne* v. *Rowley* (1907), 24 Times L.R. 51, reported in full in [1909] 1 Ch. 409, in a note to *Shaw* v. *Cates*, [1909] 1 Ch. 389. I do not take the observations quoted from the former case by Farwell, L.J., in the latter, at p. 412, as dealing with the principle laid down by Lord Watson, but rather as pointing to the difference in the measure and class of responsibility flowing from each position.

In *In re Chapman*, [1896] 2 Ch. 763, the Court of Appeal held that there was no rule of law which compels the Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorised security in a falling market, *i.e.*, a security authorised by the trust (p. 776), if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties, unless wilful default, which includes want of ordinary prudence on the part of the trustees, is proved. The Court examined the subsequent events, however, and considered that it was not proved that the attempt to realise upon the mortgages would have been either prudent or judicious. It further held that it was not the duty of executors to realise at the end of one year mortgage investments made by the testator himself, when their realisation was not required for the payment of funeral and testamentary expenses, debts and pecuniary legacies, and when the securities themselves were not in any peril. Rigby, L.J., says that there is a great difference between the duty of trustees who have money in their possession for investment and the duty of trustees with respect to investments for which they are not personally liable, and which in their discretion they have chosen not to call in. He affirms that the Court has never laid down, even with regard to risky securities such as Turkish bonds or shares in an unlimited company, that there is an absolute unvarying obligation on trustees to call them in within the twelve months, regardless of the opinion the executors or trustees may have as to the prudence or the advisability of doing so. For this he cites *Buxton* v. *Buxton* (1835), 1 My. & Cr. 80, and

Marsden v. *Kent* (1877), 5 Ch. D. 598. The former was a case of Mexican bonds which could only be realised by sale, and which were sold, some within thirteen months and some within eighteen months. Sir C. Pepys, M.R., there found that a considerable depreciation had taken place since the purchase of the bonds by the testator, and that the executor was vigilant and attentive throughout, and that he exercised his best discretion as to the time for realisation. In the latter case the bonds were foreign railway bonds of very uncertain value and rapidly depreciating. They were sold fifteen months after the testator died. Lord Justice James held that the executors were not liable, the error of waiting for a rise being one of judgment merely.

These cases seem to justify the view that, if the trustees "acted in good faith and that their decision to retain this stock was an honest exercise of the discretion given to them by the will" (*per* Lord Selborne in *Fraser* v. *Murdoch*, 6 App. Cas. at p. 864), and if the will did in fact authorise retention—for this is the effect, I think, of *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A.C. 373; *Davis* v. *Hutchings*, [1907] 1 Ch. 356; *Whicher* v. *National Trust Co.*, 22 O.L.R. 460, *National Trust Co.* v. *Whicher*, [1912] A.C. 377, 5 D.L.R. 32; *In re Grindey*, [1898] 2 Ch. 593; and *Henning* v. *Maclean* (1901-2), 2 O.L.R. 169, 4 O.L.R. 666—their abstaining from selling, hoping for a better price, from 1878 to 1882, was fairly justified.

But in 1882 the stock was cut in half, and that which had been taken in as worth $3,300, *i.e.*, 66 per cent. on $5,000, became worth no more than one-half of the par value.

As I have said, I see nothing in the evidence or documents filed to warrant the conclusion that there was any setting apart of this stock in 1881 to answer this legacy. The statements shew directly the opposite; it was treated as one of the assets, and remained unsold when others were realised upon. The receipt signed by the appellant expresses quite the contrary, and indicates an intention on the part of the executors to sell, upon the stock appreciating to the point of sixty-six cents on the dollar, and on the part of the beneficiary to wait for the remaining $200 only till that time. This is not consistent with an appropriation of these specific shares, nor, in view of the amounts reserved, of any specific amount. The appropriation was to be in money, the amount of which would be determined by the price realised, and would absorb as much or as little of the reserve as was necessary. I think the conduct of the respondents must be judged in the light of this intention and of the reduction of the stock which occurred next year.

There is nothing to indicate the value of the stock immediately or shortly after the reduction. Probably it would approximate to fifty per cent. on the original par value, upon the belief

ONT.
S. C.
1913
RE NICHOLLS, HALL v. WILDMAN.
Hodgins, J.A.

that the reduction had ascertained and eliminated the total losses of the bank, and that the stock would be worth at least the amount to which it had been reduced.

The rule under the statute, stated in *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A.C. 373, is, that where the Court finds that the trustee has acted both honestly and reasonably, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances. This is approved in *Davis* v. *Hutchings*, [1907] 1 Ch. 356, and in this Court in *Whicher* v. *National Trust Co.*, 22 O.L.R. 460.

This rule is, in the case of an honest trustee, to be applied, "carefully no doubt, but not grudgingly:" *per* Rigby, L.J., in *Re Roberts* (1897), 76 L.T.R. 479, 485; or, as put by Jessel, M.R., in *In re Speight* (1883), 22 Ch. D. 727, 746, the Court should "lean to the side of the honest trustee."

The features which this case presents are unusual. Granting that the retention was justified by the general optimism, how is the retention after the reduction in 1882 to be treated? There was a reserve in hand of $319.40, plus the $600 retained on the residuary shares, and $500 more if the last statement is to govern. Assuming that, after the reduction, the stock was worth and could be sold for $2,500, then, with the $919.40 reserve, it would have produced a trifle over the $3,300. Innes in 1896 bought twenty-two shares—after the stock, which had been reduced from $3,000,000 to $1,000,000, had been increased to $1,500,000—at 120. If this stock had been then sold at the same rate, it would have realised about $2,100. This is evidence that before the appellant was entitled to claim the legacy, the shares were saleable.

There is no evidence one way or the other as to what the stock could have been sold for between 1882 and 1896. The respondents took no steps to realise, consulted nobody, and do not know anything about the price of the stock from 1882 on until 1896, although the reduction of the dividend necessitated their resort to some quarter to keep up Miss Bryson's interest. In 1883, 1884, and 1885 she was paid $360 a year, although the dividend from the Ontario Bank stock was reduced from $300 to $150 per annum.

There are none of the circumstances relied on as excusing the trustee in *In re Chapman*, [1896] 2 Ch. 763, and *Rawsthorne* v. *Rowley*, 24 Times L.R. 51, [1909] 1 Ch. 409, *n.*; and, while there is no legal evidence of sales of Ontario Bank stock or of the prices at which it was sold except in 1896, there is evidence that sales and prices were being reported in the daily papers in 1882, after the reduction of the capital.

The case is not brought within the rule stated by Lord Romilly in *Clack* v. *Holland* (1854), 19 Beav. 262, 271, that the

trustee will be exonerated "if there is reasonable ground for believing that," had he taken steps, "they would have been ineffectual."

Under these circumstances, I come reluctantly to the conclusion that the trustees have not discharged the onus which is on them: *In re Brogden* (1881), 38 Ch. D. 546; see pp. 567-8, 573-4-5; and I cannot see that they acted reasonably in not selling or endeavouring to realise in or after 1882, or that, under all the circumstances, a case is made out for their protection under the statute. See *Grayburn* v. *Clarkson* (1868), L.R. 3 Ch. 605.

The Statute of Limitations has no application; the appellant never became entitled to possession until 1910: *In re Dive*, [1909] 1 Ch. 328, at p. 336, *per* Warrington, J.

But the reserve fund or the amounts reserved may properly be treated as absorbed by the loss. There is no evidence that unless sold at par as reduced, *i.e.*, for $2,500, the $3,300 would have been realised. Under *In re Salmon* (1889), 42 Ch. D. 351, the trustees are only liable for the loss where they are held liable for an authorised investment carelessly made; and I think that, while the respondents have not satisfied the onus in one direction, the appellant has failed to prove the loss accurately, and that justice will be done if the loss is measured by holding the respondents liable for the par value after reduction in 1882, $2,500, as being the amount that a sale after 1882 would, together with the amounts reserved, have realised.

This will also dispose of the reference back directed by Latchford, J.—as the two sums of $600 and $319.40 (mentioned therein as $348.80) are the amounts previously referred to as reserve on Ontario Bank stock.

The Royal Trust Company, as liquidators of the Ontario Bank, have proved a claim in this matter and have been allowed a claim on the amount ordered to be paid into Court. Payment of the call under that judgment constitutes a loss which flows directly from the act of retention; in other words, from the breach of trust. It seems to follow logically that the executors must make it good.

In the case of *Grayburn* v. *Clarkson*, L.R. 3 Ch. 605, a similar point arose; and Sir W. Page Wood, L.J., indicated that the question was: "Is that a loss sustained to the estate by reason of the shares not having been sold within the year?"

It was not decided, however; but there is later authority, in *Sculthorpe* v. *Tipper* (1871), L.R. 13 Eq. 232, where Sir R. Malins, V.-C., made the executors liable for the loss on a retained investment, including the calls made on the winding-up (see p. 234 of the report), on the ground that "where the property is invested in shares of an unlimited company, unless a retention

ONT.
S.C.
1913
RE NICHOLLS, HALL v. WILDMAN.
Hodgins, J.A.

is actually ordered by the will, it is the duty of the trustees to get rid of it as soon as possible, so as to exonerate the estate of the testator from liability" (pp. 240, 241).

The investment in question here was an authorised investment, in respect of which the liability of the trustee is to make good the loss, which may be enforced without giving the trustee the option of taking the security: *In re Salmon*, 42 Ch. D. 351, 368, 371; *In re Turner*, [1897] 1 Ch. 536; but the better and more reasonable practice is, that, where the trustee pays the whole loss, he may take the benefit of the security: *In re Lake*, [1903] 1 K.B. 439. This will be of some benefit in the case of the Ontario Bank stock, as a refund has already been announced, and the Central Canada Loan Company stock is a good asset.

Upon payment, therefore, of the amount of $2,500 into Court, and indemnifying the trust estate against the payment of the judgment, the respondents may retain the Ontario Bank stock, with the right to receive any refund and dividends thereon, as well as the Central Canada Loan Company stock. In the meantime, the appellant will have a lien on them: *In re Whiteley* (1886), 33 Ch. D. 347, affirmed in *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727.

I have carefully gone over the accounts, and am unable to see why the respondents should be required to credit therein as received the sum of $2,101.60. If it were so credited as a receipt, it would be on the assumption that the solicitor's receipt was equivalent to that of the respondents, who deny his authority to collect it. It never reached their hands; and, while they paid Miss Bryson sums as yearly interest which steadily lessened, because they had not received this interest, though not to the full extent of the shortage, that is her affair, and not that of the appellant. If now credited, it would in effect be charging the respondents with $2,101.60 on balancing their accounts, which I am not prepared to do, upon the evidence given.

This $2,500 will, upon the finding that there was no proper appropriation of these shares to the appellant's legacy—the report not being disturbed as to the Peterborough Real Estate Company's stock upon that point—be paid into Court. The respondents, as I have indicated, must indemnify the estate against the judgment held by the Royal Trust Company.

There should be no costs of the appeal, as the success is only partial and the case not free from doubt. The additional commission upon the $2,500 may be calculated and apportioned by the Registrar, and added to the commission mentioned in the schedule to the report, which is disturbed to the extent of adding this $2,500 and the consequent division of commission thereon, and by striking out of the order appealed from the direction for payment out of the moneys in Court.

Appeal allowed in part.

Re MODERN HOUSE MANUFACTURING CO.

DOUGHERTY and GOUDY'S CASE.

ONT.

S. C.

1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee and Hodgins, JJ.A. July 2, 1913.

1. Corporations and companies (§ V F 4—276)—Liability of shareholder as contributory—Contract to pay for shares in property.

A person cannot be held as a contributory in a winding-up proceeding in respect to shares in a company incorporated under the Ontario Companies Act, issued as fully paid and alloted to him in consideration of his agreement to convey land to the company, notwithstanding he fails to make the conveyance, where there was no subscription or other contract by which any cash value was placed upon the shares; the default did not entitle the company to treat the shareholder as holding the shares subject to call.

[*Re Modern House Mfg. Co., Dougherty and Goudy's Case*, 12 D.L.R. 217, affirmed on an equal division; *Re Alkaline Reduction Syndicate Ltd.*, 45 W.R. 10, *Re Railway Time Tables Publishing Co.*, 42 Ch. D. 98, and *Re Cornwall Furniture Co.*, 20 O.L.R. 520, specially referred to.]

Statement

Appeal by the liquidator of the company from the order and decision of Middleton, J., *Re Modern House Manufacturing Co., Dougherty and Goudy's Case*, 12 D.L.R. 217, 28 O.L.R. 237.

The appeal was dismissed on an equal division of the Court.

Argument

G. F. Shepley, K.C., for the liquidator, argued that the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 68, applied to the formation of this company, and that, though the contributories were given time, there was no question as to the ultimate consideration. He referred also to sec. 51 of the Winding-up Act, R.S.C. 1906, ch. 144. There is no difference between a bond to pay money and one to convey property; in both cases something is to be handed over. The stock certificates were left in the hands of the company's secretary, but the respondents could have got them out at any time on demand; so the situation is the same as in the case of a promissory note. He then referred to *In re Continental and Shipping Butter Co., Mege and Angier's Case*, [1875] W.N. 208, distinguishing the English Act (30 & 31 Vict. ch. 131, sec. 25) and cases cited, there being no case in this country deciding the point in question. The question is, whether the statute requires one to put in an amount equal to the amount unpaid, where nothing has been put in.

W. M. Douglas, K.C., for the respondents, argued that there was no subscription whatever, and no intention to subscribe; as a consideration for a conveyance of property, the respondents were to get some cash and some shares. They take the bond against the title, not the shares. The transaction was not *ultra vires*. It was purely a contract case, and it was never in contemplation that other than paid shares were in question. The

ONT.

S. C.
1913

RE MODERN HOUSE MANUFACTURING CO.

Argument

case of *In re Continental and Shipping Butter Co.* arose upon an agreement for certain rights; it follows *In re Western of Canada Oil Lands and Works Co., Carling's Case* (1875), 1 Ch. D. 115, at p. 124, and is a case where registration was considered necessary. It does not apply here. But here, as in *Carling's Case*, there was failure of consideration. The Court will not fix upon a party an engagement larger than that into which he has entered: see *In re Charles H. Davies Limited, McNicol's Case* (1909), 18 O.L.R. 240; *Bloomenthal* v. *Ford*, [1897] A.C. 156; *Waterhouse* v. *Jamieson* (1870), L.R. 2 Sc. App. 29. The consideration moved from the company, and the property, although the stock was subscribed for, was the subject of a contract: see *Re Wakefield Mica Co., King's and Johnson's Cases* (1906), 7 O.W.R. 104.

Shepley, in reply, referred to *Re Cornwall Furniture Co.* (1910), 20 O.L.R. 520, and *Re Clinton Thresher Co.* (1910), 20 O.L.R. 555.

Meredith, C.J.O.

July 2. MEREDITH, C.J.O.:—This is an appeal by the liquidator from an order of Middleton, J., dated the 25th February, 1913, reversing the judgment or order of the Master in Ordinary, dated the 21st November, 1912, placing the respondents' names on the list of contributories with respect to 1,500 shares each.

I agree with the conclusion of my brother Middleton.

It is not open to question, I think, that at no time was it intended that the respondents should have allotted to them anything but fully paid-up shares, and the shares which were allotted to them and in respect of which they were put upon the list of contributories were issued to and accepted by them as fully paid-up shares.

It is not disputed that, if the original arrangement by which the respondents were to sell the property to the company for $5,000 in cash and 6,500 fully paid-up shares of the company's capital stock had been carried out, the shares would have been properly issued as fully paid-up, and that, in the absence of fraud, no inquiry could be had as to the adequacy of the consideration which the company would have received for its money and shares.

Before the respondents had made title to the property, and also before the time allowed them to do so had expired, for some reason not fully explained in evidence, the respondents proposed to the company that the 6,500 fully paid-up shares should be presently issued to them, and that they should give to the company their bond conditioned that they would make title to and transfer the property to the company within thirty days; and this was assented to by the company, the shares were issued, and the bond was given.

ONT.

S. C.
1913

RE MODERN HOUSE MANUFACTURING CO.

Meredith, C.J.O.

Three thousand five hundred of the shares were contemporaneously transferred to Robert Greig, and he is named as one of the obligors in the bond.

It was not in the contemplation of any of the parties that this change in the arrangement should affect the character of the shares which the respondents were to receive, nor was it intended that the respondents should have issued to them any shares but the fully paid-up shares they were to get as part of the consideration they were to receive for the property.

As it has turned out, the respondents were unable to make title to the property satisfactory to the company, and have not yet done so.

I am unable to see how, on this state of facts, whatever other remedy the company may have, the liquidator is entitled to treat the respondents as the holders of shares subject to call in the liquidation to meet the liabilities of the company. The shares were issued as paid-up shares, accepted as paid-up shares, and as such they must be treated in the winding-up.

I attach no significance to the fact that the penalty in the bond is only $5,000, although the par value of the shares is $65,000. The respondents, after the giving of the bond, remained liable as before on their contract to convey the property, which was only modified by providing for the present issue of the shares and for an extension of time to complete the title to the property.

In addition to the cases referred to by my brother Middleton, *In re Hess Manufacturing Co., Edgar* v. *Sloan* (1894), 23 S.C.R. 644, and *Union Bank* v. *Morris, Union Bank* v. *Code* (1900), 27 A.R. 396, *Morris* v. *Union Bank, Code* v. *Union Bank* (1901), 3 S.C.R. 594, may be referred to; and it may be pointed out that in the latter case the decision of the Supreme Court proceeded on the ground that under the then Companies Act of Canada, under which the company had been incorporated, in order to entitle a shareholder to pay for his shares otherwise than in cash there must be an agreement in writing so providing deposited with the Secretary of State at or before the issue of the shares, a provision which is not found in the Ontario Act under which the company whose shares are in question was incorporated.

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

MAGEE, J.A.:—I agree.

Magee, J.A.

HODGINS, J.A.:—This appeal was argued before us by the appellant, the liquidator of the company, on the assumption that sec. 51 of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and sec. 68 of the Ontario Companies Act, 1907, 7 Edw. VII. ch. 34, governed the liability of the respondents, in view of the winding-up having intervened. On behalf of the respondents

Hodgins, J.A.

ONT.

S. C.
1913

RE MODERN HOUSE MANUFACTURING CO.

Hodgins, J.A.

the position taken was, as stated in the judgment appealed from, that, in view of the contract of the 4th March, 1910, under which the shares to be given were to be paid-up shares, no liability could attach to the respondents as for unpaid shares.

There is no dispute about the facts except upon one point which I shall mention later. The company was incorporated under the Ontario Companies Act on the 31st January, 1910, and had power under its charter to acquire by purchase, exchange, or other legal title, timber limits, houses, vessels of every description, etc., etc., and under the Ontario Companies Act, to take or otherwise acquire and hold shares in any other company, having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as, directly or indirectly, to benefit the company. Pursuant to these powers, an agreement dated the 4th March, 1910, was made between the respondents and the company, which agreement was accepted and approved by the directors on the same day, and by the shareholders on the 9th March, 1910. This agreement was preceded by a general meeting of the provisional directors, at which the by-laws were adopted; the same being subsequently confirmed at a meeting of the shareholders held on the 1st February, 1910.

No directors were elected at this meeting, but the provisional directors continued to meet and to act for the company at the meetings I have referred to. By the agreement in question the appellants contracted and agreed to sell certain timber rights and timber, all the capital stock of "Lakes Lumbering Limited" (a saw mill company), and other assets thereof, for the consideration expressed in the agreement. That consideration was the sum of $5,000 in cash and 6,500 fully paid shares (of $10 each) of the capital stock of the company. The said 6,500 shares were to be allotted and issued to the respondents upon the vesting in the company of the title to the said shares, and the said sum of $5,000 was to be payable, $2,500 on the 1st May, 1910, and the balance after the company had sold to subscribers of its capital stock 8,500 shares, and $25,000 had been paid into the treasury thereon. Time was made the essence of this agreement, and the company had twenty days to examine the titles to the said assets, and if, within that time, the company furnished the respondents with any objections which they should be unable or unwilling to remove, and which the company would not waive, the agreement was to be null and void.

On the 11th March, 1910, at a meeting of the directors, the secretary and solicitor, Mr. M. P. Vandervoort, reported his investigation of the titles through his agents, which apparently was not satisfactory; and the minute of the meeting states that the respondents were communicated with, and that, inasmuch as

transfers and conveyances were required from the recorded owners of the timber to the respondents, the options held by them not being acceptable, and as it would take some days to complete the transfers, and that the respondents stated "that it would be a matter of great convenience if the company would issue the 6,500 shares to them at the present time, and after consideration the company agreed to do so, upon Messrs. Dougherty and Goudy entering into a bond for $5,000 to the effect that the transfers would be executed and delivered and the titles to the said timber and other assets vested in the company within thirty days from the date thereof," pursuant thereto the following motion was carried: "That the said 6,500 shares be and the same are hereby allotted to Dougherty and Goudy, same to be delivered to them upon the aforesaid bond being executed and delivered to the company."

It is to be noted that it is not stated whose convenience was being served, whether the company's or the respondents', and that the shares are not referred to as paid-up shares.

In pursuance of the foregoing, a bond was taken from the respondents which read as follows:—

"Know all men by these presents that we, Lyman M. Dougherty and R. J. Goudy, both of the city of Toronto, are severally held and firmly bound unto the Modern House Manufacturing Company Limited, its successors and assigns, and Robert Greig, his heirs, executors, administrators, and assigns, each in the penal sum of five thousand dollars, to be paid to the Modern House Manufacturing Company Limited, its successors and assigns, and for the payment well and truly to be made, we, the said Lyman M. Dougherty and R. J. Goudy, bind ourselves and each of our heirs, executors, and administrators, firmly by these presents.

"Sealed with our seals and dated the 14th day of March, 1910.

"Whereas by agreement made between the said Lyman M. Dougherty and R. J. Goudy and the Modern House Manufacturing Company Limited, dated the 4th day of March, 1910, a copy of which agreement is hereto attached, the said Lyman M. Dougherty and R. J. Goudy agreed to sell, transfer, and assign unto the Modern House Manufacturing Company Limited, the timber, buildings, stock, chattels, fixtures, and other assets therein described, in consideration of the payment of five thousand dollars in cash and 6,500 shares of the paid-up stock of the Modern House Manufacturing Company Limited.

"And whereas the necessary conveyances and transfers vesting in the Modern House Manufacturing Company Limited the said timber, buildings, stock, chattels, fixtures, and other assets, have not yet been completed by execution and delivery.

ONT.

S. C.
1913

RE MODERN HOUSE MANUFACTURING CO.

Hodgins, J.A.

"And whereas the said Lyman M. Dougherty and R. J. Goudy have requested immediate issue of the said 6,500 shares of paid-up capital of the company.

"And whereas the said Modern House Manufacturing Company Limited has agreed to forthwith issue and deliver the said stock in consideration of the said Lyman M. Dougherty and R. J. Goudy entering into this bond.

"Now therefore the condition of the above written obligation is such that if the said Lyman M. Dougherty and R. J. Goudy execute and deliver, within thirty days from the date herewith, proper conveyances and transfers vesting the title to the said timber, buildings, stock, chattels, fixtures, and other assets, in the Modern House Manufacturing Company Limited, the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

"As witness the hands and seals of the said Lyman M. Dougherty and R. J. Goudy this day of March, 1910.

"Signed, sealed, and delivered in the presence of "LYMAN M. DOUGHERTY.

"M. P. Vandervoort. "R. J. GOUDY."

Prior to the date of the bond (which, it is said, had not been dated when it was signed), namely, on the 11th March, 1910, certificate No. 9 for 6,500 fully paid shares was issued to the respondents. Afterwards, and probably on the 14th March, 1910 (a transfer on the back having been endorsed in blank by the respondents), the same was marked cancelled. Three other certificates were then issued bearing date the 14th March, 1910, one, No. 12, to Robert Greig for 3,500 fully paid-up shares, and two, each for 1,500 fully paid shares, to each of the respondents. These latter certificates are still in the stock certificate book, not having been taken away by the respondents.

The respondent Goudy was, on the 15th March, 1910, elected as a director and appointed general manager of the company for one year, at a salary of $2,500 a year. At this meeting, the giving of the bond was reported and also the issue of the "6,500 shares of paid-up stock" to the respondents and the handing of the same to them. Goudy thereafter acted as director and took a part in the business of the company as manager, and attended a special general meeting of shareholders on the 3rd September, 1910, where he voted upon ten shares. On the same day, at a directors' meeting, the solicitor reported that he had been unable, up to that time, to get title to the timber limits to be sold by the respondents to the company, in part payment of which 3,500 shares of the company's capital stock had been issued. This reference to 3,500 shares, is not, I think, a mistake, as indicated by the Master in Ordinary, but refers to the shares issued to Greig, which were part of the 6,500 shares to be issued under

the respondents' agreement. The solicitor further stated that the company held a bond from the respondents, given at the time the said stock was issued, to secure the completion of the titles, and that the company still held the bond, and that the solicitor of one of the respondents, Dougherty, had written him a letter calling off the deal, and that he had replied thereto that he would hold the respondents under their contract to deliver titles. The action of the solicitor was then approved of by the board, which on that day consisted of R. J. Goudy, president, Robert Greig, and M. P. Vandervoort.

The respondent Goudy says that he acted as director, and that he qualified on a share transferred by one of the parties who resigned when he was elected president, and that he took the place of one of the officers. His election as president was on the 3rd September, 1910.

This account does not accord with the minutes, because the respondent Goudy had become a director of the 15th March, 1910, in place of L. Sleeth, who had only one share, for which there is no recorded transfer, and no one appears, according to the company's books, to have held a block of ten shares. It was upon this number of shares that the respondent Goudy voted at the shareholders' meeting on the 3rd September, 1910.

By by-law 28, ten shares of stock are required to qualify a director. Before the Master in Ordinary, evidence was given by both of the respondents to the effect that the company wanted to get some stock for flotation purposes, and that the only source the company had at that time to get stock was to have the certificates issued to the respondents, and that it was purely for flotation purposes, to give stock to Dr. Grant, and to give some also to Greig, who was apparently the intermediary.

They admit that the certificate for the 6,500 shares was issued and endorsed by them, and say that the bond was really given to secure repayment of $5,000, which they alleged was to be paid to the respondents by the company as the cash payment under the agreement, without which they would not take any steps to transfer the limits. This $5,000, they swore, they expected to receive shortly from the company.

Mr. M. P. Vandervoort, with whom, the respondents alleged, they effected this transaction, denies these statements altogether, and the Master in Ordinary has preferred his testimony to that of the respondents. The fact however remains that Greig did get 3,500 shares out of 6,500, of which he transferred 2,500 to Dr. Grant, retaining the other 1,000 himself.

I do not think that this Court should reverse the finding of the Master in Ordinary, as he had the advantage of seeing the only three witnesses to the transaction in question, and the matter should be disposed of upon the footing of the documents

ONT.

S. C.
1913

RE MODERN HOUSE MANUFACTURING CO.

Hodgins, J.A.

executed between the parties, with the additional light thrown upon it by the transfer to Greig of part of the 3,500 shares, and his subsequent assignment of these shares to Dr. Grant.

It is to be noted that Greig's name appears with the company's as an obligee in the bond. No explanation is given of this. Goudy says (p. 29): "Mr. Greig told me they had arranged and for me to get Mr. Dougherty to come down and sign some bond that Mr. Vandervoort had arranged for, and the transfer of stock, explaining how they could get this money if they could get this bonus stock."

The respondents' idea was that Dr. Grant was going to finance the deal; and in Mr. Vandervoort's cross-examination it is suggested by the respondents' counsel that the original amount of shares was increased to $6,500 so that Greig could get 3,500 shares to hand over to Dr. Grant.

Goudy also admits (p. 36) that they were not to get "that" (*i.e.*, either the 6,500 shares or the 1,500 shares each, but which it was is not clear), until the agreements were completed, "and we were to get the money for the timber limits and the titles delivered. We were not to have any stock until then—until the titles were delivered and we got paid the $5,000 cash." He adds (p. 37) that when they got the $5,000 they would get the stock to complete the deal.

The conclusion I draw from the whole of the evidence and from the inclusion of Greig's name as an obligee in the bond and his dealing with the stock then issued to him, is, that every one knew on the 11th March that the stock was then unpaid, but that the 3,500 shares were wanted in a hurry, and that the bond was taken to secure not only the company but Greig, who, as a purchaser, would appreciate the fact that, unless the timber limits were actually vested in the company, the stock then issued would be valueless, whether as paid up or not, in the eye of the law.

Counsel for the liquidator, as I have stated, relied upon the statutory liability of the respondents; contending that, there being no provision as in England that shares might be paid-up by a registered contract, there was no escape for a shareholder if his contract for shares, even if called paid-up shares, was unperformed at the date of the winding-up order by him.

The English Companies Act, 1867, sec. 25, allowed shares to be paid up by something equivalent to cash ("in meal or in malt," as said by Giffard, L.J., in Drummond's Case (1869), L.R. 4 Ch. 772), provided the consideration which was to satisfy the liability was set out in a contract, and that contract was filed with the Registrar of Joint Stock Companies, at or before the issue of the shares, so that creditors and others could estimate for themselves the value of the asset to be acquired under that contract in lieu of cash.

Under the present Act of 1908, registration is no longer required; but the same requirements exist as to the form and effect of the contract: *Mosely* v. *Koffeyfontein Mines Limited*, [1904] 2 Ch. 108.

The value of this consideration, if the contract were not part of a colourable transaction for the illusory payment-up of shares, will not be inquired into by the Courts: *Pell's Case* (1869), L.R. 5 Ch. 11; *In re Baglan Hall Colliery Co.* (1870), L.R. 5 Ch. 346; *Ooregum Gold Mining Co. of India* v. *Roper*, [1892] A.C. 125; *Chapman's Case*, [1895] 1 Ch. 771; *In re Wragg Limited*, [1897] 1 Ch. 796.

While, if there were no consideration for the payment-up of the shares or some portion thereof, as such, but only a collateral advantage from a scheme of which the issue of shares was a part, and the result was that no cash, or not enough to pay up in full, was received from the shares themselves, the shares were treated as unpaid. See *Ooregum Gold Mining Co. of India* v. *Roper* (*ante*); *Hirsche* v. *Sims*, [1894] A.C. 654; *Mosely* v. *Koffeyfontein Mines Limited*, [1904] 2 Ch. 108; *Welton* v. *Saffery*, [1897] A.C. 299.

Yet, if the contract provided a consideration for the amount of the liability on the shares, the subsequent failure of that consideration did not result in leaving the shares in the hands of the allottee as unpaid. This is the effect of *In re Continental Shipping and Butter Co., Mege and Angier's Case*, [1875] W.N. 208; *Schroder's Case* (1870), L.R. 11 Eq. 131; *Tanner's Case* (1883), 27 Sol. J. 584; although in *Chapman's Case*, [1895] 1 Ch. 771, Vaughan Williams, J., expresses the opinion that, even where the contract is registered, the shareholder is not altogether relieved from payment, and that he must really pay for the shares, though not in actual cash.

But the registration must be of an existing and valid contract. If it be illusory, or if it points to an obvious money measure, shewing that discount was allowed (*Chapman's Case*, [1895] 1 Ch. 771; *Mosely* v. *Koffeyfontein Mines Limited*, [1904] 2 Ch. 108; *In re Wragg Limited*, [1897] 1 Ch. 796), or if it imports no present obligation, but is merely a resolution distributing the shares (*Smith* v. *Brown*, [1896] A.C. 614), or if it be colourable and entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount (*per* Lord Watson in *Ooregum Gold Mining Co. of India* v. *Roper*, *ante*, and *Mosely* v. *Koffeyfontein Mines Limited*, *ante*), then there is no payment of shares by it.

In Ontario the rule laid down in the judgment appealed from has been accepted, *i.e.*, that payment may be made otherwise than by cash: *In re Hess Manufacturing Co., Edgar* v. *Sloan*, 23 S.C.R. 644; *Lindsay* v. *Imperial Steel and Wire Co.*

ONT.
S. C.
1913
RE MODERN HOUSE MANUFACTURING CO.
Hodgins, J.A.

(1910), 21 O.L.R. 375; although regard has not always been had to the qualification established by the Court of Appeal in England by *White's Case* (1879), 12 Ch.D. 511, that the transaction must be equivalent to the payment of cash, *i.e.*, by a present debt or obligation capable of being set off or taken in satisfaction.

If, therefore, this transaction falls to be decided apart from the subsequent dealings of the parties, the judgment appealed from should be sustained.

It cannot be doubted that it is the making and registration of the contract that in England pays up the shares. Otherwise, if performance were necessary, the cases on failure of consideration relied on by the respondents could not be supported. It is not easy to understand why shares should be deemed to remain paid-up, even though the whole consideration has failed; as that does away with any benefit in the way of information which the intending creditor and shareholder is supposed to have got.

It can only be defended on the ground that some method of paying-up shares otherwise than in cash had to be adopted, if companies were to be floated, and that at all events the company acquired the present liability of the vendor and had the right by virtue of the contract to compel the carrying out of the bargain or to secure damages in case of a subsequent failure of consideration. But it seems to me that this leads to the conclusion that, if the parties choose, after such a contract is made and before the shares are issued, to alter or vary it in such a way as to make the original contract valueless in law, or less extensive in dealing with the whole liability on the shares, so as to obtain for those dealing with the company the consideration, while withdrawing their original liability or by giving themselves an option to pay it by a sum in money less than the value of the shares, or in any way unsettling the basis upon which the shares are treated as paid-up, or if in their subsequent dealings all parties treat the liability on the original contract as at an end or the contract itself as varied, and then deal with the shares upon the altered and different basis, they lose the saving virtue of the earlier contract in effectually paying-up the shares. In other words, they accept the shares, not by virtue of the old, but on the terms of the new, bargain, and cannot object if that results in a liability. Otherwise the making of a contract to-day may be used as a basis for claiming that the shares are paid-up, while to-morrow that contract may, by mutual consent, be so altered as to deprive the company of practically the entire consideration coming to it.

The result of this would be to open the door widely for the creation of bonus shares, contrary altogether to the accepted law upon that subject.

The cases cited upon the effect of failure of consideration assume the continued existence of the original contract, the non-performance of which cannot alter its legal effect, though it may give rise to a different remedy; but they are no authority for the proposition that the effect continues if in fact the parties choose to act in issuing the shares upon a totally different basis, inconsistent with the original intention as expressed in their prior agreement. The first bargain here was still executory, and there was no reason why the parties could not make another and act upon it.

It cannot be denied that when the shares were issued to the respondents the latter knew that they were unpaid. They had to furnish the consideration, and had not done so. Yet they sign a bond and take the shares and deal with them to the extent of 3,500 shares of the par value of $10 each, and allow these shares, by endorsing the certificate for the whole 6,500 shares, to be issued to Greig either by way of bonus, as the respondents say, or, as the transaction imports, for business reasons. Can they be heard to say that they took those shares without knowing that the shares were unpaid or that they dealt with them or part of them upon the assumption that the shares were paid-up? They had given a bond entitling and requiring them to pay $5,000 if they failed to supply the original agreed consideration within thirty days. They were well aware that till they did so the shares were unpaid in fact, and they were affording themselves an opportunity to pay $5,000—or, as they claim, to repay it—instead of transferring assets valued on the share basis at $65,000. Some evidence is afforded of their knowledge and appreciation of that fact by their assenting to the retention of their two certificates for 1,500 shares each, and by making Greig a joint obligee in the bond.

This is not a case of making another contract for the shareholders, but of their doing so for themselves, and doing it in such a way as to require the Court to say that the shares were at the moment of issue bonus shares and unpaid. In this aspect I think the case is analogous to that of *In re Alkaline Reduction Syndicate Limited* (1896), 45 W.R. 10, where the subsequent registered agreement controlled the former registered agreement, and was held to be the real basis upon which the shares were issued, and that those shares did not retain the protection afforded by the earlier contract: the later one indicating the real contract. See this case referred to in *Lindsay* v. *Imperial Steel and Wire Co.*, 21 O.L.R. 375; *Welton* v. *Saffery*, [1897] A.C. 299.

It seems to me that the case falls as well within the principle of *In re Railway Time Tables Publishing Co.* (1889), 42 Ch.D. 98, at p. 104, rather than within *Arnot's Case* (1887),

ONT.
S. C.
1913
RE MODERN HOUSE MANUFACTURING CO.
Hodgins, J.A.

36 Ch. D. 702. In the former case, Stirling, J., had held (p. 105) that "acts might be done and dealings might take place between the company and the registered holder from which the Court would be bound to infer that an implied agreement to that effect" (*i.e.*, that the person on the register should continue to hold the shares on the proper terms upon which the company could issue them, *viz.*, that the registered holder should be liable for the amount unpaid on the share) "had been come to."

In appeal Cotton, L.J., said that the liability for the balance did not depend upon agreement but upon the obligation imposed by the 25th section of the Act of 1867, and continues (p. 113): "As soon as she assented to being put on the register in respect of these shares, the law, independently of contract, threw upon her the liability of paying off the whole £5 which was the nominal amount of these shares. . . . If she assented to have these shares in her name, that is all that is required in order to make her liable as a member, because that is so provided by the 23rd section of the Act of 1862." He holds that a mistake of the general law, *i.e.*, that shares could be issued at a discount, did not entitle her to be relieved. Lindley, L.J., speaks of it as a mistake as to the legal effect of what she had done. She knew all the time that they were not paid-up and were never intended to be paid-up. And he points out that she sells some and exchanges the certificate for the whole, for a certificate for the residue, which she continues to hold. She receives notices, signs proxies, writes letters opposing the increase of capital, and so forth, and, in short, knowing that she is a shareholder in respect of these shares, she accepts that position. Bowen, L.J. (p. 116), puts it upon the ground that she consented to allow her name to remain upon the register and to keep the shares, although they had not been allotted to her in conformity with the condition which she had imposed in her letter of application, and that from such assent and from such dealing with the shares, which took place after she knew she was upon the register, there was only one inference which the Court ought to draw, namely, that she agreed to be a member of the company, and, her name being upon the register, her liability to the company is complete.

I think that the acts of the respondents in and about and after the issue and endorsement of the certificate for 6,500 shares, is quite sufficient to warrant the conclusion that they knew the situation and were content to assume the status of unpaid shareholders meantime as to these 3,000 shares.

This Court, in *Re Cornwall Furniture Co.*, 20 O.L.R. 520, acted upon a knowledge of the situation in holding holders of so-called paid-up shares liable upon them. See *Hood* v.

Eden (1905), 36 S.C.R. 476, in which the verbal arrangement made, on the faith of which certificates for paid-up shares were issued, was accepted as settling the status of the parties, though not of record; also *Re Wiarton Beet Sugar Manufacturing Co., McNeill's Case* (1905), 10 O.L.R. 219.

I find it impossible to hold that there was any condition that the respondents were not to become shareholders until the condition of the bond had been performed or the $5,000 paid. On the contrary, the basis of the agreement was that they should become stockholders *in praesenti*, with an agreement that they might pay up the shares by conveying in thirty days or become liable for $5,000; and this condition must be treated as a condition subsequent. See *per* Meredith, C.J., in *Re Wiarton Beet Sugar Co., Jarvis's Case* (1905), 5 O.W.R. 542.

Here they were put in the register of shareholders in the usual way, and the respondent Goudy is found voting on shares, the origin of which he does not prove to be outside these 1,500 shares.

While there is no definition of "shareholder" in the Ontario Companies Act, as there is of "member" in the English Act, yet the Ontario Companies Act, secs. 46, 48, 50, 52, 53, 68, 69, 70, and 113, sufficiently indicates the position, rights, and liabilities of a shareholder; and I agree with Britton, J., in his view thereof as expressed in *Re Cornwall Furniture Co.*, 20 O.L.R. at p. 527.

No doubt, a contract to take shares other than fully paid-up shares cannot arise from the mere retention of a certificate representing fully paid shares (see *In re Macdonald Sons & Co.*, [1894] 1 Ch. 89; *Arnot's Case*, 36 Ch.D. 702); and acting as a director is not sufficient evidence of a contract to take unpaid shares: *De Ruvigne's Case* (1877), 5 Ch.D. 306.

There is, of course, no estoppel here; and, as the winding-up intervened while the parties were in the position I have indicated, I do not see how they can escape liability.

The case is not embarrassed by the question of the subsequent agreement being ineffectual, because it would be a release of the statutory liability. See *per* Lindley, L.J., in *In re Wragg Limited*, [1897] 1 Ch. at p. 829. Here the original agreement was for paid-up shares; and on that hypothesis there was no liability upon the respondents. But it is the second agreement, which, in my judgment, varied or superseded the former, or at all events was the one acted upon, that measures the liability of the respondents. The company cannot deprive itself of the right to future payment on the shares by agreeing to accept future payments in some other way: *per* Lindley, L.J., *ib.* at p. 829.

If the respondents are not so liable, then the case would

ONT.
S. C.
1913
RE MODERN HOUSE MANUFACTURING CO.
Maclaren, J.A.

form an illustration of what Lord Halsbury in the *Ooregum* case scouts, namely, the notion that that which the statute required to be paid in cash, subject to qualification of a mode of payment, should not be paid at all.

I think that the appeal should be allowed with costs throughout; the liquidator to have his costs out of the estate in case the respondents do not pay them.

MACLAREN, J.A.:—I agree.

The Court being equally divided, appeal dismissed.

ALTA.
S. C.
1913

LAZIER v. MacCULLOUGH.

Alberta Supreme Court, Harvey, C.J., Scott, Beck, and Simmons, JJ. October 11, 1913.

1. CORPORATIONS AND COMPANIES (§ IV H—161)—AGREEMENT FOR ADVANCE TO COMPANY BY PROMOTOR—PROCEEDS OF SALE OF PROMOTOR'S SHARES.

A stipulation between the buyer and seller that the purchase price of shares in a company should be applied by the seller in accordance with his promotion agreement in reduction of certain liabilities against the assets of the company, with the intention that the seller should later be repaid by the company, is one which the buyer may have an interest in enforcing as affecting the value of the shares he is getting, and the court may therefore, in an action brought by the seller for the price, give effect to such stipulation by directing payment in accordance therewith of the balance for which judgment is entered in the seller's favour.

[*Lazier* v. *MacCullough*, 7 D.L.R. 851, varied.]

2. JUDGMENT (§ VII A—270)—RELIEF AGAINST—ENFORCEMENT OF COLLATERAL AGREEMENT.

A judgment in favour of the seller suing for the price of company shares may, in a proper case, be made subject to a stay of proceedings thereon for a sufficient delay to enable the defendant to make a substantive application to the court for the enforcement of a collateral term of the sale contract that the price should be handed over to the company by the vendor as a loan in conformity with an agreement between the latter and the company.

[*Lazier* v. *MacCullough*, 7 D.L.R. 851, varied.]

Statement

APPEAL by the defendant from a judgment of Walsh, J., *Lazier* v. *MacCullough*, 7 D.L.R. 851, against defendant in an action to recover for shares of stock sold him.

The judgment was varied and otherwise the appeal was dismissed.

T. M. Tweedie, K.C., for plaintiff, respondent.

H. P. O. Savary, for defendant, appellant.

Harvey, C.J.

HARVEY, C.J.:—The learned trial Judge found on conflicting evidence that the defendant McCullough agreed to pay to the plaintiff $15,000 for the $115,000 of shares which he received. On the principle that has been so frequently recognized by this

Court of declining to interfere with a finding under such circumstances unless clearly shewn to be wrong, I am of opinion that this finding should be accepted.

He further says that but for the agreement of June 26 (ex. 7) he would have found that these $115,000 of shares were the property of the plaintiff. After a consideration of that agreement he comes to the conclusion that one Morgan, who was a witness at the trial, and the defendant Vermilyea held equal interests with the plaintiff in the shares notwithstanding that Morgan in his evidence disclaimed any interest and Vermilyea, both in his defence and in his evidence, did likewise. With all respect, I am of opinion that the learned Judge attached an importance to the agreement in question which it did not deserve. It is true that it shews that at the time it was made the three had equal interests and it provided that when the company was formed each should have an equal number of shares, but it was several months before the company was formed and when the company was formed instead of $600,000 being allotted to the three only $500,000 were allotted, and instead of their being allotted in equal amounts they were allotted in unequal amounts. It is therefore clear that the parties had changed their relations after the agreement in question. Almost at the opening of the evidence of Vermilyea, who was called as a witness on behalf of the defendant McCullough, are the following questions and answers:—

Q. When did you first get interested in these coal areas, the subject of this suit? A. Somewhere about June or July, 1907.

Q. And whom did you become interested with? A. Mr. Lazier at first.

Q. And what interest did you acquire? A. One-quarter interest.

Q. One-quarter? A. The first agreement was one-third and then another agreement was one-quarter.

Q. You had a written agreement with respect to your one-third, did you? A. Yes, sir.

Q. And is that the document? A. Yes, sir.

The document in question was then marked as ex. 7 and is the one the learned Judge referred to.

It seems abundantly clear from this that that agreement was abrogated and therefore no importance can be attached to it for the purpose of establishing the real relations of the three parties to it at the time of the formation of the company or the transaction with McCullough. I think, therefore, that effect should be given to the conclusion which the learned Judge would have reached on the oral testimony if he had not been influenced by that agreement to come to a different conclusion.

It is admitted, however, by the plaintiff that in his negotiations with the defendant it was understood that the money which the defendant was to pay, or so much as was necessary

ALTA.
S. C.
1913
LAZIER v. MACCULLOUGH.
Harvey, C.J.

was to be used to pay, what was owing on the lands of the company which the plaintiff was under obligation to pay. It may be that this was in fact part of the agreement and that the defendant has a right to insist on having the money applied in that way and he should have an opportunity, if he so desires, to establish that right.

I would, therefore, vary the judgment and direct judgment for the plaintiff for the amount of the claim with costs, but would stay execution for one month to enable defendant McCullough to apply to establish the right, in which event the stay may be continued if necessary to protect the rights of the parties.

I agree with my brother Scott that the company may apply also. The costs of the appeal should be borne by the defendant McCullough, the appellant.

Scott, J.

SCOTT, J.:—I cannot agree with the finding of the learned trial Judge that the plaintiff was entitled to only a third interest in the stock sold to defendant McCullough and that Morgan and defendant Vermilyea were jointly interested with him therein. He states that but for the agreement of 19th (26th) June, 1909, he would have found that the stock was the property of the plaintiff and in my view the evidence apart from that agreement points strongly to that conclusion. In my view the learned Judge attached too much importance to that agreement. It is true that its effect is that the stock held by the three parties of which that sold to McCullough formed a part was to be allotted to them in equal shares, but the evidence and the attitude of Morgan and Vermilyea in the action to my mind clearly shew that that agreement, in so far as it relates both as to the amount of the stock they were to be entitled to and as to their respective interests therein, was subsequently varied by them. Both Morgan and Vermilyea state that under the agreement as varied they were each to receive one-quarter of the stock and the plaintiff the remaining one-half. Both state that the stock sold to McCullough was part of the plaintiff's share and both disclaim any interest therein. That this was the final agreement between them is further borne out by the fact that when the stock was allotted each of the three received one-fourth and the remaining quarter was separately allotted to Vermilyea and he states that it was allotted to him in trust for the plaintiff. In view of this express disclaimer on the part of both Morgan and Vermilyea, I see no reason why the plaintiff should not be held entitled to recover from McCullough the full amount of the purchase money.

While I am of this opinion it appears from the evidence that the defendant McCullough and perhaps also the defendant com-

pany may be entitled to seek the aid of the Court to compel the plaintiff to apply the moneys when collected in a certain manner.

The plaintiff with Morgan and Vermilyea entered into an agreement with defendant company to sell to it the coal mining rights in certain lands in consideration whereof they were to receive paid up shares in the company to the amount of $500,000. The interest which they then had in the property was the right to purchase same under agreements for the sale thereof to them under which only a small portion of the purchase money due by them has yet been paid and for the payment of the remainder of which they are still liable both to their vendors and the company. It appears from the evidence that it was agreed between them that, for the purpose of satisfying this liability, the plaintiff should sell $115,000 of his stock to McCullough and apply the purchase money in payment thereof and that the moneys so applied by him should be considered as a loan by him which should be repaid as soon as certain stock held by them set apart for the purpose of satisfying that liability should be sold. In his evidence the plaintiff states as follows:—

> I explained to Mr. McCullough at that time that he was aware that the property wasn't paid for and that the money was to be loaned or handed over to the company.

It may be that McCullough purchased the stock on the strength of that representation of the plaintiff and, if such were the case, it would not be unreasonable to assume that the former would be entitled to compel the purchase money to be applied in that manner. If so applied the value of the stock purchased by him would be materially enhanced because if not so applied, it might follow that the company's vendors might never pay the balance of the purchase money and the company might never acquire the coal rights which appear to have been its principal asset.

In his statement of defence McCullough relies solely upon matters of defence which he has failed to prove, but notwithstanding the fact that he has not claimed that if it be found that the plaintiff is entitled to recover for the purchase money, it should be applied in the manner I have mentioned. I think this Court should even at this stage afford him the protection to which he may be entitled. It may be that the company is also entitled to claim that the purchase money should be applied in that manner but I express no opinion upon the point.

For the reasons I have stated I am of opinion that the judgment of the learned trial Judge should be varied in the following respects, viz., that the plaintiff have judgment against the defendant McCullough for $15,000 with interest from December 6, 1907, and costs of suit including costs of the examinations for discovery of plaintiff and defendant McCullough, that execution

ALTA.
S. C.
1913
LAZIER
v.
MAC-
CULLOUGH.
Scott, J.

upon the judgment shall not issue for one month after the entry of judgment and if, in the meantime, defendant McCullough and defendant company or either of them shall apply to the Court or a Judge for an order that the amount of the purchase money and interest shall be applied in payment of the balance of the purchase money due by the company's vendors, execution shall not issue until such applications are disposed of. The defendant McCullough should pay the costs of the appeal.

Beck, J.

BECK, J., concurred with the Chief Justice.

Simmons, J.

SIMMONS, J.:—This action arises out of a series of transactions among the plaintiff, the defendants McCullough and Vermilyea, and one Morgan, in connection with the acquisition by them of certain coal lands and the formation of the Three Hills Coal and Development Co., Ltd., for the purpose of acquiring said coal lands and developing them.

The transactions in question took place in 1907 and 1908, and are very complicated. The statement of claim contains alternate allegations which suggest or rather indicate a cause of action against the defendant McCullough by the defendant company the Three Hills Coal and Development Co., Limited. [The learned Judge here set out the statement of claim.]

The statement of claim up to and including par. 8 seems unobjectionable, but paragraphs 9, 10 and 11 allege an alternative claim that the defendant McCullough has defaulted in paying to the company the sum of $15,000 for 115,000 shares of the company knowing said moneys were to be applied on the amounts owing on certain coal lands which the plaintiff and Vermilyea and Morgan had agreed to transfer to the company. Paragraph 2 of the statement of claim taken together with the written documents which are exhibits in the case clearly establish that the amounts owing mentioned in paragraph 11 are the amounts which Lazier, Vermilyea and Morgan had agreed to pay Thomas, the owner, for these coal lands.

The defendants have not, however, objected to these paragraphs 9, 10 and 11, on the ground of embarrassing them and I am of the opinion that the solicitor for the plaintiff endeavoured to allege something which the evidence shews really existed, namely that these parties who were promoting this company quite failed to distinguish their own rights and liabilities as individuals and their rights and liabilities as shareholders in the company. One Morgan acquired an interest on certain coal lands and surface rights in the same and sold one-half of his interest to the plaintiff.

Then on June 26, 1907, they took in a third partner, Vermilyea, under an agreement in writing (ex. 7) whereby Lazier

and Vermilyea agreed to pay the vendors of said lands all moneys due or to become due on the purchase price of same, and these three men, Morgan, Lazier and Vermilyea, agreed to form a joint stock company to work and develop the property. The capital was to be $1,000,000 and these three men were each to receive 200,000 shares of the capital stock in consideration of assigning to the company their interests in these lands. When the said Lazier and Vermilyea had paid up in full to the vendors the purchase price of these lands, Morgan was to be charged with his share of the purchase price by giving to Lazier and Vermilyea shares of his in the stock of the company equal in value to the amount of his contribution towards the payments made for these coal areas.

The company was duly incorporated and on October 9, 1907, the capital having been reduced to 990,000 dollars shews the said Morgan and Vermilyea and Lazier agreed to take 500,000 shares of the capital stock of the company in consideration for which they did

> sell, assign, convey, make over and grant unto the Three Hills Coal and Development Co. Ltd. its successors and assigns forever all and singular the coal lands hereinbefore described.

The reason for the change from 600,000 shares as provided in the agreement of May, 1907, to 500,000 shares was apparently this, that Lazier and Vermilyea were not able to make the payments due the vendors and they took in the defendant McCullough. This agreement provided that Morgan and Lazier should get each 125,000 shares and Vermilyea 250,000 shares. They are all agreed on this that 125,000 of the shares allotted to Vermilyea, were to be held by him for McCullough. The agreement by which McCullough was taken into the company is the subject-matter of this action and was not reduced to writing. Lazier says that when the agreement of October 9, 1907, was executed (ex. 1) the proceeds of the fourth share allotment of $125,000 shares to Vermilyea was to be loaned or granted to this company until sufficient stock had been sold to reimburse the plaintiff. Lazier says that when this agreement was executed he was still owner of a half interest, Morgan a quarter interest and Vermilyea a quarter interest. Morgan and Vermilyea got their allotment of 125,000 shares each, he got 125,000 shares and the remaining 125,000 which was allotted to Vermilyea was his, Lazier's, and was to be held by Vermilyea for him. Lazier somewhat shifts his position in his evidence on page 9 and says McCullough was to pay him $15,000 for 115,000 shares, the difference between 125,000 and 115,000 being accounted for in this way that 10,000 shares was taken from each 125,000 and set apart to be sold for the company. Then again on page 35 he says the 15,000 was to be loaned or

ALTA.

S. C.
1913

LAZIER
v.
MAC-
CULLOUGH.

Simmons, J.

granted to the company. He admits at the same time that shares were to be set aside and sold for this same purpose. He says this was all agreed upon before the execution of the agreement of October 9, 1907. Morgan says they needed money and decided to take $20,000 for a quarter interest when McCullough proposed to come in the proposition, but they decided to take $15,000 for this quarter interest. He says McCullough agreed to pay us this amount. He qualifies this after at the suggestion of counsel I think and says the $15,000 was to be paid to Lazier. He, however says Lazier was "to pay off everything."

McCullough denies the alleged agreement whereby he was to pay Lazier $15,000 and says he was to sell the 40,000 shares that were set aside at 50 cents per share in consideration for the 125,000 shares he got. He says subsequently when he arranged with Thomas for a renewal of the agreements with Thomas which were in default that there was an agreement between him and his associates whereby he was relieved from his obligation to sell this stock in consideration of the services he had rendered on the renewal of the Thomas contracts. The learned trial Judge refused to believe him and he also discredited that part of Lazier's story in which he claims to be entitled to the $15,000. The learned trial Judge found that McCullough had agreed to purchase the 115,000 shares for $15,000 and that these moneys belonged to Lazier, Vermilyea and Morgan in equal portions and ordered the necessary amendments to conform with this finding. He based the last conclusion on the written document, ex. 7.

I am of the opinion, however, that in the light of the written agreements and the evidence of Lazier and Morgan which I have referred to that his conclusion should be varied to this extent, that the $15,000 was the company's money and not the money of these men individually. They had agreed among themselves and with the company that they would pay all the moneys due on the land and had executed an agreement to grant and convey these lands (not their present interest) to the company.

Without realising their true relation and their proper obligation they attempted to divest themselves of this obligation by selling these shares in the company to reimburse themselves. The company was entitled to the lands free from any liability as to unpaid purchase price and the shares which they purported to sell carried with them the legal right of the shareholder to demand that the said lands should be transferred to the company free from liability as to the purchase price.

There could not be any objection to the setting aside of these shares to be sold for the purpose of financing the company, but to allot them to the promoters or to one of the promoters

ALTA.

S. C.
1913

LAZIER
v.
MAC-
CULLOUGH.

Simmons, J.

and then sell them to pay off the promoters' liability to the company is surely not a method of finance which the Courts will assist unless the company's rights are protected.

In the result then, if any action lies against the defendant for these moneys, it is the company's right of action and not that of the plaintiff. The evidence discloses that these lands have not yet been paid for and these promoters are being sued for the purchase price, yet notwithstanding this they have sold about 6,000 shares to the public. This is not a case where the Court can exercise its discretion as to amendments as the cause of action if any disclosed by the evidence is the right of the company against both Lazier, Vermilyea and McCullough to have these moneys applied in paying the purchase price due from the above parties to the company.

I would, therefore, allow the appeal and dismiss the plaintiff's action with costs.

Judgment varied.

BLAIS v. BANKERS' TRUST CORPORATION Ltd. et al.

ALTA.

S. C.
1913

Alberta Supreme Court, Beck, J. October 22, 1913.

1. CORPORATIONS AND COMPANIES (§ VII C—377)—EXTRA PROVINCIAL COMPANIES—ACTIONS AGAINST—EFFECT OF WINDING-UP ORDER MADE BY COURT OF DOMICILE.

An action begun against an extra provincial company after the making of a winding-up order by a court of its domicile will not be entertained without leave of such court, since the action is governed by sec. 22 of R.S.C. 1906, ch. 144, prohibiting the commencement of or proceeding with suits against a company after the making of a winding-up order except with the leave of the court and subject to such terms as the court making the order may impose.

[*Re Tobique Gypsum Co.*, 6 O.L.R. 515, and *Brand* v. *Green*, 13 Man. L.R. 101, specially referred to.]

2. CORPORATIONS AND COMPANIES (§ VII C—377)—EXTRA PROVINCIAL COMPANIES—ACTIONS AGAINST—AFTER WINDING-UP ORDER BY COURT OF DOMICILE—STAYING PROCEEDINGS.

An action commenced against an extra provincial company after the making of a winding-up order by a court of its domicile, is irregular only and not void, and, under sec. 22 of R.S.C. 1906, ch. 144, prohibiting the commencement of, or proceeding with, an action against a company after the making of such an order without the leave of and subject to such terms as the court making the order may impose, the action will be stayed until leave can be obtained to proceed with the action.

Statement

APPLICATION in the name of one of the defendants, the Bankers' Trust Corporation, Ltd., to set aside a writ of summons on the ground that the Court had no jurisdiction over such defendant in respect of the subject-matter of the action.

The application was refused, but proceedings were stayed in the action as it appeared that the applicant company was in liquidation under the Winding-up Act.

ALTA.

S. C.
1913

BLAIS
v.
BANKERS' TRUST CORPORATION.

Beck, J.

J. R. Lavell, for plaintiff.
S. W. Field, for the liquidator.

BECK, J.:—The action was commenced on August 11, 1913. It is one to obtain cancellation of certain subscriptions of the plaintiff for shares in the Bankers' Trust Corporation, Ltd., and the return of cancellation of the plaintiff's promissory notes given therefor on the ground of fraudulent misrepresentations made to the plaintiff by the Negotiators, Ltd., acting as agents for the other company. It is alleged that the notes are in the hands of the defendants or one of them. Both defendant companies are stated to be companies incorporated under the laws of the province of British Columbia.

It is further alleged that the Banker's Trust Corporation has never been registered in Alberta under the Foreign Companies Ordinance although it has more than ten shareholders in the province; that the other company has been so registered. Besides specific relief the plaintiff claims "further and other relief" which is a useless and improper claim. (English O. 20, rule 6), because "general and other relief may always be given, as the Court or a Judge may think just, to the same extent as if asked for" (*ib.*) provided it be not "inconsistent with that relief that is expressly asked for" (*Cargill* v. *Bower*, 10 Ch.D. 502), and provided the defendant is represented.

It would seem, therefore, that the plaintiff makes a case for the recovery of damages for the misrepresentation as in an action of deceit. This perhaps is not material for the purpose of determining the question whether the action is one "founded on a *tort* committed within the jurisdiction" (rule 18, clause 5, "service out of the jurisdiction"). It seems to me it is so, although the common law remedy of damages is not expressly asked. I think, therefore, that I cannot set aside the writ or service.

It appears however, that a winding-up order was made on March 20, 1913, by the Supreme Court of British Columbia under the Winding-up Act for the winding-up of the Bankers' Trust Corporation, Ltd., R.S.C. 1906, ch. 144. Sec. 22 says:—

> After the winding-up order is made no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the Court and subject to such terms as the Court imposes.

The company is domiciled in British Columbia. The proper Court of that province which undoubtedly has jurisdiction to make a winding-up order under the Act has done so. The result I think is that all the assets of the company including those outside the province fall under the disposition of that Court administering the provisions of the Winding-Up Act; and not alone the company's assets, but also the relations of the company with others, whether within or without the Province of British

ALTA.

S. C.
1913

BLAIS
v.
BANKERS'
TRUST
CORPORATION.

Beck, J.

Columbia—in this sense that the Courts of other provinces cannot and Courts elsewhere ought not to exercise the jurisdiction which they otherwise possess without the leave of the Court of the company's domicile when that Court has become seised of the company's affairs under what is in effect a Dominion Bankrupt Companies Act. This view appears to be sustained by *Re Tobique Gypsum Co.*, 6 O.L.R. 515; *Brand* v. *Green*, 13 Man. L.R. 101.

Although this action was commenced after the making of the winding-up order, the proceedings in it are not in my opinion void, but only irregular on that account. I think this Court may act as ancillary to the British Columbia Court and it may be that the latter Court may wish this Court to dispose of the matters in question in this action and for that purpose desire the present action to proceed. In the meantime, I think I should stay proceedings as against the Bankers' Trust Corporation, Ltd. and make the costs of this application costs in the cause as between that company and the plaintiff.

Application dismissed.

BELL v. GRAND TRUNK R. CO.

ONT.

S. C.
1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. June 26, 1913.

1. RAILWAYS (§ II D 4—60)—ACCIDENTS AT CROSSINGS—LIABILITY FOR—PREVIOUS ACCIDENT.

By reason of the provisions contained in sec. 275 of the Railway Act, R.S.C. 1906, ch. 37, as to the making of reports and inspection of accident occurring at railway crossings, that part of the section added by 8-9 Edw. VII. (Can.) ch. 32, prohibiting a speed of more than 10 miles an hour by trains at certain crossings not protected to the satisfaction of the railway commission where accidents resulting in bodily injury or death had previously occurred, must be held to be limited in the latter respect to accidents of which the railway company is fixed with notice by reason of physical impact occasioning the same or by reason of the train employees actually becoming aware of the accident so as to report it; a previous accident by a horse taking fright at a passing train after passing over the crossing will not bring the sub-sec. (4) into operation where it was not observed by the railway employees so as to call upon them to make a report.

2. RAILWAYS (§ II D 4—60)—ACCIDENTS AT CROSSINGS—LIABILITY FOR—EXCESSIVE SPEED.

An instruction to the jury, in an action for injuries sustained by a collision at a highway crossing, that it was negligence to run a train through a thickly settled portion of a town or village at more than ten miles an hour, is erroneous, unless qualified by stating in effect the exceptions contained in sec. 275 of the Railway Act, R.S.C. 1906, ch. 36, permitting a greater rate of speed where the crossing is protected in accordance with an order of the Railway Commissioner or other competent authority.

[*Grand Trunk R. Co.* v. *McKay*, 34 Can. S.C.R. 81, 3 Can. Ry. Cas. 52, followed.]

ONT.
S. C.
1913
BELL
v.
GRAND TRUNK R.W. Co.

3. RAILWAYS (§ III B—50)—ACCIDENTS AT CROSSINGS—LIABILITY FOR—SIGNALS—FAILURE TO GIVE—RINGING BELL—INSTRUCTIONS.

In an action for injuries sustained at a highway crossing by being struck by a train an instruction to the jury that the law requires the whistle of the engine to be sounded more than eighty rods away (which was done near another crossing more than eighty rods distant), and that the evidence shewed that the bell was not rung for the latter crossing, is erroneous, and entitles the railway company to a new trial, where the failure to ring the bell was the only negligence on which a verdict for the plaintiff could be sustained, and the jury stated that they "believed that the bell was not ringing continuously," such answer being too ambiguous to sustain the verdict.

Statement

APPEAL by the defendants from the judgment of Leitch, J., at the trial, upon the findings of a jury, in favour of the plaintiff, for the recovery of $4,600, in an action for damages for personal injuries and loss sustained by the plaintiff by reason of the collision of his waggon and a train of the defendants at a highway crossing.

A new trial was ordered

Argument

D. L. McCarthy, K.C., for the appellants, argued that under sub-secs. 3 and 4 of sec. 275 of the Railway Act, R.S.C. 1906, ch. 37, added by 8 & 9 Edw. VII. ch. 32, sec. 13, impact was necessary in an accident to render that accident sufficient to limit automatically the speed at that crossing to ten miles an hour. The railway company must have notice that an accident had occurred before the provisions of the sub-section would apply: *Grand Trunk R.W. Co.* v. *McKay* (1903), 34 S.C.R. 81; *Canada Southern R.W. Co.* v. *Jackson* (1890), 17 S.C.R. 316; *Badgeley* v. *Grand Trunk R.W. Co.* (1909), 14 O.W.R. 425. The section required that the accident should happen "by" a moving train, not "by reason of" a moving train.

W. Laidlaw, K.C., and *E. H. Cleaver*, for the plaintiff, the respondent, relied upon the findings of the jury: *Canada Atlantic R.W. Co.* v. *Henderson* (1899), 29 S.C.R. 632. In regard to sub-sec. 4, there was no necessity for a collision in order to make the provisions of that statute apply. An accident could happen "by a moving train" without any impact: *Grand Trunk R.W. Co.* v. *Rosenberger* (1884), 9 S.C.R. 311, at p. 321; *Grand Trunk R.W. Co.* v. *Sibbald* (1892), 20 S.C.R. 259.

McCarthy, in reply.

Hodgins, J.A.

June 26. HODGINS, J.A.:—The point chiefly argued was the effect given by the learned trial Judge to the first part of sub-sec. 4 of sec. 275 of the Railway Act, R.S.C. 1906, ch. 37, added by 8 & 9 Edw. VII. ch. 32, sec. 13.

The original section forbids the passage of a train in or through any thickly peopled portion of any city, town, or village, at a greater speed than ten miles an hour, unless the track is fenced or properly protected in the manner prescribed in the Act, or unless permission is given by some regulation or order of

the Railway Board. The first sub-section, numbered 3, added in 1909, deals with level highway crossings in such thickly populated portions, the provision as to which is that the speed is to be similarly limited unless the crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council, or of the Railway Board, in force with respect to such crossings, or unless permission is given by some regulation or order of the Board.

Sub-section 4 prohibits a greater speed than ten miles an hour over any level highway crossing (irrespective of local conditions or population) "if at such crossing an accident has happened subsequent to the 1st day of January, 1900, by a moving train causing bodily injury or death to a person using such crossing, unless and until such crossing is protected to the satisfaction of the Board."

The sub-section also prohibits a greater speed than ten miles an hour over a level highway crossing where the Board's order providing protection for the safety and convenience of the public has not been complied with.

Section 292 makes it obligatory on the railway company, "as soon as possible, and immediately after the head officers of the company have received information of the occurrence upon the railway . . . of any accident attended with personal injury to any person using the railway, or to any employee . . . or whereby any bridge . . . has been broken or so damaged as to be . . . unfit for immediate use, (to) give notice thereof, with full particulars, to the Board."

By sec. 293, the Board is given power to appoint a person to inquire into the "cause of and the circumstances connected with any accident or casualty to life or property occurring on any railway," and the Board may act on his report.

The view taken by the learned trial Judge was, that sub-sec. 4 prohibits a greater speed over a level highway crossing at which an accident has happened, provided a moving train was in some sense the cause, even where there was no notice to or knowledge by the train employees, from contact or otherwise, of the fact that such an accident has happened. As against this view it is urged that the result of so holding must be that the railway company, without knowledge of the accident, may commit a breach of the statute on which would follow liability for damages and render its officials liable to a penalty, by running its trains at speed over the crossing until it is protected to the satisfaction of the Board. The statute should not be construed so as to put the company in that position and so to throw responsibility, without knowledge, upon the Board, unless it is plain that such is the intention of the sub-section.

ONT.
S. C.
1913
BELL
v.
GRAND TRUNK R.W. CO.
Hodgins, J.A.

Sub-sections 1 and 2 of sec. 275 are based upon the knowledge by the railway company of the condition of its fencing and of the locality; and sub-sec. 3 is based upon similar knowledge as to level crossings. All three assume that, if necessary, and with such information, the Board has been applied to or an order of the Railway Committee of the Privy Council has been obtained.

The duty of the railway company and of the Board as to accidents is set out in secs. 292 and 293, already quoted; and, although sec. 292 does not include in its language persons using a railway crossing, it may well be that, under sec. 2, sub-sec. 21, a railway crossing is comprehended in the term "railway."

In view of these provisions, it would not be unnatural to conclude that sub-sec. 4 was intended to harmonise with the general scheme of report and inspection in case of railway accidents. That scheme is based upon the knowledge communicated to the head officials and by them to the Board; and it is assumed in sub-sec. 4 that the Board shall act with knowledge of the conditions at the place of the accident. Unless, therefore, there is something in the sub-section itself which makes the prohibition dependent, not on knowledge, but on mere occurrence of an accident, the sub-section should not be so construed.

The words in it are "if at such crossing an accident has happened . . . by a moving train causing bodily injury." Here is the conjunction of a train, moving, presumably in charge of a railway crew, and a person injured by it; and therefore knowledge or means of knowledge on both sides. The words are not "by reason of a moving train."

This Court has recently construed the words "by reason of" in *Maitland* v. *Mackenzie* (1913), 13 D.L.R. 129, 28 O.L.R. 506, as including an accident happening not from impact but from apprehension at the sudden discovery of a motor in the way.

In railway cases the words "by reason of the railway" have been given a wide meaning. See *Browne* v. *Brockville and Ottawa R.W. Co.* (1860), 20 U.C.R. 202, and *May* v. *Ontario and Quebec R.W. Co.* (1885), 10 O.R. 70, where they were held to extend to an injury sustained on the railway by reason of the use made of it.

The statute says that the accident must be caused "by a moving train;" and similar expressions are found in other sections of the Act, where obviously impact is necessary. See sec. 294, sub-secs. 3 and 4, and sec. 295.

I think that the fair construction of the sub-section is, that the moving train must be the actual and physical cause of an accident which occasions bodily injury. It cannot be intended that accidents such as are mentioned in the judgment in *Atkinson* v. *Grand Trunk R.W. Co.* (1889), 17 O.R. 220, or that which was the subject of that decision, should operate to make the rail-

way company liable not only for damages but for the penalties imposed by secs. 393 and 412, where the accidents are not known to the company or its servants.

In the case in hand the respondent merely proved that an accident had happened by a horse running away after he had crossed in front of a moving train, throwing the driver out, to his bodily injury. The driver (Lillicrap) told no one, he says; and, upon the evidence, the appellant company had no notice of the accident; and the jury so found.

If an accident happening in that way is within the statute, then equally so would be one where, without the knowledge of the railway employees, the horse took fright near the railway crossing or after it had got past it, provided that the accident happened "at the crossing;" or where a man, hurrying over in front of a moving train, tripped and fell.

I do not think that the intention of the sub-section was to include accidents other than those where knowledge is obvious or reasonably probable, and where physical impact by a moving train causes bodily injury. To construe it otherwise would not advance the end in view, *i.e.*, the improvement of conditions at level crossings, and would merely render the railway company liable in damages and put the Railway Board in the position of apparently neglecting their duty without knowing of its existence.

There was, therefore, no evidence, to my mind, to go to the jury of an accident such as the statute mentions having happened, if it is a question of fact. There was an accident, and it caused bodily injury; but I think it was the province of the learned trial Judge to rule whether the words of the sub-section meant and included such an accident as was proven and not disputed. There is, of course, no question of negligence in this antecedent point; it is a mere question of the sort or kind of accident. For this reason the cases cited by the respondent, such as *Grand Trunk R. Co.* v. *Sibbald*, 20 Can. S.C.R. 259, and *Grand Trunk R. Co.* v. *Rosenberger*, 9 Can. S.C.R. 311, are not really helpful.

The ruling of the learned trial Judge at the outset on the case, having heard Lillicrap's evidence, was as follows (p. 6): "I think I will rule, Mr. McCarthy, that there was an accident there by reason of the moving train, and that the responsibility was on you not to run more than ten miles an hour;" and he declined to reserve it as a preliminary question to be determined before the trial. Hence it became part of the respondent's case, and was so left to the jury.

The learned trial Judge also instructed the jury (p. 136): "There is another protection which the law casts upon people crossing tracks, and another obligation which it imposes upon

ONT.
S. C.
1913
BELL
v.
GRAND
TRUNK
R.W. CO.
Hodgins, J.A.

railway companies; that is, that trains shall not be run through a thickly settled portion of a town or village at more than ten miles an hour." And again: "Now, was the train running faster that morning than ten miles an hour through a thickly settled portion of the village? If it was, the defendants are guilty of negligence." This instruction was not limited or modified in any way, and was properly objected to.

The jury found that the appellants' negligence consisted of "excessive speed through thickly populated districts;" and added that they believed the bell was not ringing continuously.

I am of opinion that this direction was wrong in not qualifying the statement by the exception contained in sec. 275, that is, as to protection, and was not warranted by the Railway Act as interpreted by *Grand Trunk R. Co.* v. *McKay*, 34 Can. S.C.R. 81.

Upon these two points the jury were misdirected as to the law, and their finding of excessive speed cannot, therefore, stand.

Upon the rest of the answer, "We believe the bell was not ringing continuously," a curious error, pointed out by the appellants' counsel in his objection (p. 140), was made in the charge to the jury.

The respondent was injured at the Plains road crossing. Eighteen hundred feet east of it is Brant street crossing, which the respondent had travelled over earlier that morning (p. 10). It is well established that the whistles were sounded at the latter crossing for the Plains road crossing. (See the evidence of the respondent, pp. 23, 35; Goff, the engineer; Haig, his fireman; and others.) This would be more than eighty rods off, and the statutory duty as to whistling for the crossing in question was, therefore, complied with. The bell is to "be rung continuously from the time of the sounding of the whistle" till the engine had passed the crossing. In his charge the learned Judge says (p. 135): "That is what they were bound by law to do here—sound the whistle eighty rods from the *Brant street crossing*. . . . The evidence of Waller and Robins goes to shew that the bell was not sounded for the *Brant street crossing*. . . . It is for you to say whether it was ringing or not, that is, whether it was ringing continuously up to the time that it struck this man."

The question was, whether, in fact, the statutory duty had been disregarded. That duty is limited to 80 rods before reaching the Plains road crossing, and the answer may, upon the charge, have reference only to the duty to ring prior to reaching the Brant street crossing. Breach of the statutory duty is not sufficient unless it is negligence causing or contributory, with other causes, to the accident or injury. See *Canada Atlantic R. Co.* v. *Henderson*, 29 Can. S.C.R. 632. Either the question or the answer should be clear upon this point. Had no special objection been made at the trial, or had the respondent in any

ONT.

S. C. 1913

BELL v. GRAND TRUNK R.W. CO.

way attributed his mishap to the want of sounding the bell, or to its absence prior to the whistle he heard, it might have altered the case. But, where the whole verdict hangs upon the statement that the jury believed that the bell was not sounded continuously, I think the appellants have the right to insist upon the objection that the finding is ambiguous.

There should be a new trial. The costs of the appeal should be to the appellants in any event, and the costs of the last trial should be in the cause.

Hodgins, J.A.

MACLAREN and MAGEE, JJ.A., concurred.

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

MEREDITH, C.J.O. (dissenting):—I have had an opportunity of reading the opinion of my brother Hodgins; and, if the construction he has given to the statute is right, I agree with the conclusion to which he has come.

Meredith, C.J.O. (dissenting)

I am, however, with much respect, of opinion that his construction of the statute is too narrow, and will in some cases, at least, defeat the object Parliament had in view in enacting it.

I see no reason why, where the horses a man is driving over a crossing at rail level are frightened by a moving train and run away, causing bodily injury to the driver, it cannot properly be said that "an accident has happened by a moving train causing bodily injury . . . to a person using the crossing."

New trial ordered; MEREDITH, C.J.O., *dissenting.*

Re WOODHOUSE.

ONT.

S. C. 1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. October 22, 1913.

1. ACTION (§ I A—1)—DEFINITION—STATUTORY PROCEEDING UNDER LAND TITLES ACT.

An objection filed in the land titles office against an application to bring land within the Land Titles Act, 1 Geo. V. (Ont.) ch. 28, by one claiming an interest in the land adverse to the applicant, is not an "action" within sec. 2, sub-sec. 2, of the Ontario Judicature Act, R.S.O. 1897, ch. 51, 3 Geo. V. ch. 19, R.S.O. 1914, ch. 56, declaring that the term "action" shall mean "a civil proceeding commenced by writ or in such manner as may be prescribed by rules of court."

[*Re Woodhouse*, 10 D.L.R. 759, affirmed in part.]

2. LAND TITLES (TORRENS SYSTEM) (§ II—20)—FIRST REGISTRATION—OBJECTION TO—ORDER OF DISCONTINUANCE IN PREVIOUS ACTION AS BAR.

Notwithstanding that an objection to an application to bring land under the Land Titles Act, 1 Geo. V. ch. 181 (Ont.), by a person claiming an interest in the land adverse to the applicant, is not an "action" within the meaning of the Judicature Act, R.S.O. 1897, ch. 51, 3 Geo. V. ch. 19, R.S.O. 1914, ch. 56, it is for the Master of Titles to determine whether or not the effect of an order made in a prior action brought by the objector pertaining to the land purporting to bar "any further action which may be brought by the plaintiff for the same cause of action" was a bar to the right to raise the objection in the land titles proceedings as constituting *res judicata*.

[*Re Woodhouse*, 10 D.L.R. 759, reversed in part.]

ONT.

S. C.
1913

RE WOODHOUSE.

APPEAL by John Woodhouse from the order of Latchford, J., *Re Woodhouse*, 10 D.L.R. 759, 4 O.W.N. 1265.

The appeal was allowed.

Edward Meek, K.C., for the appellant.

W. B. Milliken, for the respondents, Christie Brown & Co. Limited.

Hodgins, J.A.

The judgment of the Court was delivered by HODGINS, J.A.:—The authority for the order of the Master in Chambers made on the 5th October, 1912, is found in old Con. Rule 430, clause 4. The order, paragraph 3, provides that "this order shall be a bar to the continuance of this action and to any future action which may be brought by the plaintiff for the same cause of action."

Obviously, I think, the word "action" in the order must be construed as it is defined by the Rules under which alone the order could be made; and, if so, it is equally clear that it does not include a proceeding under the Land Titles Act.

It is to this point that the judgment of my brother Latchford is directed, and it appears to be the only one argued before him.

The effect to be given in the proceedings before the Master of Titles to the order in question is, of course, a matter for him to decide, and I agree with his decision so far as it deals with the meaning of the order. It is provided in Rule 430, clause 3, that a discontinuance under clause 1, i.e., before receipt of the statement of defence or after the receipt thereof and before any other proceeding in the action is taken by the plaintiff, shall not be a defence to any subsequent action. This means that by that sort of discontinuance there is not established any foundation for a plea of res judicata. But, where the plaintiff has to apply for leave, the Court or a Judge has power to direct that the order shall be a bar to any future action. This is exactly equivalent in effect to a judgment under such circumstances as entitle the defendant to allege that the matter in question has passed into judgment binding both parties. For if it is not a bar in that sense, it is no bar at all. The effect of the order is well illustrated by Lord Herschell's remark in *Owners of Cargo of Kronprinz* v. *Owners of Kronprinz* (1887), 12 App. Cas. at p. 262: "The Judge's order to discontinue—unless it were made a condition of the discontinuance that no other action should be brought—would not operate as a bar."

It is quite true that the bar is against a subsequent "action;" but I take it that the effect of the exercise of the Judge's power, thus expressed, is to enable the issue of res judicata to be effectively raised in other proceedings if they involve the same parties and the same issue.

ONT.

S. C. 1913

RE WOODHOUSE

Hodgins, J.A.

I think that the Master of Titles has, notwithstanding some of the expressions in his judgment, intended to decide, and has decided, that the effect of the order in question is to determine, in the proceedings before him, that issue in favour of the appellant here. I am of opinion that he is right in so holding. He is dealing with the rights of the parties before him; and, if he finds that the claimant is estopped or barred of record in regard to the right he is setting up, the Master can dismiss the claim; and this he has done. He has in fact disposed of the matter on the merits, and no good purpose would be served by again remitting it to him.

The appeal should, therefore, be allowed with costs, and the formal order objected to vacated and set aside.

Appeal allowed.

STEEL v. CANADIAN PACIFIC R. CO.

QUE.

K. B. 1913

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Lavergne, Carroll, and Gervais, JJ. October 30, 1913.

1. JURY (§ I B 1—10)—RIGHT TO TRIAL BY—PARENT'S ACTION ON BEHALF OF CHILD—JOINING CLAIM IN OWN RIGHT—QUEBEC PRACTICE.

An action by a father as tutor for his minor child for injuries sustained by the latter as the result of the negligence of a railway company, as well as on the parent's own behalf, for money expended in caring for the child and for the loss of the child's services, is one "for the recovery of damages resulting from personal wrongs" which may, in the Province of Quebec, be tried by jury, under sec. 26, of ch. 83, of the Con. Stat. of Lower Canada of 1860.

Statement

APPEAL from a decision of the Court of Review (Montreal) denying the plaintiff the right to a jury trial in an action brought by a father as tutor to his minor son against the railway for injuries received by the son and charged to be due to the negligence of defendant railway, and also on the father's own account for moneys disbursed in taking care of his son while the latter was laid up because of the injuries received, and for loss of his son's services. The Court of Review had denied the right of the plaintiff to have the action as so constituted tried by a jury and set aside the verdict of the jury trial, whereby separate sums were awarded the plaintiff for the various claims.

The appeal to the Court of King's Bench was allowed, Carroll, J., dissenting.

The opinion of the majority of the Court was delivered by

Lavergne, J.

LAVERGNE, J. (translation):—Article 421 of the Code of Civil Procedure is the result of all the anterior legislation introduced into our country, first by the statute of 25 Geo. III.

QUE.
K. B.
1913
STEEL
v.
CANADIAN PACIFIC RY. CO.
Lavergne, J.

ch. 2, sec. 9, amended by statute 9 Geo. IV. ch. 10, completed by statute 10-11 Vict. ch. 6, and reproduced by the Consolidated Statutes of Lower Canada, 1860, ch. 83, sec. 26. This statute gives us, in concrete form, the law existing to-day on the subject of jury trials in civil matters.

All that interests us in this case is the legal interpretation of the words "and also in all actions for the recovery of damages resulting from personal wrongs."

The damages in question must arise from wrongs caused a person. In the present case the injuries caused to the person of the son of plaintiff form the first basis of the claim of plaintiff for himself, represented by his tutor; (2) a second basis of claim is in favour of his father, the present appellant.

It is not necessary that the injuries should have been inflicted on the person of the appellant; it suffices that damages accrue to the appellant as a result of such injuries caused to his son.

The claim of the father results from injuries caused by the respondent; and these damages are the result of injuries accruing to a person—the son of the appellant.

That which determines the right to have a trial by jury is not the quality or condition of the plaintiff, but the cause of the damages. The damages in the present case result from wrongs or injuries caused a person, no matter who claims such damages, from the moment that the claimant has a claim for damages accruing to a person. In other words, it is only the cause of the damages that must be looked at, rather than the person claiming such damages, to determine the right to a trial by jury. The present case can be inscribed on the whole for hearing before a jury, *ratione materiæ*. The Court is called upon to determine, first, whether it was a personal wrong which gave rise to the action. Once it is established that the damages result from wrongs or injuries caused a person, the instruction of the case may be had before a jury, no matter who the plaintiff may be, if he subsidiarily establishes that these damages are due him, even though he be not the victim who received the injuries.

This is the practice and jurisprudence which have been almost uniform ever since the right to trial by jury has existed in this country. Decisions contrary to this jurisprudence have been rendered only on exceptional occasions, and I might say only within the past few months, and this new jurisprudence has not received the sanction of tribunals of high jurisdiction. For my part, I do not consider that there is any occasion to change the old and long-standing jurisprudence which has prevailed to this day.

Appeal allowed.

Re PRODUCERS ROCK AND GRAVEL CO., Ltd.

B. C.

S. C.

1913

British Columbia Supreme Court, Hunter, C.J. October 15, 1913.

1. Corporations and companies (§ VI D—337*a*)—Winding-up—Effect on causes of action—Levy of execution in another province.

As a winding-up order when made in one province, under sec. 23 of R.S.C. 1906, ch. 144, is effective throughout the Dominion, an execution and distress put in force against the assets of a company in another province after the making of such order, although done without notice thereof, is void; and the sheriff cannot recover fees, charges or poundage in respect thereto.

Statement

Application made to the Chief Justice in Chambers, on behalf of the provisional liquidator to restrain an execution and a distress for rent put in force against the assets of a company in liquidation.

The application was granted.

The winding-up order was made in Ontario on September 19, 1913; and produced to the registrar of the Supreme Court of British Columbia on October 15, 1913; the execution was levied in Victoria, British Columbia, on September 26, 1913; the distress was put in force against the effects of the company on September 29, 1913. The sheriff who levied the execution and distress had no notice at either time of the making of the winding-up order.

Argument

Mayers, for the provisional liquidator:—In matters within the Winding-up Act, R.S.C. ch. 144, there are no longer any provincial boundaries, but one territory, namely, Canada; there are no longer provincial Courts, but one federal Court with several branches; there is the one winding-up order which has effect throughout Canada, and one *punctum temporis* for the commencement of the winding-up. Any distress or execution put in force after that time is wholly void, irrespective of any notice of the winding-up order having been made (secs. 5, 23, 126 and 127). The order which is to be enforced by sec. 127 is the original order, and not some subsidiary order made by the Court of the province in which the winding-up order is sought to be enforced, as to which there is no provision in the Act. The territorial area to which the Winding-up Act applies, is shewn by the case of *Baxter* v. *Central Bank of Canada*, 20 O.R. 214, and *Re Tobique Gypsum Co.*, 6 O.L.R. 515.

If the distress or execution is void, the sheriff can have no right to any fees: *res accesoria sequitur rem principalem*: *Sneary* v. *Abdy*, 1 Ex. Div. 299, 304, 308; *Montague* v. *Davies*, [1911] 2 K.B. 595.

McDiarmid, for the execution creditor, and *Miller*, for the landlord, did not oppose the application.

Bass, for the sheriff:—It cannot be that a party in one pro-

B. C.
S. C.
1913
RE PRODUCERS ROCK AND GRAVEL CO., LTD.
Hunter, C.J.

vince is to be affected by notice of a winding-up order made in another province which may be at the other extremity of Canada; the date from which distress and execution in a province are avoided, must be the date when the order is registered in the Courts of that province.

HUNTER, C.J.:—It is a great hardship on the sheriff that the legislature has omitted to provide for the case; but the Act makes void all distresses and executions from a particular date, which date is to have effect throughout Canada; therefore, the execution and distress being void, the sheriff cannot be allowed his costs against the liquidator for performing a void act: *ex nihilo nihil fit.*

Order made.

ALTA.
S. C.
1913

AMERICAN-ABELL CO. v. PRYTRYSZYN.

Alberta Supreme Court. Motion before Beck, J. October 24, 1913.

1. MORTGAGE (§ VI I—137)—ENFORCEMENT—DEFICIENCY — REALIZING ON COLLATERAL SECURITY.

Where a mortgage of land was given for the price of an engine and separator as well as a conditional sale contract, whereby title remained in the vendors, and, on foreclosure proceedings being brought on the mortgage, it was arranged at the trial that the mortgagor deliver up the machine at a railway station, and that the mortgagees (the original vendors) should sell same to the best advantage retaining their expenses and commission for so doing, so as to reduce the sum required to redeem to the net amount which would have to be realized from the lands, the mortgagees will be chargeable with the loss sustained by their failure to take care of the machine within a reasonable time after notice of its delivery at the railway station in pursuance of the terms of the judgment in the foreclosure action, for which purpose the mortgagor may apply for an allowance of a credit on the judgment, whereupon the amount of the loss may be judicially determined.

Statement

APPLICATION by defendants to enforce an agreement of partial settlement or to allow a credit in favour of the defendants by reason of what took place in consequence of an arrangement at the trial.

A. D. Harvie, for plaintiff.
J. K. Macdonald, for defendants.

Beck, J.

BECK, J.:—The action came on before me for trial without a jury on February 13, 1912. The two defendants—father and son—bought a traction engine and separator, etc., from the plaintiff company for $1,900. They signed a "lien-agreement" dated September 23, 1908, and shortly afterwards a number of promissory notes, and on October 10, the father, Oleska, executed a mortgage on his farm to secure the purchase money and interest. The action was for payment, and in default fore-

closure and possession. I gave judgment against both defendants for the amount of the principal sum claimed with interest at 8 per cent. per annum, before maturity and also at the same rate after maturity, although 12 per cent. was claimed. My note, made at the time, upon the record, is as follows:—

Feb. 13. Judgment for claim; interest, however, to be calculated at 8 per cent. throughout, not 12, after maturity; machine to be brought in to Edmonton for repair and to be sold; mortgage proceedings to go on after machine realized upon unless for special reasons they should go on earlier; leave is reserved to defendant Oleska (Prytryszyn) to take necessary proceedings against his co-defendant for contribution.

Correspondence follows:—

Edmonton, Alta., 21st February, 1912.

J. K. McDonald, Esq.,
Barrister,
Edmonton.

Re American-Abell v. Prytryszyn.

Dear Sir,—In this matter we would suggest that you have your clients haul the engine in to the nearest railway station, which we believe is Mundare, and as soon as it is at the station advise us and we will have the Northern Alberta Machinery Company's agents go down and inspect the same, and, if necessary, have it shipped in here for repairs. Kindly have your clients do this at once and have them also gather in all the pieces of the engine which they have taken off.

EWING & HARVIE.

Feb. 22nd, 1912.

Oleska Prytryszyn, Esq.,
Mundare, Alta.

Dear Sir,—I have been told by the American-Abell Company's lawyers to have you take the engine in to Mundare ready to be shipped to Edmonton to be repaired. You might let me know what day you will be in Mundare, so that they can have their man there when you arrive with the engine. Be sure and let me know when you will be in Mundare so that we can have the man there.

J. K. MACDONALD.

Feb. 26, 1912.

Messrs. Ewing & Harvie,
Barristers,
City.

Re American-Abell v. Prytryszyn.

Dear Sirs,—Prytryszyn called at the office to-day and asked that he be allowed about three weeks longer in which to take the engine in to Mundare for shipment here as he explains that the roads are in a very bad condition and it would cause considerable extra trouble to have the engine hauled in now. Kindly let me know your client's wishes.

J. K. MACDONALD.

ALTA.

S. C.
1913

AMERICAN-ABELL CO.
v.
PRYTRYSZYN

Beck, J.

Edmonton, Alta., 29th February, 1912.

J. K. McDonald, Esq.,
Barrister,
Edmonton.

Re American-Abell v. *Prytryszyn.*

Dear Sir,—We beg to acknowledge yours of 26th inst.

We do not understand why your client cannot take the engine to Mundare at the present time. From what we know of the country roads it would be much easier to take the engine over while they are at present in a frozen condition than to wait for three weeks until the snow melts and the roads become muddy. Our clients, the American-Abell Co. desire to have the matter closed up as soon as possible and as it will take some considerable time after the engine is shipped before the repairs to be made and the sale effected by the Northern Alberta Machinery Co., we would like the same shipped with as little delay as possible.

EWING & HARVIE.

Mundare, Alta.,
Mar. 8th, 1912.

J. K. McDonald,
Barrister,
Edmonton.

Dear Sir,—Please let the American-Abell Co.'s lawyers know that the engine is now at Mundare, and also let me know when you will be here.

OLESKA PRYTRYSZYN,
Per J. S. McCallum.

March 10, 1912.

Messrs. Ewing & Harvie,
Barristers,
City.

Re American-Abell v. *Prytryszyn.*

Dear Sirs,—I am to-day in receipt of a letter from Prytryszyn, stating that the engine is now in Mundare and asking me to advise you to that effect. He also asks me to let him know when the American-Abell people will be down at Mundare to look at the engine. You might let me know this, also let me see copy of the judgment which you purpose taking out in the matter.

J. K. MACDONALD.

March 16, 1912.

Messrs. Ewing & Harvie,
Barristers,
City.

Re American-Abell v. *Prytryszyn.*

Dear Sirs,—As previously advised you, the engine in question herein has been delivered at Mundare. Before removing the engine I would ask you to let me have the report of your clients as to the amount that will be necessary to expend in order to put the engine and separator in good working order. I would like, as I am arranging for a further independent inspection by some disinterested person. I wrote you on the 10th about this but have received no reply.

J. K. MACDONALD.

Edmonton, Alta., 20th March, 1912.

J. K. McDonald, Esq.,
Barrister,
Edmonton.

Re American-Abell v. *Prytryszyn.*

Dear Sir,—Yours of 16th inst. received advising us that the engine in this matter is now in Mundare. I have notified Mr. Bowden, of the Northern Alberta Machinery Co. and he states that he will send down within the next week or ten days some man to look over the machinery and have it shipped up here, and he will then advise you what he believes it will cost to repair the same. He says that he is not at the present time sure of what day his agent will go down, but that he will personally notify Prytryszyn so that Prytryszyn may be there and deliver over the pieces which he took off the engine.

I would suggest that if you desire a separate report on the probable cost of repairing the engine that you have this inspection made at once.

EWING & HARVIE.

The machine was actually brought to Mundare on or about March 8, 1912; but no one was sent down to take it and it lay there for months, being dismantled and storm beaten, and it is probably still lying there.

The defendant Oleska Prytryszyn says that when about to haul it in to Mundare, he received a *bonâ fide* offer of $1,200 for the machine. It is explained by his solicitor that he refused the offer because he thought he could do nothing but what he had been told in Court. An affidavit is filed on his behalf stating its real value at the time it was brought in to be that amount. There are affidavits in answer as to value.

I have to decide in effect whether it is the plaintiff company or the defendants who are to bear the loss of the value of the machine, and if I charge the plaintiff company, with what amount.

I think I was right when I said in effect at the trial, when urging the representative of the plaintiff company to act in such a way as to help the old man Prytryszyn, that I could not force them to adopt my suggestion. I think they deserve commendation for adopting it. I think it was adopted and accepted by the plaintiff company as contrasted with the Northern Alberta Machinery Company. Having adopted the suggestion and co-operated with the defendant in carrying it out to the extent that he entirely fulfilled his part of the arrangement, I think the company undertook a duty towards the defendants—at first gratuitously, afterwards for a consideration—and that duty under the circumstances was at least to take actual custody of the machine so as to preserve it. The result of what happened was, in my opinion, that they in fact "repossessed" the machine. In either view I think the plaintiff company must be charged with the value of the machine at and as of the date when it was

ALTA.

S. C.
1913

taken to Mundare. Having regard to what was said at the trial with reference to its value and to the affidavits filed on this application, I think a fair estimate is $700. I think I should give the defendants the costs of this application. I fix them at $25, and they will be added to the $700.

Order accordingly.

SASK.

S. C.
1913

MILLARD v. DOMINION TOWNSITE CO.
SHAW v. DOMINION TOWNSITE CO.

Saskatchewan Supreme Court. Trial before Brown, J. September 24, 1913.

1. BROKERS (§ II B—17)—REAL ESTATE BROKERS—COMPENSATION — DEFAULT OF PURCHASER INSTIGATED BY BROKER.

A real estate broker selling lots in his principal's subdivision on terms upon which small down payments are accepted to cover the commission and the balance is left outstanding upon contract, is under a duty, even after leaving the principal's employ, not to induce the respective purchasers to abandon the contracts so made and to purchase in their stead other lots which the broker then has for sale either on the broker's own account or as salesman for another.

[As to real estate brokers generally, see Annotation, 4 D.L.R. 531.]

Statement

TRIAL of separate actions by real estate agents for services in obtaining various contracts to purchase lots in a land subdivision.

The action was dismissed.

T. A. Emerson, for the plaintiffs.

G. E. Taylor, and *E. Gravel*, for the defendants.

Brown, J.

BROWN, J.:—I shall simply set out briefly what conclusion I have reached in this case, because I have no hesitation whatever in finding that neither of the plaintiffs is entitled to recover anything on the claims sued on. These claims are for services rendered in selling the defendants' property. Now, in making these sales, a certain amount of cash was paid by each purchaser, and a contract was signed which settled the terms upon which absolute ownership of the property could be obtained. It is clear that the main benefit to the defendants from these sales, or which might be expected by virtue of these sales and the plaintiffs' services, was not simply the cash payments, because we find that the cash payment was in each case largely required to meet the commission and certain other office expenses.

It was rather in getting these purchasers on a contract; and, being on a contract and having made a cash payment, they would, in all probability, make a full payment for the property, so that the future payments would be the ones out of which the defendants would mainly benefit.

We find that these plaintiffs, immediately they leave the defendants' employ, because of some trouble which arose—just

what the nature of that trouble was is not very clear—but, immediately they leave the defendants' employ, they take advantage of the information which they have obtained by being in the service of the defendants, and, armed with a complete list of the purchasers of the various properties which they sold for the defendants, they deliberately set forth to have those various purchasers abandon the contracts which were entered into with the defendants, and enter into contracts with the Moose Jaw Realty Co. which they formed at that time. We find, according to the evidence, that they endeavoured to switch every one of those purchasers, and we find further that they succeeded in switching a great majority of them. As an inducement they promised to credit the payments already made to the defendants on the new contracts which were made with the Moose Jaw Realty Co., and not only promised it, but actually did it, in all cases where they were able to switch. I can scarcely imagine a more deliberate case of breach of good faith. They deliberately tear down what they have built up; they undo what they have done, and yet they expect this Court to help them to recover payment for their services.

It seems to me that it is very similar to the case where a contractor enters into a contract to build a house, and builds the house, but, because he happens to fall out with the owner of the house after he has built it, deliberately tears the whole thing down again, and then seeks to recover payment of the contract-price for building the house. I must say that, as the case strikes me, it is not one where the plaintiffs should have come into Court asking for relief; it is rather a case where the defendants might well be justified in coming into Court and asking for damages for the wrongs which have been done them.

The plaintiff Millard seeks to justify his conduct on the ground that he was simply obeying the instructions of the Moose Jaw Realty Co., for whom he was acting as salesman; but there is no justification in law, nor do I see any justification in morals, for any man accepting a position that would require him to be guilty of conduct such as Millard was guilty of; and I must also say that, according to the evidence, I am of opinion that Millard was just as keen as any of the other interested parties in trying to switch just as many purchasers as he could get hold of.

The result will be that there will be judgment for the defendants in both cases with costs.

Actions dismissed.

ALTA.

S. C.
1913

SMITH v. ALBERTA CLAY PRODUCTS Co. Ltd.

Alberta Supreme Court. Trial before Harvey, C.J. November 1, 1913.

1. MASTER AND SERVANT (§ II A 4—60)—SAFETY AS TO PLACE—DEFECTIVE TRACKS USED IN CONSTRUCTION WORK.

A brick-making company operating tracks on its premises for its undertakings is liable for damages in a personal injury accident to a licensee upon the premises resulting from non-repair of the tracks particularly where it had knowledge of the lack of repair, although such licensee was in the direct employment of a third party doing construction work on the premises in the course of which work the track in question had to be used, it appearing that such third party with whom the plaintiff was employed had not assumed any responsibility as to the maintenance of the track.

2. DAMAGES (§ III I 4—192)—ASSESSMENT OF—INSTANCES OF AMOUNT—PERMANENT PERSONAL INJURY.

A verdict for $5,000 damages is not excessive for permanent personal injury resulting from the defendant's negligence, whereby the plaintiff, a young labouring man, was so seriously injured that he would be a cripple for life.

Statement

TRIAL of action for damages for personal injury to the plaintiff, in a third party's employment, resulting from an accident due to want of repair of certain tracks on the defendant's premises, constituting the same an unsafe place to work.

Judgment was given for the plaintiff for $5,000 with costs.

J. J. Mahaffy, for plaintiff.

G. H. Ross, K.C., for defendant.

Harvey, C.J.

HARVEY, C.J.:—There is a little difficulty here. I have no doubt that the plaintiff was not employed by the company. That appears to be clear from the evidence, but it seems to me that that does not by any means settle the question. A perfect stranger is entitled to have reasonable care exercised toward him, particularly if he goes on the premises of another person by the other person's invitation. In the present case the plaintiff was doing work on the premises of the defendant company for their benefit. He was doing it under the direct employment of someone else it is true, but he was on the defendants' premises and he was using the defendants' appliances and equipment and properly using them. Under these circumstances I think there was undoubtedly a duty on the part of the defendants to him, and unless they shift the burden in some way by evidence, it appears to me that it is only a question of how far that duty goes. I am not satisfied from the evidence that the burden was on Roeder to keep this equipment in repair. He was using their material in doing this work. It appears from the evidence of Mr. White that they were building another track and employed men that were being employed by Roeder to do that, and the company was paying them. No doubt that other track was to be used in the same way as this track was being used, so they apparently did not leave it to

the contractor to put down the track where he wanted it, simply supplying him with the material. Mr. White says that Roeder was to assume the responsibility for repairs, but when we get into the details we find that he had no personal knowledge of any such arrangement, so his evidence is not important on that score. We have against that the fact that this particular place was repaired at one time at the instance of Mr. Aylesbury, who was the superintendent of the company, and he was not in any way under Mr. Roeder, and we have also the fact that at some time shortly before the accident took place Mr. Aylesbury had told Mr. Roeder it ought to be attended to again. That is some evidence it appears to me which would indicate that the company had considered itself under obligation to keep the track in repair. I am not quite certain that it would be really very important whether that was the case or not, however, it seems to me that the evidence, as far as it goes, would indicate that it was the company's duty, even to Roeder, or at any rate to the men, to keep the track in repair. The track was not in repair, it was in such a state that the accident took place by reason of it. Its condition was known to the defendant which is also quite clear from this conversation between Mr. Aylesbury and Mr. Roeder, and while it is quite true that the cars passed over there time and time again without an accident, that is what happens in all cases, and it is only the one time that the accident comes and then the defect is remedied and the difficulty overcome. I think, on the whole facts of the case, the defendant must be held liable. I only want to say that I have a little hesitation in coming to the conclusion, but it seems to me that the law goes that far. I don't think the principle of *volenti non fit injuria* has any application here in the facts of this case.

Then as to the question of damages. The injury is undoubtedly a very serious one. He is a man whose work has evidently been that of a manual labourer; I should say that he would probably be incapacitated for life from performing that class of labour and will have to turn his attention to something else. What he can accomplish I can hardly say. He has been put to expense or liability amounting to between seven and eight hundred dollars and he has lost while in the hospital almost a year's time, and, no doubt, since then a good many months more, so that his actual out-of-pocket expenses and loss of time will come to more than fifteen hundred dollars ($1,500); he is a young man of twenty-four and for life a cripple and largely incapacitated from earning any livelihood. It is an extremely serious matter, and while, of course, the law cannot make any adequate compensation for such injuries as this, it has to treat it in some sort of way and try to furnish him with as reasonable financial compensation as it can for the loss. I do not think that the

ALTA.

S.C.
1913

SMITH
v.
ALBERTA CLAY PRODUCTS CO. LTD.

Harvey, C.J.

amount named is, taking all things into consideration, beyond a fair amount. It is less than thirty-five hundred dollars for the whole of the man's life, to compensate him for what he will be deprived of as the result of this accident.

There will be judgment, therefore, for five thousand dollars with costs.

Mr. Ross:—Will there be a stay of execution pending appeal, my Lord? I would like to have arrangements made about that.

THE COURT:—Yes, I will stay execution for thirty days.

Judgment for plaintiff.

MAN.

C. A.
1913

Re ALARIE and FRECHETTE.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 21, 1913.

1. MORTGAGE (§ VI A—70)—ENFORCEMENT—MORTGAGE UNDER TORRENS SYSTEM.

The court will not direct the registration of a final order of foreclosure made in a court proceeding as under the old registry system against lands in Manitoba subject to the Torrens system of title registration, upon a mortgage made under sec. 99 of the Real Property Act, R.S.M. 1902, ch. 148; the compulsory transfer of the mortgagor's title can be accomplished only by a proceeding in the land titles office under secs. 113 and 114 of the Real Property Act (Man.).

2. LAND TITLES (TORRENS SYSTEM) (§ III—30)—MORTGAGES—UNDER REAL PROPERTY ACT—FORECLOSURE—PROCEDURE.

Since the 1911 statute, 1 Geo. V. (Man.) ch. 49, the only way in which a Torrens system mortgage made under sec. 99 of the Real Property Act, R.S.M. 1902, ch. 148, can be foreclosed and the title of the mortgagor divested to the mortgagee is by a proceeding in the land titles office under secs. 113 and 114 of the Act, and not by the ordinary foreclosure action and final order of foreclosure applicable to lands not under the Torrens system.

[*Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618; and *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 A.C. 391, followed; and see Annotation at end of this case.]

Statement

PETITION under the Real Property Act to compel the district registrar of the district of Winnipeg to register a final order for foreclosure made by the Court of King's Bench.

The petition was refused.

H. P. Blackwood, for petitioner.

C. P. Wilson, K.C., for district registrar.

Howell, C.J.M.

HOWELL, C.J.M.:—The simple question in this matter is whether under the Real Property Act, where no title to land is vested in the mortgagee, a simple, ordinary final order for foreclosure as under the old system can and does vest in the mortgagee the estate or interest of the mortgagor. Secs. 113 and 114

of the Real Property Act, R.S.M. 1902, ch. 148, make direct provision for foreclosure by proceedings in the land titles office, and the last-mentioned section declares that the order for foreclosure issued by the district registrar when registered shall vest in the mortgagee or his grantee the title of the mortgagor and this is the only title by foreclosure referred to in the Act. The mortgagee has no title to the property. The decree of the Court is

> that the defendant Hormidas Frechette do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption in and to the mortgaged premises.

This does not pretend to order or effect a conveyance or transfer of the title, and no case was made out in the pleadings for a conveyance. The registrar refused to register this decree and this is an appeal from his ruling.

I think that the case of *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618, is authority for the proposition that where the Act lays down a course of procedure by which title is to be got in from the mortgagor that course must be taken. Of course, if a special agreement was made between the parties raising equities as to title and perhaps agreements as to conveyance different questions might arise, but this is a simple mortgage under the new system. I think that pursuant to the provisions of sec. 83 the registrar properly refused to register the decree of foreclosure. The petition is dismissed.

Perdue, J.A.

PERDUE, J.A.:—The petitioner Adonias Alarie is the mortgagee of certain land in the district of Winnipeg by virtue of a mortgage made and registered under the Real Property Act, R.S.M. 1902, ch. 148, the land being under the operation of the Act at the time of the making of the mortgage. Default having been made in payment, the above-mentioned suit was commenced in the Court of King's Bench on November 1, 1911, for the foreclosure of the mortgage. The usual proceedings appear to have been taken in that Court, and on May 14, 1913, a final order of foreclosure was issued purporting to foreclose all right, title and equity of redemption of the mortgagor in the lands mentioned in the mortgage.

This final order of foreclosure was on May 20, 1913, deposited by the petitioner, the mortgagee, in the Winnipeg land titles office, for the purpose of registration, with a view of applying by way of transmission or otherwise to have the petitioner registered as owner of the land under the Act. The district registrar refused to register or recognize the order, on the ground that the Court of King's Bench had no jurisdiction to foreclose a mortgage made under the Real Property Act upon land then subject to the operation of the Act.

Secs. 113 and 114 set out the procedure to be followed in

MAN.

C. A.

1913

RE ALARIE AND FRECHETTE.

Perdue, J.A.

order to obtain a foreclosure of a mortgage under the Act. This procedure is substantially the same as that contained in the Victoria Act, and in the New South Wales Act. In the case of lands under the Real Property Act a mortgage does not operate as a transfer, but as a security only: Real Property Act, R.S.M. 1902, ch. 148, sec. 100. The mortgagee, therefore, never has the land vested in him, so that a bare judgment or order of foreclosure would be inoperative to give him the ownership of the land freed from the mortgagor's equity of redemption. This can only be done by following the procedure provided for that purpose by the Act itself. This is the view that has been taken by the Australian Courts: *Greig* v. *Watson*, 7 Viet. L.R. 79; *Long* v. *Town*, 10 N.S.W. (Eq.) 253, 6 W.N. 85.

In *National Bank of Australasia* v. *United Hand-in-Hand Co.*, 4 A.C. 391, it was held that the only way a mortgagee could extinguish the rights of a mortgagor was by foreclosure under the Act or by sale under the Act. This has been followed in a recent case in the Supreme Court of Canada by Mr. Justice Duff, who delivered the judgment of the majority of the Court: *Smith* v. *National Trust Co.*, 1 D.L.R. 698 at 714, 45 Can. S.C.R. 618, 644.

There was a period in this Province between the coming into force of the amendments passed in the year 1906, 5 & 6 Edw. VII. ch. 75, secs. 2 and 3, and the repeal of those sections in 1911, 1 Geo. V. (Man.) ch. 49, sec. 7, when the right of sale or foreclosure might have been exercised by any competent Court under the express authority conferred by those amendments. The Act repealing the amendments excepted pending litigation. The repealing Act, however, came into force on March 24, 1911, and the plaintiff's suit was not commenced until November 1, 1911. He cannot, therefore, obtain any benefit under the Act of 1906.

I think the district registrar acted properly in refusing to register the final order of foreclosure. The petition should be dismissed.

Richards, J.A.
Cameron, J.A.

RICHARDS and CAMERON, JJ.A., concurred with HAGGART, J.A.

Haggart, J.A.

HAGGART, J.A.:—Under sec. 121 of the Real Property Act one Adonias Alarie appealed to a Judge sitting in Chambers against the refusal of the district registrar to register a certain document called a final order of foreclosure, obtained in a suit on a mortgage covering a certain portion of lot 29 according to the Dominion Government survey of the Rat river settlement, which land is more particularly described in the petition.

The petition sets forth all the steps that were taken in the suit, which culminated in an order, bearing date May 14, 1913, ordering

that Hormidas Frechette do stand absolutely debarred and foreclosed of and from all right, title or equity of redemption of, in and to the mortgaged premises in the pleadings mentioned.

The petitioner wanted this order registered. The district registrar refused, and the reason given by him for refusing to register or recognize the so-called final order of foreclosure was that the Court of King's Bench had no jurisdiction to foreclose this mortgage, which was one under the Real Property Act.

I think the point was well taken by the district registrar. The question was very fully discussed by Mr. Justice Duff in *Smith* v. *National Trust Co.*, 45 Can. S.C.R. 618, 1 D.L.R. 698, and I refer more particularly to his reasons, 45 Can. S.C.R. at 643, 644 and 645. The substance of the judgment is, in effect, that the provisions of the Act are the only means by which a mortgagee can extinguish the mortgagor's title, under the Real Property Act.

I would refer to Brickdale & Sheldon's Land Transfer Act, 2nd ed., p. 173; Thom's Canadian Torrens System, p. 311; Duffey & Eagleson's Transfer of Land Act, p. 254; *The National Bank of Australasia* v. *The United Hand-in-Hand and Band of Hope Co.*, 4 A.C. 391, and *Greig* v. *Watson*, 7 Vict. L.R. 79.

The prayer of the petition should be refused.

Petition dismissed.

Annotation—Land titles (Torrens system) (§ III—30)—Mortgages—Foreclosing mortgage made under Torrens system—Jurisdiction.

Annotation

Mortgage foreclosure under Torrens system

The various Land Titles Acts prescribe the manner for mortgaging land registered thereunder by the execution of a memorandum of charge which in some provinces takes effect as a security only, and not as a transfer of the title to the encumbered land: see 6 Edw. VII. (Alta.) ch. 24, secs. 60, 61; 2 Geo. V. (B.C.) ch. 15, sec. 7; R.S.M. 1902, ch. 148, secs. 99, 100; 1 Geo. V. (Ont.) ch. 28, sec. 30; R.S.S. 1909, ch. 41, secs. 87, 91. However, the statutes of British Columbia and Ontario are silent as to the effect of such a mortgage as a transfer of the mortgagor's title.

In all of the provinces with the exception of Manitoba, jurisdiction is expressly conferred on some Court, in addition to cumulative remedies in the land titles office, in respect to proceedings to enforce payment of moneys secured by mortgage or encumbrances under the Land Titles Acts, or to enforce observance of covenants, agreements or stipulations therein, or for the sale of the encumbered lands, or to foreclose the estate or claim of any person in or upon the same, or to redeem or discharge any land from any such mortgage or encumbrance. Thus, in Saskatchewan the Supreme Court has jurisdiction (R.S.S. 1909, ch. 41, sec. 93); while in the North-West Territory and Yukon it is conferred on stipendiary magistrates (R.S.C. 1906, ch. 110, sec. 99). In Ontario it is provided by 1 Geo. V. ch. 28, sec. 34, that, subject to any entry to the contrary on the register, the registered owner of the registered charge may enforce it by foreclosure or sale, in the same manner and under the same circumstances in and under which he might enforce it if the land had been transferred to him by way

MAN.

Annotation

Mortgage foreclosure under Torrens system

Annotation (*continued*)—Land titles (Torrens system) (§ III—30)—Mortgages—Foreclosing mortgage made under Torrens system—Jurisdiction.

of mortgage subject to a proviso for redemption. In Alberta, by virtue of the Real Property Act, 6 Edw. VII. ch. 24, sec. 62, proceedings for the foreclosure of such mortgages are to be taken in the Supreme Court of the province; but it has been held that under such section a Master of the Supreme Court does not have jurisdiction to make a foreclosing or vesting order: *Re Land Titles Act* (Alta.), 11 D.L.R. 190. Where land is sold in satisfaction of a mortgage pursuant to a decree of a Court providing that on confirmation of the sale by a Judge, the title to the encumbered land shall vest in the purchaser, the latter, on confirmation of the sale, is entitled to be forthwith registered as owner of the land: *Canadian Pacific R. Co.* v. *Mang*, 1 Sask. L.R. 219.

But the Manitoba Real Property Act, R.S.M. 1902, ch. 148, differs from those of other provinces by providing, like those of Australia, a distinct and separate proceeding for the foreclosure of mortgages made under the Act, without conferring jurisdiction on any Court therefor. Thus, secs. 113 and 114 of the Act provide for a proceeding in the land titles office before the registrar, for the foreclosing of such mortgages and the vesting of title in the mortgagee. However, the Act was amended by 5 & 6 Edw. VII. ch. 75, sec. 3, so as to confer jurisdiction over mortgages on any competent Court, notwithstanding anything to the contrary in the Act; but this amendment was repealed by 1 Geo. V. ch. 49, sec. 7; so that at present, as laid down by the Court in *Re Alarie and Frechette* (the case above reported), there is no jurisdiction in any Court to foreclose such a mortgage by means of the ordinary foreclosure decree.

So in Australia, from which country the Torrens system is derived, it has been held that a mortgage made in conformity with the provisions of the Land Titles Act cannot be foreclosed by a Court proceeding, where another method of divesting the mortgagor's title is provided by the Act: see *National Bank of Australia* v. *United Hand-in-Hand, etc., Society*, 4 A.C. 391; *Greig* v. *Watson*, 7 Vict. L.R. 79; *Long* v. *Town*, 10 N.S.W. (Eq. R.) 253. The reason for this doctrine is that a mortgage made under the Land Titles Act differs from a common law mortgage in that no estate in the encumbered land is vested by the instrument in the mortgagee, the mortgage taking effect as a charge or security only with certain statutory methods pointed out for divesting such title; and that consequently the mortgagee's powers are dependent upon such provisions: *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618, affirming 20 Man. L.R. 522; *Long* v. *Town*, 10 N.S.W. (Eq. R.) 253; *Colonial Investment and Loan Co.* v. *King*, 5 Terr. L.R. 371. In *Greig* v. *Watson*, 7 Vict. L.R. 79, it was said that the legislature by providing for the foreclosure of mortgages made under the Land Titles Act, intended to make such method exclusive. And to the same effect see the remarks of the Court in *Smith* v. *National Trust Co.*, 1 D.L.R. 698, 45 Can. S.C.R. 618, affirming 20 Man. L.R. 522.

But where land is mortgaged under the general law, and subsequently the land is brought under the Land Titles Act, the mortgage may be foreclosed under the old system: *Re Smith*, 15 Australian L.T. 85.

The *Alarie* case, above reported, deals only with the effect of a final order of foreclosure made in the ordinary suit for foreclosure or sale and does not deal with the effect as *res judicata* which the decree might have

Annotation (*continued*)—**Land titles (Torrens system) (§ III—30)—Mortgages—Foreclosing mortgage made under Torrens system—Jurisdiction.**

MAN.

Annotation

Mortgage foreclosure under Torrens system

on an application made in the statutory method before the land titles officer. It merely affirms as a rule of practice that the decree is not an extinguishment of the mortgagor's title where the special statutory system of foreclosure is applicable, and that an application must still be made in the land titles office as might have been done apart from the Court proceedings.

The land titles registrar would then have to consider proofs of default, and on this score the decree may operate so as to conclude the mortgagor from again setting up questions of fact which had been decided against him in the mortgage action: see *Re Woodhouse*, (Ont.) 14 D.L.R. 285.

The Court presumably still retains its powers *in personam*, although the transactions may relate wholly to lands subject to the transfer and registry provisions of the Torrens system. Where the registered owner is within the jurisdiction, it may still be that in an action properly framed the Court may, by its decree against him, direct that he should execute and deliver all necessary transfers in favour of the mortgagee.

The mortgagor, on the other hand, might have some reason to complain if he were deprived of any of the periods of delay provided by the statutory procedure, particularly if the entire security were under the Torrens system. What liberty the Court could properly take in setting off, against the period for redemption which the land titles officer might or must allow, the period ordinarily allowed by the Court practice, does not appear to have come up for decision.

An interesting question would be raised if several properties were mortgaged in one transaction and for one sum, and only one of the properties was subject to the Torrens system. There might and probably would be separate mortgage documents and each of these might charge each property with the entire indebtedness.

In such case if an ordinary foreclosure action were brought as to the major portion of the security not having a Torrens title, it would be convenient to include also the Torrens system property. In fact it would have to be provided for to the extent of directing the mortgagee to discharge it along with the rest of the properties in case the mortgagor redeemed. So also in the case of collateral mortgage securities, it may well be that the mortgagor would have no separate and independent rights in equity in respect of the Torrens system mortgage, and that the circumstance might justify the Court in making a personal order against the mortgagor regardless of the statutory procedure for foreclosure and sale under the Real Property Act (Man.) or other Torrens system statutes.

Where the land titles officials have the exclusive jurisdiction as to the actual transfer of title the Court might not be able to vest the title of the defendant disobeying the decree in the party entitled to obtain it, but it might enforce its order by sequestration proceedings or by proceedings in contempt involving the personal imprisonment of the defaulter.

MAN.

K. B.

1913

ARENOWSKY v. VEITCH et al.

Manitoba King's Bench, Mathers, C.J. October 21, 1913.

1. TRIAL (§ IX—350)—PRELIMINARY LAW QUESTIONS.

An application to dispose of a preliminary question of law in an action should not be entertained as to one of several defendants unless the question to be so heard would dispose of the action as regards the applicant or would decide some important principle involved in the action.

[*Gardiner* v. *Bickley*, 15 Man. L.R. 354, applied.]

2. OFFICERS (§ II C—86)—LIABILITIES—MISCONDUCT—SCOPE OF OFFICIAL DUTIES—IMMUNITY—LIQUOR LICENSE INSPECTOR.

In an action against several defendants including a license inspector for an alleged conspiracy to defeat the plaintiff's rights on his application for a liquor license under the Manitoba Liquor License Act, R.S.M. 1902, ch. 101, the inspector enjoys no immunity by virtue of his official position as regards acts which were beyond the scope of his official duties.

Statement

APPLICATION by one of the defendants under Manitoba rule 453 for a hearing of a preliminary question of law.

The application was refused.

H. W. Whitla, K.C., for defendant Johnston.

A. B. Hudson, for plaintiff.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—This is an application by the defendant Johnston, under rule 453, for an order that a question of law said to be raised by his defence be disposed of before the trial of the action.

It was held by Mr. Justice Perdue in *Gardiner* v. *Bickley*, 15 Man. L.R. 354, that such an order should not be made unless the determination of the question of law so raised would dispose of the action or at least decide some important principle involved in the action. The same rule ought to apply where there is a demurrer by one out of several defendants. If the demurring defendant occupies a distinctive position and a decision sustaining the demurrer would eliminate him from the action, in the absence of special reasons to the contrary, his demurrer ought to be disposed of without waiting for the trial of the action as against the other defendants.

The statement of claim is not clearly expressed, but it may be paraphrased as follows: The plaintiff applied to the defendant Veitch to assist him in procuring a wholesale liquor license in the town of Transcona. Veitch represented that he was able to procure such a license for the plaintiff and agreed to do so for a payment of $5,000 or half the profits to be made in the business. The plaintiff agreed to Veitch's terms, provided the license granted was the only one of the kind issued in Transcona. The plaintiff, at Veitch's suggestion, made his application in the name of the Transcona Wine and Spirit Co. He pro-

cured the signature of the necessary householders, and paid the necessary disbursements to or through the defendant Fisher, who was employed as solicitor for both Veitch and the plaintiff. Subsequently a license was granted to parties named Currie & O'Donohue.

It is then alleged that the defendant Lennox, acting on behalf of Veitch, told the plaintiff that a license had been granted to him in the company name before mentioned, and asked for payment of the $5,000 promised, but that the plaintiff refused because of the license issued to Currie & O'Donohue, and that he also refused to comply with Lennox's request that he sell the license said to have been granted to him and divide the profit made on the sale with Veitch.

The statement of claim then continues:—

13. The defendant Veitch thereupon conceived the fraudulent scheme or design of depriving the plaintiff of the benefit of his said application for license, and of the said license, and to obtain the said license and all benefits therefrom for himself and his co-defendants and the said defendant Veitch and his co-defendants, other than the defendant company, conspired together for the purpose of depriving the plaintiff of the benefit of his said application for license and of the moneys paid by the plaintiff in respect thereof, and, in furtherance of the said design, the defendants Veitch, Lennox and Stott caused an application to be made for a charter under the Joint Stock Companies Act of Manitoba, for a company to carry on a wholesale liquor business under the name of "The Transcona Wine and Spirit Company," and procured the said charter, the shareholders being nominees of the said above-mentioned defendants except the said Stott, who was himself one of the incorporators.

14. The said defendants Veitch, Lennox, Fisher and Stott, with the connivance and assistance of the defendant Johnston, who is the chief license inspector for the Province of Manitoba, wrongfully procured a license to be granted to the said defendant company so incorporated by his co-individual defendants, and in procuring the said license took the benefit of the application of the plaintiff, and of the moneys procured and paid by the plaintiff to the defendant Fisher.

15. The individual defendants have since sold the stock held by them in the defendant company, or a portion thereof, or the assets of the said company, for a large sum of money, and have deprived the plaintiff of the benefit of his application for license and of the moneys paid by him in respect thereof.

16. The plaintiff demanded of the defendants payment to him of the said moneys so expended by him and also one half of any profits derived from the sale of the said license, and the said business conducted by the defendant company, but the individual defendants neglected and refused to pay the same.

18. By reason of the fraudulent conspiracy and acts of the defendants as aforesaid, the plaintiff has been prevented from obtaining the issue of the said license and has suffered great loss and damage, and has been delayed in the prosecution of his business.

And the plaintiff claims damages in the sum of ten thousand dollars.

MAN.

K. B.

1913

ARENOWSKY v. VEITCH.

Mathers, C.J.K.B.

The defendant Johnston demurs to the statement of claim on the grounds:—

(*a*) That this defendant has no power to procure a license to be granted to the above company or at all, under the provisions of the Liquor License Act of the Province of Manitoba, and,

(*b*) That no legal liability is imposed on this defendant in the discharge of his duties as license inspector for the Province of Manitoba as alleged.

It is not easy to make out what pars. 13 and 14 mean; but it seems to me that par. 13 amounts to this: That the defendants other than the company (which, of course, includes the defendant Johnston), conspired together for the purpose of depriving the plaintiff of the benefit of his application for license and the moneys paid by the plaintiff in respect thereof. That, I think, is as far as it affects the defendant Johnston. It goes on to allege that, in furtherance of the design, Veitch, Lennox and Stott procured a charter for a company, Veitch and Lennox being represented as shareholders by nominees, and the defendant Stott being himself one of the incorporators.

The effect of par. 14 is that Veitch, Lennox, Fisher and Stott wrongfully procured a license to be granted to this company, and thereby took the benefit of the plaintiff's application, and of the moneys paid by the plaintiff, and that they did this with the connivance and assistance of the defendant Johnston.

Pars. 15 and 16, I think, may be left out of consideration. Par. 15 alleges a sale of the stock in the company by the individual defendants, but there being no allegation that Johnston owned any of the stock in the company, that paragraph cannot affect him. The same may be said of par. 16. There is no allegation that any moneys were paid to Johnston, and therefore a demand upon him for repayment would constitute no cause of action against him.

Par. 18, however, includes the defendant Johnston. Par. 13, as I have already pointed out, alleged a conspiracy by Johnston with the other defendants, to do an unlawful act. Par. 14 alleges the performance of this unlawful purpose, with the connivance and assistance of Johnston, and par. 18 says that, by reason of the fraudulent conspiracy and acts, the plaintiff has suffered damage. There are no accessories in tort, so that if an unlawful act was performed by Veitch, Lennox, Fisher and Stott, and Johnston assisted in that unlawful act, he would be equally liable with them as a principal.

Whether or not Johnston did conspire with the other defendants as alleged, and whether or not he assisted them in carrying out the conspiracy to the damage of the plaintiff, are questions of fact, not questions of law. For the purposes of this application, I must assume that these allegations are true.

The special grounds of demurrer stated in Johnston's defence do not appear to me to be raised in the pleadings at all. It is not alleged that Johnston procured a license to be granted to the company, but that he assisted his co-individual defendants in procuring it.

As to the second ground, it will probably be conceded that, for acts done in the proper discharge of his public duties, he incurs no liability; but the allegation is of acts and conduct entirely beyond the scope of such duties. For unlawful acts so performed he enjoys no greater immunity than any other citizen. The application must be refused with costs in the cause to the plaintiff in any event.

Motion refused.

CANADIAN NORTHERN QUEBEC R. CO. v. NAUD.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin, and Brodeur, JJ. April 7, 1913.

1. ARBITRATION (§ I—3)—EXTENSION OF TIME—AGREEMENT TO EXTEND.

A formal extension in writing during the limitation period, of the time for the arbitrators to make their award upon an arbitration in expropriation proceedings under the Railway Act, R.S.C. 1906, ch. 37, is not a *sine quâ non* to their jurisdiction ;there may be circumstances which debar either party from setting up the lack of a formal extension, such as an arrangement made for the postponement of the proceedings for the convenience of counsel, which was equivalent to a consent to the making of a formal extension by the arbitrators either before or after the time fixed at the first meeting pursuant to sec. 204 of the Railway Act, R.S.C. 1906, ch. 37.

[*Canadian Northern* v. *Naud*, 42 Que. S.C. 121, and 22 Que. K.B. 221, affirmed; see MacMurchy & Denison's Railway Law, 2nd ed., 260; and *Montreal Park, etc., R. Co.* v. *Wynness*, 16 Que. S.C. 105.]

Statement

APPEAL from the judgment of the Court of King's Bench, appeal side, *Canadian Northern* v. *Naud*, 22 Que. K.B. 221, by which an appeal from the judgment of Lemieux, J., in the Superior Court, District of Quebec, *sub nom. Canadian Northern* v. *Nault*, 42 Que. S.C. 121, was dismissed with costs and the award of arbitrators under the Railway Act, R.S.C. 1906, ch. 37, stood confirmed.

The appeal was dismissed.

On an arbitration respecting compensation to be paid for lands taken under the Railway Act, R.S.C. 1906, ch. 37, the arbitrators had fixed a day for their award according to the provisions of sec. 204. After some proceedings before them it was arranged, for the convenience of counsel for the parties, that further proceedings should be suspended until the return of counsel who were obliged to be present at the sittings of the Judicial Committee of the Privy Council and nothing further was done until

CAN.
S. C.
1913
CANADIAN NORTHERN QUEBEC R. CO. v. NAUD.
Statement

after the return of counsel from abroad at a date later than the time so fixed for the award. The arbitrators had not prolonged the time for making the award, but, upon reassembling after the day originally fixed had passed, they fixed a later date for that purpose. The company's arbitrator and counsel then refused to take part in any subsequent proceedings and the two remaining arbitrators continued the hearing and made an award in favour of the claimant greater than that offered by the company for the lands expropriated. The action was brought by the company to have the award set aside and for a declaration that the sum offered should be the compensation payable for the lands. The judgments appealed from and now affirmed dismissed the action and held the award to be valid.

G. G. Stuart, K.C., for the appellants.
Eusèbe Belleau, K.C., for the respondent.

Sir Charles Fitzpatrick, C.J. (dissenting)

SIR CHARLES FITZPATRICK, C.J. (dissenting):—I have read Sir Louis Davies's judgment, and were it possible for me to accept his construction of the arrangement made between counsel and the arbitrators at the adjournment of the proceedings on January 18, I would have no hesitation in adopting his conclusion. Unfortunately, the evidence of what occurred as given by Mr. Belleau, the respondent's counsel and Mr. Mayrand, his arbitrator, convinces me that it was then agreed there would be an adjournment until January 26, on which latter date the arbitrators would again meet, and if counsel were not then able to be present, a further postponement would be made until their return from England. The minute of the proceedings of January 18 is very clear and explicit; it reads: "L'enquête est ajournée au 26 janvier courant à 2 heures p.m."

It is significant that Mr. Belleau drew the attention of the arbitrators to the statute and insisted that the delay to make the award should be extended, if there was to be a postponement beyond February 15, the date fixed for that purpose at their first meeting, as required by the express terms of sec. 204 of the Railway Act. This was clear notice to the arbitrators and if, at the time they did not intend to meet on January 26 as the appellants contend, it is inconceivable that they did not then provide for the important contingency indicated by respondent's counsel. The award was not made within the delay and the time was not enlarged. There was no meeting on January 26, nor on any day until after the delay fixed by the arbitrators at their first meeting on or before which their award would be made, and the award made at a subsequent date should be set aside.

I would allow the appeal with costs.

DAVIES, J.:—The ground mainly relied upon by the appellants for setting aside the award was that the arbitrators in extending the time for making the award to a further day than that which they had first fixed upon, had not strictly complied with sec. 204 of the Railway Act of Canada, but had made such extension after the time first fixed had elapsed.

It appears to me that the result of this appeal must depend upon the appreciation given to the understanding and agreement made and reached by all the parties and their counsel on January 18, as to the postponement of the arbitration proceedings.

After the arbitrators were appointed they met, and, on January 18, after having heard some evidence, counsel intimated that they desired to have the proceedings adjourned so as to enable them to attend the Judicial Committee of the Privy Council in London, and suggested that an adjournment should take place till January 26, on the understanding that if they were then unable to be present the proceedings should be prolonged until counsel's return from England, and should then be resumed. The 15th February had been originally fixed by the arbitrators as the date, under the section of the statute, for making their award, and, when the proceedings were adjourned at counsel's request as above stated, no definite day was named by the arbitrators extending the time from February 15. On the return of counsel from England, however, a majority of the arbitrators met and fixed June 15 as the time for making the award. The company's arbitrator and counsel refused to recognize or attend any of these later arbitration proceedings on the ground that, failing to make an extension of the time for making their award before February 15, the arbitrators had ceased to have any jurisdiction, and all further proceedings were *ultra vires*.

Whether in making the extension at the time they did the arbitrators acted within their powers or not, depends, in my opinion, upon the construction of the consent agreement respecting the postponement. As I construe that agreement, it provided for a prolongation of the proceedings and their resumption after counsel's return to Quebec. The fact that the arbitrators failed to make an entry before February 15, of an extension of time for the making of their award either at the adjournment on the 18th or on the 26th January, does not vitiate or render null and void all the further proceedings. Such extension was made by the majority of the arbitrators who met after counsel's return when they fixed the 15th June. The company's arbitrator had full notice of all these meetings.

I do not think, under the circumstances and the agreement and understanding reached, that it was too late to name and

CAN.
S. C.
1913
CANADIAN NORTHERN QUEBEC R. CO. v. NAUD.
Davies, J.

fix such a date when the return of counsel enabled the arbitrators to resume the proceedings. Their action in so naming the day was an action which must be held to have been made with the consent of the parties; and I do not think the technical point relied upon by the appellants, that such prolongation must necessarily be made before the lapse of the day originally fixed for making the award should, under such circumstances as existed in this case, be given effect to, or that it is open to the railway company, after a delay obtained at their own request, to ask that effect be given to such an objection.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The first question raised herein is upon the construction of sec. 204 of the Railway Act, which is as follows:—

> 204. A majority of the arbitrators, at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made, and if the same is not made on or before such day, or some other day to which the time for making it has, either by the consent of the parties, or by resolution of the arbitrators, or by the sole arbitrator, been prolonged, then the sum offered by the company, as aforesaid, shall be the compensation to be paid by the company.

The arbitrators had proceeded at some considerable length with their inquiry after having, as required by this section, named February 15 then next as the date on or before which their award should be made. On January 18, it seems they had a meeting at which it was intimated counsel on both sides had business that would call them before the Privy Council and they might have to leave for England on or before January 26, then named as an otherwise convenient day for further proceeding with the continuation of the reference.

There is no dispute about the fact that it was agreed as a matter of courtesy to counsel that the continuation of the reference should be enlarged if counsel were called away on or before January 26, until such time as they should have returned from England. The counsel left Quebec for England, as anticipated, either on January 26 or before. When the arbitrators assembled pursuant to adjournment at the place of sitting on January 26, no one met them, and they found or assumed as fact that counsel had gone to England. The arbitrators disagree slightly as to what exactly was done or said on that day, or 18th of same month, relative to need of a formal record being made of the enlargement till after the return of counsel and to the fixing another date for the making of the award.

Counsel for the appellant now argues, however, that all his side agreed to was that the board were to meet formally, fix a new date limiting the time for making the award, and only then postpone or adjourn, and that to a fixed day.

There is no such record. There is not a scrape of a pen to indicate that the consent of appellants was expressly made so conditional, and so peculiarly conditional, and the learned trial Judge has made a finding of fact, undisturbed in appeal, which leaves no room for such conditional form of consent having any operation. There is not a shadow of doubt that all of them and appellant had agreed that the matter of further proceeding with the reference should stand over and await the return of counsel from England. That they could not return within the time originally fixed for making the award must have been well known to all concerned. This consent by appellants seems to me, in any view one takes consistently with the findings of fact, clearly to delegate to the arbitrators the naming of a new day (which was ultimately done by the arbitrators) and to imply that it mattered not when this was done if done within a reasonable time. The reasonableness of the time fixed, under the circumstances, is not questioned. The reasonable course of awaiting their return before fixing a new date which, perchance, might prove too early or too remote does not seem open to question. The date was fixed as soon as the counsel had returned from England and the proceedings were then renewed, but the arbitrator named by the appellant, no doubt acting on its suggestion, refused to act longer.

Such a course of dealing seems to me a wretched piece of bad faith which deserved the rebuke the Courts below have given it. The action of the arbitrator was within what was manifestly the purpose of the appellant's own consent and the respondent is not to be penalized because they chose to act within that, but failed to give it the consecration of forms they might have adopted and acted upon without such consent.

Then, in the next place, appellant contends that in dealing with the matters submitted, the majority of the arbitrators exceeded the terms of the submission, by allowing for items they had no power to make any allowance for. The submission was intended to cover the estimating of compensation to be made for taking real estate of which a part was taken from the respondent's mill-dam. Clearly that involved or might involve just such items as allowances were made for and now complained of.

But appellant's counsel, it seems, proposed some questions to a witness which the learned trial Judge ruled were not admissible and now claims that as a result the trial ought to be set aside. The learned trial Judge when making his ruling pointed out to counsel that it would not be possible to pass satisfactorily upon the question relative to excess of jurisdiction without knowing what the evidence was which had been put before the board. I think the learned Judge was right in

CAN.
S. C.
1913
CANADIAN NORTHERN QUEBEC R. CO. v. NAUD.
Idington, J.

this view whether technically or not his ruling was correct. The ruling itself did not cause any miscarriage of justice. As counsel refused to place before the Court the evidence by means of which alone the limits of the inquiry could be properly understood, I think he cannot now complain.

Even now, as he declines to tell us just what in substance had been so refused to the learned Judge, and why it should not have been given, or wherein exactly he does complain, save in regard to the ruling, I think the inferences relative to its substantial nature must be against his contention.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I concur in dismissing this appeal. The respondent appeared at the first meeting of the arbitrators and was ready to proceed. To meet the convenience of the railway company there was an adjournment, and it was distinctly understood that in consequence of the adjournment it might not be possible for the arbitration to proceed until the return of counsel from Europe; and that if that proved to be so the arbitration was to go on, on a date to be fixed by the arbitrators.

It was, I think, clearly implied that the railway company would concur in any steps that might be necessary to enable that to be done. It is true it was supposed that the time would be prolonged by the action of the arbitrators themselves; but it was never in the contemplation of anybody that the respondent should lose his status by an oversight of the arbitrators The railway company ought not to be permitted in violation of the spirit of the arrangement entered into at their behest and for the purpose of conferring a benefit upon them to raise the purely technical and altogether conscienceless objection which is now put forward.

As to the other point I can see no ground whatever for thinking that the arbitrators have considered elements of compensation that ought not to have been considered.

Anglin, J. (dissenting)

ANGLIN, J. (dissenting):—I have very reluctantly come to the conclusion that the appeal should be allowed.

While I think the evidence open to the construction that it was understood between counsel on January 18, that, in the event of their being unable to proceed on January 26, the arbitration proceedings should stand enlarged until their return from their prospective trip to England, and that there should be a corresponding extension of the time for making the award, it leaves no room for doubt that it was intended and agreed that this extension should be effected by the arbitrators at a meeting to be held on January 26. It was never agreed or intended that the extension of the time for making the award

required by sec. 204 of the Railway Act should be effected by the consent of counsel *proprio vigore*. February 15 was originally fixed by the arbitrators as the date on or before which their award should be made. There was no extension of that period before it expired, and upon its expiry the arbitrators were *functi* and they were thereafter incapable of extending the time for, or of making a valid award.

But, assuming in favour of the respondent that the understanding between counsel on January 18, and what occurred on January 25, when they met and expressed to one another their purpose not to appear *pro formâ* before the arbitrators on the following day, should be taken as implying and evidencing a consent that the time for the making of the award should be extended until after their return from England, that would not, in my opinion, suffice to keep the arbitration alive beyond February 15. [The learned Judge here quoted sec. 204 of the Railway Act.]

The clear purpose of this section appears to be to require that from the initiation of the proceedings of the arbitrators there shall always be a definite and certain date, original or extended, on or before which the award shall be made, and upon the expiry of which, without an award being made, the arbitration shall come to an end, and the statutory consequences shall ensue. The requirement that the date to be fixed originally shall be a definite and ascertained day is, I think, equally applicable and for the same reason to any date to which the time may be extended. The statute, in my opinion, does not contemplate an extension for an indefinite period or to a date which is not certain. Assuming that counsel and arbitrators agreed that the time for making the award should be extended until after the return of counsel from England and to a day to be then fixed, that, in my opinion, would not be such an extension as the statute contemplates or authorizes and the arbitration came to an end on February 15, the only date ever fixed as the limit of time for the making of the award.

I, therefore, find myself driven to the conclusion that the alleged award of June 1, 1911, cannot stand. I feel, however, that I should not part with this case without animadverting upon the conduct of the plaintiffs in pressing this action as most dishonourable and reprehensible. It is sharp practice of a kind which, fortunately, we rarely encounter. But, unfortunately, upon the view which I hold as to the purpose and effect of section 204 of the statute we are in this instance powerless to prevent its success.

BRODEUR, J.:—In this action we have to construe sec. 204 of the Railway Act (Can.). The appellant and the respondent

Brodeur, J.

CAN.
S. C.
1913
CANADIAN NORTHERN QUEBEC R. CO. v. NAUD.
Brodeur, J.

proceeded before the arbitrators for a hearing to determine what compensation ought to be paid to the defendant for the expropriation of his land. The hearing had almost reached its close, when, on January 18, 1911, the railway company applied for an adjournment of the hearing until the 26th of the same month to enable it to produce certain additional evidence, which it expected to produce by that date. Counsel for the defendant, respondent, objected to the adjournment, and, among other grounds, stated that he was about to leave for England with counsel for the appellant to argue a case before the Privy Council. It was thereupon agreed that if the parties could not arrange to try the case on January 26, the hearing might, at that time, be further adjourned until the return of counsel from their trip to England when a still later date could be fixed for the hearing.

The arbitrators had at the first meeting after their appointment fixed February 15 as the date on or before which the award should be made, and on that account, when the question of adjourning the hearing was being discussed, the counsel for the respondent impressed upon the arbitrators not to overlook the fact that February 15 had been fixed for the award even if the hearing was not to proceed on January 26. On January 26, the arbitrators met at the court-house, where the hearing was to be held, and as counsel were at that time on their way or about to leave for England, the arbitrators did not formally convene. It appears, moreover, there was no entry of their meeting recorded in the arbitration minutes.

After the return of counsel, in the month of May following, two of the arbitrators (the arbitrator representing the company refusing to proceed) gave notice to the parties that the hearing was being resumed and duly entered same in their official records. The appellant company, however, refused to take part in the arbitration, and the two arbitrators made their award.

In this action, the appellant seeks to set aside the award so made, on the ground that the arbitrators had no longer any jurisdiction to proceed, and the appellant asks for a declaration that the defendant, respondent, be compelled to accept the sum offered by the company, with its expropriation notice. Sec. 204 of the Railway Act has already been the occasion of much litigation, and in each case it has been decided by the Courts that this section should not be construed so harshly as to defeat the clear intention of the parties. For instance, in *Shannon* v. *Montreal Park and Island R. Co.*, 28 Can. S.C.R. 374, Taschereau, J., says:—

> We are bound to construe the sections in question so as to ensure the attainment of that object, and the carrying out of their provisions to their

true intent, meaning and spirit. The company would have us read this sec. 156 textually, and gain an advantage over the expropriated owner.

The appellate Court decided in *Ontario and Quebec R. Co.* v. *La Fabrique de Sainte-Anne*, 7 Montreal L.R. 110, that consent to adjourn may be presumed from the facts and circumstances of the case. That case is very similar to the case at bar. The parties had proceeded to the hearing and kept adjourning from time to time, and by inadvertence had not formally fixed a date on or before which the award should be made, so that when the hearing did take place and the cause was about to be decided, the date originally fixed by the arbitrators for the award had gone by. The Court decided that, under the circumstances, there was an implied consent of the parties to prolong the time for making the award, and accordingly the railway company was, in that case, estopped from denying such consent.

It is clear that in the present case the company did consent to an adjournment until the return from England of its counsel and that of the respondent.

The minutes of the arbitration proceeding were, moreover, entered from time to time by the company's own arbitrator, and if there was any omission on his part to duly enter the adjournments and the consent of the parties thereto, the defendant, respondent, should certainly not be made to suffer by it.

I think that it would be a grave miscarriage of justice, under the circumstances, to deprive the respondent of the compensation awarded to him by the majority of the arbitrators, and I am of opinion that the judgment of the Quebec appellate Court, now appealed from, is well founded. For these reasons, the present appeal should be dismissed with costs.

Appeal dismissed.

CARLIN v. RAILWAY PASSENGERS ASSURANCE CO.

British Columbia Supreme Court. Trial before Hunter, C.J. October 13, 1913.

1. INSURANCE (§ I D—21)—AGENTS—ALTERATION OF APPLICATION BLANK BY AGENT—LIMITED AUTHORITY—RESPONSIBILITY FOR ERROR.

Where the written application for insurance is altered by the insurance agent after it is signed and authenticated by the applicant, and, in so doing, the agent fills in the answer to one of the questions submitted to the applicant according to the agent's erroneous view of the appropriate answer but not in conformity with the agent's personal knowledge of the facts (*e.g.*, negativing the use of explosives, although blasting was essential to road-building operations in the locality), the agent is to be considered as acting for the company in that respect, and not for the assured.

B. C.

S. C.
1913

CARLIN
v.
RAILWAY PASSENGERS ASSURANCE CO.

2. INSURANCE (§ VIII—436)—EMPLOYER'S LIABILITY—ERROR IN APPLICATION BLANK.

The applicant for an employer's liability insurance does not, by leaving unanswered one of the questions in the application blank and telling the agent to fill it up in accordance with the facts in regard thereto, then stated by him to such agent, and of which moreover the agent had personal knowledge, become responsible for the erroneous answer so as to disentitle him to recover on the policy.

TRIAL of an action upon an employer's liability policy. Judgment was given for the plaintiff.

Statement

The plaintiff applied to the defendants' agent for insurance against his liability as employer: the plaintiff was engaged in wagon road-making, in the course of which it was necessary to use a certain amount of explosives: the defendants' agent was aware that the use of explosives was necessary in road construction: the plaintiff filled up and signed an application form, leaving a blank against the question which asked, "Are machinery, boilers or explosives to be used": the plaintiff's reason for not answering this question was that there was no intention of using machinery or boilers, but there was an intention to use explosives; the plaintiff explained this circumstance to the defendants' agent, asking the agent to answer this question correctly, who, however, for some unexplained reason wrote the word "no" against the above question. The policy contained the usual clause making the application the basis of the contract and declaring the contract void if there were any material omission or any misrepresentation in the application. An accident happened owing to the use of explosives, and the defendant company refused to indemnify the plaintiff against his liability to make compensation.

The action was tried at Victoria, before the Chief Justice without a jury.

Argument

W. J. Taylor, K.C., and *Pooley*, for the defendant, contended that by leaving a blank in the form signed by himself, the plaintiff had made the agent his own agent to fill up the blank. They cited *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516; *Imperial Bank of Canada* v. *Royal Insurance Co.*, 12 O.L.R. 519; *Prov. Savings Life Assurance Society of New York* v. *Mowat*, 32 Can. S.C.R. 147; *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K.B. 431.

Mayers, for the plaintiff:—The company is bound by the acts, representations and knowledge of its agent, acting within the scope of his authority: *Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534; *Holdsworth* v. *Lancashire and Yorkshire Insurance Co.*, 23 Times L.R. 521; *Guardian Assurance Co.* v. *Connely*, 20 Can. S.C.R. 208; *Graham* v. *Ontario Mutual Insurance Co.*, 14 O.R. 358. The case of *Biggar* v. *Rock Life*, [1902] 1 K.B. 516, cited for the defence, is

an instance of the exception to the general rule, viz., that the principal is not bound where the agent is acting in fraud of the principal.

HUNTER, C.J.B.C.:—I am much indebted to counsel on both sides for the exhaustive manner in which they have brought to my attention the law on this subject. I have no doubt what should be the decision of the Court in this case. As to the essential fact in this case, there does not appear to be any serious dispute. Shortly put, it seems to be that Mr. Carlin, through the medium of Mr. Burdick, made application to the defendant company for an indemnity policy in connection with this undertaking on the Malahat road. I cannot see there has been any misrepresentation, either active or passive on behalf of Mr. Carlin. He had signed a blank form and the answer to the material question—at all events, the answer to the question complained of was not filled in by him, or by his instructions, but by the agent of the company.

It appears, there is no doubt, the intention of Carlin to use explosives was communicated to Currie, the agent of the company. Currie represented to Burdick, after he was informed, that he "would fix it." There is also the clear fact that Currie had knowledge that, in this particular undertaking, explosives were to be used. Currie also knew perfectly well, on the construction of any road on this island, explosives would have to be used; he admits he had some knowledge of the locality, he knew perfectly well explosives, in the necessity of the case, would have to be used in that district.

Now, the cases cited by Mr. Taylor undeniably lay down the principle, where a man authenticates a document after the answers have been filled in by himself or another person, whether that other person is the agent of the company or not, he cannot say afterwards he did not authorize it. In other words, if he signed a document after it had been filled in either by himself, or another person by his consent, he is bound in exactly the same way as if filled up by himself.

I don't see how that principle has any application to this case we have here. The document is altered by the agent of the company after it is signed and authenticated by the applicant for insurance. If the agent having a personal knowledge of the facts—as I find in this case—refuses to fill in that answer, but filled in the answer according to his judgment, he is not the agent of the party applying for the insurance, he is the agent for the purpose of that transaction of the company. If that were not so, it would be open always to a company to repudiate a policy when they ascertained some statement had been made, which did not exactly square with the facts, by or with the consent of the agent.

B. C.

S. C. 1913

CARLIN v. RAILWAY PASSENGERS ASSURANCE CO.

I think an applicant for insurance is entitled to consider an agent is not a rogue, and will not insert something on the policy which is not authorized. If the agent with or without previous knowledge of the circumstances refuses to fill in the policy, that is a matter to be fought out between the agent and the company, and not between the company and the assured.

There is no dispute about the amount involved. I think the judgment ought to go to the plaintiff.

Judgment for plaintiff.

CAN.

EX. C. 1913

VICTORIA MACHINERY DEPOT CO. v. "THE CANADA" and "THE TRIUMPH."

Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. October 28, 1913.

1. ADMIRALTY (§ I—2)—JURISDICTION OF SUBJECT-MATTER—ADDITIONAL EQUIPMENT TO VESSEL—WHEN CONSIDERED "NECESSARIES."

Making alterations and additions to the structure and equipment of a fishing vessel in order to change her from a trawler so as to permit fishing from small boats, is to be regarded as "necessaries" for the cost of which a judgment may be rendered against the vessel in admiralty proceedings.

[*Williams* v. *"The Flora"* (1897), 6 Can. Ex. 137; and *"The Riga,"* 1 Asp. 246, L.R. 3 A. & E. 516, specially referred to.]

Statement

ACTION *in rem* to recover against a fishing vessel for alterations and additions.

Judgment was given for the plaintiff.

Bodwell, K.C., and *E. B. Ross*, for plaintiffs.

Maclean, K.C., and *M. B. Jackson*, for defendants.

Martin, L.J.

MARTIN, L.J.:—At the hearing, judgment was given against "The Triumph" for $906.25, for what could only, according to the evidence, be regarded as necessaries, but the claim for necessaries against "The Canada" was reserved for further consideration so far as it relates to the work done and materials furnished in the spring of 1913; no objection can be taken to that part of the claim which relates to charges for repairing and making her seaworthy in October, 1912, after her arrival in Victoria *via* Cape Horn. She was brought here to engage in fishing as a trawler, but it was decided, after some experience in that work to change the method of fishing, and fit her out to fish with boats—dories. This necessitated certain alterations and additions to bunks for increased accommodation for her crew, and otherwise, and it is objected that this work, being to some considerable extent, at least, of a structural nature, cannot properly be classed as necessaries.

In the judgment I delivered on the interlocutory motion herein, on September 24 last, I cited the principal authorities

on this question, and I now refer to them, adding thereto the case in this Court of *Williams* v. *"The Flora"* (1897), 6 Can Ex. 137, and noting with approval the statement in Roscoe's Admiralty Practice, 3rd ed. (1903), p. 265, that the term necessaries,

> though primarily meaning indispensable repairs . . . has now, it is clear, a wider signification, and has been and is being gradually amplified by modern requirements.

The position of the ship at bar is that her owners having engaged her in a particular service (fishing) in a particular way, found it desirable to continue her in the same service in another way, and to do so it became necessary to make certain alterations in her structure and equipment. Now, the general rule is that which was established in *"The Riga"* (1872), 1 Asp. 246, L.R. 3 A. & E. 516 (one of the cases above referred to) as follows, p. 522:—

> I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term "necessaries," as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable.

I am unable to see why this rule does not apply to what was done here. Surely if a ship carrying a cargo of grain came to this port and got a return charter to carry long sticks of timber which necessitated the cutting of new ports to get them into her hold, such alterations, structural though they would strictly be, could only be said to be necessaries. And here it was necessary, for the effective business of fishing, to turn this trawler into a dory fisher, just as it was to turn the grain ship into a lumber carrier.

In the case of *"The Flora,"* 6 Can. Ex. 137, above cited, a passenger steamer, her owners were without means to fit her out or operate her, so they entered into a contract with a railway company which agreed to advance the money to fit her out to carry freight and passengers for the season of 1897, and the sum of "$2,000 was expended in painting, repairing, furnishing and outfitting the steamer," and it was held, on the authority of *"The Riga,"* that what was done came within the definition of "necessaries."

There is no substantial distinction between that case and this, and I see no obstacle to prevent judgment being entered in favour of the plaintiff against "The Canada" for the full amount of the claim, $3,217.37, all of which I hold to be necessaries in the circumstances.

Judgment for plaintiff.

ALTA.

S. C.

1913

TWYFORD v. BISHOPRIC.

Alberta Supreme Court. Trial before Walsh, J. October 16, 1913.

1. LIMITATION OF ACTIONS (§ II E—55)—WHEN STATUTE RUNS—FRAUD.

An action for an alleged fraud, where there was no active concealment, is barred by the Statute of Limitations unless commenced within six years from the time the plaintiff might have discovered the fraud by exercising reasonable diligence, or became aware of facts sufficient to put him on inquiry.

Statement

ACTION to recover for fraudulently inducing the plaintiff to purchase shares of stock.

The action was dismissed because barred by the Statute of Limitations.

E. B. Edwards, K.C., and *C. A. Grant*, K.C., for plaintiffs.

C. C. McCaul, K.C., for Bishopric and defendant company.

H. H. Parlee, K.C., for Powell and Grierson.

Walsh, J.

WALSH, J.:—I find that the plaintiffs subscribed for their shares in the capital stock of the company on the distinct understanding and agreement that the individual defendants and Dr. Braithwaite would pay for theirs by transferring to the company the assets of the syndicate. I do not think that there ever was any foundation in fact for the suggestion that these defendants and Braithwaite were to pay cash for their shares. Even if the plaintiffs did not understand this arrangement from the start, as I find that they did, the plaintiff Hugh Twyford knew it and assented to it on January 23, 1905, for he seconded the resolution passed at the meeting of that date, which forms a part of ex. 12, and which released these defendants and Braithwaite from their liability in respect of their shares in consideration of their having sold and assigned to the company property of an equivalent value. He knew why the need for this resolution arose, for the reasons for it are given in the memo. of the company's solicitor which precedes it, and this, I think, he read for the alterations and interlineations in it were made by him. I have no doubt but that this, as well as all other material information respecting the company's affairs which came to his notice, he communicated to his co-plaintiff. He, perhaps, was not her agent, but one cannot read all of their evidence without realizing that she was, as was but natural, relying upon him to look after her interests, and that he kept her in as close touch as he himself was, with the company's proceedings. In short, what he knew, she knew.

I find that the plaintiffs were induced to subscribe for these shares by the defendants Bishopric and Powell on the strength of certain representations made by them. The defendant Grierson made no representation of any kind to either of the plain-

tiffs, but he knew that his then partners were endeavouring to secure additional capital for their enterprise. I have had some difficulty in deciding just what these representations were. There was, no doubt, a great deal of talk of that high-sounding character as to the prospects of the company which glib-tongued promoters always indulge in, and to which the term "fraudulent" can not properly be applied. But there were other statements than these, statements dealing with the existing financial condition of the syndicate, and it is with respect to these that my difficulty arises. I have read over, more than once, the notes of the evidence given in June, which have been transcribed, the exhibits on file, and my notes of the evidence given at the October sitting, the salient features of which are still fresh in my memory, and I have come to a conclusion with respect to these representations which I think is the proper one from all of the evidence. I find that Bishopric and Powell represented that the value of the assets to be transferred to the company in accordance with the arrangement above set out was $16,000 over and above the liabilities of the syndicate—that the assets referred to were the fixed permanent assets as distinguished from the liquid assets of the syndicate, by which I mean the mill, land, machinery and all other property except the stock of grain and manufactured products of the mill, and that the liabilities that were spoken of were liabilities which, in a sense, attached to these assets, as distinguished from those in connection with the grain account. There was a heavy liability to the bank for grain, something in the neighbourhood of $20,000, but I am satisfied that there was, or that the defendants had reason to believe, and did believe, that there was stock on hand, manufactured and unmanufactured, of a value sufficient to meet this debt. I do not credit Hamilton's evidence as to the value of this stock. Speaking generally, I do not give much weight to his evidence. He spoke with a manifest animus against the defendants, and in the absence of the books upon which he worked now nearly nine years ago. That either his work was inaccurate or the books unreliable is evidenced by the glaring mistake in shewing the Hudson's Bay Company as a creditor of this company for an amount exceeding $5,000, when, as a matter of fact, there was no liability at all of this company to it. I think the evidence for the defence more reliable in this respect than his, despite the many contradictions, particularly as to the amounts which occur throughout the evidence of both Bishopric and Powell. It does not seem reasonable that the bank would have made so large advances on grain account unless there was stock on hand to represent this liability. I think that in the discussions which took place, Bishopric and Powell had not in mind either the liquid assets of the syndicate in the shape of

ALTA.

S. C.

1913

TWYFORD v. BISHOPRIC.

Walsh, J.

this stock or the liability to the bank in respect of it, but that they regarded the indebtedness to the bank as something which would be taken care of by the sale of the stock. I think that $16,000 was a fair and reasonable value to place upon all of the permanent assets of the syndicate in March, 1903, but I find there was a liability of the syndicate in respect of these assets at that time of $5,163.51, and to that extent the representations of these defendants were untrue. The syndicate had two accounts with the Union Bank, a construction account and a current account. Each of the plaintiffs gave a note for $4,000 for the amount of his and her subscription for these shares and these notes were discounted on April 8, 1903, the proceeds of the discounts going to the credit of the construction account, which had been closed in the ledger on the 27th of February preceding. As a result of these discounts $7,800 went to the credit of the construction account on April 8, and on the same day this construction account was debited with $5,163.51, being the amount of a call loan made by the bank on construction account on November 28, 1902, and interest, and the balance of $2,636.49 was transferred to the current account and went in reduction of the syndicate's liability on current or grain account. This is the evidence of Hamilton which I credit in this respect as it is uncontradicted, and is backed up by the entries in the bank pass book, ex. 20, and is, to some extent, corroborated by Mr. Anderson. I am satisfied that this sum of $5,163.51 was a liability on construction account pure and simple, and that it should properly go in reduction of the value of the permanent assets, which, as I have said, was I think $16,000. The plaintiffs' money was to this extent used in the satisfaction of a liability of the defendants which they had represented did not exist, and this was a fraud upon them. I might add that the evidence as to the dealings of the company and the syndicate with the bank is not in a very satisfactory form. Mr. Anderson, the manager of the bank, was examined before me in June, and it was then arranged that he should put in a statement, giving the requisite information. On each of the three days of the October trial, I asked for this statement but it was not forthcoming. At the close of the trial I instructed that it should be put in, but it has not reached me. If, therefore, I have in any manner misapprehended the facts in this connection, the fault may not be entirely my own. I find, therefore, that the representation of these defendants as to the net value of these assets was untrue to the extent of this sum of $5,163.51. I think that they knew it was untrue when they made it and that they made it fraudulently. This is the only knowingly false or fraudulent representation which I can find against these defendants. I am satisfied that the syndicate was not insol-

vent when the company was formed. Hamilton says that it was, but he has not convinced me. My conclusion would be that the assets at that time exceeded its liabilities by over $10,000. The assets of the syndicate were never transferred to the company. The reason for this does not appear. I am satisfied there was no fraud in this connection. Though the legal title was not in the company it was considered by all concerned as the owner of the property. These assets were afterwards sold with, I think, the knowledge and approval of the plaintiff Hugh Twyford at any rate, and the proceeds of the sale were properly applied in reduction of the company's liability at the bank.

I find that the plaintiff Hugh Twyford paid for his shares. He swears that he did, and he was not even cross-examined as to this. The evidence of Bishopric and Powell does not satisfy me that the latter paid Twyford's notes or that the notes of Twyford produced by him, ex. 35, represent his liability in respect of this transaction.

I do not propose to dispose of this action upon any of the foregoing findings of fact but upon another ground which I will now state. I have made the above findings so that if an appellate Court should reverse my judgment upon the ground upon which I rest it, these findings may be before it and it may thereby be assisted in rendering the proper judgment.

I am of the opinion that even if the plaintiffs upon the above findings are otherwise entitled to succeed, their right of action was barred by the Statute of Limitations, when this action was commenced. It was not disputed upon the argument, but that this cause of action is within sec. 3 of the Limitation Act, 1623, the only contest in this respect being as to the time when the statute began to run. The action was commenced in June, 1912. If the statute began to run when the fraudulent representation was made or when the plaintiffs acted upon it by signing the memorandum of association or making their notes, their remedy was barred in 1909, for these events occurred in 1903, and the period of limitation is six years. If it runs from the time when they either discovered or could, by the exercise of reasonable diligence, have discovered the fraud, I think their remedy was barred at the latest in 1911. They could have found out in the early part of 1905, and I think sooner than that, everything that they now know with reference to the subject-matter of their complaint. Hamilton completed his examination of the affairs of the syndicate and of the company and had his balance sheets out in February, 1905. He had then all the information that he gave in the witness box. His evidence in fact was based upon the work which he did between February, 1904, and February, 1905, and any member of the company could have learned the result of his investigations. Hugh

ALTA.
S. C.
1913
TWYFORD
v.
BISHOPRIC.
Walsh, J.

Twyford, and through him his co-plaintiff, knew that Hamilton was doing this work and they either knew or should have known that information of value to them could have been obtained from him for the asking. Their case, so far as proof of fraud is concerned, rests almost entirely in the evidence of Hamilton and this they could have had from him, if they had been diligent about it, more than seven years before they brought this action. According to their own evidence, they were suspicious of the defendants' honesty long before then, and for this reason should have been more vigilant when the opportunity to confirm or prove their suspicions was ready to their hand. There was no active concealment by the defendants of any fraud of which they had been guilty. On the contrary, they seem to have adopted, in February, 1904, the very means by which discovery of it might have been made when they employed Hamilton for the purpose of making a thorough examination of the affairs of the syndicate and the company, and disclosing that condition in his balance sheets. Mrs. Twyford's examination for discovery satisfies me that the plaintiffs knew enough of the facts in 1904, not only to put them on their inquiry, but to justify them in proceeding then, and that their failure to do so is to be attributed to other causes than ignorance of the facts and their inability to ascertain them. On this ground I must dismiss the action.

The defendants are entitled to their costs if they ask them. I would suggest to them, however, that they might very well waive their right in this respect. They shewed consideration for Mrs. Twyford by transferring to her the quarter section which I fancy is now sufficiently valuable to make good her original loss. They refrained from pressing their claim against Hugh Twyford until their remedy against him was barred by the statute. This may have been due to their consideration for him or to forgetfulness, or to the conclusion on their part that it might be as well to let a sleeping dog lie. However that may be, his liability, if it ever existed, is now fully determined. The defendants might, under the circumstances, carry their consideration a little further in the direction I have indicated.

The defendant company will only have its costs of appearance and defence, which I fix at $20. There was no good reason for the other defendants severing in their defences, and they will tax but one bill of costs.

The counterclaim against the plaintiff Hugh Twyford is dismissed with costs. The defendants at the close of the trial announced their willingness to withdraw it, but I think he is entitled to have it dismissed as the Statute of Limitations is a complete answer to it.

Action dismissed.

GOOD v. BESCOBY.

MAN.

C. A.

1913

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 21, 1913.

1. PRINCIPAL AND AGENT (§ II A—8)—AGENT'S AUTHORITY—VENDOR AND PURCHASER—SALE OF LAND.

Merely instructing an agent to give to a prospective purchaser the owner's price and terms of sale, does not authorize the former to enter into a contract for the sale of land.

[*Good* v. *Bescoby*, 10 D.L.R. 440, reversed; *Hamer* v. *Sharp*, L.R. 19 Eq. 108; *Bradley* v. *Elliott*, 10 O.L.R. 398, applied; *Prior* v. *Moore*, 3 Times L.R. 624; *Harvey* v. *Facey*, [1893] A.C. 552; *Johnston* v. *Rodgers*, 30 O.R. 150; *Bohan* v. *Galbraith*, 15 O.L.R. 37; *Ryan* v. *Stag*, 7 O.R. 266, referred to; *Roscubaum* v. *Belson*, [1900] 2 Ch. 267, distinguished.

2. PRINCIPAL AND AGENT (§ II D—25)—AGENT'S AUTHORITY—SALE OF LAND—UNAUTHORIZED CONTRACT—RATIFICATION.

A landowner may repudiate an agreement for the sale of land made by an agent empowered merely to find a purchaser, notwithstanding that, on being informed by telephone by the agent, that a sale had been effected and a cash payment received, but without being informed of the agent's execution of the agreement on his behalf, the principal's expressed approval of the sale, where, on learning that he had been misled as to the identity of the purchaser, he notified the agent of his refusal to complete the sale, since his conduct, under the circumstances, did not amount to a ratification of the agent's act.

[*Good* v. *Bescoby*, 10 D.L.R. 440, reversed.]

Statement

APPEAL by defendant from the decision of Curran, J., *Good* v. *Bescoby*, 10 D.L.R. 440.

The appeal was allowed.

J. Galloway, for defendant, appellant.

A. B. Hudson, and *A. E. Dills*, for plaintiff, respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—The question of agency in this matter is one of fact. Arundel, the agent, was called by the plaintiff as a witness, and the case really turned on his evidence. He was apparently not asked if he had authority to sell the land or to sign an agreement for sale, and in no place in the evidence did he state that he had any such authority. The defendant was called as a witness on his own behalf, and in no place was he asked, nor did he, anywhere in the evidence state, that he had or had not given Arundel authority to sell the land or to execute an agreement in writing for the sale of it.

Arundel is a solicitor, and, apparently, ordinarily acts for the defendant and his family in legal matters. The evidence shews that, at the request of Nelson, the agent of the plaintiff, the solicitor called up the defendant by telephone and asked him about the land in dispute, got his lowest price for cash and told him the contemplated purchaser was a Winnipeg man, but neither of the two, in giving their evidence as to this con-

MAN.
C. A.
1913
GOOD
v.
BESCOBY.
Howell, C.J.M.

versation, say one word about any authority given in any way to the solicitor. The next day the solicitor signed a receipt in writing, in which he assumes to act as agent for the defendant; this writing amounts to an agreement for sale of the land by the defendant to the plaintiff, and is sufficient under the Statute of Frauds.

A few hours later the solicitor called up the defendant by telephone and told him that "the deal was closed and I had got $100. He agreed to the terms." Counsel for the defendant asked the solicitor the following question: "You told him the sale had gone through?" Answer, "Yes." The defendant in his version of this conversation with the solicitor, says: "He said, "I have sold your land" and he said, "I have accepted $100 on it."

The solicitor that evening wrote a letter to the defendant enclosing his cheque for $100, the deposit, and stating:—

> I have to-day taken a deposit of $100 from W. R. Good on account of the purchase price of (setting forth the land). The total price paid being $2,400. This is in accordance with your telephone talk with me last night.

and later follows this statement:—

> I am charging your account with $10, my fee negotiating the sale as arranged with you over the telephone.

From the evidence, correspondence and subsequent acts of the parties, I would certainly come to the conclusion and find as a fact that the defendant in the first telephone conversation did authorize and employ the solicitor to do something with reference to this land. If he authorized the solicitor to *sell* the land, stating the price and terms, then, on the authority of *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, the solicitor was empowered to make a sale which is effectual in point of law, and where a writing is required, it will authorize him to sign the writing binding the vendor. In that case the authority was as follows:—

> Please sell for me my houses . . . and I agree to pay you . . . commission . . . on the purchase price accepted.

In *Hamer* v. *Sharp*, L.R. 19 Eq. 108, the authorization was as follows:—

> I request you to procure a purchaser of the following freehold property, and to insert particulars of the same in your monthly estate circular till further notice.

and it was held that the authority being merely to find a purchaser, the agent had no authority to sign a writing binding the vendor.

In *Bradley* v. *Elliott*, 11 O.L.R. 398, a real estate agent had some dealings with a lady respecting the sale of her real estate

and he wrote to her in reference to it and used the following, amongst other, expressions: "Supposing I can get $1,200 cash, would you take it?" and to this she replied, stating, amongst other things, "Now, here is my best offer, $1,275." As I read Sir John Boyd's judgment, the offer might have been accepted and perhaps bind her, but it did not give the agent authority to enter into a contract as her agent and bind her.

Apparently *Prior* v. *Moore*, 3 Times L.R. 624, decides that where an owner instructed a real estate agent to enter the property in his books for sale and fixed the lowest price, the agent is not thereby authorized to enter into a binding contract of sale.

In *Harvey* v. *Facey*, [1893] A.C. 552, the plaintiff telegraphed the defendant, the owner, as follows:—

Will you sell us Bumper Hall Pen. Telegraph lowest cash price,

to which the defendant replied,

Lowest price for Bumper Hall Pen, £900.

To this the plaintiff at once replied,

We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you.

It was held by the Court of Appeal that the defendant's first telegram was merely a quotation of price and not an offer to sell, and as he had not accepted the offer in the plaintiff's last telegram there was no contract. The same principle is followed in *Johnston* v. *Rodgers*, 30 O.R. 150. However, this last-mentioned case did not receive approval by Mr. Justice Riddell in *Bohan* v. *Galbraith*, 15 O.L.R. 37, at 41. This last-mentioned case, reported fully in 13 O.L.R. 301, shews how exactly the Court requires a clear agreement to sell on the part of the vendor to be established.

Ryan v. *Sing*, 7 O.R. 266, shews how critically Judge Ferguson searched to find authority for an agent to enter into a binding contract.

The onus is, of course, on the plaintiff to prove the agency, and it cannot be inferred simply because the agent acted.

I return to the consideration of the facts in their application to the law above referred to. Did the defendant tell the solicitor merely his price and that he wanted to sell or did he ask him to find a purchaser? Did he tell the solicitor to enter the land in his books for sale, giving the price? Did the solicitor say to the defendant, "I want to act for you in the sale of this land, what is your lowest price?" and suppose the only answer was, "My lowest price is $2,400." By none of the above supposed questions and answers alone was the solicitor authorized to sell the land so as to bind the defendant. From the

MAN.
C. A.
1913
GOOD
v.
BESCOBY.
Howell, C.J.M.

evidence given and from the acts of the parties, I cannot infer that the defendant intended to authorize the solicitor to sell this land without reference again to him when so many other inferences might be drawn and especially as the two parties to this conversation were called and neither gave evidence upon this particular point.

It has been argued that at all events the solicitor did sign the agreement as agent for the defendant, and that the latter ratified or confirmed it. The defendant was told over the telephone by the solicitor on Saturday evening at about 6 o'clock, that he had sold the land and had signed a receipt for the money and the defendant's answer was, "All right." A few minutes later the defendant called up the solicitor and asked who the purchaser was, and having been told it was the plaintiff he answered, "Oh," as if he were surprised and this ended the conversation. On Monday morning and before he had received the solicitor's letter above referred to, the defendant called up the solicitor and repudiated the sale on the ground that he did not wish to sell to the plaintiff and he told the solicitor to return the money to the plaintiff.

To establish ratification there must be clear adoptive acts or acquiescence equivalent thereto, and this must be accompanied by full knowledge of all the essential facts. The act which requires ratification in this case is the signing of the written document. The only facts known by the defendant were, that the solicitor had assumed to sell the land and had given a receipt for the purchase money. I think I am not bound to infer that, because the solicitor had assumed to sell without authority the defendant should therefore know that he, without authority, also assumed to sign a written contract. The defendant was told that the solicitor had given a receipt for the money, but it cannot be that this is notice of a written contract to sell the land. The solicitor could properly give his personal receipt for the money and yet it would be far short of a document required by the Statute of Frauds.

Having come to the conclusion that the plaintiff has not met the defence of the Statute of Frauds, it is not necessary to discuss the other branch of the defence.

The appeal is allowed with costs and the action must be dismissed with costs.

Perdue, J.A.

PERDUE, J.A.:—This appeal turns upon the questions: (1) Had Arundel authority from the defendant to sign the receipt evidencing the terms of sale? (2) If he had not this authority, was the sale afterwards ratified by the defendant so that it became binding upon him?

In regard to the first question, I think it is clear that prior

MAN.

C. A.
1913

GOOD
v.
BESCOBY.

Perdue, J.A.

to the telephone conversation with the defendant on February 23, while Nelson was in Arundel's office, the latter had received no authority whatever to sell the land. The learned trial Judge so finds, and he finds also that Arundel, up to a certain point, was the plaintiff's agent and not the agent of the defendant. The trial Judge further says:—

> I think he (Arundel) became the defendant's agent when the defendant informed him the land was for sale, and stated to him the price and terms upon which he was willing to sell.

But it appears to me that all one can safely gather from the conversation is that Arundel was authorized by the defendant to communicate to the person making the inquiry, the price and terms on which the defendant was willing to sell. I am unable to find any evidence that Arundel was authorized by the defendant to conclude a sale or to sign anything which would bind the defendant.

There being no authority to the agent to complete a sale, the validity of the sale must turn upon the question of ratification. During the conversation between Arundel and the defendant, that took place over the telephone on the 23rd, while Nelson was in Arundel's office, the defendant asked Arundel who was purchasing the land. Arundel then asked Nelson who was buying. Nelson made a reply which seems to have given Arundel the impression that some person in Winnipeg was the intending purchaser. Arundel then answered the defendant's question by saying, "It is a Winnipeg man." At this time Arundel had no knowledge that the plaintiff was the intending purchaser, and he did not until the following day become aware of the fact that Nelson was acting for Good and that Good was the person who wished to buy.

No further communication occurred between the defendant and Arundel until after the latter had closed the sale to Good, received the deposit and signed the memorandum as agent for the defendant. This took place on February 24. On the evening of that day Arundel called up the defendant on the telephone and informed him that the sale had gone through. Two conversations took place between these two men on the evening of the 24th, there being only a short interval between the two. They differ as to what was said in these two conversations, but, as the trial Judge appears to have taken Arundel's statement as to what passed, I shall assume that it correctly reported what was said. Arundel says that the defendant approved of the sale and was satisfied with the terms. The name of the purchaser was not mentioned at this conversation. A few minutes afterwards, the defendant called up Arundel again and asked the name of the purchaser. He was then informed for the first time that it was the plaintiff Good. Good lives near

MAN.
C. A.
1913
GOOD
v.
BESCOBY.
Perdue, J.A.

Stonewall, close to the land in question, and owns the adjoining farm. According to Arundel, when the defendant heard the name of the purchaser he said, "Oh," in a rather peculiar way, as if surprised. That was the only remark he made, and nothing further occurred at that conversation.

On the evening of February 24, Arundel wrote to the defendant reporting the sale and enclosing a cheque for the deposit received from the plaintiff. This letter was posted some time in the evening of the 24th, which was a Saturday. On Monday, at about half-past seven o'clock in the morning, and before he had received the letter, the defendant telephoned to Arundel repudiating the sale and saying he would not sell to a Stonewall man. Nothing had been done by the plaintiff on the faith of the alleged contract up to that time, except the payment of the deposit.

The plaintiff's case must rest wholly upon the alleged ratification by the defendant. There is no doubt that the defendant did at the first conversation with Arundel on the 24th, assent to the sale as reported to him by Arundel. This assent was given with the information furnished to him by Arundel on the previous day still fresh in his mind. Part of this was that the sale was being made to a Winnipeg man. The defendant was willing to sell the land to a Winnipeg man but was not willing to sell it to a Stonewall man. This may have been a mere whim or fancy upon his part, but there is nothing to prevent a man from choosing the purchaser or class of purchasers he will deal with or from declining to sell to a particular man or class of men.

Ratification must be founded upon a full knowledge of the facts: *La Banque Jacques Cartier* v. *City and District Bank*, 13 A.C. 111, 118; *Phosphate Lime Co.* v. *Green*, 7 L.R. C.P. 43, 57; *Marsh* v. *Joseph*, [1897] 1 Ch. 213, 247. The exception to the rule is where it is shewn that there was an intention to adopt the act at all events and under whatever circumstances, but I find no evidence of such an intention in this case.

It is argued that the defendant had all the knowledge that was material when he gave his assent to the sale as first reported to him by Arundel, and that the one thing not disclosed to him, the name or description of the purchaser, was immaterial. In support of this argument the cases of *Fellowes* v. *Gwydyr*, 1 Sim. 63, 57 Eng. Reps. 502, 1 Russ. & M. 83, 39 Eng. Reps. 32; *Nash* v. *Dicks*, 78 L.T. 445; and *Smith* v. *Wheatcroft*, 9 Ch.D. 223, were cited. The result of these and other cases bearing on that point is summed up by Sir Edward Fry in the following words:—

> The law now appears to be that where one person is deceived as to the real party with whom he is contracting, and *that deception either in-*

duces the contract or renders its terms more beneficial to the deceiving party or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him: Fry on Specific Performance, 5th ed., 107.

The same learned author, at page 108, quotes with approval, as embodying the equity principle, the following sentence from Pothier:—

> Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract.

In the present case it is quite clear that the defendant was deceived by the statement which was made to him, innocently, no doubt, by Arundel, that the purchaser was a Winnipeg man. It must further be borne in mind that the contract was not one which the defendant himself made, but it was one made for him, without previous authority, and which it is sought to force upon him as one that was ratified by him. I do not think that he can be bound by the assent he gave in the first conversation on the 24th, when the true facts had not been communicated to him. After he learned that Good was the purchaser he did nothing in the way of ratification, and within a reasonable time he repudiated the sale.

For the reasons I have given, I think the appeal should be allowed with costs and the plaintiff's action dismissed with costs.

CAMERON, J.A.:—I take Mr. Arundel's account of the transaction as the statement of facts on which the plaintiff must recover, if he is to recover at all. Mr. Arundel says he asked Bescoby what was the lowest price he would take for the property in question, and Bescoby answered that he would take $3,000 on time or $2,600 or $2,800 for cash. Mr. Arundel then pointed out that this figure was too high and that there would be no commission. There was then a discussion as to the purchaser and finally Mr. Arundel "got the price down to $2,400 net cash, no commission." Nelson (who was acting for Good) was to let Mr. Arundel know in a day or two whether the purchaser would take it on those terms. Now, there is not here or elsewhere in the evidence, anything to shew that Bescoby gave Arundel authority to sell (the burden of establishing which is on the plaintiff), with all that is therein implied. This case does not, therefore, come within *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267. Cameron, J.A.

The evidence on the point is open to this construction: that at Nelson's request, Arundel applied to Bescoby for his lowest quotation of price on the property in question, that Bescoby

MAN.

C. A.
1913

GOOD
v.
BESCOBY.

Cameron, J.A.

Haggart, J.A.
Richards, J.A.

gave it and had no intention of doing more than that. It was open to Bescoby, therefore, to accept or reject Good's proposal. He had a reasonable time within which to do this, and whether we accept Mr. Arundel's account of what took place or his own, it cannot be said that, in refusing to accept the proposed purchaser, he delayed unreasonably.

I agree with the Chief Justice that the appeal must be allowed.

RICHARDS, and HAGGART, JJ.A., concurred.

Appeal allowed.

MAN.

1913

MEMO. DECISIONS.

SNYDER v. MINNEDOSA POWER CO.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 6, 1913.

[*Snyder* v. *Minnedosa Power Co.*, 13 D.L.R. 804, affirmed.]

JUDGMENT (§ VI A—255)—*Stay of proceedings where counterclaim awaiting trial.*]—Appeal from decision of Galt, J., 13 D.L.R. 804.

F. M. Burbidge, for defendant, appellant.
J. W. E. Armstrong, for plaintiffs, respondents.

THE COURT dismissed the appeal, without calling upon the respondents' counsel.

THOMPSON v. YOCKNEY.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. September 29, 1913.

[*Thompson* v. *Yockney*, 8 D.L.R. 776, affirmed.]

LAND TITLES (Torrens system) (§ IV—40)—*Caveat—Agreement to give mortgage.*]—Appeal from decision of Mathers, C.J. K.B., 8 D.L.R. 776.

H. F. Tench, for defendant C. E. Yockney, appellant.
C. P. Wilson, and *J. E. Adamson*, for plaintiff, respondent.

THE COURT dismissed the appeal without calling upon the respondent's counsel.

Re HISCOX and WINNIPEG JOBBERS.

ALTA.

1913

Alberta Supreme Court, Scott, J., in Chambers, May 20, 1913.

MEMO. DECISIONS.

HOMESTEAD (§ IV—32)—*Alienation—Application to register free from executions.*]—Motion on originating summons on the application of the transferror for a direction to the registrar to register a transfer of land constituting the transferror's homestead free from executions against him.

W. J. A. Mustard, for the motion.

J. W. G. Morrison, for execution creditors, *contra*.

SCOTT, J., held that where land is exempt from seizure as the homestead of the execution debtor, the latter, on making a sale and transfer thereof to a purchaser, must be taken to have agreed to do all things necessary to facilitate the registration of the purchaser's title. Where, therefore, the registrar had refused to register the transfer except subject to the executions, the transferror has a sufficient status to apply on originating summons for a direction to the registrar to register the transfer free from the executions. If, however, the transfer had been registered and a certificate of title issued to the transferee, and stated to be subject to the executions, the latter would have been the proper party to apply.

Order made.

STEPHENS v. BANNAN and GRAY.

ALTA

S. C.

1913

Alberta Supreme Court, Stuart, Beck, Simmons, and Walsh, JJ. October 11, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS — FILING IN LAND TITLES OFFICE—PRIORITY.

Of two persons each acquiring interests from a common source in the same land under unregistered contracts for its sale, the one first filing a caveat in the Land Titles Office will, under the Land Titles Act, Alta. Stats. 1906, (6 Edw. VII.) ch. 24, relating to the filing of caveats, be entitled to priority in the absence of fraud even though he may have had notice of the other's equitable interests in the land. (*Per* Beck, Simmons and Walsh, JJ.)

[*McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, and *Sydie* v. *Sask. & Battle R.L. & D. Co.*, 14 D.L.R. 51, considered; and see Annotation at end of this case.]

2. VENDOR AND PURCHASER (§ I B—5)—PAYMENT OF PURCHASE MONEY—RECOVERY OF—FAILURE OF TITLE.

Where one of two vendees, both of whom claim the same land under unregistered contracts of sale from the same common source, is entitled to priority by reason of first filing a caveat in the Land Titles Office, the other may recover from his vendee all payments made by him under the contract, with interest, together with the costs of investigating the title, or incident thereto. (*Per* Beck and Simmons, JJ.)

Statement

APPEAL on a stated case by one of the defendants from a judgment in favour of the other defendant in an action relating

ALTA.

S. C.
1913

STEPHENS
v.
BANNAN
AND
GRAY.

Stuart, J.

to the priorities acquired by the filing of caveats in the land titles office in respect to two different contracts for the sale of the same land.

The appeal was dismissed.

O. M. Biggar, K.C., for defendant Bannan (appellant).
G. B. O'Connor, K.C., for defendant Gray (respondent).

STUART, J.:—The cases cited to us referring to priorities of equitable titles seem to me to have very little bearing upon the present case. In most of the cases the decision was forced because one of two innocent persons must suffer by the fraud of a third. In the present case Bannan does not need to suffer at all. Stephens, the plaintiff, offers to pay her money back with interest. She can be placed exactly where she was before payment of the money. That is a very different case from those in which there is a contest to decide who shall have a first mortgage and who a second. If, in those cases, both had been obviously quite secure in so far as money advanced was concerned, which is the case here, there would have been no contest and no report in the law books. This consideration seems to me to remove the case from the field of equity altogether, at least so far as negligence and laches is concerned. One party of the two will simply have to lose what he thinks is a good bargain, but he will not be deprived of any money advanced. Particularly with reference to Bannan, she will not even lose a good bargain on account of the laches or negligence of Gray or his predecessors in title. The exact position rather is that it was precisely because of some negligence or laches on their part that an apparent opportunity to make a good bargain was presented to her. But, when she is not to be left in any worse position than she would have been if she had made no bargain at all inasmuch as all her money is safe and will be paid back with interest if she does not get the land. I am unable to see why any negligence or laches on the part of the other people can be complained of by her. If after receiving money from Bannan, Marion Stephens had disappeared or had become insolvent so that Bannan could not get her money back, then, and in my opinion then only would the principle of negligence or laches become applicable. In such a case, I think something might have been found to depend on the whereabouts of the agreement of sale from the Hudson Bay Co. to Stephens which is a matter not mentioned in the case. If, for instance, Dodge and Goldsmith, although being the assignees of that agreement, failed to acquire possession of it, but left it in the possession of Stephens where it was found by his executors and by Marion Stephens and Bannan had seen it and acted on the faith of it in paying over her money then a more serious charge of negligence or laches might have

been suggested. Of course one answer would have been that the assignment referred only to one lot and Stephens was entitled to retain the original agreement with respect to the other two lots. But the case is silent upon this point and in any case for the reasons I give, I do not think the question is here a material one. The case in my opinion resolves itself into the question, which of the two claimants has the best strict legal right to demand title, that is, to have his bargain enforced? Leaving aside the question of caveats for the moment it seems to me that the one who can trace his title to the earliest agreement of the common vendor ought to prevail, that is to say that we have here a simple case for the application of the rule, *qui prior est tempore potior est jure*. Gray traces his title to an agreement of 1905, Bannan only to an agreement in 1911 or, if you like, to a devolution from Stephens in 1907.

In my opinion the agreement of July 25, 1906, between Stephens and Dodge and Goldsmith became effective as between the first and second parties thereto although the approval of the Hudson Bay Co., was never obtained. There is nothing in the document to suggest that such approval was to be a condition precedent to its effectiveness as between the parties who in fact signed it.

In the recital the approval by the company is made a consideration for the personal covenant by the assignees with the company to pay to them the balance due under the original agreement with respect to the one lot and it is so expressed in the express covenant with the company. The recital also shews that approval by the company was to be a consideration for the assignor agreeing to continue liable to them, obviously a somewhat futile provision, but probably intended to prevent any suggestion of an implied release by the company in case they approved of the assignment.

I do not think it would have been open to Stephens to say to Dodge and Goldsmith that because they never secured the approval of the company the deed was not effective as between them. It was as much Stephens' duty to obtain that approval as it was theirs. The real test is, could Stephens after executing that document and delivering it to Dodge and Goldsmith have withdrawn and refused to be bound by it on the ground that the approval of the company had not been obtained. It seems very evident that he could not have done so. The case stated shews that the approval of the company would have been forthcoming at any time it was asked for. How could Stephens even after considerable delay by Dodge and Goldsmith possibly with any shew of right say to them "You have delayed in getting the company's approval; you have not obtained it. I withdraw altogether and repudiate the agreement?" Could

ALTA.
S. C.
1913
STEPHENS v. BANNAN AND GRAY.
Stuart, J.

they not have replied by asking the simple question, "Why did you not obtain their approval yourself? It was always open to you to do so and as much your duty as ours?"

With respect to the contention that when Stephens or to speak more accurately his representative paid up the arrears to the company he thereby acquired the rights theretofore enjoyed by the company to re-sell on default, I confess to an inability to see how that result could arise. By the assignment the assignees covenanted to indemnify Stephens against the payments due the company. It seems clear that if they failed in that and Stephens had to pay he had a right of indemnity and a vendor's lien for what was practically unpaid purchase money. The assignment, if it had been accepted by the company, would have made Dodge and Goldsmith subject to the terms of the original contract as between themselves and the company and that is what the habendum clause in the assignment means; but that is a different thing from their becoming subject to those terms as between themselves and Stephens, where the assignment had never been approved by the company, merely on account of Stephens having to pay up the arrears. I can see nothing in the assignment to point to an intention that the terms of the original agreement should ever apply as between Stephens and Dodge and Goldsmith. And even if it did, I doubt if a resale could be made without notice. The default clause in the original agreement does not say that there may be a resale without notice and even assuming that that clause must be given at least some effect I would hesitate to say that a Court of equity would give effect to it at all where no notice had been given before the resale.

A more reasonable argument might be that there was evidence of such an abandonment owing to the long delay that the contract of sale should be treated as at an end. But the company did not seek to enforce such a rule; and as between Stephens and Dodge and Goldsmith the matter did not take the form of an agreement of sale as it did in the subsequent links in the chain but of an absolute assignment, a grant and conveyance of Stephens' rights to the grantees. An action for specific performance by Dodge and Goldsmith against Stephens would not be possible or necessary. It was an executed contract, not an executory agreement. Stephens' rights were clearly (1) a right of indemnity, (2) an unpaid vendor's lien. But I see nothing more.

The result is that I think Gray has the better right to call for a conveyance subject to his payment of the share of the arrears paid by Marion Stephens applicable to his lot which the case states his willingness to pay.

This makes it strictly unnecessary for me to deal with the

question of the caveats. But I think it right to say that I cannot at present accept the view of the effect of sec. 97 of our Land Titles Act, which is presented in the judgment of my brother Beck. The section is obscure. It says:—

> Registration by way of caveat whether by the registrar or by any caveator shall have the same effect as to priority as the registration of any instrument under this Act.

The expression "registration by way of caveat" suggests the question—"registration" of what? Does it mean the registration of some otherwise unregistrable interest by means of the filing of a caveat? If Parliament meant to enact that a person having an interest unregistrable under any other provision of the Act might register that interest by filing a caveat under sec. 84 it would have been very simple to say so. It is well known that the particulars of the interest claimed do not need to be shewn in the caveat but only its general nature: sec. 85 and *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551 at 580. Usually under Registry Acts the idea of registering a document is to give the public notice of it as well as an opportunity of examining its contents and terms.

The expression "registration by way of caveat" does indeed seem to suggest that the draughtsman had in his mind the idea of registration of something other than the caveat. But the use of such an obscure term without anything in the foregoing clauses to suggest the same idea cannot in my opinion affect the meaning of secs. 84 and 85 which provide, not in so many words for registering certain interests, but merely for the filing of a caveat

> against the registration of any person as transferee or owner of, or of any instrument affecting such estate or interest, unless such instrument be expressed to be subject to the claim of the caveator.

The clause I quote evidently means that another person may become registered owner in the face of the caveat provided his certificate is expressed to be subject to the claim of the caveator and we know that this is sometimes done in practice. Does this not mean "subject to the claim as it existed immediately prior to the filing of the caveat" or can it possibly mean subject to that claim *plus* something else? Surely the "claim" of the caveator means his claim when he proceeds to file his caveat and not anything more.

Again, I am afraid of the results of the interpretation given by my brother Beck. Sec. 84 says that a person claiming under a will may file a caveat. Then suppose A gives B an agreement of sale of certain lands either before or after having devised them in his will to C, and dies. Then suppose C files a caveat as claiming under the will. Does he get priority over B?

ALTA.
S. C.
1913
STEPHENS
v.
BANNAN
AND
GRAY.
Stuart, J.

If the suggested interpretation be correct, why not? The fact that a will speaks only from death does not differentiate the case because an agreement of sale can only speak from the date of its execution and if in the one case there was nothing for the will to act upon, then what is there for a second agreement of sale to act upon so as to give a caveat the power of creating effectiveness in it as against a prior agreement of sale?

Or take the case of a caveat filed by reason of an execution. A, a debtor, transfers property to his wife B. B, being registered owner, agrees to sell to C, an innocent purchaser for value. D, a creditor, afterwards gets judgment against A, issues execution and files a caveat claiming the right to set aside the transfer to B as fraudulent and void as against creditors. Does C, having registered no caveat, suffer postponement to D, because D's caveat has given him priority?

Furthermore sec. 97 says that registration by way of caveat shall have the same effect as to priority, etc. The question is "as to priority of what"? It would have been quite easy to say "of the interest claimed" but those words are not there. Surely the priority must be priority in relation to the nature of the document filed. The document filed is a caveat, a warning, and, in terms, a prohibition to the registrar. All persons dealing with the land after that date are given notice of and must be held to have notice of the interest claimed. If A's caveat is filed on January 10 then A gets priority by virtue of the Act over dealings subsequent to that date. If B. files his caveat only on the 20th he gets priority by virtue of the Act only over dealings subsequent to that date. In this way is not A given some priority which B may possibly not be given? If both A's and B's interest arose before the 10th that might not be so, their priorities being determinable by the equitable rules, but if B's arose between the 10th and the 20th then A stands ahead of him while B must compete under the equitable rules with all persons acquiring interests between the 10th and the 20th or indeed, except A, before the 20th at any time. Surely this is giving some effect to section 97 without going any further.

Finally, I think we ought not to disregard the judgment of Anglin, J., in *McKillop* v. *Alexander*, 1 D.L.R. 586 at 602 *et seq.*, which was the judgment of three out of five Judges of the Supreme Court of Canada. It is true section 97 of our Act is not found in the Saskatchewan Act but the judgment there treats a caveat as coming within the meaning of "an instrument" under the Act and yet, although this interpretation brings a caveat within the meaning of the general section of the Saskatchewan Act as to priorities and thus practically makes the provisions of our sec. 97 also a part of that Act, the Court did not attempt to decide the case in favour of Alexander

on such an obviously simple ground and there are expressions in the judgment of Anglin, J., on page 606, which point to his being of a contrary opinion.

My present view therefore is that section 97 does not give anything more than protection against interests subsequently created and as I think it unnecessary for the purpose of the present appeal to decide the point, which is one of the very gravest importance, I should prefer to have the point argued more fully than it was in the present case before expressing a final opinion.

Stuart, J.

I however agree with the result arrived at by my brother Beck and with the answers he proposes to the questions asked.

Beck, J.

BECK, J.:—Thomas A. Stephens obtained an agreement from the Hudson's Bay Company dated November 27, 1905, for the sale to him of three lots in Edmonton—lots 178, 199 and 200 in block 8, H.B. Reserve—for a total price of $950 payable 1/3 in cash—actually paid at the time—1/3 in one year and 1/3 in two years with interest at the rate of 7 per cent. per annum. This agreement contained the following provision:—

> And it is expressly understood and agreed by and between the parties hereto that time is to be considered the essence of this agreement and that unless the payments are punctually made the said parties of the first part shall be at liberty to re-enter upon or resell the said lands and all payments theretofore made on account thereof shall be forfeited.

An instrument dated July 25, 1906, stated to be made between Thomas A. Stephens of the first part, E. L. Dodge, and Robert Goldsmith, of the second part, and the Hudson's Bay Company, of the third part, recited Stephens' agreement of November 27, 1905, to purchase the land thereinafter mentioned: his desire to assign his interest therein to Dodge and Goldsmith; their agreement, in consideration of such assignment being accepted by the company, to give their personal covenant to the company to perform the covenants and conditions entered into by Stephens; and Stephens' agreement, in consideration of the company accepting the assignment, that neither the assignment nor the company's acceptance thereof shall affect Stephens' liability to the company. The instrument then witnessed that in consideration of the premises and of $1.00 Stephens assigned to Dodge and Goldsmith all his interest in lot 178—

> the sum of $216.66 being due to (the company) payable in two annual payments of $108.34 dating from November 27, 1905, with interest at 7 per cent. together with all the right, title and interest of (Stephens) in the said agreement so far as the same relates to the above described land and all benefits thereunder.

There was a covenant by Dodge and Goldsmith to indemnify

ALTA.

S. C.
1913

STEPHENS
v.
BANNAN
AND
GRAY.

Beck, J.

Stephens in respect of the above mentioned unpaid instalments and a covenant by them

in consideration of (the company) accepting this assignment which acceptance may be without formal execution hereof by

the company that they would make the payments to the company and that in default the company should have the same rights against all parties as to cancellation of the said agreement and otherwise as it had against Stephens in case of his default. The transaction represented by the above mentioned assignment had evidently been arranged some time before for evidently in anticipation of the execution of the formal assignment Dodge and Goldsmith by instrument dated June 1, 1906, they agreed to sell the same lot 178 to one Lloyd for $800 payable $150 down, $216.67 in three months, $216.67 in six months with interest at 8 per cent. per annum, and $108.33 on or before November 27, 1906, and $108.33 on or before November 27, 1907. The purchasers covenanted to pay taxes imposed on or after June 1, 1906. By instrument dated March 18, 1911, Lloyd agreed to sell to Gray the same lot 178 for $1,100, payable $550 down, $275 on or before September 18, 1911, $275 on or before September 18, 1912—interest running at 8 per cent. per annum; the purchaser was to pay taxes imposed after the date of the agreement. The land had been assessed to Stphens for the years 1906 to 1911. The taxes for these years had not been paid. Gray paid all these arrears on October 18, 1911.

It was admitted that the H.B. Co. would, if it had been requested to do so, have approved of the assignment from Stephens to Dodge and Goldsmith upon payment of any balance of purchase money in arrear.

On November 16, 1911, Gray filed a caveat against the lot in question claiming an interest as purchaser under this latter agreement. The foregoing is a statement shewing the foundation for Gray's caveat. Mrs. Bannan filed a caveat on December 21, 1911, and I now set forth the foundation for her caveat.

Thomas A. Stephens died on July 21, 1907, leaving a will whereby he appointed executors and devised and bequeathed the whole of his estate to his sister Miss Stephens. Probate of his will was granted on August 17, 1907.

The executors in accordance with the proper practice and procedure obtained an order from a Judge directing an advertisement for claims against the estate and an advertisement was duly published in accordance with the order during August and September, 1907.

The executors wound up the estate promptly and Miss Stephens became entitled to all the remaining assets of the estate including so far as then appeared the lot in question. On April 16, 1908, a certified copy of the probate was sent to the Hudson's Bay Company by the solicitors for the executors.

On October 18, 1910, the Hudson's Bay Company demanding the immediate payment of the whole balance of purchase money and interest of the three lots under the original agreement between the company and Miss Stephens, she paid them the whole amount, of which $293.86 was the proportion payable in respect of lot 178—the lot in question.

On February 11, 1911, Miss Stephens, believing herself absolutely and beneficially entitled to lot 178, and Gray's caveat not having been filed, by instrument of that date agreed to sell the lot in question to Mrs. Bannan for $1,200, of which she then received the down payment of $400.

On December 21, 1911, Mrs. Bannan filed a caveat against the lot in question claiming an interest as purchaser under her agreement from Miss Stephens.

On the 29th of the same month she paid Miss Stephens the whole balance of the purchase price and interest, and thereupon Miss Stephens, who up to this time, although she had paid the Hudson's Bay Company the whole purchase money for the three lots had refrained from asking for a transfer merely because there was no urgent reason to do so, through her solicitors obtained an abstract of title to the lot in question for the purpose of sending it to the company as part of the material upon which to ask the company for a transfer to her.

It was then for the first time that Miss Stephens had notice that Gray had filed a caveat or that there was any adverse claim to the lot. The executors had never had any notice of any claim adverse to that of Miss Stephens; nor till then had Mrs. Bannan.

The lot had never been occupied or improved.

Miss Stephens is ready to transfer to either Gray or Mrs. Bannan as she may be directed by the Court.

As has been stated the question we have to decide is whether Mrs. Bannan or Gray is entitled to the lot in question.

There is a provision of the Land Titles Act, [Alberta Stat. 1906, (6 Edw. VII.) ch. 24, R.S.S. 1909, ch. 41] to which reference will be specially necessary. Section 97 says:—

> Registration by way of caveat whether by the registrar or by any caveator shall have the same effect as to priority as the registration of any instrument under this Act and the registrar may in his discretion allow the withdrawal of such caveat at any time and the registration in lieu thereof of the instrument under which the person in whose behalf such caveat was lodged claims his title or interest, provided such instrument is an instrument that may be registered under this Act; and if the withdrawal of such caveat and the registration of such instrument is simultaneous the same priority shall be preserved to all rights under the instrument as the same rights were entitled to under the caveat.

I have quoted the whole of this section in order that it may plainly appear that it applies to a caveat founded upon an in-

ALTA.
S. C.
1913
STEPHENS v. BANNAN AND GRAY.
Beck, J.

strument not registrable under the Act or indeed upon a claim not founded upon any instrument in writing at all. See sec. 84.

No section corresponding to sec. 97 appears in the Saskatchewan Act under which the case of *McKillop* v. *Alexander*, 1 D. L.R. 586, 45 Can. S.C.R. 551, was decided.

This Court is of course bound by the essential reasoning upon which *McKillop* v. *Alexander* is based and I readily assent to it; but with great respect I think Mr. Justice Anglin who gave the opinion of the majority of the Court when he said that a caveat is an instrument under the Act was presenting a view which was not an essential part of his reasoning and which is incorrect. A caveat is in my opinion nothing more than a caution—as it is called in some similar Act—and an effective notice of a claim of title grounded upon something else and preventing any change in the rights of the caveator by dealings with the land subsequent to the lodging of the caveat.

Under the decision of the Supreme Court of Canada it seems settled that apart from a provision to the effect of sec. 97 of the Alberta Land Titles Act, where two caveats are lodged the first caveator does not necessarily acquire priority—his claim may by his laches and the greater carefulness of the second caveator be postponed to that of the latter; for instance, of two persons who obtained agreements for sale from the registered owner if the second in point of time paid his full purchase money and obtained a transfer which he could not register by reason of his not being able to obtain possession of the certificate of title he would no doubt be held to have priority over the first caveator because his title was the stronger. But under the Alberta Land Titles Act in view of sec. 97 it seems to me the result would be different; that of two innocent persons claiming under equitable titles—and all unregistered interests are merely equitable interests—the one who first lodges a caveat secures priority. The claim of each caveator must, of course, be grounded immediately or immediately upon a dealing with the registered owner and the two caveats must claim to affect in whole or in part the same interest in the land. Fraud of course would vitiate the claim of either. Mere notice is declared not to be fraud (sec. 135). It has been held however by this Court at this sittings in *Sydie* v. *Sask. & Battle R.L. & D. Co.*, 14 D.L.R. 51, that notice, plus knowledge that a contemplated acquiring of an adverse interest will defeat or prejudice the prior interest and plus the actual acquiring of the adverse interest, is fraud, and this is in accordance with decisions of Courts of the Australian colonies where the Torrens system of land registration was first introduced. Notice, however, of a prior interest received after the acquiring of an adverse interest and active steps then to preserve the innocently acquired adverse interest is clearly not

fraud. Fraud affects the question of the validity of the claim. Notice affects the question not of its validity but solely of its priority. So with the question of laches or vigilance.

Sec. 97 deals explicitly with priorities and hence in my opinion embraces cases where notice, laches, or vigilance would otherwise be important questions for consideration.

The result in my opinion is that as between the claims of two caveators the section fixes the priorities of the claims according to the dates of the lodging of the caveats so that the only questions that can be open between the two caveators are (1) whether the respective dealings with the land—were it not for the other—created an interest—and that in the same interest in the land, and (2) whether the claims of either of the caveators is voided by fraud.

In my opinion, therefore, for the reasons I have stated the claim of Gray, he having lodged his caveat first, is entitled to priority—even though at the time of doing so he may have had notice of the prior equitable interest of Mrs. Bannan or her predecessors in title, and notwithstanding any laches that may be attributed to him or his predecessors in title or the greater vigilance and activity of Mrs. Bannan and her predecessors in title.

In the event of this Court finding that Gray is entitled to the land we are asked several further questions:—

(*a*) What sum should be paid by Gray to Miss Stephens?

This amount should be the amount paid by Miss Stephens to the Hudson's Bay Company in respect of the lot in question for the balance of purchase money and interest which under the assignment from Stephens to Dodge and Goldsmith they covenanted to pay to the company. The amount paid by Miss Stephens for this purpose is agreed to be $293.86, paid on October 10, 1910. I think Gray should pay this amount with interest from that date to the actual date of payment unless with regard to interest he is shewn to have set aside the amount after having offered on May 20, 1912, Miss Stephens $348.65 as representing the proper amount at that date.

(*b*) What sum should Miss Stephens pay to Mrs. Bannan? and;

(*c*) Is Mrs. Bannan entitled as against Miss Stephens to damages other than her costs of investigating the title?

I think this sum should be the total of the several sums paid by Mrs. Bannan to Miss Stephens with interest on each payment from the date of the respective payments together with the expenses Mrs. Bannan was put to in investigating the title and incidental thereto. I agree with the learned Chief Justice that the English rule as to damages in the case of breach of contract for the sale of land should be applied in this jurisdiction

ALTA.

S. C.
1913

STEPHENS v. BANNAN AND GRAY.

Beck, J.

notwithstanding that we have here the Torrens system of land titles. If this view is correct, the last question calls for no answer.

In the result in my opinion the appeal should be dismissed with costs.

N.B.—Since writing the above it has been called to my attention that the answers to the several subsidiary questions were not the subject of appeal. My answers are substantially the same as those of the trial Judge. The latter will stand.

Simmons, J.

SIMMONS, J., concurred with BECK, J.

Walsh, J.

WALSH, J., concurred with STUART, J.

Appeal dismissed.

Annotation

Priorities under caveats

Annotation—Land titles (Torrens system) (§ IV—40)—Caveats—Priorities acquired by filing.

The general question as to what constitutes a "caveatable interest" and who is entitled to file a caveat is considered in an annotation to *Re Mooseeana Subdivision and Grand Trunk Pacific Branch Lines*, 7 D.L.R. 674, 675.

In this note the question considered is what priority is acquired by the filing of a caveat.

By filing a caveat in the land titles office one who acquires a right in land under an unregistered agreement of sale, will have priority over a person claiming under a prior agreement, of which the caveator did not have notice when acquiring his interests in the land: *Brooksbank* v. *Burn*, 3 Alta. L.R. 351. And one who first acquires the right to purchase land will, by filing a caveat, have precedence over a person claiming to be a subsequent purchaser: *Edgar* v. *Caskey* (Alta.), 4 D.L.R. 460.

Where one holding an interest in land under a contract of purchase agrees to sell the land to another person, but subsequently sells it to a third person, who did not have knowledge of the prior agreement to sell, the former, by filing a caveat before the latter, paying all of the purchase money and receiving an assignment of the original vendee's agreement (which receives the approval of the original vendor as required by the terms of the agreement) will acquire priority over such third person, and can obtain specific performance of his agreement: *Alexander* v. *Gesman*, 4 Sask. L.R. 111, affirmed (*sub nom. McKillop* v. *Alexander*), 1 D.L.R. 586; 45 Can. S.C.R. 582.

But where a person agrees to purchase land under a contract which prohibits the assignment of the agreement except for the whole of the vendee's interest, and then only with the approval of and countersigning by the vendor, one to whom the vendee agrees to sell a portion of the land does not acquire priority, by the filing of a caveat, over a third person who for value and without notice of the caveator's claim with the approval of the original vendor, took an assignment of the original vendee's entire interest: *Re Green* (Sask.), 9 D.L.R. 301.

A person who sells land under an agreement that the purchaser should

Annotation (*continued*)—Land titles (Torrens system) (§ IV—40)—Caveats—Priorities acquired by filing. Annotation

Priorities under caveats

give back a purchase money mortgage thereon which he failed to do, will, by filing a caveat, acquire a superior right over a mortgage subsequently given by the purchaser to a third person: *Thompson* v. *Yockney* (Man.), 8 D.L.R. 776. And a mortgagee, whose mortgage by reason of a defective description of the land, cannot be registered, may protect his rights against subsequent encumbrances by filing a caveat: *Reeves* v. *Stead* (Sask.), 13 D.L.R. 422.

A vendee in a contract for the purchase of land does not, by the filing of a caveat, acquire priority over an execution lodged against the land before the making of the agreement of sale: *Re Price*, 5 Sask. L.R. 318, 4 D.L.R. 407. And where, by reason of a misdescription of the land, a mortgage given by a vendee who had not acquired title, was not subject to registration, and the mortgagee filed a caveat, the priority thus acquired against executions subsequently lodged against the vendee is lost by the mortgagee, on the vendee acquiring title to the land, taking and registering a new mortgage and voluntarily discharging his caveat: *Rogers Lumber Co.* v *Smith* (Sask.), 8 D.L.R. 871.

In *Arnot* v. *Peterson*, 4 Alta. L.R. 324, 4 D.L.R. 861, Beck, J., in speaking of the effect of sec. 97 of the Alberta Land Titles Act, 6 Edw. VII. ch. 24, which declares that "registration by way of caveat . . . shall have the same effect as to priority as the registration of any instrument under" the Act, in effect, said that such priority applies only to those claiming under the same root of title, and that the one first filing a caveat would thereby acquire priority over the other; but that priority could not be thus acquired where the caveator and the caveatee claimed under a different root or title.

REEVE v. MULLEN.

ALTA.

S. C. 1913

Alberta Supreme Court, Beck, Stuart, Simmons, and Walsh, JJ. October 6, 1913.

1. VENDOR AND PURCHASER (§ I B—5)—PAYMENT OF PURCHASE MONEY—RECOVERY OF—REAL PARTY ACTING OSTENSIBLY AS AGENT—LIABILITY OF—INABILITY TO MAKE TITLE.

Purchase money paid to and which is retained by one who, although acting ostensibly as agent in reality acted for himself in agreeing to sell land and received the money entirely for his own benefit, may be recovered by the payer where the payee was unable to give a title to the land.

[See Annotation at end of this case.]

2. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT—NOTICE OF—BRINGING ACTION TO RECOVER PAYMENT AS.

The commencement of an action to recover money paid on an agreement to purchase land, on the ground that the vendor was without title, is a sufficient notice of rescission by the vendee to cast on the vendor the obligation of shewing in defence that he has a good title.

Statement

APPEAL by the defendant from a judgment against him for the return of money received on a contract for the sale of land.

The appeal was dismissed.

D. H. MacKinnon, for plaintiff.

H. H. Parlee, K.C., for defendant.

ALTA.
S. C.
1913
REEVE
v.
MULLEN.
Stuart, J.

STUART, J.:—In March, 1910, Mr. Ewing, a barrister of Edmonton, was registered owner of a certain lot. About that time he sold it under an agreement of sale, which provided for deferred instalments of the purchase price, to one Z. W. Mitchell.

On May 6, 1912, when Z. W. Mitchell was considerably in arrears in his payments to Ewing, one Clifford Mitchell, a son of Z. W. Mitchell, entered into an agreement in writing with one Oscar T. Nelson whereby he agreed to sell this same lot to Nelson for the sum of $4,500, of which $1,000 was a cash payment and the remainder was deferred. This agreement was negotiated by the defendant Mullen, who was a real estate agent. It appears that $1,200 was in fact paid in cash, $70 being paid on May 3, when the verbal arrangements were made, and $1,130 on May 6. These payments passed into Mullen's hands as agent for Mitchell. The receipts given to Nelson by Mullen shew the purchase price to have been $4,700. The $200 difference was apparently added by Mullen as commission. He paid only $1,000 to Mitchell, although there is, so far as the evidence goes, a possibility that Mitchell also may have been charged a commission. Between the 3rd of May and the 6th, that is, after receiving the deposit from Nelson, but before having the agreement signed, Mullen, according to his own evidence, went to Ewing and learned that Ewing had sold, not to Clifford Mitchell, but to Z. W. Mitchell, and that there was some $1,900 still due to Ewing from the elder Mitchell. As he stated in his evidence Mullen recognized that "before he closed out the sale from Mitchell to Nelson it was up to him to form a chain of agreements from the registered owner" and "that he knew there ought to be some agreement between Z. W. Mitchell and Clifford Mitchell." In consequence of this Mullen sent his brother, one Fred Mullen, to see Clifford Mitchell. Fred Mullen swore that he saw some document, whether an agreement or an assignment he could not say, "to the effect that he (Clifford Mitchell) had bought through Z. W. Mitchell." This evidence was objected to and was rejected by the trial Judge. The defendant Mullen, however, said that he received this information from his brother. He did not suggest that he had made any attempt to secure this document from Clifford Mitchell; although, as Mitchell was selling out absolutely to Nelson, it would appear that the document should have been passed into Nelson's possession as part of his muniment of title. According to his own story, Mullen, relying merely upon what his brother had told him he had seen, the description of which was at best very vague, put through the sale from Mitchell to Nelson, took Nelson's money and passed it on to Mitchell reserving the comfortable sum of $200 for himself.

Next, Nelson left the property in Mullen's hand for resale at

the price of $5,500. Then Mullen, who had some other lots known as the Garneau lots in his hands for sale from one Seabrook, asked Nelson to buy them and Nelson, after examining them and being satisfied with them, agreed to take them if Mullen could find a purchaser of his (Nelson's) interest in the Ewing lot. After Mullen had told Nelson that he had a deal arranged for the Ewing lot Nelson paid a deposit to Mullen of $70. This was on May 11. The purchase price of the Garneau lots was to be $3,800. Then Mullen seems to have arranged with one Mouncey for the purchase of Nelson's interest in the Ewing lot. On the same day, May 11, he received $50 from Mouncey as a deposit on the purchase by Mouncey from Nelson of the Ewing lot at $5,500. The receipt expresses the terms to have been $2,000 cash, $2,000 by assumption of a mortgage of $2,000 which Ewing had given and $1,500 in three deferred instalments.

It appears that the first payment from Nelson to Seabrook for the Garneau lots was $1,800. There was a commission due to Mullen both from Nelson and from Seabrook. Mullen, as he said, having every confidence in Mouncey, to whom Nelson was selling and having only received $50 from him undertook to advance to Nelson on Mouncey's account the remaining $1,950. But as Nelson had to pay Seabrook, Mullen's other client, $1,800, the matter including commissions was adjusted by Mullen paying Nelson $56 and paying directly to Seabrook the sum of about $1,800, or as he said, a little less, allowing for a commission.

Next, it appears Mouncey backed out of the purchase of the Ewing lot and Mullen, who had really advanced nearly $1,800 on his account, or if we include commission, $1,950, was left to do what he could to protect himself in the precarious position in which his manipulations had placed him. It does not appear that Mouncey had signed anything which would bind him. Mullen then got the plaintiff Reeve to come into the affair and to buy the Ewing lot in Mouncey's place. Of course, to keep up the general character of the whole series of events, Reeve had property himself to sell and his purchase of the Ewing lot was contingent on his being able to sell his own lots which are called the Cromdale lots. Of course, also, Reeve only had what is called an "equity" in these Cromdale lots. He was prepared to sell or dispose of them at a valuation of $4,200, which would give him an "equity" of $2,400. One Stearns, whether at Mullen's instance or not does not appear, found a purchaser for this equity, viz., one Armstrong. Armstrong agreed to give $2,300 for the equity which Reeve accepted. Things then took a short cut. Nelson assigned his purchase agreement with Mitchell to Reeve, Reeve agreed to assume $3,500 encumbrance and to pay $2,000 in cash to Nelson. Reeve assigned his agreement in regard to the Cromdale lots to Armstrong. Nelson, it will be observed had

ALTA.
S. C.
1913
REEVE
v.
MULLEN.
Stuart, J.

already received payment by means of Mullen's cheque to Seabrook. So no more money was coming to him. Strictly Armstrong should have paid Reeve $2,300 and Reeve should have paid Mullen $2,000. But here another short cut was taken. Armstrong paid to Mullen directly the $2,300. Of this $2,000 was cash and Mullen got also a horse which was put in at a valuation of $300, although he said he sold it for only $190. Reeve received none of the money coming from Armstrong. The horse was apparently treated as commission which Reeve ought to pay, whether the $190 received for it ever reached the hands of Stearns, who negotiated the sale to Armstrong, does not appear. Upon the evidence Mullen still retains it. Subsequently, on July 20 Mullen paid $50 back to Mouncey.

The exact position in which Mullen stood in relation to Reeve is a chief point in dispute in the case. Did he deal with Reeve as owner of the Ewing lot and sell as owner or was he merely an agent for some one else, either Nelson or Mouncey? Before referring to this, one last finishing touch is alone necessary to be mentioned to complete the marvellous tale. Reeve actually entered into an agreement to sell the Ewing lot back to Clifford Mitchell! But no money ever passed and Mitchell appears to have got into trouble in the Police Court.

Such is the delicious mess which the wild scramble of a number of men for a handful of what is popularly called the unearned increment has cast into the Court for examination.

Reeve afterwards discovered that there was difficulty about the title. He had parted with $2,300 of his money and this was in Mullen's hands. So he has brought this action against Mullen alleging that Mullen agreed to sell to him the lot in question, that to save multiplicity of conveyance an assignment from Nelson to the plaintiff of the Mitchell agreement was taken, that Mullen falsely and fraudulently represented to him that Clifford Mitchell was the owner of the lot in question and that the agreement of sale from Mitchell to Nelson was a good and valid agreement of sale, that in reliance on these representations he paid $2,400 to the defendant, that the defendant Mullen knew that these representations were false and fraudulent; that Mitchell was never the owner of the lot and that no title could be obtained. He, therefore, claimed (1) repayment of the sum of $2,400, (2) damages, (3) other relief, and (4) costs.

The action was tried by the Chief Justice who held that the charge of fraud had not been established, but that in reality the case was one of vendor and purchaser where the vendor had failed in the title and the purchaser was requiring his money back. He held also that Mullen dealt with the property as his own and sold it to Reeve as his own. He held also that, although there did not appear to have been any requisition in regard to

title made by Reeve yet he had come into Court and it was then the vendor's duty to shew his title and that in this he had failed because there was nothing to shew that Clifford Mitchell had any interest in the land. He, therefore, gave judgment for the plaintiff against Mullen for $2,300, the amount paid by Armstrong.

From this judgment the defendant appeals.

I cannot accede to the contention that the action is one merely for damages for deceit. It is true that there are allegations of fraud in the statement of claim and a claim for damages in the prayer for relief, but quite aside from these contents the claim does quite clearly set forth an alleged sale of land by Mullen to Reeve, a payment of money thereon by Reeve and a failure by Mullen to make title and there is a prayer for a return of the money paid.

In my opinion the Chief Justice was right in his finding of fact that Mullen was really the vendor, that he sold to Reeve on his own account, although the assignment was made directly from Nelson to Reeve, and that the plaintiff was entitled to a judgment for a return of the money paid.

It almost seems absurd that it should be thought necessary to discover the exact form of action applicable to such a case. Mullen was always the central figure in the affair. He arranged the sale from Mitchell to Nelson, and the sale from Nelson to Seabrook. He arranged the sale to Mouncey. He arranged the sale to Reeve, and even if Stearns was not connected with him he at any rate received the proceeds of the sale to Armstrong. Between May 3rd and May 6th he discovered the unclosed gap between Ewing and Clifford Mitchell. He told Nelson nothing about it. He said nothing to Nelson about what his brother had told him that he had seen. He made no effort to get for Nelson the suggested document between Z. W. Mitchell and Clifford Mitchell. He did not reveal to Nelson what a slender foundation there was for any confident belief in a good chain of title. Neither did he make any communication to Reeve about what Fred Mullen had merely told him that he had seen. Whether such a course of conduct on the part of one who was getting men to part with property and money on the faith of Clifford Mitchell's title deserves less severe characterization than is given to it in the statement of claim is in my opinion open to question. In any case I have no hesitation in agreeing with the Chief Justice in the view that a man who acted in such a way was certainly only looking out for himself when he arranged the sale to Reeve. I think he considered himself as standing in Mouncey's place, having paid money on Mouncey's account and that when he got Reeve to buy he considered that Reeve was taking over property which he himself had upon his hands and which he wanted to

ALTA.
S.C.
1913
REEVE
v.
MULLEN.
Stuart, J.

get rid of. It is indeed difficult to discover any person for whom he could have been agent. Mouncey had withdrawn. There is only a weak suggestion that Mouncey instructed Mullen to act for him and secure another purchaser.

Mullen, indeed, did swear that he was acting for Mouncey, but the trial Judge evidently disbelieved him and I think rightly so. He swore that Mouncey had signed nothing to bind him, that Mouncey had refused to go on with the deal, that he had threatened to hold Mouncey liable and then that Mouncey had told him to go on and sell and if he could afford to pay back the $50 he might do so, but if not that he, Mouncey, would be satisfied to lose it. Now, for myself I find it difficult to believe that Mouncey would in one breath repudiate the purchase and in the next breath employ the person to whom he was making the repudiation to resell the property as his agent. Mouncey could not have authorized a resale on his account unless he intended to adhere to his own purchase from Nelson. But that is just exactly what Mullen says he refused to do. How then could Mullen claim to be his agent for a resale? Obviously Mouncey only suggested to Mullen a means of getting himself out of a difficult position, but did not employ him as an agent to sell.

There is also no suggestion that Nelson gave any authority, at least referring specifically to the sale to Reeve. True, he had at first put the property in Mullen's hands for sale. But Mullen had exercised that authority and had sold to Mouncey. An agreement had been signed by Nelson selling to Mouncey. Nelson had also got his money. He had no further real interest in the matter. It was thus Mullen and Mullen only who was essentially concerned in getting the purchaser Reeve.

Nelson says that Mullen said "the house fell back to me." That, I think, expresses the true position. Nelson, merely for Mullen's convenience, and at Mullen's request, executed another assignment of the Mitchell agreement to Reeve. This, of course, on the face of it is an agreement between Nelson and Reeve, and I do not say that it might not give Reeve certain rights against Nelson. But Nelson certainly never received Reeve's money. Reeve is merely asking for a return of the money from the person who actually has it in his possession. That person is Mullen and as Mullen received it entirely for his own benefit and was in substance acting for himself in negotiating the sale to Reeve he ought, in my opinion, to be ordered to return it unless he can make out a good title to the property. I agree with the view expressed by Perdue and Richards, JJ., in *Hartt* v. *Wishart-Langan Co., Ltd.*, 9 W.L.R. 519, at 543, rather than in that of Howell, C.J., and Phippen, J. I think the commencement of the action was itself a sufficient notice of rescission and that when such an action as this is begun by the purchaser it is

ALTA.

S. C.
1913

REEVE
v.
MULLEN.

Stuart, J.

sufficient to throw the obligation on the vendor of shewing a good title in the ordinary way. This he did not do.

Even if a notice of rescission before action brought was necessary, I think the plaintiff was entitled to the same judgment by way of damages for his breach of his implied contract to give a good title. I think the plaintiff went as far as he could reasonably be expected to go and that enough appeared to cast the burden on the defendant of shewing as a matter of defence that he could give the plaintiff the title which he had a right to.

With regard to the contention that there can be no *restitutio in integrum* it appears to me that there is no difficulty on that score. Armstrong has paid his money and has got what he bargained for. Reeve sold to Armstrong and should get the money now that the purpose for which it was paid to Mullen has failed. The parties to this action will then be left in respect to the property in question just where they were before this bargain was made.

It is true that the statement of claim contains allegations of fraud and asks for damages. But it also contains the allegation of a sale agreement, a failure of title and a prayer for a return of money paid. In my view no amendment was necessary. The two causes of action were combined. The one for fraud failed at the trial. The other was sustained. In my opinion that left a result which should not be interfered with and the appeal should be dismissed with costs.

Beck, J.
Simmons, J.
Walsh, J.

BECK, SIMMONS, and WALSH, JJ., concurred.

Appeal dismissed.

Annotation—Vendor and purchaser (§ I B—5)—Payment of purchase money—Purchaser's right to return of, on vendor's inability to give title.

Annotation

Vendor and purchaser

The general question as to the right of a vendee to rescind a contract for the sale of land where the vendor is unable to make a good title is considered in the annotation appended to the case of *Stevenson* v. *Sanders*, 3 D.L.R. 795; but which does not, however, include the question discussed in this annotation of the right of a vendee under such circumstances, to recover a deposit or money he has paid under the contract.

The general rule is that one who contracts to purchase land may recover from the seller money paid in respect of the agreement, or as a deposit thereon, where it appears that the latter has no title to the property he agreed to sell: *Bannerman* v. *Green*, 1 S.L.R. 394; *Spencer* v. *Davidson*, 4 S.L.R. 172; *O'Neil* v. *Drinkle*, (Sask.) 8 W.L.R. 937; *Laycock* v. *Fowler*, (Man.) 15 W.L.R. 441; *Johnson* v. *Henry*, (Man.) 18 W.L.R. 583; *Moody* v. *McDonald*, (Man.) 4 W.L.R. 303; *Pope* v. *Cole*, 6 B.C.R. 205, affirmed, *sub nom. Cole* v. *Pope*, 29 Can. S.C.R. 291.

And one who contracts to purchase land without agreeing to accept anything less than a clear title, may recover money paid under the contract on discovering that the seller is unable to make a good title: *Scott* v. *Garnett*, 2 All. (N.B.) 624; *Millard* v. *Gregoire*, (N.S.) 11 D.L.R.

ALTA.

Annotation

Vendor and purchaser

Annotation (*continued*) — **Vendor and purchaser (§ I B—5) — Payment of purchase money—Purchaser's right to return of, on vendor's inability to give title.**

539; *Clarke* v. *McKay*, 32 U.C.R. 583; *Hurd* v. *Robertson*, 7 Gr. 142; *Kilborn* v. *Workman*, 9 Gr. 255; *Burns* v. *Griffin*, 24 Gr. 451; *Byrnes* v. *McIvor*, (Sask.) 10 W.L.R. 492. One purchasing land at an auction sale under an agreement for a clear title, may recover a deposit where, by reason of an incumbrance remaining unremoved at the time limited for the giving of a deed, a clear title could not be given; since the purchaser could treat the contract as rescinded, even though he was aware of the existence of such incumbrance at the time of sale: *Taylor* v. *Executor of Wetmore*, 20 N.B.R. 165. So, a vendor who is unable to complete a contract for the sale of land by reason of a defective title, may be restrained by the vendee from proceeding with an action to enforce payment of the purchase money; and the latter, who alleged a willingness to complete the contract if a good title could be made, may recover purchaser money paid the vendor: *Kilborn* v. *Workman*, 9 Gr. 255.

Where a vendor, who derives his title under a contract of purchase, makes default therein, and notifies his vendee of the cancellation of his contract of purchase, the latter, although himself in default, may recover payment made to his vendor: *Spencer* v. *Davidson*, 4 S.L.R. 172. And a vendee, who is unable to obtain title from his vendor, may recover payments made without first tendering a deed for execution, or rescinding the agreement; since the vendor's lack of title obviates the necessity of rescission, or of demanding repayment of a deposit before bringing an action for its recovery; the commencement of the action being the strongest kind of a demand and notice of rescission: *Laycock* v. *Fowler*, (Man.) 15 W.L.R. 441. So, where a judgment is recovered against a vendee for an instalment of purchase money, before the latter's discovery of his vendor's want of title, the vendee may recover money paid in satisfaction of such judgment, but not the costs, and the vendee's failure to defend the action for the vendor's want of title does not estop him from afterwards recovering such payment: *Johnson* v. *Henry*, (Man.) 18 W.L.R. 583. And where, as the result of an error of both parties, and without fraud or deceit, there is a complete failure of consideration for an executed agreement for the sale of land, by reason of the vendor not having title, a Court of equity may, on rescinding the agreement, compel the vendor to return the purchase money: *Pope* v. *Cole*, 6 B.C.R. 205, affirmed, *sub nom. Cole* v. *Pope*, 29 Can. S.C.R. 291.

So, where one of two vendees, both claiming the same land under unregistered contract of sale from the same common source, is entitled to priority by reason of first filling a caveat in the land titles office, the other may recover from his vendee all payments made by him under the contract, with interest, together with the cost of investigating the title or incident thereto: *Stephens* v. *Bannan*, 14 D.L.R. 333.

A deposit made by a purchaser on an agreement to purchase land, may be recovered on the discovery that his vendor, to whom he gave notice of rescission and demanded the return of the deposit, did not have title to a number of acres of the land he agreed to sell: *Clarke* v. *Everett*, 1 Man. L.R. 229. And where a vendor could give title to but four of the five parcels of land he agreed to sell, a plea to an action to recover the pur-

Annotation (*continued*)—Vendor and purchaser (§ I B—5)—Payment of purchase money—Purchaser's right to return of, on vendor's inability to give title.

ALTA.

Annotation

Vendor and purchaser

chase price, that the parcel not delivered was of greater value than the four others combined, and that the vendee was entitled to have the value of such parcel deducted from the original price, is good: *McVeigh* v. *Lussier*, 7 L.C.J. (Que.) 132, 13 L.C.R. 265, reversing 6 L.C.J. 188.

But where a portion of a payment made by a vendee is in shares of company stock he is entitled, if his vendor does not have title to the land he agreed to sell, to recover the shares themselves, and not their cash value; especially where they have depreciated since being transferred to the vendor: *Johnson* v. *Henry*, (Man.) 18 W.L.R. 583. So, collateral securities deposited by a vendee with a bank as security for the performance of his agreement to purchase land, may be recovered by him on the vendee not being able to give any title to the land: *Spencer* v. *Davidson*, 4 S.L.R. 172. And one who, as a part payment on a sale of land, accepts an assignment of a contract held by his vendee for the purchase of other land, may recover from the latter the value placed on the contract by the parties, where it subsequently appears that the vendee's rights had been cancelled prior to the assignment, notwithstanding he acted in good faith in the belief that he had a subsisting interest under his agreement: *Graham* v. *Dremen*, (Man.) 9 W.L.R. 641.

Where a principal repudiates an agent's agreement to sell land for want of authority to make it, the latter is answerable for payments made him by the person to whom he agreed to sell; since by entering into the agreement the agent represented that he had the authority of his principal to make the contract: *McManus* v. *Porter*, (Sask.) 15 W.L.R. 269. And where an attorney sold property of which he was the apparent but not the real owner, and acted for the purchaser in the transaction without disclosing the true state of the title, but alleging it to be good, the purchaser may, on the true owner recovering the property from him, hold the attorney liable for payments made him, together with expenditures made in good faith on the property, notwithstanding the attorney gave only limited covenants for title: *McRory* v. *Henderson*, 14 Gr. 271.

Where a vendee goes into possession of land under an oral agreement of purchase, and the vendor subsequently sells it to another, promising to repay the vendee the money he had paid on the purchase, he may maintain an action thereon: *Hill* v. *Stanton*, 2 U.C.R. 149.

A person acquiring title to an immovable during the pendency of an *action paulienne* to annul the title of the vendor's *auteur*, whose title was also subsequent to the institution of the action, which eventually succeeded, can claim, as against his vendor, the annulment of the sale, and repayment of the purchase money and attendant expenses, on the ground of the danger of eviction to which he is exposed by the title of his vendor's *auteur* being annulled: *Laramée* v. *Collin*, 14 Que. S.C. 416.

A purchaser of land although let into possession on discovering that his vendor cannot make a good title, may rescind the sale and recover the purchase money paid: *Simmers* v. *Erb*, 21 Gr. 289. So, the fact that a person, who agreed to purchase a mill, without the knowledge of the seller remained in it for a day or two, but without making use of it, except to amend a leak in a gate, will not prevent a recovery of a deposit from the

ALTA.

Annotation

Vendor and purchaser

Annotation (*continued*) — Vendor and purchaser (§ I B—5) — Payment of purchase money—Purchaser's right to return of, on vendor's inability to give title.

seller who was unable to give a title: *Clarke* v. *McKay*, 32 U.C.Q.B. 583. And one who orally agrees to purchase an interest in a mining lease, cannot, on discovering a defect in the title, where he continues to act as if the agreement were valid, without repudiating it until just before bringing the action, recover payments made, where the seller swears that he was ready and willing to carry out his agreement and to convey: *Patterson* v. *Irwin*, 21 U.C.C.P. 132. But if a vendee, who has been let into possession, insists on recovering interest on the money paid his vendor, he will be required to account for the rents and profits of the property while in his possession: *Simmers* v. *Erb*, 21 Gr. 289.

Where time is not of the essence of a contract for the sale of land a vendee cannot repudiate the agreement because of the vendor's want of title and recover the purchase money paid him until he has given the vendor a reasonable time to remove the defect: *Gregory* v. *Ferrie*, 3 S.L.R. 191; *Guthrie* v. *Clark*, 3 Man. L.R. 318; *Fortier* v. *Shirley*, 2 Man. L.R. 269. This rule has been applied where a vendor agreed to convey land on the payment of the purchase money, and, when it was tendered, he did not have a Crown patent for the land but merely a receipt for the payments necessary to obtain it; since the vendor was entitled to a reasonable time to make title after the payment of the purchase money: *Guthrie* v. *Clark*, 3 Man. L.R. 318. And where a person, who had made arrangements to purchase land from a railway company, accepted money from the plaintiff and agreed to sell him the land, and, although the former paid the money to the company, he had not received his conveyance at the time he agreed to convey to his vendee, and the latter gave notice that unless the title was completed by a certain day that the sale was off, after which the vendor used reasonable diligence to procure title by the day named, but which was too short to obtain a conveyance from the company, the vendee is not entitled to recover from his vendor the money paid him: *Fortier* v. *Shirley*, 2 Man. L.R. 269.

It was held in *Clarke* v. *Anderson*, E.T. 3 Viet. (Digest Ont. Case Law, 7210), that a vendee, who refused to complete a purchase because of the failure of the vendor to make a good title, could not, in an action of assumpsit, recover a deposit paid the vendor, since his remedy was on the sealed instrument. So it was held in *Robinson* v. *Jarvis*, N.B. Hill. T. 1832, that a purchaser, who does not protect himself by covenants on being ejected from land by the holder of a paramount title, cannot, in an action for money had and received, recover from his grantor, purchase money paid him; as the rule of *caveat emptor* applies to such a sale. And when a person through the persuasion of another who did not pretend to have title purchased land with notice of an incumbrance thereon and paid him the purchase money, which with the knowledge and consent of the purchaser, was appropriated towards the payment of the incumbrance, the purchaser cannot recover such payment on the common counts in assumpsit: *Miller* v. *Cummings*, 10 U.C.C.P. 448.

In some cases a vendee who is unable to collect a judgment for money paid his vendor, who is unable to make a good title to the land, the former has been given a lien on the vendor's interest in the land for the amount

Annotation (*continued*) — **Vendor and purchaser (§ I B—5) — Payment of purchase money—Purchaser's right to return of, on vendor's inability to give title.**

ALTA.

Annotation

Vendor and purchaser

of such payments: *Burns* v. *Griffin*, 24 Gr. 451; *Hurd* v. *Robertson*, 7 Gr. 142. But not for the costs of the suit for the recovery of the amount paid: *Burns* v. *Griffin*, *supra*. And where a vendor does not have title to a portion of land he agrees to sell his vendee is entitled to a lien for money paid in respect to the agreement on that to which he has title: *Bannerman* v. *Green*, 1 S.L.R. 394.

While it is not intended to consider in this note the liability of a vendor, who is unable to make title to land he has agreed to sell, to his vendee for damages beyond the return of money paid on the strength of the agreement, attention is called to a few decisions bearing on that question. Thus, a vendor who on learning that he could not obtain title to land he had contracted to sell, because previously sold, did not until six months thereafter, apply to the purchaser in order to secure title if possible, he is answerable to his vendee for damages because of his failure to apply promptly to the purchaser, and not attempting to procure title: *O'Neil* v. *Drinkle*, 1 S.L.R. 402. And it was held in *O'Neil* v. *Drinkle*, (Sask.) 8 W.L.R. 937, that a vendee might recover not only money paid on an agreement for the purchase of land, but damages as well based on the difference between the contract price of the land and its value at the time the contract was broken. So a seller of land who did not have title at the time he agreed to sell, is answerable to his vendee for improvements made on the land by him with the knowledge of the seller; and also for the loss of the increased value of the land: *Hutchinson* v. *Schleuter*, (Sask.) 8 W.L.R. 682. In the last case it was said that the English rule that a party to a contract for the sale of land was not liable in damages to the purchaser in the event of inability to complete title, being based on the uncertainty of title there prevailing, did not apply in Canada where the system of land titles was simple and certain: *O'Neil* v. *Drinkle*, *supra*.

But in *Meighen* v. *Couch*, 9 D.L.R. 829, the Manitoba Court of King's Bench, following *Bain* v. *Fothergill*, L.R. 7 H.L. 158, held that a vendee was not entitled to recover damages for the loss of his bargain on the vendor's being unable to make a title to the land he had agreed to sell. So, notwithstanding that a purchaser of land may be entitled to recover money paid if his vendor is unable to make a good title, yet he cannot, in addition, recover for improvements made by him on the land: *Kilborn* v. *Workman*, 9 Gr. 255. See also 2 Dart on Vendors, 7 ed., 992 *et seq.*, for a discussion of the law relating to the right of a vendee to recover damages on his vendor being unable to make title.

REX v. TROTTIER.

ALTA.

S. C.

1913

Alberta Supreme Court, Beck, J. October 23, 1913.

1. APPEAL (§ III E—90)—NOTICE OF—CRIMINAL CASE—TIME FOR GIVING —EXPIRATION ON SUNDAY.

If the last day of the ten days in which notice of appeal from a conviction may be given, as required by sec. 750 (*b*) of the Criminal Code, falls on Sunday, sec. 31 (*b*) of the Interpretation Act, R.S.C. 1906, ch. 1, applies to make the notice regular if given on the following day.

ALTA.
S. C.
1913
REX
v.
TROTTIER.

2. APPEAL (§ III E—91)—NOTICE OF APPEAL—CRIMINAL CASE—SERVICE OF—APPOINTMENT OF OFFICER TO ACCEPT—SERVICE ON PERSON IN CHARGE OF OFFICE.

In the absence of an officer of the N.W. Mounted Police, on whom an Indian Agent consents to service of notice of an appeal from a conviction by him, the notice may properly be served on the person in charge in such officer's place.

3. ARREST (§ I B—9)—WITHOUT WARRANT—RE-ARREST ON ORIGINAL WARRANT AFTER APPEAL FROM CONVICTION.

Pending the hearing of an appeal duly lodged against a summary conviction the appellant cannot be re-arrested on the original warrant as its operation is suspended by the appeal.

4. MANDAMUS (§ I B—8)—TO COURT OR JUDGE—TO COMPEL REINSTATEMENT OF CASE—REFUSAL TO HEAR CRIMINAL APPEAL.

Mandamus lies to require an inferior court to enter continuances and to hear an appeal from a summary conviction which it had improperly refused to hear on the merits upon an erroneous ruling against the sufficiency of the notice of appeal.

5. BAIL AND RECOGNIZANCE (§ I—6)—APPEAL FROM SUMMARY CONVICTION—CONTINUANCES.

The recognizance given on the release of the accused pending an appeal to an inferior court from a summary conviction will remain in force for the purposes of continuances ordered by a superior court in substitution for the erroneous quashing of the appeal by the inferior court to which by statute the appeal had to be taken.

[*Ex parte Blues*, 24 L.J.M.C. 138, specially referred to.]

Statement

APPLICATION for a writ of habeas corpus.

The defendant was discharged from custody pending the appeal from the summary conviction.

H. A. Mackie, for the applicant.

Norman Murray, for the Crown.

Beck, J.

BECK, J.:—This is an application for *habeas corpus*. The defendant was convicted before an Indian Agent under the Indian Act, R.S.C. 1906, ch. 81, sec. 135, for selling an intoxicant to an Indian. The conviction was made on July 10, 1913. The defendant intended to appeal. The Criminal Code, sec. 750 (*b*) (sec. substituted 1909) provides that

> the appellant shall give notice of his intention to appeal by filing in the office of the clerk of the Court appealed to, and serving the respondent or the justice who tried the case with a copy thereof, a notice in writing setting forth with reasonable certainty the conviction or order appealed against and the Court appealed to, within ten days after the conviction or order complained of.

July 10 was a Friday and the tenth day after that date consequently fell on Sunday 20. The notice of appeal was filed on Monday 21. The Judge of the District Court held that this was too late and refused on that ground alone to permit the appeal to be entered. In my opinion he was clearly wrong, inasmuch as the Interpretation Act, R.S.C. 1906, ch. 1, sec. 31(*h*), says:—

> If the time limited by any Act for any proceeding, or the doing of

anything under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday.

On the argument before me it was further contended that in any case there was not sufficient service of the notice of appeal.

The information was laid by one Burke, a sergeant in the R.N.W.M. Police. The offence was alleged to have been committed at Durlingville near the Cold Lake Reserve; the defendant was tried there before the Indian Agent and, being adjudged guilty, was sentenced to one month's imprisonment in the R.N.W.M.P. barracks at Fort Saskatchewan, a very long distance from the Reserve and about eighteen miles from Edmonton. He arrived at Fort Saskatchewan only on July 17. The Court to which the appeal lay and at which the defendant who had entered into a recognizance for the purposes of the intended appeal attended was held at St. Paul de Metis on October 14, 1913. He was represented by Mr. Mackie his solicitor. Mr. Norman Murray appeared for the Department of Indian Affairs.

Mr. Mackie had, owing to the distances and the delay occasioned thereby, received instructions to appeal under such circumstances as enabled him to prepare the notice of appeal only on July 18, and it then being impossible owing to distance to serve personally either the respondent the informant or the Indian Agent, both of whom were then at the Indian Reserve the following telegrams passed between his firm and the Agent:—

Edmonton, July 19, 1913.

W. Sibbald,

Onion Lake, Alta.

Rex v. *Trottier.*

Trottier appealing your conviction. Will you authorise some person in Edmonton to admit service of notice of appeal on your behalf. Wire us, our expense.

CORMACK & MACKIE.

Onion Lake, July 19, 1913.

To McCormack & Mackie.

Require department's authority before engaging solicitors, am wiring Ottawa.

W. SIBBALD.

Edmonton, July, 21, 1913.

W. Sibbald,

Onion Lake, Alta.

Rex v. *Trottier.*

You do not require solicitors. The idea is that ten days to appeal elapse to-day. If you say serve Major Cuthbert for you, our appeal will be properly lodged. Kindly advise us our expense at once.

CORMACK & MACKIE.

ALTA.

S. C.
1913

REX
v.
TROTTIER

Beck, J.

Onion Lake, July 21, 1913.

McCormack & Mackie, Edmonton.

No reply from Ottawa yet but have wired Major Cuthbert.

W. SIBBALD.

Onion Lake, July 21, 1913.

Major Cuthbert, R.N.W.M.P.

Kindly accept from MacCormack and Mackie service of notice of appeal against my conviction in *Trottier* case.

W. SIBBALD.

Onion Lake, July 22, 1913.

To McCormack & Mackie, Edmonton.

Ottawa enquires if appeal will be argued at Edmonton or where, reply.

W. SIBBALD.

Edmonton, July 22, 1913.

W. Sibbald,

Onion Lake, Alta.

Rex v. *Trottier.*

The appeal will be heard at St. Paul de Metis on October 14. Notice of appeal forwarded to you will give you all the data you will require.

CORMACK & MACKIE.

Unfortunately Major Cuthbert, who was the officer commanding the R.N.W.M.P. at Edmonton was absent, his place being taken by Inspector Wroughton. Mr. Wroughton was served with the notice for or instead of Mr. Cuthbert on July 21.

It is quite clear to me that Messrs. Cormack & Mackie in suggesting Major Cuthbert as the person whom they might serve for Mr. Sibbald named him because of his official position and that Mr. Sibbald in assenting to his being served for him did so for the same reason. The suggestion was a natural one to make in any case as the R.N.W.M.P. have it as a part of their duty to see to the enforcement of these provisions of the Indian Act and as, in this particular case, the informant was a member of that force.

It is quite clear that according to the practice of the former Courts of common law and equity "service" *simpliciter* did not mean *personal* service only; leaving the paper at the person's residence or place of business was equally good service: *Jeames* v. *Morgan* (1576), Cary 56, 21 Eng. R. 30; and also recent cases cited Stroud's Judicial Dictionary, tit. "served." Furthermore it is quite clear that service on one who acted as solicitor or agent in regard to the matter in question and who in fact still continued to represent the party was effective: *Reg.* v. *Somersetshire JJ.*, 69 L.J.Q.B. 311; *The Queen* v. *Justices of Oxfordshire*, 62 L.J.M.C. 156; and it seems that where one has been served for another the latter may ratify the service so as to make it good: *ib.*

The notice of appeal evidently was effective. Mr. Murray appeared in pursuance of the notice on instructions of the De-

partment of Indian Affairs. The Indian Agent and the witnesses who had given the evidence on which the conviction was made were also present. The original conviction and the recognizance entered into by the defendant and his sureties to prosecute the appeal were also produced from the proper custody. The defendant himself personally appeared.

Under these circumstances I held that the notice of appeal was served within the time required by sec. 750(*b*) and consequently that the Judge ought to have permitted the entry of the appeal: *Syred* v. *Carruthers*, E.B. & E. 469, Eng. Reps. 584, 27 L.J.M.C. 273.

The accused was re-arrested on the original warrant of the Indian Agent. I think the effect of this was suspended by the proceedings on appeal and that, therefore, the arrest was not justified. I think I should therefore discharge the defendant from custody.

Where the Court to which an appeal from a conviction is given improperly refuses to hear an appeal on the merits it is the well established practice that a mandamus will issue directing the Court "to enter continuances and to hear the appeal:" *Reg.* v. *Carnarvonshire JJ.* (1841), 2 Q.B. 325, and cases cited in Halsbury's Laws of England, vol. X., tit. Crown Practice—Mandamus, pp. 89, 90, and in Shortt on Informations, pp. 301 *et seq.*, and Short & Mellor's Crown Prac., 2nd ed., pp. 205, 206.

As in the present case the Judge of the District Court is not a party to these proceedings, I think the best course to pursue is this. The representative of the Department of Indian Affairs may, if he sees fit to do so within six weeks, take out an order that unless the Judge of the District Court shew cause to the contrary by a date to be fixed by the order to be served upon him a mandamus do issue requiring him to enter a continuance of the appeal from the sittings of the Court held on October 14, 1913, to the next sittings of the Court and then and there, if the defendant appears and prosecutes his appeal to hear and deal with the appeal according to law. The recognizance in my opinion remains in full force. In *Ex parte Blues*, 24 L.J.M.C. 138 at 140—a somewhat similar case—the Court said:—

> They (the Sessions) ought to have allowed the appeal to be entered and respited it to the next Sessions, but they had no authority to estreat the recognizance, and order the appellant to be apprehended; and he is therefore unlawfully in custody. However justice is not to be defeated because the Sessions have made this mistake, and we shall therefore, by mandamus, direct the Sessions to enter continuances and hear the appeal at the next Sessions; so that if there is good ground of appeal the conviction will be quashed, but if not, the conviction will be affirmed, and the defendant will undergo the punishment to which the law has subjected him. The recognizance under these circumstances will remain in full force

ALTA.

S. C. 1913

REX v. TROTTIER.

Beck, J.

and he will be bound to appear at the next Sessions to prosecute the appeal; and if he does not, the conviction may be legally enforced, and the defendant taken into custody.

If the order for mandamus is taken out the representative of the Department of Indian Affairs will give one month's notice to the firm of Cormack & Mackie or Mr. Mackie on behalf of the defendant that it is proposed to proceed to a hearing of the appeal at the next sittings of the District Court. If such notice is not given an order will go prohibiting any further proceedings upon the conviction. I make the order in this way on account of the great expense and inconvenience to all parties concerned owing to the distances involved unless it is quite well understood in ample time what either side proposes to do.

Order accordingly.

SASK.

S. C. 1913

ROBINSON v. FORD.

Saskatchewan Supreme Court. Trial before Brown, J. October 22, 1913.

1. MORTGAGE (§ V—66)—MERGER—INTENTION—CONVEYANCE OF EQUITY TO MORTGAGEE AFTER LATTER'S ASSIGNMENT OF MORTGAGE.

The conveyance of encumbered land by a mortgagor to the original mortgagee by an instrument referring to the mortgage as being held by the bank to whom the mortgagee had transferred the same as security, will not effect a merger of the title sufficient to work a satisfaction of the encumbrance on the mortgagee subsequently obtaining a retransfer to himself of such mortgage, where it is apparent that the intention of the parties to the transaction was that it should be kept alive.

2. FRAUD AND DECEIT (§ II—5)—CONCEALMENT — FAILURE TO DISCLOSE FACTS—LEADING PURCHASER TO BELIEVE THAT ENCUMBRANCE IS SATISFIED.

For the holder of a mortgage to lead a purchaser of land to believe that the encumbrance was satisfied and to conceal from him the fact that foreclosure proceedings were pending, is such a fraud, under the Land Titles Act, R.S.S. 1909, ch. 41, as to defeat a title subsequently acquired by the former under the foreclosure proceedings.

[*Independent Lumber Co. v. Gardiner*, 3 S.L.R. 140, referred to.]

3. MORTGAGE (§ II A—35)—PRIORITY—AS TO OTHER CLAIMS.

Notwithstanding that the title acquired by the holder of a mortgage under a foreclosure proceeding may be void against a purchaser of the encumbered land whom the former led to believe that the mortgage was satisfied, yet a person who, in good faith, lends money to the holder of the title so acquired, and who registers his mortgage without notice of such purchaser's rights, will be protected although warned of impending litigation regarding the land before taking such mortgage.

Statement

TRIAL of action brought to declare the plaintiff's title to land free from the claims of the defendants.

J. F. Frame, and *F. W. Turnbull*, for the plaintiff.

Alexander Ross, for the defendants.

BROWN, J.:—After a careful examination of the evidence in this case, I find myself unable to agree with the plaintiff's contention that the mortgage from Hagen to the Nelson Ford Lumber Co., Ltd., was discharged and satisfied when the company took a transfer of the land in question from Hagen in June, 1908. The evidence of the witness Henry Wood does not go that far. I think that what was said by him and Ford at the time was simply an expression of opinion on their part that the taking of the transfer effected a merger of the mortgage and discharged the debt. I cannot find from the evidence that the debt was in fact discharged by the transaction. At that time the mortgage was held by the bank; and there, therefore, could not be a merger. The lumber company were not, under the circumstances, competent to give a discharge; and certainly there could be no discharge apart from agreement between the lumber company and Hagen. W. E. Ford, the lumber company's manager at the time, states that there was no such agreement; and, while I do not give much weight to the testimony of this witness, his evidence in this respect is supported by the documents. Besides Hagen, who might have cleared the matter up, has not been called upon to give evidence by either party. The transfer on its face refers to this mortgage as an incumbrance, and also to the fact that the bank are the holders of it.

I also find, from the foreclosure proceedings in the action of Sharpe and Patterson against the lumber company, that the title to the property is to issue to Sharpe and Patterson, subject to this mortgage to the lumber company; so that they, Sharpe and Patterson, treated this mortgage at that time as a valid and subsisting one, and it was from them that the plaintiff derived his title. Again, when proceedings for foreclosure were subsequently taken upon this mortgage by the defendant Emma Lynn, and Hagen was made a party to the foreclosure proceedings, he did not appear to the action at all, nor did he in any way take exception to such proceedings, and this would indicate an admission on his part that the mortgage was not discharged. This mortgage was, on August 2, 1909, transferred back from the bank to the lumber company, and on September 7, 1909, it was transferred from the lumber company to the defendant Emma Lynn; and I find, with some hesitation, however, that this transfer was made for valuable consideration. It was transferred to secure an indebtedness owing by the lumber company to her.

I judge, from the evidence, that the lumber company had used her money without taking or giving proper security, and they, or rather their manager, Ford, now sought a way out of the difficulty by transferring this mortgage. It is clear that Emma Lynn was not notified of the transfer until some time

SASK.

S. C.
1913

ROBINSON
v.
FORD.

Brown, J.

after this, but that is not very surprising, in view of the fact that Ford was her nephew, and, apparently, had full power over the investment of her funds. Emma Lynn, having obtained title to this mortgage, took foreclosure proceedings under it on June 1, 1910. The summons bears that date, although her affidavit on which the summons was issued was evidently sworn to on May 17, 1910. The order *nisi* issued in those proceedings is dated October 17, 1910, and the final order vesting title in Emma Lynn is dated July 24, 1911. The plaintiff purchased the lands in question from Sharpe and Patterson in January, 1910, subject only, as he understood, to a mortgage in favour of the Toronto General Trusts Corporation for $3,000. He paid $2,550 for the same, and obtained a transfer from Sharpe and Patterson to him of the lands, on or about that time. This transfer was left by the plaintiff with his Winnipeg solicitors for attention; but, owing apparently to sheer neglect, the transfer was not registered. When the plaintiff subsequently became aware that the mortgage in question stood as an incumbrance against the title, he was led to believe that the same had been discharged, being so informed by the manager of the bank which had previously held it. In an attempt to get full information with reference to the status of the mortgage, he and his agent, one A. D. Kildahl, wrote several letters to Emma Lynn and to her agent Ford, making inquiries. This correspondence took place while the foreclosure proceedings above referred to were contemplated and pending. The correspondence shews that both Emma Lynn and her agent Ford were distinctly made aware that the plaintiff had purchased these lands from Sharpe and Patterson, and was interested as an unregistered owner, and that, as such owner, he was seeking *bonâ fide* for further information with reference to the mortgage. Notwithstanding these inquiries, the defendants not only allowed the plaintiff to remain under the belief that the mortgage was discharged, but they evidently planned to keep him under this belief and in complete ignorance of the foreclosure proceedings. All these defendants, Emma Lynn, her agent W. E. Ford, and Florence Ford, were in full league, in this matter, with W. E. Ford as the active instrument, for the perpetration of the fraud. Florence Ford has not defended the action at all, and has thereby admitted the allegations made against her. A letter from Emma Lynn to W. E. Ford, dated August 8, 1910, shews a complete understanding between her and her agent in this matter. It reads as follows:—

Conrad, Aug. 8, 1910.

Dear Nephew,—I received your letter a few days ago. Am sorry there was a mistake made in that foreclosure. I am afraid you are going to have trouble with it anyway. I rec'd a letter from A. D. Kildahl wanting

information concerning it. I told him I would send his letter to you and you could give him the desired information. I was afraid I might say the wrong thing.

As soon as foreclosure was obtained upon the mortgage and title was issued in the name of Emma Lynn, she transferred the title to W. E. Ford. Ford at once obtained a large loan through the defendant mortgage company; and, as soon as the mortgage was registered, he in his turn transferred the property to his wife, the defendant Florence Ford. These transactions are simply final steps in their dishonest scheme. I do not wish to be understood as saying that mere knowledge of the existence of an unregistered outstanding transfer necessarily implies fraud as against a party getting title and having such knowledge. But here the parties had knowledge of the plaintiff's outstanding transfer. They knew that the plaintiff was under the impression that the mortgage which they held was discharged and satisfied; they knew that the source of the plaintiff's information was the bank which had held the mortgage, and whose information was likely to be relied upon; they knew that the plaintiff was, by himself and his agents, seeking to get accurate information as to the status of the mortgage; that he was relying on them as the apparent holders of the mortgage to give this information; and all this while they were taking foreclosure proceedings under the mortgage; and yet they allow the plaintiff to remain under the false impression which he had as to the status of the mortgage; they keep him in absolute ignorance of the foreclosure proceedings, and likewise keep the Court in ignorance of the plaintiff's interest in the land in question; they deliberately plan to get title from the Court, shutting out the plaintiff entirely, without in any way giving him a chance to protect himself. I have no hesitation in holding that such conduct is fraud within the meaning of the Land Titles Act, and that the title obtained in this way ought not to be allowed to stand. See *Independent Lumber Co.* v. *Gardiner*, 3 S.L.R. 140.

The defendant Emma Lynn has now no interest in the land and asserts her claim to the money paid into Court by the defendant mortgage company.

I am of opinion that the plaintiff has failed to make out any case against the defendant mortgage company. The mere fact that they were notified or warned of impending litigation is not sufficient. When their mortgage was registered, the title was clear of any claim on the part of the plaintiff, and they advanced the moneys under their mortgage *bonâ fide*. Fortunately for the plaintiff, he will not suffer much in this respect, in view of the way the moneys have been applied. As against the mortgage company, therefore, the action will be dismissed

SASK
S. C.
1913
ROBINSON
v.
FORD.

with costs. The certificate of title now standing in the name of Florence G. Ford will be cancelled, and a new certificate of title issued in favour of the plaintiff, upon production to the registrar of the proper land titles office of the plaintiff's transfer from Sharpe and Patterson.

I think that this is a case where there should be no costs as between any of the other parties to the action, and I so order.

Judgment accordingly.

CAN.
EX. C.
1913

Re LEONARD.

Exchequer Court of Canada, Cassels, J. October 11, 1913.

1. PATENTS (§ I—3)—MISTAKE IN APPLICATION—REISSUE.

An omission through mistake to make a claim in a patent application for one of the inventions disclosed in the specification is within the purview of sec. 24 of the Patents Act, R.S.C. 1906, ch. 69, as to reissue in cases of "insufficient description or specification."

2. PATENTS (§ II C—27)—PATENTABILITY OF INVENTIONS—INVENTION DISCLOSED BUT NOT CLAIMED IN PRIOR APPLICATION—ABANDONMENT—REISSUE.

Where the claim of patentability in a patent application is for the apparatus only although the specifications disclose also, as a new invention, the process in which the apparatus is to be used, the applicant cannot afterwards, except on an application for a reissue of the patent so obtained, obtain a patent of invention upon the method or process so as to cover any device or contrivance producing the same effect as his patented apparatus and thereby widen the claims of his original patent.

[*Hinks* v. *Safety Lighting Co.*, 4 Ch.D. 607, 612; and *Miller* v. *Brass Co.*, 104 U.S.R. 350, followed; *Barnett-McQueen Co.* v. *Canadian Stewart Co.*, 13 Can. Ex. R. 186, distinguished.]

APPEAL from a decision of the Commissioner of Patents refusing to grant a patent for invention to the applicant Leonard.

The appeal was dismissed.

R. S. Smart, for the appellant.

No one *contra*.

Cassels, J.

CASSELS, J.:—Ch. 69, Revised Statutes of Canada, 1906, sec. 19, reads as follows:—

Every applicant who has failed to obtain a patent by reason of the objection of the Commissioner, as aforesaid, may, at any time within six months after notice thereof has been mailed, addressed to him or his agent, appeal from the decision of the Commissioner to the Governor-in-council.

Ch. 17, 3 & 4 Geo. V., assented to May 16, 1913, amended the Exchequer Court Act, as follows:—

23*a*. Every applicant for a patent under the Patent Act who has failed to obtain a patent by reason of the objection of the Commissioner of Patents as in the said Act provided, may, at any time within six months after notice thereof has been mailed, by registered letter, addressed to him or his agent, appeal from the decision of the said Commissioner to the Exchequer Court.

2. The Exchequer Court shall have exclusive jurisdiction to hear and determine any such appeal.

3. The Exchequer Court shall have exclusive jurisdiction to hear and determine any now pending appeals to the Governor-in-council under sec. 19 of the Patent Act, and the Governor-in-council shall transfer the said appeals and all documents and proceedings relating thereto to the Exchequer Court.

The applicant for the patent, William Leonard, appealed to the Governor-in-council pursuant to the provisions of the Patent Act hereinbefore quoted. The decision of the Commissioner of Patents was given on December 12, 1911, and the appeal was filed on January 29, 1912, and was pending before the Governor-in-council at the time the statute extending the provisions of the Exchequer Court Act hereinbefore quoted was passed.

Shortly after the enactment of this statute, orders were drawn up providing for a summary appeal to the Exchequer Court, and the papers in connection with the application were duly forwarded to this Court. Thereupon notice of the appeal and that the same would be argued on the day named in the notice, was duly served upon the Commissioner.

Nobody representing the Commissioner appeared before me on the appeal; and I understand it to have been stated that it was not the intention of the Department to be represented on any appeals under this statute. It seems to me that it is throwing too much responsibility on the Court, and that the better practice would be that the Commissioner should be represented in order to aid and assist the Judge who hears the appeal.

Counsel for an appellant, as a rule, is not very apt to put forward the opposite view of the case to that which he is retained to argue on behalf of his client. Since the argument I have gone carefully through the papers, and am of the opinion for the reasons that I am about to give, that the Commissioner was right in refusing a patent to the applicant.

On February 11, 1908, the applicant William Gray obtained a patent for an alleged new and useful improvement in feeds for grain, ore and mineral separators. I wish it to be clearly understood that while on this application I assume this patent to be valid, I am in no way precluded, if the case were presented in litigation before the Court, from determining that the patent is invalid or valid, as the case may be. It is only for the purpose of this appeal that I accept it as a valid patent.

The claims of this patent are combination claims—a vertical air blast spout and an inclined grain spout connected with one side of the same, of the feed plate arranged wholly within the said grain spout, etc.

The only invention described in the patent is the deliv-

CAN.

EX. C.
1913

RE
LEONARD.

Cassels, J.

ering of the materials in a horizontal plane or directly across the vertical spout, and therefore at right angles to the ascending current.

Figure 3 to his patent, the patentee states in his specification, is a perspective view of the curved chute which particularly embodies his inventions. The object of this curved chute is in order that the material might be delivered in a horizontal plane or directly across the vertical spout, and therefore at right angles to the ascending air current.

In his specification the patentee describes the manner in which this result is obtained. The specification states as follows:—

> Heretofore, gold and ore, cereals, seeds and various other materials requiring to be separated, have been delivered into a vertical spout from a connecting inclined spout whereby the materials acquired a considerable momentum in a downward direction and the grains or particles composing such materials were held to a certain degree in close contact, and in consequence the current of air forced upward through the vertical spout or chamber failed to act on the materials in the most effective manner. I have found that by delivering the materials in a horizontal plane or directly across the vertical spout and therefore at right angles to the ascending air current, they are spread out in a thinner sheet so that the air current acts thereon more effectively, or in other words forces upward and separates the lighter materials from the heavier in a more perfect manner than is practicable when the materials are discharged in a downward direction.

This specification shews on its face the complete invention which the patentee was claiming. It also shews the whole process. It admits the state of the art from which there would be nothing new in the patentee's invention, except the delivery of the material in a horizontal plane. With this specification the patentee obtained his patent, dated as I have mentioned, on February 11, 1908. More than two years from the issue of his patent, namely, on May 18, 1910, the application was filed for the patent in question.

By the patent which was refused by the Commissioner, the patentee is seeking to obtain a method or process patent which would cover any device or contrivance which had the effect of delivering the material in a horizontal plane, thereby very much widening the claims of the previous patent. The Commissioner refused the application, his reasons being as follows:—

> Inasmuch as in his apparatus patent, which was granted more than two years before the date of the present application, the applicant disclosed the invention now claimed without any reservation, I am of the opinion that the invention now claimed must be considered to have been at the date of the present application abandoned and dedicated to the public, and that consequently, the present application cannot be allowed.

I think this decision is correct. In the case of *Barnett-McQueen Co.* v. *Canadian Stewart Co.*, 13 Ex. C.R. 186, I had occasion to point out at p. 220 *et seq.* the objects of the claim. In patent cases the decisions are so numerous that it is useless to cite them. I would just refer to two, one a judgment of the late Lord Justice Jessel, M.R., in the case of *Hinks* v. *Safety Lighting Co.*, 4 Ch.D. 607, at 612, where the view of that celebrated Judge is set out, as follows:—

I am anxious, as I believe every Judge is who knows anything of patent law, to support honest *bona fide* inventors who have actually invented something novel and useful, and to prevent their patents from being overturned on mere technical objections, or on mere cavillings with the language of their specification so as to deprive the inventor of the benefit of his invention. This is sometimes called a "benevolent" mode of construction. Perhaps that is not the best term to use, but it may be described as construing a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent. Beyond that the "benevolent" mode of construction does not go. It never was intended to make use of ambiguous expressions with a view of protecting that which was not intended to be protected by the patentee, and which has not been claimed to be so protected by him whether or not it was an invention unknown to himself. It is for the patentee to tell the world that of which he claims a monopoly, to tell them, "You may do everything but this; but this you must not do, this is my invention." With the view of getting this into a narrow compass, it has long been the practice of patent agents to insert in specifications the distinct claim of what they say is comprised in the patent, meaning that nothing else is comprised, that everything else is thrown open to the public, or, to put it in other words, if a man has described in his specification a dozen new inventions of the most useful character, but has chosen to confine his claim to one, he has given to the public the other eleven, and he has no right to be protected as regards any one of the other eleven if he wishes to recall that gift which he has made by publishing the specification.

Then in the United States Supreme Court, in the case of *Miller* v. *Brass Company*, 104 U.S.R. 350, to the same effect. brated Judge is set out, as follows:—

Where a specific device or combination is claimed, the non-claimant of other devices or combinations apparent on the face of the specification is, in law, so far as the patentee is concerned, a dedication of them to the public and will be so enforced, unless he, with all due diligence, surrenders his patent for reissue, and proves that his omission to claim them arose wholly from inadvertence, accident or mistake

See also Frost on Patents, 4th ed. (1912), 336, for other authorities.

I therefore am of the opinion, that so long as the patent of February 11, 1908, is in force, it is a bar to the applicant obtaining the patent sought for. The applicant for the patent is not without redress. Sec. 24 of the Patent Act, relating to

CAN.
EX. C.
1913
RE LEONARD.
Cassels, J.

reissue of patents, provides a remedy, and the applicant, if entitled to a reissue, can bring himself within the provisions of this section. His proper remedy would be to apply for a reissue of the patent.

It is quite clear by a long series of decisions, that the words "by reason of insufficient description or specification" cover the claim in the patent as part of the specification. It is also settled that the original patent may be perfectly good upon its face, but that nevertheless it may come within the terms of this provision and be held defective or inoperative by reason of insufficient description for specification, if it appears that the patentee had set out in the specification his invention, but through mistake had not made a claim for it.

Usually the invention granted by the original patent would not be broadened by the reissue, but in a clear case it would be, provided the applicant had brought himself within the provisions of the statute. The patentee by taking his patent, has dedicated, as I have pointed out, what he has not claimed for the benefit of the public, and he must get rid of this dedication by means of a reissued patent.

Mr. Smart, in his argument, referred to my judgment in the case of *Barnett-McQueen Co.* v. *Canadian Stewart Co.*, 13 Ex. C.R. 186, where I say at p. 209, that

> I agree with Mr. Anglin's view that, having regard to the dates, the patentee has the same right as a stranger would have to apply for and obtain a patent for a particular means of support, provided always that there was invention and subject-matter.

But I was dealing with that particular case as I have stated in my reasons for judgment, having regard to the dates. The application for the second patent was filed on April 6, 1908. The first patent was granted on April 14, 1908. So that in that particular case there had clearly been no dedication to the public. Moreover, the application in that case was to procure a purely construction claim. I do not think that the *Barnett-McQueen* v. *Canadian Stewart* case affects the case before me.

The American statute under which the American decisions are based, is identical in language or nearly so with our own statute. There are a long series of cases in the Supreme Court of the United States dealing with this question: *Miller* v. *Brass Co.*, 104 U.S.R. 350.

I quote at length from the judgment of Blatchford, J., in the case of *Wilson* v. *Coon*, 19 Off. Patent Gaz. of the U.S., 482, as follows:—

> It is contended for the defendants that the re-issued patent is void, because the original patent was valid and operative, and because it contains new matter and entirely changes the character of the invention set forth in the original patent, and because the reissued patent was intended

to cover a different collar from that originally invented. This reissue was granted under sec. 4916 of the Revised Statutes, which provides as follows:—

"Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued. . . . The specification and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so reissued, together with the corrected specification, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

This enactment is the same as sec. 53 of Act of July 8, 1870, 16 U.S. Stats. at Large 205. The word "specification," when used separately from the word "claim" in sec. 4916, means the entire paper referred to in sec. 4888—namely, the written description of the invention "and of the manner and process of making, constructing, compounding, and using it," and the claims made. The word "specification," meaning description and claims, is used in that sense in secs. 4884, 4895, 4902, 4903, 4917, 4920, and 4922. In some cases, as in secs. 4888 and 4916, the words "specification and claim" are used, and in sec. 4902 the word "description" and the word "specification" are used; but it is clear that the word "specification," when used without the word "claim" means description and claim. Therefore a reissue is allowed, under sec. 4916, when the specification is defective or insufficient, in regard to either the description or the claim, or to both, to such an extent as to render the patent inoperative or invalid, if the error arose in the manner mentioned in the statute. In such case there may be a corrected specification—that is, one corrected in respect to description or claim, or both, and there may be a new patent in accordance therewith; but the new patent must be for the same invention. This does not mean that the claim in the reissue must be the same as the claim in the original. A patentee may, in the description and claim in his original patent, erroneously set forth as his idea of his invention something far short of his real invention, yet his real invention may be fully described and shewn in the drawings and model. Such a case is a proper one for a reissue. A patent may be inoperative from a defective or insufficient description, because it fails to claim as much as was really invented, and yet the claim may be a valid claim, sustainable in law, and there may be a description valid and sufficient to support such claim. In one sense such patent is operative and is not inoperative; yet it is inoperative to extend to or claim the real invention, and the description may be defective or insufficient to support a

CAN.
EX. C.
1913
RE LEONARD.
Cassels, J.

claim to the real invention, although the drawings and model shew the things in respect to which the defect or insufficiency of description exists, and shew enough to warrant a new claim to the real invention.

I do not wish to be understood that I am in any way deciding that the applicant is entitled to a reissue, nor do I wish it to be considered that I am holding that he is not so entitled. That is a matter that rests entirely with the Commissioner at the present time.

The appeal is dismissed. As nobody appeared for the Commissioner of Patents, it is dismissed without costs.

Appeal dismissed.

ONT.
S. C.
1913

Re McKEON.

Ontario Supreme Court, Hodgins, J.A. October 27, 1913.

1. WILLS (§ III G 7—151)—BEQUEST FOR EDUCATION AND SUPPORT—PAYMENT OF CORPUS.

The *cestui que trust* for whose education and support a fund is bequeathed to another in trust, is entitled on coming of age to receive the unexpended portion of the fund absolutely, where the gift is not entirely dependent on the discretion of the trustee and there is no gift over.

[*Re Hamilton*, 8 D.L.R. 529, 27 O.L.R. 447; and *Re Johnston*, [1894] 3 Ch. 204, applied.]

Statement

MOTION by the trustee under the will of Albert McKeon, deceased, upon originating notice, for an order determining a question arising upon the construction of the will as to the disposition of the estate.

T. J. Murphy, for Mary A. Crotty, the trustee.
J. B. McKillop, for the next of kin.
J. F. Faulds, and *P. H. Bartlett*, for Angela Crotty.

Hodgins, J.A.

HODGINS, J.A.:—The words of the will in question are as follows: "The balance of my estate . . . he" (the executor) "shall sell and hand over the proceeds to Mary A. Crotty, of St. Columban, to be held by her in trust, and to be expended by her for the education and support of my niece Angela Crotty now attending the Ursuline Academy in Chatham."

Angela Crotty at the death of the testator was a minor. She is now of age, and contends that she is entitled to have the balance of the estate which the will deals with, handed over to her. It is said that the trustee received about $5,000, and has expended about $800 or $900 for Angela's education and support; that part is in the bank, and that the balance is invested in the security of a promissory note.

I think that this case falls within the line of decisions which hold that where an entire fund is given, and a purpose, such as

education and support, is assigned as the motive of the gift, the beneficiary takes the whole fund absolutely. See *Hanson* v. *Graham*, 6 Ves. 239; *Re Sanderson's Trusts*, 3 K. & J. 497; *Younghusband* v. *Gisborne*, 1 Coll. 400; *Re Stanger*, 60 L.J. Ch. 326.

In the latter case Chitty, J., observes, on the terms of the gift (p. 327): "It is material to observe that it is not framed so as to make it the duty of the trustees to apply the whole of the income or corpus for R. Tate's benefit. Had this been so, I should have been prepared to hold that he took a vested interest in the whole fund."

I think the principle to be applied in dealing with this will is at one with that stated by the learned Chancellor in *Re Hamilton*, 8 D.L.R. 529, 27 O.L.R. at p. 447, and that the right of the beneficiary can only be defeated by "making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary." In this he follows *Re Johnston*, [1894] 3 Ch. 204.

Where it has been held that the fund does not go to the beneficiary, it is because the destination of the fund is controlled in one or other of those ways. See *Re Nelson*, 12 O.W.R. 760; *Re Rispin*, 2 D.L.R. 644, 25 O.L.R. 633, affirmed 8 D.L.R. 756, 46 Can. S.C.R. 649; *Re Hamilton*, 8 D.L.R. 529, 27 O.L.R. 445, affirmed 12 D.L.R. 861, 28 O.L.R. 534; *Re Collins*, 6 D.L.R. 893, 4 O.W.N. 206.

In no case that I have been able to find has the mere interposition of a trustee to hold and to expend the moneys been held to defeat the vesting of the gift where otherwise no controlling discretion is vested in him.

There should be a direction that the trustee should pay over the balance of the fund to Angela Crotty, after payment of any moneys properly expended by her thereout and of her commission and the costs of this motion; the account to be taken by the Master at London.

Costs of all parties out of the fund; those of the trustee as between solicitor and client. This motion was properly made in Court.

Order accordingly.

SASK.

HUTSON v. CITY OF REGINA.

S. C. 1913

Saskatchewan Supreme Court. Trial before Brown, J. October 18, 1913.

1. HIGHWAYS (§ IV A 6—155)—LIABILITY OF MUNICIPALITY—DEFECT IN SIDEWALKS—BROKEN PRISMS IN LIGHT GRATINGS.

Under sec. 393 of R.S.S. 1909, ch. 84, which requires cities to keep sidewalks in repair, and declares them to be responsible for all damages sustained by any person by reason of a neglect of such duty, a city is liable for injuries sustained by a pedestrian by his heel catching in a hole in a light area or grating containing glass prisms, from which a number of prisms had been missing for several years, notwithstanding that the grating, which was flush with the surface of the walk, was, without the consent of the city, placed therein by an adjoining property owner for his own convenience, at the time the city built the sidewalk.

2. HIGHWAYS (§ IV B 3—179)—DEFECTS—LIABILITY OF ABUTTING OWNER—GRATING IN SIDEWALK.

Relief over against the adjoining owner will be granted a city municipality in respect of damages recovered against it for injury caused a pedestrian through a defective prism light grating in the city sidewalk maintained in connection with the basement of the owner's building, although the defect had existed prior to his acquiring the property, particularly if a municipal by-law required the owner from time to time to keep it in repair.

Statement

ACTION to recover damages for injuries sustained because of a defective sidewalk. One Peterson was made a third party upon a claim by defendants against him for indemnity.

Judgment was given for the plaintiff against the city, with relief over against the third party.

P. M. Anderson, for plaintiff.

S. P. Grosch, for defendant.

J. F. L. Embury, for Peterson, the third party.

Brown, J.

BROWN, J.:—In the month of August, 1905, the defendant corporation, hereinafter called "the city," entered into a contract with a firm of contractors for the construction of a concrete sidewalk, having a uniform width of twelve feet along a portion of the south side of South Railway street. This work was done under the supervision of an engineer in the city's employ, and was completed during the year 1906 and duly paid for. It appears, that while the work was in progress, several property-owners arranged in some way to have gratings or light areas inserted in the sidewalk opposite their respective properties. These grating were, apparently, put in and paid for by the owners themselves. There is no evidence to shew that the city council, either by resolution or by-law, ever consented to these gratings being placed in the sidewalk. I have no doubt that the various owners had this work done by the contractors after consultation with someone who purported to act and sign for the city; there is, however, no evidence on this point whatever, and no evidence that anyone was ever authorized to give

such consent. We simply know that the gratings were built into the sidewalk when the sidewalk itself was constructed, and that they were put there by and at the instance of the owners. Two of these gratings were inserted in that portion of the sidewalk fronting the property now owned by the third party hereto. These gratings were in area each about two by two and a half feet, and contained a large number of light prisms, each prism being in area about four inches square. A number of prisms in each of these two gratings had become broken, I presume through continual wear and usage, and were in that condition at the time of the accident in question in this action. The sidewalk at this point was one that was used a great deal by pedestrians; and there is evidence, which I accept, by those who were in the habit of passing along this sidewalk several times almost every day, to the effect that the prisms in these gratings were in this broken condition, and had been in need of repair, for several years. On November 15, 1912, the plaintiff, who is a locomotive engineer by occupation and a resident of the city, was walking along this sidewalk in an easterly direction, and while doing so, the heel of the boot on his right foot caught in one of these holes, and he was thereby thrown violently to the walk and suffered severe injuries. He brings this action against the city to recover damages because of such injuries.

The city, if liable at all, is liable under sec. 393 of the City Act, being ch. 84, R.S.S. 1909, which reads as follows:—

> Every public road, street, bridge, highway, square, alley or other public place, subject to the direction, management and control of the council including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the council shall be kept in repair by the city; and on default of the city so to keep the same in repair, the city, besides being subject to any punishment provided by law, shall be civilly responsible for all damage sustained by any person by reason of such default.

It is contended on behalf of the city that, as these gratings or light areas were put in by the property-owner and not the city itself, that the city was not by virtue of this section under any obligation to keep the prisms in repair; that the plaintiff, if he has any remedy at all, has it against the property-owner, in this case the third party. The section in question seems to be of somewhat recent origin and peculiar to the province. In its present form, and as general legislation, it first appears in the City Act of 1908. As special legislation, and in practically the same form, it appears as sec. 312 of the Regina charter, being ch. 46 of 1906; and as far as I can ascertain, its first appearance in any Territorial ordinance is found in sec. 5, title XXX. of the Edmonton charter, being ch. 19 of 1904. South

SASK.

S. C.
1913

HUTSON
v.
CITY OF
REGINA.

Brown, J.

Railway street, including the sidewalk in question, is, and was at the time of the accident, under the direction, management and control of the council of the city, and were it not for the fact that sidewalks are specially referred to and dealt with under sec. 393, above quoted, the word "street" would have been wide enough in its meaning to include "sidewalk," and in consequence the city would be liable for repairs under that section by the mere fact that the city council had such direction, management and control. The word "street" ordinarily has such meaning, and was so regarded in the case of *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194. In view of the wording of sec. 393, however, it is contended that the city is only responsible for repairing the sidewalks where the same have been built either by the city or with the permission of the city council, and that as the gratings in question were not put there by the city, or with the permission of the council, that the city is in no way bound to repair. In this case, as I stated at the outset, the sidewalk as such was built by the city, and the mere fact that these gratings were inserted and paid for by the private owner and not by the city does not, in my opinion, make any difference. They constitute part of the sidewalk, for whose existence the city is responsible. The city, by building the walk, has held it out as a safe place for pedestrians. It is offered to the public with these gratings in it and as part of it, and, it must be held, with a knowledge that they were so in it. Moreover, the city continued this as a sidewalk for many years after its construction in that condition and with that knowledge. The city must also be held to have had knowledge of the defects and of the long-standing need of repairs, although, in my opinion, its liability under the section is in no way dependent on such knowledge. The enactment must be given a reasonable interpretation. The object of the Act is the safety and convenience of those lawfully using the sidewalk, and to allow the contention set up by the city to prevail, would, it seems to me, defeat that object. It would permit of the city opening up a sidewalk for public use, and at the same time relieve it of responsibility for the safety of the pedestrian. That is the very thing, in my opinion, that the legislature seeks to provide against. I am of opinion that the plaintiff's statement of claim should be amended by alleging that the sidewalk in question was built by the city and that the gratings formed a part of such sidewalk. As no one can be prejudiced by such an amendment, I will order the same to be made.

I have no hesitation in finding, under the evidence, that the sidewalk was at the time of the accident, and had been for a long time prior thereto, out of repair. The gratings in question were built into the sidewalk, forming part of it, but they extended beyond its limits on to the premises of the property-

owner. I find, however, that the hole into which the plaintiff stepped was in that part of the grating that extended into and formed a part of the sidewalk. The weight of evidence is to that effect, and besides, it is quite unlikely that the plaintiff was straying off the sidewalk at this point, when his objective was east of it.

The next question that arises is that of damages. A comparatively short time before this, the plaintiff had the misfortune to meet with a serious railway accident whereby he lost part of his left leg. As a result he was at this time wearing an artificial leg. When thrown to the sidewalk, this left leg, which was partly artificial, was seriously fractured near the hip, causing much immediate pain and having the permanent effect of shortening the limb and displacing it so as to cause an unfavourable change of equilibrium. The accident necessitated medical attendance, hospital expense, and a trip to Minneapolis to secure another artificial limb. The plaintiff at the time of this accident had sufficiently recovered from his previous one to enable him to go back to his work as a locomotive engineer, although it was clear that he was not able as yet to work full time. He had not, up to the time of the trial, been able to do any work since the accident on November 15, 1912, but the evidence is that he would, in a very short time, be able to go back to his work as locomotive engineer, although somewhat handicapped.

The damages which I allow are as follows:—

Special damages, $270.50, made up as follows: doctor's bill, $50; ambulance, $6; hospital bill, $31.50; medicine, $10; assistance, $24; artificial limb, $100; expense at Minneapolis, 12 days at $3, $36; fare for berth, $9; meals on train, $4. Total, $270.50.

General damages, including loss of time and permanent injuries, $1,100.

There will, therefore, be judgment in the plaintiff's favour for $1,370.50, with costs of action.

Counsel for defendant or third party may apply to me to fix a time to dispose of the question of the liability of the third party.

October 27, 1913.

BROWN, J.:—In view of my findings of fact in the judgment given against the defendants, and in view of the admissions of fact filed in this issue, I am of the opinion that the third party is liable to the defendants for such damages and costs as they have been compelled to pay. I am of the opinion that he must be held to have maintained the grating in the condition in which it was at the time of the accident, within the meaning of sec.

SASK.

S. C.
1913

HUTSON
v.
CITY OF
REGINA.

BROWN, J.

395 of the City Act; and, further, that, under the by-law filed, he was bound to repair irrespective of the condition of the area when he took the property over.

The cases cited, which I need not enumerate, satisfy me on these points. There will, therefore, be judgment against the third party for the amount of damages and costs which the defendants have to pay to the plaintiff and for the costs of the defendants in defending the action and of trying the issue against the third party.

Judgment for plaintiff.

N. B.

C. C.
1913

QUINLAN v. SCHOOL TRUSTEES.

Saint John County Court, New Brunswick, His Honour W. B. Jonah, Acting Judge. July 10, 1913.

1. SCHOOLS (§ II A—30)—EMPLOYMENT OF TEACHER—FORMALITIES OF CONTRACT.

A contract of a teacher with school trustees in New Brunswick is not invalid because not under the corporate seal of the trustees.

[*Alexander* v. *School Trustees*, 30 N.B.R. 597, applied.]

2. SCHOOLS (§ II B—35)—TEACHER'S SALARY—ADVANCE BY OFFICER BEFORE SCHOOL TAX AVAILABLE—RIGHT OF RE-IMBURSEMENT.

A school trustee who is also secretary to the board has a right of action against the board to recover the amount of a teacher's salary advanced by him where the necessary money had been voted and the advance was made with the concurrence of his co-trustees in reliance upon his being reimbursed when the school tax should be collected, the assessment of which had been duly authorized.

[*McNeil* v. *School Trustees*, 34 N.S.R. 546; and *Wenlock* v. *River Dee Co.*, 19 Q.B.D. 165, referred to.]

3. SCHOOLS (§ IV—72)—LIABILITIES—SCHOOL BOARD AND OFFICERS.

Apart from the express provisions contained in the statute C.S.N.B. 1904, ch. 50, whereby school trustees may borrow money for certain purposes, the trustees would have no power to bind the school board by a promissory note signed by them as trustees and discounted with a bank, although this were done for the purpose of raising money to pay current liabilities in connection with running the school. (Dictum *per* Jonah, County Judge.)

4. MUNICIPAL CORPORATIONS (§ II E—151)—SCHOOL BOARD—POWER TO BORROW.

School trustees as public non-trading corporations are restricted to the powers expressly given them by the creating statute as to their borrowing powers.

Statement

TRIAL of an action brought by William Quinlan to recover money paid by him to the school teacher of district No. 16, Saint John County, on her salary and, as he alleges, upon request of the trustees of the district.

The defendants relied solely upon the technical defence of illegality and want of authority in the premises upon grounds which will be stated hereafter. No evidence was submitted by the defence.

The facts proved were as follows:—

William Quinlan the plaintiff was a trustee from January, 1908, being appointed by the chief superintendent, until the school meeting in the fall of 1908, when he was elected and acted as trustee and secretary during the years 1908-09-10. Edward Quinlan was appointed at the same time to act until June, 1909, but he appears to have continued to act after that time and for a period covering the transactions in dispute. William Thompson was also appointed a third trustee to act and he did act as such trustee during the years 1908-09-10. These trustees employed Miss Loretta Ryan, a qualified teacher of the second class at a salary of $180 per year to conduct a school in the district, and she actually taught the same during the school year, beginning October, 1909, and terminating the last of June, 1910, although her contract was not actually written and signed until the fourth day of February, 1910. It was assumed, however, and not disputed that the contract was intended to cover the school year and was so treated and acted upon.

Raymond, for plaintiff.

D. Mullin, for defendants.

JUDGE JONAH:—It was objected that the contract was invalid as not being under seal, and that it was not proven to have been signed by the trustees in their corporate capacity. Neither of these objections can prevail. The first has been decided in *Alexander* v. *Trustees of School District No. 7, Parishes of Bathurst and Beresford*, 30 N.B.R. 597. The same provisions of the Corporations Act are to be found in C.S.N.B. 1903, ch. 84, secs. 6 and 7, as were held to apply in that case. The second objection is also answered in the case of *Verza* v. *School Trustees*, 40 N.B.R. 351, at 355. The contract appears to be, on its face, that of the corporation and I think the onus would be on the defendants to shew, if they could, that it was not what it purports to be. This they did not do.

It was also contended by Mr. Mullin that there should have been a notice of action before suit could be brought against the trustees, but as this is in the nature of an action on contract, the exception contained in sec. 62 of ch. 50 would apply.

The remaining objection and the one which the defence relied upon as a substantial answer to the plaintiff's case was that the money which the plaintiff alleges was paid by him to the use of the defendants was paid voluntarily and without the defendant's request expressed or implied; and in case there was such request it was *ultra vires* the trustees to borrow money in the way it was done here for school purposes.

The evidence shews that the district held regular annual meetings at which the sum of $125 was voted for school pur-

N. B.

C. C.
1913

QUINLAN
v.
SCHOOL
TRUSTEES.

Judge Jonah

poses, that that amount was voted for the year 1909-10, and that the county school fund for that year was $26.57, making a total of $151.57 available for school purposes, besides some unpaid taxes of the previous years, the amount of which was not stated. Out of these funds were to be paid the teacher's salary of $180 and the cost of fuel and lighting the fires and the secretary's commission.

It is not surprising therefore to find at the expiration of the first term in December, 1909, the trustees had not sufficient school funds on hand with which to pay the amount then due the teacher and that the same financial condition existed again at the end of the school year on June 30, 1910.

The evidence of Mary A. Quinlan, plaintiff's wife, who acted as secretary to the trustees, shews that for the school year in question the actual total receipts from all sources was $109.97 and the total expenditure $271.49, leaving a balance against the district of $161.52, which balance the plaintiff claims to have paid out of his own pocket.

From the plaintiff's evidence it appears that at the close of the fall term when he found there were not enough school funds to pay the teacher, he went to the other trustees, Edward Quinlan and William Thompson, who discussed the matter and decided that they would make a note and raise the money required upon it. A note for $50 was written by Mrs. Quinlan and signed by all the trustees. This note which purports to be signed by them as trustees of district No. 16, parish of Simonds, was taken by the plaintiff to the Bank of New Brunswick, where he got the money which he afterwards paid to the teacher. On June 30, 1910, finding himself again without money to pay the teacher whose contract was then completed, the plaintiff saw the other trustees and talked about raising the money. Edward Quinlan again consented to sign a note, but William Thompson, although consenting to that means of getting the money, did not sign the note, giving as a reason that he was too sick (he soon after died). This second note was for $100 and was again discounted by plaintiff at the Bank of New Brunswick and the face value of $100 paid to the teacher. As the notes do not draw interest and no evidence was given on the point, I am unable to say how the discounts were paid. When these notes fell due they were renewed from time to time and finally were sued by the bank and judgment taken against the plaintiff alone, on which he has paid in all $105 and the sheriff has levied on his goods for the balance of the judgment.

The plaintiff is claiming against the defendants only for the face value of the two notes, $50 and $100 respectively.

He also claims for a general balance on the books of $11.52, and for the items paid for wood amounting to $25, for building

fires $6.00, and for his commission on collections as secretary $4.67, in all amounting to $197.19.

As to the items of plaintiff's particulars for wood and lighting fires amounting to $31, I think the plaintiff is entitled to recover under his declaration for work done and materials provided.

The furnishing necessary wood to warm the schoolroom and lighting the fires for that purpose are incidental to and within the scope of trustees' duties pertaining to the proper carrying on of a district school. They would have ample authority to employ someone to do this work, and while no express contract was made with the plaintiff they knew he was performing the services, accepted the same and enjoyed the benefits, and therefore impliedly promised to pay for the said work and materials.

I do not think it makes any difference that the wood was actually supplied and the fires lighted by the plaintiff's boy. He was a minor living at home and being maintained by his father and may therefore in this matter be looked upon in the light of a servant of the plaintiff, under whose directions the wood and work were supplied and done.

The plaintiff says he advertised for tenders for the fuel and lighting of fires but got no response, and it therefore became necessary for him to have the work done in the way in which he did. I think the plaintiff should recover for $31 upon these particulars for wood supplied and for lighting fires, as also for his commission of $4.67.

As to the item of $11.63 for balance due plaintiff on over-expenditure in current account for the year ending June 30, 1910, I do not think, in view of the admitted errors in book-keeping, this item should be allowed, especially as the evidence of such over-expenditure was not very satisfactory.

The principal claim, and the one involving the most important question of law now remains to be disposed of—that of the payment to the teacher of fifty and one hundred dollars respectively, the one on December 28, 1909, and the other on June 30, 1910.

The two promissory notes which were used by plaintiff as a means to procure the money from the bank were, I have no doubt, intended by the trustees to have been made in their official capacity and to be binding upon them as a corporation. In this idea the bank seems at first to have concurred, as the word "trustee" in the body of the first note was placed there at the express instance of the bank manager; although this action is not founded upon the notes, the above fact is important as shewing that in raising the money as he did and paying it over to the teacher, the plaintiff was acting with the knowledge and consent of the trustees as a body, and I think would thereby raise an implied promise on the part of the corporation to repay the plaintiff

N. B.
C. C.
1913
QUINLAN
v.
SCHOOL
TRUSTEES.
Judge Jonah

in case it be found that they are capable of binding themselves in a transaction of this kind.

Mr. Raymond for the plaintiff contends that the trustees of schools, under the provisions of ch. 50, have full authority to borrow money in the first instance in cases of this kind where money is needed for current liabilities in connection with running school; and cites as his authority the case of *McNeil* v. *School Trustees*, 34 N.S.R. 546. This case is based upon a similar state of facts, and the provisions of the statute of Nova Scotia respecting the borrowing powers of trustees (Acts N.S., 1895, ch. 1, sec. 21), are the same as contained in sec. 72 of ch. 50, C.S.N.B. 1903.

I cannot bring my mind to the conclusion that as a general proposition, trustees of schools have, under our Acts and Regulations, authority to borrow money even for the purpose of running a school. The Act provided ways and means of raising a school revenue, and I think it would be a dangerous power to confer on trustees the right, without any special authority either from the district or the Board of Education to run a school upon borrowed money. Grave irregularities would result from such a method.

The intention of the Act clearly is that the trustees shall render an account each year to the district and also submit an estimate of their needs for the ensuing year at the regular school meeting of ratepayers, who shall then vote a necessary amount for such school purposes.

Express provisions are contained in the Act for borrowing money for certain purposes, none of which are applicable to the case under consideration, and it is a well-established rule that public non-trading corporations are restricted to the powers expressly given them by the creating statute (Halsbury's Laws of Eng., vol. 8, p. 359, sec. 805).

I think, therefore, that the trustees could not and did not bind themselves as a corporation in the two promissory notes, which they gave, and that the bank merely treated them as the personal obligations of the persons who had signed them and upon that security loaned the money to the plaintiff, to whom they eventually looked to repay them.

The plaintiff was compelled to repay the loan to the bank, so that I think it can be fairly claimed that the money which was paid the teacher in this case was the plaintiff's.

So far as the evidence shews, the equities are entirely on the side of the plaintiff. There is no doubt about the advance having been made to the teacher as stated. She is admitted to have been a duly qualified teacher, engaged under a legal contract, as I find, and no complaint is made as to the value of her services, or the quality of the work done by her in the school.

The district got the full benefit of the payment by the plaintiff of this money to the teacher. The liabilities of the district

were not increased thereby to the extent of a single dollar, and no reason was given in evidence or on the argument why the district by its trustees should not repay to the plaintiff the money which he has expended in its behalf except the technical one that it was *ultra vires* for the trustees to borrow money in the way it is alleged the plaintiff and his associates did. This case is, however, different from one of simply borrowing money and thereby increasing the indebtedness of the district, which I agree the trustees could not do.

Here, the district had voted the necessary money for school purposes; the assessment had been made. The trustees in pursuance of their duties and within the scope of their authority had entered into a contract for payment to the teacher for which the district was liable.

What the plaintiff did was pay off this liability of the district to the extent of one hundred and fifty dollars, relying upon the payment of the taxes subsequently to reimburse himself. That he might lawfully do that is laid down in *Wenlock* v. *River Dee Co.*, 19 Q.B.D. 155, at 165, where Fry, L.J., in delivering the judgment of the Court of Appeal, says:—

> This equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the company, and a payment by the company to its creditors as out of its own moneys; and assumes on the contrary that the quasi-lender and the creditor of the company met together and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit.

He then quotes Lord Selbourne, L.C., who, in giving judgment in the case of the *Blackburn Building Society* v. *Cunliffe Brooks & Co.*, 22 Ch.D. 61, at 71, says:—

> The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. . . . And if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing.

It was upon the reasoning in the case of *Wenlock* v. *River Dee Co.*, 19 Q.B.D. 155, that the Supreme Court of Nova Scotia gave their judgment in the case of *McNeil* v. *School Trustees*, 34 N.S.R. 546.

Relying upon those authorities and with a strong sense of the justice of the plaintiff's claim, I find a verdict and give judgment for the plaintiff for the sum of $185.67, being the whole of his claim, except the item of $11.52, balance on the books which was not supported by satisfactory evidence, and which I disallow.

Judgment for plaintiff.

QUE.

K. B.
1913

REX v. FRANK.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Lavergne, Carroll, and Gervais, JJ. October 30, 1913.

1. EVIDENCE (§ IV G—421)—DOCUMENTARY EVIDENCE—FORMER DEPOSITIONS OF ABSENT WITNESS—CR. CODE (1906) SEC. 999.

The deposition of a witness taken on the preliminary enquiry upon the same charge may be read against the accused where the witness, a foreigner, had been summoned but had left for parts unknown.

[See also *R.* v. *Pescaro*, 1 B.C.R., pt. 2, 144; *R.* v. *McCullough*, 8 Can. Cr. Cas. 278; *R.* v. *Forsyth*, 5 Can. Cr. Cas. 475; *R.* v. *Deloe*, 11 Can. Cr. Cas. 224.]

2. APPEAL (§ VII M 5—614)—REVERSIBLE ERRORS—RESERVING RULING AS TO CROWN EVIDENCE—DEFENCE ENTERED UPON IN MEANTIME.

On a criminal trial it is not reversible error for the trial judge to reserve until after the hearing of the witnesses in the case an objection to the placing in evidence of the prior deposition of an absent witness taken on the preliminary enquiry and compelling the accused to proceed with his defence without a ruling on the objection, where the accused had available all that he was required to answer in his defence including the questioned deposition which was finally admitted.

Statement

CROWN case reserved on the summary trial before a police magistrate at Montreal, on a charge of receiving stolen goods, the question being as to the admissibility of the deposition of a witness taken at the preliminary enquiry.

The following questions were submitted to the Court:—

1. Was the trial Judge justified in reserving until after the hearing of all the witnesses in the case, the objection of the attorney for the accused, to the said deposition being read as evidence, and ordering the accused to proceed with his case?

2. Was the trial Judge justified in allowing the said deposition of Wasili Evanhoff to be read as evidence on the trial of the present case?

M. J. Morrison, K.C., for the accused.

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

The opinion of the majority of the Court was delivered by

Lavergne, J.

LAVERGNE, J.:—The allegations contained in the deposition were corroborated by the evidence of the other witnesses, and the prosecution did not hinge upon this deposition.

When the magistrate reserved his decision on the objection entered on behalf of the accused regarding the production of this document, the latter did not suffer prejudice and the magistrate did not err in reserving the said objection, and in ordering the defence to proceed with its case; since the accused had before them all that they needed to provide for their defence.

On the second question, I am of the opinion that the magistrate could use discretion in the matter of deciding whether he would permit the reading of one of the depositions taken at the preliminary *enquête* and given by one of the witnesses who was absent at the time of the trial.

QUE.

K. B. 1913

REX v. FRANK.

Lavergne, J.

As the magistrate says in his report, at the trial, the witness Wasili Evanhoff could not be heard, notwithstanding the fact that he was regularly summoned to appear, and the case was adjourned to a subsequent day, seeing the absence of the witness was through illness.

On the day of the trial Evanhoff was still absent, and he could not be found though every effort was made to locate him. One of the persons living in the domicile of Evanhoff was heard as a witness and declared that Evanhoff had left for parts unknown. As the report of the magistrate shews, every diligence was used to produce the witness, and it was under these circumstances that the production and reading of his deposition at the preliminary *enquête* were permitted, and I believe that the magistrate made a wise use of his discretion in this connection. I am, therefore, of the opinion that the judgment was well founded, and I would answer in the affirmative the questions submitted. Therefore the appeal is dismissed with costs.

Cross, J. (dissenting)

CROSS, J., dissented.

Appeal dismissed.

SOVEREIGN BANK v. PYKE.

QUE.

S. C. 1913

Quebec Superior Court. Trial before Dunlop, J. October 28, 1913.

1. BANKS (§ III B—27)—OFFICERS—AUTHORITY OF GENERAL MANAGER.

The general manager of a bank has no implied authority from the bank to agree on its behalf to remunerate or indemnify a person who purchased shares of the bank's stock at the manager's instance to be held subject to his order and will be liable on the liquidation of the bank for the overdraft occasioned by the bank's payment of his cheques given for the purchase price.

[*Bank of Montreal* v. *Rankin*, 4 L.N. (Que.) 302, applied; compare *McMillan* v. *Stavert*, 13 D.L.R. 761 (P.C.), affirming *Stavert* v. *McMillan*, 24 O.L.R. 456, 3 O.W.N. 6.]

Statement

ACTION in the name of the Sovereign Bank of Canada by its liquidator for $13,916.20, made up of cheques drawn on the bank, made and signed by the defendant, payable to the order of J. R. Meeker, to cover the purchase of 97 shares of the capital stock of the bank. Plaintiff alleged that these cheques had been dealt with by it in the ordinary course of business; as they remained unpaid by defendant, those in charge of the liquidation of the bank's affairs demanded that defendant be condemned to pay their full face value, with accrued interest. James W. Pyke admitted signing the cheques, but averred that in purchasing the stock he had simply acted as a prête-nom for Duncan M. Stewart, who was at the time general manager of the bank. Stewart, he said, expressed a desire to purchase some of the bank's stock, and, being unable to do so in his own name, requested that defendant allow him to use his (defendant's) name, promising that defendant would be remunerated for any outlay

QUE.
S. C.
1913
SOVEREIGN BANK v. PYKE.
Dunlop, J.

he might make in connection with the transaction. Defendant claimed he had never been in possession of the stock, and his account at the bank had been later credited with the amount of the cheques.

DUNLOP, J.:—The bank paid these cheques in the ordinary course of business, in good faith and in ignorance of any alleged agreement entered into by its general manager with the defendant. Moreover, the defendant has failed to prove that any such agreement had existed and he furthermore has failed to prove that the bank had any knowledge of such pretended agreement or was a party thereto. No matter what might have been the nature of such agreement, it could not be opposed to the demand of the plaintiff to prevent it from recovering the amount of the cheques: *Bank of Montreal* v. *Rankin*, 4 Legal News 302.

In that case the Bank of Montreal sued Rankin for his cheque for $20,689.85, payable to bearer. The cheque was presented the same day and on presentation the bank paid the money. The defendant had not at the time a sufficient sum on deposit to cover the cheque, but the bank paid the full amount and entered it to the debit of the defendant in a special account. The defence was that the cheque should have been stamped [under a revenue statute as to bill stamps then in force]. That question has no bearing in this case, but Rankin also pleaded want of consideration and that the cheque was given as a compromise of a criminal prosecution brought against the defendant and six other directors of the Consolidated Bank for making false and fraudulent returns; that the bank paid the money to John Monk and to his representative, Mr. Richard, who was bringing the prosecution, and that this took place with the full knowledge by the bank of all the facts and that it could not recover on the cheque. The Court in that case found that the money was paid under the circumstances above stated, but that the bank had no knowledge of the alleged compromise; that the personal knowledge of the president, George Stephens, of the circumstances of the compromise, could not be opposed to the bank, as the latter was not bound by the acts of Mr. Stephens in his individual capacity and had no cognizance of the pretended compromise at the time the money was paid.

I am of the opinion that, if the Bank of Montreal could not be bound by any arrangement made by its president, the Sovereign Bank could not, and was not, bound by the pretended agreement alleged to have been made by its general manager with the defendant in this case and that any such arrangement could not and did not prevent the plaintiff from recovering from the defendant the full amount sued on.

Judgment for plaintiff.

Re NOELLE.

CAN.

EX. C.

1913

Exchequer Court of Canada, Cassels, J. October 23, 1913.

1. TRADE-MARK (§ I—3)—GENERAL OR SPECIFIC MARK.

The registration of the word "Albaloid" as a general trade-mark is properly refused by the Minister of Agriculture where there is already on the register a general trade-mark of a word so similar thereto as "Albolene."

2. TRADE-MARK (§ I—3)—GENERAL OR SPECIFIC MARK.

A "general" trade-mark, under the Trade Mark and Design Act, R.S.C. 1906, ch. 71, is one used in connection with the various articles in which the proprietor deals in his trade, and would cover all of the classes of merchandise in which the applicant deals, while a "specific" trade-mark is limited to one class of merchandise. (Dictum *per* Cassels, J.)

3. TRADE-MARK (§ IV—17)—INFRINGEMENT—NAME REGISTERED AS GENERAL TRADE-MARK.

Where a particular word has been registered as a general trade-mark, as distinguished from a specific trade-mark, under the Trade Mark and Design Act, R.S.C. 1906, ch. 71, it cannot afterwards be registered as a general trade-mark by another, although carrying on a different line of trade; the second applicant for the same word or for another word so similar as would likely deceive the public, is limited to an application for a specific trade-mark, the Department not being called on to distinguish between the lines of trade of applicants for general trade-marks.

4. TRADE-MARK (§ VI—31)—CONFLICTING CLAIM ON REGISTER—PRIOR GENERAL TRADE-MARK OF SIMILAR WORD.

There is no power under the Trade Marks Act (Can.) enabling the Minister of Agriculture, or his Deputy, to take evidence and adjudicate on the facts and thereupon to determine whether a trade-mark should be registered notwithstanding the prior registration of a similar mark; but such may be done by the Exchequer Court on the hearing of a petition for an order to register.

5. COSTS (§ I—2)—ON DISMISSAL—TRADE-MARK REGISTRATION—PETITION AGAINST REFUSAL TO REGISTER.

Costs incurred by the trade-mark branch of the Department of Agriculture in successfully opposing a petition to the Exchequer Court for an order to register a trade-mark may be ordered to be taxed against the petitioner.

Statement

PETITION of Gebr. Noelle for an order to register the word "Albaloid" as a general trade-mark in the trade-mark register in the Department of Agriculture.

The petition was refused.

In the month of September, 1910, the petitioner applied to the Minister of Agriculture to have registered the word "Albaloid" as a general trade-mark.

This application was refused, the ground of the refusal being that, as appears by the registry, the word "Albolene" had been registered as a general trade-mark on May 31, 1893, by a firm carrying on business in New York under the name of McKesson & Robbins.

Cassels, J.

CASSELS, J.:—It is not contended that the word "Albaloid" could be registered with the word "Albolene" previously regis-

CAN.
EX. C.
1913
RE NOELLE.
Cassels, J.

tered as a general trade-mark, if the question merely depended on the register and without further evidence.

Under clause 11, sub-sec. (*b*) of the statute (R.S.C. 1906, ch. 71), the application was rightly rejected.

The Minister or his Deputy has no means of ascertaining, except from the registry, whether such trade-mark should or should not be registered. There is no power in the statute regulating trade-marks which enables the Minister or his Deputy to take evidence, and adjudicate on the facts and to determine whether, having regard to the particular circumstances of the case, such trade-mark should be registered or not.

On the hearing of this petition it is open to the Court to receive evidence and adjudicate on the merits, having regard to the circumstances of each case.

The facts are shortly as follows:

McKesson & Robbins, who registered as a general trade-mark the word "Albolene" on May 31, 1893, were carrying on and are still carrying on in the city of New York the general business of wholesale dealers in drugs, chemicals and druggist sundries of all kinds.

The applicants, who reside in Germany, have for a great number of years been exporting to Canada articles of their manufacture, being "forks and spoons made of Britannia metal," a class of merchandise entirely different from the classes of merchandise dealt in by the owners of the registered trade-mark "Albolene."

It would appear that the applicants have registered in England and elsewhere the word "Albaloid" as their trade-mark. It does not appear that this word has been registered in these countries as a general trade-mark, and I am not aware whether the statutes in these various countries contain the same provisions as in our statute, enabling the registration of a general trade-mark as distinguished from a specific trade-mark.

These foreign trade-marks are not produced. I gathered, from Mr. Scott's careful argument, that the clause of our statute permitting a registration of a general trade-mark is unique.

Under the Imperial Trade Marks Act, 1905, 5 Edw. VII. ch. 15, sec. 8, it is provided that "A trade-mark must be registered in respect of particular goods or classes of goods."

At page 602 of Kerly on Trade Marks, 3rd ed. (1908), the English statute will be found conveniently set out.

Section 16 of the Canadian Trade Mark and Design Act (R.S. 1906, ch. 71) provides that:—

> A general trade-mark once registered and destined to be the sign in trade of the proprietor thereof shall endure without limitation.

The definition of a trade-mark, as given by Mr. Lowe, Deputy Minister of Agriculture, in the case of *Bush* v. *Hanson*, 2 Can. Ex. C.R. 557 at 559, is that the essential element of a

trade-mark is "the universality of right to its use, *i.e.*, the right to use it the world over as a representation of, or substitute for, the owner's signature."

Paul, on Trade-Marks, 3rd ed., p. 5, puts it in this way: "It has been well defined as one's commercial signature."

Mr. Scott argued before me that the same rules should be applied to a general trade-mark as those held to apply in the case of specific trade-marks. That if in the case of a specific trade-mark a mark already registered as a specific trade-mark can be taken by another and registered and used as a specific trade-mark for an entirely different class of merchandise, so in the case of a general trade-mark registered in connection with a general class of business another person can register and use the same general trade-mark in connection with an entirely different class of business.

There is no authority on the point, and the question is one of considerable difficulty. My own view is that there is a distinction between the case of a general trade-mark and that of a specific trade-mark.

I am of opinion that once a general trade-mark has been registered for a particular word, the same word cannot be registered as a general trade-mark by anyone else. If this were permitted it would lead to confusion. I think the second applicant is limited to an application for a specific trade-mark if otherwise entitled thereto.

The purpose and object of trade-mark legislation is stated by Vaughan Williams, in *Bowden Wire, Limited*, v. *Bowden Brake Co., Ltd.*, 30 Reps. of Patent Cases, 580 at 590:—

> The whole object of registering trade-marks is this, that in passing off cases it was found that a great deal of trouble and expense might be incurred in proving the identity or character of the goods which were passed off, with the goods which the plaintiff said were the goods manufactured or sold—in this case manufactured—by them. Then the Trade Marks Act was passed for the express purpose of making it easy to afford protection to traders at less expense and less trouble. The whole object is that by registering a trade-mark you should be able to represent to the public: "You may rely upon it that all goods which bear this registered trade-mark are the goods manufactured or sold by me the registered proprietor of the mark."

A few other cases bearing on the question, all of them relating practically to specific trade-marks, as distinguished from what our statute permits as a general trade-mark, are as follows:—

In Re Jelley, per Jessel, M.R., 51 L.J. Eq. (1882), at page 640, may be referred to.

In the case of *Singer Manufacturing Co.* v. *Wilson*, 2 Ch.D. 434, Jessel, M.R., discusses the question, and states, at page 443, as follows:—

CAN.
EX. C.
1913
RE
NOELLE.
Cassels, J.

Therefore, what the Court has to satisfy itself of is, that there has been an essential portion of the trade-mark used to designate goods of a similar description. I say of a similar description, because there is no right in a trade-mark except to protect the manufacturer of the goods. If a seller of carriages invented this fanciful mark, this curious animal, and put it on carriages, that would not prevent a manufacturer of woollen goods from putting it as a trade-mark on woollen goods. As I said before, you must have regard, not merely to the mark, but to the nature of the goods upon which the mark is impressed.

In *Sommerville* v. *Schembri*, 12 App. Cas. 453 at 457, Lord Watson states as follows:—

> Had it not been for the views expressed by the Court of Appeal in giving judgment, it would hardly have been necessary for their Lordships to observe that the acquisition of an exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character; and that such use by others can as little interfere with his acquisition of the right.

I will now come to the consideration of the Canadian Trade-Mark and Design Act (R.S., [1906] ch. 71).

Section 4 of the statute is the interpretation clause. It provides as follows:—

> (*a*) In this Part, unless the context otherwise requires, "general trade-mark" means a trade-mark used in connection with the sale of various articles in which a proprietor deals in his trade, business, occupation or calling generally;
>
> (*b*) "Specific trade-mark" means a trade-mark used in connection with the sale of a class of merchandise of a particular description.

The definition, under (*a*), of general trade-mark means, I think, a trade-mark used in connection with the various articles in which the proprietor deals in his trade, and may cover several classes of merchandise if the proprietor is trading in these several classes.

A specific trade-mark is limited to a class of merchandise of a particular description, so if the applicant dealt in two different classes of merchandise he would have to apply under sub-section (*b*) for two specific trade-marks, one applicable to each class.

The general trade-mark would, however, cover all the classes of merchandise in which the applicant deals. I do not think, however, that the general trade-mark would confer an unlimited right the world over as against those carrying on a business of an entirely different character.

The business of McKesson & Robbins is that of dealers in druggist supplies. If another trader manufactured steam engines, a business entirely dissimilar from that carried on by McKesson & Robbins, these latter people could not be possibly injured in any way by a specific trade-mark adopted and used by the other trader in connection with steam engines, although

the word might be the same. The whole purport of the law of trade-marks is to prevent the passing off of goods of one as the goods of another, whether intentional or not.

To come to the present case, I fail to see how the registration of "Albaloid" as a specific trade-mark as applicable to "forks and spoons of Britannia metal," could possibly enable the applicants to mislead the public into the belief that their goods were the goods of McKesson & Robbins. Moreover, while dealing with the question, it must be borne in mind that while the word "Albaloid" could not, in my judgment, be registered as a general trade-mark as long as the word "Albolene" stands on the register. There is some dissimilarity between the two words.

On the whole, I am of opinion that the applicants are not entitled to have registered the word "Albaloid" as a general trade-mark. I think, however, if limited to a specific trade-mark, as applied to "forks and spoons of Britannia metal" it may be registered.

Mr. Scott, on the argument before me, declined to accept a specific trade-mark. This would not preclude his clients, if they think better of it. Nor do I wish it to be understood that they are entitled to the registration of this specific trade-mark. There may be other reasons known to the Minister or his Deputy which might disentitle the applicants to such registration. I am merely dealing with the case as if the only obstacle were a prior registration of the general trade-mark "Albolene."

I think the petitioner should pay the Minister's costs of the petition.

Petition refused.

Re IRWIN and CAMPBELL.

Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 5, 1913.

ARBITRATION (§ III—17)—*"Award" or "valuation"—Review.*]—Appeal by the trustees of the Irwin estate from an order of Middleton, J., dismissing their appeal from an award or valuation made by three arbitrators or valuators under the provisions of a lease.

W. N. Ferguson, K.C., for appellants.

N. W. Rowell, K.C., and *George Kerr*, for Campbell.

THE COURT held, affirming the order of Middleton, J., that the proceedings appealed against were not in the nature of an arbitration, but a mere valuation, and that no appeal would lie as from an award. The dismissal would, however, be without prejudice to the rights of the appellants in pending litigation.

B. C.

C. A.

1913

MANITOBA LUMBER CO. v. EMMERSON.

(Decision No. 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. May 8, 1913.

1. MORTGAGE (§ I B—7)—WHAT CONSTITUTES—DEED WITH AGREEMENT TO RECONVEY.

An agreement by a mortgagor after default whereby the mortgagee gets a new security for advances not included in the original mortgage and expenditures not in contemplation when the original mortgage was made, is to be treated as in effect a new mortgage as regards any attempted restriction of the mortgagor's right to redeem.

[*Manitoba Lumber Co.* v. *Emmerson* (No. 1), 5 D.L.R. 337, affirmed with a variation.]

2. MORTGAGE (§ VII A—148)—REDEMPTION—LIMITATION OF RIGHT.

The parties to a mortgage or to a conveyance given in absolute form but which, being given as security for the payment of a debt, operates as a mortgage, cannot in the instrument itself or by a contemporaneous agreement, limit the mortgagor's right of redemption to a stated period.

[*Fairclough* v. *Swan Brewery*, [1912] A.C. 565, applied.]

Statement

APPEAL by defendant from the judgment at trial, *Manitoba Lumber Co.* v. *Emmerson*, 5 D.L.R. 337.

The judgment below was affirmed with a variation as to an item consented to.

A. D. Taylor, K.C., for defendant, appellant.
S. S. Taylor, K.C., for plaintiffs, respondents.

The judgment of the Court was delivered by

Macdonald, C.J.A.

MACDONALD, C.J.A.:—From what has already been said on the different points during the argument, I have indicated my opinion that the plaintiffs had the right to redeem. I need not recapitulate any further than to say that the case of *Fairclough* v. *Swan Brewery Company, Ltd.*, [1912] A.C. 565, makes it clear that the parties cannot, in the instrument of mortgage itself, or by a contemporaneous agreement, limit the mortgagor's right of redemption. It was argued here that the agreement fixing the nine months for redemption, while a limitation upon the mortgagor's right, was really not a contemporaneous agreement, but an agreement subsequently made, and must be held to have referred to the original mortgage and to vary it to that extent. But, bearing in mind the fact that the transaction, which took place on September 25, 1908, was a new transaction, a transaction which created a new security to the defendant for advances not included in the mortgage, and for expenditures which were not then included or contemplated, it must be taken to be in effect a new mortgage. While the conveyance is in form a conveyance absolute, it was in reality given as security for a debt. That debt included the debt in the mortgage, and it included subsequent debts to the extent of over $50,000 altogether. That,

I think, is the mortgage which the plaintiffs have a right to redeem, and the limitation upon their right to redeem that mortgage by the contemporaneous agreement is not such as the law will admit. That being so, the only question then is, on the assumption of the right to redeem, has the learned trial Judge made the right decree?

Mr. A. D. Taylor has contended that the defendant ought to be allowed for improvements made since he took possession. Those improvements amount, as he admits, to $98,000. The original cost of the mill was about $25,000. It is inconceivable that such improvements could be made *bonâ fide* as improvements which a mortgagee in possession would be justified in making to mortgaged premises, and, therefore, I think the learned trial Judge was justified in inferring that they were not made *bonâ fide*, and that nothing ought to be allowed to the defendant in respect thereof. He has, in his decree, decided that all just allowances should be made, and that is not appealed against. I think he was right in doing so, but we are not called upon to decide whether he was or not.

With regard to the timber limit, respondent, before the argument, by notice served on the 13th of April, declared that he would not insist upon that term of the judgment, so that that is eliminated from the case, except that the decree must be varied in that respect.

Then, with regard to the last point taken by Mr. A. D. Taylor, that the decree below should have contained a provision for ascertaining the quantity of logs and lumber and the amount of book debts which, under the agreement of September 28, the plaintiffs were to take over on redemption, I have only this to say: It appears that no evidence was given below that there were any such things on hand either at the expiration of the time fixed in the agreement for redemption or at the date of the decree. Personally, I should be disposed to infer from the evidence that it was understood by all parties at the time of the trial, that the business was a going concern, and therefore there must be both logs, lumber, and book debts. However, no application was made, as is asserted by counsel for the plaintiffs, to have such a term included in the decree below. Further directions were reserved in that decree, and it may be that the defendant can go before the learned trial Judge and get directions on this point, but I think we are not called upon to make any order or even to express an opinion as to what should be done. The result is that the decree below will be varied in respect of the timber limit. The parties may agree upon the form of variation, and, failing of agreement, the matter can be settled by one of the Judges of this Court at Chambers.

I think the respondents should have the costs of this appeal.

Judgment affirmed, with a variation.

MAN

K. B.

1913

PITURA v. HANEY et al.

Manitoba King's Bench, Galt, J. November 6, 1913.

1. TRIAL (§ VI—320)—NOTICE OF TRIAL—TIME FOR GIVING—AMENDMENT OF STATEMENT OF CLAIM.

Where, after a cause is at issue, the plaintiff's statement of claim is amended under an order, Manitoba K.B. rule 301 prevents the giving of notice of trial until ten days after service of an amended statement of defence.

[*Brown* v. *Telegram Printing Co.*, 21 Man. L.R. 775, followed.]

Statement

APPEAL from an order of a Referee striking out a notice of trial.

The appeal was dismissed.

F. Heap, for plaintiff.

E. Frith, for defendant.

Galt, J.

GALT, J.:—The statement of claim was filed on May 17, statement of defence on June 15, on October 13 the statement of claim was amended pursuant to an order made in that behalf, and on October 21, an amended defence was delivered, Notice of trial was given by the plaintiff on the following day. October 22. The learned Referee held that the notice of trial was invalid as the cause was not at issue, under the judgment pronounced by the Court of Appeal in *Brown* v. *Telegram Printing Co.*, 21 Man. L.R. 775.

The report of this decision is meagre and unsatisfactory. The dates of filing the original pleadings are not given, and no attempt is made to state upon what ground or grounds the Court of Appeal based its judgment. The following is the head-note:—

When the statement of defence has been amended an action is not at issue under rule 301 of the King's Bench Act until the expiration of ten days from the delivery of the amended statement of defence, and an application for a special jury may, under sec. 60 of the Jury Act, be made within six days after the expiration of such ten days.

I gathered from statements of counsel that in *Brown* v. *Telegram*, 21 Man. L.R. 775, the defendant had filed a defence during vacation. Under rule 205A:—

Any defendant whose time for filing a statement of defence expires in a vacation, and who files a statement of defence within such time, shall be at liberty, within eight days immediately following such vacation, to file an amended statement of defence and counterclaim, or either, and the plaintiff shall have the right of reply thereto within eight days after the service of the defendant's amended pleading.

The cause was apparently at issue before the expiration of the Long Vacation, subject to the right which the defendant had under the above rule until September 23 to file an amended statement of defence and counterclaim. He did not do this

within the time, but delivered an amended defence on September 29. The report does not shew whether this was by consent or pursuant to an order.

Rule 301 provides that the action should be at issue at the expiration of ten days from the delivery of the last pleading. It does not say anything about the last amended pleading.

I have always been under the impression that when a cause is once at issue the plaintiff is entitled to carry his case down to trial at any jury or non-jury sittings without regard to any amendments which may be granted on application by either party thereafter. It is common practice to serve a notice of motion for leave to amend pleadings at the sittings for which notice of trial has already been given, and I never heard it suggested that any such amendment would render the notice of trial or the trial itself nugatory.

In the present case the cause was at issue in June, and I should not have supposed that the amendments made under order in October could have the effect of rendering the cause not at issue. At the same time, I am unable to say that the Referee was wrong in the view he took of what was decided by the Court of Appeal in *Brown* v. *The Telegram*, 21 Man. L.R. 775.

I must therefore dismiss this appeal, but under the peculiar circumstances, I do so without costs.

Appeal dismissed.

ARMISHAW v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. April 30, 1913.

CARRIERS (§ II K 1—209)—*Street railway—Passengers getting on or off.*]—Appeal by defendants from the verdict in a personal injury action arising from the starting of a car while a passenger was alighting. The defendants contended that it was not a stopping place for passengers, and that there was no invitation to alight there, although the car had slowed up or stopped on turning a corner.

L. G. McPhillips, K.C., for defendant company.

R. M. Macdonald, for plaintiffs, *contra*.

THE COURT was of opinion that the accident was due to the neglect of the conductor, who was in the forward part of the car talking to the motorman instead of being in a position to warn passengers, and particularly the plaintiff, not to alight when the car slowed up to "take the points," at the corner at which the plaintiff had previously asked the conductor to let her off. The verdict was sustained.

Appeal dismissed.

CAN.

Ex. C.

1913

LAPOINTE v. THE KING.

Exchequer Court of Canada, Audette, J. February 4, 1913.

MASTER AND SERVANT (§ II A 4—97)—*Government railway—Defective coupling—Negligence—Quebec law of common fault.*]—Petition of right for damages from the Crown for the death of an employee of the Intercolonial Railway, operated as a public work of Canada. The proceeding was brought by the widow and children of one Tardif who had been employed as a brakeman and was killed while attempting to couple cars in motion.

At the time of the accident whereby he lost his life he was one of the crew on a shunter-train working between different stations along the line of the Intercolonial Railway in the Province of Quebec. The coupling device of one of the cars in this train was defective in that the chain connecting the pin and the lever was broken and disconnected, so that the device would not act automatically. It is the practice of brakemen to uncouple cars when the train is in motion by means of this automatic device. There are no rules or regulations of the road forbidding the work being done in this way. It was shewn by the evidence that when the train left the last divisional point the railway authorities knew that the coupling on this particular car was defective. The deceased was not a permanent employee and had not acquired that skill in coupling and uncoupling cars that more experienced brakemen have. His attention was called by one of his fellow-workmen to the fact that the coupling was defective, but notwithstanding this he undertook to uncouple the car while the train was in motion. Finding that he could not accomplish this with the defective device, he went between the cars and attempted to do the work of uncoupling with his hands. He fell between the cars and the wheels passed over him injuring him fatally.

AUDETTE, J., held that the railway authorities were guilty of negligence in allowing the coupling device to be out of repair, but that Tardif had also been at fault in not waiting until the train had stopped before he attempted to make the coupling. Under such circumstances the doctrine of *faute commune* applied, as the case arose in the Province of Quebec, and the damages divided according to the degree of fault contributed by each: *Price* v. *Roy*, 29 Can. S.C.R. 494; *Nichols Chemical Co.* v. *Lefebvre*, 42 Can. S.C.R. 402.

If an inexperienced workman knowing from observation of his skilled fellow-workmen that a particular piece of work is hazardous if done in the method pursued by them, undertakes to so perform it, while another and less dangerous method is open to him, he is not observing a proper standard of prudence and ought not to be held blameless if any accident results from his lack of care.

CAN.
Ex. C.
1913

Some of the employees of the Crown, the conductor or train-driver, were negligent in allowing the cars to be sent out with defective couplings. The case was within sec. 20 of the Exchequer Court Act as amended by 9-10 Edw. VII. (Can.) ch. 19. Judgment was entered for $2,400 in favour of the suppliants and an apportionment made to each.

Judgment accordingly.

E. Lapointe, K.C., and *C. A. Stein*, K.C., for suppliants.
E. H. Cimon, for respondent.

MAN.
C. A.
1913

ROSS v. WEBB.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. May 9, 1913.

[*Ross* v. *Webb*, 10 D.L.R. 85, affirmed.]

PRINCIPAL AND AGENT (§ III—41)—*Liability of sub-agents—Notice of principal's claim.*]—Appeal by plaintiff from the judgment of Macdonald, J., at the trial.

M. G. Macneil, and *B. L. Deacon*, for plaintiff.
C. H. Locke, for defendants, was not called on.

THE COURT dismissed the appeal.

CAN.
Ex. C.
1913

FELT GAS COMPRESSING CO. v. FELT.

Exchequer Court of Canada, Audette, J. April 10, 1913.

PATENTS (§ IV C—45)—*License and assignment—Conflicting claims—Jurisdiction.*]—Action brought to determine the respective rights of certain parties to patents of invention under special assignments brought up for hearing under Exchequer Rule 161 on an objection in point of law that the Exchequer Court had no jurisdiction in such an action.

Dr. J. Travers Lewis, K.C., for plaintiffs.
M. G. Powell, for defendants Park *et al.*
J. E. Caldwell, for defendants Detwiler *et al.*

AUDETTE, J., held that the Exchequer Court has no jurisdiction at common law in actions respecting patents of invention, and where any relief is sought in respect of such matters the jurisdiction of the Court to grant the same must be found in some statute. That Court cannot entertain proceedings to obtain a declaration of the respective rights of parties *inter se* arising under assignments of a patent of invention; nor for a declaration that such assignments are invalid, and that the registration thereof should be vacated.

CAN.

Ex. C. 1913

BURKE v. THE "VIPOND."

Exchequer Court of Canada (Nova Scotia Admiralty District), Drysdale, L.J. February 12, 1913.

1. ADMIRALTY (§ I—2)—JURISDICTION—WAGES CLAIMS—JOINDER.

Claims for seamen's wages with less than $200 due to any one claimant may be joined in an action in admiralty against the ship and the Exchequer Court will have jurisdiction where the aggregate of the claims so joined is more than $200.

[*Beaton* v. *The "Christine,"* 11 Can. Exch. R. 167, approved.]

2. ADMIRALTY (§ II—19)—JOINDER OF CLAIMS—COSTS.

Where several seamen having unpaid wages claims, each of which being less than $200 might have been the subject of summary proceedings before a magistrate, join their claims aggregating more than $200 in one action in admiralty, they are entitled to their costs in the Exchequer Court.

Statement

ACTION for seamen's wages brought by six persons jointly, the claim of each one of them being less than $200 but the total amounting to $500.56.

Argument

James Terrell, for the ship, appeared under protest, taking objection to the jurisdiction of the Court. The claim of each seaman being less than $200 the remedy of each was by a summary proceeding before a magistrate, R.S.C. 1906, ch. 113, sec. 187. He referred to the Colonial Courts of Admiralty Act (Imp.), 1890, sec. 17; Howell's Adm. Prac. 24; *The "City of Petersburg,"* Young's Adm. 1. In any case no costs should be allowed. R.S.C. 1906, ch. 113, sec. 192.

J. L. Ralston, for plaintiffs (with *C. J. Burchell*, K.C.), referred to Admiralty rule 29 as to joinder; *Beaton* v. *The "Christine,"* 11 Can. Exch. R. 167; *Phillips* v. *Highland R. Co.*, 8 A.C. 329.

Drysdale, J.

DRYSDALE, L.J.:—It was objected here that as the individual claims of the seamen were under $200, the six plaintiffs could not join and sue in Admiralty, although the total amount of the joint claims is much in excess of $200.

I am clear this point is not well taken. I agree with the reasoning of Hodgins, L.J., in *Beaton* v. *The "Christine"* (11 Ex. C.R. 167) on this point, and since the decision in *Phillips* v. *Highland Railway Company* (8 A.C. 329) in my view the point is not open.

It was urged that under section 192 of R.S.C. 1906, ch. 113, the plaintiffs should be deprived of costs, but I think not. If the plaintiffs have the right to join and secure the whole amount due them in this one proceeding, it cannot be said they had as effectual a remedy by complaint to a magistrate, to whom they must go singly in separate suits or proceedings.

I find for plaintiffs for the respective amounts proved.

Judgment for plaintiffs with costs.

BREBNER v. THE KING.

CAN.

Ex. C. 1913

Exchequer Court of Canada, Audette, J. March 10, 1913.

NEGLIGENCE (§ I C 2—50)—*Liability to licensee—Public work—Trap-door.*]—Petition of right for damages against the Crown for personal injuries received in an accident occurring upon a public work of Canada through negligence of a public servant. The suppliant was employed by a contractor to deliver hay in a barn belonging to the Department of Militia and Defence at Kingston. This barn was a public work of Canada, and the duty of receiving the hay there from the contractor was discharged by one Love, a servant of the Crown. The suppliant was invited by Mr. Love to go up into the loft to assist Mr. Love in storing the hay. There was a trap-door there, open at the time, the existence of which was not communicated by Mr. Love to the suppliant. The light from the front of the loft was cut off by the pile of hay on the left of the barn, and the rear, where the suppliant was asked to assist in piling hay, was dark. Whilst engaged in this work the suppliant fell through the trap, which was guarded only on the side opposite to that on which the suppliant was working.

AUDETTE, J., held that the suppliant was not on the premises as a mere licensee or volunteer, but on lawful business in which he and Love had a common interest. Mr. Love was guilty of negligence in not calling the attention of the suppliant to the existence of the trap, and that the Crown was liable for such negligence under the provisions of sec. 20 of the Exchequer Court Act. The suppliant was not a fellow-servant of Mr. Love and was, therefore, entitled to recover for the negligence of the latter.

J. L. Whiting, K.C., for suppliant.

G. M. Macdonnell, K.C., for the Crown.

SMITH v. NORTH CYPRESS.

MAN.

C. A. 1913

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. May 21, 1913.

[*Smith* v. *North Cypress*, 12 D.L.R. 269, affirmed.]

INTOXICATING LIQUORS (§ I C—33)—*Local option by-law—Prior publication of notice.*]—Appeal by the Rural Municipality of North Cypress from an order of Mathers, C.J.K.B., quashing a local option by-law, *Smith* v. *North Cypress*, 12 D.L.R. 269.

H. R. Hooper, for appellants.

F. M. Burbidge, for respondents, was not called on.

THE COURT dismissed the appeal.

CAN.

Ex. C. 1913

FOWLER AND WOLFE MFG. CO. v. GURNEY FOUNDRY CO.

Exchequer Court of Canada, The Registrar in Chambers. April 1, 1913.*

DISMISSAL AND DISCONTINUANCE (§ I—2)—*Involuntary—For want of prosecution.*]—Motion to dismiss for want of prosecution an action brought for alleged infringement of a patent right.

THE REGISTRAR held that the intendment of Practice rule 131 of the Exchequer Court is to leave the dismissal of an action for want of prosecution to the discretion of the Judge; and if, upon the material before him, he thinks the interests of justice would be served by refusing the order on the terms of costs to the defendant in any event, it is open to him to make such a disposition of the motion.

The ethics of practice in the Exchequer Court, arising under the provisions of rule 325, is that the rules should not be administered *strictissimi juris*, but that they should be so applied that no proceeding in the Court shall be defeated by any merely formal objection.

The motion was dismissed on terms of paying defendant's costs in any event.

Order accordingly.

QUE.

S. C. 1913

COLLEGE OF DENTAL SURGEONS v. GAGNON.

Quebec Superior Court, Bruneau, J. January 14, 1913.

DENTISTS (§ I—6)—*Practising as a dentist without license—Habitual acts.*]—Action to recover a fine for unlawfully practising as a dentist brought under R.S. Que. 1909, arts. 5063 and 5067.

F. Lefebvre, K.C., for plaintiffs.

Lanctot and *Magnan*, for defendant.

BRUNEAU, J., held that a person in Quebec "practises as a dentist" in violation of article 5063, R.S. Que. 1909, when he engages "habitually" in the methods, or operations, constituting dentistry without (*a*) holding the prescribed license or diploma from the College of Dental Surgeons or (*b*) otherwise coming within the saving provisions of sections 5063 and 5081; and when such habitual acts are brought home to the defendant it is immaterial whether he did the prohibited work free of charge or not since the object of the law is the protection of the public against ignorance and incompetence, and the law is not concerned about the emoluments of the practice itself, in this last respect sub-sec. (*a*) of art. 5063 differing in principle from sub-secs. (*d*) and (*e*).

Judgment was given for the plaintiff for the minimum fine, but with full costs.

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*Now the Hon. Mr. Justice Audette.

CRAIG, defendant, appellant v. LAMOUREUX, plaintiff, respondent.

QUE.
K. B.
1913

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, Gervais, JJ. February 22, 1913.

[*Lamoureux* v. *Craig*, 2 D.L.R. 148, reversed.]

WILLS (§ I B—23)—*Form and requisites—Attestation.*]—Appeal from the judgment of Bruneau, J., in *Lamoureux* v. *Craig*, 2 D.L.R. 148, setting aside a subsequent will made by a testatrix who was advised and believed that her former will was invalid, but there was an issue (*a*) as to such invalidity of the former will, and (*b*) as to the reasons therefor.

The appeal was allowed, the judgment of the Court below being reversed, and the subsequent will sustained.

THE COURT held that although a will is not vitiated for mere illegibility of the signature of the testator, yet if it appears that the attestation of the witnesses did not occur at the same time and place as the signature, nor with the testator's knowledge, such an attestation is (under the Quebec law adopted from the laws of England) insufficient, and the will is thereby invalid.

Where a testatrix understandingly executes her subsequent will, operating to revoke a former will, and it appears that the former will was of no effect owing to an insufficient attestation by the witnesses thereto, the subsequent will is not invalidated by the fact that the testatrix was not advised as to the true cause of the invalidity of the former will, where she actually was correctly advised and understood that it was invalid, and she executed the subsequent will because of such stated invalidity.

G. Lamothe, K.C., and *Cinq-Mars*, for defendant, appellant.

J. A. Hurteau, for plaintiff, respondent.

ALLARD v. MEUNIER.

QUE.
S. C.
1913

Quebec Superior Court, Chauvin, J. November 8, 1913.

BROKERS (§ II B 1—13)—*Real estate brokers—Transaction effected without broker's aid.*]—Action to recover a commission of 2½ per cent. on a sale of lands. The plaintiff's case was that he had been given the exclusive agency of the property for a period of two months, had interested a prospective buyer, and shewn him the property. Before the latter had come to a decision and within the exclusive agency period the owner found another party who would purchase and thereupon closed a sale at $25,000.

CHAUVIN, J., held that the sale which defendant had made

QUE.
S. C.
1913

himself was a revocation of the mandate given plaintiff. Defendant was liable for the actual damages which he had caused plaintiff by such revocation, that is for a *quantum meruit* for the services he had actually rendered. These services consisted in interviews with the prospective buyer and taking him over the property and for this the Court allowed $10. The sale which defendant had made was not the result of the work of plaintiff. Hence the latter could not exact a commission on the transaction, to the bringing about of which he had in no wise contributed. And this more especially, as there was no clause in the agreement making the commission payable to him even if the sale were brought about by defendant himself.

Laflamme, Mitchell, Chenevert and *O'Callaghan*, for plaintiff.

Dorais & Dorais, for defendant.

B. C.
S. C.
1913

HALL MINING AND SMELTING CO. v. CONNECTICUT FIRE INSURANCE CO.

British Columbia Supreme Court. Trial before Clement, J. June 18, 1913.

INSURANCE (§ III E 1—87)—*Fire policy—Conditions as to vacancy and forest fires—Variations from statutory conditions.*]—Trial of action upon a fire insurance policy. The loss was occasioned by a forest fire, and, furthermore, the premises had become vacant and were so at the time. It was a condition of the policy, in variation of the statutory conditions in the Fire Insurance Policy Act, R.S.B.C. 1911, ch. 114, that the company should not be answerable, either for loss through forest fires or for loss if the premises became vacant or unoccupied.

Variations from the statutory conditions would, under the statute, not be binding if the Court should find them to be unjust and unreasonable.

Clark, for plaintiffs.

Mayers, for defendant insurance company.

CLEMENT, J., held that whether a variation from the statutory condition was unjust and unreasonable must be determined on the circumstances surrounding the particular insurance, except in the case of a variation manifestly unjust and unreasonable on its face. He referred to *Eckhardt* v. *Lancashire Insurance Co.*, 31 Can. S.C.R. 72, and the judgment in the same case in the Court below, 29 Ont. R. 695 at 699. There was no evidence here upon which he could find that at the date of the contract of insurance, it was unreasonable for the company to stipulate for immunity under either of the circumstances mentioned in the variation. The action would be dismissed.

Action dismissed.

INDEX OF SUBJECT MATTER, VOL. XIV., PART 3.

(For Table of Cases Reported see end of this Index.)

CASES REPORTED, VOL. XIV., PART 3.

McDERMOTT v. COATES.

B.C.
S. C.
1913

British Columbia Supreme Court, Motion before Hunter, C.J. October 17, 1913.

1. ARCHITECT (§ I—8)—ACCOUNTING TO OWNER FOR CERTIFICATES ISSUED—BASIS OF CERTIFICATES TO BE SHEWN IN DETAIL.

An architect is bound to render to the building owner, a detailed account shewing the appropriation of the various sums expended under the architect's certificate, notwithstanding that the certificate is, by the terms of the contract, made final as between the building owner and contractor; and such account should shew separately the extras and the work condemned and disallowed.

[As to the architect's duty to his employer, see Annotation to this case.]

Statement

MOTION for an account under Order 15 which provides that where a writ of summons has been indorsed for an account, under Order 3, rule 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the proper accounts, with all necessary additional inquiries shall be forthwith made.

Argument

Mayers, for the plaintiff, the building owner:—The plaintiff asks for a detailed account shewing the various appropriations of the sums expended by the plaintiff on the defendant, the architect's certificate: the finality of the certificate does not bind the building owner as regards the architect: *Badgley* v. *Dickson*, 13 A.R. (Ont.) 494.

Meredith, for the defendant, the architect:—The duty of the architect was to supervise, and not to render accounts; if the building owner desires accounts he must employ a clerk of the works; there is no authority to shew that an architect is bound to keep any accounts; his certificate is final and binding on both parties, as appears by the contract between the plaintiff and the contractor.

Hunter, C.J.

HUNTER, C.J.:—I do not think an architect performs his duty towards the building owner by merely issuing certificates for lump sums; he must be prepared to shew the materials from which he calculated the sums for which he issued the certificates; the object of employing an architect is to protect the interests of the building owner, and I do not see how that duty can be performed unless the architect keeps accurate accounts of the various sums expended for labour and material. The architect's position under the contract between the building owner and the contractor cannot affect his duties as agent to his principal. The order will go for the account as prayed.

Order made.

B. C.

S. C.
1913

McDERMOTT
v.
COATES.

N.B.—The order was issued in the following form:—

It is ordered that the defendant do within ten (10) days from the date of this order, make and file an account verified by affidavit, of all moneys which the defendant has disbursed or directed or authorized to be disbursed by certificate or otherwise, as agent for the plaintiff, distinguishing between moneys expended for work done and moneys expended for materials supplied, shewing the different classes of the work done and of material supplied, with the amounts paid in respect of each item of each class, and the dates when such work was done or material supplied, shewing what work was done and material supplied in accordance with the contract between the plaintiff and one Thomas L. Crosson, and what work was done and what labour supplied as extras to the said contract, together with a statement shewing the value of the work performed upon the said buildings by the said contractor, and the cost of replacing any work performed by the said contractor and condemned by the defendant.

Annotation

Duty to employer.

Annotation—Architect (§ I—8)—Duty to employer.

An architect is defined as "a skilled professor of the art of building, whose business it is to prepare the plans of edifices, and exercise a general superintendence over the course of their erection": Murray's Eng. Dict.

When an architect is employed on the erection of a house he is expected usually to perform the following services:—

1. To prepare all drawings and a specification of the work.
2. To arrange terms with the contractor.
3. To superintend the work.
4. To certify what amount of money is to be paid at the dates stipulated in the contract.

In this relation the architect must give "reasonable supervision." Lord Young, in *Jameson* v. *Simon*, 1 Fraser 1221, 36 Scot. L.R. 883, says: "To some extent an architect is an artist—that is, as regards the design and plan. But for the rest, his work is just ordinary tradesman's work—drawing specifications and supervising the work. He is not supposed to do all the supervision personally. His subordinates can do much of it as well as he can himself, but if he undertakes to do it, he is bound either to do it himself, or to have it done by some person whom he employs and in whom he has confidence. I think the meaning of the contract is that he shall see that the work is done well before he certifies it. If he does not do this then the interest of the employer is altogether neglected."

In extensive operations the usage is for architects to employ a quantity surveyor, whose charges are added to his contract by the successful competitor. Where the architect does supply quantities he may thereby become personally liable for any loss occurring to a contractor through error on his part: Beven on Negligence, 3rd ed., 1135.

It was held in an English case, *Kemp* v. *Rose*, 1 Giff. 258, 268, 4 Jur. (N.S.) 919, that it is neither the usual nor a safe course for the architect to prepare bills of particulars or quantities of the works to be executed.

Where the contract for the building recites that the bills of quantities supplied to the architect are "believed to be correct," such goes against any suggestion that the owner warranted the quantities, particularly where the contract by another clause gives the architect a discretionary power to re-measure if he finds reasonable grounds for so doing and to adjust errors: *Young* v. *Blake*, 2 Hudson on Building Contracts 106.

Annotation (*continued*)—**Architect** (§ I—8)—**Duty to employer.**

B. C.

Annotation

Duty to employer.

The services rendered to their employers by engineers, architects, surveyors and valuers, being undertaken by them for reward, they are bound to possess an ordinary and reasonable degree of skill in the art or profession which they profess, by undertaking to do the work; and to act with reasonable care and diligence in rendering those services, and are liable for failure to do so: 1 Hudson on Building Contracts, 3rd ed., 40.

An architect is in the same position as any other professional or skilled person, and whether it be in the preparation of plans and specifications, or the doing of any other professional work for reward, he is responsible if he omits to do it with an ordinary and reasonable degree of care and skill: *per* Osler, J.A., in *Badgley* v. *Dickson* (1886), 13 A.R. (Ont.) 494, at p. 500.

An architect is bound to exercise reasonable care, skill, and diligence in the preparation of plans and the supervision of work intrusted to him. Whether he has failed or not, in the exercise of those qualities, is a question of fact for the judge or jury: *Russell* v. *McKerchar*, 1 W.L.R. 138 at 139.

An architect or engineer will not be relieved from liability for negligently conducting his business by his advising his employer to examine, or by the employer himself examining, the subject as to which the architect is required to perform his duties or to exercise his professional judgment: 1 Hudson on Building Contracts, 3rd ed., 57.

In accepting an appointment from the employer, the engineer or architect undertakes responsibilities to the employer under the contract, but to the contractor only under the law. To the employer he may be liable for an error in the performance of his duties; but to the contractor only for a fraud committed or aided by him, in the performance of his functions under the contract, or otherwise.

As fraud and deceit are *mala in se*, and in the performance of functions under the provisions of a contract, as in every other transaction, a person is under the legal obligation to be a party to no fraud, and to make no false statement for the purpose of it being used to another's injury, the employer's direction or request to the engineer or architect as to the performance of his duties under a contract is no justification for a fraudulent performance of them.

That his functions shall not be exercised in bad faith, is the extent of the engineer or architect's obligation to the contractor with whom he has no privity of contract; while to the employer, he may be under the obligation to duly perform all the duties which, by his acceptance of the appointment, he undertook to perform.

Such disparity between the responsibility which the engineer or architect has to the contractor and that which he has to the employer, must necessarily exist where he is the agent, appointed solely by the employer, to exercise a control over a contractor who has no part in his appointment: Gregory on the Law of Engineers and Architects 12.

In a building contract, the architect's certificate is final, as between the builder and the building owner, but not as between the building owner and the architect himself: *Rogers* v. *James*, 8 Times L.R. 67, 56 J.P. 277 (C.A.).

In *Irving* v. *Morrison*, 27 U.C.C.P. 242, the plaintiff sued for services

B. C. **Annotation (*continued*)—Architect (§ I—8)—Duty to employer.**

Annotation

Duty to employer.

as architect in planning and superintending the erection of the defendant's house. Amongst the plaintiff's duties was the certifying for payments to the contractors employed in certain fixed proportions to the value of the work done. In consequence of the plaintiff's failure to perform his duty in this respect, a large amount was overpaid on the carpenter's and joiner's contract, and, on the failure of these contractors, the defendant was compelled to have the work finished by others at a much higher price, and thereby the defendant wholly lost the amount which he had overpaid to the failing contractors on the plaintiff's certificates, which ought not to have been given. The Court held that the defendant might deduct from the plaintiff's claim for services his loss by the overpayment of the contractors: *Irving* v. *Morrison* (1877), 27 U.C.C.P. 242.

Hudson on Building Contracts (3rd ed., vol. 1, p. 77) summarizes the architect's duties as to extras and variations by stating that he should (1) obtain instructions from his employer as to extra work or deviations, unless he has power under the contract to order what extras or variations he pleases without reference to his employer; (2) see that none are undertaken without orders in writing, signed by him, and countersigned by the employer if required by the terms of the contract: *Pattinson* v. *Luckley* (1873), L.R. 10 Ex. 330, 331; (3) not certify for payment of any extras or deviations executed without proper orders; (4) not order as extras, or certify for as extras, works indispensably necessary to complete an entire contract.

The engineer or architect's approval for, the purpose of a progress certificate, is altogether distinct from his approval of the completion of the entire work. Work which is quite satisfactory so far as it has progressed when a progress certificate is made, may develop defects before the entire work is completed; and an approval of work, for the purpose of a progress certificate, does not operate in establishing the right of the contractor, which it is stipulated in the contract, shall only accrue to him, upon the engineer or architect's approval of the completion of the entire work: *Richardson* v. *Mahon* (1879), 4 L.R. Ir. 486.

The operation of a progress certificate, or of any approval made for the purpose of a progress certificate, is limited to the performance of the function for which the progress certificate is intended, which is to cause the sum so certified to become payable to the contractor, as a portion of the amount which shall, upon the completion of the entire work, be ascertained to have been earned by him, as the consideration for the performance and completion of the entire work: Gregory on Engineers and Architects 87.

The architect is liable for negligence to his employer, when he is not acting as arbitrator or *quasi*-arbitrator, for over-certifying for advances to the builder, for carelessly or unskilfully measuring or calculating the work done, and for certifying for improper or incorrect charges.

If the architect over-certifies for advances to the builder during the progress of the works, and the builder fails before completion, the architect may put his employer to additional cost in completing the work, and in such a case he would be liable to make good the loss sustained by the building owner: see *Irving* v. *Morrison* (1877), 27 U.C.C.P. 242; and *Badgley* v. *Dickson* (1886), 13 A.R. (Ont.) 494; *Saunders* v. *Broadstairs Local*

Annotation (*continued*)—**Architect** (§ I—8)—**Duty to employer.** B. C.

Annotation

Duty to employer.

Board (1890), 2 Hudson, p. 159; *Rogers* v. *James* (1891), 8 Times L.R. 67, 56 J.P. 277.

The architect's duties, as *quasi*-arbitrator or certifier, must depend on the special terms of the building contract, but as a general rule they will continue until the completion of his duties under the contract with the builder, whether or not the builder has forfeited his rights: *Botterill* v. *Ware Guardians* (1886), 2 Times L.R. 621 (C.A.); 1 Hudson on Building Contracts, 3rd ed., 77.

A building owner employed an architect for reward to supervise the erection of certain houses by a contractor. The building contract provided for payments on account of the price of the works during their progress, and for payment of the balance after their completion, upon certificates of the architect, and that a certificate of the architect, shewing the final balance due or payable to the contractor, should be conclusive evidence of the works having been duly completed, and that the contractor was entitled to receive payment of the final balance. The Court of Appeal held that the architect, in ascertaining the amount due to the contractor and certifying for the same under the contract, occupied the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in the exercise of those functions: *Chambers* v. *Goldthorpe*, 70 L.J.K.B. 482, [1901] 1 K.B. 624, 84 L.T. 444, 49 W.R. 401, 17 Times L.R. 304 (C.A.) (affirming same case *sub nom. Restell* v. *Nye*, 16 Times L.R. 154, *per* Mathew, J.).

An architect employed to superintend the erection of a building, who with knowledge that it had not been completed according to the plans and specifications, improperly gave the contractor a certificate of completion is answerable for his negligence to his employer: *Bruce* v. *James*, 12 D.L.R. 469 (Man.); *Rogers* v. *James* (1891), 8 Times L.R. 67; *Badgley* v. *Dickson*, 13 A.R. (Ont.) 494, followed; *Chambers* v. *Goldthorpe*, [1901] 1 K.B. 624, distinguished.

An architect is entitled to compensation *quantum meruit* for superintending the erection of a building and making extra drawings therefor, notwithstanding the fact that he is answerable to his employer for negligently giving a final certificate to the contractor before he had finished his work according to the plans and specifications: *Bruce* v. *James*, 12 D.L.R. 469.

A building contract contained a clause, appointing the architect arbitrator in respect of extra works; the architect had guaranteed to his employer that the total cost should not exceed a specific sum, but that fact had not been disclosed to the builder at the time when he signed the contract:—*Held*, that the guarantee was a material fact tending to influence the architect's decision, and as it was not disclosed to the builder, he was not bound by the submission to the architect's arbitration, and the Court would perform the part of arbitrator in the matter: *Kimberley* v. *Dick*, 41 L.J. Ch. 38, L.R. 13 Eq. 1, 25 L.T. 476, 20 W.R. 49. Where a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for his work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a specified amount, although he refused to guarantee that amount, the Court did not consider that the decision of the architect made

B.C.

Annotation

Duty to employer.

Annotation (*continued*)—**Architect (§ I—8)—Duty to employer.**

under such a bias was binding, but gave directions so as to ascertain under the authority of the Court how much remained justly due to the builder: *Kemp* v. *Rose*, 1 Giff. 258, 4 Jur. (N.S.) 919.

Where the contract is entire, progress certificates are not conclusive as to the quality of the work done nor do they prevent the employer from subsequently disputing the quality: *Cooper* v. *Uttoxeter Burial Board* (1865), 11 L.T. 565; and *Richardson* v. *Mahon* (1879), 4 L.R. Ir. 486; Hudson on Building Contracts, 3rd ed., 380. Nor is the owner barred by having made payments on progress certificates from setting up against the contractor's claim of completion a general non-performance and that by the contract it was a condition precedent to payment that the work should be completed to the satisfaction of a named official: *Coatsworth* v. *Toronto*, 10 U.C.C.P. 73.

In *Moneypenny* v. *Hartland*, 1 C. & P. 352, Abbott, C.J., laid it down that, if a quantity surveyor, who makes an estimate, sues those who employ him for the value of his services, and if it appear that he was so negligent that he did not inform himself, but went upon the information of others, which proved to be false or insufficient, he is not entitled to recover for his plans and specifications: "for every person employed as a surveyor must use due diligence. Whether the plaintiff has used due diligence or not, is a question for the jury; and if the plaintiff went on the statements of others, that is no excuse, as it was his duty to ascertain how the fact was, or to report to his employers that he only went on the information of others, or that the fact was uncertain." This ruling was sustained *en banc* on the ground that, if the plaintiff "led his employers into a great expense by his want of care, his services would be worth nothing." In a subsequent phase of the same case, Best, C.J., explains this by saying: "Supposing negligence or want of skill to be sufficiently made out, unless that negligence or want of skill has been to an extent that has rendered the work useless to the defendants, they must pay him, and seek their remedy in a cross-action. For if it were not so, a man by a small error might deprive himself of his whole remuneration." The learned Judge continues: "I grant that it is not a trifling deviation from an estimate that is to prevent a party's recovering. But if a surveyor delivers in an estimate greatly below the sum at which a work can be done, and thereby induces a private person to undertake what he would not otherwise do, then I think he is not entitled to recover." See also *Nelson* v. *Spooner*, 2 F. & F. 613.

The plaintiffs, the proprietors, authorized the defendant architect to prepare plans, etc., and to employ a surveyor to take out quantities, for a building on a certain site. He did the work and was paid for it, and plaintiffs sold the site without building on it. Subsequently it was discovered that he had never measured the site, and that the building planned by him would not cover the whole site. Wright, J., held that there had not been a total failure of consideration entitling the plaintiffs to recover back the defendant's fee; and that, so far as the plans were concerned, the damages were only nominal, for the defendant would be bound to correct them for nothing; but that the plaintiffs were entitled to the £40 which a quantity surveyor would charge for adapting the bills of quantities to the new plans: *Columbus Co. Ltd.* v. *Clowes*, [1903] 1 K.B. 244, 72 L.J.K.B. 330, 51 W.R. 366.

Annotation (*continued*) **Architect (§ I—8)—Duty to employer.**

B. C.

Annotation

Duty to employer.

An architect's decision as to the value of work performed or of materials furnished for a building erected under a contract declaring that his decision should be final, is not open to attack if he acts fairly and honestly and no collusion between him and the contractor is shewn: *Hamilton* v. *Vineberg*, 2 D.L.R. 921, 3 O.W.N. 605, affirmed on appeal: *Hamilton* v. *Vineberg* (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337.

Where provision is contained in a contract for the construction of certain works that payment is to be made on the completion of the work to the satisfaction of the engineer, the authority of the engineer is to be confined to what is specially conferred on him by the contract including the specifications, and while he may, pursuant to the provisions of the specifications, issue progress estimates from time to time, he has no authority to release the contractor from the performance of any essential part of the work, nor has he power to give a certificate, final in its nature, until the work is completed to his satisfaction. *Davidson* v. *Francis*, 14 Man. L.R. 141; *Canty* v. *Clark*, 44 U.C.R. 222, followed: *Merriam* v. *Public Parks Board*, 2 D.L.R. 702, 22 Man. L.R. 107.

A contract for the erection of a building authorizing the architect, if there was any part of the work remaining uncompleted for reasons not within the contractor's control, to deduct the value of the incomplete portions from the contract price and to issue a final certificate that the works were completed, gives the architect no power to accept the contractor's guarantee that he will complete the uncompleted portions of the work in lieu of the deduction required by the contract and a certificate by the architect to that effect is not a final one: *Brown* v. *Bannatyne School District*, 2 D.L.R. 264, 22 Man. L.R. 260, 5 D.L.R. 623.

Plaintiff was engaged by defendants to prepare plans and specifications for an hotel building, to cost not more than $4,000 or $5,000, for which he was to receive a commission of two per cent. on the cost, with one per cent. additional for superintendence. Instructions as to size, number of rooms, etc., were given by defendants. Before the plans were completed changes were made by additions to the original plan, involving an additional expenditure of $1,500. The plans were approved of by the defendants, when completed, and tenders called for, and the work partly proceeded with. It was then found by defendants that, owing to an advance in the price of materials, the building would cost much more than they had expected, and the work was stopped. The plaintiff was held entitled to recover from defendants the stipulated commission of two per cent. on the estimated cost of the building with the additions agreed upon: *Hutchinson* v. *Conway*, 34 N.S.R. 554.

Defendant requested plaintiff to prepare for him plans for a building to cost from $15,000 to $18,000. After inspecting the plans, the defendant objected that the building shewn would not give him sufficient room, and suggested changes which, he was told, would increase the cost. Defendant assented, and the plans, as finally prepared, were for a building which would cost $25,000. It was held, that plaintiff was entitled to be paid a percentage on the latter amount, and that, in the absence of evidence to fix the value independent of the special contract proved by plaintiff, the amount allowed by the trial Judge could not be reduced: *Chappell* v. *Nolan*, 38 N.S.R. 74.

B. C.

Annotation (*continued*)—Architect (§ I—8)—Duty to employer.

Annotation

Duty to employer.

In making his estimates for the cost of a building an architect is only required to use a reasonable degree of care and skill, and if he does this he is not liable for any loss caused by error in the estimates: *Grant* v. *Dupont*, 8 B.C.R. 223, affirming 8 B.C.R. 7.

The plaintiffs entered into a contract with the defendants to provide all the materials and perform all the work in the erection and completion of a building, according to certain plans and specifications. After the walls were up and the roof and concrete floors in, an accident occurred to the basement walls resulting in considerable damage, and the defendants terminated the employment of the plaintiffs, under the provisions of the contract, and completed the building themselves, asserting that the damage was due to the default of the plaintiffs, and that the plaintiffs refused to repair it except as extra work for which they should be paid. The plaintiffs sued for the balance alleged to be due under the contract for work done and materials supplied including a large amount for extras, up to the time their employment was terminated. They alleged that the accident to the walls was due to the negligence or lack of judgment of the architects, and that they (the plaintiffs) were not responsible therefor, and that the termination of their employment by the defendants was, therefore, wrongful:—*Held*, that the specifications, being incorporated with and constituting part of the contract, must be read with it; and, in so far as the contract proper modified the terms of the specifications, the contract must prevail. By the terms of the contract, the plaintiffs were not liable for loss or damage to the works which might be due to the negligence or lack of judgment of the architects. The plaintiffs alleged that the drawings and specifications prepared by the architects were defective and improper; that they failed to provide for adequate foundations and footings:—*Held*, that the onus of establishing this was on the plaintiffs; and they had failed to shew that the subsidence of the walls was due to the negligence or lack of judgment of the architects in so far as the footings were concerned: *Grace* v. *Osler*, 19 W.L.R. 109.

In *McDonald* v *Edey*, 3 D.L.R. 893, an Ontario case tried before Middleton, J., the plaintiffs alleged that the defendant, who was employed by them as an architect in the erection of a house, was liable for damages by reason of his careless, negligent, and unskilful conduct in and about the building in question. The damages claimed were $2,500. The defendant, denying the plaintiff's allegations, counterclaimed to recover his commission. Middleton, J., said that most of the specific claims put forward by the plaintiffs were negatived by the evidence at the trial; and all the claims were very much exaggerated; yet, in the result, he thought that there was some negligence on the part of the defendant. The two matters in which the defendant was to blame were: allowing the building to be so erected that the eave overlapped the eave of the adjoining building, also owned by the defendant; and his failure to compel the carpenters to use flooring in accordance with the specifications. It was said that the overlapping of the eaves would interfere with the selling value of the premises. This claim was very much exaggerated. The fact that the overlapping eave keeps the 18 inches of space between the houses dry and prevents the walls becoming wet and so injured, was not to be overlooked. The plaintiffs stood by and did not in any way complain of this when the building was located; and,

Annotation (*continued*) Architect (§ I—8)—Duty to employer. B. C.

Annotation

Duty to employer.

while some allowance should be made upon this head, it should not be large. As to the flooring, the specifications called for flooring not exceeding 4-½ inches in width. About 30 per cent. of that actually laid down was 5-½ inches in width. This rendered the floor boards more liable to warp and to leave wider cracks in shrinking. The architect was to be allowed 5 per cent. commission upon the erection, or $200 in all. The learned Judge assessed the plaintiff's damages at $200 against the architect and set off the damages against the defendant's claim for commission.

In *Maclure* v. *Cusack*, 7 D.L.R. 835, in the County Court, Victoria, the plaintiff, an architect, sued for $337.50 for services in preparing plans and specifications for a house which the defendant contemplated building. Judge Lampman said: "I do not think an architect's right to be paid for his work differs from that of any other professional man, or a day labourer. If I employ a man to dig for me, I cannot at the end of a week's digging say to him: 'I don't like the way you dig, and I won't pay you for what you have done.' Neither could I refuse to pay a surgeon simply because I did not like the manner in which he performed an operation. The employment can be terminated, but for work already done payment must be made." The learned Judge found from the negotiations in that case that there was an implied contract for specifications.

An architect was employed by the owner of certain houses to design and carry out the conversion of the houses into flats, and he was to receive five per cent. on the contract price for his services. The architect accordingly prepared plans and specifications, and superintended the work of conversion. At the conclusion of the work the owner paid the architect his fees, and claimed to be entitled to the plans and specifications. At the trial the architect tendered evidence of a custom in the profession by which, in the circumstances of the case, the plans and specifications were the property of the architect:—*Held*, that the custom was unreasonable, and that the evidence was not admissible, and that the plans and specifications belonged to the building owner: *Ebdy* v. *McGowan* (1870), 2 Hudson on Building Contracts 7; *Gibbon* v. *Pease*, [1905] 1 K.B. 810, 74 L.J.K.B. 502, 69 J.P. 209, 53 W.R. 417, 92 L.T. 433, 21 Times L.R. 365, 3 L.G.R. 461.

An architect who undertakes the supervision of building operations is liable in damages to his employer for defective work done by a contractor, where due supervision on his part would have detected and prevented the defect: *Jameson* v. *Simon*, [1899] 36 Sc. L.R. 883.

A contract between a railway company and a quarrymaster for the construction of a siding provided that the company should form the permanent way of the siding and execute certain other work connected therewith, and that on completion of the work the quarrymaster should pay to the company the cost of the labour incurred and interest on the cost of the permanent way, etc., as the amount of such cost and interest should be determined by the company's engineer. The railway company brought an action against the quarrymaster for payment of (1) the balance of a lump sum certified by the engineer as the amount expended on wages, and (2) interest on a lump sum certified by him as the value of the materials. The defender maintained that the sums certified were excessive; that no details were ever furnished to him; and that he never was afforded an opportunity of

B. C. Annotation (*continued*)—Architect (§ I—8)—Duty to employer.

Annotation

Duty to employer.

being heard. It was held that the action was premature, and that the company had failed to make a proper demand under the contract in respect that while the engineer was, no doubt, made the final judge of the amount if the parties failed to agree, that did not absolve the company from furnishing to the defender a properly detailed account: *North British R. Co.* v. *Wilson*, [1911] Sc. C. 730, 48 Sc. L.R. 620 (Ct. of Sess.).

A firm, of which the defendant was the sole surviving member, were employed as architects, it being a term of the agreement that a clerk of the works should be employed. Four years after the work was completed dry rot broke out in floors laid over concrete, a large area of which was laid on the ground floor of the new building. It was alleged that this defect arose owing to the negligence of the defendant in not seeing that the concrete was properly laid in accordance with the contract. It was also alleged that, in correspondence which passed between the parties after the dispute arose, the defendant, in consideration of the corporation refraining from suing, undertook to put the work right at his own expense. The defendant denied that it was his duty to supervise the laying of the concrete, and alleged that it was the duty of the clerk of works. He counterclaimed for damages, alleged to have been occasioned by the plaintiffs having in breach of an implied contract appointed an incompetent clerk of the works. It was held that while the duty of a clerk of the works under an ordinary building contract was to supervise the details of the work, the laying of a floor such as this could not be regarded as a detail, and that the architect was liable. The Court held further, that the defendant was liable under the subsidiary contract, and that for that contract, which was not under seal, sealing was unnecessary: *Leicester Guardians* v. *Trollope*, 75 J.P. 197, Channell, J.

At a meeting of the defendant municipal council it was verbally resolved that the plaintiff should be employed as joint architect for the erection of a kursaal which the defendants were authorized under a private Act to erect. The plaintiff prepared plans, and for some time did work in pursuance of the resolution, but before the work was finished he was dismissed. It was held, that although the contract was not under seal the plaintiff was entitled to recover on a *quantum meruit* as the defendants had had the benefit of his work in an employment within the scope of their authority and for the purposes for which they were created: *Hodge* v. *Urban District Council of Matlock Bath*, 74 J.P. 374, 26 Times L.R. 617, 8 L.G.R. 958 (Lawrence, J.). The case was appealed and the appeal was allowed on the question of the amount awarded by the jury as a *quantum meruit*, but, the amount being reduced by consent, no new trial ordered: *Hodge* v. *Urban District*, 27 Times L.R. 129, 8 L.G.R. 1127 (C.A.).

In the Province of Quebec, by arts. 1688, 1689 of the Civil Code, architects are responsible during ten years for defects in buildings erected by them, and this liability has been imposed even in a case in which the plans were made by another architect before the person sued assumed charge of the works to be erected: *Scott* v. *Christ Church Cathedral* (1865), 1 L.C. L.J. 65.

In another Quebec case the floors of a building sank in consequence of the insufficiency of the timbers specified and used to support the bridging joists and floors. It was held that the architect and the contractor were

Annotation (*continued*)—**Architect** (§ I—8)—**Duty to employer.** B. C.

Annotation

Duty to employer.

jointly and severally liable: *David* v. *Macdonald* (1863), 8 L.C. Jur. 44, 14 L.C. Rep. 31.

In an action by an architect for the value of his services rendered in connection with the construction of a block of buildings, the value being estimated at a certain percentage on the cost of the buildings, it was held that although the architect had no right, in the absence of an express agreement, to recover a commission on the property *eo nomine*, yet the value of his services could be established by evidence; that the allowance of a commission was usual, and was a fair and reasonable mode of remuneration, in which case he would recover as for a *quantum meruit*: *Footner* v. *Joseph* (Que. 1860), 5 L.C.J. 225, 11 L.C.R. 94, 7 R.J.R. (Que.) 478; reversing S.C. 3 L.C.J. 233, 7 R.J.R. (Que.) 477; *Roy* v. *Huot*, S.C. 1879, 2 L.N. (Montreal) 347, and see remarks, 2 L.N. 345.

An architect employed by a building owner to superintend a house being built by a contractor, made an arrangement with the contractor that he, the contractor, should pay him £20. The building owner, when he knew it, dismissed the architect, and the architect sued him for his fees. It was held, confirming the judgment of the Court below, that an architect cannot at the same time be employed in the interests both of the building owner and the builder, and receive pay from both, and as it was proved that the architect had covenanted with the builder to receive pay from him, it was a violation of the contract sufficient to discharge the building owner from liability to pay the architect anything: *Tahrland* v. *Rodier* (Que. 1866), 16 L.C.R. 473; and see *Shaw* v. *Davis* (1860), 3 L.T.N.S. 135.

The agreement by which an architect undertakes to prepare plans and specifications, receive tenders and award the contract, direct the contractors and superintend the work of erecting two buildings, creates an obligation divisible and susceptible of executing in portions. Therefore, the absence of the architect during the course of the work only gives the owner a right to a reduction of the sum agreed to be paid to him in proportion to the prejudice suffered: *Maan* v. *Rudolph*, 37 Que. S.C. 299 (Ct. Rev.), reversing 36 Que. S.C. 57.

GOODWIN v. MICHIGAN CENTRAL R. CO.

ONT.

S. C. 1913

Ontario Supreme Court (*Appellate Division*), *Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November* 3, 1913.

1. DEATH (§ II B—14)—RIGHT OF ACTION FOR CAUSING—WHO MAY MAINTAIN—CHILDREN.

That the premature death of an aged parent caused an acceleration of the enjoyment of his estate by his children is not such a benefit as will prevent them recovering under the Fatal Injuries Act, 1 Geo. V. ch. 33, R.S.O. 1914, ch. 151, where there is a reasonable probability that had the parent lived he would have saved all of his income for the benefit of his children.

2. EVIDENCE (§ XI G—803)—RELEVANCY AND MATERIALITY—DAMAGES—DEATH—PROBABLE DURATION OF LIFE.

The fact that the deceased was an unusually healthy man, although 82 years old, may be considered in awarding damages under the Fatal Injuries Act, 1 Geo. V. ch. 33, R.S.O. 1914, ch. 151, and a finding

ONT.

S.C.
1913

GOODWIN
v.
MICHIGAN
CENTRAL
R. CO.

of a probable greater duration of life than that of the average man may be based thereon.

[*Rowley* v. *London & North Western R. Co.*, L.R. 8 Ex. 221, 226, followed.]

3. DAMAGES (§ III—I—3—187)—MEASURE OF COMPENSATION—DEATH OF PARENT—PROBABLE ACCUMULATIONS—PRESENT VALUE.

The measure of damages under the Fatal Injuries Act, 1 Geo. V. ch. 33, R.S.O. 1914, ch. 151, where it appears that the deceased would have saved the annual income from his property for the remainder of his life for the benefit of his children, is not the full amount thereof for the probable duration of his life, but the present value of the annual payments thereof capitalized at five per cent.

Statement

APPEAL by the defendants from the judgment of Boyd, C., in favour of the plaintiffs, after the trial of the action before him, without a jury, at Welland, on the 21st May, 1913.

The judgment was varied.

W. B. Kingsmill, for the defendants.

G. Lynch-Staunton, K.C., for the plaintiffs.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought by the executors of James Goodwin, deceased, on behalf of his seven children, to recover damages, under the Fatal Accidents Act, for the death of the deceased, who was killed owing, as alleged, to the negligence of the appellant company.

That the death was caused by the negligence of the appellant company is not disputed; but it is contended that the persons on whose behalf the action is brought have suffered no pecuniary loss by his death, or at all events that the damages should have been assessed at a much less sum than $1,650, the amount awarded by the Chancellor.

The facts, having regard to which the question in dispute is to be determined, are not in controversy. The deceased was a superannuated Methodist Minister, and was in receipt of an allowance of $330 a year, during his life, from the Superannuation Fund of that church, and he was possessed of property of the value of about $23,000, which by his will he left to his children in equal shares. He was eighty-two years old, and his expectation of life, according to the mortality tables, was shewn to be 3.90 years, but, according to the testimony of Dr. Smith, a medical witness who was well acquainted with the deceased and had been his physician for several years, his physical condition was such that he "might easily have been expected to live for ten years."

The Chancellor came to the conclusion that the reasonable expectation of life of the deceased was five years; and, being of opinion that, upon the evidence, there was a reasonable expectation that what the deceased, if he had lived, would have received from the Superannuation Fund would have been saved by him and have passed at his death to his children, he assessed the

damages on that basis, allowing as the pecuniary loss sustained by the children five of the yearly payments of the superannuation allowance.

In support of the appeal it was contended, first, that the children of the deceased had sustained no pecuniary loss by his premature death, because his whole estate passed to them at his decease, and they had thus been pecuniarily benefited by it; second, that at all events they had benefited by the accelerated enjoyment of his estate more than they had lost by the superannuation allowance having ceased; and third, that in any case the Chancellor erred in assessing the damages on the basis of a five years' expectation of life, and in allowing the sum of the allowance for five years instead of the capitalized value of it.

It is clear, I think, that the first of these contentions is not maintainable. Upon the evidence, the proper conclusion is, that there was a reasonable expectation that the whole of the estate of the deceased would go to his children at his death; and it would, therefore, be improper, for the purpose of ascertaining their pecuniary loss, to treat the children as being benefited by his premature death to the extent of the value of the estate. They benefited owing to his premature death only by the enjoyment of the estate being accelerated; and, had it not been found upon the evidence that there was a reasonable probability that the whole of the income of his estate would have been saved by the deceased and have passed to his children at his death, the second contention would have been entitled to prevail; but that finding is a complete answer to it.

That the Chancellor was right, in order to arrive at a conclusion as to the probable duration of the life of the deceased, in taking into consideration the fact that his life was an unusually healthy one, and on that account in finding the probable duration of it to be greater than that of the average life, is, I think, clear upon principle; and, if authority for the proposition is needed, it will be found in *Rowley* v. *London and North Western R. Co.* (1873), L.R. 8 Ex. 221, 226.

For these reasons, we are of opinion that the judgment is right, except as to the computation of the damages. The pecuniary loss to the children, on the hypothesis on which the Chancellor proceeded, was not the sum of the allowance for five years, but the present value of the five yearly payments, which, capitalizing them at five per cent. per annum, amounts to $1,428.73.

The judgment should, therefore, be varied by reducing the damages to that sum, and, with that variation, should be affirmed and the appeal be dismissed.

As success is divided, there will be no costs of the appeal to either party.

Judgment varied.

CAN.

Ex. C.
1913

MAY v. THE KING.

Exchequer Court of Canada, Audette, J. June 2, 1913.

PUBLIC PRINTING (§ I—5)—*Liability of Crown—Irregular order—Delivery of goods to Government Department.*]—Hearing of petition of right for the recovery from the Crown of the price of goods delivered to and alleged to have been purchased by the Department of Public Printing and Stationery.

R. C. Smith, K.C., and *W. G. Pugsley*, for suppliants.
W. D. Hogg, K.C., for respondent.

AUDETTE, J., held that according to the true intent, meaning and spirit of section 24 of the Public Printing and Stationery Act, R.S.C. 1906, ch. 80, such section is a precautionary measure to safeguard and protect the State. In the absence of a strict compliance with the formalities prescribed thereby it must be held that no legal contract can obtain between the Crown and a subject, and the only claim which can be entertained for the right of recovery of goods delivered would be that based not on an executed contract, but rather as upon a *quantum meruit*.

Specific approval by the Minister of the King's Printer of each requisition is essential under the statute. The Crown will not be held to be constructively in possession of goods, nor will goods be held to be constructively delivered, or requisitions constructively made, upon an informal contract, because the Crown cannot be prejudiced by the unauthorized acts or laches of any of its officers.

Judgment accordingly.

MAN.

C. A.
1913

Re GIMLI ELECTION.
REJESKI v. TAYLOR.
(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 27, 1913.

1. APPEAL (§ I B—15)—FINALITY OF DECISION—CONTROVERTED ELECTION—REGULARITY OF PETITION.

An appeal to the Manitoba Court of Appeal lies from an order in a controverted election proceeding under the Controverted Elections Act, R.S.M. 1902, ch. 34, from an order setting aside, as having been made without jurisdiction, prior orders extending the time for service of the petition and for substitutional service where the setting aside of those orders if allowed to stand would end the entire proceeding as the statutory period for service apart from the extension order had expired when the order appealed from was made.

[*Re Shoal Lake Election*, 5 Man. L.R. 57, discussed.]

MAN.

C. A.

1913

RE GIMLI ELECTION.

2. ELECTIONS (§ IV—92)—CONTESTS—CONTROVERTED ELECTIONS ACT — SERVICE OF PETITION—SECOND EXTENSION OF TIME FOR.

While sec. 33 of the Controverted Elections Act, R.S.M. 1902, ch. 34, provides that the petition and notice of presentation thereof shall be served within five days, "or within such further time as a Judge shall order," the power of a Judge is not exhausted by making one extension of time, but he may make a further extension under sec. 34 of the Act, which provides that service may be made "within such longer time as any Judge may grant, regard being had to the difficulty of effecting service, or to special circumstances." (*Per* Howell, C.J., Perdue, and Cameron, JJ.)

[*Re Gimli Election*, 13 D.L.R. 121, reversed.]

3. ELECTIONS (§ IV—92)—CONTESTS—CONTROVERTED ELECTIONS ACT — SUBSTITUTIONAL SERVICE OF PETITION—TIME FOR—EXTENSION OF.

Under sec. 35 of the Controverted Elections Act, R.S.M. 1902, ch. 34, which provides that if a petition in a controverted election proceeding cannot be served personally on the respondent at his domicile, "service may be effected upon such other person, or in such other manner as any Judge may appoint," an order for substitutional service may be made after the expiration of a previous extension of time, granted under secs. 33 and 34 of the Act, for personal service of such petition. (*Per* Howell, C.J., Perdue, and Cameron, JJ.)

[*Re Gimli Election*, 13 D.L.R. 121, reversed.]

4. MOTIONS AND ORDERS (§ II—6)—SETTING ASIDE OR RECALLING ORDER—POWER OF JUDGE OVER.

In the absence of express statutory authority, a Judge of the Court of King's Bench is without power to set aside an order made by him in a controverted election proceeding; appeal being the only remedy in such case. (*Per* Perdue, and Cameron, JJ.)

[*Munroe* v. *Heubach*, 18 Man. L.R. 547; *Re St. Nazaire Co.*, 12 Ch.D. 88; *Preston Banking Co.* v. *Allsup*, [1895] 1 Ch. 141; *Charles Bright & Co.* v. *Sellar*, [1904] 1 K.B. 6; *McNabb* v. *Oppenheimer*, 11 P.R. 214; and *Robertson* v. *Coulton*, 9 P.R. 16, followed.]

Statement

APPEAL from the decision of Mathers, C.J.K.B., *Re Gimli Election, Rejeski* v. *Taylor*, 13 D.L.R. 121.

The appeal was allowed, RICHARDS, and HAGGART, JJ.A., dissenting.

A. B. Hudson, and *H. E. Swift*, for petitioners, appellants.

A. J. Andrews, K.C., and *F. M. Burbidge*, for respondents.

Howell, C.J.M.

HOWELL, C.J.M.:—Sec. 33 of the Act respecting Controverted Elections, R.S.M. 1902, ch. 34, provides that the petition shall be served within five days or within such further time as a Judge shall order. Sec. 34 provides that

such service may be made within such longer time as any Judge may grant, regard being had to the difficulty of effecting service or to special circumstances.

I assume the Legislature meant something by this last mentioned section, and that it was not intended as a repetition of the powers set forth in the former section. The law compels me to give a reasonable interpretation to both sections and this can be done in the very language of sec. 34. If service has not been effected according to sec. 33, that is within five days or within the extended period, then

MAN.

C. A.

1913

RE GIMLI ELECTION.

Howell, C.J.M.

such service may be made within such longer time as any Judge may grant,

not necessarily the Judge who made the first order, but any Judge may grant such longer time than sec. 33 provided for. Giving it this meaning gives a reason for the existence of sec. 34. To give it the meaning claimed by the respondent is to pronounce it mere surplusage, waste timber.

If I am correct in this holding, then the second order of the learned Chief Justice was properly made and therefore the third was also properly made.

It seems to me also that the true reading of sec. 35 in the light of the preceding sections is that if all reasonable efforts have been made to serve personally, a Judge has power to make an order for substitutional service after the time limited by the former sections. As, however, I am clear that the second order was properly made this point need not be further considered.

I have had the advantage of reading the judgment of Mr. Justice Perdue and I quite agree with him that this Court has jurisdiction to hear this appeal.

The appeal is allowed. The costs of this appeal and of the motion before the Chief Justice of the King's Bench to be costs in the cause to the petitioners.

Richards, J.A. (dissenting)

RICHARDS, J.A. (dissenting):—Four questions arise here:

Firstly, does an appeal lie to this Court?

Secondly, had the learned Chief Justice, whose decision is appealed against, power to make the order of July 18, being the order purporting to grant a second extension of the time for serving the petition?

Thirdly, had he power after the expiry of the time fixed by the order of July 9, being the order granting the first extension of such time, to grant the order purporting to allow the petition to be substitutionally served?

Fourthly, had he, after making the order of July 18, and that for substitutional service, power to set aside those orders?

As to the first point. I think the decision in *Re Shoal Lake Election*, 5 Man. L.R. 57, is binding on this Court and that we must hold that an appeal does lie.

The second point turns on whether the making of the order of July 9, exhausted the powers of the Judge under secs. 33 and 34 of the Manitoba Controverted Elections Act.

In the first place, the rules of the King's Bench Act, R.S.M. 1902, ch. 40, do not apply. See rule 1 of the Act, which says:—

> Nothing in these rules shall be construed as intended to affect the practice or procedure . . . upon election petitions.

We must, therefore, find our code in the provincial Controverted Elections Act itself, or in rules made under it. There

are no rules, that I am aware of, that bear on the questions here to be dealt with. So that we must find our authority in the Act itself. The Act does not contain any section, similar to sec. 87 of the Dominion Act, giving a Judge power

> to extend, from time to time, the period limited by this Act, for taking any steps or proceedings.

In its absence I do not think we can assume that any such power is implied. It seems to me, therefore, that a Judge is limited to such powers as are given him on the face of the Act, or by necessary implication.

Sec. 33 provides that the petitioner shall cause service to be made within five days after the day on which the petition shall have been presented "or within such further time as a Judge shall order."

That is immediately followed by sec. 34, which reads:—

> Such service may be made within such longer time as any Judge may grant, regard being had to the difficulty of effecting service or to special circumstances.

The question then is, do the words at the end of sec. 33 refer to the "longer time" provided by sec. 34, or do they, in themselves, contain a power to the Judge to grant an extension of the time for service, irrespective of and exercisable before sec. 34 need be invoked; so that, between the two sections, power is given to a Judge to twice extend the time for service?

I take the word "service," where it occurs in these two sections, to mean personal service.

Sec. 33 as first enacted (as sec. 35) in 1875, (38 Vict. ch. 1), had at its end the words "or within the time prescribed" instead of the words now there, "or within such further time as a Judge shall order." Those words "or within the time prescribed" in themselves gave no power to a Judge to grant an extension of the time for service. The interpretation clause of the 1875 Act says that "prescribed" means "prescribed by this Act, or by some rule made under this Act." No rule ever was made under that Act, so far as I can ascertain. It seems to me, therefore, that at least until such rules should be made, the words "or within the time prescribed" could only mean, prescribed by the Act. Apart from the earlier part of that section, the only thing prescribed by the Act as to time for service of the petition, was what immediately followed in sec. 36, which was the then equivalent, though with different wording, of the present sec. 34.

The result, I take it, was that only one extension of time by the Judge was provided by the Act of 1875.

There was no amendment to sec. 35 of the 1875 Act. But, in the Consolidated Statutes of 1880, it appeared with the present words "or within such further time as a Judge shall

MAN.

C. A.
1913

RE GIMLI ELECTION.

Richards, J.A. (dissenting)

order" substituted for the words "or within the time prescribed," with which it was first enacted.

Then, was the effect of that change to provide a new power of extension, that could be exercised prior to the only one theretofore allowed (under sec. 36, now sec. 34), or were the substituted words merely intended to make more distinct what was apparently really intended by those first enacted—that is, that the extension intended to be referred to was that provided by the section which followed?

The Consolidation of 1880 was made pursuant to 41 Viet. ch. 3 (1878), intituled "An Act to authorize the Consolidation of the General Statutes of the Province of Manitoba." That Act provided for the appointment of Commissioners, to prepare the intended consolidation. It says in sec. 5:—

> Any alteration may be made in the language of the consolidated statutes as may seem requisite by the commissioners in order to preserve a uniform mode of expression, and so as to render any of the provisions thereof simple, clear, and precise; but the commissioners shall in no way whatsoever alter the meaning, nor the spirit, nor the legal effect of any such statutes or provisions of statute.

Sec. 6 of that Act says that

> The commissioners may suggest such amendments for the better carrying out of any statute, within the authority of the legislature, as may seem advisable; and such suggestions shall not be made unless accompanied by a distinct statement of the reasons in support thereof.

The Act, 44 Viet. (1881) ch. 2, by which the Consolidated Statutes were brought into force, stated them to be so brought "subject to the limitations in the Act 42 Viet. ch. 9, contained."

Search has been made for the commissioners' report that accompanied the roll, sent by them to the legislature, of the Consolidated Statutes of 1880. But none can now be found, though apparently one was made. Therefore, if special reasons for the above change were given, they are not now to be found.

In their absence, and finding that, in the ordinary sense of the language, the two sections can be read together (as held by the learned Judge appealed from) as containing only one provision for extension of time, we should, I think, assume that the change at the end of sec. 35, now sec. 33, was made pursuant to sec. 5 of the 1878 Act, "to preserve a uniform mode of expression and so as to render" the "provisions" of secs. 35 and 36 (now 33 and 34) "simple, clear and precise" and that it was not intended to, in effect, insert, between the then secs. 35 and 36, an entirely new power to the Judge, which would, contrary to such sec. 5, "alter the legal effect" of sec. 35 (now 33).

If the legislature had intended, by the 1880 consolidation, to change the Act by providing for further extensions beyond

the one previously allowed, it seems strange that they should have limited it to only one further extension, which, I take it, would still be the effect of the Act if the appellants' contention is correct. When the original Act was passed in 1875 there was in the Dominion Controverted Elections Act, 1874, 37-38 Vict. ch. 10, a section as follows:—

43. The Judge shall, upon sufficient cause being shewn, have power on the application of any of the parties to a petition, to extend from time to time the period limited by this Act for taking any steps or proceedings by such party.

That section remained in force till the 1886 consolidation of the statutes of Canada and was there re-enacted as sec. 64. It appears in the present Dominion Act as sec. 87, under which heading I have already referred to it.

That Dominion Act of 1874 was known to the Manitoba Legislature when they passed the Act of 1875. A comparison of language makes me think that it must have served, in part, as a precedent for the drafting of that Act of 1875. It was also known to the Commissioners, and to the Legislature, when the Consolidation of 1880 was prepared, and when it was made law. One would expect that, if the intention had been to give power to make more than one extension of the time for service (as must be contended to support the appellants' present contention), that a similar section to that above quoted would have been introduced into the Provincial Act.

Further, if these sections, under consideration, provide for two extensions, there is the curious result, that, though the second one—that in the present sec. 34—is limited by the provision that, in making it, the Judge is to have regard "to the difficulty of effecting service," (that is to say, personal service) "or to special circumstances," and apparently, therefore, not to grant the extension unless such difficulty or special circumstances exist, he may grant the first extension without regard to such matters, as sec. 33, on its face, contains no such limitation.

I take the law to be that, in construing Controverted Elections Acts, a strict construction must be put upon their provisions, as they are a delegation by the legislatures of their own powers.

With some hesitation, I am of the opinion that the decision appealed from was correct on this point, and that the learned Judge had no jurisdiction to make the order of July 18.

Then, thirdly, was there power to make the order, for substitutional service after the time limited by the first order, that of July 9, had expired?

Sec. 37 of the Act of 1875 (now sec. 35) says:—

If the respondent or respondents cannot be served personally, or at their domicile, within the time granted by the Judge, the service may be

MAN.
C. A.
1913
RE GIMLI ELECTION.
Richards, J.A. (dissenting)

effected upon such other person, or in such other manner, as the Judge, on the application of the petitioner, may appoint.

No change was made in the above till the consolidation of 1880. There it appeared in the form in which it now exists as sec. 35. The words "within the time granted by the Judge" had been omitted, and the words "the Judge," where they last occur, had been changed to "any Judge."

I see nothing in the substitution of "any" for "the." But the omission (which we must presume to have been intentional) of "within the time granted by the Judge," does seem to me to necessarily change the legal effect of the section. If it now read as it originally stood, I think that, though the Judge had not power to make the order of July 18, he would probably have still had power (under sec. 35), during, or after, the period granted by the order of July 9, to order that the service might be made substitutionally.

I say he would have had that power during that period on the authority of the *West Peterborough* case, 41 Can. S.C.R. 410, where, although sec. 18, sub-sec. 2, of the Dominion Controverted Elections Act says that if service cannot be effected "within the time granted by the Court" an order for substitutional service can be made. An order, both extending the time and providing for substitutional service, was made on the day after the expiry of the ten days allowed, for personal service, after the filing of the petition. It was the first and only order extending the time. It was held that the provision for substitutional service was properly included in that order.

Now, what conclusion is to be drawn from the omission of these words "within the time granted by the Judge"? Their omission cannot, like the change in sec. 35 (now 33), be read as intended "to preserve a uniform mode of expression," or "to render any of the provisions" of the section "simple, clear and precise." It was an alteration "in the meaning" and "legal effect" of the section—an omission of an important part—and I can only assume that it was intended to curtail the effect of the section by limiting the period within which substitutional service might be allowed by the same, or some other, Judge, to the one period during which an extension of the time for service might be granted under the preceding section. Its omission could be for no other purpose that I can see.

It was argued that the intention of sec. 35 is that it was not until the expiry of the five days allowed by sec. 33 and of such further time, as might be given by a Judge under secs. 33 and 34, that the powers under sec. 35 could be exercised. But that contention is negatived by the *West Peterborough* case referred to above, and seems to me untenable in view of the above alteration in the section.

If I am right in my view of the meaning of sec. 35, then, after the time allowed by the order of July 9 had expired, the learned Judge had no jurisdiction to grant the order for substitutional service.

Then, having made the orders in question, had he power to set them aside?

The powers at one time freely exercised by Judges, at least in equity, to set aside their own decisions, have been largely restricted by later decisions on the ground that, in so acting, Judges have, in effect, dealt with appeals from their own judgments. But the same consideration does not, apparently, apply to interlocutory orders.

In *Mullins* v. *Howell*, 11 Ch.D. 763 at 766, Sir George Jessel says:—

> The Court has jurisdiction over its own orders, and there is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments.

In *Ainsworth* v. *Wilding* (1896), 1 Ch. 673, Romer, J., at foot of p. 678, after pointing out that, in a case he was referring to, the question had been one of dealing with a final judgment, says:—

> *Mullins* v. *Howell*, 11 Ch.D. 763, was a case of an order made on an interlocutory application, and that was the very ground taken by Sir G. Jessel for entertaining the jurisdiction to discharge the order.

In *Neale* v. *Gordon Lennox*, [1902] 1 K.B. 838 at 844, Lord Alverstone says:—

> In my judgment . . . there is a broad distinction between interlocutory and final orders. This distinction has often been pointed out. See the judgment of Jessel, M.R., in *Mullins* v. *Howell*, and also the judgment of Romer, J., in *Ainsworth* v. *Wilding*.

The order appealed from was not a final disposal of the petition and the cases of *Re St. Nazaire Co.*, 12 Ch.D. 88, and *Preston Banking Co.* v. *Allsup*, [1895] 1 Ch. 141, in which the orders under consideration were final disposals of the cases do not seem to me to be in point.

The two orders, which the learned Chief Justice purported to set aside, were made *ex parte*.

As stated above, the rules of the King's Bench Act do not, in my opinion, apply in this case. But they may, perhaps, be referred to, as shewing how *ex parte* orders are there dealt with If they did apply here, then, reading rules 430 and 438, the learned Judge would clearly have the power to make the setting aside order that he did, and which is now appealed against.

It would be an extraordinary thing if a Judge, who finds he had no jurisdiction to make an order which he had purported to make, should have no power to set that order aside. The

MAN.

C. A.

1913

RE GIMLI ELECTION.

learned Chief Justice held that he had not had the jurisdiction, in this case, to make the order of July 18 and that for substitutional service, and it seems to me that he rightly so held. That being the case, I cannot doubt his power to make the order rescinding them which is appealed from. I would dismiss the appeal.

Perdue, J.A.

PERDUE, J.A.:—The petition in this case is filed under the Manitoba Controverted Elections Act, R.S.M. 1902, ch. 34, to set aside the election of the respondent as member for Gimli in the Legislative Assembly of this province.

The petition was filed on July 5, 1913, and on July 9 an order was made by Mathers, C.J., extending the time for service of the petition and other documents up to and including the 19th day of the same month. On July 18, a further order was made by Mathers, C.J., extending the time for service up to and including the 28th day of July. This order was granted upon affidavits shewing unsuccessful efforts to serve the respondent, that he was outside the Province of Manitoba and that it was uncertain when he would return.

On July 24, Mathers, C.J., made an order that substitutional service of the petition, etc., be made by serving two of the respondent's partners in the law firm of which he was a member, and by mailing copies of the papers to be served to the respondent at Kenora. All the above orders were made *ex parte*.

On August 29, 1913, Mathers, C.J., made an order on the application of the respondent, and after hearing both parties, setting aside the orders of July 18 and 24. The learned Chief Justice acted upon the view that he had only power to extend the time for service once and that then the power was exhausted. He therefore set aside the order of July 18, on this ground. He further held that the order for substitutional service must be made within the time prescribed by the Act or the extended time allowed by a Judge, and not afterwards. Acting wholly upon that view, he set aside the order of July 24. The petitioner has appealed from the order of August 20.

The respondent raises the point that the petitioner has no right to appeal to this Court from the order in question. The only appeal specially mentioned in the Act is that for which provision is made in secs. 101-104, and that, it is claimed, is confined to an appeal from the decision rendered upon the trial of the petition. The point now raised came up in *Re Shoal Lake Election*, 5 Man. L.R. 57, where it was claimed that no appeal lay from an order disposing of the preliminary objections, on the ground that the Act made no provision for an appeal from such an order. The full Court *en banc* consisting of Wall-

bridge, C.J., Taylor, and Killam, JJ., unanimously decided that an appeal lay from the order. It was held that the powers given to a Judge of the Court by the Act must be deemed to have been given subject to the usual jurisdiction of the Court to review an interlocutory order in a cause in Court. Since *Re Shoal Lake* was decided the present King's Bench Act was passed. Sec. 58 of that Act declares that

> every rule, order, verdict, judgment, decree, or decision, made, given, rendered or pronounced by a Judge of the Court may be set aside, varied, amended or discharged on appeal, upon notice, by the Court *en banc*.

This section was passed by the same legislative authority which passed the Controverted Elections Act and the plain intention is that the section should have general application to all judicial acts of any Judge of the Court sitting as such. This section confirms the view taken by the Court in the *Shoal Lake* case. That decision has never been disturbed in so far as my knowledge goes, and it has always, I think, been regarded as a binding authority.

A further objection was raised that the Court of Appeal had not the powers in this regard of the Court of King's Bench sitting *en banc*, but sec. 7 of the Court of Appeal Act, 5 & 6 Edw. VII. ch. 18, completely disposes of the objection. That section enacts that

> after the coming into force of this Act the Court of Appeal shall be vested with and shall exercise all the rights, powers and duties heretofore held, exercised and enjoyed under and by virtue of "The King's Bench Act" or any other statute of this province or of the Dominion of Canada by the Court of King's Bench sitting *en banc* and as a Court of Appeal from the judgment, decision, order, or decree, of a single Judge, etc.

The same section also provides that after the coming into force of the Court of Appeal Act the appellate jurisdiction of the Court of King's Bench should cease. I have no hesitation in holding that an appeal lies to this Court from any order or decision of a single Judge made or pronounced under any powers conferred on him by the Manitoba Controverted Elections Act.

Granting then that there is an appeal to this Court, the first point to be considered is, what power, if any, had the learned Chief Justice to set aside the two orders already made by him. Neither the Controverted Elections Act nor the rules made thereunder give him any such power. Both rules and Act are silent upon that point. If, therefore, he possessed the authority to reverse his own order, that authority must have been acquired as part of the powers possessed by him in the capacity of a Judge of the Court of King's Bench.

It has been repeatedly held by the Court of Appeal in England, as well as by other authority, that under the system of procedure established by the Judicature Acts (upon which our

MAN.
C. A.
1913
RE GIMLI ELECTION.
Perdue, J.A.

King's Bench Act is founded) a Judge of the Court has no jurisdiction to re-hear an order which has been pronounced, drawn up, signed and completed, whether the order was made by himself or by any other Judge. The power to re-hear has become part of the appellate jurisdiction transferred to the Court of Appeal.

The following cases fully support this view: *Re St. Nazaire Company*, 12 Ch. D. 88; *Preston Banking Co.* v. *Allsup*, [1895] 1 Ch. 141; *Charles Bright & Co.* v. *Sellar*, [1904] 1 K.B. 6.

All of these were decisions of the Court of Appeal. In *Preston Banking Co.* v. *Allsup* (1895), 1 Ch. 141 at 143, Lord Halsbury said:—

> Even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to re-hear it. If such a jurisdiction existed it would be most mischievous. The fact that in the present case the application to re-hear is made to the particular Judge who made the order is immaterial; for if one Judge can re-hear the order another can. Any application which may be made to the Vice-Chancellor for an order in the nature of a supplemental order is, of course, still within his jurisdiction; but he has no jurisdiction to re-hear or alter this order.

The same principle has been adopted in our own Courts. See *Munroe* v. *Heubach*, 18 Man. L.R. 547. I should, however, prefer to deal with the present case as if it were an appeal brought by the respondent against the orders of July 18 and 24 so that the actual questions in dispute as to the validity of these orders might be disposed of on the present appeal.

The provisions of the Controverted Elections Act relating to the service of the petition and notice of presentation thereof are contained in secs. 33-36 inclusive.

These sections first appeared in the consolidation made in 1880. The first Act passed in 1874 contained provisions relating to the service of the petition differing substantially from the present ones.

By sec. 33 the service is to be made within five days "or within such further time as a Judge shall order." Then follows sec. 34 which declares that the service may be made "within such longer time as any Judge may grant, regard being had to the difficulty of effecting service or to special circumstances." The wording of sec. 34 where the expressions "longer time," "any Judge" and "may grant" are used, instead of "further time," "a Judge" and "shall order," which are found in sec. 33, appears to me to have been adopted to shew that sec. 34 confers a power upon a Judge different from and additional to what had been already provided by sec. 33.

Sec. 35 enables the petitioner to obtain an order for substitutional service in case the respondent cannot be served personally. Sec. 36 speaks of "the services required by the three

next preceding sections," indicating that they are distinct provisions.

I think the meaning of these sections is:—

(1) Under sec. 33 the petition and notice of presentation are to be personally served on the respondent within five days, or such further time as a Judge may order, without any special circumstances or difficulty in effecting service being disclosed.

(2) Under sec. 34 the personal service on the respondent is to be made within the longer time that may be granted by any Judge (not necessarily the one first applied to under sec. 33) on being shewn the difficulty of effecting service or the existence of special circumstances.

(3) If personal service cannot be effected, then any Judge may, on the application of the petitioner and on proof of the necessary facts, direct substitutional service.

If both secs. 33 and 34 refer to the same extension of time and to one extension only, I cannot conceive why two distinct sections were drawn up and a wording adopted in sec. 34 differing from that in sec. 33, when the intention, if it were such, might have been succinctly and clearly expressed by simply adding, at the end of sec. 33, the last clause of sec. 34, namely, "regard being had to the difficulty of effecting service or to special circumstances."

I think it is clear that the two sections refer to two different conditions and that the true intention is that after an order has been granted under sec. 33, the same Judge or another Judge of the Court may grant additional time for service under sec. 34, on special circumstances being shewn.

Taking that view of the Act, the second order extending the time was properly made.

But even supposing that secs. 33 and 34 should be read together and that they both refer to one and the same extension of time, must the order for substitutional service be made within the time limited by such extension? Mathers, C.J., answers this question in the affirmative. He says:—

> Under secs. 33 and 34 the time within which the petition must be served is fixed. Sec. 35 only provides for an alternative mode of service if personal service cannot be effected. But whether the service be personal or otherwise, it must be made within the time fixed under secs. 33 and 34.

If the view taken by the learned Chief Justice of the King's Bench is correct, an election petition under the Act might be completely defeated and rendered null and void by a Judge failing to give sufficient time for service in the first instance. The petitioner might not succeed in making the service within the time granted, although he used every effort to do so and exercised the utmost diligence. He might be unable during that time

MAN.

C. A.
1913

RE GIMLI ELECTION.

Perdue, J.A.

to prove that the respondent was evading service, or to shew other grounds upon which substitutional service might be granted. Thus the time limited might elapse without personal service being made and without an order for substitutional service being obtained. The Judges of the Court would then, if this view is correct, be powerless either to extend the time or to grant substitutional service. I cannot believe that that was the intention of the Act.

It is true that under rules 12 and 13 passed by the Judges of the Court of King's Bench in pursuance of the Act, provision is made by which a Judge can, if the respondent has been evading service, order that what has been done should, in certain cases referred to in the rules, be considered sufficient service. But the Judges have no power to pass a rule which is inconsistent with the Act. If, therefore, the intention of rules 12 and 13 is to confer power upon a Judge to declare, after the time for service has elapsed, that certain things which happened during the currency of that time should be deemed to be service of the petition, a grave question might arise as to the power to pass such rules, assuming that the interpretation placed upon the sections by Mathers, C.J., is correct. These rules would, in effect, confer power on a Judge to revive a petition which was virtually dead.

There is the further important consideration that if secs. 33 and 34 give a Judge power to order only one extension of time in which to make the service, so that after making that one order his power to extend the time is gone, then he would have no power to further extend the time for the purpose of making the substitutional service authorized under sec. 35, unless we regard that section as a separate and distinct provision giving new powers in the new circumstances of the case, and enabling a Judge to order substitutional service after the time limited under secs. 33 and 34 had expired.

I think we must regard sec. 35 as a provision separate and distinct from secs. 33 and 34. Sec. 35 was, in my view, passed for the purpose of enabling a Judge to order substitutional service upon the respondent, where the petitioner could not effect the personal service referred to in the two preceding sections. This must imply a power to order substitutional service even after the whole time allowed for making personal service has been consumed in ineffectual efforts to make such personal service.

I think the appeal should be allowed, the order dated August 20, 1913, set aside and the orders of July 18 and 24, 1913, restored. The costs of this appeal and of the motion before Mathers, C.J., to set aside the orders should be costs in the cause to the petitioner.

CAMERON, J.A.:—This is an appeal from an order made August 20, 1913, by Chief Justice Mathers setting aside a previous order made by him July 18, 1913, extending the time for service of the petition herein and a further order made July 24, 1913, for substitutional service of the petition.

The point is taken that no appeal lies from the order of August 20, which it is contended, is, therefore, final. It is argued that the provisions of the Controverted Elections Act, ch. 34, R.S.M. 1902, do not expressly authorize such an appeal and that therefore the jurisdiction cannot be presumed; that the appeal, expressly given by sec. 101, is limited to decisions at trials and does not extend to interlocutory matters, or it would have been so enacted, and that this application to review the order of a Judge of the King's Bench is an attempted exercise of an authority on the part of this Court not warranted by the Act constituting it.

We find that appeals from the decision of a single Judge in election proceedings have been entertained for a considerable period. In *Re Shoal Lake Election*, decided in 1887, 5 Man. L.R. 57, it was held that an appeal lay against an order by a single Judge allowing preliminary objections, although the Act as it then stood did not provide for an appeal in express words.

The authority given to a Judge to hear and determine questions raised on preliminary objections must be deemed to be given subject to the usual jurisdiction of the Court to review an interlocutory order in a cause in Court:

Per Killam, J., at p. 61, who, in support of this statement, cites numerous authorities, amongst which I refer particularly to a decision of Harrison, C.J., in *Kidd* v. *O'Connor*, 43 U.C.R. 198. In *Re Cypress Election*, 8 Man. L.R. 581, an appeal from an order of Mr. Justice Killam allowing preliminary objections was entertained and dismissed, and the question of jurisdiction was not, apparently, raised. In *Re Brandon City Election*, 9 Man. L.R. 511 (1894), the preliminary objections were overruled by Mr. Justice Bain, whose order was upheld by the full Court. Mr. Justice Taylor, however, in a lengthy judgment, held with the appellants and would have allowed the appeal. But nowhere in his judgment or elsewhere does it appear that the jurisdiction of the Court was called in question.

These cases were decided prior to the Queen's Bench Act, 1895, where we find the following section (now 58):—

Save as provided in the next preceding section every rule, order, verdict, judgment, decree or decision, made, given, rendered or pronounced by a Judge of the Court may be set aside, varied, amended or discharged on appeal, upon notice, by the Court *en banc*.

I refer also to secs. 92, 93 and 94 of the Act. These provi-

MAN.
C. A.
1913
RE GIMLI ELECTION.
Cameron, J.A.

sions can surely be construed in no other way than as making it clear beyond any possible doubt that in the case of an order in an interlocutory matter in an election proceeding in Court such an order can be varied, amended, set aside and discharged by the Court *en banc*. That was the settled law before the King's Bench Act, and it is impossible to question it now.

But it is submitted that this Court does not possess all the powers of the Court of King's Bench *en banc*, one of which was the authority to review and, in a proper case, to reverse the order of a Judge of that Court. The jurisdiction of this Court, it is argued, is purely statutory and cannot be extended to include powers not expressly conferred, of which the authority to review a judgment or order of a Judge of the King's Bench on an interlocutory matter is not one.

Section 5 of the Controverted Elections Act provides that

> His Majesty's Court of King's Bench for Manitoba shall have jurisdiction over election petitions and over all proceedings to be had in relation thereto, subject, nevertheless, to the provisions of this Act.

The general jurisdiction of the Court of King's Bench is defined by secs. 23 and 24 of the King's Bench Act. By sec. 7 of the Court of Appeal Act, ch. 18, 5-6 Edw. VII. the Court of Appeal is vested with all the rights, powers, and duties theretofore exercised by the Court of King's Bench sitting *en banc* and as a Court of Appeal from the judgment, order or decision of a single Judge and the Court of King's Bench thereupon ceased to have any appellate jurisdiction. In view of these sweeping provisions, to my mind the conclusion is plain that whatever powers of review the Court of King's Bench had in respect of an order made by a Judge of that Court, those powers have been transferred to and are now vested in this Court. I have no doubt, therefore, that this Court is competent to entertain this appeal.

The next question presented for discussion is that of the authority of the learned Chief Justice to rescind his own orders. In England it is now held that a Judge of the High Court has no power to rehear an order made by himself or any other Judge after the order has been drawn up: Annual Practice, 1912, p. 1024; *Re St. Nazaire Co.*, 12 Ch.D. 88; *Preston* v. *Allsup*, [1895] 1 Ch. 141. It was pointed out that orders made *ex parte* were an exception to this rule and reference was made to the decision in *Shaw* v. *Nickerson*, 7 U.C.R. 541, cited in *Kidd* v. *O'Connor*, 43 U.C.R. 198. But in *McNabb* v. *Oppenheimer*, 11 P.R. 214, Mr. Justice Rose examined those authorities and held that he had no jurisdiction to reconsider or rescind his own order. See also *Robertson & Coulton*, 9 P.R. 16, and *Munroe* v. *Heubach*, 18 Man. L.R. 547. Certain it is that no such express authority is given the Judge by the Controverted Elections Act.

And it would also appear that the sole authority to set aside and discharge an order made by a Judge is now vested in the Court of Appeal. But this whole matter is now before us, and an extension of time could be granted if necessary to enable us to deal with it as if an appeal had been duly taken.

Secs. 33 and 34 of the Controverted Elections Act read as follows:—

33. The petitioner shall cause each respondent to be served with a copy of the petition and a notice of the presentation thereof, within five days after the day on which the petition shall have been presented, or within such further time as a Judge shall order.

34. Such service may be made within such longer time as any Judge may grant, regard being had to the difficulty of effecting service or to special circumstances.

We are asked to read sec. 34 as if it merely reiterated, in other words, the concluding words of sec. 33. On such construction sec. 34 becomes superfluous and is inserted without an object. But the wording of sec. 34 differs in obvious particulars from that of the concluding part of sec. 33, and it is to be presumed that the legislature had an object in enacting sec. 34 separately. Sec. 33 provides for service within five days after the presentation or such additional time to that as a Judge might grant on an application, which might, under circumstances readily conceivable, be made before the lapse of the five days, or which might be made thereafter. But that extension might prove inadequate and sec. 34 gives "any Judge" of the Court power to extend the time for a further period than that already granted. In an application coming under sec. 34 "any Judge" considering the same is to have regard for the difficulty of effecting service or any special circumstances that may be shewn. This seems to me a fair and reasonable construction to place on these two sections. It cannot surely be assumed that the legislature's intention was merely to repeat in sec. 34 what it had already said in sec. 33. The true intention of the legislature, I take it, was to make adequate provision for the service of the petition on the respondent and this intention might not be effectually carried out if we reject sec. 34 as meaningless and give to sec. 33 the narrow construction that it authorizes one order of extension and no more. An examination of the sections of the statute in question in *Power* v. *Griffin*, 33 Can. S.C.R. 39, shews, in my opinion, that that case is not applicable here.

I am, therefore, of the opinion that the order of the Chief Justice of July 18, subsequently set aside by him, was validly made and ought to be restored.

Sec. 35 of the Act says:—

35. If the respondent or respondents cannot be served personally or at their domicile, the service may be effected upon such other person or in

MAN.
C. A.
1913
RE GIMLI ELECTION.
Cameron, J.A.

such other manner as any Judge, on the application of the petitioner, may appoint.

It follows that if the order of July 18 was valid, the order for substitutional service must stand. Apart from that, on the best consideration I have given this section, it appears to me that it authorizes any Judge to make an order effecting service upon some other person or in some other manner for the petitioner upon a proper case being made and the application for such order might be made before or after the lapse of the time fixed for service. There is no restriction in the section and it might well happen that an application could properly be made and ought in certain circumstances to be made before the lapse of the time. The section is wide enough to cover either case and that, it seems to me, was the intention.

In my judgment the appeal must be allowed.

Haggart, J.A. (dissenting)

HAGGART, J.A. (dissenting):—I do not think that the members of the legislature individually, or collectively, intended that their tenure of office should be more uncertain or that their seats should be more assailable than is expressed in the very words of the statute. The legislature is divesting itself of certain inherent powers, creating a tribunal, and enacting a code. The tribunal has no powers not expressly given to it by the Act. The code is complete and cannot be extended by inference. With all due respect, I do not think the legislature intended to facilitate the proceedings of those dissatisfied with the result of an election and claiming their seats.

I agree with the strict interpretation given to the different sections in question by the Chief Justice of the King's Bench, and would not disturb the disposition of the case made by him.

I have read carefully the reasons of my brother Richards who has traced the different changes in the legislation since 1874, and has pointed out the difference in the wording of the Dominion Act. I concur with him in his conclusions, and would dismiss the appeal.

Appeal allowed, RICHARDS, *and* HAGGART, JJ.A., *dissenting*.

N. B.
C. C.
1913

REX v. McALLISTER.

County Court of King's, New Brunswick, Jonah, County Judge. November 7, 1913.

1. INTOXICATING LIQUORS (§ III D—72)—UNLAWFUL SALES—"SPECIALLY LICENSED DRUGGISTS OR VENDORS"—SACRAMENTAL PURPOSES.

Under sec. 118 of the Canada Temperance Act, R.S.C. 1906, ch. 152, the sale of wine by a "specially licensed druggist or vendor" for sacramental purposes upon a clergyman's certificate may be of an unlimited quantity. (Dictum *per* Judge Jonah.)

2. INTOXICATING LIQUORS (§ III D—73)—UNLAWFUL SALES—SALE ON PHYSICIAN'S CERTIFICATE—CANADA TEMPERANCE ACT.

Under sec. 119 of the Canada Temperance Act, R.S.C. 1906, ch. 152, the sale for medicinal use of intoxicating liquor upon the certificate of a "legally qualified physician having no interest in the sale" may (by analogy to sec. 118 of the Act as to sacramental wine) be of an unlimited quantity.

3. INTOXICATING LIQUORS (§ III D—74)—UNLAWFUL SALES—BY "PHYSICIANS THEMSELVES, CHEMISTS OR ORDINARY DRUGGISTS"—CANADA TEMPERANCE ACT.

Under sec. 125 of the Canada Temperance Act, R.S.C. 1906, ch. 152, the sale of spirituous liquors or alcohol by physicians themselves, chemists or druggists, who are not "specially licensed vendors" (under secs. 118 and 119) is restricted to the ten-ounce quantity. (Dictum *per* Judge Jonah.)

4. CRIMINAL LAW (§ I A—3)—LIABILITY—INTENT—MENS REA.

In construing a statute creating an offence against public order and punishable as a crime there is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient until met by clear and definite enactment overriding such presumption.

[*Sherras* v *De Rutzen*, [1895] 1 Q.B. 918, 921; *Chisholm* v. *Doulton*, L.R. 22 Q.B.D. 736, applied.]

5. INTOXICATING LIQUORS (§ III D—73)—UNLAWFUL SALES—GIVING OF CERTIFICATES BY PHYSICIANS—SCOPE OF RESPONSIBILITY—CANADA TEMPERANCE ACT.

The penalty prescribed against physicians by sec. 126 of the Canada Temperance Act, R.S.C. 1906, ch. 152, read with sec. 119, is for giving a certificate for other than strictly medical purposes and the offence in no way depends upon the subsequent use which may be made of the liquor which may be obtained by means of the certificate, and where such certificate is given *bonâ fide* and with reasonable discretion and upon professional grounds for "strictly medical purposes," the physician is protected.

6. INTOXICATING LIQUORS (§ III D—73)—PHYSICIAN ISSUING CERTIFICATE—"FOR MEDICAL PURPOSES," INTERPRETED — CANADA TEMPERANCE ACT.

The permission for the sale "for medical purposes" of intoxicating liquor on the certificate of a "legally qualified physician having no interest in the sale" granted by sec. 119 of the Canada Temperance Act, R.S.C. 1906, ch. 152, may include a medical provision for contingencies which may not have arisen at the time of the application for the certificate.

7. WITNESS (§ IV—63)—CREDIBILITY—MOTIVE.

Upon a prosecution of a physician for issuing a certificate for the purchase of intoxicating liquor for non-medical purposes contrary to the provisions of the Canada Temperance Act, the credibility of an informer will be adversely affected by any of the following circumstances, if present, (*a*) the informer being an unknown adventurer, (*b*) the informer being an employee of the prosecution at a weekly wage to build up cases, (*c*) the informer making a false statement to the physician in applying for the certificate.

Statement

APPEALS from the separate convictions entered against the respective defendants, McAllister *et al.*, by Hiram W. Folkins, esquire, police magistrate for the town of Sussex, upon informations laid against the said defendants who are practising physicians in the said town of Sussex, for violation of sec. 126 of the Canada Temperance Act, R.S.C. 1906, ch. 152.

N. B.

C. C.
1913

REX
v.
MC-
ALLISTER.

Judge Jonah.

These appeals were allowed. There was also an appeal by the informant against the dismissal of another charge but the informant's appeal was dismissed.

Fowler, K.C., for defendants, appellants.

Wilson, K.C., for the informant, respondent.

JUDGE JONAH:—For convenience of consideration I am taking all cases together, as the facts, with slight variation, are similar in each of the cases and the offence charged is the same against all the defendants.

The facts seem to be that in the month of August, Wilmot G. Asbell, who is inspector under ch. 152, known as the Canada Temperance Act, employed one Anton Gjerde, a recent immigrant from Norway, to act as a spotter or detective and between them it was agreed that the said Gjerde should represent himself as the agent of a lumber concern in Montreal who were, it was alleged, endeavouring to purchase lumber in the Province of New Brunswick and in whose interests he was cruising certain lumber properties and endeavouring to obtain options or make purchases for this company. Under these pretences the said Gjerde visited the office of Dr. McAllister on the ninth and twelfth days of August last, and, under the circumstances which will be referred to more particularly hereafter, obtained from him on each occasion a prescription entitling him to procure from the licensed vendor in the town of Sussex a certain quantity of liquor. Also that on the twelfth day of August he made a similar call upon Dr. George N. Pearson and obtained from him also a similar prescription or certificate with which he obtained from Mr. Fairweather, the druggist and vendor, one and a half pints of spirituous liquor. He also went to the office of Dr. John B. Gilchrist upon a similar errand on the thirteenth and sixteenth days of August and on each occasion obtained a prescription for more than ten ounces. And on August 7, he went to the office of Dr. Wilsey H. White, and from him procured a similar prescription for twenty ounces of liquor. Upon these certificates Gjerde obtained several bottles of liquor, wherefore the inspector brought actions on the grounds that the certificates were not given for medical purposes.

The magistrate before whom the informations were laid convicted in all the cases except in the case of the prescription given by Dr. McAllister on August 9, in which he dismissed the information.

On the re-trial of these cases upon appeal two questions were at issue:—

First, it was contended by Mr. Wilson, K.C., on behalf of the respondent, that, under the Act no physician is authorized to issue a prescription under any circumstances for more than

ten ounces. The sections of the Act bearing upon this point are secs. 119, 125, sub-sec. (*c*), and sec. 126, the latter being the penal section. Sec. 117 of ch. 152, which is in force in the town of Sussex and in the county of King's generally, prohibits the sale or barter, directly or indirectly, of any intoxicating liquor. Sec. 118 permits the sale of wine for exclusively sacramental purposes, upon the certificate of a clergyman, by specially licensed druggists and vendors. This section does not limit the quantity that may be so sold for sacramental purposes, and it is therefore clear that a clergyman's certificate might be for an unlimited quantity and, so long as it is affirmed in the said certificate that the wine was required for sacramental purposes any authorized vendor may legally sell the same.

Sec. 119 permits the sale of intoxicating liquor for exclusively medicinal purposes, by any person duly authorized to sell the same upon the certificate of a legally qualified physician affirming that such liquor has been prescribed for the person therein named or for use in some art, trade or manufacture upon a certificate signed by two justices of the peace with an affirmation by the applicant that the liquor is to be used only for the particular purpose set forth in such affirmation. In this section as in the preceding one relating to the sale of wine for sacramental purposes there is no limitation as to the quantity which may be certified for by either the two justices or the physician respectively, and it is therefore, I think, equally clear that no limitation within ten ounces was intended by the Legislature in the latter case any more than in the former.

It is also significant that there is no provision under secs. 118 or 119 for the inspection, by the Scott Act inspector for the county, of the files of such certificates and prescriptions or of the register of such sales required to be kept by the vendor; whereas, under sec. 125 such inspection is provided for and expressly authorized.

Sec. 125, which it was argued on behalf of the respondents applied to and limited all certificates issued for medical purposes, reads as follows:—

> Nothing in this Act shall be deemed to interfere with the purchase or sale by legally qualified physicians, chemists or druggists, (*c*) of spirituous liquors or alcohol for exclusively medical purposes, or for *bonâ fide* use in some art, trade or manufacture, provided that such spirituous liquor or alcohol when sold for medicinal purposes shall not exceed in quantity ten ounces at any one time and shall be removed from the premises and that the sale thereof is made on the certificate or prescription of a legally qualified physician affirming that such liquor or alcohol has been prescribed for the person named therein; and that when such sale is for the use of the liquor or alcohol in some art, trade or manufacture, such sale shall be made only on a certificate signed by two justices of the peace of the good faith of the application accompanied by the affirmation of the applicant that such

N. B.
C. C.
1913
REX
v.
MCALLISTER.
Judge Jonah.

liquor or alcohol is to be used only for the purposes set forth in the application.

We see, therefore, that there are two sections in the Act providing for the sale of liquor for medicinal purposes or for use in some art, trade or manufacture. The first is sec. 119, to which I have referred, and like the sale of wine for sacramental purposes, provided in sec. 118, applies to the sale of liquor for such purposes respectively, by a duly licensed or authorized vendor, and, as we have seen, is not limited in quantity; whereas sec. 125 refers exclusively to the sale by physicians themselves, chemists, or ordinary druggists, who are not specially appointed and licensed vendors and the sale by whom is restricted in quantity to that of ten ounces; and under this sec. we have the additional safeguard that the quantity thus limited shall not be exceeded without prompt exposure by a provision which makes the files to be kept by such physicians, chemists, or druggists open to inspection by the Scott Act inspector, a provision which, as we have seen, does not apply to a licensed vendor.

Had Parliament intended the "ten ounce" limitation to apply to sec. 119, it would have so stated in express terms, and had it done so then sub-sec. (*c*) of sec. 125 would be meaningless repetition.

I therefore think that there is nothing in the Act limiting the quantity which may be specified in a physician's certificate, or which may be sold by a specially authorized vendor, of whom there can be only one in each town or parish or one for every 4,000 inhabitants in each city.

The second and principal point which arises for decision in all these cases is whether, as is alleged by the prosecution, a physician is subject to the penalties provided in sec. 126, if as a matter of fact, the certificate which he gives is used to obtain liquor for other than medical purposes, although the doctor when giving it may have *bonâ fide* believed that it was only to be used for medical purposes.

It was put forward by Mr. Wilson on behalf of the inspector, although not strongly argued, that a physician who gives a certificate under the Act was in the same position as a publican who is held to be liable for supplying liquor to a constable on duty, even though he was ignorant of the fact of his being a constable; or of a saloon-keeper who sells intoxicating liquor to an interdict or an intoxicated man without knowing that he is such; or of a butcher who keeps for sale unsound meat, though without knowing it to be unsound; or of a grocer who sells adulterated articles of food even though he did not know, and it would be impossible for him to know, that such food was adulterated. In support of this view Mr. Wilson has cited the cases of *The King* v. *Treanor*, 18 O.L.R. 194; *Cundy* v. *Le Cocq*, 13 Q.B.D. 207; and *Reg.* v. *Prince*, L.R. 2 C.C.R. 154.

N. B.
C. C.
1913
REX
v.
McALLISTER.
Judge Jonah.

The first case was one for selling to a conductor on the Grand Trunk railway, and the Judge who decided the case held that the fact that the men were not in uniform or known to be railway authorities, was not a defence and that want of knowledge would not exculpate the defendant. This judgment was one delivered at Chambers only and has not the weight of a judgment of a Court of Appeal. It is in direct variance with the English case of *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, cited by Mr. Fowler on the argument. In the latter case the appellant, the licensee of a public house, was convicted before the police magistrate for having unlawfully supplied liquor to a police constable on duty. Prior to entering the public house, the police constable had removed his armlet, and it was admitted that if a police constable is not wearing his armlet that is an indication that he is off duty. The police constable was in the habit of using the appellant's house and was well known as a customer to the appellant and his daughter. Neither the appellant nor his daughter made any inquiry of the police constable as to whether he was or was not on duty; but they took it for granted that he was off duty in consequence of his armlet being off and served him with liquor under that belief. The judgment of the Court of Queen's Bench Division was delivered by Day, J., who said:—

> I am clearly of the opinion that this conviction ought to be quashed. This police constable comes into the appellant's house without his armlet and with every appearance of being off duty. The appellant believed, and he had very natural grounds for believing that the constable was off duty. Under that belief he accordingly served him with liquor. As a matter of fact the constable was on duty, but does that fact make the innocent act of the appellant an offence? I do not think it does. He had no intention to do an unlawful act. He acted in the *bonâ fide* belief that the constable was off duty. Wright, J., who agreed with this opinion says, at p. 921: "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals and both must be considered.

I think this case and the remarks of Wright, J., especially, upon it, more correctly state the law than does the dictum of Judge Latchford in the case of *The King* v. *Treanor*, 18 O.L.R. 194. There are undoubtedly numerous statutes, the breach of which necessarily renders the offender liable to a penalty, no matter how innocent his intentions may have been, but these are statutes which are exceptions to the general rule and provided especially for the protection of the health or public peace and do not afford any room for holding that any less degree of *mens rea* than the ordinary one is allowed by law to suffice, and clear words are usually needed to establish that sufficiency: *Chisholm* v. *Doulton*, L.R. 22 Q.B.D. 736, *per* Cave, J., at 741.

N. B.
C. C.
1913
REX
v.
MCALLISTER.
Judge Jonah.

The last case cited by Mr. Wilson of *Reg.* v. *Prince*, L.R. 2 C.C.R. 154, is one clearly against his contention. This is a leading case upon the question of *mens rea* and in delivering judgment, Brett, J., said, at 170:—

> Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind, or *mens rea*. . . . It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind and which he has a reasonable ground to believe and does believe to be the facts, would, if true, make his acts no criminal offence at all.

It is true the conviction which was upon the charge of having unlawfully taken an unmarried girl under the age of sixteen out of the possession and against the will of her father was sustained in the case cited, but it was upon the ground as stated by Bramwell, B., in his judgment that the taking of the girl out of the possession of her father under the circumstances was a wrongful act, even if she were, as the prisoner supposed, over the age of eighteen years, and that, therefore, there was present a sufficient *mens rea* to make the offence a crime under the statute. Denman, J., in his judgment says:—

> He, the prisoner, had wrongfully done the very thing contemplated by the Legislature. He had wrongfully and knowingly violated the father's rights against the father's will and he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which, in fact, he was committing.

I do not think therefore that the case of *Reg.* v. *Prince*, L.R. 2 C.C.R. 154, supports the contention of the respondent in the cases now under consideration.

It may be useful also in this connection to refer to the express language of the section under which these convictions were made.

Sec. 126 is as follows:—

> Any legally qualified physician who gives a certificate under this part for any other than strictly medical purposes affirming that any intoxicating liquor therein specified has been prescribed for the person named therein, shall on summary conviction for the first offence be liable to a penalty of twenty dollars, and for any second or subsequent offence to a penalty of forty dollars.

It will be observed by the terms of this section that the penalty is for giving a certificate for other than strictly medical purposes, and the offence in no way depends upon the subsequent use which may be made of the liquor which may be obtained by means of the certificate. In other words, if the physician prescribed intoxicating liquor for a patient, and, in order to enable him to obtain the same, gives the certificate authorized by sec. 119, then it is immaterial whether the person so obtaining the liquor uses it for the purposes for which it is prescribed, or whether he improperly uses it for the purposes of a beverage.

The question then, it seems to me, narrows down to one of fact, and that fact whether or not the doctors in the cases before me did *bonâ fide* give the certificates in question for "strictly medical purposes." If they did, then I think they cannot be charged with any offence against the Act.

The provisions of the Act permitting the sale of intoxicating liquor for *bonâ fide* use in some art, trade or manufacture, are similar to those authorizing its sale for medicinal purposes, except that in the former case the certificate must be signed by two justices of the peace.

Suppose, for the purpose of illustration that under these provisions upon the application of a person made, as the justices believe *bonâ fide* by a person who they had good reason to think intended to use the liquor in some trade or manufacture, two justices were to issue a certificate under the Act, and it turned out that the applicant after procuring the liquor used it for the purpose of gratifying his own appetite, would it be reasonable to maintain that such justices were guilty of the offence of issuing a false certificate?

Or suppose, again, that a person successfully represents himself to a vendor as being a clergyman and gives a certificate to the druggist under the provisions of sec. 118 whereby he obtained wine, but, instead of using it for sacramental purposes, he uses it as a beverage in his household, can it be said that the druggist who *bonâ fide* believed that the person applying was a clergyman and that his certificate was *bonâ fide* given under the Act, should be punished for unlawfully selling liquor?

Moreover in the succeeding sections of the Act where manufacturers, merchants, or traders duly licensed to sell liquor by wholesale are permitted to sell to druggists and vendors or to such persons as he has good reason to believe will carry the same beyond the limits of the county or city in which the Canada Temperance Act is in force, it is made a good defence to any charge under those sections that the defendant had good reason for believing that such liquor would be removed beyond the limits of the county.

So that I think it is clear from the authorities referred to as well as from the language of the permissive sections of this Act that only wilful violations of them are contemplated as falling within its penal sections, and to hold otherwise would be to render abortive all such permissive provisions.

It is then as I think within the discretion of medical practitioners to determine when they shall prescribe spirituous liquors for medical purposes and when an applicant is entitled to have a certificate under the Act. Of course this discretion must be based upon such facts and circumstances as to afford a reasonable justification for its exercise and when a prescription

N. B.

C. C.
1913

REX
v.
MCALLISTER.

Judge Jonah.

is given, in the language of the Act, for "strictly medical purposes," it must be given *bonâ fide* and upon professional grounds alone. I do not, however, find anything in the Act to support the contention that such prescriptions can only be given to a person who is an applicant at the time, and who, upon actual examination and diagnosis, is found to be suffering with some physical ailment. There is no reason why an invalid requiring intoxicating liquor as a medicine should not send by a messenger or agent to his physician and obtain the liquor without a personal application and the doctor would be justified, after satisfying himself that the application was made in good faith on behalf of such invalid in giving a certificate under the Act. Nor do I think the subsequent disposition of the liquor would in any way affect the *bona fides* of the doctor's act.

The term, "for medical purposes" is a very wide one and might even include a provision for contingencies which had not arisen at the time of the application for a certificate. Nothing is more common than for persons who are going on distant journeys to remote places where medical assistance or relief could not be obtained in case they should be required, to provide themselves with a medical box or outfit containing such things as might be supposed to be useful in case of accident or sudden illness. Among such provisions spirituous liquors are almost invariably found to be included along with other narcotics and stimulants. A wood-chopper going to the woods for the winter might well provide himself with bandages, splints, liniments and like medicines, for such emergencies as fractures, cuts and frost bites, and, although their use might never be required, yet the providing of these remedies for possible use in the future would clearly fall within the meaning of the words, "for medical purposes," as used in the Act.

Intoxicating liquors are declared by medical authorities to be an essential drug, useful in their place like other drugs of pharmacopœia. That this use of alcohol in its various forms is recognized everywhere is abundantly proved by the fact that the most advanced temperance legislation has always made provision for the sale of such liquors for medical purposes and the propriety of such provision has never been questioned by anyone. The Canada Temperance Act, which is, perhaps, as strict in its terms as any prohibitive legislation, always has, and still does, recognize and provide for the disposal of intoxicating liquors for medical purposes in counties where its sale for other purposes is strictly prohibited; so that I think it is abundantly clear that if in any case it is apparent from the evidence that certificates for the sale of intoxicants are given by a doctor, under circumstances which would lead a medical person reasonably to suppose that its use would be beneficial to the applicant, no violation of the spirit and intention of the law has taken place.

Coming now to the evidence, and the facts as disclosed from the evidence, I have to determine whether, under the circumstances, the doctors, in each of the cases now before me, were in this interpretation of the law justified in giving the several certificates referred to.

The only evidence on behalf of the prosecution is that of the man Gjerde who was employed by the inspector, Wilmot Asbell, to procure the certificates which he alleges to have done. This action on the part of the inspector is sought to be justified on the ground that the several defendants were habitually giving certificates indiscriminately, not for medical purposes; but that the persons applying for them might use the liquor obtained thereby to gratify their appetites.

It was alleged at the argument by the learned counsel for the prosecution that it was a matter of public repute that the doctors of Sussex had been thus violating the statute and for that reason these actions were brought. It seems to me that if the facts were as so alleged there would be ample evidence of it without the necessity of procuring evidence of it in the somewhat doubtful manner in which it was obtained in these several cases. If certificates have been indiscriminately issued by the doctors to persons who are known not to be invalids or to require alcoholic stimulants, surely the certificates themselves, which the law requires to be filed, would afford the best evidence of that fact.

Solely upon the evidence of an unknown adventurer and one who has admitted upon his oath that he deliberately lied to the doctors in order to obtain the certificates in question, I am asked to believe that men prominent in their profession and of high standing in the community, have, for the paltry sum of twenty-five cents, at the mere request of a stranger, not only broken well-known rules of professional integrity, but have also deliberately violated a statute of their country.

The evidence shews that the witness Gjerde was employed to get this evidence and for his services was to be paid by the inspector fifteen dollars per week and expenses. It would be trifling with intelligence to pretend that this youthful Norwegian had any higher motive than that of simply earning his pay; and, it is clear, that in order to do so, and continue his employment, it was necessary that he should appear to be successful. He produced at Court a memorandum book in which he had made certain entries in the Norwegian language, but which, it appears, was not used at the trial before the magistrate, and, indeed, had it been objected to, could not have been used as evidence in any Court of law. But the principal purpose of this book seems to have been to give information to the inspector to whom it was read from time to time by Gjerde, as

N. B.
C. C.
1913
REX
v.
MCALLISTER.
Judge Jonah.

he progressed in his work. It is not unreasonable to assume that the desire to retain his job would largely colour the character of these memoranda. He admits in his evidence that he did read these entries to Mr. Asbell, from time to time, as he visited the different doctors, and no doubt the inspector, encouraged by his success as set forth in this book, continued his services and his pay so long as they were apparently bringing about results. This feature of the character of the prosecution's witness strongly impressed me at the trial; and I cannot avoid the impression also that one who could deliberately frame a false story and repeat it with an air of apparent sincerity in the somewhat critical presence of half a dozen different doctors with such success as to impose upon them all, would not hesitate, especially if his remuneration depended upon the results, to endeavour to deceive the Court when the exigencies of the case required it; and I do not hesitate to say that with such evidence on the one side met by the positive contradiction of men whose word would not be questioned in the community in which they live, there is no alternative as to whose testimony I should accept, unless I shall disregard all the rules known to apply to the credibility of sworn testimony.

Gjerde in his evidence swears that no examination was made by any of the doctors, in fact that he distinctly told them that he was not sick and yet, under these circumstances, he says the doctors one and all readily gave him certificates. If I could believe that testimony then I would have no hesitancy in saying that these cases were instances of the most flagrant and stupid violation of law of which it would be possible to conceive.

On the other hand, Dr. McAllister says that when Gjerde came into the office he appeared nervous and that he examined his pulse, looked at his tongue, and gave him such visual examination as is usual in the case of persons who are merely suffering from some temporary disability.

Dr. Pearson corroborates this testimony so far as his nervousness is concerned, as do also Dr. Gilchrist and Dr. White. I can readily understand the nervous symptoms which they describe and can well believe that they were apparent. It would indeed be a hardened criminal who could, under the circumstances, with a lie upon his lips, face serious men without some evidence of excitement, and that such excitement would naturally lead to the quickened pulse, which Dr. McAllister swears he found on examination to exist, is most reasonable to suppose.

I am satisfied that Dr. McAllister made all the examination that was necessary to satisfy himself and that he exercised his discretion upon a reasonable basis, both when giving the certi-

ficate on August 9, and on the 12th of the same month; and I therefore think the magistrate very properly dismissed the information for the alleged offence of the 9th, and upon the same reasons should have dismissed the information relating to August 12; and I therefore do now quash the conviction entered by him upon the certificate of that date; and also dismiss the appeal in the case of the certificate issued on August 9.

Dr. Pearson, who was convicted for giving a certificate on August 12, says in his evidence that

> When Gjerde came in he asked for a prescription to get some whiskey and I said, "You cannot get it unless you are sick." He then told me who he was and what he was doing here. He told me he was employed by a lumber firm in Montreal and came "down here to buy lumber," etc., etc. He said that he had been either in Moncton or St. John the day before and got in with some acquaintances and they had been having too much drink and he had taken a little too much and felt upset. His stomach was out of order and he did not feel able to transact his business, unless he got a little whiskey to straighten him out.

The doctor further says:—

> I eyed him closely to see what I could notice. I saw he was nervous and staggering like a man who really was in need of whiskey. We had quite a long conversation and I considered it was a case where whiskey was clearly indicated in pulling a man over a booze.

This evidence I think discloses sufficient justification for issuing a certificate in this case and I therefore sustain this appeal and quash the conviction in his case.

Dr. Gilchrist was convicted for having issued a certificate on August 13, upon the application of Gjerde. His evidence as to what took place is as follows:—

> He (Gjerde) came in and told me he was a stranger in town. He was representing a Norwegian lumber concern. He said he was going out on a cruise and was not feeling very well. He was going on a four days' cruise and he thought he would like to have a bottle of whiskey. I told him that I never prescribed only for medicinal purposes. I asked him if he was sick. He said he did not think he was very sick. He was exhausted and wanted something to take with him. He told me about his lumber dealings. He said he had been on a cruise that day. He was exhausted as though he had been out on a cruise. I thought he was sick. I thought he needed a little stimulant, and if he were going in the woods that a stimulant would be a very good thing for him.

Again he says:—

> I did not know anything else that would take its place under the conditions to which he was subjected.

Again:—

> He was sick and exhausted at the time and I prescribed so that he would not become more so. I thought he was as he represented himself to be. I never prescribe for a man who wants to take liquor as a beverage.

N. B.
C. C.
1913
REX
v.
MCALLISTER.
Judge Jonah.

Assuming, as I do, that Dr. Gilchrist believed that this man told him as to his physical condition and that his visual examination which he says he made bore out his representations, this is a case where, in his discretion, he decided a stimulant might properly be prescribed and a certificate to obtain the same given under the Act. While other doctors might think differently, yet he arrived at his decision upon grounds, which if not conclusive were reasonable, and I cannot say his conclusions are wrong. The appeal in this case will also be sustained and the conviction below be quashed.

In the second conviction against Dr. Gilchrist for issuing the certificate on August 16, the evidence is not so clear, and I am not without some doubt as to the propriety of the doctor in giving a certificate on that occasion.

If the evidence given by Gjerde as to what took place on August 16, had been given by a reputable witness known to me to be truthful I would hesitate about quashing the conviction, but, under the circumstances, it is largely a question of credibility of testimony, and I shall give the doctor the benefit of the doubt; and I therefore sustain the appeal and quash the conviction in this case.

The last case is that of Dr. Wilsey H. White, who was convicted for giving Gjerde a certificate on August 7. Dr. White diagnosed the Norwegian's case somewhat differently from the others. He says:—

He (Gjerde) said he was just from Norway and was feeling upset. He had his hands on his abdomen and complained of being in great distress. He said he could neither eat nor sleep and was feeling ill. He said that a little liquor always did him more good than anything else. I told him he could only get it for medical purposes. He said that would be all right, he would take it that way. He said he was representing a firm in Norway and was going on a cruise and expected to be away several days. I thought he was sick. My diagnosis of his case was that he probably had not recovered from the long, tedious voyage. I didn't know whether it was seasickness. He said he was just from Norway and I thought maybe it might be produced from that. There are many complaints that you have to take the word of the patient. In many cases you have to rely on what the patient tells you. On the strength of what he told me and what I observed I prescribed for him.

In this case, if Dr. White's evidence is to be believed, Gjerde did represent himself as being sick to a much greater extent than to any of the other doctors, and from the doctor's diagnosis it seemed that a stimulant was all that he required, and if he believed the representations made by Gjerde he would be justified, no doubt, in giving the prescription which he did, and the certificate to obtain the liquor, and I sustain the appeal and quash the conviction in this case also.

N. B.
C. C.
1913
REX
v.
McALLISTER.
Judge Jonah.

In all these cases I am influenced somewhat by the fact that Gjerde represented himself to all the defendants as intending to take a long cruising trip into the woods where medical aid and assistance could not be procured, and I think it is quite natural that a doctor under these circumstances, seeing that the applicant was then in a run-down, nervous and exhausted condition, as they all agree that he appeared to be, should recommend that he take with him a narcotic so convenient for carrying and palatably prepared for use under such unfavourable conditions.

The appeals of the several doctors are therefore sustained with costs and the appeal of the informant is dismissed, but without costs as I think the inspector was justified in bringing the case to this Court, seeing that there has not been any previous decision upon the points involved.

Defendants' appeals allowed; informant's appeals dismissed.

Re NORTH GOWER LOCAL OPTION BY-LAW.

ONT.
S. C.
1913

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. November 10, 1913.

1. INTOXICATING LIQUORS (§ I C—33)—BY-LAWS—LOCAL OPTION—VALIDITY—PUBLICATION OF NOTICE.

A local option by-law which has received the approval of three-fifths of the electors voting upon it, will not be quashed on the ground that it was finally passed by the council within a month of the first publication of the notice required by sub-sec. 3 of sec. 338 of the Consolidated Municipal Act 1903 (3 Edw. VII. (Ont.) ch. 19), [R.S.O. 1914, ch. 192] where a scrutiny has taken place before the County Court Judge, and the rights of electors or other persons having an interest in the result of the voting have not been interfered with or prejudiced.

[*Re North Gower Local Option By-law*, 10 D.L.R. 662, 4 O.W.N. 1177, affirmed; *Re Duncan and Town of Midland*, 16 O.L.R. 132, referred to.]

2. ELECTIONS (§ II B 2—46)—BALLOTS — CASTING — ASSISTING VOTER—OMISSION OF DECLARATION, EFFECT.

The taking of the declaration provided for by sec. 171 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, as amended by 3-4 Geo. V. ch. 43 [R.S.O. 1914, ch. 192] in the case of illiterate person or persons incapacitated from marking the ballot papers is not a statutory condition precedent to the right to vote, and its omission is merely an irregularity in the mode of receiving the vote, which is cured by sec. 204 of the Act.

[*Re North Gower Local Option By-law*, 10 D.L.R. 662, 4 O.W.N. 1177, affirmed; *Re Ellis and Town of Renfrew*, 23 O.L.R. 427, followed.]

3. INTOXICATING LIQUORS (§ I C—33)—BY-LAWS—LOCAL OPTION—QUASHING—EFFECT OF JUDICIAL CERTIFICATE.

Upon an application to quash a by-law submitted to the electors on the ground that unauthorized names were entered upon the list of

ONT.

S. C. 1913

RE NORTH GOWER LOCAL OPTION BY-LAW.

voters used in voting upon the by-law, the court will not go behind the certificate of the County Court judge affixed to the revised list under the provisions of sec. 21 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, as amended by 3-4 Geo. V. ch. 43, R.S.O. 1914, ch. 192.

[*Re North Gower Local Option By-law*, 10 D.L.R. 662, 4 O.W.N. 1177, affirmed; *Re Ryan and Village of Alliston*, 22 O.L.R. 200, referred to.]

Statement

APPEAL by the applicant from the order of Kelly, J., *Re North Gower Local Option By-law*, 10 D.L.R. 662, 4 O.W.N. 1177, refusing to quash the by-law.

The appeal was dismissed.

F. B. Proctor, for the appellant.

C. J. Holman, K.C., for the Corporation of the Township of North Gower, the respondents.

Sutherland, J.

The judgment of the Court was delivered by SUTHERLAND, J.:—The vote on the by-law, as stated in the declaration of the Reeve, was as follows: "297 for and 192 against (total 489);" and the by-law, on that shewing, was apparently passed by four and one-fifth votes beyond the necessary three-fifths. A recount and scrutiny of the ballots followed before the County Court Judge, with the result that the figures were altered to 295 for and 192 against the by-law (total 487). The Judge also decided that four persons who had voted had not the necessary qualifications, and he deducted these four votes, making the final count, according to his certificate, dated the 19th February, 1913, to be, for the by-law 291, against 192 (total 483).

The first and second grounds are of a general character: (1) that the by-law did not receive the necessary three-fifths majority of votes; (2) that the voting was not conducted in accordance with the Acts in question, and that persons were allowed to vote whose names did not appear upon the last revised voters' list.

The third ground is to the effect "that unauthorised names were entered upon the list of voters of the said municipality, used in voting upon the said by-law, which names had not been entered upon the said lists of voters in accordance with the provisions and requirements of sec. 17 and subsequent sections of the Ontario Voters' Lists Act."

The evidence as to the way in which the names of two men, namely, Dalglish and McQuaig, appeared upon the list of voters used at the elections, is shortly put in the judgment appealed from in this way: "Their names not appearing on the original list, an application was made to the Judge of the County Court to have them added, and they were so added by him, after which he certified to the revised list, as required by sec. 21 of the Act." He then proceeds to say: "I do not think

that I am required to go behind this certificate and examine into the sufficiency of the various steps by which the Judge arrived at his results."

It does not appear that the County Court Judge held any formal Court for the purpose of adding these names to the list. The men had made a written application to the clerk to have their names added, and the clerk informed the Judge of the fact. Their names then appear to have been added. It was apparently admitted, or, at all events, not disputed, that, in any event, the two men were persons who were entitled to have their names on the list. If their votes had been disallowed, this in itself would not have affected the result, as it would be necessary to disallow at least four votes to do this. I agree, however, with Kelly, J., in his view that he was not called upon to go behind the certificate of the Judge as to the voters' list: *Re Ryan and Village of Alliston* (1910-11), 21 O.L.R. 583, affirmed 22 O.L.R. 200.

The fourth ground of objection is, "that illiterate voters were allowed to vote on the by-law without first having taken the declaration required by sec. 171 of the Consolidated Municipal Act." Two of the voters were unable to read or write, and the third was blind. As to this objection, the learned Judge whose judgment is in appeal was right in holding, under the authority of *Re Ellis and Town of Renfrew*, 23 O.L.R. 427, that "the omission to take the declaration is merely an irregularity in the mode of receiving the vote, and so covered by the curative clause of the statute, sec. 204."

The fifth objection is, that the by-law was finally passed within one month after its first publication in a public newspaper, contrary to the provisions of sec. 338 (3) of the Consolidated Municipal Act.

Sub-section (2) of sec. 338 refers to the publication of the by-law, and sub-sec. (3) is as follows: "Appended to each copy so published and posted, shall be a notice signed by the clerk of the council stating that the copy is a true copy of a proposed by-law which has been taken into consideration and which will be finally passed by the council (in the event of the assent of the electors being obtained thereto) after one month from the first publication in the newspaper, stating the date of the first publication, and that at the hour, day, and place or places therein fixed for taking the votes of the electors, the polls will be held."

The by-law was first published on the 13th December, 1912, and given its third reading on the 13th January, 1913.

The case of *Re Duncan and Town of Midland*, 16 O.L.R. 132, has application to this ground of appeal, and is, I think, conclusive against it.

ONT.

S. C.
1913

RE NORTH GOWER LOCAL OPTION BY-LAW.

The present case is really on the facts a stronger one, as a recount and scrutiny of the ballots was actually had.

The sixth ground of objection is to the effect that a deputy returning officer was disqualified by interest from holding that office. It is unsupported by any evidence that could properly sustain it.

Upon all grounds the appeal fails and should be dismissed with costs.

Appeal dismissed.

B. C.

S. C.
1913

WALKER v. SOUTH VANCOUVER.

British Columbia Supreme Court, Morrison, J. October 27, 1913.

1. EMINENT DOMAIN (§ I E 4—187)—REMEDY OF OWNER—STREETS—DAMAGE TO PROPERTY BY CHANGE OF GRADE.

The provisions of the Arbitration Act, R.S.B.C. 1911, ch. 11, sec. 8, as to the appointment of an arbitrator by the court on the default of the opposite party to make an appointment, do not apply to an arbitration of the claim of an adjoining owner against a municipality for damages to his property by the re-grading of the street; the procedure to be followed on the default of the municipality to name an arbitrator under sec. 394 of the Municipal Act, R.S.B.C. 1911, ch. 170, sec. 394, is to apply for a mandamus against the municipality.

Statement

MOTION by the property owner for the appointment by the Court of an arbitrator for the municipality on the latter's default or refusal to do so.

The motion was dismissed.

Alfred Bull, for applicant.

W. B. A. Ritchie, K.C., for the municipality.

Morrison, J.

MORRISON, J.:—The applicant, Dora Walker, was at the times material to this matter owner of property situate at the corner of Euclid avenue and Maple street in the municipality of South Vancouver. The municipality, pursuant to its statutory powers, re-graded those streets, causing, as it is alleged, between May and August, 1912, certain damage to the said property.

On May 27, 1912, she made a claim to the municipality for such damages, and again on May 27, 1913, her solicitor presented her claim therefor. On July 4 following, the municipality denied liability and declined to arbitrate. On July 10, without having selected her arbitrator, the applicant requested the municipality to appoint theirs. Again the municipality declined to do so. Then on August 5 the applicant notified the municipality of her selection of an arbitrator and requested them to appoint theirs pursuant to sec. 8 of the Arbitration Act. The municipality still declined, whereupon the present application pursuant to sec. 8, *supra*, was launched on September 10 ultimo.

In limine Mr. Ritchie for the municipality invokes sec. 513 of the Municipal Act, contending that the application should

B. C.
S. C.
1913
WALKER v. SOUTH VANCOUVER.
MORRISON, J.

have been brought within a year from the date on which the damage was caused. He substantively contended in the second place that the Arbitration Act does not apply. With this contention I agree. The Municipal Act is a special or particular Act dealing with municipal corporations. The Arbitration Act is a general Act. The general maxim *generalia specialibus non derogant* applies. The rule as laid down by Sir Orlando Bridgman is that the law will not allow the expositive to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it; Sir Montague Smith in *Thames Conservators* v. *Hall* (1868), L.R. 3 C.P. 415, at p. 421, 37 L.J.C.P. 163.

I agree, as has been submitted, that sec. 394 of the Municipal Act aided by proceedings by way of mandamus to compel the selection of an arbitrator furnishes a code which must in cases of this kind be adhered to.

Coming to the first point as to the applicant being out of time, the evidence is not satisfactory, but I incline to the view that she is too late. I have always understood that the point of those clauses limiting the time within which an action for damages, such as is the present one, must be brought, was to ensure their prompt disposal and thus enable the municipality to regulate their rates, etc., for the current year. The application is refused.

Motion dismissed.

POS v. JOHNSON.

B. C.
C. A.
1913

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. May 8, 1913.

MASTER AND SERVANT (§ I E—23)—*Liability for wrongful discharge.*]—Appeal from the judgment of Morrison, J., in favour of plaintiff, in an action for damages for wrongful dismissal of plaintiff as a draughtsman. The plaintiff was to receive an increased rate of wages during the progress of certain railway work, and the defendant sought to place him on the reduced wage while making alterations in the drafting already done for the railway work, and this the plaintiff declined to do unless paid on the higher scale of wages. His dismissal followed.

S. S. Taylor, K.C., for defendant, appellant.

Davis, K.C., for plaintiff, respondent.

THE COURT held, affirming the judgment appealed from, that the plaintiff's position in regard to the alteration work was justified, and that the same was work "in connection with the railway contract" for which his contract of hiring, as shewn by a written agreement, entitled him to the higher rate. The judgment for damages at that rate from the time of his dismissal to the time of his entering another employment would be affirmed.

Appeal dismissed.

ALTA.

S. C.

1913

WATERS v. CAMPBELL.

Alberta Supreme Court, Beck, J. November 3, 1913.

1. BILLS AND NOTES (§ I D 2—42)—PROMISSORY NOTE—NATURE; REQUISITES—AUTHORITY TO CONFESS JUDGMENT.

Where a written instrument includes a promissory note form for a stated indebtedness adding a stipulation by the payor authorizing "any attorney of any court of record" to confess judgment against the payor for the amount unpaid thereon "together with costs and $50 attorney's fee"; the provision as to "costs" renders the amount payable uncertain and prevents the instrument from being a promissory note.

2. CHAMPERTY AND MAINTENANCE (§ II—6)—AGREEMENTS BETWEEN SOLICITOR AND CLIENT—CONTINGENT FEE.

The courts of this country will decline on grounds of public policy to enforce an agreement made in another country between a foreign attorney and his client whereby the attorney was to receive one-half of the proceeds by compromise or suit of the client's claim against her husband for alimony; and will in lieu thereof fix and allow such reduced amount as is found to be reasonable.

3. CONFLICT OF LAWS (§ I B—11)—CONTRACT IN FOREIGN COUNTRY—DECLINING ENFORCEMENT IN DOMESTIC JURISDICTION WHERE AGAINST PUBLIC POLICY.

If the client's agreement made in a foreign country to divide with a foreign attorney the proceeds of the litigation in the foreign country is made after the rendering of the services and is consequently not champertous, it is contrary to the policy and practice of our courts and is unenforceable in Alberta against the client as regards the property in Alberta recovered or secured for the client by means of a compromise of the foreign litigation, and will be subject to reduction to a *quantum meruit*.

4. CONFLICT OF LAWS (§ I A—4)—AS TO RIGHTS—STATUTORY CAUSE OF ACTION GENERALLY.

A foreign attorney's statutory lien under the foreign law upon any money or property recovered for the client is ineffective as against land in the domestic jurisdiction.

[See also *Huntington* v. *Attrill*, [1893] A.C. 150, and in appendix to 20 A.R. (Ont.) 731.]

5. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATABLE INTEREST—SOLICITORS' LIEN.

An attorney's or solicitor's right of lien upon the client's papers remaining in his custody for the balance of his costs does not give him a caveatable interest in or against the lands described in a transfer obtained of Alberta lands for the costs of obtaining same.

6. JUDGMENT (§ I B—8)—GENERAL AUTHORIZATION TO ANY ATTORNEY TO CONFESS JUDGMENT—PUBLIC POLICY.

It is against the policy of the law of Alberta to give effect to a stipulation accompanying an acknowledgment of a debt that to secure payment thereof the debtor authorizes any attorney to confess judgment for the amount appearing unpaid; and this although the acknowledgment was given in a foreign country where such an agreement to confess judgment was recognized as legal. (Dictum *per* Beck, J.)

Statement

TRIAL of action brought for the enforcement against Alberta lands of a contract made in Illinois, with an attorney there for a percentage share or portion of property received upon the settlement of an alimony action brought in that State. A further

ALTA.

S.C.

1913

WATERS v. CAMPBELL.

claim based upon an alleged deposit of title documents with the attorney was negatived for lack of proof of the alleged deposit.

The action, so far as it was based on a claim to an aliquot part of the property or to any lien thereon, was held not maintainable, but a personal judgment was given the plaintiff against the defendant for the value of the plaintiff's services as fixed by the trial Judge.

H. H. Parlee, K.C., for plaintiff.

C. C. McCaul, K.C., for defendant.

Beck, J.

BECK, J.:—Plaintiff sues on what is alleged as a promissory note.

In my opinion it is not a promissory note—though perhaps whether it is or not is of no consequence in this action.

It reads as follows:—

$1,100.00. Chicago, Ill., Sept. 9, 1911.

On demand after date for value received I promise to pay to the order of John F. Waters eleven hundred dollars at Edmonton, Canada, with interest at six per cent. per annum after date until paid. And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of record to appear for me in such Court, in term time or vacation, at any time hereafter, and confess a judgment without process, in favour of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and fifty dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that he my said attorney may do by virtue hereof.

KATHERINE T. CAMPBELL.

Attest.

George B. O'Reilly.

If the authority contained in it is valid the provision regarding costs in my opinion renders the amount payable uncertain. I think it an agreement, not a promissory note, and an agreement which, though I have no doubt it is valid in the State of Illinois, where it was made, is, so far as the authority contained in it is concerned, invalid in this jurisdiction as being contrary to the policy of the law. No doubt it would be good as evidence of a debt to the amount of the principal sum.

Then it is alleged that to secure the payment of this instrument the defendant, the maker, deposited with the plaintiff by way of mortgage a transfer of certain lots in Edmonton from her husband to herself. The claim is for payment, and default "foreclosure" or sale and possession, etc.

The plaintiff acted as attorney for the defendant in Chicago in obtaining a settlement from the defendant's husband of her claim against him on a judgment in the Circuit Court of Cook county, Illinois, awarding her alimony. The settlement con-

ALTA.

S.C.

1913

WATERS v. CAMPBELL.

Beck, J.

sisted in the husband's assigning to her an interest under an agreement for the sale to him of certain property in Alabama and a quit claim deed of certain lots in Edmonton. The plaintiff took from the defendant an agreement in writing as follows:

For and in consideration of one dollar to me in hand paid by John F. Waters, I hereby employ John F. Waters my attorney at law and in fact to institute and prosecute to final judgment case I now have pending in the Circuit Court of Cook county, Illinois, No. 266,872, or to compromise the same at such sum as he may deem right and proper; and for his services rendered and hereafter to be rendered, I agree to pay him a sum of money equal to one-half of any sum that I may receive, either by suit or compromise.

KATHERINE T. CAMPBELL.

Dated, Chicago, May 7, A.D. 1910.

Witness:

Fred C. Smith.

The "case" referred to in this agreement was the case of the wife against the husband for alimony in which judgment had been given for the wife and at the date when it was signed the plaintiff had already effected the settlement for her and the husband had performed his part of it.

So far as this agreement can affect the property in question in this action it is one to be performed in this jurisdiction and is governed, in my opinion, as to its validity and effect by the law of this jurisdiction as being the *lex loci solutionis*, and by the law of this jurisdiction it is void. In any case it is not enforceable in this Court; the *lex fori* governs. If it is merely the written expression of a previous verbal agreement it is champertous and therefore void here: *Grell* v. *Levy*, 16 C.B.N.S. 73. If it is saved from being champertous because made after the rendering of the services it is according to the policy and practice of the Court ineffective against the client's right of taxation.

In my opinion $250 is ample compensation to the plaintiff for all the services he rendered the defendant and all the money he advanced her. I allow him that amount.

I do not think that either the quit claim deed or the subsequently secured transfer in the form required by the Land Titles Act was ever *deposited* by the defendant as security for the plaintiff's claim for costs. He no doubt had a right of lien upon them for his costs, but that did not in my opinion give him any interest in the property comprised in these instruments, so as to ground a caveat.

Evidence is given of a statute of the State of Illinois giving a lien upon any money or property recovered by an attorney; but it seems to me clear enough that that statutory lien is ineffective against land in this jurisdiction.

I hold, therefore, that the plaintiff has no lien upon the

lands in question for the $250 which I have allowed him and that the caveat he registered was invalid and ineffective.

I think the defendant's counterclaim for negligence in respect of the Alabama property has not been established. Taking everything into account I think the plaintiff should have no costs.

Judgment for plaintiff for reduced compensation and without costs; claim against lands dismissed.

ALTA.
S. C.
1913
WATERS v. CAMPBELL.

DOCTOR v. PEOPLE'S TRUST CO.

B. C.
S. C.
1913

British Columbia Supreme Court. Motion before Morrison, J. March 12, 1913.

ASSIGNMENT FOR CREDITORS (§ III B 2—20)—*Assignee—Claim to fund in Court paid in under conditional order.*]—Motion by plaintiff for payment out of Court of a sum paid in by defendant company, or so much thereof as might be required to answer the plaintiff's judgment. The payment into Court was made pursuant to a condition imposed on defendant company on its being granted a new trial of the action. The new trial was had, and it resulted in favour of the plaintiff for $3,450 and costs. A few days afterwards the defendant company made an assignment for the benefit of its creditors. The application for payment out was opposed by the assignees, who claimed the fund on behalf of creditors generally.

Bird, for plaintiff.

S. S. Taylor, K.C., for the assignees for benefit of creditors.

MORRISON, J., held that the money so paid in was appropriated or ear-marked, and, upon the second judgment being given, it became absolutely the plaintiff's. The short delay in applying for payment out after the handing down of the judgment to the registrar did not change the character of the situation, although the assignment had been made meanwhile.

Order accordingly.

BORDEAUX v. JOBS.

ALTA.
S. C.
1913

Alberta Supreme Court, Harvey, C.J. November 8, 1913.

1. LIBEL AND SLANDER (§ II A—10)—WHAT ACTIONABLE—CHARGING ENGAGED MAN WITH BEING MARRIED—REPETITION.

To untruly state to the father of the plaintiff's *fiancée* that it is reported that he is a married man, with the intention that the parent should act thereon in order to protect his daughter, which he did by repeating the report to her, is a reflection on the honour of the plaintiff and the honesty of his intentions sufficient to support an action for slander if special damages are shewn.

[*Speight* v. *Gosnay*, 60 L.J.Q.B. 231; *Gillett* v. *Bullivant*, 7 L.T. (O.S.) 490; and *Derry* v. *Handley*, 16 L.T.N.S. 263, followed.]

ALTA.

S. C.

1913

BORDEAUX v. JOBS.

Statement

2. LIBEL AND SLANDER (§ II A—10)—WHAT ACTIONABLE—WHAT CONSTITUTES SPECIAL DAMAGES—POSTPONEMENT OF MARRIAGE.

The postponement of the plaintiff's marriage as the result of a slanderous statement regarding him constitutes special damage sufficient to support an action for slander.

ACTION for slander by charging a person with being a married man which resulted in the postponement of his impending marriage.

Judgment was given for the plaintiff.

A. S. Watt, for plaintiff.

Alex. Knox, for defendant.

Harvey, C.J.

HARVEY, C.J.:—The plaintiff was engaged to marry a Miss Wernke and they proposed being married last spring though the fact of the engagement was unknown to others. It was known, however, that they were "keeping company" as the witnesses designate it. Early in March last, the defendant was at the house of the young lady's brother, their wives being cousins. On seeing the young lady and the plaintiff pass the house defendant asked if plaintiff came often, and on being told that he did, he said to the brother and the father, who was also present, that he heard people say that the plaintiff had a wife in the States. The father promptly told this to his daughter who thereupon told the plaintiff that she would not marry him "until he vindicated his character" and as a result the marriage has not taken place. These facts are not in dispute. I intimated at the close of the evidence that the plaintiff had failed to prove the slander as alleged and that the words proved would not support the innuendo alleged and the case was argued on the facts as established by the evidence and whatever amendment may be necessary to base an action on these facts I deem to be made.

The plaintiff on oath denies the truth of the rumour and there is no suggestion now that it has any foundation in fact. No question of privilege is raised either by the pleadings or by the argument and I therefore do not consider that aspect. It is alleged and contended that the words used are not capable of any defamatory meaning and that there is no special damage shewn.

I am of opinion that having in view the known relation of the plaintiff and Miss Wernke the words do impute to the plaintiff dishonourable conduct or intentions and are therefore defamatory. The defendant says he told the father and brother what he had heard so that they could guard against it, which shews that he considered the statement reflected on the plaintiff's honour or honesty of intention and the result which followed shews that the hearers and Miss Wernke to whom it was repeated looked at it in the same light.

The defendant however relies on *Speight* v. *Gosnay* (1891), 60 L.J.Q.B. 231. In that case there was an engagement of marriage which was broken upon the parties becoming aware of the slander which was uttered by the defendant. In these respects the cases are similar but in that case the slander was with respect to the woman and the publication by the defendant was to her mother. The mother repeated it to the daughter, who told her *fiancé*, who thereupon broke the engagement, and the daughter then brought the action. In these respects the cases are essentially different. In that case it seems to have been accepted that the loss of the marriage was special damage, but it was held that it was not the probable consequence of the slander and therefore would not support the action. Lindley, L.J., at p. 232 says:—

> In the case of an unauthorized repetition of a slander, it is not the person who utters the slander, but the person who repeats it that is liable. But it is said that there is an exception to that rule, and that this case comes within the exception, because the defendant when he uttered the slander intended that it should reach Galloway's ears, or because that was the natural consequence of his uttering the slander. But there is no evidence to support that view.

And Lopes, L.J., on the same page, says:—

> The words used here are not actionable of themselves. In order to make them actionable, the plaintiff must shew that she has suffered some special damage in consequence of the uttering of those words. In this case she must make out that by reason of those words being uttered she has lost the marriage. If she has lost the marriage it is clear that that loss is primarily due, not to the utterance of the slander, but to its repetition. That being so, it cannot be said that the injury directly resulted from the slanderous words of the defendant. But there are certain cases where an action against the slanderer may be maintained for the repetition of the slander. These cases may be divided into four classes. If the defendant had authorized the mother to repeat the slanderous words to Galloway, the action could have been sustained. But there is no evidence of any such authority. Then again, if the defendant had intended that the words should be communicated to Galloway, that would have been done. But there is no evidence of any sort or kind to warrant that suggestion. Again, if the repetition of these words had been the natural consequence of the defendant's uttering them, that would have been sufficient; but that cannot be established here. Lastly, there is authority for this proposition, that if it could have been made out that there was a moral obligation on the mother to communicate the slander to her daughter, and on the daughter to communicate it to Galloway, the action would have been maintainable. But here the words were untrue, and the mother must have known that they were untrue, and there could not be any obligation either on the mother or the daughter to repeat them to Galloway. I think the learned Judge was wrong.

Gillett v. *Bullivant* (1846), 7 L.T. (O.S.) 490; and *Derry* v. *Handley* (1867), 16 L.T.N.S. 263, are cases in which the defend-

ALTA.

S. C.
1913

BORDEAUX
v.
JOBS.

Harvey, C.J.

ant was held liable for the slander though the damages resulted from the repetition which however was the natural consequence of the publication by the plaintiff. The repetition in this case by the father was the natural consequence of the defendant's act and there was indeed a moral obligation on his part to communicate the slander to his daughter, bringing the case within two of the classes of exceptions noted by Lopes, L.J. Indeed the reason given by the defendant for making the statement shews that he contemplated either that the father would tell his daughter or that he would himself take some steps which would prevent a marriage between the daughter and the plaintiff. I feel no doubt, therefore, that the postponement of the marriage was the natural and probable consequence of the uttering of the slander by the defendant, and if the absolute deprivation of marriage with an individual is a damage, as we find it recognised to be every day in breach of promise actions, I can see no reason why the temporary deprivation should not be so, though, of course, to a less extent, I think the special damage required to support the action is made out. The actual damage suffered, however, is not very great, and I am satisfied that the defendant was entirely innocent of any intention to injure the plaintiff. The action was brought simply and solely for the purpose of establishing the plaintiff's good name. I think, therefore, justice will be done by giving him judgment for $25 and costs, which will be allowed on the District Court scale.

Judgment for plaintiff.

B. C.

S. C.
1913

SMITH v. ANDERSON.

British Columbia Supreme Court. Trial before Morrison, J. October 20, 1913.

1. TAXES (§ III F—148a)—TAX SALE—SUBSEQUENT TAXES PAID BY TAX PURCHASER—VACATING SALE.

Section 14 of the Taxation Act Amendment Act, 3 Geo. V. (B.C.) ch. 71, is not retroactive so as to confer a lien in favour of the tax purchaser for taxes accruing after the tax sale and before the judgment setting it aside, all of which had taken place prior to the passing of the statute.

Statement

TRIAL of action claiming repayment to plaintiffs of the amount of taxes paid in the years 1908-9-10 and 11 in respect of certain lots in South Vancouver purchased by them under agreement of sale in 1907 from Mrs. Fleming, who had previously acquired the property through a tax sale. About the time that the plaintiffs so purchased, an action was commenced by the defendant, the original owner, to set aside this tax sale, and in 1911 he succeeded in setting it aside and being declared the owner. During the pendency of this litigation, of which the plaintiffs had know-

B. C.

S. C.
1913

SMITH
v.
ANDERSON.

Statement

ledge, they paid the taxes to the Municipality of South Vancouver. They now allege that the said taxes were paid by them at the request and with the knowledge of the defendant. In the alternative, that the defendant stood by and allowed plaintiffs to so pay said taxes and that he is estopped by his conduct from denying his liability as claimed. Plaintiffs claimed that sec. 14 of the Taxation Act Amendment Act of British Columbia, 1913, ch. 71, applied retroactively to tax sales previously annulled. The section adds to the principal Act two new sections, one of which is as follows:—

255A.—In any case where a sale of lands for arrears of taxes, whether made before or after the passing of this Act, is set aside or declared illegal or void, the purchaser shall have a lien on the lands for the purchase-money paid by him in respect of the said lands, with lawful interest thereon, and for the amount of all taxes paid by him since the sale, with lawful interest thereon, which may be enforced against the lands in such proportions as regards the various owners of the lands and in such manner as the Supreme Court thinks proper.

A. A. Fraser, for plaintiff.
A. H. McNeill, K.C., for defendant.

Morrison, J.

MORRISON, J.:—There does not seem to me to be anything intractable or ambiguous in the words employed in this paragraph. I do not think it is retroactive. As the plaintiffs relied upon this section as their sheet-anchor, I dismiss the action with costs.

Action dismissed.

CAN.

Ex. C.
1913

CANADIAN RUBBER CO. v. COLUMBUS RUBBER CO.

Exchequer Court of Canada, Audette, J. March 17, 1913.

1. INJUNCTION (§ I M—119)—WHEN GRANTED—TRADE-MARK INFRINGEMENT.

Further infringement of a trade-mark registered in Canada may be restrained by the Exchequer Court of Canada in a decree awarding damages for past infringement, where both remedies are claimed on the pleadings.

[See Annotation on Injunctions at end of this case.]

2. TRADE-MARK (§ IV A—21)—INFRINGEMENT—IMITATION OF LABEL OR DESIGN.

To establish an infringement of a trade-mark, as basis for injunction, it is not essential to shew that the defendant has used a mark in all respects corresponding with that which another person has acquired an exclusive right to use, provided the resemblance is such as to be likely to make ordinary purchasers suppose that they are buying the article sold by the party to whom the right to use the trade-mark belongs and that they have been thereby misled and deceived.

[*Barsalou* v. *Darling*, 9 Can. S.C.R. 681; and *Wotherspoon* v. *Currie*, L.R. 5 H.L. 508, applied.]

CAN.

EX. C. 1913

CANADIAN RUBBER CO. v. COLUMBUS RUBBER CO.

Statement

TRIAL of action for an injunction to restrain an alleged infringement of trade-mark and for damages.

Judgment was given for the plaintiff.

Plaintiff company was the duly registered owner of a general trade-mark consisting of an effigy of Jacques Cartier surrounded by the words "The Canadian Rubber Company of Montreal, Limited." The plaintiff, and its predecessor in title, had been for years large manufacturers of rubber footwear to which this mark was applied. It was established that so well known was the mark in the trade that customers of merchants handling the plaintiff's goods in the Province of Quebec would ask for them by the name of the "Jacques Cartier," the "Canadian," or the "Sailor." In June, 1912, the defendant company proceeded to manufacture and sell a class of rubber footwear stamped with the effigy of a sailor closely resembling that of Jacques Cartier in the plaintiff's trade-mark, surrounded with the words, "Columbus Rubber Company of Montreal, Limited," in a scroll chiefly differing from the one used by the plaintiff in that it was rectangular in form, while that of the plaintiff was round. Defendant's mark was not registered.

T. Chase Casgrain, K.C., and *G. S. Stairs*, for plaintiff.

A. Geoffrion, K.C., for defendant.

Audette, J.

AUDETTE, J.:—The plaintiff company was incorporated in 1866, by a special Act of the old Province of Canada, 29 & 30 Vict. ch. 111, under the name of "The Canadian Rubber Company of Montreal." Subsequently thereto, to wit, in 1905, it acquired under sec. 11 of ch. 15, 2 Edw. VII., a Dominion charter, and from that date on continued to do business under the name of "The Canadian Rubber Company of Montreal, Limited."

On December 3, 1869, the plaintiff acquired from the Canadian Rubber Company, by assignment, the rights to the general trade-mark, bearing the effigy of Jacques Cartier surrounded by the following words, "Canadian Rubber Company," which was applied to rubber shoes and other rubber goods manufactured by the said company.

On December 6, 1869, the plaintiff obtained the registration of the said trade-mark, in Trade-Mark Register, No. 1, folio 62.

On September 25, 1912, the plaintiff obtained from this Court, under the provisions of sec. 43 of the Trade Mark and Design Act, leave to add and alter its trade-mark by prefixing to the words "Canadian Rubber Company," the word "The," and adding thereto the words "of Montreal, Limited." The said addition and variation has been duly registered in the Department of Agriculture, and the amendments made accordingly on September 30, 1912.

Therefore from that date the plaintiff's registered trade-mark

consists of the effigy of Jacques Cartier, surrounded by the following words, "The Canadian Rubber Company of Montreal, Limited," and it is applied to the rubber shoes and may be applied to the other goods manufactured and sold by them, as shewn upon the two stamps attached to the certificate of the Department of Agriculture, bearing date October 15, 1912, and filed herein as plaintiff's exhibit No. 2.

The defendant's plea resolves itself into a general denial respecting the infringement complained of.

It is established beyond controversy by the evidence in this case, that the plaintiff's trade-mark is a very valuable one, that it has been in existence and used for a great number of years, that the plaintiff company were carrying on a large business, and that during several years their rubbers were the only rubbers on the market, with the exception of some American rubbers. Their rubbers are known by the name of "Jacques Cartier" among the French-speaking population, and they are also known as the "Canadian" and the "Sailor" among the English-speaking community.

Now, Joseph Chouinard, who is the president and the general manager of the defendant, had been in the rubber business for a great number of years before his company began to manufacture in June, 1912, although it does not appear from the evidence that his goods were on the market before October or November of that year. Therefore he was perfectly acquainted with that trade, and obviously knew of the large business carried on by the plaintiff company and also of the good quality of the "Jacques Cartier" rubbers manufactured by them. How does he proceed to make the trade-mark of the defendant company? On this point we have no evidence, but the rational inference is manifest. He would appear to have taken the plaintiff's trade-mark as a model from start to finish, to have studied their price-list and their several marks. And, consistently with the idea that he might imitate as closely as possible, without making a servile imitation, he starts by looking for the effigy of a man, who at the same time should be a sailor, and a sailor of historical fame if possible—who should also wear an antique costume, with a *béret* or some such headwear, as was customary to wear in the centuries gone by, and also identical with the one worn in the Cartier effigy. Coupled with that also he seeks a great discoverer, of historical fame, and he finally arrives at the conclusion to select Columbus. The choice was a happy and easy one, as, after all, it was also suggested to Mr. Chouinard from his knowledge that the plaintiff was also selling a rubber under the name of Columbus, a mark which was not, however, protected by registration. Then he required a name for his company and a general get-up for his design. Well, by selecting "The Columbus Rubber Company of Montreal, Limited,"

CAN.
Ex. C.
1913
CANADIAN RUBBER CO. v. COLUMBUS RUBBER CO.
Audette, J.

he had only to strike off the word "Canadian" from the plaintiff's trade-mark and substitute therefor the word "Columbus." A happy hit, indeed! Having done so much, he probably realized he had come very close to the plaintiff's trade-mark, and that he had better make a change from the scroll of the plaintiff's mark, which is round, to a square one, of rectangular shape, with a few ornamental deviations. Even on this rectangular scroll one is inclined to ask if he did not copy from the rubber "Royal," another rubber manufactured by the plaintiff, whereon the scroll is also more or less square and of a somewhat rectangular form. Therefore, the conclusion must be that the defendant's trade-mark, which is not registered, has all the elements taken either from the actual registered trade-mark of the plaintiff or from some of their marks not protected by registration.

There were so many names and so many designs the defendant could have selected, and he was so well *au fait* with the rubber trade and the several marks on the market, that at first sight it seems there was no excuse for imitating so closely as he did the plaintiff's trade-mark, unless explained by his desire and this apparent view to appropriate, as much as possible, the benefit attached both to the good reputation as to quality of the plaintiff's goods covered by their trade-mark and to the large business carried on by them.

Now, what are the essential characteristics of a trade-mark, if not the general appearance of the mark as a whole, its get-up and all of its *ensemble*? As Sebastian puts it, the appeal is to the eye. What is that, at first sight, strikes the eye on looking at either trade-mark, if not the effigy of a man? So much so, indeed, as has already been said, that a large proportion of the public call the plaintiff's trade-mark by what strikes their eye—they call it the "Jacques Cartier," the very name of the effigy on the rubber. Others call it the "Sailor." Here, again, a term which would equally well apply to the defendant's trade-mark, and which applied to both is again suggested by the effigy.

There is a last and third name under which it is known among the English-speaking element, and that is the word "Canadian." We have a witness, Paiment, who sold the "Columbus" to persons asking for the "Jacques Cartier" or the "Canadian," because, he said, he could equally well tell his customers it was a "Canadian," as the "Columbus" and the "Jacques Cartier" were manufactured in Canada. And it is manifest to justify this assertion he could shew on each trade-mark, they were both from Montreal, hence both "Canadians."

Now, what does the evidence disclose? It shews that the general outline of the two trade-marks are alike and that the ordinary incautious and unwary purchaser, who may buy two or three pairs of rubbers yearly, looks at the effigy. They do not buy from the name, but from the portrait of Jacques Cartier.

Such purchaser does not really know the name of the respective company. And a large majority of them know the "Jacques Cartier" mark, and they ask for the "Jacques Cartier" rubber, or the "Sailor" or the "Canadian." Now, when the two marks are not side by side, and that is the test, is it not obvious that one rubber could be sold for the other? On that point we have the evidence of McIver, who went to two distinct shops in Montreal and asked for a "Jacques Cartier" rubber and was given a "Columbus." When asked if it was a "Jacques Cartier," the clerk answered in the affirmative. Then we have Paiment, who says that, in that part of the city where he sells, three-quarters of the time the "Jacques Cartier" is asked for. He knows the "Columbus" since about November last, and says that, according to him, about half of the purchasers could be deceived, and he has himself, about ten times, sold a "Columbus" for a "Jacques Cartier" that were asked, when the "Jacques Cartier" stock was, in his estimation, getting low. He considers that what strikes one in the two trade-marks is the effigy of the sailor.

It is also contended by witness McKechnie that it would be easy to sell a "Columbus" for a "Jacques Cartier" to an ordinary purchaser, because the word "Columbus" is also known to be one of the marks sold by the plaintiff company, although not protected by registration.

Witness Daoust is also of opinion that the public could mistake one mark for the other. It is the effigy of the man that strikes the eye.

Then Pilon, a witness heard on behalf of the defendant, says that the majority of the public ask for "Jacques Cartier," and that he does not know what would happen if one mark was tried to be passed off for the other.

The general trend of the evidence is to the effect that the "Jacques Cartier" is a well-known mark, selling well and very much asked for on the market, and that the principal element of the plaintiff's trade-mark is the effigy of the sailor. Leclerc, one of the defendant's witnesses, admits having said the two trade-marks (*se ressemblent*) looked like one another.

In this case, as in the case of *Barsalou* v. *Darling* (9 Can. S.C.R. 681), the appeal is to the eye. What appealed to the eye in the *Barsalou* case was the head—the head of the horse and the head of the unicorn—although somewhat dissimilar. In the present case what appeals to the eye is the effigy of the man. In both the plaintiff's and the defendant's trade-marks it is a man, the bust of a man, a sailor, explorer, both of historical fame, wearing antique dress and cap, with great resemblance in the general get-up of the trade-mark. If there is infringement in the *Barsalou* case, *a fortiori*, the infringement must be found in the present case.

CAN.

EX. C. 1913

CANADIAN RUBBER CO. v. COLUMBUS RUBBER CO.

AUDETTE, J.

Now, as said by Sebastian (Law of Trade Marks, 5th ed., p. 151), for the purpose of establishing an infringement it is not necessary that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use; it is sufficient to shew that the resemblance is such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs: see *per* Lord Chelmsford in *Wotherspoon* v. *Currie*, L.R. 5 H.L. 508.

There can be no doubt that an unfair competition in trade is created by the use of the defendant's trade-mark, in violation of the rights of a rival trader in the same class of goods. Further, such a design or get-up applied on rubber tends to make it less clear, with an additional chance for confusing one mark with the other.

While the two marks are not identical, there is such a close imitation in the design and get-up of the defendant's mark that one readily realizes how easily the ordinary purchaser could be deceived and misled to buy the defendant's goods for that of the plaintiff. With this strong probability of deception, the plaintiff is obviously entitled to relief and to have his trade-mark duly protected as against a rival competitor in the same class of goods, who has no right directly or indirectly to appropriate to himself the benefit derived from a well-known trade-mark having a good reputation, commanding a large business, and in existence for a great number of years, protected as it is by registration.

There will be judgment as follows, to wit:—

1. The defendant is declared to have infringed the plaintiff's trade-mark.

2. There will be a reference to the Registrar of this Court to ascertain the damages suffered by the plaintiff in the premises; and it is ordered and adjudged that the defendant do pay to the plaintiff the amount of the damages when so ascertained.

3. The defendant, its servants, agents, and employees are further enjoined from placing on the market and selling rubber footwear and rubber goods bearing its present trade-mark or any trade-mark in any way resembling the plaintiff's trade-mark mentioned in this case.

4. The plaintiff will have also the costs of the action, including the costs of the reference.

Judgment accordingly.

Annotation

Annotation—Injunction (§ I A—2)—When injunction lies.

When injunction lies

The scope of this annotation is, to consider when an injunction lies. An article on this question naturally embraces not only an exact definition of injunction, but also some passing notice of the Courts now empowered, as

Annotation (*continued*)—Injunction (§ I A—2)—When injunction lies. CAN.

Annotation

When injunction lies

well as of the tribunals formerly vested with jurisdiction, to hear and determine injunction proceedings.

An injunction *is* a Court order not to do some wrongful act, or not to continue some wrongful omission: Kerr on Injunctions, 4th ed., p. 1.

An injunction *was* a writ under a Court order restraining against wrongful acts or omissions: Snell's Equity, 16th ed., p. 510.

Again, an injunction is a judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another, is restrained from continuing or commencing such wrongful act: 7 Enc. Laws of England, 2nd ed., p. 247.

While, by prohibition, an inferior Court is inhibited, and by mandamus an official is directed; the injunction, in the wide sense, is the discretionary process for preventive and remedial justice generally.

Injunction petitions were heard and determined, prior to the Judicature Act in England by the Court of Chancery. Equity being the mother of injunction, a glance at that fruitful parent helps us to understand the child. The history of equity jurisdiction in England for half-a-dozen centuries, up to the Judicature Act, 1873, bristles with countless issues of writs of injunction. The Court of Chancery from time immemorial had exercised its activity in English jurisprudence for the purpose of granting such natural justice as could be enforced judicially, but could not be enforced by common law machinery. It cannot be denied that, although among the twelve cardinal maxims of equity is the familiar principle "equity follows the law," many a time the Chancery injunction hearing *appeared* to override that rule.

The two prime functions of the Chancery Court in its injunction processes, prior to the Judicature Act, were (*a*) to prevent and to clog the harsh motion of common law machinery, and (*b*) to restrain wrongful acts *in pais*. So where the common law process stood open to the beneficiary under a contract induced by fraud, the Chancery Court enjoined him against proceeding thereon at law; and here it is to be noted that such injunction, in an age of legal fiction was aimed not at the common law Court, but at the suitor who was "right at law and wrong in equity."

In England (prior to the Judicature Act, 1873) the injunction process, issuable only in the Court of equity, was an original and distinct proceeding by way of writ. The English Judicature Act has in the main been adopted by provincial legislation in nearly all of the provinces of Canada which followed the English legal system, Quebec not being included. In that connection the following enactments will be of interest: 58 Vict. (Man.) ch. 6, R.S.M. 1902, ch. 40; Sask. Jud. Act, 1907, ch. 8, R.S.S. 1909, ch. 52; Cons. Ord. N.W.T. 1905, ch. 21; Supreme Court Act (B.C.) 1904; 60 Vict. (N.B.) ch. 24; C.S.N.B. 1903, ch. 111, 7 Edw. VII. (N.B.) ch. 29; 47 Vict. (N.S.) ch. 25, R.S.N.S. 1900, ch. 155; P.E. Island Ch. Rules of 1910; Laws Declaratory Act, R.S.B.C. 1911, Ch. 133.

By the Judicature Act, 1873, we find (sec. 24) it was provided that "no cause or proceeding pending in the High Court of Justice is any longer to be restrained by injunction; but every matter of equity (which would formerly have been ground for an injunction) may now be pleaded by way of defence to the action; and the Court (before which the action is pending) may also direct a stay of the proceedings in the action, or may make such other order as shall appear to be just." Further sec. 25 provides that an injunction may be granted in all cases in which it shall appear to the Court to be "just or convenient" that such order should be made against any threatened or apprehended waste or trespass, and irrespectively of the cir-

CAN.

Annotation (*continued*)—Injunction (§ I A—2)—When injunction lies.

Annotation

When injunction lies

cumstance of the estate of the parties being legal or equitable and whether the plaintiff or the defendant is in the possession.

Injunction lies (under the Judicature Act) whenever (*a*) the remedy shall appear to the Court to be "just or convenient," (*b*) there is threatened or apprehended waste or trespass, (*c*) the parties have either legal or equitable interests, and (*d*) the parties are either in or out of possession.

Again, injunction lies (*a*) to enforce a contract, and (*b*) to prevent a tort.

From the foregoing it follows that, in the main, the injunction jurisdiction of equity is co-extensive with its jurisdiction in specific performance and therefore if the contract is not specifically enforceable by reason of illegality, the Court will ordinarily not (by injunction) restrain the breach of it. See Snell's Equity, 16th ed., p. 512.

Indeed, an injunction is specific performance of a contract *not* to do particular things. For instance, a contract *not* to ring certain church bells at certain early hours is specifically performed by an injunction against ringing them: *Martin* v. *Nutkin*, 2 P.Wms. 266, 24 Eng. R. 724.

A stipulation to sing for a certain period at a certain theatre and *not* to sing elsewhere, presents the negative part of an agreement capable of being specifically enforced, and the affirmative part not enforceable; in such a case (for its speculative result) the Court will enjoin on the negative part: *Lumley* v. *Wagner*, 1 DeG.M. & G. 604, 42 Eng. R. 687.

Injunction lies also to stay the breach of a statutory contract, as illustrated by specific citations *infra*.

For the history of English jurisprudence culminating in the fusing of common law and equity, see specially the four common law commission reports issued in the years 1829, 1831, 1851 and 1853 as well as the Common Law Procedure Act, 1854, and the Judicature Act, 1873.

Under the Ontario Judicature Act, 1881, sec. 17, the High Court of Justice had power in any action to grant an injunction to restrain defendant from (*a*) the repetition or continuance of any breach of contract, (*b*) any wrongful act complained of in the action, (*c*) the commission of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right. See Holmested and Langton, 3rd ed., p. 79. These same powers now devolve in Ontario upon the Supreme Court of Ontario which has not only the jurisdiction formerly possessed by the Court of Chancery but also that formerly conferred on the Courts of law. R.S.O. 1914, ch. 56.

Illustrating general principles basing an injunction: Where a statute creates a penalty for doing an act, an injunction lies to restrain the act, as an ancillary remedy: *Cooper* v. *Whittingham*, 15 Ch. D. 501.

"Just and convenient" does not mean that the Court is to grant an injunction simply because the Court thinks it convenient. It means that the Court should grant an injunction for the protection of rights, or for the prevention of injury, according to legal principles. The moment it is found (*a*) that there is a legal principle, (*b*) that a suitor is about to suffer serious injury, and (*c*) that there is no pretence for inflicting that injury upon him, the Court ought to interfere: *Aslatt* v. *Corporation of Southampton*, 16 Ch.D. 143 at 148.

The performance of statutory duties imposed on a public body may be enforced by injunction; hence a railway may be enjoined as to speed though no evidence of any damage by reason of the breach is adduced: *Attorney-General* v. *London and North Western Railway*, [1900] 1 Q.B. 78.

Annotation *(continued)*—**Injunction (§ I A—2)—When injunction lies.** CAN.

Annotation

When injunction lies

Granting an injunction is in the discretion of the Court, and in exercising such discretion the Court will consider among other things, (*a*) whether the act complained of must produce injury to the applicant, (*b*) whether the injury can be atoned for by damages, (*c*) whether those damages must be sought in successive suits, or may be obtained once for all: *Doherty* v. *Allman*, 3 A.C. 709.

Injunction will be granted restraining an act although a statute imposes a penalty for its commission: *Hamilton & Milton Road Co.* v. *Raspberry*, 13 O.R. 466.

Injunction may be granted restraining a company from acting contrary to its Act of incorporation: *Devonport Corporation* v. *Plymouth, etc. Tramways Co.*, 52 L.T. 161.

Injunction lies against a person not a party, (*a*) when he is the agent of a party, or (*b*) where he is doing something constituting a contempt of Court or its process: *Re Gay* v. *Hancock*, 80 L.T. Jour. 392.

The Court may award damages in addition to, or in substitution for either injunction or specific performance: Ont. Judicature Act, R.S.O. 1897, ch. 51, sec. 58 [R.S.O. 1914, ch. 56].

In *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch.D. 438, Lindley, M.R., says: "The registrar has called our attention to the form in which orders of this kind have hitherto been made, namely, restraining the defendant from allowing the buildings to remain on the land; but in future it will be better for the Court to say in plain terms what it means and in direct words to order the buildings to be pulled down and removed."

With this case is reported a footnote saying: "It is somewhat remarkable that the Court has now for the first time had the courage to exercise in a direct form a branch of its jurisdiction which for at least 95 years it has been content to exercise in (as Lord Brougham, when Lord Chancellor, said, in 1832) 'a roundabout mode.' "

In *Bidwell* v. *Holden* (1890), 63 L.R. 104, North, J., states: "In a case where the defendant is in a humble position in life, it will be better, I think, to make a positive order that he should do the act which it is intended to compel him to do rather than to make an order in the negative form. . . . I remember that in one case the late Master of the Rolls made an order in a similar form."

The practice to-day conforms to common sense, the first consideration being clear and ordinary language in all cases.

Where the plaintiff failed to prove actual damage, he was allowed nominal damages for the diversion of a watercourse interfering with his riparian rights, and instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. ch. 29, sec. 90: *Tolton* v. *C.P.R.*, 22 O.R. 204.

Interlocutory injunctions are commonly granted to retain matters *in statu quo* until the trial, if a *primâ facie* case is made out and the plaintiff would not have a complete remedy in damages. The burden is on the plaintiff to shew on his own material a *primâ facie* right to the injunction: *Anonyme* v. *Tilghman*, 25 Ch. D. 1.

Deliberate violation of a contract may be restrained, though the injury be trifling: *Cooke* v. *Gilbert*, 92 L.T. Jour. 312, 8 Times L.R. 382.

Where irreparable injury may be caused by withholding the injunction,

CAN. Annotation (*continued*)—Injunction (§ I A—2)—When injunction lies.

Annotation

When injunction lies

while any injury occasioned by the injunction may be sufficiently compensated by damages, the injunction should be granted: *Corporation of Cork* v. *Rooney*, 7 L.R. Ir. 191.

Injunction has been granted restraining repetition of a slander under a pretence of mind reading: *Quirk* v. *Dudley*, 4 O.L.R. 532.

In treating of the nature and right of injunction, as tempered and controlled by equity, it goes without saying that the equity maxims (including such as those against multiplicity of suits and as to coming into equity with clean hands) are applied in injunction practice and procedure.

Where an injunction which was intended to last only "during the remainder of the term of a lease" was drawn up as a perpetual injunction, relief was granted: *Shipwright* v. *Clements*, 38 W.R. 746; see *Harrison* v. *Harrison*, 12 P.D. 145.

The English rules for detention, preservation or inspection of property, such as rules 657, 657*a*, 658, and 659, serve as models for injunction rules. Under English rule 659 the Court will grant an interim injunction to restrain a defendant from ceasing to pump water out of a mine, in order to preserve it from destruction: *Strelley* v. *Pearson*, 15 Ch. D. 113. The Court will by injunction protect a fund pending an appeal: *Polini* v. *Gray*, 12 Ch.D. 438.

The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy: *London & Blackwall R. Co.* v. *Cross*, 31 Ch.D. 354 at 369.

The person entitled to an injunction is the person whose legal right has been infringed: *Warwick* v. *New Motor*, [1910] 1 Ch. 248.

The usual period in England as to interim injunctions was formerly said to be about five days, but there is now both in England and Canada very elastic latitude in this respect.

Equity rules prevail over common law rules, in cases of conflict, by express statutory enactment: *Pugh* v. *Heath*, 7 A.C. 235 at 237.

It will be noted that the offspring of the Judicature Act is a Court of complete jurisdiction, as distinct from the old chancery Court or the old common law Courts, and that Judges of any and all Courts are required to administer equity as well as the common law, and that the rules of equity, as reformed, are incorporated into the Judicature Act, which alters and develops and abrogates such rules in such fashion as may appear just and convenient. The legislature in that respect wisely adopts equitable doctrines wiping out many of the old inflexible common law rules and many of the legal fictions of both jurisdictions.

Prior to the Judicature Act there was the constant danger of being "right at law and wrong in equity" or vice versa. Common law refused to recognize claims and defences which equity allowed, and a plaintiff who succeeded at law was frequently restrained by an injunction in equity from enforcing his common law judgment.

Under the old system even after the Common Law Procedure Act, 1854, a plaintiff seeking injunction "to prevent a threatened injury" was driven to commence separate proceedings in equity auxiliary to his action at law; just as a person seeking "to construe a single paragraph of a will" was under the old practice required to administer the entire estate, although an "originating summons" now brings the desired construction with slight cost and slight delay: Century of Law Reform, 1901, p. 10.

Annotation (*continued*)—Injunction (§ I A —2)—When injunction lies.

CAN.

Annotation

When injunction lies

The old Court of Chancery was partially reformed in 1854, completely reformed by the Judicature Act in 1873.

The Court created by the Judicature Act is not a Court of law, nor a Court of equity, but a Court of complete jurisdiction, and upon a conflict between what, before that Act, a Court of law and a Court of equity would have done, the rule of the Court of equity must now prevail: *Pugh* v. *Heath*, 7 A.C. 235 at 237, 36 and 37 Vict. (Imp.) ch. 66 (Judicature Act, 1873, sec. 25.

See Lord Cairns' Act, 21 and 22 Vict. (Imp.) ch. 27, as to awarding damages in addition to or in substitution for other relief.

The marvellous variety of injunction remedies afforded by the Courts even prior to the Judicature Act, and the increased number available since that enactment are indicated by Eden on Injunctions, 1821, pp. 1 and 2: 7 Enc. Laws of England, 2nd ed., p. 253. Even prior to the Judicature Act, there were enacted, in addition to the Common Law Procedure Act, such specific statutes as Patent Law Amendment Act, 1852, ch. 83, Railway and Land Traffic Act, 1854, ch. 31, giving common law Courts limited jurisdiction to enjoin; but since the great Judicature Act vests all the Courts with practically unlimited jurisdiction, the earlier reformation steps are now relatively of minor importance.

Under the Judicature Act, technical difficulties which affected the right to an injunction in the case of "threatened or apprehended waste or trespass" have been removed: *Stocker* v. *Planet Building Society* (1879), 27 W.T. 793.

There is unlimited power to grant an injunction in any case where it would be right or just to do so, and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons, or on settled legal principles: *Beddow* v. *Beddow*, 9 Ch. D. 89 at 93.

Questions of personal status, as well as of property, are now grounds for the injunction jurisdiction: *Aslatt* v. *Corporation of Southampton*, 16 Ch.D. 143 at 148.

The cases subjoined either come clearly within the classes in which injunction is granted, or serve to emphasize the principles which guide the Courts in granting preventive and remedial justice under their injunction jurisdiction. They are therefore, in either event, helpful cases in determining when injunction lies.

The right to grant an injunction is not limited to cases in which irreparable mischief may otherwise result and in which the plaintiff could not be compensated in damages; and the transfer of a promissory note may be enjoined in an action for cancellation thereof if the Court is satisfied that it is just and convenient to grant the same: *Thompson* v. *Baldry*, 1 D.L.R. 327.

If a riparian owner or other person, not having acquired a prescriptive right to do so as against other riparian owners, prejudicially affects the condition of the water so as sensibly to injure the riparian owner lower down, he becomes liable to the latter in an action for damages and an injunction to restrain further pollution of the stream: *Crowther* v. *Town of Cobourg*, 1 D.L.R. 40.

The owner of land on the bank of a river can maintain an action to restrain the fouling of the water by municipal drainage works without shewing that the fouling is actually injurious to him, if it appears that there is a probability that in summer the stream would thereby be made dangerous to health: *Crowther* v. *Town of Cobourg*, 1 D.L.R. 40; *Crossley* v. *Lightowler*, L.R. 2 Ch. 478; *Young* v. *Bankier*, [1893] A.C. 691.

CAN.

Annotation (*continued*)—Injunction (§I A—2)—When injunction lies.

Annotation

When injunction lies

Riparian owners have a right of action to compel the removal of a dam which seriously interferes with their riparian rights and to compel the restoration of the former *status in quo* so that the waters may escape from the lake at their natural level, and this without prejudice to their claim for damages: *Village of Marbleton* v. *Ruel*, 1 D.L.R. 624.

An injunction will lie to restrain a municipality from proceeding to confiscate and destroy articles (*e.g.*, eggs) which have been neither inspected nor seized: *City of Montreal* v. *Layton*, 1 D.L.R. 160.

An injunction will be granted to protect a copyright and to restrain infringement although in the infringing work the protected literary matter has been inseparably mixed up with the defendant's own compilation so that the injunction will have the indirect effect of restraining the publication of both: *Mawman* v. *Tegg* (1826), 2 Russ. 385; Kerr on Injunctions, 4th ed., p. 290; *Cartwright* v. *Wharton*, 1 D.L.R. 392.

As shares of stock may be easily lost to judgment creditors the Court will, as an exercise of discretion, grant an interlocutory injunction restraining their transfer by one to whom it was alleged they were fraudulently transferred, notwithstanding it did not appear on the application that there was imminent danger that they would be transferred and lost to the judgment creditor if the writ were denied: *Toronto Carpet Co.* v. *Wright*, 3 D.L.R. 725.

Upon an application by a judgment creditor for an interlocutory injunction to prevent the disposal of shares of stock by the wife of the judgment debtor, to whom it is alleged the latter transferred them in his lifetime with intent to defraud his creditors, the judgment debtor's examination in the suit in which the judgment was rendered cannot be considered: *Clinton* v. *Sellers*, 1 Alta. L.R. 135; *Toronto Carpet Co.* v. *Wright*, 3 D.L.R. 725.

Where delay in applying for an interlocutory injunction is satisfactorily explained the writ will not be denied: *Toronto Carpet Co.* v. *Wright*, 3 D.L.R. 725.

Where a public service corporation proceeds with its undertaking without complying with the statutory requisites as to its use of the highway, it is deemed a trespasser upon the highway and may be enjoined from further continuance of such trespass: *County of Haldimand* v. *Bell Telephone Co.*, 2 D.L.R. 197.

Where a municipality is entitled to relief by reason of the unauthorized act of a telephone company in proceeding with the erection of poles and wires on the highway without complying with the conditions imposed by the Railway Act of Canada, which Act also provides that municipalities have the right to apply to the Board of Railway Commissioners in respect to matters arising in connection with the undertakings of telephone companies, this latter provision is not to be deemed the exclusive remedy and does not oust the jurisdiction of the High Court of Justice of Ontario to deal with the trespass thereby committed by the telephone company: *Kemp* v. *London and Brighton R. Co.* (1839), 1 Ry. Cas. (Eng.) 495, 504; *Simpson* v. *South Staffordshire Waterworks Co.* (1865), 34 L.J. Ch. 380; *River Dun Navigation Co.* v. *North Midland R. Co.* (1838), 1 Ry. Cas. (Eng.) 135, 154; *County of Haldimand* v. *Bell Telephone Co.*, 2 D.L.R. 197.

An action by a lessor for an injunction restraining a lessee from using the land demised in a manner contrary to the lease, may be maintained as an independent action, without the addition of a prayer for the cancellation of the lease: *Audet* v. *Jolicoeur*, 5 D.L.R. 68.

CAN.

Annotation (*continued*)—Injunction (§I A—2)—When injunction lies.

Annotation

When injunction lies

An action by a lessor for an injunction restraining a lessee from building upon the land demised in breach of the terms of the lease may be maintained without proof of damage to the lessor: *Audet* v. *Jolicoeur*, 5 D.L.R. 68.

Not only will damages be awarded for past injuries, but an injunction will be granted to restrain the defendant from dumping debris from a quarry upon a steep declivity on land owned by or under his control from which earth was washed into a mill pond owned by the plaintiff, which not only fouled the waters thereof but threatened as well to fill the pond itself, notwithstanding it did not appear that the plaintiff had title, either by deed or right of possession, to the bank of the pond at the place where such debris washed into it: *Fisher* v. *Doolittle and Wilcox, Ltd.*, 5 D.L.R. 549.

Where a right at law is clearly or fairly made out it is the duty of the Court to interfere by interlocutory injunction to prevent effect being given to an illegal vote at a meeting of company shareholders: Kerr on Injunctions, 4th ed., p. 357; *Elliot* v. *Hatzic Prairie Ltd.*, 6 D.L.R. 9.

In an action to restrain a company from acting upon a resolution said to have been illegally passed at a shareholders' meeting, it need not be shewn that application was first made to the company to begin proceedings, if it appear that such an application would have been futile: *Rose* v. *British Columbia Refinery Co.*, 16 B.C.R. 215; *Elliot* v. *Hatzic Prairie Ltd.*, 6 D.L.R. 9.

An injunction will be granted restraining the trustees of a school district from preventing the child of a parent whose permanent and principal place of residence is within the school district, from attending the school without the payment of a fee chargeable only against "non-resident" pupils: *Inkster* v. *Minitonka School District*, 6 D.L.R. 58.

Fundamentally, as well as under sec. 57, sub-sec. 9, of the Judicature Act (Ont.), the law is that no cause pending in the High Court of Justice or before the Court of Appeal shall be restrained by a prohibition or injunction, but that the remedy, if any, must be by an application for a stay in the original action: *Boeckh* v. *Gowganda-Queen Mines, Ltd.*, 6 D.L.R. 292.

Where in contravention of sec. 57, sub-sec. 9, of the Judicature Act (Ont.), a motion in a new action is made for an injunction against a judgment in a prior action between the same parties seeking the identical remedy already sought and refused in the original action, the Court in dismissing the motion for injunction may broaden it into a motion for judgment and also dismiss the substantive action, where its decision of the injunction motion in effect disposes of the whole action: *Boeckh* v. *Gowganda-Queen Mines, Ltd.*, 6 D.L.R. 292.

The ordinary rule is to grant damages in lieu of an injunction in cases where (*a*) the injury to plaintiff's legal rights is small, and (*b*) is capable of being estimated in damages, and (*c*) can be adequately compensated by a small money payment, and (*d*) where it would be oppressive to defendant to grant an injunction: *Shelfer* v. *City of London Electric Lighting Co.* (No. 1), [1895] 1 Ch. 287; *Canadian Pacific R. Co.* v. *Canadian Northern R. Co.*, 7 D.L.R. 120.

Where an injury has not been actually committed, but is threatened, it is still a matter of doubt whether the Court which might grant an injunction to restrain the threatened injury has any jurisdiction to award damages in lieu of an injunction which would have been preventive only and not mandatory: *Canadian Pacific R. Co.* v. *Canadian Northern R. Co.*, 7 D.L.R. 120.

Where a railway company had agreed in building its road to erect per-

CAN.

Annotation (*continued*)—Injunction (§ I A—2)—When injunction lies.

Annotation

When injunction lies

manent bridges over plaintiff's irrigation ditches and it appeared that without first erecting temporary bridges, and maintaining them for some months, the agreement could only be performed with great difficulty and considerable delay and consequent loss to the company and there was no proof that plaintiff would sustain more than nominal damages, the Court has a discretion to refuse an interim injunction to restrain the railway company from erecting the temporary structures, leaving it open for the Court at the trial to make a mandatory order for their removal or to award damages or to do both, and this particularly in view of an express statutory power to award damages in lieu of, or in addition to an injunction for breach of contract: *Canadian Pacific R. Co.* v. *Canadian Northern R. Co.*, 7 D.L.R. 120.

A municipal corporation which exceeds its powers by infringing the property rights of an adjoining owner in widening a street, will be enjoined and held in damages: *Peterson* v. *Bitulithic & Contracting Co.*, 7 D.L.R. 586.

An injunction will be granted to restrain the defendant (a fraternal benevolent society) from taking any proceedings under a certain amendment to the constitution of the defendant society, where it appeared that the amendment in question greatly increased the assessments (or premiums) on the insurance of the plaintiffs, as aged members of the society; and where its constitution required that a copy of all proposed amendments should be forwarded to the Grand Recorder on or before a certain fixed date each year, in order that the Grand Recorder, in turn, might send a copy to each subordinate lodge in time for a full discussion of the proposed amendment before selection of a Grand Lodge representative; and where the constitution also provides that in all important matters the representative in Grand Lodge of a subordinate lodge has as many votes as his lodge has members; and where the Grand Lodge has assumed to pass such constitutional amendment without such notice being given to the Grand Recorder, as provided by the constitution of the society: *Cordiner* v. *A.O.U.W.*, 9 D.L.R. 213, affirming 6 D.L.R. 491, 4 O.W.N. 102.

A preliminary injunction obtained *ex parte* on an affidavit which the applicant knew was false, or which he stated to be true as of his own personal knowledge, while as a matter of fact it was false, will be dissolved on motion of the defendant: *Hart* v. *Brown*, 9 D.L.R. 560.

While in England the usual practice in granting an interim injunction on an *ex parte* application is to grant the injunction for a definite period, the practice has become quite common in Alberta to grant it "until further order," since this method avoids the necessity of a second application where there are no real grounds of objection to the injunction; but where a motion is made to dissolve the injunction, the burden of supporting the injunction is still on the party who applied for it, in the same way and to the same extent as if the motion were one by him to continue the injunction: *Hart* v. *Brown*, 9 D.L.R. 560 (Harvey, C.J.).

Where the defendant moves to dissolve an injunction restraining him "until further order from interfering with the plaintiff in his use and occupancy of" certain premises, and where upon this motion coming up for hearing it appears that a prior motion to commit the defendant for breach of the injunction had been instituted, the motion to commit will, under the Alberta practice, take precedence over that to dissolve, and, it appearing that the defendant had been guilty of contempt by disobeying the injunction,

Annotation *(continued)*—**Injunction (§ I A—2)—When injunction lies.** CAN.

Annotation

When injunction lies

such contempt must be purged before the application to dissolve will be heard: *Hart* v. *Brown*, 9 D.L.R. 560.

Where one person obtains the property of another upon the representation that he wishes to use it for a particular purpose, he is not entitled to use it for another purpose, and upon so doing will be restrained from further use, and the owner will be entitled to recover his property: *Lindsey* v. *Le Sueur*, 11 D.L.R. 411.

Where, for many years, a seven-foot water level was maintained by a dam only during spring freshets and late in the fall and winter, the maintenance, by tightening the dam, of water at such level during the entire year, in the absence of a prescriptive right, will be enjoined so as to prevent the flooding of the land of the plaintiff during the summer months: *Cardwell* v. *Breckenridge*, 11 D.L.R. 461.

An inquiry as to damages sustained by the wrongful issuance of an injunction will not be granted where the injuries claimed are trivial or remote, and not such as could have been within the contemplation of the parties when the writ was issued: *Smith* v. *Day*, 21 Ch.D. 421; *Gault* v. *Murray*, 21 O.R. 458; *Douglass* v. *Bullen*, 12 D.L.R. 652.

On an injunction undertaking damages will not be awarded in relation to matters not within the scope of the injunction order, *i.e.*, loss of time incident to the litigation generally, and not specially to the injunction: *Douglass* v. *Bullen*, 12 D.L.R. 652.

An injunction will not be granted to prevent the erection of a building alleged to encroach on the plaintiff's land, if his remedy by an action for damages is adequate: *Ibid.*

Injunction lies to prevent the diverting of the property of a voluntary society by a majority of the members thereof to uses alien to and in conflict with the fundamental principles of the society, contrary to the wishes of the minority who contributed toward its acquisition: *Vick* v. *Toivonen*, 12 D.L.R. 299.

An interlocutory injunction will not be continued where the balance of convenience, as well as avoidance of loss by both parties, does not require it, and any injury may be remedied by an award of damages, and the *status quo* of the parties restored when the case is tried: *Baldwin* v. *Chaplin*, 12 D.L.R. 387.

A shareholder of an incorporated company organized under the Companies Act, R.S.C. 1906, ch. 79, has a right of action to enjoin it from doing business in British Columbia without having been licensed or registered in that province as required by R.S.B.C. 1911, ch. 39, as so doing would constitute an illegal act on the part of the company: *Wharton* v. *John Deere Plow Company, Ltd.*, 12 D.L.R. 422.

An interim injunction will not be granted where the preponderance of convenience, both public and private, does not require it, and a proper inference can be drawn from the undisputed facts only on the trial; and the damages, if any, which are not irreparable, may be compensated in money: *Breed* v. *Rogers*, 12 D.L.R. 620.

The use of the words "My New Valet" as a trade name is properly enjoined as an attempt to pass off the business of the user as the business of one who has for many years used the words "My Valet" as a trade name in the same city, where the latter's customers are shewn to have been frequently misled by the similarity of name and it is found that the defendant attempted to trade unfairly and to represent his business as identical with

CAN.

Annotation (*continued*)—Injunction (§ I A—2)—When injunction lies.

Annotation

When injunction lies

the plaintiffs: *"My Valet" Limited* v. *Winters*, 13 D.L.R. 583, affirming 9 D.L.R. 306.

A Dominion railway company will not be enjoined from expropriating and building tracks on a right-of-way acquired by a provincial railway company, where the latter has not yet utilized it for railway purposes; the rights of a Dominion railway company being in such case superior to those of the provincial company: *Canadian Northern Western R. Co.* v. *Canadian Pacific R. Co.*, 13 D.L.R. 624.

The Court will not enjoin a proposed application by a company to the Governor-in-council for permission to expropriate land or an easement for the purposes of its business, as permitted by its charter, ch. 113 of N.S. Acts, 1911, on the ground that the property sought was not such as could be acquired by expropriation, because affected with public rights, or rights already acquired by others under statutory grants, since the Court cannot assume in advance that the Governor-in-council will exceed his jurisdiction or act illegally and grant permission to take land not subject to expropriation: *per* Townshend, C.J., and Longley, J., *Miller* v. *Halifax Power Co.*, 13 D.L.R. 844.

The use by a clothes cleaning establishment of the descriptive term "Fort Rouge Cleaners," with the last word prominently displayed in the form of an inverted crescent and the first two in smaller type will be enjoined as a wrongful imitation of the trade name "The Cleaners," previously adopted by a competitor, with the word "The" in small letters and the word "Cleaners" prominently displayed in the peculiar form adopted by the defendant, where the defendant's use of such name results in confusion between the two establishments so as to mislead a number of the plaintiff's customers: *Matthews* v. *Omansky*, 14 D.L.R. 168.

ONT.

S. C. 1913

LUMSDEN v. SPECTATOR PRINTING CO.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 13, 1913.

1. NEW TRIAL (§ III B—15)—FOR MATTERS PERTAINING TO VERDICT—ERRONEOUS VERDICT—LIBEL.

Where the words complained of in a libel action as to the plaintiff's business are not susceptible of any but a defamatory meaning unless they can be justified as true, and no plea of justification is raised, a verdict for the defendant will be set aside and a new trial ordered.

[*Sydney Post Publishing Co.* v. *Kendall*, 43 Can. S.C.R. 461, followed.]

2. LIBEL AND SLANDER (§ II C—25)—WHAT ACTIONABLE—DAMAGING BUSINESS—CHARGING CANDY MAKER WITH KEEPING UNSANITARY FACTORY.

A charge that the plaintiff's candy factory was found by a public health inspector to be in an unclean and unsanitary condition, and that the destruction of a large quantity of candy was ordered, setting out a purported statement of particulars supplied by the inspector, is libellous, irrespective of whether the plaintiff was charged with being guilty of a criminal offence; such charge is defamatory both of the plaintiff and of his business.

ONT.

S. C.
1913

LUMSDEN v. SPECTATOR PRINTING CO.

3. EVIDENCE (§ XI W—902)—RELEVANCY AND MATERIALITY—MITIGATION —LIBEL.

The facts and circumstances leading to the publication of a libellous charge that the plaintiff's candy factory was found by a public health inspector to be in an unclean and unsanitary condition, and that the destruction of a large quantity of candy was ordered, as well as the facts tending to shew the writer's belief that the premises described were those of the plaintiff, are admissible in mitigation of damages when so pleaded.

4. PARTIES (§ I A 1—1)—PLAINTIFFS—SOLE PROPRIETOR SUING IN TRADE NAME.

The Ontario practice rules do not permit a person who carries on business alone under a firm name to sue in such firm name only without making himself a plaintiff under his individual name, although he is liable to be sued under the firm name. (Dictum *per* Meredith, C.J.O.)

5. TRIAL (§ II C 7—105)—QUESTION OF LAW OR FACT—POWER OF COURT OR JURY GENERALLY—LIBEL—SUFFICIENCY OF RETRACTION—QUESTION FOR JURY.

The question whether a subsequent publication was a full and fair retraction of a libellous publication involving a criminal charge within the meaning of sec. 8 of the Libel and Slander Act, 9 Edw. VII. ch. 4, [R.S.O. 1914, ch. 71] is for the jury.

Statement

ACTION for libel. The statement of claim was as follows:—

1. The plaintiff firm, Lumsden Brothers, are wholesale grocers, carrying on business in the city of Hamilton, in the county of Wentworth, and William Godfrey Lumsden, of the said city of Hamilton, is the sole member of the said firm, and the defendants are publishers of a daily newspaper called "The Hamilton Spectator" published in the said city of Hamilton.

2. At the time of the writing and publishing of the libel hereinafter complained of, the plaintiffs were, as the defendants well knew, carrying on the business of wholesale grocers on Macnab street north, in the said city of Hamilton, and had been carrying on such business for forty years.

3. On the 7th November, 1912, the defendants falsely and maliciously printed and published in their said newspaper, "The Hamilton Spectator," of and concerning the plaintiffs and of and concerning the plaintiffs in relation to their trade and business as aforesaid, and of and concerning the goods, wares, and merchandise sold and dealt in by the plaintiffs, the words following, that is to say:—

"Two Thousand Pounds of Candy Condemned.

"Inspector Shain Making a Regular Clean-up.

"Lumsden Bros. Asked to Appear in Police Court.

"Inspector Shain, of the local board of health, has for many weeks been conducting a rigid investigation into all matters that concern the sanitation and cleanliness particularly of stores, factories, and dairies in the city. In the course of that inquiry he has come across much that he has had to condemn, and in some instances it has been necessary to summon the par-

ONT.
S. C.
1913
LUMSDEN v. SPECTATOR PRINTING CO.
Statement

ties to the Police Court. This morning he made an inspection of the premises of Lumsden Bros., wholesale grocers, Macnab street north, and, as a result of that visit, he stated that a summons would be issued for the appearance in Police Court of those responsible for the conditions which exist there. The firm will be given 24 hours to clean up, and the summons will be on a charge of having impure food-stuffs on the premises.

"Dr. Shain, after spending nearly three hours poking into every nook and corner of the warehouse from cellar to garret, ordered two thousand pounds of candy destroyed. This was piled up in wooden trays on the third floor, where there is a candy-making department, and the inspector ordered the stuff taken down in the elevator and burned in the furnace. It was removed to the basement, and instructions were given by the Health Officer that the candy should be destroyed under his own directions later in the day.

"He gave instructions to have all the floors cleaned from top to bottom of the building, the walls whitewashed, better lighting and ventilating installed, separate cloak rooms for the men and women employed, and the lavatories for the work-people remodelled entirely. A number of tubs used in making candies were condemned as being unfit, and some equipment for making yeast he also ordered destroyed. A device for cleaning currants was likewise condemned.

"Dr. Shain said that what he had seen had given him a cue to investigate every large wholesale warehouse in the city where food-stuffs are prepared and kept."

Meaning thereby that the plaintiffs as such wholesale merchants had been guilty of fraudulent and dishonest practices and of a criminal offence within the meaning of sec. 224 of the Criminal Code, R.S.C. 1906, ch. 146, and meaning also thereby and intending to cause it to be believed that the goods, wares, and merchandise sold and dealt in by the plaintiffs were impure and unfit for food, and that no person could safely purchase the goods, wares, and merchandise of the plaintiffs, whereas in fact and in truth the goods sold and traded in by the plaintiffs were not impure or unfit for food.

4. By reason of the premises and the publication of the said statements the plaintiffs have been and are prejudiced and greatly injured in their trade and business as wholesale grocers, and the reputation of their goods has been injured, and the sale thereof has diminished and fallen off, and the plaintiffs have suffered in their credit and reputation.

The plaintiffs claim:—

1. $75,000 damages.

2. Costs of this action.

The statement of defence was as follows:—

ONT.

S. C.
1913

LUMSDEN
v.
SPECTATOR
PRINTING
CO.

Statement

1. The defendants deny all the allegations contained in the plaintiffs' statement of claim, and put them to the proof thereof.

2. In case the defendants printed and published the article set forth in the plaintiffs' statement of claim, the same was not done falsely or maliciously.

3. The said words in the statement of claim were not printed or published with the defamatory meaning alleged by the plaintiffs, or with any other defamatory meaning.

4. The defendants will object that the words are not defamatory in themselves, and that no circumstances are alleged shewing them to have been used in any defamatory sense, and that they are insufficient in law to sustain the action.

5. The defendants, even if it be proved that they printed or published the words alleged in the statement of claim, further deny that they printed or published such words with the sense or meaning alleged, or with any other defamatory or actionable sense or meaning.

6. The said words do not involve a criminal charge.

7. The defendants did not print or publish the said words, of the plaintiffs, in relation to their trade or business, or of or concerning their mode of conducting the same, or with the meaning in the said statement of claim imputed to the said words, or in any other defamatory sense.

8. The words complained of are the report of Inspector Shain of the local board of health, made by him in the discharge of his duty, and are the statements and assertions of the said Inspector Shain, and are not statements and assertions made by the defendants on their own account.

9. The words complained of in the statement of claim were printed and published by the defendants without malice and in the belief that they were true and correct, and under such circumstances as to make them a privileged communication.

10. The defendants are public journalists; and, if the said words were printed and published by them, they were so printed and published as such public journalists, in a public journal, *bonâ fide* and without malice, and for the public benefit, and not otherwise, and were and are a correct, fair, impartial, and honest report and account of proceedings of public interest and concern, made by public officials, the defendants relying on and believing the statements contained in the said alleged libel; and the said words, so far as they are matters of comment, were and are fair and *bonâ fide* comment regarding the subject-matter complained of.

11. The Board of Health of the City of Hamilton, being a public body, in discharge of its duties had been conducting investigations into matters concerning sanitation and cleanliness, particularly of stores, factories, and dairies, such investigations

ONT.

S.C
1913

LUMSDEN
v.
SPECTATOR
PRINTING
CO.

Statement

being in the interest of the employees of such stores, factories, and dairies, and the public generally, and in pursuance thereof made investigation of the premises of the plaintiffs, and the words complained of are the report of the Inspector as to the condition of the premises at the time of the said investigation, and such report so made by Inspector Shain, in the sense in which the statements therein contained were made, namely, merely as to the condition of things, is privileged under the Libel and Slander Act, 9 Edw. VII. ch. 40.

12. That Inspector Shain did say and do the things complained of is true in substance and in fact.

13. The statements made by Inspector Shain, in the sense in which they were made, namely, merely as to the condition of things found by him on the plaintiffs' premises, are true in substance and in fact.

14. The words, if printed and published by the defendants, were printed and published in good faith, and there was reasonable ground to believe that the publication thereof was for the public benefit, on the ground of public health, and the health of employees and others on the said premises; and, on the 18th day of November, 1912, after notice had been received from the plaintiffs, the defendants printed and published in a prominent place on the front page of their newspaper, the words following, that is to say (setting out the notice served on the defendants, and an explanation published by the defendants in their newspaper on the day following the receipt of the notice).

The action was tried before FALCONBRIDGE, C.J.K.B., and a jury, at Hamilton; and, upon the verdict of the jury, judgment was entered for the defendants, dismissing the action.

The plaintiff appealed.

G. F. Shepley, K.C., and *I. F. Hellmuth*, K.C., for the plaintiff:—There is a distinction between Lumsden and the individual and the firm and the company: *Salomon* v. *Salomon & Co.*, [1897] A.C. 22; *Rielle* v. *Reid* (1899), 26 A.R. 54. Evidence as to the circumstances leading to the publication, and to the belief of the writer that the building in which the candy was found was the premises of the plaintiff, should not have been admitted, as such evidence could only be given in mitigation of damages, and there was no plea of justification: Con. Rule 488; Holmested and Langton's Judicature Act, 3rd ed., p. 711, and cases there cited. A libeller cannot be heard to say, "I have been libelling the wrong man:" *Jones* v. *E. Hulton & Co.*, [1909] 2 K.B. 444, affirmed in *E. Hulton & Co.* v. *Jones*, [1910] A.C. 20. The law of libel is of a highly technical character, and the *Jones* case shews it to be the same as it was in the times

of Elizabeth and James. See also *Fulford* v. *Wallace* (1901), 1 O.L.R. 278; *Brown* v. *Moyer* (1893), 20 A.R. 509. Such evidence cannot be given, at any rate, unless the facts are pleaded: Odgers on Libel and Slander, 5th ed., p. 393; *Rumsey* v. *Webb* (1842), Car. & M. 104. Even in mitigation of damages, evidence cannot be adduced, which, if proved, would amount to a justification: *Watt* v. *Watt*, [1905] A.C. 115, at p. 118; *Underwood* v. *Parks* (1744), 2 Stra. 1200. The verdict of the jury was perverse in that they found that not to be a libel which could not be anything else; and so there should be a new trial: *Sydney Post Publishing Co.* v. *Kendall* (1910), 43 S.C.R. 461. It was for the Judge, and not for the jury, to say whether the matter complained of involved a criminal charge against the plaintiff.

E. F. B. Johnston, K.C., and *J. G. Gauld*, K.C., for the defendants:—There was no application to amend the pleadings at the trial. The publication was admitted. We shewed that W. G. Lumsden was the sole member of the firm of Lumsden Bros., and also president and chief shareholder of the Jersey Cream Company Limited. Counsel for the plaintiffs must divide W. G. Lumsden into three pieces, and select one of them from time to time. On these facts, we were entitled to ask the jury, was it really the Jersey Cream Company Limited, or only a blind? So it was on that ground and to shew that the article was written in good faith, and was fair comment, that the evidence complained of was used. We submit that, if the jury find that the company and the man are the same, the evidence can be used in justification, though not if the jury found otherwise. So the evidence was admissible. The plaintiff brought the libel upon himself: *Douglas* v. *Stephenson* (1898-9), 29 O.R. 616, 26 A.R. 26; Odgers on Libel and Slander, 5th ed., p. 399.

Hellmuth, in reply.

Meredith, C.J.O.

September 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment, dated the 22nd January, 1913, which the Chief Justice of the King's Bench directed to be entered on the verdict of the jury at the trial before him at Hamilton on that and the previous day.

The action is one of libel, and there is no plea of justification on the record. The verdict of the jury, which was for the respondents, must, therefore, have been based on the view that the matter, the publication of which is complained of, was not a libel of the appellant.

I have reluctantly come to the conclusion that a new trial must be granted. That the plaintiff in a libel action, where the jury has found not to be libellous that which is plainly a libel,

ONT.

S. C. 1913

LUMSDEN v. SPECTATOR PRINTING CO.

Meredith, C.J.O.

is entitled to a new trial, was decided by the Supreme Court of Canada in *Sydney Post Publishing Co.* v. *Kendall*, 43 S.C.R. 461.

I am of opinion that the words of which the appellant complained in the case at bar are not susceptible of any construction which is not defamatory.

Whether or not they charge that the appellant was guilty of a criminal offence, they plainly are defamatory of him and of his business. Indeed, the contrary was not argued by the learned counsel for the respondents.

The facts and circumstances which led to the publication, and to the writer of the report which appeared in the respondents' newspaper believing that the premises in which the candy was found were the premises of the appellant, were clearly admissible in mitigation of damages, if they had been so pleaded, and the notice required by the Rules had been given.

It is unnecessary to express any opinion as to what the result of the appeal would have been had there been a plea of justification on the record.

It was, I think, for the jury and not for the Judge to determine whether, under the circumstances, the matter complained of involved a criminal charge against the appellant; and it should be open to the respondents, upon the new trial, to have that question left to the jury, with the further question, if it is found that a criminal charge was not made, whether or not what was subsequently published by the respondents was a full and fair retractation, within the meaning of sec. 8 of the Libel and Slander Act.

The respondents should have leave, if so advised, to plead justification and also to set up in mitigation of damages the matters on which they relied at the trial as a defence to the action.

The costs of the last trial and of the appeal should be costs in the cause.

It may be well to point out that the action is improperly brought in the name under which William G. Lumsden, the real plaintiff, carried on business. While the Rules permit a single person carrying on business under a firm name to be sued in that name, they do not permit him so to sue. See Holmested and Langton's Judicature Act, 3rd ed., p. 414, and cases there cited.

New trial ordered.

WATERS v. CITY OF TORONTO.

ONT.

S.C. 1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 3, 1913.

1. FALSE IMPRISONMENT (§ II A—6)—LIABILITY OF MUNICIPALITY FOR FALSE ARREST—RESPONDEAT SUPERIOR.

A direction from the mayor and Board of Control of a city for the police department to prevent the erection of electric light poles on a city street is not in itself such an authority to the police to make an arrest of the electric company's employees attempting to put up the poles, as to render the city liable for a false arrest where the electric company's employees persisted in proceeding with the work of erecting poles against the directions of the police and one of them was arrested by a police officer having authority as a conservator of the peace upon a charge of disorderly conduct which was afterwards dismissed.

[*Kelly* v. *Barton*, 22 A.R. (Ont.) 522, applied.]

Statement

APPEAL by the plaintiff from the judgment of Denton, Jun. Co.C.J., dismissing an action brought in the County Court of the County of York to recover damages for malicious prosecution, and tried without a jury.

The appeal was dismissed.

H. H. Dewart, K.C., and *N. S. Macdonnell*, for the plaintiff.

C. M. Colquhoun, for the Corporation of the City of Toronto, the defendants.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The action is for malicious prosecution, and the allegations of the statement of claim are: that the respondent corporation on the 30th October, 1912, falsely and maliciously and without any reasonable or probable cause, caused the appellant to be arrested and imprisoned (par. 2); and that on the following day the respondent corporation, falsely and maliciously and without any reasonable or probable cause, caused a police constable named David MacKenney to appear as informant before a Justice of the Peace, and to charge that the appellant had been disorderly on the previous day, contrary to a by-law of the respondent corporation (par. 3).

Evidence was adduced by the appellant establishing that on the 30th October, 1912, he was arrested by Sergeant Martin, a member of the police force of Toronto, and afterwards taken to the police station; that the reason for the arrest was the refusal of the appellant to stop the work which he was superintending of erecting steel poles and putting up transmission wires on a city street for the Toronto and Niagara Power Company. It was also shewn that McKenney acted in obedience to the direction of Sergeant Verney, acting Inspector of No. 7 Divi-

ONT.

S. C.

1913

WATERS v. CITY OF TORONTO.

Meredith, C.J.O.

sion, and that the latter acted under the written instructions of the Chief Constable.

It was proved that on the 31st October, 1912, McKenney laid an information before the acting Police Magistrate for the city, charging the appellant and eight other men with having been disorderly, contrary to a city by-law; that they were remanded from time to time until the 30th of the following December, when they were all acquitted; and an endeavour was made to fix the respondent corporation with responsibility for these proceedings.

It appeared in evidence that previous to the arrest of the appellant there had been disputes between the respondent corporation and the power company as to the latter's right to erect its poles in the city streets; that on the 2nd October, 1912, the Mayor had written to the Chief Constable authorising him "to prevent the erection of certain steel towers by the Toronto Power Company," and that an attempt on that day to erect the poles had been stopped owing to the intervention of the police, acting under the authority of this letter. On the following day, a letter was written by the chief engineer of the power company to Mr. Harris, the respondent corporation's Commissioner of Works, in which, after stating that, owing to a misunderstanding of the company's foreman of construction, he had started to erect the poles, although he asserted that he had no intention of stringing wires, he went on to say: "I trust that you will consider this a misunderstanding rather than an attempt to put this through without your consent and apologise for the situation that has arisen;" and concluded by asking Mr. Harris to forward his consent or advise of his objection.

On the 12th October, 1912, Harris replied to the chief engineer advising him that the consent would not be given.

In the meantime, at a meeting of the Board of Control held on the 8th of the same month, a communication was read from the City Solicitor advising that he had received an application on behalf of the Toronto and Niagara Power Company to erect poles for the purpose of crossing the Hydro-Electric power line on Davenport road and Bathurst street, and that the drawing No. 329, accompanying the application, shews the erection of towers instead of poles as mentioned in the application, and recommending that the application should be refused; and there was also read a communication from the Commissioner of Works forwarding a copy of a letter from the chief engineer of the Toronto Power Company Limited, covering the matter of the application referred to in the solicitor's communication, whereupon it was ordered "that the City Solicitor and the Commissioner of Works be advised that the Board of Control, on behalf of the city, refuse to locate the poles mentioned in the applica-

tion of the Toronto Power Company, and further order that the police department be authorised to prevent the poles in question being erected."

This action of the Board of Control was not communicated to the police authorities, nor was it reported to the Council.

On the 17th October, 1912, a letter was sent by the power company to the Commissioner of Works, informing him that the city's consent had been asked "as a matter of courtesy only," notifying him that the company proposed to carry out the work with the least possible delay, and asking to be informed of the city's attitude in the matter. To this letter the Commissioner replied, on the 25th of the same month, that he had nothing to add to his letter of the 12th October.

There was no evidence of any other communication, written or verbal, from the Mayor to the Chief Constable or the police authorities after the letter of the 2nd October to which I have referred; and it was assumed at the trial—although there was not a tittle of evidence to support the assumption—that the action of the police authorities of which the appellant complains was taken under the impression that it was authorised by that letter.

We are of opinion that the letter of the Mayor of the 2nd October did not authorise nor assume to authorise any such action as was taken by the police authorities, and that the resolution of the Board of Control was not a ratification of what the Mayor had done, nor would it have been, even if it had been communicated to the police authorities, any authority for their action.

The authority in both cases was to prevent the erection of the poles or towers, and was not, and cannot by any process of reasoning be treated as, an authority to arrest or to prosecute anybody.

What really happened, I have no doubt, was that in the carrying out of the Mayor's directions to the Chief Constable the appellant resisted the members of the police force, and in so doing was, in the opinion of the police sergeant, guilty of disorderly conduct within the meaning of the city by-law, and that the officer, as a conservator of the peace, and not under the authority of the Mayor's letter, did the acts of which the appellant complains.

The appellant's case, therefore, failed on the facts; but I agree that if it had been otherwise, and the authority given by the Mayor had been to arrest, the appellant must have failed, for the reasons given by the learned Judge; the case being not distinguishable from *Kelly* v. *Barton* (1895), 26 O.R. 608, 22 A.R. 522.

The appeal should be dismissed with costs.

Appeal dismissed.

ONT.

S. C.
1913

VOGLER v. CAMPBELL.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. October 27, 1913.

1. GIFT (§ I—7)—BANK DEPOSIT TO JOINT ACCOUNT—RIGHT OF WITHDRAWAL BY EITHER—SURVIVORSHIP.

A written direction to the bank by two depositors, father and daughter, whereby each agrees with the other and with the bank that certain moneys, theretofore the sole property of the father, shall be deposited in the bank to their joint credit as their "joint property" subject to withdrawal by either of them and in the case of the death of one by the survivor, and which expressly authorizes the bank to pay to the survivor, is evidence of a completed gift to the daughter of so much as remained on deposit at the father's death.

[*Vogler* v. *Campbell*, 11 D.L.R. 605, reversed; *Hill* v. *Hill*, 8 O.L.R. 710, distinguished.]

Statement

APPEAL by the defendant from the part of the judgment of Lennox, J., *Vogler* v. *Campbell*, 11 D.L.R. 605, 4 O.W.N. 1389, holding an alleged gift of money to the defendant in the form of a joint bank deposit to be (*a*) in its nature testamentary, and (*b*) insufficient as to delivery, and for those reasons ineffective.

The appeal was allowed.

M. Wilson, K.C., and *W. Mills*, K.C., for the defendant.

O. L. Lewis, K.C., and *H. D. Smith*, for the plaintiff.

Mulock, C.J.

MULOCK, C.J.:—This is an appeal from so much of the judgment of Lennox, J., as finds that the money in question belonged to the estate of John L. Campbell, deceased.

John L. Campbell, an old man, resided with his daughter Margaret A. Campbell, the defendant, and on the 11th July, 1908, he and the defendant signed and delivered to the Traders Bank at Ridgetown a document in the following words and figures:—

"To the Traders Bank of Canada:—

"We, the undersigned, John L. Campbell and Margaret Ann Campbell, hereby agree, jointly and severally, and each with the other, to deposit certain moneys with the Traders Bank of Canada to the credit of our joint names; any moneys so deposited to be our joint property, and the whole amount of the same, and of the interest thereon, to be subject to withdrawal by either of us, and, in the case of the death of one, by the survivor. And each of the undersigned hereby authorises the said bank to pay any moneys which may be at any time so deposited, and any interest there may be thereon, to either of the undersigned, and, in the case of the death of one, to the survivor.

"Dated at Ridgetown this 11th day of July, 1908.

"John L. Campbell.

"Margaret A. Campbell.

"Witness: Hugh Ferguson."

John L. Campbell then deposited in the Traders Bank to the credit of the joint account of himself and his daughter Margaret A. Campbell a sum of $2,000, which theretofore he held on deposit to his own credit. During his lifetime, Margaret A. Campbell drew $500 out of this joint fund, the balance remaining there until the death of the settlor, John L. Campbell, who died intestate, when the defendant was appointed administratrix of his estate.

This action is brought by the plaintiff, another daughter of the deceased, who, among other things, asks that the $2,000 be declared to be part of the estate, and that she be declared entitled to share therein as one of the next of kin of the deceased.

The question, I think, turns wholly on the construction to be placed upon the document above set forth. The intestate deposited the money, subject to the terms of that document, to the credit of himself and the defendant, and when so deposited it became the joint property of the two, and on the death of one became the property of the survivor. Nothing remained in order to perfect the gift to the defendant of a joint interest in the fund during their joint lives; and the exclusive ownership of so much as remained on deposit at the time of his death, in the event of her surviving him. John L. Campbell predeceasing her, the fund formed no part of his estate at the time of his death.

The learned trial Judge considered himself bound by *Hill* v. *Hill* (1904), 8 O.L.R. 710. The facts, however, in that case were different. There a person, having money on deposit in a bank, procured from the bank a deposit receipt therefor "payable to William Hill senior" (the depositor) "and John R. Hill" (his son) "or either or the survivor." This instrument did not transfer the ownership of or any interest in the fund to the son, during the lifetime of the father, and on his death the legal estate in the fund devolved on the father's legal representative. As regards the son, the deposit receipt at most was but an incomplete gift or settlement, and, being voluntary, was not enforceable against the estate.

In the present case, the gift being complete in John L. Campbell's lifetime, I am of opinion that the defendant is entitled to retain the fund. I, therefore, with respect, find myself obliged to differ from the learned trial Judge, and think this appeal should be allowed with costs.

Having regard to the state of the pleadings, I think we should not deal with the item of $500 referred to in the case, but reserve to the plaintiff any rights thereto to which she may consider herself entitled.

SUTHERLAND, J.:—I agree.

ONT.

S. C. 1913

VOGLER v. CAMPBELL.

Riddell, J.

LEITCH, J.:—I agree.

RIDDELL, J.:—The appeal should be allowed generally and the action dismissed.

The sum of $500 was withdrawn by the deceased a short time before his death, and was delivered to the defendant. Some evidence was given at the trial, but the matter was not fully investigated; there was nothing in the pleadings about it; and, while we dismiss the action, we reserve to the plaintiff the right to bring any action she may be advised in respect of the $500.

As to costs, I can see no good reason for taking this case out of the general rule; and I think that the plaintiff must pay the costs of the action and appeal.

I have assumed that the plaintiff has the right to sue, since the defendant is herself administratrix: *Hilliard* v. *Eiffe* (1874), L.R. 7 H.L. 39, at p. 44, n., and other cases considered in *Empey* v. *Fick* (1907), 15 O.L.R. 19, at 24.

Appeal allowed.

ONT.

S. C. 1913

HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. November 5, 1913.

1. MORTGAGE (§ VI C—82)—ENFORCEMENT — FORECLOSURE — PARTIES DEFENDANT—ADDING IN MASTER'S OFFICE.

The fact that all persons interested in an equity of redemption are not made parties to a foreclosure proceeding, or that the action is discontinued as to some of them, does not render the proceeding fatally defective, since all necessary parties may be added even after judgment.

[*Jones* v. *Bank of Upper Canada*, 12 Gr. 429; *Buckley* v. *Wilson*, 8 Gr. 566; *Portman* v. *Paul*, 10 Gr. 458; and *Municipality of Oxford* v. *Bayley*, 1 Ch. Chrs. 272, followed.]

2. MORTGAGE (§ VI C—82)—ENFORCEMENT — FORECLOSURE — PARTIES DEFENDANT—PARTIES ADDED IN MASTER'S OFFICE.

Where, on an appeal from a judgment of foreclosure, it appears that all parties interested in the equity of redemption were not made parties to the proceeding, or added in the master's office, the matter will be referred back to the master so that they may be added by a formal order and not by the service of a master's warrant, making them parties.

[*Home Building and Savings Assn.* v. *Pringle*, 12 D.L.R. 856, reversed.]

3. MORTGAGE (§ VI C—82)—ENFORCEMENT — FORECLOSURE — PARTIES DEFENDANT—WHO MUST BE.

All persons having an interest in an equity of redemption, or having any lien, charge or incumbrance acquired subsequent to the mortgage, must be made parties to a foreclosure action.

4. PARTIES (§ II A 1—67*b*)—PROPER AND NECESSARY PARTIES—DEFENDANTS—MORTGAGE FORECLOSURE—NUMEROUS PARTIES—REPRESENTATIVE FOR NUMEROUS CLASS.

Practice rule 77 (Ont. rules of 1913) as to the appointment by the court of a person to represent unascertained classes of defendants,

does not apply where the parties interested in an equity of redemption, although numerous, have separate and distinct interests in the incumbered land, and are entitled to indemnity and contribution differing according to their respective titles and the dates of their acquisition.

ONT.
S. C.
1913
HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.

APPEAL by the defendants McKillican and Smith from the order of Britton, J., *Home Building and Savings Association* v. *Pringle*, 12 D.L.R. 856, 4 O.W.N. 1583, dismissing without costs an appeal from a report of the Local Master at Ottawa.

The order appealed from was vacated and the matter referred back to the Master.

Statement

C. H. Cline, for the appellants.

F. A. Magee, for the plaintiffs, respondents.

Hodgins, J.A.

The judgment of the Court was delivered by HODGINS, J.A.:—In this case the mortgagees began their action for sale as to the whole of the lands comprised in the mortgage, except three parcels released by them, and against thirty-three defendants. They discontinued against twenty-two. It is alleged that the thirty-three were not all that were interested in the equity of redemption. The action did not become fatally defective on the discontinuance; for, although it is quite clear that all parties interested in the equity of redemption must be parties, they may be made parties either by writ or in the Master's office: *Jones* v. *Bank of Upper Canada*, 12 Gr. 429; *Buckley* v. *Wilson*, 8 Gr. 566; "Where, after a mortgage being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties in a suit to foreclose the mortgage." See also, in England, *Peto* v. *Hammond* (1860), 29 Beav. 91; *Caddick* v. *Cook* (1863), 32 Beav. 70; Halsbury's Laws of England, vol. 21, p. 279; *Griffith* v. *Pound* (1890), 45 Ch.D. at p. 567; *Gee* v. *Liddell*, [1913] 2 Ch. 62.

Under rule 190 (now 490), if it appears to the Court or Judge that, by reason of their number or otherwise, it is expedient to permit the action to proceed without the presence of all, the Court or Judge may give direction accordingly, and may order the others to be made parties in the Master's office. After judgment the Master may order persons interested in the equity of redemption, other than those already named in the writ, to be added in his office. This is the proper practice after judgment. See *Portman* v. *Paul*, 10 Gr. 458.

The reason for requiring all parties to be before the Court, or to have notice, is, that the mortgage account may be taken so as to bind all parties and so as to appoint either one day or successive days for redemption, and to enable redemption to be had by any party interested.

ONT.
S.C.
1913
HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE.
Hodgins, J.A.

As put in *Faulds* v. *Harper* (1882), 2 O.R. 405, "The equity of redemption is an entire whole, and, so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all." The Court endeavours to make a complete decree, that shall embrace the whole subject, and determine upon the rights of all parties interested in the estate: per Grant, M.R., in *Palk* v. *Lord Clinton* (1806), 32 Beav. at p. 58.

If this were not so, no one whose land is sold, if sale is asked, as it is in this case, can be sure, if he redeems the mortgage, that all other parties interested are bound by the account, nor can the Master properly determine whether only part of the property should be sold "as he may think best for the interest of all parties" (old Rule 716), unless he have all parties before him. Nor can the mortgagor, which term includes all those interested in the equity of redemption, properly perform the duty of seeing to the parcelling out of the land so as to secure that enough and only enough is sold to pay the claim of the mortgagee: *Beaty* v. *Radenhurst*, 3 Ch. Chrs. 344. The importance of seeing that all parties interested in the equity of redemption are before the Court, and the difficulties that arise from any departure from the proper practice, may be seen from the case of *Street* v. *Dolan*, 3 Ch. Chrs. 227, and *Imperial Loan Co.* v. *Kelly*, 11 A.R. 526, 11 Can. S.C.R. 676.

It is further objected that all subsequent incumbrancers were not added by the Master.

The respondent, the mortgagee, relies upon the judgment pronounced in this action on the 25th February, 1911, which recites the discontinuance against the twenty-two original defendants. This discontinuance, although recited in the judgment, was the respondent's own act, and is not equivalent to an order or direction under Rule 190 (old Rule).

The judgment was proper, as there still remained the right to add these parties in the Master's office before the final order is made: see *Municipality of Oxford* v. *Bayley*, 1 Ch. Chrs. 272.

I have examined the orders and judgments of Mr. Justice Sutherland, the Divisional Court in appeal therefrom, and the judgment of Mr. Justice Britton, now appealed from, in order to see whether any of them make any reference to the state of facts which was made clear in this appeal. I do not find that there is anything in these orders or judgments that cures the defects now apparent. Any difficulty caused by the judgment of Mr. Justice Sutherland disappears in view of the order made by the Divisional Court on appeal therefrom.

The remarks of Vankoughnet, C., in *Portman* v. *Paul*, 10 Gr. 458, seem to express the present situation. "If parties," he says, "will not take the trouble, more or less according to

circumstances, to bring the proper parties before the Court, they have only themselves to blame, but they have no right to cast that labour upon the Court, and turn it into a Court of inquiry for their convenience."

I can see no escape from the conclusion that this matter must go back to the Master, so that he may add all those interested in the equity of redemption as parties. This is not done by serving a warrant, the practice adopted by the Master, as his report of the 6th November, 1911, shews, but by formal order making and advising them as parties: see Rule 404 (new Rule). There should be added as well all those having any lien, charge, or incumbrance upon the mortgaged premises or any part thereof subsequent to the plaintiffs' mortgage. The Master's report of the 13th May, 1913, states that this is not necessary, and in this he is wrong. I do not think that Rule 77 (new Rule), as to representation of classes of defendants, was intended to apply or can be made use of when the parties, though numerous, have all separate and distinct interests in land, and rights to exoneration and contribution which differ according to their title and the date of its acquisition. But the Master has power to order substitutional service in a proceeding in his office under Rules 16 and 433 (new Rules).

No effective order, in the absence of these parties, can be made in this appeal on any of the other questions argued, which will have to come up again, unless those now agitating them can, by the exercise of discretion, settle them out of Court. Nor have we power to make any order now under Rule 490 (new Rule).

No doubt the plaintiffs thought by their proceedings to save costs; but the result has been otherwise. The Master reports that the abstract brought in before him did not shew all the mortgage incumbrancers, nor the properties sold and discharged by the plaintiffs. This is contrary to Rules 468 and 469 (new Rules).

Had the defendants, who are the appellants in this Court, made their position clear, instead of clouding the issue before the Master by designating the others interested in parts of the equity of redemption as subsequent incumbrancers entitled to notice as such, they might have had their costs. But, under the circumstances, there should be no costs of the appeal to this Court or to Mr. Justice Britton.

The judgment appealed from and the Master's report will be vacated, and the action remitted to the Master to be dealt with by him as indicated in this judgment.

Case remitted.

ALTA.

S. C.
1913

MYLNZYUK v. NORTHWESTERN BRASS CO.

Alberta Supreme Court, Stuart, J. October 18, 1913.

1. MECHANICS' LIENS (§ IV—15)—FOR LOADING MATERIAL FOR TRANSPORTATION TO BUILDING.

Labourers employed by a sub-contractor to dig earth and load it on wagons for transportation to the place where it was used in improving other property are not entitled to a lien on such other property for their services under sec. 4 of the Alberta Mechanics' Lien Act, 6 Edw. VII. ch. 21.

[*Canadian Equipment and Supply Co. v. Bell*, 11 D.L.R. 829, referred to.]

2. MECHANICS' LIENS (§ IV—15)—FOR CONVEYING MATERIALS TO BUILDING.

Teamsters employed by a sub-contractor in conveying material to a building in the course of erection are entitled, under sec. 4 of the Alberta Mechanics' Lien Act, 6 Edw. VII. ch. 21, to a lien thereon for their services.

[See to same effect, Wallace on Mechanics' Liens, 2nd ed., 90; *Fowler v. Pompelly* (1903), 76 S.W. 173.]

Statement

ACTION to enforce a mechanics' lien.

The lien claimed was allowed in part.

Geo. Ross, for plaintiff.

J. W. Hughill, for defendant.

Stuart, J.

STUART, J.:—This was an argument upon two points of law under a stated case which is as follows:—

The Northwestern Brass Co. Ltd. is the owner of lots one to thirty-six in block 15, according to a plan of Calgary, of record in the land titles office for the South Alberta Land Registration District as plan Calgary 6700—A.N. situated in the district more commonly known as "East Calgary."

The said company contracted with the Westinghouse-Church-Kerr Co. for the erection of their brass foundry on the said land.

The said Westinghouse-Church-Kerr Co. contracted with W. H. Henry for the supply and delivery of 4,900 cubic yards more or less of clean earth or gravel to be used for filling in, bringing the grade of the Brass Company's property to proper floor level, at and for the price of 75c. per cubic yard delivered on the premises of the Brass Company. The terms of this contract are contained in an agreement dated May 6, 1913, the original of which is produced and admitted and copy hereunto attached.

Henry delivered 3,660 cubic yards, for which he was paid by the Westinghouse-Church-Kerr Co. the sum of $2,745, final payment being made to him on Monday, July 28. On July 30, the other defendant, Bob Powell, approached the manager of the Westinghouse-Church-Kerr Co. as to Henry's whereabouts, stating that he had a sub-contract with Henry to place the filling inside of the foundry building at a price of 55c. per cubic yard, which is the fact.

ALTA.

S. C.
1913

MYLNZYUK
v.
NORTH-
WESTERN
BRASS CO.

Stuart, J.

On Monday, July 28, Henry had left Calgary without paying Powell in accordance with his contract.

It is admitted that twenty of the labourers claiming a lien, whose claims total $379.15, were employed by Powell, a sub-contractor of Henry's, and were working in excavating gravel some distance from the Brass Company's property. It is further admitted that 8 of the claimants, whose claims total $523.10, were teamsters employed by Powell to deliver the gravel excavated by the labourers before mentioned to the Brass Company's building. It is still further admitted that 8 of the claimants herein whose claims total $160.92 were engaged by the said contractor W. H. Henry upon the premises of the Brass Company in spreading the gravel or filling material dumped by Powell's teams upon the premises.

The questions submitted for the consideration of the learned Judge are as follows:—

(1) Can labourers employed by the sub-contractor Powell digging and loading material at the distance from the land aforesaid under Powell's contract with Henry for the supply of material to the premises in question maintain a claim to a mechanics' lien?

(2) Can the teamsters employed by sub-contractor Powell conveying material to the building of the owner maintain a claim to a mechanics' lien for wages accrued during the performance of their work as teamsters engaged by the sub-contractor in the delivery of such material?

It was further admitted upon the argument that the filling process referred to was essential to the proper construction of the building and that it should be treated as part of the work of construction of the building and that the workmen employed continually upon the land in spreading into proper position the material hauled were entitled to a lien.

Sec. 4 of the Mechanics' Lien Act (Alberta), 6 Edw. VII. ch. 21, reads as follows:—

Unless there is an agreement in writing to the contrary signed by the person claiming the lien, every contractor, sub-contractor, labourer and furnisher of material doing or causing work to be done upon or placing or furnishing any materials to be used in or for the construction, erection, alteration, or repairs, either in whole or in part of, or addition to, any building, tramway, railway, erection, wharf, bridge or other work, or doing or causing work to be done upon, or in connection with, or the placing or furnishing of materials to be used in or for the clearing, excavating, filling, grading, track laying, draining or irrigating of any land in respect of a tramway, railway, mine, sewer, drain, ditch, flume, or other work, or improving any street, road or sidewalk adjacent thereto, at the request of the owner of such land, shall, by virtue thereof, have a lien or charge for the price of such work, and the placing or furnishing of such materials upon such building, erection, wharf, machinery, fixture or other works, and all materials furnished or produced for use in constructing or making such works or improvements so long as the same are about to be in good

ALTA.
S. C.
1913
MYLNZYUK v. NORTH-WESTERN BRASS CO.
Stuart, J.

faith worked into or made part of the said works or improvements, and the land, premises, and appurtenances thereto, occupied thereby or enjoyed therewith but limited in amount as hereinafter mentioned:

Provided such lien shall affect only such interest in the said land, premises and appurtenances thereto as is vested in the owner at the time the works or improvements are commenced, or any greater interest the owner may acquire during the progress of the works or improvements, or have at any time during which the lien stands as an incumbrance against said land.

This is an exceedingly long and involved sentence. It is a question in my mind whether better results in so far as intelligibility and interpretation are concerned would not have been arrived at by separating the clause into several distinct ones and dealing with each class of person in a separate clause.

In my opinion the expression "furnisher of material" cannot be applied to a labourer working for wages, but is intended only to cover persons who sell or supply material on contract at a certain price. I think also the phrase "furnishing any material" must be referable only to the term "furnisher of material" and ought not to be read as referring in any way to the word "labourer."

Reading the clause, then, in so far only as it can possibly apply to the persons here claiming a lien and leaving out phrases not necessary to be considered in this connection, it will read as follows:—

> Every labourer doing or causing work to be done upon or placing any material to be used in or for the construction, erection, alteration or repairs of any building, or doing or causing work to be done upon or in connection with or the placing of materials to be used in or for the filling of any land in respect of a sewer, drain or other work at the request of the owner of such land, shall by virtue thereof, have a lien for the price of such work and the placing of such material upon such building, etc., etc.

Obviously the words "the" and "of" where they occur in line nine of the printed statute should not be there at all. As one reaches the end of the sentence, one inevitably loses oneself in the maze, and I very much doubt whether, grammatically speaking, the sentence is even really completed at all.

The insertion of the word "of" between the words "and" and "the" in line sixteen and of a comma after the word "materials" on the same line, would probably bring out the real meaning and remove the obscurity.

Assuming that the word "placing" is intended to mean placing *upon the land* or, under such circumstances as existed in *Canadian Equipment and Supply Co.* v. *Bell*, 11 D.L.R. 820, in the immediate vicinity of the land, I think it is clear that the labourers referred to in the first question, who merely dug and loaded the material at a distance cannot derive any benefit from

ALTA.

S. C.
1913

MYLNZYUK
v.
NORTH-
WESTERN
BRASS CO.

Stuart, J.

the use of that word. They, at any rate, did not "place" any material within the meaning of the Act.

In so far as these men are concerned the real question is: Did they do any work upon the construction or erection of the building or in connection with the filling of the land in respect of a sewer or drain? There is nothing said in the case about sewers or drains and I think this eliminates any necessity for considering the extent of the meaning to be attributed to the phrase "in connection with." The test question then is, Did they "do any work upon the construction of the building" within the meaning of the statute? In my opinion they did not. So far as they knew the loads may have been taken by the contractor anywhere. They were simply employed to dig that earth and throw it upon those wagons. It is true that the wagons were in fact afterwards driven to the land in question, but in my opinion this makes no difference. A line must be drawn somewhere and I think these men lie far beyond any reasonable line that can be drawn as defining what work is and what work is not done upon the construction of any building. I think, therefore, the first question should be answered in the negative.

On the other hand, I think the labourers or teamsters referred to in question two are entitled to the benefit of the word "placing" where it occurs in the section quoted. I see no reason why that word should not be held to qualify the word "labourer" as well as the words "furnisher of material." Even aside from that I think they must be treated as doing "work upon the construction." They had to drive their teams upon the land, they had to unload their load or assist in doing so. It is true that they spent a part of their time going off the land for their loads, but I can see no logical distinction between such a case and the case of a carpenter or bricklayer or hod carrier working upon a building who must in some cases have to go to the adjoining land, either street or vacant lot, for his material and carry it to the building being constructed. The hod carrier goes, it may be, to the street for his hod full of mortar and does nothing but empty it at the mason's feet. But I think no one would deny his right to a lien under the Act merely because he has to go to some other land for his load. The teamsters are on principle and logically in the same position. I think the second question should be answered in the affirmative.

Judgment accordingly.

ALTA.

S. C.

1913

GAUTHIER v. CANADIAN NORTHERN R. CO.

Alberta Supreme Court, Beck, J. November 12, 1913.

1. INTEREST (§ I D—36)—ON AWARD—IN CONDEMNATION PROCEEDINGS—WHEN BEGINS TO RUN.

Where a railway company takes possession of land before proceeding to expropriate it, on an award of damages being subsequently made, interest attaches, not from the date of the award, but from the time of taking possession.

[*Re Clark and Toronto, Grey and Bruce R. Co.*, 18 O.L.R. 628, 9 Can. Ry. Cas. 290; *Rhys* v. *Dare Valley R. Co.*, L.R. 19 Eq. 93; and *Re Shaw and Birmingham Corporation*, L.R. 27 Ch.D. 614, 54 L.J. Ch. 51, followed.]

2. COSTS (§ I—8)—LIABILITY FOR—IN CONDEMNATION PROCEEDINGS—TAKING LAND FOR RAILWAY PURPOSES—WHEN AWARD EXCEEDS AMOUNT OFFERED—INTEREST.

In determining whether an award in a proceeding to expropriate land for railway purposes exceeds the sum offered by the company so as to cast upon it, under sec. 199 of the Railway Act, R.S.C. 1906, ch. 37, the costs of the arbitration, there must be added to the amount of the award the interest or such other sum to which the landowner is entitled either under the Act or otherwise.

3. LIMITATION OF ACTIONS (§ I E—30)—TO WHAT CLAIMS APPLICABLE—RAILWAY ACT—BREACH OF CONTRACT TO LOCATE STATION.

An action for the breach of an agreement to locate a railway station on the plaintiff's land in consideration of a right of way over it is not within the limitation of one year prescribed by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, for actions for damages or injury sustained by reason of the construction or operation of a railway.

[*Beard* v. *Credit Valley R. Co.*, 9 O.R. 616, followed.]

Statement

ACTION against a railway company for damages for the breach of a contract to locate a railway station, or in the alternative for compensation for land taken.

Judgment was given for the plaintiff.

E. B. Edwards, K.C., for plaintiff.

O. M. Biggar, K.C., for defendants.

Beck, J.

BECK, J.:—This is an action in which the plaintiff sets up in effect:—

1. That he is the owner of the land in question.

2. That in September, 1905, the defendants' right of way agent represented to the plaintiff that the defendant company were about to construct their line through the plaintiff's land and agreed that if the plaintiff would give the company the right-of-way the company would establish and maintain the station for the village of Morinville on the plaintiff's land.

3. That the plaintiff agreed to this and accordingly allowed the defendant company to enter and construct its line on the land.

4. That the company has not performed the agreement on its part.

The plaintiff claims damages, and, in the alternative, compensation. The agreement was denied. Subsequently the company took proceedings under the Railway Act for the expropri-

ation of the land. An application was in due course made for the appointment of arbitrators and they were appointed. A motion was then made in this action by the defendant company for a stay of the action pending the arbitration. The Master made the order. On appeal I affirmed it, expressing the view that if the alleged agreement was put forward as excluding the right of arbitration that was a question which it was necessary should be raised—and I was told it had in fact been raised—on the application to appoint arbitrators and that the fact that the Judge had appointed arbitrators was in effect a decision in favour of the company's right to proceed to arbitration; that the plaintiff's only remedy was to appeal from that order—a course which was not taken. The action being stayed, the arbitration was proceeded with and on June 17, 1913, the arbitrators made their award by which they fixed as compensation for the value of the land taken and damages for severance $2,500, a sum in excess of that offered by the company. Later, the action came on for trial before me. The arbitration proceedings and the award were proved and leave given the defendant company to amend its defence by setting up the proceedings under the Railway Act and paying into Court the amount of the award and such further sums as the company should see fit, and the trial proceeded on the supposition that this would be done. I declined to hear any evidence on the plaintiff's claim, based upon the agreement, on the ground that that was concluded by the award. I fixed $5 as the damages not comprised in the award. The defendant company on October 21 filed an amended defence and paid into Court in this action the sum of $5, denying liability, and, in the proceedings under the Railway Act, $2,542.88, the latter sum representing the $2,500 fixed by the award and interest at 5 per cent. per annum from the date of the award to October 21.

In the result, the only question left for me to decide is, whether the amount paid in in respect of the award is sufficient, and this involves the questions, (1) whether interest on the amount awarded runs from the time the company took possession or from the date of the award, and (2) whether the costs of the arbitration proceedings, which, in fact have been fixed, ought also to have been paid in.

As to interest, it was contended by Mr. Biggar for the company that owing to the amendment of sec. 192 of the Railway Act, R.S.C. 1906, ch. 37, by 8-9 Edw. VII. (1909), ch. 32, sec. 3, which provides that if the company does not acquire title within a year of the deposit of the plan (which was the case here) the date of such acquisition (in effect I suppose the date of the award) shall be the date with reference to which the compensation or damages shall be ascertained, the principle of the cases holding that the owner is entitled to in-

ALTA.

S.C.
1913

GAUTHIER
v.
CANADIAN
NORTHERN
R. Co.

Beck, J.

terest on the amount of the award, except from its date, is no longer applicable. I see, however, no reason on this or on any other ground for declining to follow the decision of Meredith, C.J., *Re Clark and Toronto, Grey and Bruce R. Co.*, 18 O.L.R. 628, 9 Can. Ry. Cas. 290. Interest it seems to me is a compensation for possession, and it is on this ground that it is allowed. I consequently hold that the plaintiff is entitled to interest at the rate of 5 per cent. per annum on $2,500 from October 1, 1906, the date at which the company went into possession of the land, to June 17, 1913, the date of the award, 6 years 8 months and 17 days. This amount as I calculate it, comes to the sum of $839.25. There may be some question whether I should give this as damages or whether this interest is a necessary consequence and incident of the award attaching itself inseparably and effectively thereto in such sense as to increase "the sum awarded" or "the compensation" by that amount. I, indeed, took the latter view, in interpreting sec. 199 on the question of the costs of the arbitration in the case of *Dagenais*, and the defendant company (*Dagenais* v. *Canadian Northern R. Co.*, 14 D.L.R. 494).

As it is necessary to consider this question for the purpose of deciding the case of *Dagenais* v. *C.N.R.*, tried at the same time as this case, and as it is closely connected with the question of the costs of the arbitration proceedings, I deal with it here. Sec. 199 says:—

> If by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.
>
> 2. The amount of the costs, if not agreed upon, may be taxed by the Judge.

The award is, in my opinion, final and conclusive so long as it stands and cannot be rejected by the company: sec. 197, sub-sec. 2; secs. 205, 209, sub-secs. 1 and 4.

On its being made, a contract, final and binding, arises, for the first time, I think, under which the company can obtain title to the land and the owner can enforce payment of the compensation: sub-sec. 210 *et seq.* The amount fixed by the award becomes *eo instanti* the purchase price of the land, *i.e.*, the principal sum; what preceded were negotiations; on the purchase price being fixed interest from the taking of possession attached thereto in favour of the owner (vendor) as of right: *Rhys* v. *Dare Valley R. Co.*, L.R. 19 Eq. 93, 23 W.R. 23; *Birch* v. *Joy* (1851), 3 H.L.C. 565; *Re Shaw and Birmingham Corporation*, L.R. 27 Ch.D. 614, 54 L.J. Ch. 51, and so also I think any proper costs payable by the company.

It must be admitted that the interpretation of sec. 199, when taken alone, is far from plain in the sense I am attributing to it. Its wording is confused. The words, "By any award of the arbitrators or of the sole arbitrator made under this Act" are either absolutely useless and purposeless or not; it is to be presumed that they are not so; attempting to assign them a purpose, they seem to suggest that an award made under the Act has in some way a greater virtue than other awards, and that "by" is to be taken as equivalent to "by virtue of." Again, "the sum awarded" and "compensation" are used in an equivalent sense. For if the sum offered by the company is more than "the sum awarded," the costs shall be borne by the owner and be deducted from "the compensation;" if the sum offered by the company is less than "the sum awarded," the costs shall be borne by the company and (I think the corresponding consequence is intended) shall be added to the compensation and form part thereof in the same way as when deducted, what is deducted is a part of the compensation.

Section 210 provides, that in certain circumstances,

> the company may pay such compensation into Court with the interest thereon for six months and deliver to the clerk of the Court an authentic copy of the award and that such award shall thereafter be deemed to be the title of the company to the land. See also sec. 213.

"Compensation" in this section must certainly mean not the exact sum the figures of which are *stated in* the award, but that sum plus costs in one event and minus costs in another event; and, in my opinion together with, in either case, proper interest. In the light then, of other sections, I interpret the words, "The sum awarded" occurring in sec. 199 as equivalent not to the words, "the sum stated in the award," but to "the sum to which the owner has become entitled by virtue of the award," or in other words, to the "compensation" and this latter word as meaning not the precise amount *stated in* the award, but that amount added to or subtracted from according to the respective rights of the parties whether under the Act or otherwise.

Some time ago I taxed the costs in the arbitration proceedings at the sum of $240.10. In the view I have expressed the amount paid into Court in the proceedings under the Railway Act is insufficient by the sum of $839.25 for interest and $240.10 for costs; a total of $1,079.35.

I think the plaintiff is entitled to judgment for this amount with interest at 5 per cent. from October 21 last—the date of the payment into Court—with costs of the action. He is entitled also to judgment for $5 damages in respect to which that amount has been paid into Court and which will be paid out on satisfaction of that part of the claim.

ALTA.
S. C.
1913
GAUTHIER v. CANADIAN NORTHERN R. CO.

In the amended defence filed after the actual hearing, the defendant company sets up the limitation provision of the Railway Act, sec. 306, as a bar to the plaintiff's claim for damages. I think that section is not applicable to this case: *Beard* v. *Credit Valley R. Co.*, 9 O.R. 616. In any case it was not my intention that leave to file an amended defence should cover more than leave to set up the arbitration proceedings and to pay money into Court so that these additional defences must be disregarded.

Judgment for plaintiff.

ALTA.
S. C.
1913

DAGENAIS v. CANADIAN NORTHERN R. CO.

Alberta Supreme Court, Beck, J. November 12, 1913.

1. INTEREST (§ I D—36)—ON AWARD—IN CONDEMNATION PROCEEDINGS—WHEN BEGINS TO RUN.

To the amount of an award for land expropriated for railway purposes interest attaches not from the date of the award but from a previous taking possession by the railway company.

[*Gauthier* v. *Canadian Northern R. Co.* (Alta.) 14 D.L.R. 490, followed.]

2. COSTS (§ I—8)—LIABILITY FOR—IN CONDEMNATION PROCEEDINGS—TAKING LAND FOR RAILWAY PURPOSES—WHEN AWARD EXCEEDS AMOUNT OFFERED—INTEREST.

Whether an award for land expropriated for railway purposes is in excess of the sum offered therefor by a railway company so as to cast upon it, under sec. 199 of the Railway Act, R.S.C. 1906, ch. 37, the costs of an arbitration, is to be determined not from the amount of the award itself but by adding thereto the interest or such other sum to which the landowner is entitled under the Act or otherwise.

[*Gauthier* v. *Canadian Northern R. Co.* (Alta.) 14 D.L.R. 490, followed.]

Statement

ACTION against a railway company for the taking of land for railway purposes.

Judgment was given for the plaintiff.

E. B. Edwards, K.C., for plaintiff.

O. M. Biggar, K.C., for defendants.

Beck, J.

BECK, J.:—This action is much like that of *Gauthier* v. *The C.N.R. Co.*, 14 D.L.R. 490. Similar proceedings took place in both.

The defendant company after the hearing filed an amended statement of defence setting up the arbitration proceedings and the award. The amount fixed by the award was $1,750, a sum less than the amount offered by the company. The company, on October 21, paid into Court in the proceedings under the Railway Act, the sum of $1,779.89, being $1,750 and interest from the date of the award to the date of payment into Court. The company also paid into Court in this action—denying liability—

ALTA.

S. C.
1913

DAGENAIS
v.
CANADIAN
NORTHERN
R. CO.

Beck, J.

the sum of $155 to meet damages other than those covered by the award. I fix these damages at that amount.

For the reasons given in the *Gauthier* case, I hold that the plaintiff is entitled to interest on the sum stated in the award—$1,750—at the rate of 5 per cent. per annum, from the date at which the company took possession—October 1, 1906—to the date of the award. This interest amounts to the sum of $587.46 and being added to the $1,750 makes $2,337.46—a sum in excess of the amount offered by the company. For the reasons also stated in the *Gauthier* case I hold that the sum stated in the award is not "the amount awarded" or "the compensation," but that the latter is the former sum plus or minus such sum or sums as the parties respectively, either by virtue of the Act or otherwise are entitled to have added to or deducted from the amount stated in the award and that interest from the taking of possession is one such sum the owner—the plaintiff—is entitled to have added in order to ascertain "the amount awarded" or "the compensation," and, inasmuch as the interest in this case brings the amount to an amount in excess of the amount offered by the company, the plaintiff is also entitled to have added thereto the costs of the arbitration proceedings. This I fixed some time ago at $172.70.

In my opinion the plaintiff is entitled to judgment in addition to $155 for damages—the amount of which has been paid into Court and which will be paid out on satisfaction of that part of the claim, and also to judgment for $587.46 for interest and $172.20 for costs, making $759.66, with interest from October 21, 1913, at 5 per cent. per annum, together with the costs of the action.

Judgment for plaintiff with costs.

Re LEES.

B. C.

S. C.
1913

British Columbia Supreme Court, Murphy, J., in Chambers. November 27, 1913.

INCOMPETENT PERSONS (§ VI—31)—*Lunatic—Powers of committee—Removal of committeman.*]—This was an application in the estate of a lunatic not so found by inquisition for an order discharging a member of the committee upon the ground that he had left the jurisdiction of the Court and for the appointment of a new member of the committee in his place.

C. B. S. Phelan, for the applicant cited *Ex parte Ord*, Jac. R. 94.

MURPHY, J., granted the order upon the terms that the consent of the Attorney-General was obtained and the accounts were passed.

ONT.
S. C.
1913

ALLEN v. GRAND VALLEY R. CO.

(Decision No. 2.)

Ontario Supreme Court, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 3, 1913.

[*Allen v. Grand Valley R. Co.*, 12 D.L.R. 855, 4 O.W.N. 1578, affirmed.]

ACTION (§ I B—5)—*Prematurity—Terms of Credit—Surety.*]—Appeal by the defendants the railway company and appeal by the defendants Verner and Dinnick from the judgment of Kelly, J., *Allen v. Grand Valley R. Co.*, 12 D.L.R. 855, 4 O.W.N. 1578.

Grayson Smith, for the appellants.

H. E. Rose, K.C., and *J. W. Pickup*, for the plaintiffs.

MEREDITH, C.J.O.:—Mr. Smith has very fully presented the case from the standpoint of the appellants, and it seems reasonably clear. The letter of the respondents of the 4th July, 1908, was simply a quotation of prices. In the letter of the 13th July, 1909, from the appellant company's superintendent to the respondents, accepting what is referred to as the tender of the 14th July, 1908, for the supply of points "in general accordance with tracings and sketches then submitted, but to be amended as necessary to agree with the requirements of our own engineer and that of the city engineer of Brantford," it was stated that, "as explained to your Mr. Ward and Mr. Hampton, there will be certain alterations and probably additional work in various job numbers, but the details of these alterations and additions can only be arrived at when your engineer comes here to prepare the working drawings." Then, after referring to the shipment of the materials, the importance of getting some of the "jobs" completed quickly, and the terms of payment, the letter concludes with the following statement: "Jobs Nos. 33, 34, and 35 are to be complete lay-outs, including the manganese steel rails curved to the required radius; prices of these three lay-outs to be arranged as soon as detailed drawings have been prepared."

It is quite clear from the terms of this letter that a great deal was left open. The work to be done was to depend upon the requirements of the company's engineer and of the engineer of the city of Brantford; and it was also in contemplation that additional work would be required. It is not pretended that what was supplied was not all required for the purpose of carrying out the undertaking with reference to which the contract was made; and it is clear that the statement as to changes, alterations, and requirements of the engineers applied to all the work, including jobs 33, 34, and 35.

ONT.

S. C.
1913

It is manifest from the terms of the guaranty that it was in the contemplation of the guarantor that more than was mentioned in the list attached to the tender of the 14th July, 1908, would be needed to carry out the work that was to be done, for the order is stated to have been for work amounting "to some $60,000"—a sum considerably in excess of what the cost of the work would have been on the basis of the tender.

Everything supplied was supplied in accordance with the requirements of the company's engineer, and there is nothing in the correspondence or in the circumstances to warrant the conclusion that it was intended that it should not be open to the engineer to alter his requirements from time to time as occasion might render necessary.

For these reasons, and agreeing as we do with the reasoning and conclusion of the learned trial Judge, the judgment must be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

SYKES v. SOPER.

ONT.

S. C.
1913

Ontario Supreme Court, Meredith, C.J.C.P. June 24, 1913.

1. ASSIGNMENTS FOR CREDITORS (§ III B—20)—PRIORITIES—CREDITORS' INTERPLEADER WITH CHATTEL MORTGAGEE PENDING WHEN ASSIGNMENT MADE.

Contesting execution creditors who have taken an issue in interpleader proceedings as against a chattel mortgagee whose mortgage is attacked are subject to have their executions and rights in the interpleader subordinated to those of the general body of creditors as represented by the assignee upon an assignment under the Ontario Assignments Act, 10 Edw. VII. ch. 64, R.S.O. 1914, ch. 134, made between the preliminary interpleader order and the trial of the issue thereunder, and this although the preliminary order, pursuant to the interpleader clauses of the Creditors' Relief Act, 9 Edw. VII. (Ont.) ch. 48, R.S.O. 1914, ch. 81, made provision whereby other creditors might come in and share in the benefits of the issue on contributing *pro rata* to the expense.

[*Re Henderson Roller Bearings Ltd.*, 22 O.L.R. 306, 24 O.L.R. 356, in appeal *sub nom. Martin* v. *Fowler*, 6 D.L.R. 243, 46 Can. S.C.R. 119, distinguished; *Soper* v. *Palos*, 10 D.L.R. 848, overruled; and see Annotation at end of this case.]

2. ASSIGNMENTS FOR CREDITORS (§ III B 2—20)—CHATTEL MORTGAGE IN FRAUD OF CREDITORS—POSSESSION OBTAINED BY ASSIGNEE WITHOUT INTERVENTION OF COURT.

If the debtor's assignee for the benefit of creditors can, in any lawful way, obtain possession of personal property of the debtor fraudulently transferred or mortgaged, he is entitled to deal with it as part of the estate without bringing action and obtaining a judgment declaring his right thereto.

Statement

THIS was an interpleader issue between Albert G. Sykes and John Percy Grant, plaintiffs, and Allen Soper and Abbott Grant & Co., defendants, in which the plaintiffs affirmed and the de-

ONT.
S. C.
1913
SYKES
v.
SOPER.
Statement

fendants denied that certain goods, chattels, and effects in and about certain premises occupied by George Pulos and George Pulos and Nicholas Leras, situated in the town of Brockville, in the county of Leeds, seized in execution by the Sheriff of the United Counties of Leeds and Grenville, under several writs of *fieri facias*, all dated the 26th March, 1913, and issued out of the Supreme Court of Ontario and the County Court of the United Counties of Leeds and Grenville, directed to the said Sheriff for the having in execution of a judgment of the said Supreme Court of Ontario recovered by the said Allen Soper in an action at his suit against George Pulos, of a judgment of the County Court of the United Counties of Leeds and Grenville recovered by the said Allen Soper in an action at his suit against the said George Pulos and Nicholas Leras, and of a judgment of the said County Court of the United Counties of Leeds and Grenville recovered by the said Abbott Grant & Co. in an action at their suit against the said George Pulos and Nicholas Leras, are the goods of the plaintiffs as against the defendants; the said Pulos and Leras and the said Pulos having made an assignment of all their goods, chattels, property, and effects to the plaintiffs, for the benefit of their creditors, in pursuance of the Act respecting Assignments and Preferences by Insolvent Persons.

Judgment was given in favour of the assignees. A preliminary motion in one of the actions out of which the present issue arose is reported *sub nom. Soper* v. *Pulos*, 10 D.L.R. 848, 4 O. W.N. 1258.

B. N. Davis and *M. M. Brown*, for the plaintiffs.
J. A. Hutcheson, K.C., for the defendants.
C. C. Fulford, for the Sheriff.

Meredith, C.J.C.P.

June 24. MEREDITH, C.J.C.P.:—The difficulties of this case are not solved, but indeed are accentuated, by the ruling, and the expressions of opinion, in *Henderson's* case (*Re Henderson Roller Bearings Limited* (1910-11), 22 O.L.R. 306, 24 O.L.R. 356; *Martin* v. *Fowler* (1912), 6 D.L.R. 243, 46 Can. S.C.R. 119).

In that case the facts were different in some very substantial respects from those of this case. It would have been a hard case if the assignee had succeeded. As I remember the facts, the active spirit in the assignment which was made and in the cause which failed in all the Courts, was a creditor who throughout opposed the judgment creditors, and resorted to the assignment proceedings only after all other attempts to withhold the property from the creditors had failed.

This case is one of an assignment made in good faith for the purposes of putting all creditors on an equal footing.

In *Henderson's* case the assignment was not made until after

failure on the interpleader issue, as well as in all other expedients to defeat creditors.

In this case the assignment was made soon after the interpleader order was made, and some time before the interpleader issue came on for trial; and quite without any inconsistent conduct on the part of those who seek to share in the proceeds of the insolvent estate.

If the ruling in *Henderson's* case had been in favour of the assignee, that case would have been conclusive of this case: no such question as that which has now to be solved could reasonably have arisen: the assignment would, as the one enactment plainly provides, have taken precedence over the executions, which are, of course, the foundation of the execution creditors' rights—take the executions away and what is left of their claims?

But the judgment in that case—the final judgment, I mean, of course—affords no means of determining at what stage in the proceedings upon the executions, or in the interpleader, the right of the execution creditors take precedence over the right of the assignee. In *Henderson's* case there had been judgment in the interpleader issue in favour of the execution creditors; and there are some indications, in some of the opinions of the Judges, that their rights arose out of that fact; but there is no decision upon the point, the decision in truth creates the difficulty; and I have no right to shelter myself behind anything but that which was decided in that, or in any other, case; and so the duty falls upon me to lay down, for the first time, the point of beginning of the rights of execution creditors, under the 6th section of the Creditors' Relief Act, over the rights of an assignee, under the 14th section of the Assignments and Preferences Act.*

*Sub-sections (4), (5), and (6) of sec. 6 of the Creditors' Relief Act, 9 Edw. VII. ch 48, are as follows:—

(4) Where proceedings are taken by a Sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute *pro ratâ* in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates.

(5) The Judge making the interpleader order may direct that one creditor shall have the carriage of the interpleader proceedings on behalf of all creditors interested, and the costs thereof, as between solicitor and client, shall be a first charge upon the money or goods which may be found by the proceedings to be applicable upon the executions or certificates.

(6) Upon any interpleader application the Judge may allow to other creditors who desire to take part in the contest, a reasonable time in which to place their executions or certificates in the Sheriff's hands, upon such terms as to costs and otherwise as may be deemed just.

Sub-section (1) of sec. 12 of the Assignments and Preferences Act, 10 Edw. VII. ch. 64, is as follows:—

12.—(1) Except as in this section is otherwise provided, the assignee shall have the exclusive right of suing for the rescission of agreements,

ONT.

S. C.
1913

SYKES
v.
SOPER.

Meredith,
C.J.C.P.

Some things bearing upon the question can hardly be controverted; the Legislature, in passing these enactments, was sailing as close to the wind of an insolvency or bankruptcy law as it was deemed it lawfully might, "bankruptcy and insolvency" being expressly excluded from its legislative powers. It, therefore, omitted the most prominent features of such a law, compulsory bankruptcy or insolvency and a discharge of the bankrupt or insolvent from his debts; but, in case of a voluntary assignment, applied to it substantially all the features of the federal Insolvent Act which had been in force for a good many years but had been repealed; and, in cases in which a voluntary assignment could not be obtained, provided for something in the nature of a distribution of a bankrupt's or insolvent's estate through the proceeding in the Sheriff's office, as set out in the Creditors' Relief Act. There were the two cases to be dealt with: the one that in which a voluntary assignment could be obtained, and to which, short of a discharge of the debtor, in all substantial matters, the estate was brought under the repealed insolvent laws, the very words of those repealed laws being largely employed; and the other, that in which no assignment could be procured, and so a special method of giving equality between creditors had to be devised.

And so it seemed to me that once the assignment was obtained, once there was a person duly empowered to deal with all the estate of the insolvent, it was right and proper, and intended by the Legislature, that the assignee alone should wind up the estate, superseding the Sheriff and putting an end not only to two windings-up of the one estate, with substantially two assignees, but also putting an end to the cost and formality of proceedings in the Sheriff's office or otherwise in the Courts. That it was only when an assignment could not be obtained that the much more cumbersome methods of the Creditors' Relief Act should continue—a sort of necessary evil. And so full effect might be given to each enactment without modifying the language of either—the Creditors' Relief Act necessary, and given full effect to, where no assignment was procured; the other Act taking effect the moment the assignment was made. And, that being so, and the spirit of the enactment being equality among creditors—as near to bankruptcy or insolvency as possible—and

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deeds and instruments or other transactions made or entered into in fraud of creditors, or in violation of this Act.

Section 14 of the same Act is as follows:—

14. An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the Sheriff's hands or to the lien, if any, for his costs of the creditor who has the first execution in the Sheriff's hands.

being bound by the expressed injunction of the Legislature to treat these enactments as remedial, and to give to them such fair, large, and liberal construction as would best ensure the attainment of the objects of the Acts according to their true intent, meaning, and spirit,I had no difficulty in reaching the conclusion that the words "shall take precedence of executions not completely executed by payment" should be given their liberal meaning. How erroneous that opinion must have been appears from the fact that not one of the other Judges who expressed an opinion in *Henderson's* case was of the like opinion. And yet these things must not be lost sight of in dealing with this, or with any other, case arising under the enactment.

The right of the execution creditors in *Henderson's* case was finally rested upon the 6th section of the Creditors' Relief Act; when then does the 4th sub-section of that section come into play so as to override the 14th section of the Assignments and Preferences Act? One answer must be, after a judgment in their favour in the interpleader; because *Henderson's* case says so. But does it at any earlier stage?

My answer must be, no. And I am led to that conclusion from the following considerations, in addition to those I have already mentioned pointing that way. The purpose of the enactment is equality among creditors; to do away, largely, with the advantages of having the first execution or indeed any execution. The benefits of the 4th sub-section are not for the first execution nor for any execution; any creditor may come in under sub-sec. 6, if allowed by the Judge, and time may be given to enable them to place executions, or certificates, the equivalent of executions, in the Sheriff's hands. So that it seems to me to be quite plain that until judgment in the interpleader issue, at all events, no execution creditor has a right which excludes any other creditors; the purpose of the enactment, equality among creditors, yet holds good and may be given effect to. Then, that being so, an assignment is made under which the assignee represents all creditors alike; and, acting for those who are not yet barred, asks for equal rights for them, rights which, if they could apply for them themselves, would doubtless be granted. Again, under the 12th section of the Assignments and Preferences Act, the right to attack the chattel mortgage in question is exclusively that of the assignee; he insists upon that exclusive right; and that question has not yet been tried at the instance of execution creditors and determined in their favour, as it had been in *Henderson's* case. On what ground can his right, under this section, to prosecute the issue as to the validity, against creditors of the chattel mortgagee in question, be denied; indeed, how can that issue be duly tried in his absence? All these things lead me irresistibly to the con-

ONT.
S. C.
1913
SYKES
v.
SOPER.
Meredith, C.J.C.P.

clusion that execution creditors' rights against an assignee, under the ruling in *Henderson's* case, cannot arise, at all events, until they have judgment in their favour in the interpleader, or in some other binding way.

Something was said about "salvage;" but we are not dealing with mere equitable rights, or even mere common law rights; we are dealing with plain words of recent enactments, and must give effect to them, not to that which might be the law if we were at liberty to make it to fit each case according to our individual notions. But is the word "salvage" applicable to such a claim as the execution creditors make? My notion of salvage is, a reward for success in perils undertaken: when the reward might well be the costs incurred—upon a liberal scale—and so generally a small share of the thing saved; I could hardly call grabbing and retaining the whole thing, salvage; from the point of view where equality among creditors prevails it might perhaps better be described as "piratage" or "brigandage."

Nor can I see anything in the other points so much urged in the argument before me. The obvious fact that the mortgage, if made in fraud of creditors, is in a sense not void but voidable, can surely make no difference. But it may be needful to point out that it is voidable, not void, in this sense, and only, because of the necessity, in almost all cases, that the creditor must reach out his hand to take the benefit of the law, must do some action shewing an election, as it were, to avoid it. It is not the judgment of any Court that makes the transaction void; it is the enactment or the common law; the transaction is absolutely void because of the fraud; the Courts do but find the fact and give judgment accordingly. It may be that in most cases litigation is necessary or advisable; but none the less a Sheriff, or other person having authority, may take the property as that of the fraudulent debtor; he needs no authorisation of any Court. If sued for trespass or in trover he must succeed if the plaintiff's case depends upon a transaction vitiated by fraud on creditors. It is true that the 12th section of the Assignments and Preferences Act mentions only the right of suing; but, assuredly, if the assignee can obtain possession of the fraudulently transferred property in any other lawful way, he may take it and deal with it as part of the estate assigned to him.

As I pointed out in *Henderson's* case, the assignee there—one of the Judges of the Supreme Court of Canada mistook the reference to the assignee for a reference to a creditor—had never had an opportunity of joining in the contest as to the validity of the transfer attacked in the interpleader issue; in this case the assignees have the opportunity, and desire, to exercise their exclusive right to attack it; and that right must, I think, be given to them and exercised in their favour.

ONT.

S. C.
1913

I must find the issue joined in favour of the assignees, who should also have their costs, from the other parties to the issue, throughout.

Judgment for plaintiffs.

Annotation—Assignments for creditors (§ III B—20)—Rights and powers of assignee.

Annotation

Rights and powers of assignee

Where an assignment has been made under the provisions of the Assignments and Preferences Act, 10 Edw. VII. (Ont.) ch. 64, R.S.O. 1914, ch. 134, there is a special provision of that statute giving the assignment priority over pending executions and analogous process for recovery by creditors out of the assignor's estate. The title of the statute is "An Act respecting Assignments and Preferences by insolvent persons," and while lacking any process for involuntary assignment, and not being in strictness an insolvency law, its general effect and purpose is to distribute *pro rata* the assets of insolvents who execute voluntary assignments of their whole estates for the general benefit of their creditors.

Section 14 of the Assignments Act is as follows:—

"An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment, and orders appointing receivers by way of equitable execution, subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands."

As shewn by the report of *Soper* v. *Pulos*, 10 D.L.R. 848, out of which the present case of *Sykes* v. *Soper* arises, the interpleader order on the contest between the chattel mortgagee and the seizing execution creditor, had contained the usual clause for participation by other execution creditors in the benefits of the contest raised by the sheriff's interpleader. Such a clause is commonly worded as follows:—

"And it is further ordered that any other execution creditors desiring to take part in the contest of the said issue shall be at liberty to do so upon placing their executions against the goods of the defendant in the hands of the said sheriff within . . . days from this date, and upon notifying within the same time the solicitors for . . . (*an execution creditor*) (who shall have the conduct of the said issue for all execution creditors taking part in it) of their desire to come in and of their agreement to contribute *pro rata* to the expense of the said contest according to the statute in that behalf."

The effect of the decision in *Sykes* v. *Soper* is that under the ordinary interpleader order, although containing a clause for participation by other creditors in terms of the Creditors' Relief Act, 9 Edw. VII. (Ont.) ch. 48, R.S.O. 1914, ch. 81, the original attacking creditor as well as others who may come in and contribute to the expense of attacking an invalid chattel mortgage, are subject to be displaced by a statutory assignment for benefit of creditors made on the eve of the final disposition of the case which they have made out.

Sub-sec. 5 of sec. 6 of the Creditors' Relief Act, permits the inclusion in the interpleader order (*i.e.*, the order directing an issue to be tried) of

ONT.

Annotation

Rights and powers of assignee

Annotation (*continued*)—Assignments for creditors (§ III B—20)—Rights and powers of assignee.

a direction that one creditor shall have the carriage of the proceedings for the attacking creditors, in which event the costs "as between solicitor and client" of the interpleader proceedings conducted by the creditor so selected, shall be a first charge upon "the money or goods which may be found *by the proceedings* to be *applicable* upon the executions" (or certificates). If, however, the creditors' rights are entirely superseded by the claim of the assignee for benefit of creditors and the assignee appointed *pendente lite* intervenes in the interpleader issue and obtains a judgment establishing his claim, there would appear to be some doubt as to the applicability of sub-sec. 5. The goods seized would in that event not be found by the proceedings to be "applicable upon the executions." The same result would, of course, ensue if the creditors abandoned their attack upon the assignment being made. In effect, the creditors properly joining to attack a fraudulent chattel mortgage under the Creditors' Relief Act are compelled to merge their interests with the body of creditors acting conjointly under the Assignments for Creditors Act under the name and authority of the assignee for creditors, and this takes place at the will of the debtor himself whose fraud is the subject of attack. It may be that sub-sec. 5 is not all comprehensive on the control of costs, and that, apart from the statute, the general body of creditors acting through the assignee may be compelled, even if unwilling to do so, to reimburse their costs to those of the creditors who had instituted the attack in interpleader against an adverse claim, when the assignee takes over the benefit of their proceedings. The time limited under sub-sec. 6 of sec. 6 (Creditors' Relief Act, 9 Edw. VII. ch. 48) for other creditors to come in will be effective only so long as the Creditors' Relief Act continues to govern the contest and the distribution of the proceeds. And if the debtor assigns, a creditor who had failed to come in under sub-secs. 4 to 6 and contribute *pro rata* to the expense of contesting a chattel mortgage, may share in the benefits taken over by the assignee for creditors generally. It seems probable that he could share in the assignment proceedings although formally barred as an execution creditor on declining to assist in the interpleader.

The case of *Pulos* v. *Soper*, 4 O.W.N. 1559, which was the trial of the interpleader with the chattel mortgagee came on for hearing before Meredith, C.J.C.P. after the decision in *Sykes* v. *Soper*, above reported, and an order was made making the assignee a party thereto and giving judgment in his favour on the issue, but payment out of the estate of the executio. creditors' costs was made a condition precedent to his intervention.

As said by Meredith, C.J.C.P., in *Sykes* v. *Soper*, reported *supra*, the execution creditors' rights against an assignee cannot arise "until they have judgment in their favour in the interpleader or in some other binding way." The latter part of the quotation seems to imply a reservation of opinion as to possible contingencies not present in the *Sykes* case. This raises a question whether it is possible in any other way and upon any other contingency arising under a sheriff's interpleader, to so segregate and charge the proceeds in favour of attacking creditors in advance of the final determination of the issue even as against an assignee for creditors. Circumstances of that kind are more likely to arise where the goods seized

Annotation (*continued*)—Assignments for creditors (§ III B—20)—Rights and powers of assignee. ONT.

Annotation

Rights and powers of assignee

have been sold and the proceeds paid into Court. A usual form of preliminary order is that the question of costs and all further questions be reserved to be disposed of at the trial of the issue. But if this form leaves an opportunity to the debtor by his voluntary assignment to change the creditor's rights, and if it be possible for the attacking creditors under another form of order to acquire in advance (as by some provisional declaration in the interpleader order), rights which would not be subject to the Assignments Act, it may be expected that a variation from the usual order will be attempted by some such means as ordering, that in the event of the creditors' success in the issue, the fund in Court should be charged with the amount of the contesting creditors' claims, in an effort by creditors to gain a title or lien which would not be subject to be abrogated by sec. 14 of the Assignments and Preferences Act, 10 Edw. VII. (Ont.) ch. 64. See the decision in *Doctor* v. *Peoples' Trust Co.* (B.C.), 14 D.L.R. 451, ante.

GRAHAM v. "THE E. MAYFIELD."

CAN.

Ex. C. 1913

Exchequer Court of Canada (Nova Scotia Admiralty District). Drysdale, L.J. March 24, 1913.

1. SHIPPING (§ III—10)—DEPRIVING VESSEL OF BERTH AT DOCK—LIABILITY FOR RESULTING INJURY.

Where, while the plaintiff was warping a boat into a berth at a dock with lines fastened to the dock, those in charge of the defendant vessel, knowing of the plaintiff's intention, so manœuvred their boat, with the aid of its auxiliary power, as to take possession of the berth and exclude the plaintiff's boat therefrom, so that the latter was compelled to lie in a dangerous position in a stream, and on the ebbing of the tide, fell over and was wrecked, the defendant boat is answerable in damages; the taking of the berth away from the plaintiff's vessel under the circumstances, was an unreasonable exercise of the right of navigation.

Statement

ACTION for damages against a ship for loss arising from improper navigation.

The evidence for the plaintiff was that the plaintiff's vessel, the "Stella Maud," and the defendant ship both loaded coal at Parrsboro, N.S., for F. W. Dimock at Windsor, N.S., both intended to discharge at Dimock's wharf at the latter place, and it was agreed that which arrived at the latter wharf first would have the berth at the wharf. Both left Parrsboro about the same time, but the "Stella Maud" arrived at Windsor about six o'clock in the evening, about half an hour ahead of the "E. Mayfield." When the "Stella Maud" arrived abreast of Dimock's wharf, she began to pay out her anchor, but it did not take hold of the bottom quickly and went past the wharf, striking the next wharf, Shand's, carrying away her jibboom. A four-inch line was then put on the cleat on the face of Dimock's wharf and another smaller line was put to Shand's wharf. They then started to raise the anchor and haul her into Dimock's wharf and while

CAN.
Ex. C.
1913
GRAHAM
v.
"THE MAYFIELD."
Statement

doing so the "E. Mayfield" came up, being propelled by gasoline, and went into Dimock's wharf and took the berth. The plaintiff called to the captain of the "E. Mayfield" and told him that he had his line first on Dimock's wharf, but the latter ship did not give him the berth but remained there.

As the tide was then high and the wind blowing on the wharves, the "Stella Maud," which had sails only, was compelled to take the berth at Shand's wharf. They were only able to get her into five feet of the wharf, and she was made fast there. The captain made enquiries and learning that it was a mud bottom, did not list his vessel on the wharf. The tide here has a fall of about twenty feet and when it is out there is only a small stream in the centre of the Avon river, the decline from the berth in front of the wharf being very steep. When the tide fell, the "Stella Maud" fell over into the centre of the river and became a total wreck.

The defendant's evidence was that when the "E. Mayfield" arrived at Dimock's wharf, the plaintiff's vessel was anchored at Shand's wharf. They also when putting their lines on Dimock's wharf, searched with a lantern for lines from the "Stella Maud" to that wharf but could find none.

J. L. Ralston, and *V. B. Fullerton*, for plaintiff.
H. Mellish, K.C., for the "E. Mayfield."

Drysdale, L.J.

DRYSDALE, L.J. :—The action here is based on the navigation of the defendant ship in an unreasonable manner to the injury of the plaintiff's vessel, the "Stella Maud," whilst both vessels were using the navigable river Avon.

It seems both vessels were coal-laden and bound up said river, consigned to Dimock, a coal dealer at Windsor, in Hants County, and both were making for a wharf in the Port of Windsor known as Dimock's wharf. It is very clear that a navigable river is a public highway, navigable by all His Majesty's subjects in a reasonable manner and for a reasonable purpose. This right, however, must be exercised in a reasonable manner, since each person has a right with every other person to its enjoyment and the enjoyment of it by one necessarily to a certain extent interferes with its exercise by another, and what constitutes reasonable use depends on the circumstances of each particular case. The plaintiff's vessel it seems was sailing up the river and to the knowledge of those in charge of the defendant ship, bound for Dimock's wharf. The plaintiff's vessel was using sail only, whilst defendant vessel has auxiliary power. The plaintiff's vessel was leading with the right of way and made for the wharf mentioned, where a safe berth at the end of the wharf was awaiting the first arrival. In trying to make the berth, the plaintiff failed to drop his anchor quite in time and brought up in front of the next wharf up river,

known as Shand's wharf. The plaintiff then promptly took steps to warp his vessel, the "Stella Maud," into Dimock's wharf, or rather into the berth arranged for vessels at the outer end of such wharf.

The charge against the defendant ship is that whilst plaintiff was in the act of docking his vessel or warping her into the berth mentioned, the defendant vessel, by the aid of its auxiliary power, unreasonably and improperly interfered with the plaintiff's ship whilst in the act of docking, and by the aid of its said power slipped past the plaintiff's vessel into the berth that plaintiff had almost reached and into which by the aid of a line then already fastened to said Dimock's wharf, the plaintiff was actually in the act of taking; that by such a manœuvre the defendant unreasonably and improperly crowded the plaintiff's vessel out of her intended berth and compelled her to remain in a dangerous place, where, owing to the ebbing of the tide, she suffered damage. After having given the extended notes in this case full consideration, I feel obliged to make the following findings:—

The plaintiff with his vessel the "Stella Maud" was, to the knowledge of those navigating the defendant vessel, in the act of warping into the Dimock berth at the time the defendant vessel, by the aid of its auxiliary power, slipped by and took possession of the berth.

That when the defendant vessel and those in charge decided on and put into execution the manœuvre that enabled the "E. Mayfield" to take the berth, the defendant vessel's master well knew he was preventing the plaintiff's vessel from completing a manœuvre that would in a then very short time have given the "Stella Maud" the berth.

I find that when the defendant vessel attempted its manœuvre to take the berth, the master of the "E. Mayfield" had full notice that the "Stella Maud," by the aid of a bow-line then fastened to Dimock's wharf, was in the act of docking at that wharf and that the act of taking the bed on the part of the "E. Mayfield" was deliberately performed for the purpose of first acquiring the berth, notwithstanding the first arrival of the "Stella Maud" in the immediate vicinity, and notwithstanding the fact that the "Stella Maud" was then engaged in warping or in endeavouring to warp in.

It was argued that the "Stella Maud" had grounded in front of Shand's wharf and could not be warped in as intended, but I have no doubt that in a short time, viz., at high tide, the warping in would have been completed had it not been for the act of the "E. Mayfield."

I think I am obliged to hold under these findings that those in charge of the "E. Mayfield" were unreasonably exercising the right of navigation on the occasion in question, and to the prejudice and injury of the "Stella Maud." I think also the injury

CAN.

EX. C. 1913

GRAHAM v. "THE MAYFIELD."

Drysdale, L.J.

suffered by the "Stella Maud" as a consequence of what I must regard as unreasonable navigation, was directly due to defendant's acts found above. It was urged that the injury suffered by the "Stella Maud" was caused by her own neglect of reasonable precautions at Shand's wharf, but I think the evidence does not establish this contention.

I will either assess the damages myself after hearing the parties, or adopt the usual way of assessing damages in this Court by a reference to the registrar, assisted by two merchants, as counsel may desire.

Judgment accordingly.

ALTA.

S. C. 1913

DOMINION BANK v. MARKHAM CO. Ltd.

Alberta Supreme Court, Stuart, J. November 19, 1913.

1. CHATTEL MORTGAGE (§ V—51)—ASSIGNMENT BY DEPOSIT—MORTGAGEE WITH LEGAL TITLE.

The chattel mortgagee to whom the legal title has been transferred by the terms of the chattel mortgage may effectually create an equitable mortgage by deposit of the documents evidencing the title so acquired which will be given effect as against execution creditors of the mortgagor in a case in which the registration laws do not apply and in which the rights of the mortgagor are not affected.

[*Jones* v. *Twohey*, 1 A.L.R. 267; *Bonin* v. *Robertson*, 2 Terr. L.R. 21, referred to.]

2. BANKS (§ VIII A—167)—SECURITY—DEPOSIT OF CHATTEL MORTGAGES HELD BY BORROWER.

Where, as collateral to advances, the borrower has deposited with a bank a chattel mortgage made by another in his favour with a verbal agreement with the bank manager that the same should be held as security, the bank does not lose its lien by parting with the deposited document of title for the purpose of allowing the borrower to proceed upon same and realize his claim.

[*Ex parte Morgan*, 12 Ves. 6, applied.]

Statement

TRIAL of an interpleader issue in which the claimants, the Dominion Bank and John Bradley were plaintiffs, as against execution or attaching creditors of one McDougal.

G. B. Henwood, for the Dominion Bank.

G. E. Winkler, for Bradley.

C. C. McCaul, K.C., and *G. L. Valens*, for Markham Co. and other execution creditors of C. McDougal.

C. A. Grant, K.C., for Revillon Wholesale Ltd., execution creditors of Bradley.

Stuart, J.

STUART, J.:—This is an interpleader issue. On June 10, 1913, upon the application of the sheriff of the Edmonton judicial district, the Master made an order in a number of actions in which C. C. Markham Co. Ltd., and others were execution or attaching creditors and one Charles McDougal was execution

debtor, and in another action in which Revillon Wholesale Ltd. were execution creditors and John Bradley was execution debtor, which order directed an issue to be tried in which the Dominion Bank and John Bradley should be plaintiffs and the execution and attaching creditors other than Bradley should be defendants. The order directed further, that the issue to be tried should be, whether at the time of the seizure by the sheriff, the goods and chattels seized, or any of them, were the property of the claimants, that is, the Dominion Bank and John Bradley, as against the execution and attaching creditors, or any of them, and that on the trial of such issue it should be open to the execution and attaching creditors or any of them to contest the validity of any securities held by the Dominion Bank or John Bradley as against the creditors generally or the judgment execution or attaching creditors, or any of them. By a further order made October 1, 1913, by Mr. Justice Beck, one James A. MacKinnon, the assignee for the benefit of creditors of Charles McDougal was added as a party defendant in the issue and the plaintiffs in the issue were directed to prove their claim as against the said assignee as well. This latter order directed the issue to be "amended accordingly." The order of the Master, however, did not direct the preparation of the issue, and no formal issue was in fact ever prepared. The case came on for trial before me simply upon the two orders mentioned, which, as I pointed out at the trial, is an objectionable practice, inasmuch as it conduces to confusion rather than to clearness with regard to the position of the parties. I have had reason on several previous occasions to observe that solicitors seem to be forgetting the well-established practice in interpleader which was based upon good reasons and should, I think, be still adhered to.

The peculiar position in which Revillon Wholesale Ltd. and Bradley stand will be made clear by a statement of the facts. These parties as well as the Dominion Bank were represented by different counsel, but one counsel appeared for all the execution creditors of McDougal. No one appeared at the trial for the assignee of McDougal.

On February 7, 1911, Charles McDougal gave a mortgage to the firm of Dutton and Timson, railway contractors of Winnipeg, to secure an indebtedness of $3,600. This mortgage was given in the Province of Saskatchewan where the horses and other chattels covered by it then were. McDougal himself was a railway contractor. He got into financial difficulties and his contracting outfit was seized by a sheriff. He appealed to Bradley, also a railway contractor, for assistance and Bradley advanced him $2,600 for the purpose of releasing the chattels. As security, Bradley took a second mortgage on the same chat-

ALTA.
S. C.
1913
DOMINION BANK v. MARKHAM CO.
Stuart, J.

tels as were covered by the mortgage to Dutton and Timson, which, as I understood the evidence, were also the chattels under seizure. Bradley borrowed the money to lend to McDougal from the Dominion Bank with whom he had a line of credit and to whom he was already indebted in a large amount, namely, about $50,000 or $60,000. Then in May, 1911, Bradley sold to McDougal some 18 horses and took from McDougal certain documents which were described as "lien notes," but which were not put in evidence. Counsel for the bank had in Court what he said were copies of these notes, but no witness could prove the copies or the contents of the originals and the originals had been lost. These copies, although left with the clerk and improperly bearing an exhibit stamp are not part of the record. In August, 1911, McDougal removed all the chattels covered by the mortgages as well as the horses purchased under the "lien notes" to Alberta. In November, 1911, Bradley paid off the mortgage to Dutton and Timson and took an assignment of it to himself.

Sometime in 1911, the exact date not being stated and not being mentioned, Bradley, while still indebted to the Dominion Bank deposited the two mortgages, the assignment and the "lien notes," with the bank in Saskatchewan as collateral security for his indebtedness.

In the fall of 1911 and the winter of 1911 and 1912, McDougal did some contracting and freighting in Alberta with his horses and general outfit for the Canadian Northern. In the spring and early summer of 1912 he did some freighting for Bradley, who also seems to have transferred his operations to Alberta, although he was still much in Saskatchewan.

In May or June, 1912, McDougal sold a half interest in his outfit to one Morrow and seems to have gone into partnership with him. Apparently, owing to some delinquencies of Morrow, McDougal and Morrow got into difficulties with Bradley and began an action against him for moneys earned.

In 1912 the Dominion Bank handed back to Bradley the mortgages and the lien notes, upon what terms it is difficult to decide because Tucker, the manager of the Brandon branch of the Dominion Bank, where the documents had been was not in charge there until May, 1912, and the documents, according to his evidence—he was the only officer of the bank who gave evidence—had been redelivered to Bradley before he took charge. Bradley said that the bank had sent the documents up to Edmonton but Mr. Dickson of the then firm of Robertson and Dickson who were acting for Bradley said that they had come from Bradley to them. Dickson said that the last time he saw the documents was when Morrow was in the office examining them. At any rate they were then lost and have never

been found. Copies of the mortgages and the assignment were available and were put in evidence.

Bradley had a bookkeeper named Phillips. On January 15, 1913, he executed a general power of attorney giving Phillips power, among other things, "to compound, compromise and accept part in satisfaction for the payment of the whole of any debt or sum of money payable to me or to grant an extension of time for the payment of same either with or without security or otherwise to act in respect of the same as to my said attorney shall appear most expedient."

Phillips seems to have come up to Alberta to look after Bradley's interests, and on February 22, 1913, McDougal gave a new chattel mortgage to Bradley. Bradley in the evidence denied that Phillips had any authority to take this chattel mortgage, but in view of the power of attorney, I think Phillips had authority to do what he did. This mortgage contained long recitals. It recited the mortgage to Dutton and Timson and the assignment of it. It recited certain conditional sale agreements apparently covering the horses mentioned in the lost "lien notes" and being identical, probably with those "lien notes." It recited that the mortgagor was indebted in further sums to the mortgagee, and that the mortgagor admitted an indebtedness of $15,000, and that in consideration of this indebtedness "and to settle a certain action pending in the Supreme Court wherein the mortgagor is plaintiff and the mortgagee defendant, the defendant has agreed to settle the said account with the mortgagor at and for the sum of $12,500 as the security of these presents and the mortgagor in consideration of the revision and reduction of the sum of $2,500 of the mortgagee's accounts has agreed to execute these presents." McDougal mortgaged again the horses and outfit which are stated in the mortgage to be "at or in the vicinity of Edmonton, on railway construction, and at or near mile 72 in British Columbia." Phillips took the affidavit of *bona fides* in respect of this mortgage as agent for Bradley and the mortgage was filed with the registration clerk on February 25, 1912.

The horses in question were brought into Edmonton on April 7, 1913. McDougal, by a document in writing over his signature, appointed one Patrick as his bailiff to take possession of all his horses and other chattels in Edmonton, "and upon collecting the same, to hand the whole of same, subject to my approval to John Bradley and his receipt for the same shall be your sufficient acquittance and discharge."

On April 8, Revillon Wholesale Ltd. issued a writ of execution against the goods of Bradley for the sum of $544.88.

On April 9, 1913, C. C. Markham Co. Limited, in a suit in which McDougal & Morrow were defendants, issued a writ of attachment against the goods of McDougal and on the same day

ALTA.

S. C.
1913

DOMINION BANK v. MARKHAM CO.

Stuart, J.

the sheriff's bailiff, one Third, acting under the Revillon execution and the Markham attachment, seized the horses in question at the railway freight sheds in Edmonton. Third said he found Bradley and one Creighton, in the freight office arranging for shipment and that McDougall was not there. He did not say what he heard Bradley say or how he knew he was arranging for shipment. Bradley swore that he told McDougal that he had better sign the authority to Patrick, but that he did not go into possession, that Patrick had taken possession for McDougal and that it was McDougal who was shipping the horses away to go to work. McDougal swore that at the date of the last mortgage of February 22, 1913, 24 out of the 54 horses were in British Columbia. McDougal did not say whether he had ever given his approval to Patrick's handing the horses over to Bradley and he was not asked. He did say that Bradley had taken two carloads of grading machines, tents, equipments and supplies and had moved them out but that the horses were caught by the writs.

On May 21, 1913, Markham & Co. having obtained judgment issued execution against the goods of McDougal for $638.52. On May 20, 1913, Hislop & Goodridge issued execution against the goods of McDougal for $266.63. On December 3, 1912, Neilson had issued execution against McDougal for $190.

It appears from the interpleader order that the sheriff obtained his summons asking the parties to interplead on April 22, 1913. The interpleader order was made on June 10. On July 10, McDougal assigned for the benefit of creditors to McKinnon.

It is quite evident from the evidence of McDougal himself and I so find that, on February 22, 1913, the date of the last mortgage, McDougal was insolvent. This finding, however, is not necessary to the decision I am about to give. It was admitted that the horses or at least some of them were covered by all the mortgages, and it is clear from the evidence of William W. Bradley that some 7 of the horses sold to McDougal and covered by the "lien notes" were among those seized.

I may say at once that the claim of Bradley and the bank so far as it rests upon the so-called "lien notes" cannot, in my opinion, succeed. The contents of these documents were never proven, and in the absence of any evidence in regard to their contents, I cannot assume from the mere use in evidence of the term "lien notes" that they had the effect of leaving the property in the horses in Bradley. Neither do I think the recitals in the mortgage of February 22, 1913, are sufficient to prove the contents of the documents referred to.

On the other hand I think it is quite clear from the evidence that Bradley did deposit the two mortgages and the assign-

ALTA.

S. C.
1913

DOMINION BANK v. MARKHAM CO.

Stuart, J.

ment with the Dominion Bank as security for his advances. This can be done by a mere deposit of the mortgages and by verbal arrangement. Bradley did indeed say that he had signed something to the effect that "the manager wrote up a piece that this is the property of the Dominion Bank and I signed it, but I do not think that the non-production of that writing is fatal. The probability is that it was an endorsement on the mortgage itself though of course no such endorsement appears on the copy produced. But taking Bradley's statement as it stands, I think it is obvious that the terms of the deposit were made verbally. I refer to 21 Hals. 79 to 83.

No question was raised as to the non-registration of the mortgages in Alberta, no doubt, on account of the well-known decisions in our own Courts, that this is unnecessary where the chattels were in another jurisdiction, when the mortgage was there signed and have since been brought to Alberta: *Jones* v. *Twohey*, 1 A.L.R. 267; *Bonin* v. *Robertson*, 2 Terr. L.R. 21.

The question of the circumstances under which the bank ceased to have possession of the mortgages is important.

Tucker's evidence cannot be accepted in its entirety because he was speaking of something that occurred before he assumed charge at Brandon. On the other hand, Bradley asserted that the bank sent the documents to Edmonton themselves. Dickson's evidence is also uncertain, but there can be no doubt of the original deposit, and in the absence of the clear evidence that the bank gave up all claim upon the documents, I think the Court ought to assume that whatever possession of them was given to Bradley, was given in order to allow him to proceed upon them and realize his claim. I do not think the bank thereby lost its lien: *Ex parte Morgan*, 12 Ves. Jr. 6, Hals., vol. 21, p. 82.

The bank's claim can only be to the amount of the account between the original mortgagor and the original mortgagee. The mortgage of February 22, and Bradley's evidence, shew that McDougal's debt to Bradley secured by the original mortgages had not been paid.

It was contended that the taking of the mortgage of February 22, 1913, had the effect of wiping out altogether the previous mortgages. But, however that may be as regards Bradley, I am unable to see how the bank's rights could be affected by that circumstance. It is not shewn that the bank either knew of or assented to that later mortgage or that at the time of their parting with possession of the original mortgages, the taking of the later mortgage was contemplated at all.

I think, therefore that the bank is entitled to succeed in so far as any of the horses seized are identical with horses covered by the mortgages but that the execution creditors of Mr. McDougal are entitled to succeed in so far as the horses sold

ALTA.
S. C.
1913
DOMINION BANK v. MARKHAM CO.
Stuart, J.

by Bradley to McDougal are concerned. Inasmuch as Bradley was not shewn to have any ownership in the horses sold to McDougal and inasmuch as I have held that as legal mortgagee of the other horses he had given an equitable mortgage to the bank which had not been revoked at the date of the seizure, I think Revillon Wholesale Ltd. are unable to establish any claim of any kind. If the bank had failed to uphold their claim under the original mortgages and that mortgage of February 22 had been held good, a question would have arisen whether Bradley had not gone into possession prior to the seizure so that the execution of Revillon Wholesale Ltd. would attach; but in the view I have taken of the matter it becomes unnecessary to deal with that question. Inasmuch as there has been a partial failure and partial success on each side, I think each party should bear his own costs, except that, if any party can shew that he was put to additional costs by the course taken by Revillon Wholesale Ltd., they are entitled to judgment against that firm for the amount of such additional costs. Inasmuch, however, as the seizure was made as much under the Markham writ of attachment as under Revillon's *fieri facias*, I think there will probably be no such additional expense shewn.

I think the sheriff's costs of the interpleader proceedings and the costs of possession should be divided proportionately to the value of the chattel mortgage horses and the so-called "lien notes" horses, included in the seizure and should rest upon the two classes of horses and be paid by the parties now found entitled to them in that proportion. I have, no doubt, from what was stated at the trial, that these costs and expenses can without much difficulty be adjusted and arrived at upon that basis.

Judgment accordingly.

ONT.
S. C.
1913

DAHL v. ST. PIERRE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Leitch, J. November 7, 1913.

[*Dahl v. St. Pierre*, 11 D.L.R. 775, 4 O.W.N. 1413, affirmed.]

SPECIFIC PERFORMANCE (§ I E 1—30)—*Contract for sale of land—Payments—Failure to make within stipulated time—Default—Waiver.*]—Appeal by the defendant from the judgment of Lennox, J., 11 D.L.R. 775, 4 O.W.N. 1413.

F. D. Davis, for the defendant.

M. K. Cowan, K.C., and *J. W. Pickup*, for the plaintiff.

THE COURT dismissed the appeal with costs, being of opinion that there had been a waiver of the condition that time should be of the essence of the contract.

PRESSICK v. CORDOVA MINES Ltd.

ONT.

S. C.
1913

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. November 10, 1913.

1. MASTER AND SERVANT (§ II B 4—160)—SERVANT'S ASSUMPTION OF RISKS —KNOWLEDGE OF DEFECT.

Where a mine proprietor leaves a winze in the mine unprotected, contrary to a statute requiring protection, and supplies the employee with a defective wrench to use in his work on a drill, by reason of which negligence and defect the employee fell down the winze and was killed, the employer's liability is not taken away by a finding that the employee might have avoided the accident by exercising more care in using the defective wrench, if there is no evidence that the employee knew the wrench to be defective.

[*Pressick* v. *Cordova Mines*, 11 D.L.R. 452, affirmed in the result on an equal division.]

2. MASTER AND SERVANT (§ II B 6—276)—ASSUMPTION OF RISKS—NEGLIGENCE OF FELLOW-SERVANT—COMMON EMPLOYMENT.

For the breach by the mining company of a statutory duty to guard an opening or shaft in a mine, which neglect was the cause of a mine employee falling down the opening, it is no defence that the failure to guard was due to the negligence of a fellow-servant in the course of their common employment.

[*Groves* v. *Wimborne*, [1898] 2 Q.B. 402, applied.]

Statement

APPEAL by the defendants from the judgment of Latchford, J., *Pressick* v. *Cordova Mines Ltd*, 11 D.L.R. 452, 4 O.W.N. 1334, upon the findings of a jury, in favour of the plaintiff.

The action was brought by the widow of John Arthur Pressick, deceased, on behalf of herself and the infant children of the deceased, for damages for the death of the deceased, who was killed by falling down a winze or shaft in the defendants' gold mine, in which he was working on a drill, under the orders of the defendants' foreman.

The questions put to the jury and their answers thereto were as follows:—

1. Was the death of the plaintiff's husband caused by any negligence on the part of the defendants? A. Yes.

2. If so, in what did such negligence consist? A. The opening through which the man Pressick fell should have been guarded or protected in some manner.

3. Was the accident caused by any defect in the works, ways, machinery, plant, or premises of the defendants? A. Yes.

4. If so, what was such defect? A. That wrench used was defective, also the opening being unguarded or unprotected.

5. Was the opening through which Pressick fell dangerous by reason of its depth? A. Yes.

6. Was it practicable to cover or guard that opening, having regard to the work of breaking down the pillar of ore on which Pressick was engaged at the time of the accident? A. Yes.

7. Could Pressick, had he exercised reasonable care and diligence, have avoided the accident? A. Yes.

ONT.

S. C.
1913

PRESSICK
v.
CORDOVA
MINES.

8. If so, in what did such negligence consist? A. Should have used more care in using a defective wrench.

9. What damages have the plaintiff and her children sustained by reason of the accident? A. $1,750.

Judgment was given for the plaintiff for that sum, and the defendants appealed.

The appeal was dismissed on an equal division of the Court.

H. E. Rose, K.C., and *J. K. Pickup*, for the defendants.
F. D. Kerr, for the plaintiff.

Mulock, C.J.

MULOCK, C.J., was of opinion that the place where the work was being carried on was a mine within the meaning of the Mining Act of Ontario, 1908, and that sec. 164 of that Act, as enacted by the Mining Amendment Act, 1912, sec. 18, sub-secs. 24 and 25, made it the duty of the defendants to guard the shaft or winze, and their failure to do so was a breach of a statutory duty; and, if failure to guard was the ultimate cause of the accident, then, irrespective of negligence of a fellow-workman, the defendants were liable: *Groves* v. *Lord Wimborne*, [1898] 2 Q. B. 402.

He was also of opinion that the jury's finding with regard to the wrench, in answer to question 4, could not, upon the evidence, be disturbed; and that the answers to questions 7 and 8 did not relieve the defendants of liability—having regard to the evidence and the charge they were meaningless; and there was no evidence that the deceased knew that the wrench was defective. The learned Chief Justice was, therefore, of opinion that the appeal should be dismissed with costs.

Riddell, J.

RIDDELL, J., was of opinion, that, if the jury meant by the answer to question 8 to find that the deceased knew that the wrench was defective, there was ample evidence upon which they might so find; and that, upon the finding of contributory negligence, the appeal should be allowed and the action should be dismissed, both with costs.

Sutherland, J.

SUTHERLAND, J., agreed with MULOCK, C.J.

Leitch, J.

LEITCH, J., agreed with RIDDELL, J.

THE COURT being equally divided, the appeal was dismissed, and with costs, the dissenting Judges withdrawing their judgment as to costs, and agreeing that the appeal should be dismissed with costs.

Appeal dismissed on equal division of Court.

GORDON v. GOWLING.

ONT.

S.C.
1913

Ontario Supreme Court (Appellate Division), Mulock, C.J. Ex., Riddell, Sutherland, and Leitch, JJ. November 15, 1913.

1. COSTS (§ I—2*d*)—ON SET-OFF OR COUNTERCLAIM—SCALE OF.

The costs of a counterclaim should be on the scale of the court in which the action is brought, unless otherwise ordered by the court. [*Foster* v. *Viegel*, 13 P.R. 133, followed.]

2. COSTS (§ I—2*c*)—ON APPEAL—CORRECTING ERROR WHICH MIGHT HAVE BEEN CORRECTED BELOW.

Costs of appeal will not be awarded an appellant who succeeds only in respect of an error which was a mere oversight in the judgment appealed from and which it could be assumed would have been corrected had application been made to the trial judge.

Statement

APPEAL by the plaintiff from the judgment of the County Court of the County of Welland dismissing an action for damages for failure to deliver hay according to agreement; and awarding the defendant $76 on his counterclaim for damages for refusal to accept hay shipped by the defendant to the plaintiff.

The judgment was varied.

F. W. Griffiths, for the plaintiff.

No one appeared for the defendant.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—The plaintiff brought his action in the County Court of the County of Welland, but failed, and now appeals.

The facts as found by the trial Judge are as follows. The defendant sold to the plaintiff all his timothy hay and lucerne (except what he needed for his own use) at $12 per ton f.o.b. The plaintiff was to have notified the defendant when he wanted the hay delivered, but failed to do so. Some 22¼ tons of lucerne were delivered to and received by the plaintiff, and a draft for $268 in payment therefor was accepted and paid. The plaintiff complained: (1) of non-delivery of the timothy; and (2) of the alleged failure of the lucerne delivered to fill the contract. At the trial the County Court Judge found, and rightly found, against the plaintiff, holding that he should have given notice of the time at which delivery was required of the timothy, and further that the lucerne delivered was such as was contracted for. So far as these findings were concerned, we dismissed the appeal on the hearing. But the plaintiff also complains on this appeal that the trial Judge did not take into consideration the payment by the plaintiff of $50 at the time of the purchase. The point is specifically taken in the notice of motion; and we must, therefore, examine the proceedings as best we may without the assistance of counsel to determine the fact. That $50 was paid by cheque enclosed in the letter of the

ONT.
S. C.
1913
GORDON v. GOWLING.
Riddell, J.

13th September, 1912, is quite clear; it is sworn to and not denied. The sight draft for payment of the lucerne was also paid before receipt of the lucerne. Therefore, all the goods received were paid for, and $50 more was paid by the plaintiff to the defendant.

The Court below gives $60, being "damages to the defendant for 30 tons" of timothy, i.e., damages for non-acceptance of timothy sold; and also for "$16 for damages with reference to the lucerne." This $16 is shewn by the reasons for judgment to be $2 per ton for 8 tons of lucerne sold to the plaintiff but not accepted. The $50 is not taken into consideration at all, as it should have been.

Accordingly, the damages awarded the defendant should be reduced by $50; and the judgment on the counterclaim will be for $26 in all, with costs on the County Court scale.

"The costs of a counterclaim should be on the scale of the Court in which the action is brought by the plaintiff, unless the Judge . . . makes a different order:" Court of Appeal in *Foster* v. *Viegel* (1889), 13 P.R. 133. The appeal should be allowed to that extent.

As to costs, we cannot give the defendant costs—he did not appear on the argument. There is a double reason why the plaintiff should not have costs—he succeeds only in part, and he should have applied to the trial Judge to correct what is a mere oversight. There will be no costs of appeal.

Judgment accordingly.

ALTA.
S. C.
1913

ANDERSON v. BUCKHAM et al.

Alberta Supreme Court, Simmons, J. October 15, 1913.

ACTION (§ II D—62)—*Union or choice of remedies—Joinder of defendants—Negligence action.*]—Appeal by plaintiff from the order of the Master in Chambers directing the plaintiff to elect against which of the defendants he would proceed.

W. J. Hanley, for plaintiff.
F. Craze, for defendants, *contra*.

Simmons, J.

SIMMONS, J., held that an employee engaged in building construction and suing both the contractor and sub-contractor for personal injuries alleged to have been caused by defendant's neglect to comply with the Building Trades Protection Act (1913), 4 Geo. V. (Alta.) ch. 14, secs. 7 and 8, will not be compelled on delivery of his statement of claim setting up those facts to elect against which of the defendants he will proceed.

Appeal allowed.

SLATER SHOE CO., Ltd. v. BURDETTE.

ALTA.

S. C.
1913

Alberta Supreme Court, Beck, J. November 25, 1913.

1. CORPORATIONS AND COMPANIES (§ VII C—376)—FOREIGN CORPORATIONS——UNREGISTERED EXTRA-PROVINCIAL COMPANIES—ACTIONS BY—REGISTRATION PENDENTE LITE.

That an action was begun by an extra-provincial company before being registered in accordance with sec. 10 of the Ordinance of 1903, ch. 14, 1st sess. (Alta.), declaring that no such company "while unregistered" shall be capable of "maintaining" any action in any court of the province, will not prevent the action being prosecuted to final judgment if the plaintiff was registered in compliance with the Act *pendente lite;* since it is only the "maintenance" and not the bringing or commencement of an action that is prohibited by the Act.

[*Blais* v. *Bankers Trust Corp.*, 14 D.L.R. 277; *Smith* v. *Western Canada Flour Mills Co.*, 3 A.L.R. 348; *Moon* v. *Durden*, 2 Ex. 22, 29; and *Re Jones*, L.R. 9 Eq. 63, specially referred to.]

Statement

ACTION brought by an extra-provincial company before, but in which judgment was rendered after, registration in compliance with sec. 10, ch. 14, of the Ordinance of 1903, 1st sess. (Alta.).

Judgment was given for the plaintiff.

Frank Ford, K.C., for plaintiff.
H. R. Milner, for defendant.

Beck, J.

BECK, J.:—This action, one upon a number of promissory notes, came on for trial before me to-day on admissions of fact which leave the sole question for decision the question whether the plaintiff, a "foreign" company, can succeed; it being admitted that at the commencement of the action the company was not registered under the Foreign Companies Ordinance (Ord. 1903, 1st sess., ch. 14, amended 1903, 2nd sess., ch. 19, Alberta, 1907, ch. 5, 1908, ch. 20, 1909, ch. 4, 1911-12, ch. 4, 1913, ch. 9), although it is admitted that the company has since become registered. Sec. 10 of the Ordinance, 1903, 1st sess., ch. 14, sec. 10, says:—

> Any foreign company required by this Ordinance to become registered shall not *while unregistered* be capable of *maintaining* any action or other proceeding in any Court in respect of any contract made in whole or in part in the Territories in the course of or in connection with business carried on without registration contrary to the provisions of sec. 3 hereof.

It is admitted that the notes sued on are contracts to which the section applies. I have no hesitation at all in deciding that the plaintiff is entitled to succeed. The word to be interpreted is "maintain," not "commence" or "bring." There must be something in existence before it can be maintained.

I accept the interpretation of the word "maintain" given by Platt, B., in *Moon* v. *Durden*, 2 Ex. 22, at p. 29, 12 Jur. 138.

ALTA.

S. C.
1913

SLATER SHOE CO. v. BURDETTE.

Beck, J.

The Legislature has used the word "maintained" alternatively (to the word "bring"). Are we to say it has no distinct meaning? *Dixit.* Are we to say *non voluit?* The verb "to maintain" in pleading has a distinct technical signification. It signifies to support what has already been brought into existence. Thus a defendant who admits the right of the plaintiff to bring, or to bring and up to the last pleading maintain, his action, but relies on matter, disabling him from further proceeding, insists that the plaintiff ought not, by reason of such matter, further "to maintain" his action. A plea in bar of the *further* maintenance of the action admits the plaintiff to have properly maintained it up to the time of such plea.

Though these words occur in a dissenting judgment they are not inconsistent with the point of the decision. This case is referred to in *Knight* v. *Lee*, [1893] 1 Q.B. 41. Again the words "while unregistered," even in the ordinance as it originally stood, have an application to the circumstance that the company, although once registered has ceased to remain registered (secs. 8 and 15), shewing that the word "maintain" has an application in its primary sense. I have been referred to cases in Ontario, Saskatchewan and British Columbia, but find them of but little assistance. The language of our own Court in *Smith* v. *Western Canada Flour Mills Co.*, 3 A.L.R. 348, seems to suggest that it would accept the interpretation of the section in question which I have given to it. *Re Jones*, L.R. 9 Eq. 63, is a decision much in line with the last-mentioned case.

I could not have come to any other conclusion than that which I have come to consistently with my own decision in *Blais* v. *Bankers Trust Corporation*, 14 D.L.R. 277, where I held that an action commenced in contravention of the Winding-up Act was not void, but only irregular. The plaintiff will have judgment for the amount claimed and costs.

Judgment for plaintiff.

ONT.

S. C.
1913

REX v. McELROY.

Ontario Supreme Court, Latchford, J. November 14, 1913.

1. CERTIORARI (§ I A—9)—INTOXICATING LIQUOR CASES—REFUSAL TO CREDIT CROSS-EXAMINATION AS AGAINST DEPOSITION IN CHIEF.

On a charge of unlawful sale of liquor it is for the magistrate to decide whether he will believe the evidence in chief, to the effect that the witness bought a bottle of whisky from the accused, or the evidence brought out on cross-examination of the same witness that he had given accused the money to buy the whiskey for him and that the accused had done so; and the fact that the magistrate gave credence to the former and not to the latter statement is not a ground for quashing a conviction on *certiorari*.

Statement

MOTION to quash a conviction of the defendant, made by the police magistrate for the town of Collingwood, for unlawfully selling liquor without a license.

ONT.

S. C.
1913

REX
v.
McELROY.

Latchford, J.

A. E. H. Creswicke, K.C., for the prisoner.
J. R. Cartwright, K.C., for the Crown.

LATCHFORD, J.:—A witness named McDonald deposed that he bought a bottle of whisky from McElroy, paying $1.25 for it. This is the only evidence of the purchase. On cross-examination McDonald put the matter in quite a different way. He said: "I gave $1.25 to McElroy to get me a bottle . . . He got the liquor."

It is contended on behalf of McElroy that the two statements must be taken together—the first as explained by the second—and, accordingly, that McElroy was but the agent or messenger of McDonald and not liable to conviction: *Rex* v. *Davis* (1912), 8 D.L.R. 1046, 4 O.W.N. 358.

Before the magistrate such an argument would, no doubt, have great force; and it might be effective before me were I sitting in appeal from his decision; but, as I have to be convinced, before I can quash the conviction, that there was no legal evidence of a sale, the contention fails. There was undoubtedly some evidence of a sale. The magistrate believed that evidence, and rejected all evidence to the contrary. He did not credit what the witness said on cross-examination, and accepted his evidence in chief—and that evidence warranted the conviction.

The motion must be dismissed with costs.

Motion refused.

LAVELL v. CANADIAN MINERAL RUBBER CO. Ltd.

ALTA.

S. C.
1913

Alberta Supreme Court, Beck, J. November 25, 1913.

1. CORPORATIONS AND COMPANIES (§ VII C—377)—EXTRA-PROVINCIAL COMPANIES—ACTIONS AGAINST—EFFECT OF WINDING-UP ORDER MADE BY COURT OF DOMICILE.

An action begun against an extra-provincial company after the making of a winding-up order by a court of the province in which it has its domicile will not be entertained without leave of such court, as the Winding-up Act, R.S.C. 1906, ch. 144, sec. 22, prohibits the commencement of or proceeding with suits against a company after the making of a winding-up order except with the leave of the court and subject to such terms as the court making the order may impose.

[*Blais* v. *Bankers' Trusts Corporation*, 14 D.L.R. 277, followed.]

2. CORPORATIONS AND COMPANIES (§ VII C—377)—EXTRA-PROVINCIAL COMPANIES—ACTIONS AGAINST—AFTER WINDING-UP ORDER BY COURT OF DOMICILE—STAYING PROCEEDINGS.

An action commenced against an extra-provincial company after the making of a winding-up order by a court of its domicile is irregular, and, under sec. 22 of R.S.C. 1906, ch. 144, prohibiting the commencement of, or proceeding with, an action against such company after the making of such order without the leave and direction of

ALTA.

S. C.
1913

LAVELL
v.
CANADIAN
MINERAL
RUBBER CO.

the court making it, the action will be stayed until leave to proceed can be obtained.

[*Blais* v. *Bankers' Trusts Corporation*, 14 D.L.R. 277, followed.]

3. CORPORATIONS AND COMPANIES (§ VII C—377)—EXTRA-PROVINCIAL COMPANIES—GARNISHMENT AFTER WINDING-UP ORDER.

A garnishee summons issued in another province than that of the debtor company's domicile will be set aside if it appears that the proceedings in which the garnishee summons was issued had been begun in contravention of the Winding-up Act after the date of the winding-up order against the company made in the province in which it had its head office and without leave of the court in that jurisdiction.

Statement

MOTION to set aside the writ and a garnishee summons in an action against an extra-provincial company after the making of a winding-up order by a Court of its domicile, under the Winding-up Act, R.S.C. 1906, ch. 144.

Lavell, plaintiff in person.
S. W. Field, for defendant.

Beck, J.

BECK, J.:—This is an action of debt. It was commenced on October 13, 1913. On the same day a garnishee summons was issued against the city of Calgary, and was served upon the garnishee on October 14.

This is a motion on the part of the defendant to set aside the writ of summons and the service thereof and the garnishee summons or in the alternative to stay the proceedings until such time as the Supreme Court of Ontario has given leave to the plaintiff to proceed with this action and to set aside the garnishee summons. The ground of the motion is that on September 19, 1913, a winding-up order was made by the Supreme Court of Ontario under the Winding-up Act (R.S.C. 1906, ch. 144, and amending Acts), against the defendant company; and that the garnishee, the city of Calgary, had set up that any moneys due or to accrue due by the city to the defendants must be paid under the above-mentioned order to the National Trust Company of Toronto, the liquidator appointed by the Supreme Court of Ontario by order of October 30, 1913, of which notice had been given to the garnishee.

Following my own decision in *Blais* v. *Bankers' Trusts Corporation*, 14 D.L.R. 277, I think I should stay the proceedings in this action. Further, I think I should declare the garnishee summons ineffective to attach the moneys owing by the garnishee to the defendant company and consequently should set it aside.

I refer to Dicey's Conflict of Laws, 2nd ed., ch. XI., rule 70, pp. 339 *et seq.*, on the effect of an English winding-up order and rule 180, pp. 655 *et seq.*, as to the administration of a bankrupt's estate.

There will, therefore, be an order staying the proceedings in the action unless and until leave be obtained from the Sup-

ALTA.

S. C.
1913

LAVELL
v.
CANADIAN
MINERAL
RUBBER CO.

Beck, J.

reme Court of Ontario and an order setting aside the garnishee summons.

As the plaintiff seems to have had no notice of the winding-up proceedings when commencing the action and issuing the garnishee summons, I not only do not give costs against him, but think that if he establishes his claim in the winding-up proceedings, he should be permitted to add to his claim all costs incurred in this action, and, therefore, hoping it may be effective, the order will include an order that, in the event of the plaintiff establishing his claim to any extent, the defendant company do pay the plaintiff's costs of this action including the costs of the present motion.

There will be a stay of proceedings of five days to permit of the plaintiff deciding whether he wishes to appeal from this order. If, within that time, he decides to do so I will make such an order as will enable him to have his appeal heard at the next sittings of the Court *en banc* at Calgary.

Proceedings stayed.

JEWELL v. DORAN.

ONT.

S. C.
1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Magee, and Hodgins, JJ.A., and Sutherland, J. November 21, 1913.

[*Jewell* v. *Doran*, 12 D.L.R. 839, varied.]

TROVER (§ II—25)—*Conversion of chattels—Return or payment of value—Reference—Effect of recovery.*]—Appeal by the plaintiff from the judgment of Britton, J., in *Jewell* v. *Doran*, 12 D.L.R. 839, 4 O.W.N. 1581.

W. M. Douglas, K.C., for the plaintiff.
G. H. Kilmer, K.C., for the defendants.

THE COURT varied the judgment of Britton, J., by striking out the second, third, and fourth paragraphs thereof, and in lieu thereof declaring that the defendants wrongfully converted to their own use the chattels, furniture, etc., enumerated in the lease, except such articles as were missing at the date of the lease; directing a reference to the Local Master at Sault Ste. Marie to inquire, ascertain, and report as directed in the judgment; and requiring the defendants to pay the amount found due and interest from the 31st December, 1911, and the costs of the action and appeal. Judgment not to be enforced against the defendant Mackie. Further directions and subsequent costs reserved.

B. C.

C. A.
1913

BECK v. GUTHRIE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, J.J.A. November 4, 1913.

1. MASTER AND SERVANT (§ II A 3—50)—LIABILITY OF MASTER TO SERVANT—DUTY TO WARN OR INSTRUCT—AS TO EXPLOSION OF BLAST—FAILURE TO HEAR WARNING.

The fact that an employee was injured as the result of his failure to hear a warning of a fellow-servant that a blast was about to be exploded, will not impose any liability on an employer where the method of warning was that employed by others engaged in similar work.

2. MASTER AND SERVANT (§ II B 4—160)—SERVANT'S ASSUMPTION OF RISK—KNOWLEDGE OF DEFECT OR DANGER—BLASTING.

The risk of injury from a premature explosion is assumed by an employee, who, without protest, works for six weeks loading holes for blasting, in proximity to other holes that, preparatory to loading, were being "sprung" or enlarged by exploding a small quantity of powder in them, with knowledge that the concussion therefrom was liable to discharge the powder in the hole he was charging.

[*Smith* v. *Baker*, [1891] A.C. 325, considered.]

Statement

APPEAL by the plaintiff from a judgment dismissing an action for injuries sustained by an employee.

The appeal was dismissed.

McTaggart, for appellant, plaintiff.

S. S. Taylor, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The learned trial Judge withdrew the case from the jury and dismissed the action on the ground that no evidence fit to be submitted to a jury had been adduced by the plaintiff of negligence on the defendant's part. The whole point in the case (as was admitted by Mr. Taylor in his argument at the trial, see p. 87) is as to whether or not the work was being done under a negligent system.

There were two operations being carried on concurrently, one called "springing" a hole and the other "loading" it for the purpose of the main blasting operation. The plaintiff defines springing a hole as "blasting the bottom of a hole wider to make room for more powder." This may not be very clear, but whatever it is, it appears to be a preliminary to the final operation of loading a hole and setting off a main blast. What happened here was that while the plaintiff was performing, or assisting in performing, the final loading of a hole, the preliminary operation of springing other holes was being carried on in close proximity to him. An explosion in this springing operation caused the blast at the hole where the plaintiff was working to go off, thus injuring him. In his pleadings and particulars the plaintiff alleges defective system "in that loading holes were being prepared at the time when spring holes were being fired." I think there is evidence to sustain that allegation. There was evidence that this system of putting off blasts was not in vogue elsewhere, and that it was unnecessarily dangerous.

Then again the plaintiff claims that the system of giving warning to those engaged as he was, was a negligent one.

No person was specially charged with the duty of giving warning, the practice was for the workman who happened to be nearest to the battery which fired the charges to call out to his fellow-workmen some sort of warning. I think it was for the jury to say whether or not the system of carrying out the work was negligent, having regard to the dangerous mode of loading holes while other holes were being fired, coupled with the system of warning to which I have adverted. In view of the fact that in my opinion there should be a new trial, I shall not say anything further with regard to this phase of the case.

While the question of *volens* was not raised in argument at the trial, nor referred to by the learned Judge, it was raised in the statement of defence and in the argument in appeal, and hence it ought to be considered, because, if on the evidence it is quite clear that the jury could come to no other proper conclusion than that the plaintiff voluntarily agreed to accept the risk in the sense in which that term is understood in this class of case, it would be idle and unjust to both parties to send the case back for a new trial. The plaintiff is a young Finlander of twenty years of age. He had been engaged on and off for three years as a labourer in employment similar to that with the defendants. He admits that he knew that in springing holes in close proximity to loaded holes there was a danger of the loaded hole being affected. If his evidence be taken literally it amounts to this: that he knew the system was a dangerous one and made no complaint but continued to work on notwithstanding. Could a jury properly say that this youth—apparently unable even to converse with the foreman, except possibly in very broken English—appreciated in fact the exceptional risk to which he was being subjected, not only by springing holes in the manner followed here, but by failure to safeguard the men where that exceptionally dangerous mode of conducting the work was being pursued by an adequate system of warning. After a careful consideration of the oft-quoted authorities on the question, I have come to the conclusion, but not without some doubt, that the opinion of the jury ought to have been taken.

I would allow the appeal and order a new trial, costs of the first trial to abide the result of the new trial, and the costs of this appeal to go to the appellant.

IRVING, J.A.:—I would dismiss this appeal. The particular thing that caused the action was the failure of the plaintiff to hear the warning (if given) or, if not given, it was the neglect of a fellow-servant. The plaintiff, according to his own evidence, was not only *sciens* but *volens*, in that he undertook the risk of a particular thing as part of his business, and if the jury had found

Irving, J.A.

B. C.
C. A.
1913
BECK
v.
GUTHRIE.
Irving, J.A.

that he was not *volens*, I would be prepared to say that it was against the evidence, and against the weight of evidence. Therefore, I think the Judge under such circumstances was justified in refusing to allow the case to go to the jury. We have had our attention called to a statement in Beven on Negligence, 3rd ed., pp. 634, 635, that since the decision of *Smith* v. *Baker*, [1891] A.C. 325, *volens* is never withdrawn from the jury. Nevertheless, in *Smith* v. *Baker*, [1891] A.C. 325, there are expressions used which shew that a Judge would be justified in withdrawing it under certain circumstances. In particular, Lord Herschell at p. 360. In that case the defendants wished to push their argument too far. They said that the mere continuance in service with knowledge of the risk precluded the employed from recovering damages, and that plaintiff having admitted these facts ought to be nonsuited. In this case the evidence of *volens* goes much further.

When an injured man testifies that the defendants used the same method of warning that other contractors used in warning workmen when they are blasting, and the only thing that he complains of in his particular case is that he did not get or hear the warning, and says that he understands the work, that he knew it was dangerous work, and he knew that if while he was working loading a hole, as he was in this case, and a hole was sprung, there was danger of the hole at which he was working being fired by concussion, and that they had been carrying on this system of work in which he was engaged for six weeks and there was no protest, that man, in my opinion, must be held to have voluntarily undertaken the risk.

Galliher, J.A.

GALLIHER, J.A., concurred with IRVING, J.A.

Appeal dismissed.

MAN.
K. B.
1913

WATSON v. CADWALLADER.

Manitoba King's Bench, Galt, J. November 14, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEAT—MORTGAGEE OF INTEREST UNDER PURCHASE CONTRACT.

Where the interests of transferees of rights under a land purchase agreement are disclosed in a caveat filed under the Real Property Act, R.S.M. 1902, ch. 148, by a subsequent assignee thereof to whom such transferees had assigned their interests as security for advances, the vendor in an action to declare the original purchaser in default and to forfeit and rescind the right of purchase, must do more than make the original purchaser and such caveator parties by original action; he must join the intermediate transferees who would according to the caveat have equities against the caveator so that claims for relief over can be made between the defendants in the same action.

2. PARTIES (§ II A 8—105)—DEFENDANTS—PROPER AND NECESSARY PARTIES—CASES AS TO REAL ESTATE—ADDING IN MASTER'S OFFICE.

The Manitoba rules of practice as to adding parties in the Master's office are confined to cases where neither any accounting nor any direct

relief is sought against the parties to be added and in which the question of relief to the added parties themselves (beyond what is claimed by the plaintiff) cannot arise. (Dictum, per Galt, J.)

[*Campbell* v. *Imperial Loan Co.*, 15 Man. L.R. 614, specially referred to.]

MOTION for judgment in a vendor's action to foreclose under a land purchase agreement.

The motion was dismissed with leave to add other parties.

A. W. Morley, for plaintiff.

W. W. Kennedy, and *F. C. Kennedy*, for defendant Bray.

A. C. Ferguson, for other parties.

GALT, J. :—This is a motion for judgment pursuant to an order made by the Referee. Both defendants oppose the motion. The action is brought by the plaintiff as vendor against the defendant Cadwallader as purchaser, and Herdis Bray as assignee of an interest in the land. Galt, J.

The plaintiff states in his statement of claim that the defendant Bray claims to have an nterest in the said lands and has filed a caveat under the Real Property Act, R.S.M. 1902, ch. 148, against the said lands in the land titles office for the district of Winnipeg, which said caveat appears on the register of the said land titles office against the said lands as No. 70022, and claims to hold said interest by, through or under, the defendant Cadwallader.

The plaintiff claims payment by the defendant Cadwallader, and in default, that the defendants may be foreclosed.

The defendant Bray, in her statement of defence, sets up that by agreement in writing and under seal, bearing date April 26, 1911, the defendant Cadwallader sold the land above described to James D. McIntosh and Herbert W. Burdick, of Winnipeg, for the sum of $4,500 payable as in the said agreement set out, and the defendant Bray says that the said James D. McIntosh and Herbert W. Burdick should be made parties to this action.

The defendant Bray further says that she advanced large sums of money to the said Herbert W. Burdick upon the security of the interest of the said Burdick in the said lands, and that by agreement under seal said Burdick assigned to the defendant Bray, all his interest in the lands hereinbefore described as security for said indebtedness and that such indebtedness is still outstanding to the extent of $1,150 and interest.

The statement of claim was issued on August 21, 1913.

It would appear from the above statement of facts that the interests of McIntosh and Burdick accrued prior to the commencement of this action, and it was admitted by counsel that their interests appeared on the caveat filed by the defendant Bray.

Under such circumstances it appears to me that these parties, McIntosh and Burdick, should have been made original defendants

MAN.

K. B. 1913

WATSON v. CADWALLADER.

Galt, J.

to the statement of claim and should have been given an opportunity of claiming relief over, if necessary, against the plaintiff or defendants, as they might be advised.

It was suggested by counsel for the plaintiff that these parties might be added in the Master's office, but no direct relief can be had against parties added in the Master's office and they cannot be required to account. It would also seem that they cannot themselves get any relief against co-defendants beyond what is claimed by the plaintiff. See *Holmested & Langton*, Judicature Act, 3rd ed., 866, 867. See also *Campbell* v. *Imperial Loan Co.*, 15 Man. L.R. 614, and *Sveinsson* v. *Jenkins*, 21 Man. L.R. 746.

For this reason I must decline to finally dispose of this action by entering final judgment against the defendant Bray, and must dismiss this motion, with leave to the plaintiff to add McIntosh and Burdick as parties defendant, and take such further proceedings as they may be advised.

The motion will be dismissed with costs to defendant Bray in any event.

Leave to amend.

N. B.

S. C. 1913

J. B. SNOWBALL CO. LTD. v. SULLIVAN.

New Brunswick Supreme Court, Barker, C.J. October 21, 1913.

1. INJUNCTION (§ III A—160)—AGREEMENT TO POSTPONE INTERIM INJUNCTION HEARING—NECESSITY FOR FORMAL CONTINUANCE BY COURT UNDER THE CONSENT.

Where an injunction order restraining the defendant in his disposal of certain property is made *ex parte* for a period ending on a certain day and hour, or "until such time as any motion to be on that day made to continue it should be heard and disposed of," such order will not be held in the absence of any direction by the court for its continuance, to extend the injunction period "until a date to be agreed upon by both parties," merely because of an agreement between counsel for their convenience to that effect, and the injunction will be strictly construed to expire with the original injunction period.

[*Bolton* v. *London School Board*, 7 Ch.D. 766 at 771; *McCuaig* v. *Conmee*, 19 P.R. (Ont.) 45, referred to.]

2. INJUNCTION (§ III A—139)—PROCEDURE—DELAY IN APPLYING FOR FORMAL ORDER.

An application to commit the defendant for contempt of court based on an alleged breach of an interim injunction order will be refused where there has been a delay of several months after the order was made before any formal order was applied for or taken out. (Dictum per Barker, C.J.)

[*James* v. *Downes*, 18 Ves. 522, 34 Eng. R. 415, applied.]

3. INJUNCTION (§ I A—6)—TITLE IN DISPUTE—EFFECT OF INJUNCTION PROCEEDINGS, HOW LIMITED.

Where, in a pending action between the plaintiff and the defendant involving title to certain property, an injunction order is made restraining the defendant in his disposal of such property and subsequently a motion to commit the defendant for contempt of court based on an alleged breach of the order is launched, the question of contempt is one between the offender and the court and ordinarily has no legal effect upon the rights of the litigants in their issue as to title in the original action. (Dictum *per* Barker, C.J.)

4. CONTEMPT (§ II A—16)—PROCEDURE—IN WHOSE NAME PROSECUTED.

Commitment for disobedience of an injunction restraining the defendant in his disposal of certain property is to be based on a wilful disregard of the order itself, and is a question between the offender and the court, limited so strictly to the actual order that no agreement between counsel for the parties can be read into it to support a commitment not within the strict terms of the order.

5. CONTEMPT (§ II A—23)—PROCEDURE—ONUS ON PROSECUTION—BREACH OF COURT ORDER.

Upon an application to commit the defendant for contempt of court based on an alleged breach of an injunction order, the onus is on the applicant to prove such breach beyond all reasonable doubt.

Statement

APPLICATION by the plaintiff for an order of committal against the defendant Daniel Sullivan and his agents and co-defendants William M. Sullivan and Linton Tingley, based on an alleged breach of an injunction order.

The application was refused.

L. J. Tweedie, K.C., for plaintiffs.

W. H. Harrison, for defendant Daniel Sullivan.

H. A. Powell, K.C., for respondents William M. Sullivan and Linton Tingley.

Barker, C.J.

BARKER, C.J. :—This is an application on the part of the plaintiff for an order of commitment of the defendant Daniel Sullivan and of William M. Sullivan and Linton Tingley, two of the defendant's agents or workmen for an alleged breach of an injunction order made in the case granted by McKeown, J., on July 17, 1912. The order was made *ex parte* and restrained the defendant, his servants, workmen and agents, until the 20th day of August then next (1912) at eleven o'clock in the forenoon or until such time as any motion to be on that day made to continue the injunction should be heard and disposed of, from selling, disposing of or delivering to any person other than the plaintiffs any of the logs cut by or for the defendant during the seasons of 1910, 1911 and 1912, from or off certain Crown lands which had been transferred to the defendant by the Honourable J. B. Snowball in 1895. This order was served on the defendant on August 20, 1912, and notice of it was given to Tingley in August, 1913, a year after the injunction was granted. This action was commenced on July 5, 1912, and an appearance entered. It would appear that some negotiations have been going on with a view to a settlement, and, in consequence of that, or for some other reason, no further steps have been taken except making this application. The dispute between the parties arises out of an agreement, made in December, 1895, between the late Hon. J. B. Snowball and the defendant, by which the defendant agreed for a term of twenty-five years to cut and deliver to Snowball a certain quantity of logs to be cut on lands under licenses from the Crown and at the time assigned to the defendant as part of the arrangement and

N. B.

S. C.
1913

SNOWBALL CO. LTD. v. SULLIVAN.

Barker, C.J.

also to sell and deliver to Snowball all the merchantable lumber sawn by the defendant at his mill at Red Bank.

The first and important question is, has there been a breach of the injunction? Unless the breach can be proved beyond all reasonable doubt, no Court would think of committing the defendant for a contempt. Assuming that the parties have been guilty of acts which in the event of their having had notice of the injunction while it was in force would amount to a wilful disregard of it, the material question is, was the injunction in force when the acts relied on here were committed? The order of injunction only ran to August 20, 1912, at eleven o'clock a.m. or *until such time as any motion to be on that day made to continue it, should be heard and disposed of.* Although over a year has elapsed since August 20, 1912, no motion to continue it was made then or has been made since. The injunction was spent on August 20, 1912, so soon as the condition upon which the Court authorized its continuance beyond that date had been forfeited and not taken advantage of: *Bolton* v. *London School Board*, 7 Ch. D. 766 at 771; *McCuaig* v. *Conmee*, 19 P.R. (Ont.) 45.

In *James* v. *Downes*, 18 Ves. 522, 34 Eng. R. 415, the Court refused to commit for contempt, when the party was in Court, when the motion for injunction was made, but four months elapsed before the order was taken out. The plaintiff however contended that, as a result of what took place between the solicitors of the parties to the suit, the injunction order was kept alive. What took place is thus described by Mr. Lawlor, the plaintiff's solicitor, in his affidavit made on August 23, 1913, and used on this motion. He says (sec. 3):—

(Sec. 3.) That on the 12th day of August, 1912, I caused a notice of motion to be made to continue the injunction and in or about the 17th day of August served the said notice to continue the injunction on Allan A. Davidson, Esquire, solicitor for the defendant in this suit.

(Sec. 4.) That on account of business engagements of Mr. Davidson and myself, we agreed that the hearing of the motion to continue the injunction should be postponed to some future date when it would be convenient for both of us to be in attendance and accordingly, with the consent of Mr. Davidson, Messrs. Powell & Harrison were appointed agents for both of us to attend at the hearing on the 20th day of August, A.D. 1912, at St. John for the purpose of having the motion to continue the injunction postponed until a date to be agreed upon, and on the 21st day of August, A.D. 1912, I received a letter from Messrs. Powell & Harrison, a copy of which is as follows:—

St. John, N.B., August 25, 1912.

Dear Mr. Lawlor:—

To-day our Mr. Harrison made application in the Equity Court to have the hearing on the injunction postponed until a date to be agreed upon by both parties, the injunction to continue in the meantime. Let us know in ample time so as to arrange for the hearing with one of the Judges in the Chancery Division.

Powell & Harrison.

(Sec. 5.) That, no time being agreed upon when we could meet, on the 30th day of August, A.D. 1912, I received the affidavit of Wm. H. Sullivan made in this case and while acknowledging receipt of the same, I asked Mr. Davidson if he would be good enough to set a time that would suit him and his clients so that we could name a day that would be suitable to my clients at which the matter might be heard, to which on August 31st, I received a reply from A. A. Davidson saying he was writing Mr. Powell to arrange a day for the hearing.

This was in August, 1912. Nothing more was done until April 15, 1913, a period of nearly eight months, when the plaintiff made some offer to take some of the lumber and deposit the money in Court, and at the same time the plaintiff's solicitor called Mr. Davidson's attention to certain dealings with the lumber amounting as he alleged to a breach of the injunction. It seems quite impossible that what took place as I have described it from Mr. Lawlor's affidavit can be considered an extension of the injunction. At most it appears that the agreement between him and Mr. Davidson about which they wrote to Mr. Harrison, was simply that the hearing of the motion to continue the injunction should be postponed to suit their convenience. It is true that Mr. Harrison speaks of the injunction being continued "in the meantime," but according to his letter you must conclude, in order to meet the plaintiff's requirements, that the Judge to whom the application was made, continued the injunction "*until a date to be agreed upon by both parties*" a form of order which it seems to me, no Judge would ever adopt. Mr. Harrison, in his letter, does not say that any order was made at all. No formal order was ever taken out, and three times the period which was held to be a fatal delay in the case I have just cited, has elapsed here.

Commitment for disobedience to the Court's order is based on a wilful disregard of the order. It may not, and, in most cases, does not, in any way, affect the rights of the litigants. It is a question between the offender and the Court. No agreement of solicitors can be substituted for the Court's order. In the present case, I think the affidavits do not disclose anything more than the not uncommon agreement between counsel to delay motions to suit their convenience. There is no evidence of any attempt to continue the order merely by the consent of counsel, though I am disposed to think both parties thought the injunction was operative. This motion will be refused, but, under the peculiar circumstances, without costs.

Motion refused.

ONT.

S.C. 1913

HAGGERTY v. LATREILLE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. September 15, 1913.

1. WATERS (§ II A—66)—ACCESS TO WATER—TITLE EXTENDING TO RIVER BANK ONLY.

The owner of land fronting on a navigable river, where the river itself forms the boundary of the land as described in the conveyances and in the Crown grant, has a right of access to the river as a riparian proprietor even where the presumption of ownership *ad medium filum* is rebutted or does not apply.

[*Keewatin Power Co.* v. *Kenora*, 16 O.L.R. 184; and *Dixson* v. *Snetsinger*, 23 U.C.C.P. 235, considered.]

2. WATERS (§ I C 4—41)—RIGHT TO SHORE—UNAUTHORIZED CRIB WORK IN STREAM AS WRONG TO ADJOINING RIPARIAN PROPRIETOR.

The owner of land adjoining a navigable stream has a right of action for interference with his riparian rights against a person who without his license, and without any permission from the Crown owning the bed of the stream places and maintains immediately in front of and abutting plaintiff's land crib work and "made land," which interferes with plaintiff's right of access to the stream.

[*Lyon* v. *Fishmongers Co.*, 1 A.C. 662, applied.]

3. INJUNCTION (§ I A—4)—REFUSAL ON GROUND OF INCONVENIENCE TO DEFENDANT—REMEDY IN DAMAGES.

The court may decline to award a mandatory injunction for the removal of an obstruction to plaintiff's riparian rights where the plaintiff had sustained, and would sustain, a comparatively trifling injury as compared with which the defendant would be placed at a large expense to remove the obstruction which had remained in place for a number of years.

Statement

THIS was an action in the County Court of the United Counties of Stormont, Dundas, and Glengarry, for the recovery of land and for possession and for damages for trespass, tried before O'Reilly, Co.C.J., on the 20th and 21st December, 1912.

On the 18th February, 1913, the following judgment, in which the facts are stated, was delivered by the County Court Judge:—

The plaintiff claims to be the owner in fee of that certain parcel or tract of land and premises situate, lying, and being in the township of Charlottenburgh, in the county of Glengarry, and being composed of that part of lot number 11 in the 1st concession of that township which may be better known and described as follows: commencing at the north-west corner of that parcel of the said lot conveyed by the late David Summers to Andrew Summers by an indenture of bargain and sale, registered in the registry office for the county of Glengarry in book 4 for the said township of Charlottenburgh as number 1632, being a point on the south side of the King's highway distant from the east side of the said lot along the south side of the said highway forty-five feet, thence in a westerly direction along the south side of the said highway forty-one feet, thence south twenty-four degrees east to within thirty feet of the present

ONT.
S. C.
1913
HAGGERTY v. LATREILLE.
Statement

bank of the river St. Lawrence, thence in a westerly direction parallel to the said highway nine feet, thence south twenty-four degrees east to the river St. Lawrence, thence in an easterly direction along the said river St. Lawrence to the south-west corner of the said land so conveyed by the said David Summers to the said Andrew Summers as aforesaid, thence north twenty-four degrees west to the place of beginning, subject to the right of John S. Summers and his heirs to an easement for light, as mentioned in a deed from the said John S. Summers to the Rev. Hugh Cairns dated the 4th day of December, A.D. 1900.

The defendant Agnes Latreille is the owner in fee of a quarter of an acre of land lying immediately to the east of the land above-described. Both parcels of land are parts of the west half of lot number 11 in the 1st or front concession of the township of Charlottenburgh, and Agnes Latreille's parcel may be described as follows: commencing at the south-west corner of Mrs. Baker's lot, thence running north twenty-four degrees west to the south side of the King's highway, passing through the front of said lot, thence westward following the south side of the said highway forty-five feet, thence south twenty-four degrees east to the river St. Lawrence, and thence eastward following the bank of the said river to the place of beginning, containing one-quarter of an acre more or less.

The root of the title of both parties to their respective parcels of land is found in a Crown grant or patent to one Jacob Summers, his heirs and assigns forever, dated the 9th day of November, A.D. 1803, of all that parcel or tract of land situate in the township of Charlottenburgh, in the county of Glengarry, in the eastern district in the Province of Upper Canada, containing by admeasurement one hundred and seventeen acres, be the same more or less, being the west half of lot number 11 in the front concession of the said township of Charlottenburgh, together with all the woods and waters thereon lying and being, under the reservations, limitations, and conditions hereinafter expressed; which said one hundred and seventeen acres of land are butted and bounded or may be otherwise known as follows, that is to say: commencing in front upon the river St. Lawrence at the centre of the said lot, thence north twenty-four degrees west one hundred and twenty-four chains more or less to the allowance for road in rear of the said concession, thence south sixty-six degrees west nine chains fifty links more or less to the limit between lots numbers 11 and 12, thence south twenty-four degrees east to the river St. Lawrence, then easterly along the water's edge to the place of beginning.

The title to both parcels eventually came to be vested in one David Summers, who, on the 24th July, 1862, conveyed the quarter of an acre now owned by Agnes Latreille to his son

ONT.
S. C.
1913
HAGGERTY
v.
LATREILLE.
Statement

Andrew Summers, and by his will dated the 27th March, 1867, devised the parcel now owned by the plaintiff to his wife Jane Summers, who, on the 12th May, 1887, conveyed it to her son John S. Summers, a brother of Andrew Summers, who had owned the quarter of an acre now owned by Agnes Latreille, but who had conveyed it on the 14th September, 1871, to one Louis Haines, who on the 16th June, 1879, conveyed it to one Francis Sauvé, better known as "Frank Laplante." The defendant is a daughter of the said Frank Laplante, and in May, 1908, became owner of the quarter of an acre.

When David Summers owned the properties, the water's edge of the river St. Lawrence, which formed the southerly boundary line of both of them, was not where it now is. It was at a distance of thirty-five or forty feet south of the road which forms the northern boundary of the properties, on the plaintiff's parcel and probably about the same distance or less (being as little as twenty-five feet according to some witnesses) on the one-quarter acre now owned by the defendant Agnes Latreille.

Andrew Summers, according to the evidence of his brother John S. Summers, between the years 1861 and 1872 (and while he still owned the quarter acre), made land by filling in in front of his property, to a considerable distance south, into the river St. Lawrence.

In the summer of 1886, or twenty-six years ago last summer, the Dominion Government seems to have done dredging in the vicinity of the properties in question, and to have been willing to give away the earth obtained in the dredging operations.

Frank Laplante, who had then owned the quarter of an acre for some years, built crib-work in front of his property at a distance of about a hundred feet south of the said road and out in the river St. Lawrence, and filled it in with stones and with earth obtained from the dredging operations. This crib-work extended from a point about a hundred feet south of the highway in a northerly direction for about forty-eight feet, and a number of feet of it—exactly how many does not appear in evidence, but, it is said, twenty-three feet at the southerly end—are in front of the land owned by the plaintiff.

John S. Summers, who was not then the owner of the plaintiff's parcel, but acting no doubt for his mother, notified Laplante that he was coming too far west with his crib-work, but no notice was taken of this alleged warning, and nothing more was done about it. John S. Summers secured four scow-loads of the earth from the dredging operations and had them put in front of the land now owned by the plaintiff.

Laplante then appears to have built a carpenter shop for building boats in, and placed it on the west side of the crib-work about eighteen feet north of the south end of the crib.

John S. Summers swears that the boat-house, or rather carpenter shop, was erected before the outer crib-work, and that it projected over the water a distance of ten feet, or over the west line of Laplante's property, and encroached to that extent on his mother's property.

Perhaps this is the more correct statement in connection with the placing of the carpenter shop, and when it was done. John S. Summers impressed me very favourably when in the witness-box, and I am prepared to accept anything he has sworn to. John S. Summers acquired the parcel of land now owned by the plaintiff in 1887, and in that year he had a large quantity of stone drawn to the property, and in 1888 he filled in in front of his place with large logs and stone, until he had carried the made land in front of his property out on a line with the crib-work built by Laplante in 1886. In the course of the filling-in done by John S. Summers in 1888, he filled in under the carpenter shop erected by Laplante, and then notified the latter to remove the shop, but this Laplante did not do for some years afterwards, and it is evident that the removal of the carpenter shop was not in consequence of any notice.

The result is, that in front of both the properties in question there is made land in the river connected with the parcels originally owned by David Summers, which extends the depth of the properties seventy or eighty feet into the river.

This is without reference to the further extension on the Latreille place, on which there is now a boat-house and wharf.

The defendant's counsel raised some questions as to the plaintiff's title, owing to alleged defects in the paper title, and to the presence of a conventional line which, he alleged, existed between the two properties; but he informs me that, if I should come to the conclusion that the Crown grant to Jacob Summers of the one hundred and seventeen acres did not convey to him the ownership in the bed of the river St. Lawrence to the middle of the river in front of the hundred and seventeen acres, then the other questions affecting the title may be ignored.

The property in dispute is all on the made ground in the river in front of the plaintiff's parcel, and is said to be a plot on the crib-work having a depth running from the south to the north of forty-eight feet, and having a width on the south end of twenty-three feet and on the north end of twenty-two feet. This would leave quite a parcel of made ground between the plot in dispute and the plaintiff's property as it was before John S. Summers carried its frontage out into the river, as he says, a distance of from seventy-five to eighty feet.

The public have used the land in dispute, as far as passing over it is concerned, without restriction, for the past twenty-six years. That is, any one landing there from boats seemed free to

ONT.
S. C.
1913
HAGGERTY
v.
LATREILLE.
Statement

pass over it going to Summerstown. The inhabitants of Summerstown seemed free to pass over it when going to the river. The plaintiff swears that for over ten years he went over the disputed plot to draw water from the river, and that it was used by the public generally. Laplante for a great many years used it for a wood-yard, and for the past twenty years there has always been more or less wood on it.

Although the plaintiff only obtained title to the parcel he now owns in April last in his own right, he held it as one of the trustees of the Methodist Church from the 25th March, 1901, until he acquired it in his own right in 1912.

The plaintiff came to Summerstown, where these properties are, in the year 1893, when John S. Summers still owned the parcel now owned by the plaintiff, and the plaintiff swears that all the filling-in was then done in front of the plaintiff's parcel, except some filling-in that he himself did last fall.

In 1908 the defendant Napoleon Latreille, finding that the southerly ten feet of the crib-work at its west end had become dilapidated and overflowed with water, put in two new logs and filled up the ground over it, restoring it to its former condition.

No question of a natural receding of the water's edge of the river, or of natural accretion of land to the shore of the respective parcels of land owned by the plaintiff and Agnes Latreille, is involved in this case.

The former owners deliberately made land on the river-bed in front of their respective properties, and connected their properties with the made land, so that now they hold from two to three times as much land as their deeds cover, and the made land is in great part indistinguishable from the natural soil.

The plaintiff's contention is, that he owns not only to the original water's edge of the St. Lawrence river, but the soil in the bed of the stream for one mile out, *ad medium filum*.

The paper title of both parties originates from the grant from the Crown to Jacob Summers of one hundred and seventeen acres of land described by metes and bounds, and bounded on the south by the water's edge of the river St. Lawrence. The river in front of the hundred and seventeen acres is at least two miles wide, and the plaintiff's contention means, that when the Crown granted Jacob Summers one hundred and seventeen acres of land more or less running to the water's edge of the river St. Lawrence, it in fact conveyed to him over eighty additional acres of the bed of the river, running one mile south to the middle of the stream.

In this Province, since 1792, the law of England has been in force to the following effect, viz., that *primâ facie* the ownership of the soil forming the bed of a running stream, whether

navigable or not, belongs *ad medium filum* to the owner of the adjoining shore.

This presumption of law is a rebuttable one, as the late lamented Chief Justice Moss points out in the case of *Keewatin Power Co.* v. *Town of Kenora* (1908), 16 O.L.R. 184, at p. 190. He says further, on p. 192: "The rule of the common law as to the presumption of title in the beds of the streams, whether navigable or non-navigable, still prevails in this Province, and is to be applied in the first instance. Whether there exist circumstances or conditions sufficient to repel the presumption is a question to be dealt with in the particular case. I have already said that in the case of the Great Lakes and some of the rivers rebutting circumstances and conditions would not be far to seek." He there refers to what he had said on p. 190 as follows: "In this case we are not dealing with the Great Lakes nor with a river forming part of the international boundary. But in these circumstances the *primâ facie* presumption would probably be not difficult of rebuttal."

Mr. Justice Meredith, now Chief Justice of the Common Pleas, at pp. 199 and 200 of the same report, says, in speaking of a suggestion that a grant of a part of the shore of one of the Great Lakes might carry title to the middle of the lake: "Again, such a case is but a fanciful one, for, as every one knows, all the lands in this Province are surveyed into lots, generally farm lands of one hundred or two hundred acres, and are not only shewn upon plans of the survey, but are staked at their angles, and sold accordingly, and it is needless to say that these surveys and plans do not extend *ad medium filum*, nor are the stakes placed under the water. The land is invariably sold according to such surveys and plans, and this question can hardly, if at all, arise. If it could, could it possibly be held that a lot described as containing one hundred acres more or less, extending to the waters of the lake, conveyed not only one hundred acres, but possibly twenty-five square miles or sixteen thousand square acres? The same considerations apply, with more or less force, to the greater international rivers, and also, with precisely the same force, to the great inland bodies of water not international."

If the presumption does not apply to the St. Lawrence, or rather if it cannot be rebutted as regards the St. Lawrence, in what international river could it be rebutted?

The St. Lawrence is the greatest international river that we have in this Province.

True it is that the international boundary, which follows the course of the St. Lawrence downward for a great distance, veers to the south and leaves the course of the river at a point five or six miles above Summerstown, and that the mainland on the

ONT.
S. C.
1913
HAGGERTY
v.
LATREILLE.
Statement

other side of the river, opposite the parcels of land in question, is in the Province of Quebec; but I take it that the presumption must be deemed to be rebutted as regards the whole river, if rebutted at all, and cannot be deemed as rebutted just above where the international boundary veers south and to be applicable below that point.

In any event, even if the river St. Lawrence were not an international boundary river, I strongly believe that the mere fact that the river opposite the parcels in question is two miles wide is sufficient in itself to rebut the presumption.

In the result, I hold that the plaintiff has no paper title to any of the land south of what was the original water's edge of the river St. Lawrence.

At the hearing, the plaintiff's counsel was granted leave to amend the record by adding a claim to meet the event of his failing to establish his paper title. The claim is, that the built-up land in front of his property constitutes an obstruction cutting off the plaintiff from his free access to the river St. Lawrence, to which he is entitled as a riparian proprietor, and that the defendants accordingly should be ordered to remove such obstruction and restore the plaintiff to his proper position.

There is no doubt that the owner of the shore has a right to free access to the river. The plaintiff's counsel cites *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662, in support of that proposition. This case and a number of others of a like nature are to be found collected in *Merritt* v. *City of Toronto* (1911), 23 O.L.R. 365.

The plaintiff demands a mandatory injunction to compel the removal of all that portion of the crib-work and made land which lies in front of his property. The expense of doing this would be far in excess of the value of his property, but that in itself would be no sufficient answer to his demand.

The removal of this portion of the made land, speaking of the plot in dispute, if it were accomplished, would not put the plaintiff's property in the condition in which it originally was as regards the river. It would give him a slip about twenty-three feet wide and forty-eight feet long to made land in front of his property, the slip being bounded on the west by the plaintiff's own made land, and on the east by the made land of the defendants. If the defendants were ordered to remove the crib-work and made land in the plot, which has a width of about twenty-three feet at the river and extends north forty-eight feet, where it has a width of twenty-two feet, they would be ordered to remove the filling done there in 1888 by John S. Summers and his men. This is a considerable part of the whole filling. The carpenter shop was thirty feet long and stood lengthwise on the crib-work, and John S. Summers swears that he and his men

Statement

filled up with stones, etc., etc., under it along the length of it, for the ten feet that it projected over in front of his property—so that of the obstruction to be removed, being roughly forty-eight feet by twenty-three feet, John S. Summers (the plaintiff's predecessor in title) created thirty feet by ten feet, and the Court is asked to order the defendants to remove this from in front of the plaintiff's property. It has been there for about twenty-five years, or a quarter of a century. The plaintiff knew that it was there in 1893, twenty years ago. He did filling himself last fall, which, no doubt, would add to the difficulty of doing this work of removal, in case it should be ordered.

He (in common with the public generally) has used this means of access to the river for a number of years, but he now demands the aid of the Court to have it removed. I think that it is only necessary to state the facts to shew how impossible it would be for any Court to grant this demand.

Apart from the impossibility of granting the demand, I should think that, as far as the plaintiff is concerned, there would be an easement created after all these years in favour of those using this plot which is in dispute. Of course, as regards the Crown, no easement might be effective, but I should think that an easement might be set up as against this claim of the plaintiff.

I think that the plaintiff's action should be dismissed with costs.

The plaintiff appealed from the judgment of O'Reilly, Co. C.J.

Argument

G. A. Stiles, for the plaintiff:—The land in question, having been formed by deposit in the river St. Lawrence in front of the plaintiff's lot, belongs to the plaintiff. Where a grant of land is made bordering on a non-tidal river, whether navigable or not, the title in the bed, to the middle of the stream, is presumed to be in the riparian proprietor, and this presumption is not rebutted here: *Keewatin Power Co.* v. *Town of Kenora*, 16 O.L.R. 184, at p. 190. Land formed by gradual accretions in front of a water lot accrue to the owner of the lot: *Standly* v. *Perry* (1877), 2 A.R. 195; *Throop* v. *Cobourg and Peterborough R.W. Co.* (1856), 5 C.P. 509; *Buck* v. *Cobourg and Peterborough R.W. Co.* (1856), 5 C.P. 552; *Attorney-General* v. *Chambers* (1859), 4 De G. & J. 55; *Doe d. Seebkristo* v. *East India Co.* (1856), 10 Moo. P.C. 140; *In re Hull and Selby Railway* (1839), 5 M. & W. 327. In the alternative, I submit that the filling-in of the river in front of the plaintiff's lot is an interference with his riparian rights, and he is entitled to relief: *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; Coulson & Forbes' Law of Waters, 3rd ed., p.

ONT.
S. C.
1913
HAGGERTY
v.
LATREILLE.
Argument

110; *Stover* v. *Lavoia* (1906), 8 O.W.R. 398; *Warin* v. *London and Canadian Loan and Agency Co.* (1885), 7 O.R. 706, 12 A.R. 327; *S.C., sub nom. London and Canadian Loan and Agency Co.* v. *Warin* (1886), 14 S.C.R. 232; *Servos* v. *Stewart* (1907), 15 O.L.R. 216; *Ratté* v. *Booth* (1887), 14 A.R. 419; *S.C., sub nom. Booth* v. *Ratté* (1890), 15 App. Cas. 188; *Blair and Sumner* v. *Deakin* (1887), 57 L.T.R. 522.

C. H. Cline, for the defendants:—The title to the land in dispute is vested in the defendants by possession. The evidence shews that the plaintiff has been out of possession for twenty years, during which period the defendants have had exclusive possession: Banning's Limitation of Actions, 3rd ed., pp. 152, 153. The plaintiff does not own to the centre of the stream, the title to the bed of the St. Lawrence river above tide-water being vested in the Crown: *Dixson* v. *Snetsinger* (1873), 23 C.P. 235; *Point Abino Land Co.* v. *Michener* (1910), 2 O.W.N. 122; The Bed of Navigable Waters Act, 1 Geo. V. ch. 6 (O.)

Stiles, in reply.

Meredith, C.J.O.

September 15. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the United Counties of Stormont, Dundas, and Glengarry, dated the 19th day of February, 1913, which was directed to be entered by the Senior Judge, after the trial before him, sitting without a jury, on the 20th and 21st December, 1912.

The contest is as to the ownership of a small piece of land lying in front of a lot in the hamlet of Summerstown, belonging to the appellant, which was made by depositing earth and stone in the bed of the river St. Lawrence.

This land is claimed by the appellant as part of his lot, and is claimed by the respondents by length of possession, and the appellant claims in the alternative that the filling-in of the river in front of his lot constitutes an interference with his riparian rights, and he seeks a mandatory order for the removal of the earth and stone which have been deposited there.

The learned Judge found that the title to the *locus* in question was not in the appellant, but in the Crown; and that the *primâ facie* presumption which, according to the decision of this Court in *Keewatin Power Co.* v. *Town of Kenora*, 16 O.L.R. 184, exists, that in all non-tidal rivers, whether in fact navigable or non-navigable, the title to the alveus is in the riparian proprietor, was rebutted; and in that conclusion we agree.

That the bed of the river St. Lawrence above tide water is vested in the Crown was decided by the Court of Common Pleas in *Dixson* v. *Snetsinger*, 23 C.P. 235. How far, if at all, the rea-

soning on which this decision was based is in conflict with what was decided in the *Kenora* case it is unnecessary to inquire, as the same conclusion would have been reached on the ground that the *primâ facie* presumption I have mentioned was rebutted in the case of such a river as the St. Lawrence, as undoubtedly it would be in the case of the Great Lakes.

If there were any question as to the correctness of the view of the learned Judge of the County Court, it is removed by the Bed of Navigable Waters Act (1 Geo. V. ch. 6), which declares (sec. 2) that "where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed" of such a navigable body of water or stream "was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English common law."

There remains to be considered the question whether the appellant is entitled to any relief for the interference with his riparian rights by the filling-in of the river in front of his lot. That this filling-in was an interference with the property rights of the appellant is well settled: *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662; but, in view of the comparatively trifling injury which has been caused to the appellant and the very considerable expense that the respondents would be put to if a mandatory order were granted requiring them to remove the earth and stone, the case is not, we think, one in which such an order should be made, and the justice of the case will be met by awarding the appellant $5 as damages for the invasion of his rights, and the judgment of the Court below will be varied accordingly.

As the appellant has failed on the main ground on which his action was based, and has now succeeded on a ground that was not presented until the trial and that he was permitted to set up by amendment, there should be no costs to either party in the Court below or of this appeal.

Judgment below varied.

ONT.

S. C.

1913

Re KETCHESON and CANADIAN NORTHERN ONTARIO R. CO.

(Decision No. 2.)

Ontario Supreme Court, Hodgins, J.A., in Chambers. November 11, 1913.

1. APPEAL (§ II A—35)—SUPREME COURT OF CANADA—ALLOWING SECURITY—QUESTION OF COMPETENCY OF APPEAL.

Until the question is settled as to the right of appeal in Ontario to the Supreme Court of Canada from a decision of the Appellate Division of the Supreme Court of Ontario, varying an award on the compulsory taking of lands under the Railway Act of Canada, the proper practice is for the Ontario court to approve the security on the proposed appeal, leaving the parties to contest in the Supreme Court of Canada the jurisdiction of the latter court, in view of sec. 36 of the Supreme Court Act, R.S.C. 1906, ch. 139, and of sec. 209 of the Railway Act, R.S.C. 1906, ch. 37.

[*Townsend* v. *Northern Crown Bank*, 10 D.L.R. 652, 4 O.W.N. 1245, referred to.]

Statement

MOTION by the railway company for an order approving of the security on a proposed appeal to the Supreme Court of Canada from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, *Re Ketcheson and Canadian Northern Ontario R. Co.*, 13 D.L.R. 854, 5 O.W.N. 36.

Featherston Aylesworth, for the railway company.

E. D. Armour, K.C., for the claimants.

Hodgins, J.A.

HODGINS, J.A.:—If I were clear that no appeal lay, it would be my duty to refuse to approve of the security: see *Townsend* v. *Northern Crown Bank* (1913), 10 D.L.R. 652, 4 O.W.N. 1245. Appeals in cases of awards under the Railway Act, originating in other provinces, have reached the Supreme Court of Canada; but I am unable to find any instance from this Province. In the present state of the decisions, I do not think that I ought to prevent the appellants from testing their right to appeal, as they undertake to do, under Rule 1 of the Supreme Court, leaving that Court to decide the point involved.

Under sec. 209 of the Railway Act, R.S.C. 1906, ch. 37, an appeal from the award of the arbitrators may be taken to a Superior Court in Ontario. The appellants had no choice but to appeal to the Supreme Court of Ontario and having chosen a Divisional Court of the Appellate Division, are, therefore, saved from the difficulty pointed out in *Birely* v. *Toronto Hamilton and Buffalo R. Co.* (1898), 25 A.R. 88; *Ottawa Electric Co.* v. *Brennan* (1901), 31 Can. S.C.R. 311; *James Bay R. Co.* v. *Armstrong* (1907), 38 Can. S.C.R. 511.

But none of these cases seems to me to involve any negative of the proposition that an appeal lies, under sec. 36 of the present Supreme Court Act (Can.) to that Court, from the

highest Court of final resort, in any Province, where such Court is either a Court of appeal, or, if of original jurisdiction, is a Superior Court.

The right to revise, if necessary, the decision of the statutory appellate Court should exist, in view of the extensive power given to it "to decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction."

I, therefore, approve of the security.

Order accordingly.

ONT.
S. C.
1913
RE KETCHESON AND CANADIAN NORTHERN ONTARIO R. CO.

Re ATHENS HIGH SCHOOL BOARD.

ONT.
S. C.
1913

Ontario Supreme Court, Middleton, J. October 8, 1913.

1. SCHOOLS (§ IV—74)—SCHOOL TAXES—WHAT MAY BE INCLUDED—DEFICIT FROM PRECEDING YEAR.

A high school board may, in the absence of *mala fides* or any deliberate intention to postpone the debts incurred in one year to the next, include in the amount to be levied by a township corporation for school purposes for the ensuing year, the amount of a deficit arising from unforeseen contingencies during the preceding year, which was met with money borrowed by the board.

[*Re Toronto Public School Board and City of Toronto*, 2 O.L.R. 727, 4 O.L.R. 468, considered; *Attorney-General* v. *Corporation of Lichfield*, 17 L.J. Ch. 472; *Jones* v. *Johnson*, 5 Ex. 862, and *Haynes* v. *Copeland*, 18 U.C.C.P. 150, followed.]

Statement

MOTION by the High School Board for a mandamus to compel the township corporation to levy and collect its proportion of the amount required by the Board for the maintenance of the High School, in pursuance of a requisition made by the Board.

The motion was granted.

G. H. Kilmer, K.C., and *H. A. Stewart*, K.C., for the High School Board.

J. A. Hutcheson, K.C., for the township corporation.

Middleton, J.

October 8. MIDDLETON, J.:—The municipality has served notice consenting to an order directing it to levy and collect the amount mentioned in the requisition, save as to one item, namely, "deficit from last school year, $916.20." The argument was confined to the right of the School Board to compel payment of this item.

The duty of the School Board is defined by the High Schools Act, 9 Edw. VII. ch. 91, sec. 24. To it is intrusted the obligation of providing adequate education for the pupils, and appointing necessary teachers and officers; and, by sub-sec. (*h*), it is authorised to apply to the municipal council before the 1st August in each year "for such sums as the Board may require for the main-

ONT.
S. C.
1913
RE ATHENS HIGH SCHOOL BOARD
Middleton, J.

tenance of the school for the twelve months next following the date of such application."

The whole duty of administering school affairs is placed upon the School Board. Its sole source of income, apart from fees and legislative and county grants, is the sum to be contributed by the ratepayers through the municipal council; the scheme, put shortly, being to have all the rates levied and collected at the one time by the municipal council, although the administration of school affairs is left with the School Board. In the case of this particular school, the amount required last year turned out to be insufficient to meet the actual expenses of the school. This arose from the fact that the number of pupils was greater than had been foreseen, and it became necessary, in the opinion of the Board, to appoint an additional teacher. The municipality now takes the position that, the Board's expenditure having exceeded the estimate, there is no provision in the Municipal Act by which the Board can compel a levy for the excess. There is no room on the material to suggest *mala fides;* in fact, counsel expressly repudiated any such idea. The fault of the Board, if any, is, that it did not make an adequate allowance for unforeseen contingencies.

It would be a most serious reflection upon the legislation if, by any such reasoning, the ratepayers could be relieved from paying for services incurred on their behalf by their duly elected representatives; and it would be equally unfortunate if the failure of the Board to demand a sum sufficient to cover the necessary outgoings is to impose personal liability upon the members of the Board.

It is said, and truly said, that the policy of the Act is to require the expenditure of each year to be borne by the taxation of that year. This is true not only of school sections, but in respect to the whole municipal government; but it would scarcely be thought that the failure to levy adequate rates would constitute a defence to a municipality if sued by its creditors.

In *Re Toronto Public School Board and City of Toronto* (1901), 2 O.L.R. 727, a precisely similar question was raised, and Mr. Justice Street thought that the municipality was within its right in refusing to levy a sum necessary to enable the School Board to pay debts contracted in previous years. Upon appeal Chief Justice Meredith, delivering the judgment of the Divisional Court, thus deals with this question (2 O.L.R. at p. 751): "My learned brother Street decided that these payments do not form part of the expenses of the schools under the charge of the Board for the current year, and should not therefore have been included in the estimate; and with that view I agree. The Act makes no express provision for cases which must sometimes

occur, where it has become necessary, owing to too small an estimate having been made to cover the necessary expenses of the year, to incur liabilities beyond the amount provided for in the estimate of the year; and I desire to leave open, as far as I am concerned, until it comes up for decision, the question whether in such circumstances the Act may not be so construed as to justify the amount of the over-expenditure being treated as an expense of the following year, at all events where the payment has been made in that year; but, as far as the present case is concerned, I do not see how the Act can be interpreted so as to bring the expenditure in question within its terms."

This, I think, leaves the matter open for consideration upon the present appeal, as the Court of Appeal (1902), *Re Toronto Public School Board*, 4 O.L.R. 468, has said nothing upon this point.

A series of cases which appear to me to throw much light upon this problem was not cited in the *Toronto* case. While it is true that these cases, by reason of the difference of legislation, may not be, strictly speaking, conclusive, yet the principles indicated seem to govern.

In *Attorney-General* v. *Corporation of Lichfield* (1848), 17 L.J. Ch. 472, the Court refused an injunction to restrain the levying of a rate which included a balance with respect to expenditure during the previous year. The learned Lord Chancellor (Cottenham) points out: "If, then, it should turn out that the money raised by the rate was not applicable to antecedent debts, the corporate fund, so far as it existed, must be applied in payment of antecedent demands, and the money raised by the rate would be applicable to the demands of the year. In cases where corporate property existed, it would be a very idle case to discuss the question. The result would be the same; and there would only be a different mode of keeping the accounts." In other words, because the School Board has a debt, and the School Board has property which may be made available to meet the debt, the charge must ultimately be paid.

In the later case of *Jones* v. *Johnson* (1850), 5 Ex. 862, Pollock, C.B., after pointing out the difficulties arising from the construction contended for, says: "We ought, therefore, to give such effect to the words of the statute as will best meet the exigencies of the case. The Legislature has provided that the borough council is to make an estimate, if that can be done, for the purpose of providing prospectively for these expenses. It may, however, happen that this may not be possible, although made with all due care and fairness. It may be that the prospective estimate will fall short of the demand upon it, or persons may fail to pay their rates, or the rate may become unproductive

ONT.
S. C.
1913
RE ATHENS HIGH SCHOOL BOARD.
Middleton, J.

from some other cause. It is impossible for the council to guard against all such matters. It therefore appears to me that under such circumstances, if a rate is made prospectively, and it turns out to be inadequate to the occasion, and another rate is requisite, it is competent to the council to make it. But the question here is, whether this rate is prospective or retrospective; and I am of opinion that in point of fact it is prospective, for it was made *bonâ fide* and for the purpose of providing for payments which it was expected would become payable thereafter. I therefore think that the rate was not retrospective; but I doubt whether it would have been bad if we had held it to be retrospective. The object of the statute was to enable the council to pay their debts, and we ought to construe the clause applicable to this point as directory only, in all cases where the council act *bonâ fide*."

In *Haynes* v. *Copeland* (1868), 18 C.P. 150, Sir Adam Wilson emphasises the principle underlying the Municipal Act, that each year's debts should be paid by that year's assessments, yet recognises as applicable to the case of the municipality the principle of the English case just cited.

I realise the difficulty in applying this law, in view of the wording of the statute in question here; yet I think it is applicable. Where there is no deliberate intention on the part of the Board to postpone the payment of debts incurred one year to the next, but the obligation arises by reason of the insufficient estimate, and money has had to be borrowed to pay the necessary expenses for maintaining the school, that money may, I think, be regarded during the next year as a sum required for the maintenance of the school for the ensuing twelve months; as, if it is not obtained on requisition to the municipal council, it cannot be obtained at all, and the creditor could sue and take in execution the school property, without which the school cannot be maintained or continued. Totally different considerations would arise if there was any room for supposing that there had been any deliberate attempt on the part of the Board to shift the burden of taxation from one year to another, or if the contract had been a contract void upon its face as being a contract to incur liability in one year payable in another.

Had it not been for the decision in the *Toronto* case, I would have thought that the Legislature had intended the Board alone to determine the amount to be levied, and that, in the absence of bad faith, the municipal council had no right to criticise the demands made; but I am precluded from acting upon that view by the decision in question.

The mandamus will therefore go, with costs.

Mandamus granted.

STARRATT v. DOMINION ATLANTIC R. CO.

(Decision No. 3.)

N. S.
S. C.
1913

Nova Scotia Supreme Court, Russell, J. November 5, 1913.

1. JURY (§ IV—80)—SPECIAL JURY—SECOND TRIAL—SELECTION OF JURY—DRAWING NEW PANEL.

Where a verdict directed by the court to be entered for the defendant on withdrawing a case from the jury is reversed on appeal and a new trial ordered, the jury for the new trial cannot be selected from the panel drawn for the first trial, but a new jury must be summoned.

[*The King* v. *Perry*, 5 Term Reps. 453, considered.]

Statement

MOTION on a second trial to summon the former jury panel.

On the trial of this cause before Drysdale, J., with a special jury, the learned Judge, at the conclusion of the evidence, withdrew the case from the jury and directed the entry of judgment for defendant. The full Court, on appeal, *Starratt* v. *Dominion Atlantic R. Co.*, 11 D.L.R. 607, reversed the judgment so entered, on the ground that there was evidence which should have been submitted to the jury, and ordered a new trial. This was an application to summon the same panel for the second trial.

The application was denied.

J. L. Ralston, in support of application.

W. A. Henry, K.C., *contra*.

Russell, J.

RUSSELL, J.:—This case was tried before a Judge with a special jury and was withdrawn from the jury because in the opinion of the learned Judge there was no evidence to go to the jury. The Court on appeal thought otherwise and ordered a new trial. The question has been raised whether the special jury to try the case is to be drawn from the panel already delivered to the prothonotary and from which the jury was struck which entered upon the trial of the cause before Mr. Justice Drysdale, or whether a new panel of special jurors is to be summoned. On the strength of R.S.N.S., ch. 162, sec. 62, sub-sec. 12, of the Jury Act, it is contended that the eighteen jurors already empanelled must be the panel from which the jurors to try this cause are to be selected, but the argument drawn from this sub-section seems to me to go too far for the contention set up. If the words used in the sub-section prove that the panel is to be that already, or rather formerly, summoned, they also prove that the nine jurors already drawn from the panel and who entered upon the trial of the cause before Drysdale, J., must try the cause at the present sittings. The words are as follows:—

The prothonotary, when the cause is called, shall draw from such box the names of jurors to the prescribed number, and the jurors, whose names

N. S.
S. C.
1913
STARRATT
v.
DOMINION
ATLANTIC
R. CO.
Russell, J.

are first drawn, and who are in attendance, shall be the jury for the trial of the cause.

The inconvenience of such a conclusion is a strong reason for assuming that it was never intended by the legislature.

Further, the statute, sec. 62, sub-sec. 6, provides that the party who desires a special jury shall pay $25 before it can be drawn,

which sum the prothonotary shall forthwith pay to the treasurer of the municipality which pays the jurors' fees for such county, and such treasurer shall pay to such special jurors their fees for attendance and travel.

These words, although not conclusive, strongly suggest that there is a connection between the payment of the fee by the party and the payment to the jurors by the treasurer; and as the jurors, who have already attended must be paid if they attend again, it is reasonable to assume that the party who requires their attendance shall again pay the required fee. No such fee is provided for except in connection with a special jury "to be drawn," apparently in the manner pointed out in the sub-sections that follow, which provide for a drawing of thirty-six names, a reduction of the number to eighteen in the manner prescribed, a *venire facias* and summons.

But what seems to me to be conclusive is the provision of section 6, that

no juror shall be liable to serve as juror more than once in three years except, etc.

(The exception has no bearing on the question here.)

The provisions of the chapter applicable to petit jurors apply to special juries (sec. 62) with the variations set out in the section none of which are, I think, inconsistent with the exception referred to unless it is the sub-sec. 12 already mentioned which I have said proves too much for the contention.

The ground for the argument is that the cause was withdrawn by Mr. Justice Drysdale from the jury and has never, therefore, been tried by that jury. If that is a good ground for the contention it is also a ground for the conclusion that the very nine who were empanelled to try the case before Drysdale, J., must now try it, a result which I cannot think was ever intended. The case cited of *The King* v. *Perry*, 5 Term Reps. 453, lends colour to the contention, but the words on which the conclusion in that case is based differ significantly from those used in the sub-section relied on here. They expressly provide that "the jury so struck, etc., shall be the jury returned" for the trial of the issue, meaning that the panel from which the jury is to be drawn shall be the panel for the trial of the cause. The pressing of those words does not lead to the objectionable conclusion which would have to be drawn from the words of our Act which are

as already quoted that the jurors whose names are first drawn (which would be the very nine who entered the jury box and were sworn) "shall be the jury for the trial of the cause."

I conclude that these words simply mean that the jury so drawn is to try the cause on the occasion on which they are drawn. The same words might as well have been used with reference to the ordinary petty jury drawn in the usual way. If they had been so used I think no one would have contended that a new trial, if ordered because the case had been improperly withdrawn from the jury, must take place before a jury drawn from the old panel.

I consider the point very fairly debatable, but my best judgment is that a new jury must be summoned.

Application denied.

ORTENBERG v. PLAMONDON.

Quebec Superior Court. Trial before Malouin, J. October 22, 1913.

1. LIBEL AND SLANDER (§ III B—100)—ACTIONS FOR DAMAGES—WHO MAY RECOVER.

A civil action for damages does not lie for loss of business alleged to have resulted to the plaintiff from an alleged defamatory attack on the sect or class to which he belongs, contained in a public address which had been printed and issued in pamphlet form where the attack was not beyond the bounds of free discussion of philosophic, social or religious doctrines or opinions, and did not name or indicate the plaintiff specially in any defamatory sense.

[*R.* v. *Gathercole*, 2 Lewin C.C. 237, distinguished; Odgers on Libel, 5th ed., 456, referred to.]

Statement

ACTION by two Jewish merchants, of St. Roch, Benjamin Ortenberg and Louis Lazarovitch, for defamation, they claiming that as a direct result of an address or lecture, entitled "The Jew," delivered before a society by the defendant Plamondon, and subsequently published in pamphlet form by his co-defendant, many of plaintiffs' Roman Catholic customers ceased to trade with them and that there was a distinct falling off in returns of their business as compared with the previous year, and for which they sued both Plamondon and Leduc for damages for having done an act, which they alleged, caused them prejudice.

The case was tried without a jury, and extended from May 18 to May 27, 1913. The defendants reiterated in their pleadings all the charges made in the address, and published in the pamphlet, and claimed these to be true; and furthermore, that the anti-Semitic question, being one of general interest, should, and ought to be publicly discussed; that the address contained no imputations of a personal character against the plaintiffs, and that it merely referred to the Jewish race, its doctrines and religious practices,

QUE.
S. C.
1913
ORTENBERG
v.
PLAMONDON.
Malouin, J.

warning the Christian public of the danger to which the Province of Quebec was exposed by the presence of Jews in their midst.

S. W. Jacobs, K.C., *L. A. Cannon*, K.C., *G. C. Papineau-Couture*, and *Louis Fitch*, for plaintiff.

J. E. Bédard, K.C., *E. Belleau*, K.C., and *J. A. Lane*, K.C., for defendants.

MALOUIN, J. (translation):—Plaintiff claims from defendant a sum of $500 as damages resulting from a lecture which defendant delivered on March 30, 1910, entitled "The Jew."

Plaintiff professes the Jewish religion. He has carried on business in Quebec for many years. He alleges that he has been libelled, and that he has suffered damage by reason of the statements made by the defendant in his lecture.

Defendant pleads, among other things, that his lecture contained no charges against plaintiff; that he referred only to the Jewish race, its doctrines and social and religious practices, and that the lecture did not contain anything except what has appeared in numerous books and in the press on the Jewish peril. A copy of the lecture in question is filed in the record.

The defendant Plamondon, in his address, treated of the Jewish race in general; he made no charge against the plaintiff in particular. The lecture was composed almost entirely of citations and extracts from foreign publications.

Under the circumstances, has the plaintiff a right of action?

It is a principle of law that

> If the incriminating writing contains no libellous allegation or insinuations in respect to persons, but is merely a discussion, more or less violent and passionate, of philosophic, social or religious opinions, attributed to a corporation or religious sect, or to an association, it is not libel. (2 le Poittevin, p. 308.)

This principle has received the sanction of the Cour de Cassation in a case which is analogous with the one submitted to me. (Dalloz, Recueil Périodique, 1894, pp. 25-26.) The following are the facts:—

In December, 1890, or January, 1891, the Catholic mission of Tananarive, acting under the authority of Abbé Cazet, Bishop of Soruza, printed and published a pamphlet in the Malgache, (Madagascar) language, entitled "Ny Framasao" (The Free Masons). In this pamphlet, almost entirely made up of citations from publications previously published, and more or less ancient, it was said that

> Free Masons employ, to secure members, means which consist of flattering their mercantile interests and their liking for pleasure; that they try to draw men away from their family duties, and disgust them with their daily occupations, and with their religion; their purpose is to effect the overthrow of states by the destruction of law, or riches, and of religion and customs,

and for this end they use the most untruthful means; they do not hesitate at assassination to make the oaths taken by their members respected; they aim at the destruction of the family, the corruption of morals, the abolition of marriage, and of burial, adultery, and scorn of family duties (principally of the assistance due by children to their parents in their old age), and at the suppression of prayers for the dead; they try to pervert children, and for this object have built a great number of schools; the result of their efforts is revolution against established authority, and the assassination of kings; finally, their purpose is the ruin of the true religion, and of many systems of government, in order to establish a new state of things.

Iribe and Rigaud, founders of the Masonic Lodge then recently established in Madagascar, sued the editor of this pamphlet. The Court of Aix maintained their pretensions, holding that the statements complained of, although naming no one, and apparently attacking only the doctrines of the Free Masons, were clearly designed to hold up to public reprobation Iribe and Rigaud, the founders of the Masonic Lodge then recently established in Madagascar, and that the allegations were of a defamatory character, and directed against the plaintiffs. On appeal, the Cour de Cassation reversed this, on the ground that the pamphlet "Ny Framasao," and especially the passages mentioned in the judgment appealed from, did not contain allegations or charges against determinate persons; that a careful examination disclosed a strong and violent attack, but not beyond the bounds of free discussion of the philosophic, social and religious opinions attributed to the followers of Free Masonry. This principle appears to be recognized by English law.

The plaintiff has cited the case of *R.* v. *Gathercole*, 2 Lewin C.C. 237 and Odgers (5th ed.), p. 456, where it was held:—

> It is also a misdemeanor to libel any sect, company, or class of men without mentioning any person in particular, provided it be alleged and proved that such libel tends to excite the hatred of the people against all belonging to such a class and conduces to a breach of the peace.

But it is to be noted that this decision was rendered in a criminal prosecution, and is cited with many others under the heading "Criminal Law," and the author Odgers, 5th ed., 456, adds, in referring to these decisions:—

> A libel may be indictable though it be not actionable. Thus, in neither of the cases [*R.* v. *Topham*, 4 T.R. 126, and *R.* v. *Gathercole*, 2 Lewin C.C. 237] would an action lie for want of a proper plaintiff.

These authorities lay down the principle that, in my opinion, should serve to decide the present case. The defendant, in his lecture, incriminates only the Jewish race, its doctrines, and its religious and social practices without attacking the plaintiff in particular, or charging him with any offence.

I am of opinion that the plaintiff, being neither named nor specially indicated, has no recourse civilly against the defendant,

QUE.
S. C.
1913

and, in consequence, I dismiss his action, with costs. Having arrived at this conclusion, it is useless for me to study the other questions raised. For the same reason, I dismiss the action of *Ortenberg* v. *Leduc*, and that of *Lazarovitz* v. *Plamondon*.

Actions dismissed.

B. C.
C. A.
1913

ATLANTIC REALTY CO. v. JACKSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Martin, JJ.A. November 4, 1913.

1. COVENANTS AND CONDITIONS (§ IID—23)—LAND PURCHASE CONTRACT —RESTRAINT UPON ALIENATION.

A vendor may, in order to obtain the removal of a caveat and *lis pendens* filed by one claiming under an assignment from a vendee, invoke a condition of a contract of sale prohibiting its assignment without the approval of and countersigning by the vendor, and providing that in the absence of such approval, no agreement, condition or relations between the vendee and his assignee, or other person acquiring title or interests from or through the vendee, should preclude the vendor from conveying the land to the vendee on the surrender of the agreement and payment of the unpaid purchase-money.

[*McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, affirming 4 S.L.R. 111; and *Shaw* v. *Foster*, L.R. 5 H.L. 321, applied.]

2. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS—LIS PENDENS— WHO MAY FILE—ASSIGNEE OF LAND CONTRACT—ASSIGNMENT WITHOUT VENDOR'S APPROVAL—EFFECT.

An interest sufficient to permit the filing of a caveat or *lis pendens* is not acquired by an assignment from a vendee of an interest in a contract for the sale of land, where the assignment contravened a condition of the agreement prohibiting its assignment without the approval of and countersigning by the vendor; and providing that, in the absence of such approval, no agreement, condition or relations between the vendee and his assignee or other person acquiring title or interest from or through the vendee, should preclude the vendor from conveying the land to the vendee on the surrender of the agreement and payment of the remainder of the purchase-money.

Statement

APPEAL by the defendant from a judgment for the plaintiff in an action by a vendor to cancel and remove a *lis pendens* and caveat filed by one claiming an interest in land under an assignment from a vendee which was not approved by the vendor as required by the terms of the agreement of sale.

The appeal was dismissed.

W. J. Taylor, for appellant, defendant.
W. C. Brown, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A., concurred with IRVING, J.A.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal.

By a term of the contract between the plaintiff and Bell, it was provided that:—

B. C.
C. A.
1913
ATLANTIC REALTY CO. v. JACKSON.
Irving, J.A.

No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser and approved and countersigned by the president, vice-president and secretary or any other duly authorised person, and no agreement or conditions or relations between the purchaser and his assignee, or any other person acquiring title or interest from or through the purchaser, shall preclude the company from the right to convey the premises to the said purchaser on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder unless the assignment hereof be approved and countersigned as aforesaid.

Jackson omitted to press the company for this approval, and I think he has no status to file a *lis pendens* or caveat.

Lord Cairns in *Shaw* v. *Foster*, L.R. 5 H.L. 321 at 338, has pointed out that although a vendor of real estate is a trustee for the purchaser, he is not a mere dormant trustee, but he has a right to protect that personal and substantial interest which still remains in him. The plaintiffs having seen fit to guard their interest by inserting in their agreement for sale the above clause, I am unable to see how Bell can confer on Jackson any greater right than he, Bell, had himself.

The plaintiffs who are invoking the condition in restriction of the assignment of Bell's agreement are the original vendors.

Martin, J.A.

MARTIN, J.A.:—After a careful consideration of the authorities cited to us I am of the opinion that this appeal should be dismissed, because even assuming that the lodging of the caveat was notice to Bonneau of the defendant's claim, and that the defendant had a valid contract with Bell, yet here at last we have the case of the original owner of the legal estate, the plaintiff company, setting up and relying on its rights under the clause in the contract to approve any assignment thereof. The decision of the majority of the Court in *McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, 4 S. L.R. 111, was based on the assumption that the said owner had waived that right, (p. 584 of the Supreme Court report), and therefore their co-defendants could not do so. Mr. Justice Duff did not take that view, and his judgment is founded upon the assumption that the clause could be invoked by a purchaser as well as the owner of the legal estate, and he proceeds to consider the question from that standpoint, and to hold (p. 561), that the clause, if it could be invoked, gave to the obligation of the owner

> the character of rights which should be personal to the contracting parties to the extent at least that they should be enforceable against the company only by the purchaser or his representatives or by such persons as with the consent of the company should become invested with the purchaser's rights and should become bound to assume his obligations under the agreement.

He goes on to discuss the result of this in a manner with which I am in entire accord, the result of which, as relevant to this case,

B. C.
C. A.
1913
ATLANTIC REALTY CO. v. JACKSON.
Martin, J.A.

is that an assignee who has not obtained said approval has not (p. 569)

acquired any right which he could compel the registered owner to recognise, and, therefore, he never had a right which in any lawyerly use of the words could be described as an interest in land. His right was and remained a personal right against Gesman, enforceable no doubt by equitable remedies both against Gesman and against others who might be implicated in Gesman's breach of faith, but still only a personal right because of the special provisions of the contract with the company under which Alexander could acquire no claim against the registered proprietors until they had assented to his assignment. It is argued that Gesman was the owner of the land in equity, but this seems really to be an abuse of language (see Fry, Specific Performance, p. 675, sec. 1382; and *Ridout* v. *Fowler*, [1904] 1 Ch. 558, at pp. 661 and 662, *per* Farwell, J.). The company, it may be admitted, was a trustee in a limited sense. It is inaccurate to say that the company held the land in trust for the purpose of fulfilling the agreement of sale. But as I have pointed out that trust is defined by the agreement; and only those can in any admissible sense of the words be said to have acquired a beneficial interest in the land who have acquired or in other words are entitled to enforce some rights under the agreement. In this Alexander fails; his right (in the sense indicated) though in process of consummation was never consummated.

And as to the effect of a caveat in such circumstances (p. 566):—

A caveat prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of, but the caveator's claim must stand or fall on its own merits. If the caveator has no right enforceable against the registered owner which entitles him to restrain the alienation of the owner's title, then the caveat itself cannot and does not impose any burden on the registered title.

And at page 569 he shews that the maxim *qui prior*, etc., has no application to those who have no legal or equitable interest in the land which was the subject of the dispute.

These views of the learned Judge as to the effect of the clause if it could be invoked were not considered by the other members of the Court owing to the fact that they held the clause had been waived, but in my opinion they cover the point which is now clearly raised, and it should, I think, be determined in favour of the respondents.

Appeal dismissed.

B. C. CANNING CO. v. McGREGOR.

B. C.
C. A.
1913

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. November 4, 1913.

1. Shipping (§ II—5)—Ownership and employment of vessel—Chartering at owner's risk—Liability of charterer to owner for negligence of engineer employed with owner's approval.

The charterer of a boat at the owner's risk is relieved from liability to the latter for the result of the negligence of an engineer employed by the charterer with the approval of the owner, which was required by the charter party, since such approval recognized the competency of the engineer, and the charterer was not required to take any further precautions in respect thereto, notwithstanding the charter party provided that the latter should "take all reasonable precautions regarding the safety" of the vessel.

[*Dixon* v. *Richelieu Nav. Co.*, 15 A.R. (Ont.) 647, 18 Can. S.C.R. 704, referred to.]

Statement

Appeal by the plaintiff from a judgment for the defendant in an action against the charterer of a vessel for damage alleged to have been occasioned by the negligence of the engineer.

The appeal was dismissed.

Bodwell, K.C., for appellant, respondent.
Harold Robertson, for respondent, defendant.

Macdonald, C.J.A.

Macdonald, C.J.A., concurred with Irving and Martin, JJ.A.

Irving, J.A.

Irving, J.A.:—In the absence of special terms in the charter party to the contrary everything would have been at the risk of the charterers who would have had the right to appoint a master and engineer without reference to the owners.

Recognizing this, the parties determined to insert in the charter certain special terms—and so they reached the agreement as presented to us. Under it the master and engineer are to be approved of by the owners—the ship is to be at owner's risk, but the "charterers shall take all reasonable precautions regarding her safety." What further or other reasonable precaution they could take than allow the engineer, approved of by the owners, to have absolute control in the engine room, I cannot imagine.

It seems to me absurd to say that under the terms of a charter party of this kind the charterers were bound to have some person to superintend the work of the engineer approved of by the owners. Had they done so, had they employed some one else, and an accident happened in consequence of their following the advice of such person in preference to that given by the master or engineer approved of by the owners, that to my mind would be some evidence that they had neglected to take reasonable precautions. In my opinion the defendants are not liable under the express provisions of the contract. I would dismiss the appeal.

Martin, J.A.

Martin, J.A.:—So far as the expression "at owner's risk," *solus*, is concerned, we must adopt the meaning given to it by the

B. C.
C. A.
1913
B. C. CANNING CO. v. MCGREGOR.
Martin, J.A.

Supreme Court of Canada in *Dixon* v. *Richelieu Nav. Co., Ltd.*, 15 A.R. 647, 18 Can. S.C.R. 704, which is, as laid down by Hagarty, C.J.O., at p. 649:—

> It seems conceded that the words "owner's risk" alone would protect the carriers against all but wilful neglect or misconduct or unreasonable delay.

and Burton, J.A., at p. 654:—

> The cases fully establish that the words "owner's risk" protect the defendants from all liabilities, except wilful misconduct.

This would relieve the defendants, but we have the additional words: "but the charterers shall take all reasonable precautions regarding her safety," and the point is as to the meaning to be attached to them. In my opinion, in the absence of any authority they should receive that "reasonable" construction which business men would be assumed to have in mind in the circumstances, and the owners themselves would not do more in a matter relating to the engines than employ a competent man to take charge of them. It would be a very unusual and, I think, "unreasonable" precaution for them to take not only to employ a competent man, but to literally stand over him to see that he was doing his work properly. Can it be said that the charterers should do more than would be expected of the owners? The engineer must be held to be competent because his appointment was approved by the owners. The appeal, I think, should be dismissed.

Appeal dismissed.

N. B.
S. C.
1913

HUNTER v. FARRELL.

New Brunswick Supreme Court, Barker, C.J. October 21, 1913.

1. EVIDENCE (§ VI A—515)—PAROL AND EXTRINSIC EVIDENCE CONCERNING WRITINGS—TO VARY TERMS OF CONTRACT.

> It cannot be shewn by parol, in the absence of fraud or misrepresentation on the part of the tenant as to the contents of his lease, which contains an option permitting him to purchase the demised premises during his term, that the landlord refused to assent to such condition and executed the lease on the express understanding that the only right of purchase given the tenant was that in case the former wished to dispose of the property during the term he would sell to the tenant for the sum mentioned in the lease in preference to any other person.
>
> [*Croome* v. *Lediard*, 2 My. & K. 251, 39 Eng. R. 940; *Stewart* v. *Kennedy*, 15 A.C. 108, followed.]

2. CONTRACTS (§ II D 2—171)—CONSTRUCTION—REAL PROPERTY—AGREEMENT TO SELL FOR "NOT LESS THAN" A STATED SUM.

> An option agreement to sell land "for not less than $10,000" is an offer to sell for that figure.
>
> [*Re Richard*, 38 Can. S.C.R. 394; and *Leeming* v. *Snaith*, 16 Q.B. 275, 117 Eng. R. 884 applied.]

3. CONTRACTS (§ II D 2—170)—CONSTRUCTION—REAL PROPERTY—AGREEMENT FOR SALE OF "BUILDING"—WHAT COVERED BY.

An option in a rental agreement in respect of a store described by its street number which states that the tenant shall have the option "of buying the building," where practically all of the demised premises was covered by the store building which was affixed to the land so as to become a part of the freehold, has the effect of an option for the sale of the land and building and not of the building only.

[*Hughes* v. *Parker*, 8 M. & W. 244, followed.]

N. B.

S. C.
1913

HUNTER
v.
FARRELL.

ACTION for specific performance of an agreement to sell land. Judgment was given for the plaintiff.

Statement

M. G. Teed, K.C., for plaintiffs.

H. A. Powell, K.C. (*W. H. Harrison* with him), for defendant.

BARKER, C.J.:—On February 22, 1910, the plaintiffs and defendant entered into an agreement in writing for the leasing by the defendant to the plaintiffs of a portion of the building situate on the lot in question. The agreement is as follows:—

Barker, C.J.

St. John, February 22, 1910.

Mr. M. Farrell.

Dear Sir,—We agree to rent from you the store with room in rear, No. 20 Canterbury street, the premises now occupied by the Currie Business University for a term of five years from the first day of May next at the rental of $300 (three hundred dollars). Also during the above mentioned term we have the option of buying the building for not less than $10,000.

Yours truly,

(Sgd.) MICHAEL FARRELL.
ROGER HUNTER, LIMITED.
(Sgd.) P. R. HUNTER, *president*.
(Sgd.) L. S. HUNTER, *secretary*.

Plaintiffs went into possession of the premises under the said agreement in May, 1911, and have continued in such possession ever since and paid the yearly rental of $300. On January 30, 1913, the plaintiffs gave the defendant notice of their acceptance of the option to purchase, notified him of their readiness to pay the $10,000 and tendered him with a conveyance of the land and premises in question for execution.

The building mentioned in the agreement is a brick building covering practically all the lot on which it stands owned by the defendant. It is affixed to the land in the ordinary way so as to become part of the freehold. As originally prepared and presented to the defendant for signature, the agreement contained a renewal clause for five years as follows. After the words "first day of May next," were the following words, "and at the end of said five years to have the privilege of renewing for another five years." Also after the words "above mentioned term" were these words "and renewal thereof." So that as originally drawn the agreement was for five years and a renewal for another five

N. B.
S. C.
1913
HUNTER
v.
FARRELL.
Barker, C.J.

years and an option to purchase during the ten years, in case of renewal. The defendant refused to agree to these renewal clauses and insisted upon their being erased and the words I have mentioned were erased and the erasure initialed. As to these facts there seems no difference between the parties. The defendant admits in his statement of defence, that on February 22, 1910, the plaintiffs offered to rent the premises upon the terms mentioned in the agreement and submitted the agreement itself to him for his signature, which he refused to give. In his statement of defence he says:—

> And the said defendant thereupon on the said 22nd day of February, A.D. 1910, refused to sign the said agreement and refused to agree that at the end of the said five years the plaintiffs should have the privilege of renewing for another five years at the rental of $300 and refused to give the plaintiffs the option during the said term of five years for which he agreed to rent the said store, or during the said renewal term of five years, of buying the buildings for $10,000, but offered to rent the said land and premises to the plaintiffs for the term of five years at the annual rental of $300 and to sell to the plaintiffs in preference to any other purchaser at the same price in case he determined to sell. This offer of the defendant's the plaintiffs agreed to accept and did accept, and the defendant signed the said alleged agreement in the third paragraph of the plaintiff's statement of claim mentioned, on the express understanding between plaintiffs and defendant that the said agreement so far as it related to the buying of the said building should operate only to the effect that the defendant should, in case he wished to sell the said building, sell to the plaintiffs in preference to any other purchaser who might offer the same price.

There is no charge of fraud or misrepresentation here, or that the defendant was induced to sign this agreement in the belief that it contained the bargain, which he says was in fact made, instead of the one which the plaintiffs say was made. The defendant alleges that he refused to accept the plaintiffs' offer as to the option but he made a counter-offer to the effect that he would give the plaintiffs a preference over any other purchaser, in case he determined to sell during the five years. He alleges that this counter-offer was accepted and that he then signed the original agreement in evidence

> on the express understanding between him and the plaintiffs that the said agreement, so far as it related to the buying of the building, should operate only to the effect that the defendant should, in case he wished to sell the said building, sell to the plaintiffs in preference to any other purchaser who might offer the same price.

It is obvious that neither fraud or misrepresentation could be chargeable, as against the plaintiffs, because the defendant says this was his counter-offer and the plaintiffs agreed to and accepted it. In addition to this the defendant knew exactly that it was the agreement for an option he was signing, but he says that he signed it on the agreement and understanding between them that

it was to "*operate*" so that in case the defendant concluded to sell, the plaintiffs should have a preference. Later on I shall allude to the improbability of two sensible business men entering into an agreement which seems childish from every point of view. But what is its legal effect? In *Croome* v. *Lediard*, 2 My. & K. 251, 39 Eng. R. 940, a bill was filed for the specific performance of an agreement to purchase. By the agreement the plaintiff was to sell an estate to the defendant, and the defendant was to sell an estate to the plaintiff. By the true construction of the contract, the two sales were separate transactions, and the inability of one party to perform his contract was no answer to an action by the same party, to compel specific performance of the agreement to sell to him. In answer to the action, it was set up that the negotiations previous to the signing of the agreement were for an exchange, and not for separate purchases, and that, when the agreement was reduced into writing, it was understood between the parties that the same was on the footing and in the nature of a mutual exchange. The Master of the Rolls said that the intention of the parties must be collected from the written instrument, and no evidence *aliunde* could be received to give a construction to the agreement contrary to the plain import of these expressions. The Lord Chancellor in dealing with the case on appeal, says:—

> What effect the extrinsic evidence tendered by the defendant in the Court below might, if admitted, have had in explaining the intention of the parties, it was unnecessary to consider, because he was clearly of opinion that such evidence was not admissible . . . . in the present case.

The Lord Chancellor continued:—

> The purpose for which the parol evidence was tendered on the part of the defendant was, not to enforce a collateral stipulation, but to shew that the transaction was conducted on the basis of an exchange; a circumstance which, if true, was totally at variance with the language and plain import of the instrument. Nothing could be more dangerous than to admit such evidence, for if the agreement between the parties was in fact conducted upon the basis of an exchange, why was the instrument so drawn as to suppress the real nature of the transaction?

In every view of the case he was clearly of opinion that the decision of the Master of the Rolls must be affirmed.

In *Stewart* v. *Kennedy*, 15 A.C. 108, the plaintiff was seeking to set aside a contract, and in settling issues to be tried under the practice prevailing in the Scotch Courts, a question as to the admission of a certain letter was proposed and the issue was refused. On appeal to the House of Lords, Lord Herschell says at 118:—

> But assuming that the suggested difficulty does not stand in the appellant's way, and that the error averred is in the essentials of the contract, the question remains whether he is entitled to have the contract reduced

N. B.

S. C.
1913

HUNTER
v.
FARRELL.

Barker, C.J.

merely because he understood and intended it to be other than it really was, that misunderstanding not having been induced by the conduct of the other party. The contention of the appellant is certainly a sufficiently startling one. He made the respondent an offer, which all the Courts, including the tribunal of ultimate appeal, have held to bear a certain construction. This offer the respondent accepted. And now it is sought to reduce the contract simply on the ground that the appellant did not intend to make the offer which the Courts have held that he did make. Such a contention is far-reaching in its consequence. It would apply in every case where the parties differed in their construction of an essential part of the contract.

After litigating the matter through all the Courts without success, it would always be open to the defeated litigant to reduce the contract, provided he could shew that he understood the contract to bear the interpretation for which he had contended. . . . The authorities cited, when carefully examined, tell in my opinion against the appellant. They shew, I think, 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. It is true that in some instances an issue has been allowed in the same terms as that now under discussion. But the case set up by the pleadings, and intended to be tried under them, was that there had been essential error induced by the misrepresentation of the other party to the contract.

In the same case Lord Watson says at 121 *et seq.*:—

Professor Bell does not, in his useful treatise, deal with the important question how far, in the case of contracts and onerous unilateral obligations, an erroneous belief, entertained by one party only, will give him a right to rescind. 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, unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract. . . .
So far as I can judge, his (Lord Shand's) opinion rests upon the inference or assumption that in such a case there cannot be that *duorum in idem placitum consensus atque conventio* which is necessary to the constitution of a mutual contract. To give any countenance to that doctrine would, in my opinion, be to destroy the security of written engagements. In this case I do not think it has any foundation in fact. By delivering his missive offer 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.

Apart altogether from the legal aspect of the case, I am of opinion, and so find, that the defendant has altogether failed in establishing any such agreement as he sets up. The only witness

with any knowledge of the facts, beside the defendant, are the two Hunters—one, the president and the other, the secretary of the company. They positively deny that there ever was any such agreement as the defendant alleges, either as to the purchase clause or as to the meaning to be attached to the executed agreement. If there ever was any such agreement, one naturally wonders, as the Lord Chancellor did in *Croome* v. *Lediard*, 2 My. & K. 251, 39 Eng. R. 940, why it was not signed, instead of adopting the unusual course of signing a paper which did not contain the agreement, subject to a verbal arrangement that it should mean what the real agreement stipulated. The paper submitted by Hunter was criticised by the defendant, and on his objection the renewal clauses were expunged. If the option clause was objectionable why was it not expunged also? No reason has been even suggested for the defendant adopting the course he says was done, and I am at a loss to imagine one. We have his own signature deliberately appended to a document which he understood and knew all about, and the evidence fails in establishing any such agreement as is put forward here to nullify its effect, even if that could be done, if such an agreement had been made.

Two other grounds are put forward in the statement of defence. It is said that the agreement is incomplete, as there is no fixed price mentioned in it, nor any method by which the purchase price can be fixed, and therefore there can be no specific performance. It is said that the words "not less than $10,000" do not amount to a contract to convey for that sum, for any amount in excess of $10,000 is not less than $10,000 and therefore satisfies the requirements of the action. Any such construction would render the contract useless and meaningless, for it would simply mean a contract for the defendant to sell at any price he might select in excess of the $10,000, or to use the defendant's version, "not less than $10,000." As the defendant had control over his own property, he did not require to enter into a written obligation to sell it at a price to be fixed by himself in excess of a minimum price of $10,000. If there was any contract at all, it seems very clear that there was none having any such meaning as that which the defendant contends. The parties have not used a very happy form of expression to carry out what I have no doubt was their intention, but in my view, so soon as the option to purchase was exercised, a contract became complete on the part of the defendant to convey the premises to the plaintiffs for $10,000. Mr. Powell directed my attention to the cases where statutory penalties were imposed by the words "not less than $50." Judicial opinions differ on the question, but the case of *Re Richard*, 38 Can. S.C.R. 394, has settled the construction to be placed on these statutes and that the words mean "$50 and no more or less." That decision is adverse to the defendant's contention. Duff, J., who

N. B.
S. C.
1913
HUNTER
v.
FARRELL.
Barker, C.J.

gave the opinion of the Court on that branch of the case, says (page 409):—

There is nothing in the section, or, I think, in the Act as a whole, which would justify us in imputing to the words referred to any meaning other than that which they literally convey, namely, that the penalty imposed shall not be less than the sum mentioned.

If that be the literal meaning of the words in the statute, there is no reason why in this contract the same words should not have the same meaning, there being nothing in the context to control it in any way. In *Leeming* v. *Snaith*, 16 Q.B. 275, 117 Eng. R. 884, a question arose as to a contract by which the defendant sold "what he may pull up to 6th January, say not less than 100 packs of combing skin," etc., and it was held that the words amounted to a contract to deliver at least that quantity. Campbell, C.J., says (16 Q.B. 277):—

I think it must be taken that the plaintiffs had occasion for at least 100 packs of combing skins, and meant to stipulate that they should have that quantity at least; and that they were willing to bind themselves to take all that the defendant might pull beyond that quantity. If such be their intention, is it not clearly expressed by these words "sold," "what he may pull up to January 6, say not less than 100 packs?" Is not this a stipulation securing to the plaintiffs a minimum quantity of 100 packs?

Patterson, J., says:—

I think therefore that the construction of this contract is that the defendant is to supply the plaintiffs with at least 100 packs.

The fair construction of the agreement, I think, is this. The plaintiff in his offer stipulated that he was to have the option of buying the building at any time during the term for a minimum sum of $10,000, and by the acceptance of the offer the defendant gave the plaintiffs the right to a conveyance in the terms of his offer for this minimum sum.

Another objection has been made as to the terms of the contract, by which it is contended that the option is for the purchase of the buildings on the land, and not the land and buildings. It is admitted by the pleadings that the buildings practically cover the land and that they are affixed so as to render them a part of the freehold. It is obvious that one person could not occupy the land and another the buildings which cover it and are affixed to it. In *Hughes* v. *Parker*, 8 M. & W. 244, it appeared that a sale and purchase agreement had been made in these words:—

I agree to sell the house and fixtures No. 168 Piccadilly, to commence from the 1st January next, for £60.

It was held that this was a sale of the fee simple. Aldersen, B., says at 248:—

This is in truth, on the face of it, an agreement for the sale of a fee simple. There must be a decree in favour of the plaintiffs with costs.

Judgment for plaintiffs.

N. B.
S. C.
1913

Re THE COLONIAL INVESTMENT CO. OF WINNIPEG.

MAN.
K. B.
1913

Manitoba King's Bench, Galt, J. November 6, 1913.

1 CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP—INCORPORATION UNDER PROVINCIAL LAW—BRINGING UNDER DOMINION WINDING-UP ACT.

The provisions of sec. 11 of the Dominion Winding-Up Act, R.S.C. 1906, ch. 144, as to when the winding-up of a company may be brought within the Act, are not restricted in their operation to companies organized under the Dominion Companies Act, but apply as well to provincial building societies having a capital stock and organized under provincial laws, if in liquidation or in process of being wound-up under a resolution adopted by its shareholders; and a winding-up order may be made in a proper case on petition of a shareholder asking that the society be brought under the provisions of the Winding-Up Act (Can.).

[*Re Union Fire Insurance Co.*, 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265, applied; *Re Cramp Steel Co.*, 16 O.L.R. 230, distinguished and criticized.]

2. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP—VOLUNTARY PROCEEDINGS UNDER PROVINCIAL ACT—BRINGING UNDER DOMINION ACT.

A building loan and investment company, organized under a Manitoba Act, and which is in process of being voluntarily wound up under a provincial law pursuant to a resolution adopted by its shareholders at a special meeting, may, under sec. 11 (*b*) of the Dominion Winding-Up Act, R.S.C. 1906, ch. 144, be ordered to be wound up under the provisions of the latter Act on the petition of any shareholder.

[*Re Union Fire Insurance Co.*, 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265, applied; *Re Cramp Steel Co.*, 16 O.L.R. 230, distinguished and criticized.]

3. CORPORATIONS AND COMPANIES (§ VI A—313)—COMPULSORY WINDING-UP—VOLUNTARY PROCEEDINGS PENDING UNDER PROVINCIAL ACT—DISCRETION.

Whether a winding-up order will be made under the Dominion Winding-Up Act, R.S.C. 1906, ch. 144, on the petition of any of the shareholders of a provincial company which is in process of winding-up under a provincial law rests in the discretion of the court, and will not be made *ex debito justitiæ* merely because the petitioners bring themselves within the terms of the Dominion Act.

4. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP—WHERE COMPULSORY ORDER WOULD BE "JUST AND EQUITABLE."

An order for the winding-up of a provincial company at the instance of a shareholder may be made under the Dominion Winding-Up Act, R.S.C. 1906, ch. 144, sec. 11 (*e*), as to a company to which the latter Act applies, notwithstanding the pendency of a voluntary winding-up proceeding under a provincial Act, where ample reason is shewn for fearing that the interests of the company at large, and of the shareholders in particular, are likely to be insufficiently protected in the voluntary proceeding and the court is, in consequence, of opinion that it is just and equitable to make the winding-up order.

5. CORPORATIONS AND COMPANIES (§ VI A—313)—AFFIDAVIT FOR WINDING-UP ORDER.

In Manitoba where a petition for a winding-up order cannot be based on an affidavit of information and belief only, a verification in gen-

MAN.

K. B.
1913

RE THE COLONIAL INVESTMENT CO. OF WINNIPEG.

Statement

eral terms of the several paragraphs of a supporting affidavit, by a statement that the deponent has read over certain numbered paragraphs of the petition and that they are true, ought not to be encouraged, although constituting evidence which may be given effect to in the absence of conflicting material.

[*Re Manitoba Commission Co.*, 2 D.L.R. 1, 22 Man. L.R. 268, followed; *Gilbert* v. *Endean*, L.R. 9 Ch.D. 259, applied; see also *Re Kootenay Brewing Co.*, 6 B.C.R. 131; Hamilton's Company Law, 3rd ed., 442 and 533 *g*.]

PETITION by a shareholder to the extent of $1,000 in the company for a winding-up order under the Dominion Winding-Up Act, R.S.C. 1906, ch. 144, after the commencement of a voluntary winding-up proceeding under a provincial statute of Manitoba of a company incorporated in that province.

The order was granted.

G. A. Elliott, K.C., and *W. L. McLaws*, for petitioner.

H. A. Bergman, and *C. Blake*, for the liquidator appointed by the shareholders in a voluntary liquidation.

Galt, J.

GALT, J.:—The company was first incorporated under the authority of the Manitoba Building Societies Act (R.S.M. 1902, ch. 15) with the objects, amongst others, of borrowing money and receiving deposits and carrying on generally the business of a loan and investment company. By private Act of the Legislature of Manitoba, 1 Edw. VII. (Man.) ch. 56, the company was incorporated anew and it was provided (sec. 2) that the company should have, hold and continue to exercise all the rights, powers and privileges that previous to the said Act it had used, exercised and enjoyed.

The conditions and terms adopted by the company in loaning money to borrowers were exceedingly complicated and unusual; some of such terms are set forth at length in paragraph 8 of the petition. The meaning and effect of these terms was carefully examined by Mr. Justice Beck of Alberta in the case of *Colonial Investment Co. of Winnipeg* v. *Borland* (December, 1911), 19 W.L.R. 588, when his Lordship came to the conclusion that such terms were too intricate and complex to be understood and enforced; that the defendant [in that case] could not have understood them; and that he was entitled to relief on the ground of mistake.

It is difficult to resist the conclusion that many other mortgages of the company, containing similar terms may be open to the same objection and with the same result as occurred in the *Borland* case.

On June 5, 1913, a notice to the shareholders of the company was sent out by George Leslie, secretary, calling an extraordinary general meeting of the company to be held at the company's office in Winnipeg on Friday, June 20, 1913, at 3 p.m., for the purpose of considering and, if thought fit, passing a resolution under paragraph (*b*) of sec. 4 of the Joint Stock Companies Wind-

ing-Up Act, R.S.M. 1902, ch. 175, with a view to voluntary winding-up of the affairs of the company, and appointing a liquidator. The shareholders were notified that if the resolution passed by the requisite majority, the same would be submitted for confirmation to a second extraordinary general meeting to be subsequently convened. The secretary also enclosed with the notice a copy of a financial statement of the company up to December 31, 1912, signed by A. D. Jolliffe, auditor, setting forth the assets and liabilities of the company, and shewing a deficit of $9,220.46.

At the meeting held pursuant to said notice, a resolution was passed that the company be wound up. On June 24, notice of an extraordinary general meeting to be held on July 10, 1913, at 2 p.m., for the purpose of confirming the said resolution was sent to the shareholders, and on July 10, the resolution was duly confirmed and the Canadian Guaranty Trust Co. was appointed to act as liquidator of the company and H. L. Adolph was appointed inspector. Since that date the voluntary liquidation has been going on, subject to certain restrictions arranged between the parties interested when this petition was first filed.

The petition was supported in the first instance by the affidavits of James Hooper and Joseph Marshall and subsequently by the affidavits of Robert Macqueen and Benjamin Denby, admitted by leave of the Court. No material was read on behalf of the liquidator in the voluntary winding-up, but he was represented by counsel who strenuously opposed the petitioner's application on the ground that the material read by the petitioner was insufficient to justify a compulsory order.

The petitioner relies upon secs. 6 and 11 of the Dominion Winding-Up Act, R.S.C. 1906, ch. 144, which, so far as applicable to this petition read as follows:—

> 6. This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada . . . and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock and incorporated trading companies doing business in Canada wheresoever incorporated; and
>
> (*a*) which are insolvent; or
>
> (*b*) which are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of this Act.
>
> . . . . . .
>
> 11. The Court may make a winding-up order.
>
> (*b*) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up;
>
> (*c*) when the company is insolvent; . . .
>
> (*e*) when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up.

Dealing first with sec. 6, counsel for the liquidator argued that there is no sufficient evidence of the company's insolvency, and

MAN.

K. B.
1913

RE THE COLONIAL INVESTMENT CO. OF WINNIPEG.

Galt, J.

that sub-sec. (*b*) (relating to companies in liquidation) can only apply to companies incorporated under the Dominion Companies Act.

In support of this contention reference was made to *Re Cramp Steel Co. Ltd.*, 16 O.L.R. 230, where it was held by the late Mr. Justice Mabee that the provisions of the Dominion Winding-Up Act do not apply to a company incorporated under a provincial statute unless such company is shewn to be insolvent.

In that case there were no creditors, and so insolvency could not be shewn; but it was admitted that, if the Dominion statute was applicable, the petitioners had made out a case under sub-sec. (*d*) of sec. 11 (when the capital stock of the company is impaired to the extent of twenty-five per centum thereof, etc.), and that also sub-sec. (*e*) (when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up), might have been held to apply to the facts.

His Lordship says, at p. 231:—

> Now the steel company in question, not being insolvent and being a corporate body brought into existence under the Ontario Companies Act, is, of course, subject to the Ontario Winding-Up Act, but I am unable to see how it can be brought under the provisions of the Dominion Winding-Up Act. If this latter Act provided that the clause in question (sec. 11) should apply to provincial corporations, whether insolvent or not, I think it would clearly be *ultra vires*, but it does not so provide, so it is fair to presume that it was intended to apply to such companies as were subject to federal control or companies incorporated under the Dominion Companies Act. I think it is clear that the order cannot be made under sec. 11. It was also contended that the order might be made under sub-section (*b*) of sec. 6 (that is trading companies doing business in Canada wheresoever incorporated and which are in liquidation, etc.) as the material shews the company is in process of a voluntrary liquidation or winding-up. I think the same objection applies to this section, or in other words, the only clauses of the Dominion Act that can be made to apply to an Ontario corporation are those dealing with insolvency.

His Lordship concludes that as the facts shew a proper case for a winding-up order, and as the motion fails only upon the ground that the Dominion Act does not apply, it is dismissed without costs.

The only authorities referred to in the judgment are certain decisions: *Re Union Fire Insurance Co.*, (1887) 14 O.R. 618, (1889) 16 A.R. 161, (1890) 17 Can. S.C.R. 265.

The history of this litigation originated some years earlier than the first of the reported cases above mentioned, and it has an important bearing upon the question at issue.

Re Clarke v. *Union Fire Insurance Co.* (*Shoolbred's Petition*), 10 O.R. 489, contains a statement of the facts out of which the later decisions arose. It there appears that on or about November 24, 1881, Alexander A. Allen, Delia Amelia Lyman and James Paterson took proceedings under the Ontario Joint Stock Com-

panies Winding-Up Act and obtained an order under the said statute from the County Court Judge of York for winding-up the Union Fire Insurance Co. This order was confirmed on appeal; see 7 A.R. (Ont.) 783. At that date an Act respecting the winding-up of joint stock companies in Ontario was in force: 41 Vict. ch. 5; see also R.S.O. 1887, ch. 183. This statute appears to be similar in form and substance to our present Manitoba Winding-Up Act and neither of these Acts authorizes a winding-up based on insolvency.

On November 29, 1881, a writ was issued in the Chancery Division of Ontario in an action by one Clarke, who sued on behalf of himself and all other creditors of the Union Fire Insurance Co., against the said company for administration of the company's deposit in the hands of the Provincial Treasurer, and one Badanach was appointed *interim* receiver, and on January 7, 1882, judgment was pronounced in the suit whereby, after reciting that the company had failed to pay an undisputed claim arising, or loss insured against, in Ontario for a space of sixty days after being due, whereby the deposit of the company with the Treasurer of Ontario had, under the provisions of the Ontario Insurance Act, R.S.O. 1877, ch. 160, become liable to administration and distribution, the Court continued W. Badanach as receiver of the company, and there was a reference to the Master-in-Ordinary to take an account of the debts and liabilities of the company and fix priorities of the creditors; further directions being reserved.

By an order made in the said action in the Chancery Division on November 29, 1882, the said Alexander A. Allen *et al.* were added as parties defendants to the said action to represent themselves and other shareholders who obtained and were prosecuting the said winding-up order, and by the said order the winding-up order and all the proceedings thereunder were stayed.

During the same year, 1882, the first Dominion Winding-Up Act was passed, and on January 27, 1885, an order was made upon the petition of two of the creditors of the Union Fire Insurance Company, declaring that the company was an insurance company within the meaning of 45 Vict. ch. 23, and amendments thereto, and directing the winding-up of the company.

It will be seen by the above statement that the company was first placed in liquidation under the Ontario Joint Stock Companies Winding-Up Act, R.S.O. 1887, ch. 183, for some reason other than insolvency; that then a suit in Chancery was commenced, based upon the company's failure to pay one creditor for sixty days, and partly carried out, and then a winding-up order under the Dominion Act was granted.

Shoolbred petitioned to discharge the last mentioned winding-up order upon the ground, amongst others, that the Dominion Parliament had no jurisdiction over a company incorporated in Ontario. Mr. Justice Proudfoot, before whom the petition came

MAN.
K. B.
1913
RE THE COLONIAL INVESTMENT CO. OF WINNIPEG.
Galt, J.

in 1885, points out, in 10 Ont. R. 489, at p. 494, that the Insolvent Acts had been repealed by 43 Vict. ch. 1 (D), April 1, 1880, and from that time until the passing of 43 Vict. ch. 23 (May 17, 1882), there was no mode by which the insurance company could be wound up in the technical sense of that phrase, and that during that interval Clarke instituted said action on behalf of himself and all creditors of the company against the company. The Dominion winding-up order had been made without notice to the creditors, contributories, shareholders, etc., of the company, and it did not contain the appointment of a liquidator. Shoolbred's appeal from this order is reported *Re Union Fire Insurance Company*, 13 A.R. 268. The Court was equally divided on the questions relating to want of notice and appointment of liquidator; but on the question of jurisdiction, it appears to have been unanimous. Patterson, J.A., at p. 286, dealing with the liquidation which had been in progress in *Clarke* v. *The Union Fire Insurance Co.*, says:—

> Was the company in fact in liquidation; or was its business in fact in process of being wound up? If so, the statutory declaration is that what was being done without the aid of such an Act as this may be taken up and continued under the Act. . . . I have not placed any stress, in what I have said, upon the effect of the clause now in discussion, in warranting the making of the winding-up order, though I might well have done so, because the business of the company was in fact being wound up by order of the High Court; and moreover the order under the Ontario Joint Stock Companies Winding-Up Act was in force at the specified date, viz., on May 17, 1882.

Osler, J.A., says, at p. 288:—

> I agree in the first place that this company was at the date of the Winding-Up Act of 1882 "a company in liquidation or in process of being wound up" within the meaning of sec. 2 of the Act of 1884. . . . The contention of the appellants requires us to introduce words not found in the section, but I see no sound reason for not giving the words which are there, and which I have already quoted, their obvious and natural meaning, viz., a company which has ceased to do business is declared or admitted to be insolvent and the assets of which are being got in and administered for the payment of its debts. That I think was the position in which this company was placed by their resolution passed on November 24, 1881, and by the proceedings and judgments in Clarke's action.

Shoolbred then appealed to the Supreme Court of Canada when the Court held that it is a substantial objection to a winding-up order that such order has been made without notice to the creditors, contributories, etc., as required by sec. 24 of the Act then in force, and the order was therefore set aside and the petition therefor referred back to the Judge to be dealt with anew.

The petition accordingly came before Chancellor Boyd in September, 1887, [14 O.R. 618] when counsel for Shoolbred again raised the point that the Dominion Winding-Up Act could not affect a company incorporated by the Ontario Legislature. His

Lordship appears to assume that after several years of liquidation the company was insolvent; but he says, 14 O.R. 618, at p. 620:—

I have no doubt that the Act is within the competence of the Dominion Parliament under the British North America Act, sec. 91, art. 21, and that the present company incorporated under a provincial charter is subject to its provisions.

The case was then appealed to the Court of Appeal for Ontario, and the question of jurisdiction was again raised.

In delivering judgment in 1889, Osler, J.A., says (in 16 A.R. at p. 165):—

I think for the reasons given in my judgment and that of Mr. Justice Patterson on the former appeal, 13 A.R. 268, that this insurance company, though incorporated by a provincial statute, was subject to the Dominion Winding-Up Act, 45 Vict. ch. 23, and the amending Act of 1884, 47 Vict. ch. 39. On that point there was no difference of opinion in this Court. Nor do I think it was doubted by any of us that, for the purpose of making a winding-up order under secs. 2 and 3 of the Act of 1884, the company was an insolvent company, and in course of liquidation by force of the proceedings in the Clarke suit within the meaning of sec. 2 of that Act. There is nothing to control the comprehensive language of sec. 3, which declares that the Act shall apply *inter alia* to all incorporated insurance companies doing business in Canada wherever incorporated.

Mr. Justice Burton says, at p. 169:—

Most of the other objections are really covered by the decision in this Court and the Supreme Court; such for instance as that this was not a company within the provisions of the Act and was not insolvent. It was not necessary that the insolvency should be established if it was "in liquidation or in process of being wound up" within sec. 3; and this Court rightly or wrongly decided on the former occasion that it came within that description. If it did, then the Court could proceed to make an order that the winding-up of such company should thereafter be carried on under the Act. The order is not made in that form, but is founded on the insolvency of the company.

His Lordship then deals with a point on which he dissents from the otherwise unanimous judgment of the Court dismissing Shoolbred's appeal.

Shoolbred then appealed to the Supreme Court of Canada (see 17 Can. S.C.R. 265), when his appeal was dismissed. Gwynne, J., says, at p. 267:—

I entertain no doubt that the Winding-Up Act of the Dominion Parliament, 45 Vict. ch. 23, and the Acts in amendment thereof, do apply to the Union Fire Insurance Company, and that so applying those Acts are *intra vires* of the Dominion Parliament, and I confess that I cannot understand how it can be doubted that this Court was of that opinion when it made the order which was made upon the former appeal between the same parties. It cannot be conceived that after hearing an argument upon this very ground of appeal upon the former occasion, this Court would have remitted the case to be dealt with by the Court below, under the provisions of the statute,

MAN.

K. B.
1913

RE THE COLONIAL INVESTMENT CO. OF WINNIPEG.

Galt, J.

in accordance with the opinion of the majority of the Court as to the construction of the statute, if they were of opinion that the Act did not apply to the Union Fire Insurance Company.

Patterson, J., says, at p. 274:—

Section 3 declares that the Act applies to certain incorporated companies, including incorporated insurance companies, wheresoever incorporated, and

(*a*) which are insolvent; or

(*b*) which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of the Act.

No language could be more general and comprehensive or less calculated to suggest the exclusion of any class of incorporated companies, nor has any good reason been given for thinking such exclusion can have been intended.

In its compulsory operation upon incorporated companies the Winding-Up Act is an insolvency law. Companies that are not insolvent, as well as those that are, may be brought under its operation by the effect of the second part of sec. 3 (now sec. 6) when they are already in liquidation or in process of being wound up. This may be on petition of creditors or assignees as well as of shareholders or liquidators; but original proceedings under the Winding-Up Act can be instituted only by creditors and only when the company is insolvent.

The earlier proceedings respecting the Union Fire Insurance Co., and the reports thereon, do not appear to have been brought to the attention of the late Mr. Justice Mabee.

If the view expressed by Osler, J.A., in 13 A.R. at p. 289, be correct, namely, that "a company which has ceased to do business is declared or admitted to be insolvent," for the purposes of the Act, all difficulty vanishes.

I think this view is really intended to be expressed by all of the above judgments affecting the Union Fire Insurance Co.—at all events, if I may respectfully say so, I agree with and adopt it.

In connection with this question of what may be deemed insolvency it is pertinent to note that under the Insolvent Act of 1875 [Statutes of Canada, 1875, 38 Vict. ch. 16], a man might be deemed to be insolvent for the purposes of the Act in several instances in which he might have been actually solvent—for instance, under sec. 3 a debtor shall be deemed insolvent.

(*g*) if he wilfully neglects or refuses to appear on any rule or order requiring his appearance to be examined as to his debts under any statute or law in that behalf;

(*h*) or if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or any part of them;

(*i*) or if he wilfully neglects or refuses to obey or comply with an order or decree of the Court of Chancery or of any of the Judges thereof, for payment of money.

I find it impossible to agree with the construction which the late Mr. Justice Mabee has placed upon the provisions of the

Dominion Winding-Up Act in *Re Cramp Steel Co.*, 16 O.L.R. 230, as it is in direct conflict with what appears to me to be the plain meaning of the statute and with practically all the judgments pronounced in the case of the Union Fire Insurance Co. This, however, does not altogether conclude the contest in the present case. It cannot be said that a shareholder is entitled to a winding-up order *ex debito justitiæ* merely because he brings himself within the terms of the Dominion Winding-Up Act. Cases have arisen and may arise where a voluntary winding-up is proceeding with perfect satisfaction to the majority of the creditors and shareholders and yet one or more of the parties interested desire a compulsory winding-up. Such an application is subject to the discretion of the Court and has often been refused.

The next objection taken by the liquidator is that the petitioner has not brought himself within any of the provisions of sec. 11 of the Winding-Up Act, R.S.C. 1906, ch. 144. Under that section the Court may make a winding-up order

(*b*) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up.

It is argued that because the word "resolution" is not specially defined in the interpretation clause of the Act that the meaning of the word must be sought in the Provincial Winding-Up Act. It looks as though Parliament was content to allow such a simple word as this to have its ordinary meaning. A reference to the Manitoba Winding-Up Act, R.S.M. 1902, ch. 175, shews that the Legislature took the same view for there is no definition of it there given.

I think myself that the resolution passed by the company on June 20, 1913, and the special resolution confirming it passed by the company on July 10, 1913, sufficiently comply with the requirements of the Manitoba Winding-Up Act [R.S.M. 1902, ch. 175, sec. 4 (*b*)].

The petitioner did not strongly rely on sub-sec. (*c*)

when the company is insolvent.

I think, however, that when the shareholders were notified to attend a meeting of the company for the purpose of passing a resolution to wind up its affairs, and when at the same time a financial statement was handed to them shewing a deficit of over $9,000 the inference is very strong that the company found itself practically in an insolvent position.

Finally the petitioner relies on sub-sec. (*e*)

when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up.

Counsel for the liquidator argued that nearly all the matters applicable to this particular point were sworn to on information and belief, and contended that all such evidence was inadmissible.

MAN.
K. B.
1913
RE THE COLONIAL INVESTMENT CO. OF WINNIPEG.
Galt, J.

In support of this contention they referred to a decision of Mathers, C.J., in *Re Manitoba Commission Co.*, 2 D.L.R. 1, 22 Man. L.R. 268, where his Lordship held that inasmuch as a winding-up order under the Dominion Winding-Up Act finally determines the rights of the parties within the principle laid down in *Gilbert* v. *Endean*, 9 Ch.D 259, a petition for such an order cannot be supported by statements on information and belief. In that case the affidavits of one James in support of the petition were of the vaguest nature, one of them stating that

> Such statements in the said petition as relate to my own acts and deeds are true, and that such statements in the said petition as relate to the acts and deeds of the said petitioners, or to the claim of the said petitioners against the above named company are true and such of the said statements as relate to the acts and deeds of any other person are true to the best of my knowledge, information and belief.

His Lordship points out that there are no "acts and deeds" of James set out in the petition and the statement verifying his acts and deeds in the affidavit is absolutely meaningless. The only other evidence was an affidavit of one Bissaillon.

> He cannot speak of what occurred at any meeting because he was not present at any meeting and does not pretend to state what took place thereat.

Under the English practice, as his Lordship points out, affidavits on information and belief are admissible. The English practice is followed in Ontario; see form of affidavit in Holmested & Langton. Also in British Columbia: see form appended to the Supreme Court Rules of British Columbia. It would appear that in Manitoba it is otherwise. I think this is to be regretted, for in many cases a petitioner cannot get direct evidence without going into the enemy's camp.

But the affidavits in support of the present petition contain much that is not expressed to be on information and belief, and establish at least *primâ facie* evidence of facts which, in the absence of any contradiction whatever, ought to be accepted as proved. For instance, James Hooper states:—

> 1. That he is a shareholder of the above named company (The Colonial Investment Co. of Winnipeg) and holds shares in the capital stock thereof to the amount of $400.
>
> 2. That on June 20, 1913, he attended a special meeting of shareholders of the company called for that purpose and at such meeting a resolution was passed that the company be wound up.
>
> 3. He has carefully read over the petition and says the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 10, 11, 21, 22, 23, 27, 28, 29, 30, 32, 34, 36, 37, and 38, are true.

The petition says (para. 8):—

> From the time of its incorporation the company solicited loans from and advanced money to borrowers upon mortgages containing the following among other conditions and terms.

(and then sets out the extraordinary term referred to and dealt with by Mr. Justice Beck in the case of *Colonial Investment Co. v. Borland*, 19 W.L.R. 588, above mentioned).

10. From the time of its organization under the Building Societies Act until June 20, 1913, one William Smith was one of the directors and at times president and always manager of the company.

11. The said William Smith and two other persons were the promoters of, and until February 10, 1909, were the directors and officers of, the said company.

21. Almost every applicant for stock in the company was required in his application therefor to appoint the said William Smith, manager of the company, as his proxy to vote at all meetings of the company, and by the use of said proxies the said William Smith was able to, and did, control the company and nominated the directors.

22. Some time after the company was organized, applications were accepted from the promoters of the company and others for the issue to each of them of $2,500 worth of instalment stock of the company, and subsequently when the sum of $170 or thereabouts had been paid thereon by each of the applicants the said stock of said applicants was declared fully paid up, and no more instalments were paid by the holders thereof, but said stock was treated as if the company had received all the instalments thereon and dividends were paid thereon as if it were fully paid up stock.

27. At the meeting held pursuant to said notice mentioned in the last preceding paragraph hereof a resolution was passed that the company be wound up, and a further resolution was passed that the president, the said H. L. Adolph, and the company's solicitor, one Mr. Johnson, interview various trust companies with a view to obtaining some trust company to act as liquidator.

28. That pursuant to the notice to shareholders of the company dated June 24, 1913, an extraordinary general meeting of the shareholders of the company was held at the company's offices, 622 McIntyre Block in the city of Winnipeg, on Thursday, July 10, 1913, at the hour of 2 o'clock in the afternoon, and that at such meeting a resolution was passed confirming the resolution mentioned in para. 27 hereof and a further resolution was passed appointing the Canadian Guaranty Trust Co. to act as liquidator of the company and the said L. H. Adolph was at said meeting appointed inspector.

30. Your petitioner charges, as the fact is, that the said H. L. Adolph holds stock in the company which has not been fully paid for.

38. It is necessary for the protection of the property of the company and for the interests of the shareholders, creditors or contributories thereof that a provisional liquidator be appointed who is in no way connected with the company or the present or past directors thereof, and your petitioner humbly suggests that the National Trust Company be appointed provisional liquidator.

Hooper also states in his affidavit (para. 6):—

That I have carefully read para. 24 of the petition now shewn to me, marked with the letter "C" and I say with reference to the allegations in the said paragraph contained that the stock in the company to the value of $5,000 was about the time mentioned in said paragraph issued to the said William Smith ostensibly for his services as promoter and organizer of the

MAN.

K. B.
1913

RE THE COLONIAL INVESTMENT CO. OF WINNIPEG.

Galt, J.

company, but in reality the said William Smith gave no consideration for the said shares and has received dividends thereon from the company.

11. Since the year 1909 or thereabouts the company has been loaning little, if any, money upon mortgages as hereinbefore set forth, a large amount of the money advanced by the company being in connection with speculations of the manager, William Smith, and his associates.

13. That since the year 1908 the company has practically ceased to do business as a loaning company, very few, if any, loans having been made.

18. That the said H. L. Adolph is the holder of stock in the company which is not fully paid up and that the said William Smith is or was the holder of stock in the company which is not paid up and that the said William Smith and H. L. Adolph have been most active in endeavouring to have the Canadian Guaranty Trust Co. appointed liquidator of the company and the company wound up voluntarily under the Manitoba Winding-Up Act, R.S.M. ch. 175, and amending Acts.

Two additional affidavits by Robert Macqueen and Benjamin Denby were also admitted pursuant to leave which had originally been granted by the Chief Justice; but I find that these affidavits are based almost wholly upon information and belief, and therefore are inadmissible.

With regard to the various paragraphs of the petition verified by James Hooper's affidavit, stating that the allegations contained therein are true, I think that such a mode of verification ought not to be encouraged under our present practice, as it bears a close resemblance to an affidavit on information and belief. But, in the absence of any conflicting material, such a form of verification is admissible, and many other important facts appear in other portions of the same affidavit, not open to any objection whatever.

Considering the position of William Smith, promoter and manager of the company, and of H. L. Adolph, inspector, and of the Canadian Guaranty Trust Co., the present liquidator, I think the petitioner and any other members who are in favour of his petition have ample reason for fearing that the interests of the company at large and of the shareholders in particular are likely to be insufficiently protected under the voluntary winding-up proceedings. I am satisfied that it is just and equitable to grant a compulsory winding-up order under the Dominion statute.

The name of the National Trust Co. is suggested by the petitioner as a fit and proper company to be appointed provisional liquidator, and no objection has been offered to this suggestion.

The order applied for is accordingly granted, declaring the company to be insolvent and liable to be wound up under the Dominion statute. It will also contain a provision appointing the National Trust Co. provisional liquidator and directing the Canadian Guaranty Trust Co. to transfer the company's assets to such provisional liquidator. The petitioner will then be in a position to apply, upon notice to the creditors, contributories, etc., for an order appointing a permanent liquidator. The petitioner is entitled to his costs out of the assets of the company.

Winding-up order made.

HICKS v. SMITH'S FALLS ELECTRIC POWER CO.

ONT.

S. C. 1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 19, 1913.

1. MASTER AND SERVANT (§ II A 4—71)—LIABILITY OF MASTER—GUARDING DANGEROUS MACHINERY—EXCEPTIONAL WORK—LIABILITY BY STATUTE BUT NOT AT COMMON LAW.

The employer's duty at common law to see that the employees are not required to work under a defective system does not extend to an unusual employment of a workman in assisting to move a pulley through a passageway not ordinarily used or intended for workmen to work in; and where an unprotected revolving shaft projected into the passageway, and the workman, while assisting in moving the pulley through it was injured by coming in contact therewith, the efficient cause of the injury was the direction of the superintendent to the workman to work there, and the damages must accordingly be limited to the amount recoverable under the Workmen's Compensation Act, R.S.O. 1897, ch. 160, R.S.O. 1914, ch. 146.

[*Hicks* v. *Smith's Falls Elec. Power Co.*, 10 D.L.R. 653, varied; *Ainslie* v. *McDougall*, 42 Can. S.C.R. 420, and *Brooks, etc., Co.* v. *Fakkema*, 44 Can. S.C.R. 412, referred to.]

Statement

APPEAL by the defendant company from the judgment of Latchford, J., *Hicks* v. *Smith's Falls Electric Power Co.*, 10 D.L.R. 653, 4 O.W.N. 1215.

The judgment appealed from was varied.

D. L. McCarthy, K.C., for the defendant company.

J. A. Hutcheson, K.C., for the plaintiffs.

Meredith, C.J.O.

THE JUDGMENT of the Court was delivered by MEREDITH, C.J. O.:—The action is brought by the widow and infant daughter of Richard Hicks, deceased, who was a workman in the employment of the appellant company, to recover damages under the Fatal Accidents Act for his death, which, as it is alleged, was caused by the negligence of the appellant company.

The facts are fully stated in the reasons for judgment of the learned trial Judge, and it is unnecessary to restate them. His finding was, that there was in use by the appellant company "a defective system which caused the death of Hicks;" and he held that the respondents were entitled to recover at common law, and he assessed the damages at $4,000. He also assessed them contingently at $2,000 if ultimately it should be held that the respondents were entitled to recover only under the Workmen's Compensation for Injuries Act.

The right of the respondents to recover under the Act was but faintly denied; but it was contended that they were not entitled to recover at common law.

I should not have differed from the conclusion of the learned trial Judge that the appellant company was liable at common law, if the place in which the deceased was working at the time

ONT.
S. C.
1913
HICKS
v.
SMITH'S FALLS ELECTRIC POWER CO.
Meredith, C.J.O.

he met with the injury which caused his death had been a place in which, in the ordinary course of the business of the company, workmen would be required to be employed; for in that case the company would have failed to perform the duty which it owed to its workmen: *Ainslie Mining and R. Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420; *Brooks Scanlon O'Brien Co.* v. *Fakkema* (1911), 44 Can. S.C.R. 412. No such case was made by the respondents. The place in which the deceased was working was not ordinarily used or intended for workmen to work in. It was a passage-way, seldom used; and the occasion of the deceased being at work there was a very exceptional one, due to the necessity of moving through the passage-way the large pulley which was to be placed in the engine-room. The duty of guarding against the risk to which the deceased was exposed in moving the pulley was, therefore, I think, not one which the appellant company might not delegate to a competent superintendent or foreman. Besides this, the projecting end of the shaft was not a source of danger to any one unless the shaft was in motion; and in the usual course of the business it was not in use during the daytime.

On the morning of the accident, owing to something having occurred which necessitated the repair of a belt in connection with the shaft, which was ordinarily used for the purpose of supplying power to the customers of the appellant company, it could not be used, and the other shaft was being temporarily used instead of it. There was, therefore, the conjunction of two exceptional circumstances which led to the deceased being at work at a place in which he was exposed to unnecessary risk of injury.

For these reasons, I am of opinion that the efficient cause of the deceased's injury was not the failure of the appellant company to perform the duty which rested upon it, to which I have referred, but the negligence of the superintendents who had charge of the moving of the pulley, in requiring the deceased to work at a place where, owing to the shaft with the projecting end being in motion, he was in a position which needlessly exposed him to risk of injury.

The judgment should, in my opinion, be varied by reducing the damages to $2,000, and with that variation it should be affirmed. There should be no costs of appeal to either party.

Judgment varied.

INDEX OF SUBJECT MATTER, VOL. XIV., PART 4.

(*For Table of Cases Reported see end of this Index.*)

CASES REPORTED, VOL. XIV., PART 4.

767
648
596
699
608
737
749
729
633
666
718
711
696

PULFORD v. LOYAL ORDER OF MOOSE.

(Decision No. 2.)

MAN.

C. A.

1913

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 7, 1913.

1. PRINCIPAL AND AGENT (§ II D—26)—AS TO AUTHORITY—LIABILITY OF PRINCIPAL—RATIFICATION OF UNAUTHORIZED ACTS—WHAT CONSTITUTES.

Where a benevolent society appoints a committee to secure rooms for lodge purposes, and an officer of the society, although not a member of such committee, but with its approval, enters into a contract for the rental of rooms and makes a payment thereon, the conduct of the society in reimbursing him for his outlay adopting a vote thanking him for his services, and treating the officer as binding, ratifies such agreement.

[*Reuter* v. *Electric Telegraph Co.*, 6 E. & B. 341, 119 Eng. R. 892; *Smith* v. *Hull Glass Co.*, 8 C.B. 668, 11 C.B. 897; *Hoare* v. *Mayor of Lewisham*, 85 L.T.N.S. 281; and *Conway Bridge Commissioners* v. *Jones*, 102 L.T.N.S. 92, applied.]

2. CONTRACTS (§ I E 5—106)—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—DESCRIPTION OF PARTIES—CONTRACT IN AGENT'S NAME.

An agreement relating to land made in the name of an agent sufficiently satisfies the Statute of Frauds, since parol evidence is admissible to disclose the principal.

3. PARTIES (§ I A 2—22*a*)—PERSONS WHO MUST OR MAY SUE ON CONTRACT—PRINCIPAL ON CONTRACT MADE BY AGENT.

A contract made by an agent in his own name sufficiently satisfies the Statute of Frauds so as to permit the principal to maintain an action thereon, parol evidence being admissible to shew the relation of the parties.

[*Cummins* v. *Scott*, 20 Eq. 11 at 15, 16; *Morris* v. *Wilson*, 5 Jur. N.S. 168; *Filby* v. *Hounsell*, [1896] 2 Ch. 737; and *Standard Realty Co.* v. *Nicholson*, 24 O.L.R. 46, referred to.]

4. EVIDENCE (§ VI M—586)—PAROL OR EXTRINSIC EVIDENCE CONCERNING WRITINGS—CHARACTER OF PARTY—AGENCY.

Parol evidence is admissible in an action on a contract by one whose name does not appear therein, to shew that the person in whose name it was made was merely an agent.

5. ESTOPPEL (§ III E—71)—BY CONDUCT—AS TO AGENCY—ESTOPPEL TO DENY—VALIDITY OF APPOINTMENT.

By holding out a person as its agent or permitting him to appear as such, a company is estopped from questioning his authority on the ground that his appointment was not under seal; and contracts with persons dealing with him in good faith without notice of any informality in his appointment are binding on the company.

[*Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869; *Re County Life Ass. Co.*, L.R. 5 Ch. 288; and *Muldowan* v. *German Canadian Land Co.*, 19 Man. L.R. 667, specially referred to.]

6. LANDLORD AND TENANT (§ III D—95)—REPUDIATION OF LEASE—LANDLORD'S REMEDY.

On the repudiation of a lease by a lessee the lessor may recover damages therefor, his remedy not being limited to the enforcement of the payment of rent as it falls due.

[*Pulford* v. *Loyal Order of Moose*, 9 D.L.R. 804, reversed.]

Statement

APPEAL from the judgment of Macdonald, J., *Pulford* v. *Loyal Order of Moose*, 9 D.L.R. 804, in favour of the defendant in an action for damages sustained by the repudiation of a lease.

MAN.

C. A.
1913

PULFORD
v.
LOYAL
ORDER OF
MOOSE.

Perdue, J.A.

The appeal was allowed.

W. A. T. Sweatman, and *A. G. Kemp*, for the plaintiff.
H. P. Blackwood, for the defendants.

PERDUE, J.A.:—The defendants are incorporated by letters patent issued by the Government of the Province of Manitoba under the provisions of the Charitable Associations Act, R.S.M. 1902, ch. 18. The purposes of the members in seeking incorporation were, as stated in the letters patent, (*a*) for mutual protection by means of contributions, subscriptions, donations or otherwise against casualties caused by disease, accident or death with a view of helping the afflicted or the widows and orphans of deceased members, (*b*) for any benevolent or provident purpose not connected with trade or business.

These are two of the purposes set out in sec. 2 of the Act for which such associations of persons may be incorporated.

The letters patent authorise the corporation to hold land for its purposes, provided that the annual value thereof shall not exceed $5,000.

A booklet was put in evidence which was called the constitution of the defendant association. This purports to contain the constitution and laws of the "Supreme Lodge of the World, Loyal Order of Moose." This is apparently a foreign association, all the officers of which reside in the United States. The booklet contains a provision for the formation of subordinate lodges and a number of sections headed, "General laws for government of subordinate lodges." Although it is by no means clear, I take it that the defendants have adopted as their by-laws the provisions appearing under this last heading in so far as they are authorised so to do by the laws of this province. It was so assumed upon the argument of the case. No point was raised as to the legality of these by-laws, if such they can be called, or whether the defendants have sufficiently complied with the Act in electing directors and appointing officers.

The defendants, on June 5, 1912, passed a resolution in favour of opening club-rooms. The secretary was instructed to write to the Supreme Lodge for authority so to do. The house committee, which had previously been appointed by resolution, "was vested with full power to rent or lease suitable club rooms." Whether authority from the Supreme Lodge was necessary or not, we can at all events infer that it was granted, because club-rooms were afterwards leased, opened and used as such by the lodge. From the evidence given in the case I have no hesitation in finding that the house committee, on behalf of the lodge, agreed to lease the premises in question from the plaintiff. This took place on June 11, 1912. On that date an offer in writing to take the premises for two years on certain terms therein set out was drawn up and sent to Groves, the plaintiff's agent. This offer

was signed, "Loyal Order of Moose, per W. G. Gibbs." Gibbs held the office of "vice-dictator" in the lodge, a position which, I take it, corresponded to that of vice-president. He had apparently assisted the house committee very much in the business of procuring club-rooms, because we find a vote of thanks to him included in the resolution of June 5, "for his untiring efforts on behalf of the house committee." The plaintiff's agent accepted the offer signed by Gibbs, and a cheque for $100 was then handed to the agent on behalf of the defendants. This was a cheque of the firm of which Clark, the secretary of the lodge, was a member. This advance made by Clark was repaid to him at once out of the moneys of the defendants. A warrant was made out and signed by two of the trustees of the lodge authorizing the payment and designating it as "rent of club-rooms." The payment of $100 appears as an entry in the cash book under date of June 12, where it is referred to as rent. The cheque was signed by Newton, who was at the time the "dictator" of the lodge, an office which I infer is equivalent to that of president, the office of president being provided for by the Charitable Associations Act, but no mention being made in it of such an office as dictator. The constitution, or by-laws as we may assume them to be, shews that the dictator exercises all the powers that would ordinarily be exercised by a president. Newton knew, when he signed the cheque, the purpose for which the money had been paid. The treasurer paid the $100 to Clark.

Under the Charitable Associations Act, the affairs of the corporation are to be managed by a board of directors or trustees appointed as indicated in the Act. I think we must assume that the trustees mentioned in the evidence and referred to in the "constitution" were the directors or trustees contemplated by the Act.

A letter was written on July 3, to the plaintiff by the defendants' solicitor distinctly referring to the lease made by the plaintiff to the defendant and complaining that, by reason of delay in completing certain alterations, the lodge had lost an opportunity of sub-letting a portion of the premises.

On July 9 the plaintiff notified Gibbs that the premises were ready and at the same time caused the keys of the premises to be handed to him. There was no denial of the authority to make the lease by the defendant until October 9, and the keys of the premises were not until then returned to the plaintiff.

I think that the facts I have referred to establish that Gibbs was authorised to sign the written offer on behalf of defendant, or that, at all events, his action in so doing was ratified afterwards by the defendant.

The leasing of premises was within the scope of the defendant's powers. The plaintiff acted upon the contract of lease and made considerable alterations in the premises at the request

MAN.

C. A.
1913

PULFORD
v.
LOYAL
ORDER OF
MOOSE.

of the members of the house committee who arranged the lease. A payment of $100 which was put through in due form by the directors and officers of the lodge and passed into its books, was made to the plaintiff on account of rent. This brings the case exactly within the principles referred to in *Reuter* v. *Electric Telegraph Co.*, 6 E. & B. 341, 119 Eng. R. 892, and *Smith* v. *The Hull Glass Co.*, 8 C.B. 668, 11 C.B. 897.

Perdue, J.A.

A further objection taken by the defendant was that the writing was addressed to Groves, the plaintiff's agent, and that the plaintiff's name did not appear either in the writing or in the acceptance. But, in order to satisfy the Statute of Frauds, it is immaterial that the parties named in the memorandum are in fact agents. Parol evidence is admissible to prove who are the principals. A person may enforce a contract which his agent has made for him in the agent's own name. These principles are stated in *Cummins* v. *Scott*, 20 Eq. 11 at 15, 16; *Morris* v. *Wilson*, 5 Jur. N.S. 168; *Filby* v. *Hounsell*, [1896] 2 Ch. 737.

There was no jurisdiction for the defendant's breach of the contract to take a lease of the premises.

I think the appeal should be allowed and that a judgment should be entered for the plaintiff. The damages have been assessed by this Court at $900 over and above the money already paid to the plaintiff. The defendant should pay the costs of this appeal and also the costs in the Court of King's Bench down to and including the trial.

Cameron, J.A.

CAMERON, J.A.:—This is an action brought by the plaintiff on an agreement for a lease of certain premises, the property of the plaintiff, made by the defendants, for two years at a monthly rental of $100. The agreement is dated June 11, 1912.

The dispute narrows down to the question whether the document on which the plaintiff bases his claim satisfies the requirements of the Statute of Frauds.

The defendant lodge was organized under the Charitable Associations Act, R.S.M. 1902, ch. 18. The letters patent constituting the defendant lodge a body corporate and politic under the Act are dated October 31, 1911. The minutes of the lodge shew the appointment of a house committee January 22, 1912. This committee was given power to rent or lease suitable clubrooms by resolution passed at a regular meeting June 5, 1912.

The plaintiff, according to his evidence, met Mr. Gibbs, vice-dictator of the lodge, and certain other members of the house committee June 12, 1912, when the terms of the lease of the premises in question were discussed and agreed to. There was another meeting the next day when Gibbs handed over to Groves the letter dated June 11, which is the basis of this action. In the letter was enclosed a cheque for $100. Groves to whom the

letter is addressed is rental agent for the Rogers Realty Co., rental agents for the plaintiff.

The following is a copy of the letter referred to:—

Re top flat Pulford block, Donald St.

I beg to submit the sum of one hundred dollars ($100) rent per month for above flat taking a two years' lease. Owners to repair and make place comfortable and attractive and furnish heat and water.

We guarantee proper usage of flat and will keep same in repair. Rent to start from day flat can be used by Loyal Order of Moose.

The space to include from passage to windows (back) and from north brick wall to wooden partition. Stairs to be covered over as suggested by Mr. Newton and the writer on June 5.

Kindly give me a written reply by 12 o'clock noon Wednesday, June 12. Or submit best price.

LOYAL ORDER OF MOOSE,
Per W. G. Gibbs.

This offer was duly accepted by Pulford, who received the $100, and went to considerable expense in fitting up the premises to meet the needs of the defendants. The plaintiff also sent the keys to the defendants, who retained them until the following October. The cheque for $100, made by Bannerman Clark & Co., was afterwards reimbursed out of the lodge's funds. There is no question that this payment was duly authorized.

Parol evidence is clearly admissible to shew that Groves was agent for the plaintiff and there is no doubt as to the fact on the evidence. As the name of the agent appears, the identity of the plaintiff is sufficiently disclosed by the memorandum. This is the law as it appears to be clearly laid down: *Cummins* v. *Scott*, L.R. 20 Eq. 11 at 16, *per* Sir George Jessel; *Filby* v. *Hounsell*, [1896] 2 h. D. 737; *Standard Realty Co.* v. *Nicholson*, 24 O.L.R. 46.

The house committee of the defendants was appointed January 22, 1912, consisting of Fletcher, Pearson, Arthur Newton, Kench Brandon and Chas. Newton. This committee was by resolution of the lodge passed June 5, 1912, vested with full powers to rent or lease club-rooms. Gibbs, who signed the letter of June 11, is not named as a member of the house commitee. He was, however, vice-dictator, or second chief officer of the lodge, acting as chief officer in the absence of the dictator, and he acted as a member of the house committee. This appears in the evidence of the members of the committee. Newcombe, past dictator and chairman of the house committee, says he (Gibbs) "had some power to a certain extent" but he holds he had no authority to sign. Newcombe was present at the meeting when Gibbs handed over the cheque for $100. Fletcher says that it was at Gibbs' request that he went up to see the premises in question. Gibbs, he says, did quite a lot of work in endeavouring to procure premises and acted as chairman of the house committee in Newcombe's absence (p. 127) It was

MAN.

C. A.

1913

PULFORD v. LOYAL ORDER OF MOOSE.

Cameron, J.A.

apparently on Fletcher's motion that a vote of thanks to Gibbs, "for his untiring efforts on behalf of the house committee" was put and carried at the meeting of the lodge, June 5, 1912. McIntosh, a trustee but not a member of the house committee, inspected the premises at Gibbs' request (p. 149) and at p. 156 he speaks of Gibbs as one of the members of the house committee, who had been very active in the negotiations for club-rooms (p. 171). At p. 179 the trial Judge asked McIntosh whether Gibbs was a member of the house committee, and the answer is "Mr. Gibbs was acting on the house committee." Clark, the secretary of the lodge, testifies that he gave Gibbs his firm's cheque at Gibbs' request in order to "make a deposit on some premises." This advance was repaid out of the lodge funds pursuant to a warrant signed by the trustees, McIntosh and McFarlane. Clark says he is not certain, but he presumes he told "these people" that he had given Gibbs a hundred dollars to be paid for the first month's rent of these premises. He got the money from the treasurer.

According to the plaintiff's evidence the terms were agreed upon at the meeting on June 12, when Gibbs, Newton, Newcombe and McIntosh were present.

Those present acquiesced in the terms and in the statement that a cheque would be brought as deposit. The next day Newton, Newcombe, McIntosh, Gibbs and Fletcher met the plaintiff, and the letter of June 12, and the $100, were given to Mr. Groves on the plaintiff's behalf. Gibbs handed Groves this letter in the presence of the others.

Gibbs was present during the trial, but was not called to give evidence by the defence, though he was the man above all those involved who was in a position to shed light on the transaction. He was clearly a member of the house committee, sometimes acting as its chairman and taking the leadership in the negotiations by virtue of his position as vice-dictator and otherwise.

On the whole it is clear that the lodge acting by resolution delegated its powers with respect to renting club-rooms to the house committee. I think it also reasonably clear that the members of the house committee practically delegated their powers to Gibbs, who "had been working harder than all the other members of the house committee put together:" Newcombe, p. 108. Having in view the plaintiff's evidence, particularly, and the evidence generally of the members of the lodge, I think I must reach the conclusion that the members of the house committee clothed Gibbs with authority to write and sign the letter of June 12, and to hand over to the plaintiff the $100 therein enclosed. They were with Gibbs when he handed this letter to Groves. The theory that Gibbs was acting without authority from or consultation with the members of the committee,

in the absence of a clear and unequivocal explanation of the facts from him, must, in my judgment, be rejected.

It is objected that the appointment of Gibbs should have been under the seal of the defendant lodge and there being no such appointment under seal, he could not bind the lodge as its agent. The general rule in England is that the appointment of an agent by a corporation must be under its common seal. The rule, with its exceptions, is stated in Bowstead on Agency, 5th ed., p. 43. We discussed this branch of the law as concerning municipal corporations in this province in *Manning* v. *City of Winnipeg*, 21 Man. L.R. 203.

Where, however, a corporation holds out or permits a person to appear as its agent, it is bound by his acts as such, with respect to persons dealing with him in good faith, and without notice of any informality, though he has not been formally appointed: Bowstead on Agency, 5th ed., p. 45; *Faviell* v. *Eastern Counties R. Co.*, 2 Ex. 344. See also Bowstead at p. 292, and the cases cited in the following pages. I refer particularly to *Mahony* v. *East Holyford*, L.R. 7 H.L. 869. *Re County Life Ass. Co.*, L.R. 5 Ch. 288; *Wilson* v. *West Hartlepool*, 34 Beav. 187. I had a similar question before me in *Muldowan* v. *German Canadian Land Co.*, 19 Man. L.R. 667, arising out of our Joint Stock Companies Act.

Inasmuch as in this case the plaintiff was led to believe by the lodge through the acts, words and conduct of its house committee, and the members of that committee, and of its officers, that Gibbs was authorized to sign and send the letter of June 11, and, acting on that belief, entered into the agreement proposed, and in good faith incurred considerable expense in fitting up the premises, it would appear to me that the case comes fairly within the law as stated in 1 Halsbury 156. It is not denied that Gibbs had authority to a certain extent and if he exceeded it to the prejudice of the plaintiff who acted throughout in good faith, then the lodge having made that excess of authority possible is therefore stopped from denying Gibbs' ostensible agency.

In any event the payment of the $100 to the plaintiff out of the funds of the lodge, and the various acts of the defendants' officers in connection with the transaction constitute acts of acquiescence on the part of the lodge sufficient, in my opinion, to ratify and confirm the contract. Amongst those acts I refer to the acceptance and retention for a long period of the keys, the wording of the solicitors' letter of July 3, which admits a contract, the acceptance of the receipt for the $100, the issue of the warrant for the payment of that amount by the trustees in conformity with the rules of the lodge, and the payment made by the treasurer thereon, the entry of the payment in the lodge's cash book, the offer made to the plaintiff by McIntosh of $100 "to allow the matter to drop," and the acts and conduct throughout of Gibbs, vice-dictator of the lodge, and the most active

MAN.

C. A.
1913

PULFORD
v.
LOYAL
ORDER OF
MOOSE.

Cameron, J.A.

member of the house committee. These circumstances appear to me clearly referable to the contract and sufficient to bring the case within *Hoare* v. *Mayor of Lewisham*, 85 L.T.N.S. 281, and *Conway* v. *Jones*, 102 L.T.N.S. 92. I refer also to *Reuter* v. *Electric Telegraph Co.*, 6 E. & B. 341, 11 Eng. R. 892.

At the trial the learned trial Judge took the view that the plaintiff had failed to establish a cause of action as set forth in the pleadings. With deference, I am unable to concur in this view. I think the judgment of nonsuit entered at the trial should be set aside and that judgment for the plaintiff should be entered for $900 damages. The appeal is therefore allowed with costs to the plaintiff of the appeal and of the action.

Howell, C.J.M.
Richards, J.A.
Haggart, J.A.

HOWELL, C.J.M., RICHARDS, and HAGGART, JJ.A., concurred.

Appeal allowed.

MAN.

C. A.
1913

PICKERING v. GRAND TRUNK PACIFIC R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 24, 1913.

1. TRIAL (§ III E 2—236)—INSTRUCTIONS—CORRECTNESS OF—DAMAGES—PERSONAL INJURIES.

In a negligence case against a railway company by a fireman in its employment, for permanent personal injury impairing his earning capacity, the judge should charge the jury to consider, on the quantum of damages, the general opportunities in life still open to the plaintiff, and there is misdirection where the charge limits those opportunities to the plaintiff's particular calling or even the class of callings within his general industrial field, for instance, railroading.

[*Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250; *Rowley* v. *London and North Western R. Co.*, L.R. 8 Ex. 221, specially referred to; *Schwartz* v. *Winnipeg Electric*, 12 D.L.R. 56, and *Bateman* v. *Middlesex*, 6 D.L.R. 533, considered.]

2. DAMAGES (§ III—I—173)—IMPAIRMENT OF EARNING CAPACITY—MISDIRECTION.

In a negligence action for damages for permanent personal injury to the plaintiff, a railroad man, impairing his earning capacity, it is misdirection for the trial judge to charge the jury by suggesting that the jurymen put themselves in the plaintiff's place and consider for themselves whether, in similar circumstances, any of them would be willing to undergo such suffering and loss, and to seek employment in industrial fields other than railroading.

[*Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250; *Rowley* v. *London and North Western R. Co.*, L.R. 8 Ex. 221, specially referred to.]

Statement

APPEAL by the defendant by way of motion to set aside the verdict of the jury, on the ground of misdirection.

The appeal was allowed and a new trial ordered, HOWELL, C.J.M., and CAMERON, J.A., dissenting.

W. H. Trueman, for plaintiff.

C. P. Fullerton, and *A. Hutcheon*, for defendants.

HOWELL, C.J.M. (dissenting):—To my mind the only ground upon which the verdict might be assailed is the amount of the damages. If the matter had come before me for decision, I would have fixed the amount at a much lower sum. The plaintiff, a young man of twenty-three, with fair education, chose the occupation of fireman upon a railway engine, and was earning from $80 to $100 per month. I shall assume what probably the jury assumed, that this occupation he hoped, and probably with good reason, would be merely a stepping stone to that of engineer, and, perhaps, in the future, something in railway work even higher. Still, it would be probably railway work, and besides the ordinary chances and accidents of life, there is connected with it the peculiar risks of that dangerous occupation. The accident has deprived him of the position in life which he chose to adopt; he has lost many months of time, has endured great suffering and has lost part of his leg below the knee, but I gather he has the benefit of the knee joint. On the other hand, there are many other occupations which he might adopt and which are not as dangerous as the occupation which he had chosen, and this should be considered by the jury in estimating the damages. The plaintiff is not to remain idle and do nothing because he cannot work on a railway engine, and if he cannot get railway work, there are other avenues open.

To my mind it would have been better if the learned Judge had told the jury to consider the life work which might be still open to the plaintiff, and to consider the accidents and incidents of life and the peculiar dangers of railway work which might be avoided in other occupations and keep all this in view in assessing the damages.

Much stress was laid by counsel for the defendant on a statement made by the learned Judge in the charge, "Put yourselves in his place." Objection was taken to this and the jury was recalled and the Judge told them, in reference to the above, as follows: "I desire now to tell you that you must not pay any attention to it; that you must not, in your mind's eye, put yourselves in this man's place." The first statement was unwise, but the second one, the plaintiff might complain of. From my experience at the bar, I should say that while trials by jury last, juries, at all events, sympathetic and imaginative ones, will continue—in their imagination—to place themselves in the environment so as to draw their conclusions of fact, and thus perform some of the true functions of a jury.

Because of the tendencies of juries to give large damages against corporations, it is prudent for Judges to charge carefully as to measure of damages, that this tendency may be met.

It seems to me that the objection of counsel to the charge as to damages was merely that the learned Judge had used the ex-

MAN.

C. A.
1913

PICKERING
v.
GRAND
TRUNK
PACIFIC
R. CO.

Howell, C.J.M. (dissenting)

pression above referred to, which he corrected on the recall. Whatever objection there may be on the ground of non-direction in the charge, no objection was taken on this ground, and Lord Halsbury, in *Nevill* v. *Fine Arts*, [1897] A.C. 69, at 76, uses this language:—

> But what puts him out of Court in that respect is this, that where you are complaining of non-direction of the Judge or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial.

See also *Seaton* v. *Burnand*, [1900] A.C. 135.

Reading the correction as to misdirection made on the recall of the jury, I cannot say that this caused such substantial wrong as, under rule 660, would require the granting of a new trial.

After carefully reading the charge and the several objections to it and considering what was stated on the recall, and considering that there were no objections as to non-direction, I do not think that because of the charge, the plaintiff should be put to all the expense of a new trial to obtain his rights.

The amount of the verdict is not in harmony with my judgment. Such a judgment thirty years ago, when dollars were much more valuable than now, would have been startling. The jury is the tribunal to judge this matter, and the verdict is not to be set aside merely because, in my judgment, I would have given much less: *Toronto* v. *King*, [1908] A.C. 260. I cannot say that the verdict was unreasonable and almost perverse which seems to be the measure required in granting a new trial: *Cox* v. *English*, [1905] A.C., at 168.

I would dismiss the appeal.

Richards, J.A.

RICHARDS, J.A.:—This was an action to recover damages for injuries caused by negligence of the defendants' servants in operating a railway train. The result of the injury was that the plaintiff was obliged to undergo several operations and lost his left leg half way from the foot to the knee. He was in hospital eight or nine months, and during that period suffered from diphtheria and pneumonia. He was a young man of twenty-three or thereabouts at the time of the injury, and earning in the neighbourhood of $90 a month as a fireman. The jury gave a verdict in his favour for $10,000 and from that verdict the defendants have appealed.

Although several grounds were urged in support of the appeal, I do not think there is anything to be considered but the amount of the damages, which certainly seem very large, and parts of the learned Judge's charge.

The learned trial Judge charged the jury very ably on all

other points, but I think he should not have used the following language:—

> Now, it has been suggested that he is a young man and that there are other avenues of occupation in life open to him. Well, I can only say, put yourselves in his place, as to that argument. Is there any man of you that would be willing to have a leg taken off below the knee and say, "Well, there are other opportunities of earning a living; I am a well-educated man and there are lots of things I can turn my hand to?" Do you think that would be much of an argument? If so, give what effect to it you think it merits. Apparently a railroad career is the one the plaintiff started out on and he was earning in the neighbourhood of $80 to $100 a month. Is this avenue of occupation still open to him? It seems to me this accident has debarred him, shut him out from a career as a railroad man, excepting in some of the humbler walks in that calling, which would not give a man much opportunity to do more than earn a day's bread.

After the jury had retired, objection was taken to this charge by counsel for the defendants, in the following words:—

> In dealing with the question of damages and with the argument which I made, namely, that in considering the question of damages, it would be fair to consider that this young man was only two years in the service of the railway company, and had an education and was able to earn a living in other ways; having such an education, your Lordship used these words: "Put yourselves in his place."

Though this objection, strictly read, seems only to take exception to the use of the words, "Put yourself in his place," I think the intent was to object also to the way in which the Judge had referred to the plaintiff's chances of making his living in the future.

The Judge recalled the jury, and used the following language:—

> Now, I made use of an expression to you that, perhaps, it is true, I should not have, and I desire you to eliminate from your minds any impression that may have been conveyed to you by what I said. I made use of the expression, "Put yourselves in his place." Now, I should not have done that. It was a slip of the tongue, a *lapsus linguæ*. It is very difficult for a Judge, off-hand, to charge a jury upon questions of fact and law without having time to consider and weigh his words. So that, if you remember that expression as coming from me, I desire now to tell you that you must not pay any attention to it. That you must not, in your mind's eye, put yourselves in this man's place, and you will consider the question as if these words had not been spoken at all.

He said nothing in correction of his references to the plaintiff's prospects in life.

It is argued by counsel for the plaintiff that the Judge, having given the above direction, the objection to the earlier part of his charge was removed.

MAN.
C. A.
1913
PICKERING
v.
GRAND
TRUNK
PACIFIC
R. Co.
Richards, J.A.

With deference, I am unable to take that view. When the learned Judge, in the language used by him, told the jury to put themselves in the plaintiff's place, he must, I think, have made an impression on their mind which could hardly be removed by what he afterwards said.

Then, also, I do not think that he should have referred, as he did in the charge, to the plaintiff's opportunities of earning a living in the condition in which he is left with part of his leg gone. I take it to be a necessary part of a charge to the jury, in a case of this kind, to direct them that, in arriving at the quantum of damages, they must take into consideration and give weight to the opportunities in life still remaining to the plaintiff. That does not seem to me to have been stated to the jury as it should have been. The latter part of the first quotation above given from the charge seems to imply that the plaintiff's only opportunity in life would be in the humbler walks of his calling as a railroad man. There are other lines of life than railroading in which the plaintiff could make a living, he being a man of some education, and the jury should have been instructed to take that into consideration in arriving at their verdict.

With the utmost deference, I am of opinion that, in view of the size of the verdict, there is reason to believe that the amount was unduly increased by the effect of the charge, and that, but for that, the amount would have been smaller.

If the jury had been charged as I think they should have, on these points, and the verdict had still been $10,000, I should require further consideration before deciding that it was a case for a new trial, even though the damages are so unusually large; or if, notwithstanding the charge, the damages had been half of the sum awarded, I should doubt whether we ought to order a new trial, as it would then be doubtful whether the charge had improperly influenced them. But when, after being so charged, the jury gave the equivalent of about ten years of the plaintiff's earnings at the time of his injury, I cannot but think, as stated above, that the charge affected them by causing them to take into consideration in aggravation of damages, things that they should not so take, and to omit from consideration matters which should be given their attention in mitigation of damages.

I would allow the appeal and order a new trial. Costs of this appeal and of the trial already had to be costs in the cause.

Perdue, J.A.

PERDUE, J.A.:—One objection raised by the defendants was to the effect that it had been proved that the defendants' servants who caused the injury were at the time acting within the scope of their authority. I think there was sufficient evidence to support a finding that the accident was caused by the negli-

gence of the defendants. The argument based upon an alleged disobedience of certain rules of the Canadian Northern Railway as affording evidence of contributory negligence must, I think, fail. There remains only one serious contention, that the damages were excessive and that there was in this regard mis-direction and non-direction on the part of the learned trial Judge.

The plaintiff was, at the time of the accident, twenty-three years of age. He was a fireman in the employ of the Canadian Northern R. Co., and had been so for six months. For a year and a half previously he had been employed by that company as a cleaner. He was earning about eighty dollars a month at the time he received the injury. He has a fair education. The injury was a very severe one. There appear to have been several operations on the foot and leg, finally resulting in the leg being amputated below the knee. The jury awarded ten thousand dollars damages.

It appears to me that even allowing for everything which the jury might properly take into account, the damages are excessive. The Court is asked to set aside the verdict and order a new trial upon the ground that the learned Judge had not properly directed the jury on the subject of damages. In summing up he said to the jury, at the close of his address:—

> Now, it has been suggested that he is a young man and that there are other avenues of occupation in life open to him. Well, I can only say, put yourselves in his place, as to that argument. Is there any man of you that would be willing to have a leg taken off below the knee and say, "Well, there are other opportunities of earning a living, I am a well-educated man and there are lots of things I can turn my hand to?" Do you think that would be much of an argument? If so, give what effect to it you think it merits. Apparently a railroad career is the one the plaintiff started out on and he was earning in the neighbourhood of $80 to $100 a month. Is this avenue of occupation still open to him? It seems to me this accident has debarred him, shut him out from a career as a railroad man, excepting in some of the humbler walks in that calling, which would not give a man much opportunity to do more than earn a day's bread. I will not hinder you any longer by saying anything further to you upon this question of damages. I have indicated to you fairly well what you ought to take into consideration, and, of course, you are the judges and are here for that purpose.

After the jury had retired, counsel for the defendants took the following objection, amongst others, the learned trial Judge apparently interrupting with the remark that immediately follows:—

> It seems to me that the way your Lordship put this question of damages before the jury was not a fair way of putting it according to our point of view. In dealing with the question of damages and with the argument which I made, namely, that in considering the question of damages, it would be fair to consider that this young man was only two years

MAN.

C. A.
1913

PICKERING
v.
GRAND
TRUNK
PACIFIC
R. CO.

Perdue, J.A.

in the service of the railway company, and had an education and was able to earn a living in other ways; having such an education, your Lordship used these words: "Put yourselves in his place."

HIS LORDSHIP:—Yes, I did not mean to use that expression, and shall tell them so when I recall them. It was what might be called a *lapsus linguæ*.

The defendants' counsel then went on to speak of other matters of objection not connected with the question of damages. The trial Judge recalled the jury and instructed them to pay no attention to the words, "Put yourselves in his place," and directed them to consider the question as if these words had not been spoken; but he did not make any modification of the remainder of the direction as to damages.

It appears to me that the objection made by counsel to the charge was two-fold, first, that it might fairly be left to the jury to consider that the plaintiff, with the education such as he had, was still able to earn a living in other ways; secondly, that it was incorrect to say to the jury "Put yourselves in his place." At all events, I think it was sufficiently indicated by counsel that objection was taken to the direction dealing with the question of the plaintiff's capability of still earning money in other occupations. If counsel had not been stopped by the learned Judge, the objection would, probably, have been more fully stated.

Now, supposing that we eliminate from the portion of the charge to the jury above cited, the words, "Put yourselves in his place," we still have expressions left which, I think, the jury would understand as a direction that they need not take into account the fact that the plaintiff still had opportunities of earning money in other occupations. I think the jury was left with the impression that compensation should be awarded simply upon the basis that the plaintiff had been debarred from his career as a railway man except in a very humble position "which would not give a man much opportunity to do more than earn a day's bread." Looking at the amount of the verdict, I think that, even if we allow for everything which the jury should properly take into consideration, there would remain a sum so large that the jury must have attempted to give the plaintiff a complete compensation for the expected loss of income from railway employment during his life.

In *Johnston* v. *Great Western Railway*, [1904] 2 K.B. 250, at 259, Vaughan Williams quotes Grantham, J., as having charged the jury in the Court below as follows:—

> There is loss of five hundred pounds a year on what he (the plaintiff) is earning already—the difference between what he is able to earn now and what he would have earned but for this accident. Give him such com-

pensation as you think will put him in the position in which he would have been.

In dealing with this charge, Vaughan Williams, L.J., said:—

If the summing up had stood there, I should have said there was a clear misdirection, because the plaintiff ought not to be put in the position in which he would have been by making such a calculation as that which the learned Judge has referred to, for the jury are bound to take into consideration the chances and accidents of life, and a number of other matters. But the learned Judge, in the very next passage, gave the jury a sufficiently plain instruction, based on the judgment in *Rowley* v. *London and North Western Railway*, L.R. 8 Ex. 221, for he said: "There are the accidents of life and other elements which have to be taken into consideration which ought to prevent you giving him such a sum as would be simply an investment for him, and enable him to do nothing. Still he is entitled to a fair sum, considering the position for which he was fitted, and the position in which he is now." I think that direction is accurate and cannot be complained of.

The fact that the plaintiff is by no means wholly disabled and that he has reasonable opportunities of engaging in other employments, is one which should have been taken into account by the jury. With great respect, I think the meaning they would take, and did take, from the learned Judge's charge was, that they were at liberty to leave the fact as to other occupations being open to the plaintiff out of consideration in arriving at the amount of the verdict.

I am sorry that the plaintiff should be put to the expense of a new trial in this case, simply on the question of damages. If I could see my way to supporting the verdict, in so far as the quantum is concerned, I would gladly do so. I hope the parties may be able to settle the amount of the damages without the necessity of going to the expense of another trial. In the meantime I see no other course open than to order a new trial, the costs of this appeal and of the former trial to be costs in the cause.

Cameron, J.A. (dissenting)

CAMERON, J.A. (dissenting):—This action was brought by the plaintiff, a locomotive fireman at the time of the accident in question, in the employment of the Canadian Northern Railway Co., against the defendant company for injuries sustained by him, March 11, 1912, at Paddington street, St. Boniface, on the railway track of the Canadian Northern Railway Company.

The plaintiff was, it is alleged, underneath his engine removing ashes from the fire-box, when the defendant company, by its agents and servants, caused a train of cars to run into the rear of the train of cars to which the said engine was attached and thereby caused the engine to pass over and mangle the plaintiff's left leg. The action was tried before Mr. Justice

MAN.

C. A.
1913

PICKERING
v.
GRAND
TRUNK
PACIFIC
R. CO.

Cameron, J.A.
(dissenting)

Curran and a jury in March last, when a verdict was given for the plaintiff for $10,000 damages and judgment was entered accordingly.

This appeal is taken to set aside the judgment on various grounds.

The Canadian Northern train of about twenty cars, to which was attached the engine on which the plaintiff was working, had been on the main line of the Canadian Northern and was backed upon the Bird's Hill branch about 6 o'clock of March 1, 1912, in order to clear the main line for an approaching passenger train due to pass about that time. The engine was at the point marked XE on the plan filed, at a standstill, with the brakes on. The plaintiff then asked the engineer if it would be all right for him to go under the engine to clean the ash-pan, and he said "Yes." The plaintiff was in the act of getting under when the wheels moved and one of them ran over his foot.

Foster, the yardmaster of the Canadian Northern Railway, says that he told Thompson, the fireman of the Canadian Northern train that there were some fruit cars on the transfer for the Canadian Northern. Foster then went down to the diamond, saw a Grand Trunk Pacific crew and asked Carroll, the foreman of that crew, if "as a matter of convenience he would pull the three cars over for us, as he had one car for the Grand Trunk Pacific." Carroll's reason for being there with an engine was to get this Grand Trunk Pacific car. These four cars were in what was known as the C.P.R. transfer track, lying alongside and north of the Canadian Northern track. Carroll states how he took these four cars, went east with them to the Bird's Hill branch, set the G.T.P. car and a caboose on the "new track," and then shunted the three cars to and coupled them with the C.N.R. train. It was unquestionably this impact that set the train in motion and caused the injury to the plaintiff. Plunkett, the engineer of the G.T.P. train, gives an account of the event, and tells that, after backing the one car and the caboose into a small spur, he, on signal, went ahead east and then backed up west towards the C.N.R. train which had backed into the Bird's Hill branch, and made a coupling with the C.N.R. train. He then backed into the spur and got his car and caboose and went to Strathcona, knowing nothing of the accident. This witness was questioned as to the advisability of the course adopted in order to get hold of the G.T.P. car.

The question is raised whether the G.T.P. crew was not acting in excess of authority, and it is objected that the learned trial Judge misdirected the jury on this point. The trial Judge referred to the statement of defence, in which it is set forth that the defendant company and the C.N.R were jointly using freight terminals in Winnipeg and such joint use included the Bird's

Hill branch, that on the day in question the defendant company was requested to deliver to the C.N.R. the three cars and that in accordance with this request the defendant company coupled the said cars to the C.N.R. train, alleged that the defendants' servants and workmen observed due care and obeyed the rules and regulations of the company and that the accident was due to the neglect of the C.N.R. He called attention to Foster's evidence (and, it is to be noted, Foster was a witness for the defence), that he told Thompson, the foreman of the C.N.R. crew, that there were cars for him on the C.P.R. track, and that Foster afterwards went to Carroll and made arrangements with Carroll to move these cars. The trial Judge also called attention to the discrepancy between the evidence of Foster and Thompson as to the interview spoken of by Foster.

Upon consideration, I cannot see that the learned trial Judge misdirected the jury. There was an arrangement between these two companies for the joint user of these terminals and of the Bird's Hill track. The foreman of the G.T.P. crew had the authority of the yardmaster for what he did. The yardmaster gave his direction as to what was to be done as being necessary or highly convenient for both companies under the circumstances. I do not think it can be held otherwise than that the G.T.P. foreman or crew were acting within their authority. There is nothing on which the jury could base a contrary finding had the question been left specifically to them.

As to the rules of the C.N.R. which the defendant company relied upon, I think the learned trial Judge placed these and their effect fairly before the jury. It would be giving rule 26 a strained construction to hold that it distinctly imposed on the C.N.R. crew a duty so imperative as to disentitle this plaintiff to relief as against the defendant company. The rule is evidently intended for the protection of the workmen themselves, and is not available as a weapon of defence to an outside party. Now, would it follow, that non-compliance with the rule would affirmatively establish either that the plaintiff's own negligence was the proximate and efficient cause of the accident or that he had by his action voluntarily assumed the risk? As for rule 99, the trial Judge intimated that it was not applicable in this case, and it does appear to me on the evidence that, in this, he was right. The point was left to the jury to decide and was, no doubt, in their minds.

The main question before us for consideration is that of damages which the jury fixed at $10,000. The plaintiff was at the time of the trial twenty-three years of age. The accident happened March 1, 1912, and the trial took place March 4, of this year. The plaintiff had been with the Canadian Northern Railway Company for two years and a fireman for six months;

MAN
C. A.
1913
PICKERING
v.
GRAND
TRUNK
PACIFIC
R. Co.
Cameron, J.A.
(dissenting)

before that he was a locomotive cleaner. He was earning about $80 per month for the six months. After the accident he was taken to the St. Boniface hospital and operated on, but his foot was not removed until subsequently. He then contracted diphtheria, and, after his recovery therefrom, about three months after the accident, his foot was amputated below the ankle, and five months after the accident, his leg was amputated below the knee. During the last operation he had pneumonia.

It is urged that the damages awarded are excessive, and that there must be a new trial on this ground.

On this point we were referred by counsel for the appellants to *Schwartz* v. *Winnipeg Electric*, 12 D.L.R. 56; *Johnston* v. *Great Western Ry. Co.*, [1904] 2 K.B. 250, and *Phillips* v. *South Western Ry. Co.*, 4 Q.B.D. 406. On the other side we were referred to *Hesse* v. *St. John*, 30 Can. S.C.R. 218; *Gordon* v. *Canadian Northern Ry. Co.*, 2 D.L.R. 183; *Tobin* v. *Canadian Pacific Ry. Co.*, 2 D.L.R. 173, and *Bateman* v. *Middlesex*, 6 D.L.R. 533, 27 O.L.R. 122.

Lord Justice Vaughan Williams, in *Johnston* v. *Great Western Ry. Co.*, [1904] 2 K.B. 250, discusses the various cases on the subject of ordering a new trial in case of excessive damages. As to an alleged over-estimate of damages, the Court might be prepared to say that they were larger than the Court would have given, but not so large that twelve sensible men could not reasonably have given them. Yet that would, he held, not necessarily dispose of the matter. Because it might appear, even though the Court could not regard the damages as perversely large or such as twelve sensible men could not reasonably have given, yet the amount and the circumstances of the case might enable the Court to say that the jury must have disregarded a direction as to damages which they ought not to have passed over, as in *Phillips* v. *South Western Ry. Co.*, 4 Q.B.D. 406. So, where the damages were attacked as being too great instead of as being too small, as in the *Phillips* case, the rule would apply. He sets forth at some length the judgment of Lord Chief Justice Cockburn in the *Phillips* case (4 Q.B.D. 406), and adds:—

> So in the present case, if I could come to the conclusion that, looking at the figures, the jury must have taken into account some head or some measure of damage not properly involved in or applied to the plaintiff's claim, I should say that we ought to order a new trial: p. 256.

These considerations are luminously elaborated by the Lord Justice at pp. 257 and 258.

Upon giving the authorities and the circumstances of this case the best consideration I can bring to bear, I cannot say that the amount of the damages here is such that it could not be awarded by a jury of sensible men, though I am bound to

state it surpasses the amount I should be disposed to allow were I trying the case alone without the assistance of a jury. Nor can I come to the conclusion that the jury have taken into account some topic or measure of damages which should not properly be made applicable to the plaintiff's claim. I cannot conclude that the amount fixed demonstrates that the jury awarded a sum as an investment, enabling him to wholly dispense with earning a livelihood, irrespective of the accidents of life. All I feel that I can say is that it is a case where it is difficult to estimate the damages, and that I think they are on too generous a scale. But there are many and substantial matters material to the question of damages, such as the jury had under consideration, and these will readily occur to the mind of any one.

The career of the plaintiff as a railway employee, with his possible promotions and increased earning capacity, is at an end. The plaintiff himself appeared before the jury and told them the tale of his position, his earnings, his sufferings, operations, illnesses and condition. I may think, and do think, the verdict was far too large an amount. But I cannot say that it was so large as to be, in my judgment, perverse or to indicate that it was founded upon an untenable measure of damages.

As to the expression used by the trial Judge to the jury: "Put yourself in his place," that was, no doubt, improper. But when the attention of the learned trial Judge was called to these words he withdrew them on re-assembling the jury, and the jury were told to consider the matter as if they had not been uttered. In those circumstances, I am unwilling to believe that the jury could have been influenced by an expression expressly designated by the trial Judge as a slip of the tongue. As a matter of fact, the thought underlying the expression is almost certainly bound to occur to any mind considering accidents of this kind. That the trial Judge put the natural thought in words is not likely to have led the jury astray in view of his emphatic correction, and of the unexceptionable rules they were directed to follow in estimating damages as set out at page 201 of his charge.

I think the appeal must be dismissed.

HAGGART, J.A., concurred with RICHARDS, and PERDUE, JJ.A. Haggart, J.A.

Appeal allowed and new trial ordered.

ONT.

S. C.

1913

Re FARMERS BANK OF CANADA.

MURRAY'S CASE.

SPROAT'S EXECUTORS' CASE.

Ontario Supreme Court, Alcorn, Master in Ordinary. October 27, 1913.

1. BANKS (§ II—9)—WHO LIABLE AS STOCKHOLDERS.

A subscriber for bank shares who, before its organization, rescinds his subscription for fraud, and receives back the money he paid thereon, cannot, on the subsequent insolvency of the bank, be placed on the list of contributories or held for the double liability of a shareholder, notwithstanding that on the organization of the bank, shares were allotted him, where such allotment was made without his knowledge and no calls were ever made on, or any shares ever issued to, or received by him, or any dividends paid to him, and he had never attended or voted at a shareholders' meeting, or knowingly permitted his name to appear as a shareholder.

2. BANKS (§ II—9)—WHO LIABLE AS SHAREHOLDERS—ASSIGNOR OF SHARES —NON-COMPLIANCE WITH BANK ACT.

A subscriber for bank shares who, before the organization of the bank, rescinds his subscription for fraud and receives back the payment made by him, at the same time executing a document purporting to be an assignment to an agent of the bank, of his shares, which at the time, had not been allotted or issued, and who was never afterwards treated as a shareholder, cannot, on the subsequent insolvency of the bank, be placed on the list of contributories or held for a shareholder's double liability on the ground that the assignment of his shares was not made in conformity with the requirements of the Bank Act, since, at the time of the purported assignment, there were no shares he could assign.

Statement

IN a proceeding for the winding-up of the bank, the liquidator presented a list of proposed contributories, among whom were James Murray, personally, and James Murray and John Murray, as executors of John Sproat, deceased.

The liquidator's application to have these persons' names settled on the list of contributories was heard and evidence thereon was taken before the Master in Ordinary.

The application was denied.

James Bicknell, K.C., and *Morley*, for the liquidator.
George Bell, K.C., for the alleged contributories.

Alcorn, M.O.

THE MASTER:—I think that the names of the above alleged contributories should be removed from the list as presented by the liquidator, and that they are not indebted for the amount said to be unpaid on their subscriptions or under the double liability imposed by the Bank Act.

By writ of summons, tested of the 22nd October, 1906, they brought an action against the Farmers Bank of Canada, its provisional directors and executive officers, asking by the endorsement, among other things, for a declaration that their subscriptions were void, for rescission, and for an injunction re-

straining the defendants from proceeding thereon, and alleging that such subscriptions were obtained by fraud and misrepresentation.

The liquidator now asks to retain James Murray on the list for double liability under two subscriptions, one for 25 and one for 10 shares of $100 each, and James Murray and John Murray, executors of John Sproat, for double liability for a subscription for 100 shares of like amount each, obtained from them by one W. J. Lindsay, an agent of the bank.

On the return of a motion by the plaintiffs for the injunction prayed, on the 27th October, 1906, an affidavit of Lindsay was filed, in which he says that, on the previous day, he had interviewed all the eleven plaintiffs, including Sproat and James Murray, with the concurrence of the manager of the bank and its solicitor; that he had at that interview paid back to each all moneys paid for stock, had given an undertaking to return notes for unpaid balances, and had obtained from each an assignment of his stock to him, Lindsay. He had in fact paid James Murray $300—all the latter had paid. Sproat had paid nothing. The assignments by James Murray and John Sproat so obtained are produced by the liquidator, each having annexed a writing intituled in the Court and cause, duly signed and witnessed, in which each states that he has "now no interest in this litigation, and desires that this action be not proceeded with."

James Murray was examined before me, and detailed the grounds of fraud and misrepresentation alleged in his case, and his repudiation of his first subscription alleged to be for 25 shares, within a day or two days; he said that that subscription paper was then, on the spot, returned to him, when he destroyed it in Lindsay's presence, as he distinctly recollects, and signed one for 10 shares only.

W. R. Travers made an affidavit, filed on the said motion, in which he says that he produces the Murray subscription for 25 shares marked as exhibit N, and the Sproat subscription as exhibit D. The liquidator now produces such subscriptions. Neither is so marked. He further says (agreeing with James Murray's evidence) that the second Murray subscription, for 10 shares, was substituted for the first, for 25 shares, which was intended to be cancelled, and that he produces the former as exhibit O to his affidavit. The liquidator also produces this 10-share subscription, which is not so marked. A letter is put in, dated the 21st July, 1906, purporting to be from John Sproat, per his wife, charging that his subscription had been raised by Lindsay from 10 to 100 shares, and Lindsay's promise to make it right.

In answer, on the same motion, there were filed affidavits of

ONT.
S. C.
1913
RE FARMERS BANK OF CANADA.
Alcorn, M.O.

the defendants Gallagher, Ferguson, Fraser, and Lown, provisional directors, stating that the proceedings in the action, and particularly the motion for an injunction, "are calculated to and will, if proceeded with, very seriously injure and prejudice the Farmers Bank of Canada and seriously prejudice and injure the interests of the shareholders or subscribers for stock of the said bank, of whom there are now in all over 500," and each deponent adds his belief "that it is absolutely essential and in the interest of the said bank, and in the interest of the shareholders hereof, and also in the interest of the plaintiffs in this action, that the said motion and the proceedings thereunder should be forthwith stayed." Part of the "proceedings thereunder" was an endeavour (up to that point unsuccessful) to procure an examination before a special examiner at Toronto of the defendants in support of the motion for an injunction. The importance to the bank of preventing such an examination and of smothering the action is apparent. The assignments to Lindsay by the eleven plaintiffs, all produced as exhibits to his affidavit, as appears by those of Sproat and James Murray, produced before me, were, no doubt, prepared in typewriting in the office of the defendant bank's solicitor, and Lindsay took the bundle, accompanied by the written disclaimers above-mentioned, armed and ready with pen and ink, to the plaintiffs, and procured their execution the day before the plaintiffs' motion came on. So confronted—all moneys being repaid and notes provided against—the bank's solicitor had matters his own way. He astutely took, by consent, as upon his own motion for an order setting aside the subpœna and appointment for examination of the defendants, an order staying all proceedings thereon and on the plaintiffs' injunction motion, and concluding as follows: "And it appearing that the said plaintiffs John Sproat, George Castle, William A. Dixon, William McLean, Finlay McCallum, Robert Hume, James Murray, George Denoon, and John McLeod, have assigned and transferred their applications for the issue of shares of stock of the Farmers Bank of Canada and their right to shares in accordance with the said applications to one William J. Lindsay, and that the claims of the plaintiffs last above-named and also the obligations and liabilities of the said plaintiffs have ceased: it is ordered and adjudged that this action be and the same is hereby dismissed out of Court without costs."

The judgment carefully refrains from any statement or admission that the plaintiffs—including Sproat and James Murray—were shareholders. Both had promptly repudiated, and brought an action for a declaration that the subscriptions were void.

On the 27th October, 1906, W. R. Travers, acting general

manager of the bank, wrote to James Murray a letter informing him of the judgment, expressing regret that the bank had lost Murray and Sproat as subscribers, and concluding: "You will understand that you are now relieved from any further responsibility to this bank." A copy of this letter is produced by the liquidator.

All the foregoing was complete a month before the organisation meeting and election of directors. Months afterwards, the directors apparently assumed to attempt to allot shares on the said subscriptions. There is no evidence that any notices of allotment or of calls were ever sent to either Sproat or Murray. I am of opinion, from the appearance of the books, that no notices were sent, and that there was no intention to send any to Sproat or Murray, but it served the purposes of the directors to proceed on the assumption—as Lindsay was their creature—that such shares existed, and they apparently, as shewn by the evidence of Mr. Frederick Clarkson, used those alleged shares, sold them, and probably got the money for them. Neither Sproat to the date of his death, the 25th June, 1910, nor James Murray, before or since, had anything further to do with the matter—never received dividends, never attended meetings, voted, or knowingly allowed their names to appear on the bank's books, nor did they, or either of them, receive any certificate of shares or other communication from the bank until notice by the liquidator claiming to put them on the list.

The touchstone is, did they or either of them ever become shareholders? I think they did not. Counsel for the liquidator bases his long and luminous argument and instructive exposition of the banking law on the assumption that they did. He opens his argument by saying: "Undoubtedly Mr. Sproat and Mr. Murray subscribed for shares. Undoubtedly they became shareholders. Undoubtedly they executed to their attorney, Mr. Lindsay, transfers of their shares or some of them," etc. If his assumption were correct, then his elaborate argument, that they could not and did not legally assign under the Bank Act and could not and did not rid themselves of their liability, including the double liability, but got only Lindsay's guaranty, has the greatest force. I, however, do not agree that they became shareholders, and I think it not very material what the form of the judgment relieving them was. The plainly evident intention of what took place, which I have detailed, shewed feverish haste by the provisional directors to get rid of the plaintiffs and their action, on any terms. I do not think that any argument against Sproat and Murray can be built on the assignments which Lindsay obtained not complying with the Bank Act. There was nothing to assign, and the idea of assignment came wholly from the bank. At that time the matter rested wholly on the applica-

ONT.

S. C.
1913

RE FARMERS BANK OF CANADA.

Alcorn, M.O.

tion—there were no directors or books or certificate allowing the bank to commence business for a month afterwards. When the directors were elected, there was no attempt, as I think, to allot to Sproat or Murray, and no notice of allotment. There is a right to go behind the words of the judgment and shew the real transaction: *Cockburn* v. *Kettle* (1913), 12 D.L.R. 512, 28 O.L.R. 407; *Sauermann* v. *E. M. F. Co.* (1913), 12 D.L.R. 191, 4 O.W.N. 1510.

The requirement of sec. 13 of the Bank Act is, that there be $500,000 *bonâ fide subscribed*, and that $250,000 *thereof* has been paid to the Minister. If, as I gather, Sproat's and Murray's alleged subscriptions were used, it is impossible to say, in the light of the judgment and what preceded it, that their subscriptions were *bonâ fide* or that any part thereof had been paid. All that Sproat and Murray had under the subscriptions was a right (if the subscriptions had been *bonâ fide*) to receive shares from the directors when elected. The judgment wiped out the right, and neither the provisional directors nor the directors had a right to deal further with or recognise those subscriptions. The bank should not have taken the assumed transfer to Lindsay, or made the subsequent transfer, and Sproat and Murray are not responsible for acts of the bank assuming to deal with shares that did not exist. The subscriptions never ripened into shares. The effect of the judgment was to find no binding subscriptions, and that the subscriptions were, as alleged in the endorsement of the writ, void. No authority is, or I think can be, cited holding that one who signs a subscription never can be relieved of his liability otherwise than under the formalities of the Bank Act. Fraud can be, and I think in this case was, relieved against to the extent of declaring in effect that there never was a binding subscription.

The names of James Murray, and of James Murray and John Murray, executors of John Sproat, deceased, should be struck off the list of contributories as submitted by the liquidator.

Application denied.

THE KING v. FERRIE.

CAN.

Ex. C. 1913

Exchequer Court of Canada, Cassels, J. May 21, 1913.

1. EVIDENCE (§ VII F—620)—VALUE ON EXPROPRIATION — AFFIDAVIT OF VALUE ON LAND TRANSFER.

Affidavits of value of real estate filed on the transfer of same under the Land Titles Act (Sask.), for the purpose of fixing the fees payable on the transfer will not be taken as evidence of the value of the land on its expropriation, but are admissible for the purpose of confronting the deponent in cross-examination if called as a witness in the expropriation proceedings.

Statement

HEARING of an information exhibited by the Attorney-General of Canada to have it declared that certain lands in the town of North Battleford be vested in the Crown, and praying that the compensation therefor should be ascertained. The land in question consists of a lot situate on the north-east corner of King street and First avenue, in the town of North Battleford. The date of the expropriation, and the period at which the compensation has to be ascertained is July 16, 1912. The lot has a frontage on King street of 65 feet, with a depth running along First avenue of 120 feet. It contains altogether 7,800 square feet. The Crown offered for this lot the sum of $12,000. The defendants claim the sum of $39,000.

Judgment was given fixing the compensation at $24,000 and interest and costs.

Donald Keith, for plaintiff.
A. M. Panton, for defendant.

Cassels, J.

CASSELS, J.:—Dealing with it as the witnesses have dealt with it on the King street frontage, $39,000 would mean $600 a foot frontage, and the claim put forward by the defendants is for five dollars per square foot.

In my judgment, the price asked is greatly in excess of its real value. I think the value is greatly inflated. I am aware of the rule that should govern the fixing of values. No doubt the market price of lands taken ought to be the *primâ facie* basis of valuation. Let me describe North Battleford and its situation. At the time in question, July 16, 1912, it was a town containing a population of about 4,500 people. On the first of May of this present year the population having increased beyond 5,000, it became a city, under the provisions of the enactments in force in Saskatchewan. According to the evidence, at the present time, May, 1913, the population is in the neighbourhood of 6,000 souls. It is a city situate on the north side of the Saskatchewan river. It is one of the cities or towns situate on the Canadian Northern Railway between Winnipeg and Edmonton. North Battleford is situate 572 miles west of Winni-

CAN.
EX. C.
1913
THE KING
v.
FERRIE.
Cassels, J.

peg, and about 250 miles east of Edmonton. At a place called Warman, situate about 65 miles east of North Battleford, two branches of the Canadian Northern Railway run, one to Saskatoon in the south, situate about 65 miles south of Warman, and another to Prince Albert to the north at a distance also of about 65 miles from Warman. There is no railway other than the Canadian Northern which comes near North Battleford. As I have stated, North Battleford is situate on the north side of the Saskatchewan river. It is apparently a city of seven years' growth. The town of Old Battleford is situate immediately south of North Battleford on the other bank of the Saskatchewan river, and I should judge in a direct line the distance between the two would be in the neighbourhood of two or three miles. Within the last three years the Government of Saskatchewan have erected a fine Court house in Old Battleford; and they have also erected a registry office in the same town. Old Battleford is situate near the junction of the Battle river with the Saskatchewan. North Battleford and Old Battleford have been united by a bridge spanning the Saskatchewan river. As if to make the union of these two places difficult, this bridge is placed a considerable distance east of North Battleford necessitating a drive from six to seven miles to reach Old Battleford from the centre of North Battleford. North Battleford has no water power.

At the present time, May, 1913, according to the evidence of Mr. Dixon, who is secretary-treasurer of the city of North Battleford, the manufactories in North Battleford consist of a grist mill, and a planing mill. There are also a sash and door factory, a brickyard and a machine shop. There are a considerable number of towns situate along the route of the Canadian Northern Railway between Winnipeg and North Battleford. There is a fine agricultural country to the north, west and east of North Battleford, the crops depending to a great extent upon the climatic conditions, and the revenue to be derived therefrom depending upon the ripening of the crops free from damage or frost, and also upon transportation facilities. As Mr. Dixon says, the future of North Battleford depends practically upon the agricultural outlook.

The city has very fine cement sidewalks. Neither King nor First avenue, nor, I think, any other of the streets is macadamized, asphalted or paved with blocks up to the present time. Some of the streets are lighted in a manner that would do credit to Sparks street in the city of Ottawa. The hotel accommodation of North Battleford is of a poor class. There are but few buildings of any moment in the city, most of them are small.

I am asked to fix a value of five dollars a square foot on vacant property, no doubt well situated. With the knowledge

that I have of the values of properties in well-settled cities, such as Halifax, St. John, Quebec, Montreal, Ottawa, Toronto, Winnipeg, Calgary and Vancouver it would do violence to my common sense if I am compelled to allow any such price as is asked in this particular case. There is, no doubt, evidence of large prices for lands on King street. For instance, Montague A. Wood swears to having purchased lot 13 situate on the corner of King street and First avenue, immediately opposite the property in question, for the sum of $36,000. This is a lot containing about 70 feet on King street, with a depth of 85 feet on First avenue, as against 65 feet on King street and 120 feet on First avenue, being the property in question.

According to the evidence of Joseph A. Foley, one of the defendants in this case, the property in question, namely, 65 feet on King street with a depth of 120 feet, and including also the property on King street immediately north of the property in question, marked on plan exhibit I, "Foley and Pickel," containing 35 feet frontage on King street, was purchased in the spring of 1911 for the sum of $7,500.

Plan No. 1 is the plan referred to in the evidence, and indicates the various properties adverted to by the witnesses.

In August of 1911, the property in question was offered by the defendants to Mr. Mollard, Inspector of Public Works for the Dominion of Canada, for the sum of $12,000. Between that period and the 16th July, 1912, there has been a large advance in the value of property.

In regard to the values of rentals received from one or two properties upon which buildings have been erected, I do not consider that evidence of much value. The large rentals received arise to a great extent from the absence of buildings in the city of North Battleford.

Certain copies of transfers from the registry office were produced by Mr. Keith, and the affidavits of value. I stated at the trial that I do not consider these as evidence with respect to the facts sworn to in the affidavits. They were admissible for the purpose of confronting any witness who had sworn to the affidavit.

I allow the defendants a sum which I consider extremely liberal, namely, twenty-four thousand dollars and interest from July 16, 1912, to the date of judgment, and their costs of action.

Judgment accordingly.

CAN.

Ex. C. 1913

THE KING v. L'HEUREUX.

Exchequer Court of Canada, Audette, J. April 5, 1913.

1. PLEADING (§ I K—75)—PRELIMINARY QUESTIONS OF LAW.

A hearing by consent upon a submission of points of law before the trial, is authorized by Exchequer Court rule 126, only as to matters which appear upon the pleadings.

2. INTOXICATING LIQUORS (§ III H—90)—SEIZURE AND DESTRUCTION—LIQUORS IN POSSESSION OF GOVERNMENT RAILWAY—RIGHT TO BREAK INTO STATION AND SEIZE.

Since the title to the property of the Intercolonial Railway of Canada is vested in the Dominion Government and is not subject to provincial legislation, a provincial revenue officer cannot lawfully break into a railway station of that railway for the purpose of seizing under a provincial law a consignment of intoxicating liquor which he may have reason to believe the consignee intends to sell in violation of the provincial liquor license law.

3. OFFICERS (§ II C—86)—LIABILITY—NEGLIGENCE OR MISCONDUCT GENERALLY—SEIZING LIQUOR INTENDED FOR ILLEGAL USE—TAKING FROM POSSESSION OF CARRIER—INTERCOLONIAL RAILWAY.

A provincial revenue officer is answerable to the Dominion Government as for a conversion for breaking into an Intercolonial Railway station and seizing a consignment of intoxicating liquor which he had reason to believe was intended to be sold by the consignee in violation of a provincial law, since the title to the property of such railway is vested in the Dominion Government and, being public property of the Dominion, is not subject to provincial legislation.

Statement

INFORMATION filed by the Attorney-General of Canada for damages and the recovery of certain goods unlawfully seized by the defendant, a Quebec revenue officer, on the Intercolonial Railway, a public work of Canada.

E. L. Newcombe, K.C., for the Attorney-General of Canada.
A. Marchand, for defendant.

Audette, J.

AUDETTE, J.:—This matter came before the Court under the provisions of rule 126, whereby both parties, by consent submitted, before trial, the points of law raised by the pleadings on the record at the time of the argument. On the hearing of the argument, two technical questions, perhaps, more of form than of substance, are met with. One is the question of want of notice to the defendant required under art. 88 of the Code of Procedure, Que., and the other the question of prescription or limitation arising under art. 3387, R.S.Q. 1909. Neither of these questions is raised by the pleadings.

Is this Court to pronounce upon these two preliminary and technical questions when they are not raised by the pleadings? The answer is that under rule 126, the Court must limit its consideration to such facts as appear by the pleadings.

As the case comes before me under the provisions of rule 126, these two questions cannot now be considered. The ques-

tion of want of notice is one which, if not pleaded, may, under the authority of *Léveillé* v. *Lévy*, 9 R. de J. 528, and *Simard* v. *Tuttle*, 4 L.C. Rep. 193, 4 Math. R.J.R. 150, be raised at the trial and evidence then adduced shewing that notice was in fact given. Then, the question of limitation or prescription is not one coming within arts. 2267 and 2188, Civil Code, P.Q., and must therefore be pleaded; and to be so set up, the pleading will have to be amended. This question may be also brought up at the trial.

The three questions, (*a*) of want of notice, (*b*) prescription, and (*c*) damages, if any, are questions which will therefore be dealt with at the trial, as they cannot be considered on the disposition of the points of law.

Here follows a summary of the pleadings.

The information exhibited by the Attorney-General of Canada alleges, *inter alia*, that the Crown owns and operates the Intercolonial Railway between Halifax and Montreal—that the said railway is vested in the Crown, and is a public work of Canada.

It is further alleged that the Intercolonial Railway passes through or near the village of Ste. Flavie station, in the district of Rimouski, in the Province of Quebec, and on or about May 17, 1911, one Joseph N. Anetil, of Rivière du Loup, P.Q., shipped therefrom by the Intercolonial Railway one jar of liquor, said to be whisky, consigned to one Elzear Coté, together with two cases, said to contain bottled gin, consigned to J. N. Coté, both of Ste. Flavie aforesaid.

The information further alleges that the goods arrived at Ste. Flavie on May 19, 1911, when the defendant went to the Intercolonial Railway station at Ste. Flavie, and unlawfully, by force and arms, seized the box containing the jar of liquor, and the two boxes, said to contain bottles of gin, and stated his intention of holding the same and depriving His Majesty the King of the possession which he then lawfully had of the said goods. The defendant did not then remove the goods from the station.

It is further alleged that on May 19, 1911, one J. Ad. Thibault, of Fraserville, P.Q., shipped by the Intercolonial Railway two barrels, in the bill of lading said to contain ginger ale, consigned to François Damien, at Ste. Flavie, and arriving at their destination on or before May 23, 1911—when before any of the goods hereinbefore mentioned had been taken away by the parties to whom they were respectively consigned, and whilst the same were still in the lawful possession of His Majesty the King, the defendant came in again to the Ste. Flavie station, and demanded of J. Lavoie, the agent in charge of the railway station, possession of the jar of liquor and the two boxes of

CAN.
EX. C.
1913
THE KING
v.
L'HEUREUX.
Audette, J.

gin, which he had seized on the 19th of the same month, but which were still lying at the station in a locked room. The station agent refused to give up possession of the said goods or to open the doors of the room in which the same were deposited. The defendant thereupon by force and arms and using great violence, and to the great injury of the property of His Majesty, broke open the door of the room in which the goods were so deposited, and seized and took possession of the said jar of liquor and the two cases of gin.

The plaintiff further alleges that the defendant then demanded of the said J. Lavoie that he should open the door of the freight shed, adjoining the station, to enable the defendant to see what goods were deposited therein. The said J. Lavoie refused to open the door and the defendant by force and arms and with great violence, and to the injury of the property of His Majesty the King, broke open the doors of the freight shed and found therein the two barrels of liquor consigned to François Damien; and thereupon seized and took possession of the same and deprived His Majesty the King, in whose possession up to that time they lawfully were, of his property and possession in the same. The said defendant, moreover, then removed the whole of the said goods.

The Attorney-General therefore concludes asking that it may be declared:—

(*a*) That the defendant unlawfully entered and broke and opened the premises of His Majesty the King in his property of the said Intercolonial Railway.

(*b*) That the defendant unlawfully seized and deprived His Majesty the King of the property and possession of the goods so seized and taken away by him.

(*c*) That the defendant may be ordered to pay to His Majesty damages for the injury done by him to the railway property.

(*d*) That the defendant may be ordered to give up and restore to His Majesty the King the goods so seized, with damages for the unlawful detention, or, in the alternative, damages for the value and unlawful seizing and detention of the same.

(*e*) Such further or other damages as may be found due to His Majesty the King in respect of the said trespass and unlawful seizure and conversion of the said property.

The defendant by his plea avers, among other things that the said boxes, jars, bottles and barrels or vessels containing intoxicating liquors were brought into the revenue district of Rimouski, P.Q., from another district of the same province, in sufficient quantity to warrant the presumption that they were so brought in for the purpose of sale, and were addressed to persons not licensed under the Quebec License Act, R.S.Q. 1909, vol. 2, sec. 14, ch. 5, title 4, to sell intoxicating liquors;

That the collector of provincial revenue and his officers had reason to suspect that the persons to whom said liquors were addressed were obtaining them for the purposes of sale;

That the defendant was an officer and constable and deputy of the collector of provincial revenue, duly authorized by him, and was acting in that capacity and according to orders from the said collector;

That the said goods so seized were taken, carried away, and placed in the care and possession of the collector of provincial revenue for the said district, and that he, acting under the authority of the law, had the right to proceed as he did;

That the Ste. Flavie station is within the limits of a municipality where the sale of intoxicating liquors is prohibited, and that the defendant was authorized and acting in his official capacity as aforesaid, at the time of the said seizure, and that the station agent was duly informed thereof.

As has been stated the questions of law raised by the pleadings were by consent of parties, argued before coming to trial, and for the purposes of the said argument the facts as alleged were admitted by and between counsel for the respective parties.

Now, the only question to be at present decided is whether, all these proceedings taken, assuming under the said Quebec license law, to be duly authorized and regular in an ordinary case against a subject, can be invoked to justify a seizure of goods in the hands of the Dominion Crown.

In other words, can a constable, under the circumstances above recited, break into the property vested in the Crown in the right of the Dominion and seize and take away the goods in question?

Now, the Intercolonial Railway is a public work of Canada and is vested in the Crown, in the right of the Dominion under secs. 55 and 80 of the Government Railways Act, R.S.C. 1906, ch. 36. As such it therefore enjoys all the prerogatives and immunity attaching to Crown property, as is very clearly shewn in the case of the *SS. "Scotia,"* [1903] A.C. 501. The property of Canada, in the right of the Federal Crown, is exempt from provincial legislative jurisdiction, and the Quebec License Act by any forced construction of its provisions cannot be made to apply to it. See *Burrard Power Co. Ltd.* v. *The King*, [1911] A.C. 87. The Crown is not bound by any such statute. See the Interpretation Acts, R.S.C. 1906, ch. 1, sec. 16, R.S.Q. 1909, ch. 1, sec. 14, C.C. (P.Q.), art. 9.

It is, in effect, contended by counsel for the defendant that, when a train of the Intercolonial Railway is in motion through the Province of Quebec for the purpose of Provincial jurisdiction in general, the status of such train as a piece of property is not to be complicated by considerations of prerogatival im-

CAN.
EX. C.
1913
THE KING
v.
L'HEUREUX.
Audette, J.

munity, but it is to be accorded nothing more than the status of a train on any ordinary railway operating in such province. The weakness of the argument is radical, amounting, as it does, to a denegation of the status given the Dominion property by the B.N. America Act of 1867. Under the provisions of sub-sec. 1 of sec. 91 of the said Act, legislative control over public property of the Dominion is exclusively vested in the Parliament of Canada, while by the intendment of sec. 145 thereof, the Intercolonial Railway is not merely to be treated (as in law and practice it has been treated) as a portion of the public property held by the Dominion Government, but conspicuously so, inasmuch as its construction was stipulated for as one of the fundamental conditions of Confederation.

Might not the refutation of the argument that the Crown be liable in such a case as the present one be also found, by analogy, in the fact that seizure by garnishment, which may be fairly said to be a cognate matter, cannot issue against moneys in the hands of the Crown?

Therefore, this Court declares that the provincial Crown officer unlawfully broke into the premises of the Crown. The Court further declaring unlawful the seizure and conversion of the goods in question herein. The question of costs is reserved to be adjudicated upon at the trial.

Judgment accordingly.

N. S.
S. C.
1913

TOWN OF TRENTON v. FRASER.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell, and Longley, JJ. June 28, 1913.

1. TAXES (§ VI—220)—INCOME TAX—JOURNEYMEN MECHANICS—WHO ARE.

Men who, after learning their respective trades, are employed in a steel mill as rollers, roll turners or mechanics, without having superintendence over or charge of an entire department and the direction of the work therein, or power to hire and discharge the men under them, are "journeymen mechanics" within the meaning of rule 11 of sec. 15, of the Assessment Act, R.S.N.S. 1900, ch. 73, taxing the income of such in the town wherein they reside and not in another town where they work, notwithstanding the fact that unlike other employees, they do not work all of the time with their hands, but, in the capacity of journeymen mechanics, spend a considerable portion of the time overseeing the work of other employees.

Statement

APPEAL from the judgment of His Honour Judge Wallace, County Judge, in favour of defendants in an action by plaintiff town to recover amounts claimed to be due for rates and taxes for the year 1912.

The appeal was dismissed.

The judgment appealed from was as follows:—

N. S.

S. C.

1913

TOWN OF TRENTON v. FRASER.

Judge Wallace.

JUDGE WALLACE:—The appellants in the five separate appeals all reside in the town of New Glasgow, but earn and receive their incomes in the town of Trenton. Both towns have assessed them on their incomes. The question is: which town has the right to assess the incomes of these appellants? While ordinarily the town in which the income is earned and the work performed might be considered as having a *primâ facie* right to assess such incomes, the present question must be determined by construing the Assessment Act, R.S.N.S. 1900, ch. 73, and particularly the proviso in rule 11 of sec. 15.

Are the appellants journeymen mechanics? If so, they come within the exceptions mentioned in rule 11. The term "journeyman mechanic" is somewhat antiquated and was originally applied to mechanics who worked by the day, but in its modern use, its meaning has been extended to include any mechanic who has served his apprenticeship or learned his trade or handicraft and works at it as the employee of another. If the evidence in the cases before me had shewn that the appellants were superintendents of an entire department merely directing the work of the mechanics under them and with power to employ and discharge those under them, and doing no manual labour themselves, I might hold that they were not "journeymen mechanics," but no such evidence was given. The evidence shews that the appellants are all skilled workmen who, having learned their respective trades, are now working as rollers, roll-turners or machinists. It is true that unlike the employees under them, they do not work with their hands all the time, and that they spend a considerable portion of their time in overseeing the work of the other mechanics, but such supervising work is really done by them in their capacity as journeymen mechanics. If one of them resigned or died, his position would necessarily be taken by a journeyman mechanic, and my conclusion is that it is in that capacity they are employed. In order to exercise their present duties it was necessary for the appellants to have received the training of journeymen mechanics, and the mere fact that they now earn a greater income and are performing the duties of foremen would not exclude them from the designation "journeymen mechanics."

The appeals, therefore, from the Trenton assessment, will be allowed.

The plaintiffs appealed from the above judgment.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This is an appeal from the decision of the Judge of the County Court in favour of the defendants. It is an action against the several defendants for taxes claimed to be due to the town. The defendants all reside in the town of New Glasgow but earn and receive their income

N. S.

S. C. 1913

TOWN OF TRENTON v. FRASER.

Sir Charles Townshend, C.J.

in the town of Trenton. They all claim to be journeymen mechanics, and, as such, under the Assessment Act, R.S.N.S. 1900, ch. 73, can only be assessed and liable to pay taxes in the town in which they reside. By sec. 14 of that Act:—

The assessors having ascertained as nearly as they can the particulars of the real and personal property and income to be assessed, shall prepare an assessment roll, in which shall be set down in separate columns the names in alphabetical order of all persons, firms, companies, associations and corporations, liable to be rated, the places of residence of such persons, etc., etc.

By sec. 15, in making up the assessment roll the assessors shall be governed by the following rules:—

Rule 11. Income derived from any profession, trade, calling, employment or occupation (other than the income of journeymen mechanics, labourers, and commercial travellers), the income derived from any office or employment (other than an office or employment in or under the Government of Canada or Nova Scotia or in connection with any department of the public service), shall be assessed in the town or district in which such profession, trade, calling, employment or occupation is carried on, or such office is filled or exercised, provided the same is carried on, filled or exercised in a town or municipal district in which an income tax is levied, otherwise the same shall be assessed in the town or district in which the person receiving such income resides.

Clearly then, if these defendants are journeymen mechanics they were not assessable in the town of Trenton on their incomes, but in the town of New Glasgow where they reside.

It is contended that they were not journeymen mechanics and therefore not within rules 11 and 12.

How then a journeyman mechanic is to be defined is an important enquiry in relation to the evidence here.

In the Oxford Standard Dictionary, we find the following definition:—

Journeyman. One who having served his apprenticeship to a handicraft or trade is qualified to work at it for day's wages; a mechanic who has served his apprenticeship or learned his trade or handicraft and works at it not on his own account but as the servant or employee of another; a qualified mechanic or artizan who works for another.

Mechanic. One who is employed in a manual occupation—a handicraftsman.

Now, all these defendants swear that they served an apprenticeship and are now employed in their different capacities in the Nova Scotia Steel Works.

Armstrong says:—

My work is varied. It is principally marking off work for others to do and helping them to do it and working myself. The work that I do requires a certain degree of skill. You must be a skilled mechanic. An ordinary labourer could not do it.

J. C. Fraser swears:—

My work consists in rolling steel in the rolling mill. I am a roller. There are certain different shapes and sizes of steel produced and this size and shape depends on the skill in which things are assembled together.

And so the other defendants describe their occupation to be that of skilled workmen in the Steel Company's employment.

It seems to me very clear that they all come within the definition already given of a journeyman mechanic, and that they are the persons pointed to in Rules 11 and 12.

Sir Charles Townshend, C.J.

For these reasons I think this appeal should be dismissed with costs.

MEAGHER, J.:—I agree.

Meagher, J.

RUSSELL, J.:—I have no doubt as to the correctness of the judgment appealed from. I think that all the persons assessed were journeymen mechanics within the meaning of the statute. I base my decision on the Oxford Dictionary which defines a journeyman as:—

Russell, J.

One who having served his apprenticeship to a handicraft or trade is qualified to work at it for day's wages; a mechanic who has served his apprenticeship or learned his trade or handicraft and works at it not on his own account but as the servant or employee of another; a qualified mechanic or artizan who works for another; distinguished on the one side from apprentice, on the other from master.

It matters not that the journeyman has been so long in one service that he has become a permanent employee, nor that as to some of his duties he occupies a position of *quasi*-superior. If (not being an apprentice) his work is essentially that of a mechanic and he is not his own master, I think he comes within the definition of a journeyman mechanic. The law is passed to meet the average case and cannot provide for an exceptional condition. If it could so provide, no doubt according to its policy these taxpayers would pay their income tax where they derive their income.

LONGLEY, J.:—I am inclined to think that the judgment of Judge Wallace is sound. In the Oxford Dictionary "Journeyman" is described as:—

Longley, J.

A mechanic who has served his apprenticeship or learned a trade or handicraft and works at it not on his own account but as the servant or employee of another.

This seems to cover the description which the defendant gives of his own employment. He is a superior sort of person in

N. S.

S. C. 1913

TOWN OF TRENTON v. FRASER.

Longley, J.

his own employment but is liable to be dismissed from his employment, and is not acting for himself. I see nothing in this case which involves the question of preponderance of evidence. These men are in the category of those who would likely be regarded as journeymen from their occupation and would usually, therefore, be assessed on their income at home. I cannot avoid regarding what the legislature had in mind in making an exception. It was to place the wages of a man who was merely an employee doing journeymen's work for the benefit of the town in which he resided instead of the town in which the amount was earned.

I think, therefore, that the requirements of the Legislature and the rational definition of the word rather makes these parties liable for assessment on income in the town in which they reside.

The appeal, therefore, should be dismissed.

Appeal dismissed with costs.

SASK.

S. C. 1913

COURT v. GLENN.

Saskatchewan Supreme Court, Johnstone, J. November 6, 1913.

1. MISTAKE (§ VII A—155)—VOLUNTARY PAYMENT MADE TWICE OF SAME DEBT—ABSENCE OF FRAUD.

In the absence of fraud or misrepresentation on the part of the payee, he is not under an obligation to pay back upon the ground of mistake, the amount of promissory notes which the payer had paid the second time under protest and with the knowledge that he was not liable.

[*Kelly* v. *Solari*, 9 M. & W. 54, and *Imperial Bank* v. *Bank of Hamilton*, [1903] A.C. 49, applied.]

Statement

TRIAL of action to recover money alleged to have been twice paid to take up certain promissory notes.

The action was dismissed.

H. Y. MacDonald, for plaintiff.
J. A. Allan, for defendant.

Johnstone, J.

JOHNSTONE, J.:—In view of the plaintiff's evidence given at the trial, I find that I must give effect to the motion of the defendant's counsel, made at the close of the plaintiff's case, for a dismissal of the plaintiff's action, on the ground that the money sued for was not shewn to have been paid by the plaintiff to the defendant in mistake, as alleged by him in his statement of claim.

The plaintiff in giving evidence said:—

SASK.

S. C.
1913

COURT
v.
GLENN.

Johnstone, J.

In the fall of 1909, I came to the conclusion that I would pay these notes, and at that time I knew I had already paid them; every payment I made, I made under protest with knowledge of the fact that I did not owe it. I was not misled by any representation that the defendant made. I knew I was not liable. I did not know that I could prove that I was not liable.

This knowledge on the part of the plaintiff, in the absence of proof of fraud on the part of the defendant (the position here), brings the case within one of the rules laid down in *Kelly* v. *Solari*, 9 M. & W. 54. In speaking of these rules, Lord Abinger, C.B., at p. 57, is reported to have said:—

> The safest rule, however, is that, if the party makes the payment with full knowledge of the facts (that is, that there had been a previous payment), there being no fraud on the other side, he cannot recover it back.

The judgment of Lord Abinger, C.B., in the case referred to, was approved by the Privy Council in *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A.C. 49.

The plaintiff's action will, therefore, be dismissed with costs.

Action dismissed.

DALLONTANIA v. McCORMICK.

ONT.

S. C.
1913

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ. September 22, 1913.

1. MASTER AND SERVANT (§ III B 2—300)—JOINT LIABILITY OF PROPRIETOR AND OF INDEPENDENT CONTRACTOR—INJURY TO SERVANT OF CONTRACTOR.

A railway company's reservation by contract of complete control over and the right to direct an independent contractor in respect of railway tunnelling work, renders the former jointly liable with the contractor (notwithstanding the latter's individual liability under the Workmen's Compensation Act, R.S.O. 1897, ch. 160) to a servant of the contractor for injuries sustained as the result of being required to work in a place known by both defendants to be one of danger by reason of the omission of the railway company or the contractors to provide safeguards against the falling of rock upon the workmen.

Statement

APPEAL by the defendants from the judgment of Falconbridge, C.J.K.B., *Dallontania* v. *McCormick and The Canadian Pacific R. Co.*, 8 D.L.R. 757.

The appeal was dismissed.

Argument

W. R. White, K.C., for the defendant company:—While there has undoubtedly been negligence on the part of some one by which the plaintiff has been injured, the defendant company is not responsible therefor. The evidence shews that the company did direct that the rock should be sealed before the acci-

ONT.

S. C. 1913

DALLONTANIA v. MCCORMICK.

dent. If the engineer had the right to direct under the contract, and gave the proper directions, he did all that he was bound to do, and the company is not liable. If the contractor disregarded his directions, the engineer had no authority over the men to enforce them. He referred to *Pattison* v. *Canadian Pacific R.W. Co.* (1912), 5 D.L.R. 582, 26 O.L.R. 410; 26 Cyc. 1083 *et seq.*; article in 40 C.L.J., p. 529 *et seq.*

Argument

R. McKay, K.C., for the defendant McCormick, argued that in reality a new contract had been made between his client and the company, under which he was to superintend the work, merely receiving a percentage for his superintendence and outfit, and the company could have discharged him at any time. He knew of the danger, but had not the right to interfere without the consent of the engineer, nor could he do the work necessary in order to ensure safety and charge the cost to the company without their agreement to that effect, which they refused to give. He referred to *Longmore* v. *J. D. McArthur Co.* (1910), 43 S.C.R. 640, affirming the judgment in 19 Man. L.R. 641.

R. R. McKessock, K.C., for the plaintiff:—While each defendant contends that the other is liable, the fact is that both are liable. The company is liable under sec. 4 of the Act, for the operations were under the direction of the engineer, and both he and the contractor were duly warned of the danger.

Clute, J.

September 22. CLUTE, J.:—The plaintiff was injured while working as a mucker in the employ of the defendant McCormick, who had a contract to construct a tunnel to divert a creek from passing under a trestle which the company desired to fill up. While the plaintiff was working on the approach to the mouth of the tunnel, a mass of rock fell upon his leg, crushing it and injuring it to such an extent that it had to be amputated.

It is not disputed that at the time of the injury the plaintiff was working under the instructions of the foreman in charge of the work. It is charged that the work was dangerous, and that the defendants knew of the danger and did not take proper precautions to prevent the accident.

The defendant McCormick, besides denying the allegations in the statement of claim, pleads that he was employed by the defendant company as a hiring and purchasing agent for the work, the work itself being performed by and under the directions of the defendant company and its engineers.

The defendant company denies liability, and alleges that the defendant McCormick was an independent contractor, and that the plaintiff was not in their employ, but was employed by McCormick and working under his foreman, and that the Canadian Pacific Railway Company is in no way liable for any injuries suffered by the plaintiff.

The facts in the case are not, I think, seriously disputed, and may be shortly stated as follows.

On the 30th December, 1911, the defendant McCormick entered into a contract with the defendant the Canadian Pacific Railway Company, hereinafter called the company, to supply all labour and material and complete all work according to plans and directions of the engineer of the company in conformity with the specifications, to drive a 7' by 16' tunnel, and excavate approaches at bridge 117.6, Sudbury Division, Lake Superior Division, Canadian Pacific Railway; the work to be completed on or before the 1st May, 1912. The work was to be paid for at so much per lineal foot and per cubic yard. The contract provides that the railway company shall appoint their representative on the work, who is referred to as "the engineer."

The contract contains this clause (3): "The said work shall be commenced immediately after the execution of this agreement, and shall be proceeded with continuously and diligently and under the personal supervision of the contractor until completed. The work shall be carried on and prosecuted in all its several parts in such a manner and at such times and at such points or places as the engineer shall from time to time direct and to his satisfaction, but always according to the provisions of this agreement, and if no direction is given then in a careful, prompt, and workmanlike manner, in accordance with this agreement."

Clause (5) provides: "The contractor will in all things conform to and comply with the instructions of the engineer."

Clause (12) provides for an indemnity in favour of the company in case of damage to any person or property without fault or negligence on the part of the company. "Any damages or compensation recoverable from the railway company in respect thereof shall be paid by the contractor, and, together with any costs or expenses incurred, may be deducted from any money or moneys due to or to become due to the contractor."

On the 13th March, 1912, the defendant McCormick wrote Miles, the resident engineer of the company, that he was "compelled to give the approach work up, as it has been misrepresented entirely to me from the beginning . . . I can see that this work is a force account proposition, otherwise I will be compelled to give up the work and hereby give you notice that I will do so."

To this the resident engineer replied on the 30th March, 1912: "Referring to your letter of March 13th, advising that you are compelled to give up the approach work at bridge 117.6, Sudbury Division; after discussing the matter with the division engineer, I am advised that the tunnel approaches will be completed by force account plus 10%. I am instructed to place

ONT.
S. C.
1913
DALLONTANIA v. MCCORMICK.
Clute, J.

an inspector on the job. He will keep track of the time and advise the division engineer's office weekly of the progress being made. It is of the utmost importance that this work be rushed to completion, and I want you to get all the men you can possibly get to work on the job at once."

The work then proceeded under this arrangement. By "force work" is meant that the contractor, instead of being paid by the cubic foot or yard, hires the labour and supervises the job, and is allowed ten per cent. on the total cost. In other words, the contract was intended, by both parties, to continue. This is apparent from the correspondence changing the terms of payment.

It is perfectly clear from the evidence—indeed it was not contended otherwise—that the injuries were occasioned by negligence.

I also think it perfectly clear that McCormick is responsible for this negligence. The more difficult question is, whether the Canadian Pacific Railway Company is also responsible.

The learned Chief Justice finds that the plaintiff was not careless or negligent in any way, and that his injuries were caused by the negligence of both defendants. He also finds "that the defendant McCormick, personally, and the Canadian Pacific Railway Company, by its engineers and servants, had abundant notice of the danger that existed in carrying on the work in the manner in which it was being carried on, and that the cause of the accident was the negligence of the defendants in either not guarding against the falling of the rocks which caused the accident, or not first removing them before doing the work."

He also finds that McFadyen and Boughton, two of the company's witnesses, are mistaken in thinking that scaling was done before the accident.

Except as to the question of the liability of the company, which I will consider later, I think the evidence fully supports the findings of the learned Chief Justice.

Black, who succeeded Miles as the engineer in charge, on behalf of the company, admits that Moore reported that the rock was dangerous, and that he told him that if the rock was dangerous it would be necessary to scale in order to keep the work going in the right shape. He says that this was before the accident. By scaling is meant clearing the stone and débris that is likely to fall from the face of the hill on the men at work. He states further that they worked for a long time scaling, two or three weeks, taking out probably 1,000 yards.

The fact is clearly established that the face of the hill required scaling in order to make it safe for the men to work on the approach; that this dangerous condition was known to the engineer in charge of the company and that he ordered it to be done.

On cross-examination, Black states that Moore complained to him that the rock overhead was unsafe early in the month of April, and that he sent his assistant engineer down the next morning to find out if it would be necessary to scale the face of the hill. He sent Boughton. Boughton went over the ground with Moore. They climbed to the top of the cliff and discussed the matter as to what should come down and what was dangerous on the face of the cliff.

"Q. Why did you go down there—was it specially to look over this? A. Yes, sir.

"Q. Instructed by whom? A. It was Mr. Black's instructions to me, to keep an eye on the work and see that it was getting along as it should.

"Q. But did he specially instruct you to go down and look over this thing? A. It was part of my weekly routine, at least once a week to visit the tunnel."

A certain amount of scaling was then done.

"Q. Did you see the men scaling? A. Not that day. The next time I was down, a day or two after, they were working at the rock.

"Q. Not doing the scaling, which had been blasted down? A. Yes, sir."

The result of the undisputed evidence is, that the engineer in charge had actual notice of the danger to the men employed on the work from rock falling from the face of the hill through which the tunnel was to be made, and, recognising this danger, sent his assistant to report. Upon the report, the face of the hill was directed to be scaled; that is, cleared of the débris. This work was commenced, and about 1,000 yards of this stone and débris removed; but, as the learned Chief Justice finds, the scaling was not done before the accident, and the men were allowed to proceed with their work, when a loose rock fell, causing the accident complained of.

There can be no doubt as to the liability of McCormick, who having knowledge of the danger, allowed the men to proceed with their work before the face of the hill had been properly scaled and made safe. Indeed, counsel for McCormick did not seriously argue that he was not responsible.

The liability of the company may be considered: (1) at common law; (2) under the contract; (3) under the Workmen's Compensation for Injuries Act.

The principal's liability is not taken away simply because the work is paid for by piece or by the day. The test is, did the master retain the power of controlling the work? *Sadler* v. *Henlock* (1855), 4 E. & B. 570; *Tarry* v. *Ashton* (1876), 1 Q. B.D. 314; Piggott on Torts, ed. of 1885, p. 79.

In *Gray* v. *Pullen* (1864), 5 B. & S. 970, Cockburn, C.J.,

ONT.
S. C.
1913
DALLONTANIA
v.
McCORMICK.
Clute, J.

refers to the common law doctrine "that if a person in the exercise of a right, either as a private individual or conferred by statute, employs a contractor to do work, and the contractor is guilty of negligence in doing it, from which damage results, he and not the employer is liable." That is the general common law rule. "Where a statutory duty is imposed on a company, and they have not discharged it, and mischief results, it is no answer that that arose by reason of the manner in which the duty was discharged by their contractor:" *Hole* v. *Sittingbourne and Sheerness R.W. Co.* (1861), 6 H. & N. 488.

In the *Hole* case, Wilde, B., points out the distinction in this way, that, "when work is being done under a contract, if an accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorised the act, and is responsible for it." See also *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470.

These cases creating liability of the principal arise where the work is directed under a statute or there is some breach of duty.

In *Reedie* v. *London and North Western R.W. Co.* (1849), 4 Ex. 244, a workman let fall a stone on a passer-by. The company were held not liable, although they had reserved power to dismiss employees for incompetence. The decision rests on the principle that he who has chosen the workmen is liable.

In *Pendlebury* v. *Greenhalgh* (1875), 1 Q.B.D. 36, the principals were held liable because the particular duty to light, the absence of which caused the accident, was not included in the contract, and so was left with the owner to do, and for the neglect of it he remained responsible.

The question as to when liability may attach to an independent contractor, and not to the employer, is very clearly stated in Halsbury's Laws of England, vol. 21, p. 471, sec. 794: "Where an act, which causes injury to another and is actionable on the ground of a failure to use proper care, is committed in the performance of a contract or of some term of a contract, that fact does not of itself render liable the person for whose benefit the contract enures. If the performance of the contract or of the particular term of it does not, and in the natural course of things will not, involve or result in any particular duty, such as a duty towards an individual or class to use proper care to protect him or them from danger, and the performance is undertaken by an independent contractor, who acts as such and not as

a servant or agent of the other party to the contract, the liability for a failure to use proper care may attach to such independent contractor and not to such other party. But if such other party retains in his own hands the control over or interferes with such performance, he may also be responsible."

"Whether or not control is exercised so as to render the employer liable is a question of fact (*Brady* v. *Giles* (1835), 1 Mood. & R. 494). The mere fact that a certain amount of supervision is exercised (*Reedie* v. *London and North Western R.W. Co.*, 4 Ex. 244; *Cuthbertson* v. *Parsons* (1852), 12 C.B. 304) . . . or directions given as to the work to be done, not amounting to directions as to the manner in which it is to be done, will not as a rule give such control to the employer (*Steel* v. *South Eastern R.W. Co.* (1855), 16 C.B. 550; *Bennett* v. *Castle & Sons* (1898), 14 Times L.R. 288, C.A.):" *ib.* p. 472, note (*i*).

In the *Steel* case, it was held that where work is done for a railway company under a contract (parol or otherwise), the company are not responsible for injury resulting to a third person from the negligent *manner* of doing the work, though they employ their own surveyor to superintend it, and to direct *what* shall be done. There was no written contract proved in that case. The surveyor of the company told the man what to do, but the witness said that he was the person to determine in what manner that which he was directed to do should be carried out.

In the present case the contract expressly provides that the work shall be carried on in such manner as the engineer shall direct and to his satisfaction, and in this respect reserves the control wanting in the *Steel* case to render the principal liable.

"A principal is not liable for damage resulting from the casual or collateral negligence of an independent contractor, or of the latter's servants, while doing the work contracted to be done:" Halsbury's Laws of England, vol. 21, p. 473, sec. 795.

"Negligence is said to be casual or collateral when it arises incidentally in the course of the performance of, and not directly from, the act authorised, such as a workman leaving a tool or barrow in a road (*Hole* v. *Sittingbourne and Sheerness R.W. Co.*, 6 H. & N. 488, *per* Pollock, C.B., at p. 497):" *ib.*, note (*k*).

An employer is also liable in certain cases, although he has employed an independent contractor, as where the work contracted to be done is necessarily dangerous or is from its nature likely to cause danger to others, unless precautions are taken to prevent such danger.

The cases which I have read where this principle has been applied do not appear to me to cover the present case. They

ONT.
S.C.
1913
DALONTANIA
v.
McCORMICK.
Clute, J.

have reference rather to injuries which are likely to arise to third parties, as dipping a benzoline lamp into a caldron of molten lead on the highway, where there was a duty owing to the public: *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392 (C.A.); *Hughes* v. *Percival* (1883), 8 App. Cas. 443, where there was injury to a party wall causing injury to a neighbour's house.

"The fact that the contractor is liable does not of itself free the principal from liability:" Halsbury's Laws of England, vol. 21, p. 475, sec. 797.

"The relation between employer and contractor is not to be considered the same as the relation between master and servant. A contractor is to be regarded as a person carrying on an independent business: *Allen* v. *Hayward* (1845), 7 Q.B. 960; . . . *Rapson* v. *Cubitt* (1842), 9 M. & W. 710. . . . To distinguish between an independent contractor and a servant, the test is whether or not the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. If a person can be overlooked and directed in regard to the manner of doing his work, such person is not a contractor:" Halsbury's Laws of England, vol. 20, pp. 67, 68, sec. 134, and cases referred to.

In the present case, although McCormick was clearly, I think, a contractor, the reservation by the company of the control over the manner of doing the work brings the case within the rule where the principal is held to be liable.

The doctrine of common employment is treated in the same volume, p. 132, sec. 260 *et seq.* The doctrine is thus expressed: "If the person occasioning and the person suffering an injury are fellow servants engaged in a common employment, for and under the same master, the master is not liable for the consequences of the injury."

The Workmen's Compensation for Injuries Act does not abolish, though it largely modifies, the doctrine of common employment. Negligence still has to be proven.

The limitation on the employer's liability where work is done under an independent contract is also fully dealt with in Beven on Negligence, ed. of 1908, p. 597. The learned author points out that the earlier decisions favour the view that a person is answerable for injury arising in executing work that he has employed another to do, but ultimately the view was adopted that limited the liability of the owner of the premises to those acts which he definitely authorises, or that are in the nature of a nuisance which he permits.

After as careful a review of the cases as I have been able to give, I do not think that the nature of the work to be done was such as to render the company liable at common law, independ-

ently of the contract. While it was dangerous to proceed with the construction of the tunnel until the hill had been scaled and made safe, yet the injury did not arise from the fact that the scaling was dangerous, but because it was not done. It would not necessarily cause injury if carefully done.

It was neglect in not having the dangerous stone removed before the work was continued that caused the injury.

In the contract, however, the company saw fit to provide that "the work shall be carried on and prosecuted in all its several parts in such a manner . . . and at such times and at such places as the engineer shall from time to time direct and to his satisfaction." And the contractor was bound "in all things to comply with the instructions of the engineer."

This reserved to the company such complete control over the manner of doing what was necessary as I think to make it liable with the contractor in case of negligence in the doing of it. It cannot be doubted that the injury arose owing to the manner in which the work was done; the scaling was imperfectly done; it was not completely done. It left the premises in a dangerous condition when the men were directed to proceed with the tunnel, with the consequent injury to the plaintiff.

There is such an intimate connection created and control reserved by the contract, between the company and the contractor, as to make them, in my opinion, both liable for the negligence which caused the accident.

The premises being in this dangerous condition, the plaintiff was directed to do the work. It is true that this direction was given by the contractor's foreman, and renders the contractor liable under both sub-secs. 2 and 3, sec. 3, of the Workmen's Compensation for Injuries Act.

I think that the company is liable independently of the Workmen's Compensation for Injuries Act, for the reason, as above indicated, that the company reserved to itself the right to direct the manner in which the work was to be done. The company made itself responsible for the manner of doing the work, and it was the negligent manner of doing the work that caused the accident.

If it be said that the plaintiff is not in the employ of the company, because hired and paid by the contractor, the answer is that if that be so he is not met with the question of common employment and does not have to invoke the aid of the statute to be relieved of the effect of that doctrine, and if he has been injured owing to the negligence of the company, he is entitled to recover against the company for such negligence.

If, however, the plaintiff may be regarded as a servant of the company, then he has the right to invoke the benefit of sec. 3, sub-secs. 2 and 3, and sec. 4 of the Workmen's Compensation for

ONT.

S. C.
1913

DALLONTANIA
v.
MCCORMICK.

Riddell, J.

Injuries Act; but, in my view of the case, he cannot be regarded as a servant of the company, and does not require to call in the aid of the Act.

The appeal should, I think, be dismissed with costs.

MULOCK, C.J., SUTHERLAND and LEITCH, JJ., agreed.

RIDDELL, J.:—The defendant McCormick had a contract with the Canadian Pacific Railway Company to force a tunnel through a hill for a passage for a stream which was in the way, etc. Finding part of the work non-remunerative, he informed the company that he must work on "force account" or give up his contract. The company agreed that he might work on "force account." This means that, instead of being paid per yard, etc., he is paid the amount of his time-sheet, etc., and ten per cent. added—he is still an independent contractor, but his manner of remuneration is changed. He hires, pays, manages, the men, and his profits are a percentage of his outlay.

The plaintiff was a man in McCormick's employ, and, when he was working at his job and using all due care, a mass of rock fell down from the face of the hill and so injured his leg that it had to be amputated. He sued both his master and the railway company; the case was tried before the Chief Justice of the King's Bench, who gave judgment against both defendants for "$1,750 as under the statute."

Both defendants appeal.

In view of the contentions raised, it was thought necessary to consult the learned trial Judge in respect of the credit to be attached to certain parts of the evidence, and his conclusions of fact; and, with that assistance, I set out what I conceive to be the material circumstances.

In April, McCormick's men began the approach work to get into the hill to make the tunnel for Whitefish Creek, the hill being about 80 ft. high. The hill was sloping part of the way up; and on the face McCormick's foreman saw a mass of rock which he considered dangerous, and he told McCormick that it should come down. McCormick answered: "Now I want that sealed to protect the men, but, before shooting it, have the engineer to look at it, and get the decision from the engineer." The foreman, an Italian named Mauro, but who uses and is known by the name of Joe Moore, went to the engineer, of the Canadian Pacific Railway, one Black, and told him that the rock was dangerous, and Black told him that if the rock was dangerous it would be "necessary to scale in order to keep the work going in right shape."

The next morning, Boughton, the Canadian Pacific Railway engineer, went to the *locus in quo*, went over the ground with Moore, discussed the matter as to what was dangerous and should

come down; and a few days afterwards he saw men scaling the rock. He thinks that all the rock was scaled before the accident, but this the learned Chief Justice finds is a mistake. This is the only point upon which the evidence of the engineers is not to be accepted; in all else, the Chief Justice informs us, their evidence is reliable. Boughton returned on the 25th April to the place, and then the men were at work scaling.

Moore reported to his employer, "in the very latter part of April," that he had taken down the rock, and that there was more than a thousand yards of it—but, by and through Moore's neglect, all the rock was not scaled, and on the 2nd May part fell on the plaintiff and injured him.

Moore's negligence it was which was the cause of the accident; and, as he was the servant and foreman of McCormick, placed over the plaintiff, there can be no possible doubt of McCormick's liability under the Act, sec. 3, sub-secs. 2 and 3.

The liability of the Canadian Pacific Railway Company is a different matter—and the learned Chief Justice informs us that he found against the company with very great doubt and hesitation.

In the written reasons, the decision is based upon sec. 4 of the Act.

After a careful perusal of the evidence and of the authorities, I do not think that this section covers the present case.

All three requisites are necessary: (1) the company must own or supply the ways . . . or premises used for the purpose of executing the work; (2) the injury must be caused by a defect therein; and (3) the defect must have been left unremedied by the negligence of the servant of the company intrusted with the duty of seeing that the condition is proper.

Here there is no evidence that the Canadian Pacific Railway Company owned the hill, and in any case the part of the hill upon which was the rock was not being "used for the purpose of executing the work." Moreover, taking the facts as found by the Chief Justice, assume that the Canadian Pacific Railway engineer, Black or McFadyen, was charged with the duty of seeing that the condition was proper, there is, I think, no negligence attributable to the engineer. He directed, so far as he could direct, the removal of the dangerous mass, he saw men removing the material, he thought it had been removed, and I think he had the right so to think. He was not charged with the duty of removing the rock ,and he could not be expected personally to inspect the hill and see if the contractor was doing or had done what he should have done in a matter not part of the work itself. Moore's negligence was, of course, attributable to his master, McCormick—*respondeat superior*—but not to a third party with whom his master had a contract.

ONT.
S. C.
1913
DALLONTANIA v. MCCORMICK.
Riddell, J.

Nor do I think there is any liability at the common law. The only ground, as it seems to me, upon which such a liability could be based, is the principle of *Indermaur* v. *Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311. There the defendant was a tenant of certain premises; his landlord sent the plaintiff to do on the premises some work in which the defendant had an interest. The defendant maintained on the premises an open lift—an unusual circumstance; the plaintiff fell down the opening and was injured. It was held that the defendant was liable—that the plaintiff, being lawfully upon the premises at the implied request of the defendant, had the right to be protected against an unusual danger which the defendant knew or ought to have known. There the two elements were proved—the premises being in the possession of the defendant and the unusual character of the danger.

The limitations of *Indermaur* v. *Dames*, laid down in *O'Neil* v. *Everest* (1892), 61 L.J.Q.B. 453, and other cases, are of importance. In *O'Neil* v. *Everest*, an owner of a barge contracted with a stevedore for the stevedore to take the barge to a ship with a cargo and bring it back to the dock when unloaded. The cabin on the barge was left uncovered, and the plaintiff, an employee of the stevedore, fell through the hatchway and was injured. Cave, J., in giving judgment, considered *Indermaur* v. *Dames* and pointed out that in that case "the trap-door was not a trap-door which one would expect to find upon premises of that description," and distinguished the case in hand.

In the present case, there is the double difficulty in the plaintiff's way—he has not proved that the source of the danger was upon the premises of the Canadian Pacific Railway Company, nor has he proved that the danger was at all unusual. It is common knowledge that stones will roll down hill, especially after blasting, and very generally as the frost is going or has just gone out of the ground.

I think the appeal of the railway company should be allowed with costs, and the action against it dismissed with costs; as against McCormick, the appeal should be dismissed with costs.

To avoid any possible error, I have submitted my MS. to Sir Glenholme Falconbridge, and he has read it, and made a correction where there was a mistake.

Appeal dismissed; RIDDELL, J., *dissenting in part.*

Re LLOYD AND ANCIENT ORDER OF UNITED WORKMEN.

ONT.
S. C.
1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. September 15, 1913.

1. INSURANCE (§ IV B—171)—STATUTORY DESIGNATION — RIGHT OF WIFE NOT NAMED IN POLICY.

The words "the insurance" in sub-sec. 3 of sec. 178 of the Insurance Act, 2 Geo. V. ch. 33, R.S.O. 1914, ch. 183, providing that "where it is stated in the contract . . . that the insurance is for the benefit of the wife of the assured only . . . the word 'wife' shall mean the wife living at the maturity of the contract," applies equally to a portion of the insurance money under a policy payable one-half only to a wife by name; and, since sub-sec. 4 makes sub-sec. 3 applicable irrespective of whether the wife is designated by name, such portion is payable to the wife living at maturity of the contract although not the one designated in the policy.

[*Re Lloyd and Ancient Order of United Workmen*, 10 D.L.R. 611, reversed; *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, referred to.]

2. INSURANCE (§ IV B—171)—STATUTORY DESIGNATION—CHANGE OF BENEFICIARY—SURVIVORSHIP.

Sub-sec. 7 of sec. 178 of the Insurance Act, 2 Geo. V. ch. 33, R.S.O. 1914, ch. 183, providing for a right by survivorship where one or more of the preferred beneficiaries die in the lifetime of the assured, is applicable as to the insurance moneys designated in favour of the wife, only when there is no wife of the assured living at the maturity of the contract.

Statement

APPEAL from the order of Middleton, J., *Re Lloyd and Ancient Order of United Workmen*, 10 D.L.R. 611.

The appeal was allowed.

Argument

J. M. Ferguson, for the appellant, argued that the wife living at the time of the maturity of the contract should take the benefit of it, by 2 Geo. V. ch. 33, sec. 178, sub-secs. 3 and 4; and that sub-sec. 7 was not applicable. He referred to *Re Sons of Scotland Benevolent Association and Davidson* (1910), 2 O.W.N. 200; and the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-sec. 41.

G. G. Mills, for the respondent, referred to the old Insurance Act, R.S.O. 1897, ch. 203, sec. 151, sub-sec. 6, and sec. 159, sub-secs. 7 and 8, as applying to this case. By virtue of these sections the interest in the contract passed at once on the first wife's death to her daughter, the other beneficiary. The new Insurance Act, 2 Geo. V. ch. 33, sec. 171, sub-sec. 9, is conclusive.

Ferguson, in reply, referred to 2 Geo. V. ch. 33, sec. 170, as making the Act applicable to this case.

Hodgins, J.A.

September 15. HODGINS, J.A.:—The dominating idea underlying the sections of the Ontario Insurance Act which relate to preferred beneficiaries is, of course, the creation of a trust; which trust withdraws "the insurance money or part thereof" from the estate of the assured and from interference by his creditors.

ONT.

S. C.
1913

RE LLOYD AND ANCIENT ORDER OF UNITED WORKMEN.

Hodgins, J.A.

There are only two ways in which the interest of the preferred beneficiary, when once established, can be affected. In the first place, the assured is given power to restrict, revoke, extend, transfer, limit, or alter "the benefits of the insurance," provided he does not go outside the preferred class, while any of those of its members in whose favour the contract or declaration was made are living. In the second place, the share of a preferred beneficiary predeceasing the assured, if not dealt with by him, is controlled by statutory provisions.

There is, I think, a clear intention in the Act to control, not only the whole of the moneys payable by the contract of insurance, but any part thereof; and to provide that a trust created in favour of a preferred beneficiary of the whole or any part of the insurance money shall create a vested interest as to the whole or part respectively, which can be divested only in one of the ways I have mentioned.

This appears from sec. 178, sub-sec. 2, where the insurance money or a part thereof, or the interest thereof, are specially mentioned as the subject of a trust. By sub-secs. 3 and 7 of sec. 178, and sub-sec. 3 of sec. 181, shares of beneficiaries in the insurance money are dealt with as separate interests. The power of the assured to vary, revoke, or alter the benefits of the insurance, to the exclusion of all or any others of the preferred class, or so as to give it wholly to one or more for life or any other term, with remainder to any other or others of the class, only emphasises this governing idea; without recognition of which many of the decisions under this Act could not have been given.

Dealing then with sec. 178, sub-secs. 3 and 4, and the words (sub-sec. 3) "where it is stated in the contract . . . that the insurance is for the benefit of the wife of the assured only," it would seem that the designation in the policy in question as to one-half the insurance money is satisfied, provided the words "the insurance" is read as covering and including a part thereof.

Under sec. 178, sub-sec. 2, where the contract of insurance provides that the insurance money, or a part thereof, shall be for the benefit of a preferred beneficiary, such contract shall create a trust in favour of such beneficiary, etc. Looking at the interpretation section of the Act (sec. 2, sub-sec. 36), the words "insurance moneys" are defined as meaning every benefit and bonus payable by the insurer under the contract of insurance. By sec. 2, sub-sec. 6, "beneficiary" includes every person entitled to "insurance money," not "the insurance money;" and by sec. 89, sub-sec. 2, any person entitled as beneficiary to the insurance money, etc., may sue for the same. If the wife had not died, it cannot be doubted that she would have had the right to the benefit of one-half the insurance moneys under the con-

tract in question, and that a trust for her benefit had been created, and that she would have the right to sue for it under sec. 89, sub-sec. 2.

The words of sub-sec. 3 of sec. 178 are, "where it is stated in the contract . . . that the insurance is for the benefit of the wife . . . only." The question is, therefore, are the words "the insurance" sufficiently explicit to exclude a part of the insurance moneys? In the certificate in question it is provided that the sum of $2,000 shall, at the death of the assured, be paid "to his wife Sarah Anne Lloyd one-half and the other half to his daughter Mary Eliza Lloyd." As to the one-half share, therefore, it is declared to be for the benefit of the wife only. No doubt, the words "the insurance" apply to the whole insurance contract and the moneys payable thereunder, but do they exclude the idea that if only a part is dealt with for the benefit of the wife that is not "the insurance" as to her? To hold that they do so exclude would, in my judgment, do away with many of the benefits provided for by the Act, and certainly with many intended, as I think, by the section itself. For instance, if the assured designated two daughters as beneficiaries of one-half the insurance moneys, then the first part of the section would not apply; and in the same way a declaration as to one-half for the wife and children, or for the children generally, would not be controlled by the provision in question. I do not think that the section is so limited or is so wholly out of harmony with the general trend of the other statutory provisions. Subject to what may be said as to the scope of sub-sec. 7, as making the entire body of beneficiaries ("whether an apportionment has been made or not" among them) the successors to benefits in which they did not, under the apportionment itself, acquire an interest, I think that sub-section may well include the designation of part of the insurance moneys. The provisions for the alteration of apportionments and for the exclusion, limitation, and alteration of the benefits of the insurance from one to another, and between preferred beneficiaries, point, to my mind, strongly in the same direction.

If, then, that construction is correct, the moneys payable under this contract to the wife are for the benefit of the wife only; and, by force of sub-secs. 3 and 4, the word "wife" means the wife living at the maturity of the contract.

The maturity of the contract in this case is the death of the husband; and, by virtue of the provision of sub-secs. 3 and 4, the insurance contract must be read as creating a trust of one-half in favour of the wife of the assured only, such wife being, by force of the statutory definition, the wife living at the maturity of the contract, notwithstanding that the first wife was designated by name. It must be remembered that the trust

ONT.
S. C.
1913
RE LLOYD AND ANCIENT ORDER OF UNITED WORKMEN.
Hodgins, J.A.

exists "so long as any object of the trust remains;" and, construing those words as in *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147, it may be said that, by force of the statute, the benefit of the named wife, or the wife at the death of the assured, still remains as an object of the trust.

In the judgment appealed from, sub-sec. 7 of sec. 178 has been applied in preference to sub-secs. 3 and 4, construed in the way I have indicated. Sub-section 7 is very wide in its terms, and applies whether an apportionment has been made or not, and deals with the share or shares not only of one but of all the designated preferred beneficiaries in case of their death in the lifetime of the assured. But for the words "whether an apportionment has been made or not," I should have thought that the sub-section might have been construed as dealing with the interests of one or more preferred beneficiaries, either in the entire insurance moneys, if it was given to him or them jointly, or with a part only if treated as a separate trust for his or their benefit. But the words I have quoted indicate that, even where an apportionment has been made, and where, therefore, individual trusts and interests are created, then, notwithstanding that separation, the right of survivorship exists in those who are interested as preferred beneficiaries in any part of the insurance moneys, subject to the assured's right to declare in favour of himself, his estate, or any one else. It, of course, can be applied in such a case as is presented here, where only one-half of the insurance moneys are dealt with, but it seems to me wide enough to include all cases where preferred beneficiaries exist, though interested in separate parts of the insurance moneys. But I do not think that this is decisive.

I think this sub-section can be fairly read so as not to interfere with sub-secs. 3 and 4, by limiting it to cases not governed by the explicit provision which treats the wife at maturity as the wife meant, though clearly not the wife described. In other words, sub-sec. 7 can be given full effect by dealing with it as providing for survivorship only where one or more or all of the designated preferred beneficiaries die in the lifetime of the assured, provided there is no wife living at the maturity of the contract. The judgment below treats the present situation as a *casus omissus* under sub-sec. 3. I would prefer to treat it as a case provided for under those sub-sections, and therefore exempt from the survivorship dealt with in sub-sec. 7.

So to hold makes the sections more harmonious, in view of the subject-matter dealt with. Under sub-sec. 7, if the original wife's share lapses by her death, then the assured can deal with it, and may appropriate it to himself, to his estate, or to a person not a preferred beneficiary. If he omits so to do, then the lapsed share is for the benefit of the preferred beneficiaries

ONT.

S. C. 1913

RE LLOYD AND ANCIENT ORDER OF UNITED WORKMEN.

who ultimately survive him, and not those who survive the wife only, because, if they succeeded *co instanti*, that would prevent the assured from appointing the share to himself or his estate or to an ordinary beneficiary, as he could only deal with it, under sec. 179, sub-sec. 1, in favour of a preferred beneficiary.

Hence until the maturity of the policy it would not be known who were interested in the share: *Re Jannison*, 10 D.L.R. 608, 4 O.W.N. 1084. At that time the specific provisions of sub-secs. 3 and 4 operate and transfer the right to the wife then living.

On the whole, I am satisfied that this construction of the statute is more in consonance with the spirit of our insurance legislation as to wives and children, and, under the best consideration I can give, it comes within its letter as well.

I would allow the appeal; but I think that the costs throughout of each party may well be borne by themselves.

Hodgins, J.A.

MEREDITH, C.J.O., and MACLAREN, J.A., agreed.

Meredith, C.J.O. Maclaren, J.A.

MAGEE, J.A., agreed in the result.

Magee, J.A.

Appeal allowed.

MAN.

K. B. 1913

FIRST NATIONAL BANK v. AVITT.

Manitoba King's Bench, The Referee. November 21, 1913.

1. PARTIES (§ III—120)—BRINGING IN—BY AMENDMENT ON PRÆCIPE.

Additional parties defendant may be added by the plaintiff under Man. K.B. Rule 327, by amendment on præcipe of the plaintiff's statement of claim instituting the action.

2. PARTIES (§ II B—115*a*)—DEFENDANTS—JOINDER—IMPROPER JOINDER—ELECTION.

In an action on a promissory note and to set aside certain transfers of real and personal property as fraudulent, against the grantor's creditors, the holders of alleged fraudulent mortgages on a portion of the land cannot be added as defendants by an amendment to the plaintiff's statement of claim, since they are not concerned in the case against or the relief sought from the other defendant; and, under Man. K.B. rule 220 permitting the making of such order as may be just to prevent any defendant being embarrassed or put to expense by being required to attend any proceeding in the action in which he has no interest, the plaintiff will be required to elect as to which set of defendants he will pursue.

[*Andrews* v. *Forsythe*, 7 O.L.R. 188; and *Chandler* v. *Grand Trunk R. Co.*, 5 O.L.R. 589, followed; *Ward* v. *Short*, 1 Man. L.R. 328; *Martel* v. *Mitchell*, 16 Man. L.R. 266; *Hatfield* v. *Nugent*, 6 Man. L.R. 547; *Gower* v. *Couldridge*, [1898] 1 Q.B. 348; and *Sadler* v. *G.W.R.*, [1896] A.C. 450, specially referred to; *Lee* v. *Gallagher*, 15 Man. L.R. 677; and *Gas Power Age* v. *Central Garage Co.*, 21 Man. L.R. 496, distinguished.]

Statement

MOTION to strike out an amendment adding parties defendant to an action on a promissory note and to set aside a transfer of real and personal property as fraudulent against the grantor's creditors.

MAN.

K. B.
1913

FIRST NATIONAL BANK v. AVITT.

The Referee.

The plaintiff was ordered to elect as to which of the defendants he would proceed against.

C. H. Locke, for plaintiff.

D. A. Stacpoole, for defendants.

THE REFEREE:—The plaintiff bank, suing on behalf of itself and all other creditors of the defendant Isaac W. Avitt, commenced this action on July 15, 1913, for the recovery of the amount of a promissory note of the defendant Isaac W. Avitt and to set aside certain transfers of real and personal property alleged to have been made by Avitt to his co-defendants the Red River Valley Farm and Live Stock Co., Ltd., when insolvent and with intent to defeat, delay or prejudice his creditors, and to be void under the Assignments Act, and for other relief.

On September 6, 1913, plaintiff's statement of claim was amended on præcipe, under rule 327 of the King's Bench Act, by adding E. E. Sharpe and George H. Avitt as defendants, charging, in para. 15, that

> the defendant E. E. Sharpe, is Isaac W. Avitt's solicitor, and a registered mortgagee of part of said lands. The defendant George H. Avitt is a brother of Isaac W. Avitt, and a registered assignee of one of the mortgages made to said Sharpe. Both these defendants have full knowledge of the facts hereinbefore set forth, and have knowledge of the fraud on creditors pleaded, and are not *bonâ fide* mortgagees for valuable consideration, but took with full notice and in collusion with Isaac W. Avitt, in the matters aforesaid, and the plaintiffs claim that said mortgages and assignments be set aside,

and by adding to the prayer that said mortgages and assignments be set aside under the provisions of the Assignments Act.

The defendants E. E. Sharpe and George H. Avitt moved to strike out the amendments adding them as parties defendant, and all allegations referring to them, upon the ground, (1) that they had been improperly joined in this action, and (2) that parties to the action cannot be added by amendment on præcipe.

As to the second of the above grounds, counsel for the defendants applying cited no authority to shew that a plaintiff amending on præcipe cannot add more defendants, and I am of opinion that the language of rule 327 is perfectly general and permits the addition of new parties defendant whose presence before the Court is necessary or proper in order that the plaintiff may have his full remedy in respect of the cause or causes of action set forth in his statement of claim.

On the other ground, however, I think the motion should succeed as the amendments render the statement of claim multifarious.

The defendants E. E. Sharpe and George H. Avitt are not concerned in the case against Isaac W. Avitt and the company

or in the relief prayed against them, nor are Isaac W. Avitt and the company concerned in the case against E. E. Sharpe and George H. Avitt or in the relief prayed against them.

The old time vice of multifariousness in a pleading still exists, although the mode of getting rid of it is no longer by demurrer.

Rules 219 and 220 are as follows:—

219. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. And, without any amendment, judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

220. It shall not be necessary that every defendant to an action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just, to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest.

Under rule 219, no doubt, such a joinder of defendants and causes of action as we find in this case is permissible, but it remains to consider whether an order should not be made in this case under the last sentence of rule 220.

In *Ward* v. *Short*, 1 Man. L.R. 328, it was held that a bill praying for an account against the defendant Short, payment of the amount which might be found due to the plaintiffs, and in default, a sale of certain chattels upon which the plaintiffs claimed a right of possession, also alleging that the defendant Short had given a mortgage to his co-defendants, the Imperial Bank of Canada, upon the chattels, and praying for an injunction against the bank to restrain it from taking possession of and selling the chattels, was multifarious and the demurrer of the Imperial Bank was allowed.

In *Haffield* v. *Nugent*, 6 Man. L.R. 547, it was held that a bill by a client against solicitors for an account and to set aside a conveyance of land made by the client at the instance of the solicitors to the wife of one of them was multifarious.

In *Gower* v. *Couldridge*, [1898] 1 Q.B. 348, it was held that, where several defendants were sued, a claim for damages in respect of a tort alleged against some of them cannot be combined with a claim for damages in respect of a separate tort alleged against all.

In *Sadler* v. *G.W. Ry.*, [1896] A.C. 450, it was held that the plaintiff could not join two different railway companies in respect of a complaint that, in their manner of using their respective properties on each side of his premises, they interfered with his business and caused him damage.

The last two cases were followed in *Martel* v. *Mitchell*, 16 Man. L.R. 266, where it was held that if the statement of claim in an action against a number of defendants contains paragraphs setting up matters in which some of the defendants are not inter-

MAN.

K. B.
1913

FIRST NATIONAL BANK v. AVITT.

The Referee.

ested, such paragraphs should be struck out on application of any of those defendants.

Andrews v. *Forsythe*, 7 O.L.R. 188, more nearly resembles the present case than any of the others that I have found. It was held there that, in an action claiming, as against one defendant, rectification of a deed and, as against the other defendant, cancellation as a cloud on the plaintiff's title of a deed from a third person to that defendant of part of the land which, as the plaintiff alleged, should have been included in the deed of which rectification was sought, an order should be made requiring the plaintiff to elect as against which defendant he would proceed. The Master in that case, 7 O.L.R. at 189, followed the decision in *Chandler* v. *G.T.R. Co.*, 5 O.L.R. 589, and laid down the principle that in each case the nature of the action and the relief asked must be considered:—

> If that relief is of an equitable nature all parties must be before the Court whose presence is necessary to give the plaintiff, if successful, the full measure of his rights, assuming that the suit is not multifarious. On the other hand he cannot, as in the present case, join two independent actions merely because they happen to relate to the same subject matter, there being no connection otherwise between the parties.

In *Evans* v. *Jaffray*, 1 O.L.R. 614, the joinder of parties and causes of action was upheld, the learned Chancellor, in giving judgment, saying at p. 621:—

> Despite the form of pleading, there is such unity in the matters complained of as between all parties as justifies the retention of the defendants who appeal.

But I do not think that there is such unity in the present case and that *Evans* v. *Jaffray* may be distinguished.

I refer also to the following cases which seem to me to be applicable: *Maw* v. *Massey Harris Co.*, 14 Man. L.R. 252; *Thompson* v. *London County Council*, [1899] 1 Q.B. 840; *Alexander* v. *Simpson*, 1 D.L.R. 534, 22 Man. L.R. 424; *Appleton* v. *Fuller*, 6 O.L.R. 683; *Hinds* v. *Barrie*, 6 O.L.R. 656; *Quigley* v. *Waterloo*, 1 O.L.R. 606; *Bank of Hamilton* v. *Anderson*, 8 O.L.R. 153, and *Levi* v. *Phœnix*, 17 Man. L.R. 61.

The following cases may, I think, be readily distinguished: *Lee* v. *Gallagher*, 15 Man. L.R. 677; *Gas Power Age* v. *Central Garage Co.*, 21 Man. L.R. 496.

Following the decisions in *Andrews* v. *Forsythe*, 7 O.L.R. 188, and *Chandler* v. *G.T.R.*, 5 O.L.R. 589, which were given under rules identical with those above quoted, I think the proper order will be that the plaintiff should elect against which set of defendants it will proceed, and amend its statement of claim accordingly.

Costs of the motion to be costs in the cause to the defendants applying.

Order accordingly.

WESTHAVER v. HALIFAX AND SOUTH WESTERN R. CO.

N. S.

S. C. 1913

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell, and Longley JJ. November 29, 1913.

1. DAMAGES (§ III K 2—215)—INJURY TO TIMBER—FIRE SPREADING FROM RAILWAY.

The persistent failure of a railway company to remove from its right of way, as required by statute, growing combustible material likely to catch fire from sparks from the locomotives and to spread to adjoining owners' property is an element to be considered in favour of awarding liberal damages in that contingency.

Statement

APPEAL by the defendant railway company against the verdict of the jury on the ground of alleged excessive damages.

The action was for damages for injury to plaintiff's woodland, caused by fire which spread from defendant's right of way. The cause was tried before Ritchie, J., with a jury, at Bridgewater, October 17, 1913. The jury found in answer to questions submitted to them, *inter alia*, that the fire originated from or by reason of sparks or cinders from defendant's engine, starting on defendant's right of way; that at the time and place where the fire started there was combustible material consisting of brush, ferns and grass; that the damages suffered by plaintiff were caused by the negligence of defendant; and that such negligence consisted in not putting out the fire when seen. Damages were assessed at the sum of $375.

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

H. Mellish, K.C., for appellant.

T. S. Rogers, K.C., for respondent.

Meagher, J.

MEAGHER, J. (oral), delivered the judgment of the majority of the Court, holding that the measure of damages was fairly submitted to the jury, who were entitled to award the amount they did, and more. Nothing was done by defendant's section men to prevent the spread of the fire. The condition in which the right of way was kept was in violation of the statute, and nothing effective was done by defendant to remove the conditions. Their persistent disregard of the safety of their neighbour's property was ground for measuring the damages with a liberal hand, and he saw no reason for disturbing the verdict, which seemed reasonable in view of all the facts of the case.

Sir Charles Townshend, C.J. Russell, J.

SIR CHARLES TOWNSHEND, C.J., and RUSSELL, J., concurred.

Longley, J. (dissenting)

LONGLEY, J. (dissenting):—In this case it is simply a question of the amount of damages. The piece of land on which the damages are alleged to have occurred was purchased in 1890 for $150. The amount covered by the fire was fifty acres. Allowing that it destroyed the timber entirely, the loss would be only $150 or $175. But the plaintiff has the land still, and probably would

N. S.

S. C.
1913

WESTHAVER
v.
HALIFAX
AND
SOUTH
WESTERN
R. Co.

Longley, J.
(dissenting).

not consider any such offer for it. An attempt was made to shew that the defendant was responsible for consequential damages. I think the attempt failed. In any case I do not see how a railway company can be responsible for damages of this kind. All the evidence was not sent up, but only that which related to the extent of the damage, and we are unable to take any account whatever of the conduct of the defendant's section man. A copy of the evidence was examined by the Court, but this discloses nothing which can convict the defendants of negligence. I firmly believe that $175 would be ample and that any larger sum, such as that awarded by the jury, is an excessive amount.

Appeal dismissed, LONGLEY, J., *dissenting*.

N. S.

S. C.
1913

McLEOD v. HOLLAND.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Russell and Longley, JJ. November 22, 1913.

1. NEW TRIAL (§ II—8)—FOR ERRORS OF THE COURT—AS TO INSTRUCTIONS —ACTION FOR ASSAULT.

A new trial will be granted where the trial judge, in an action for an assault, instructed the jury, by whom a verdict for the plaintiff was rendered for only nominal damages, that the assault was of a trifling character that the plaintiff had not received any physical injury and that the action was one which should have been settled in the police court, where, as a matter of fact, the defendant's treatment of the plaintiff by shaking his fist in the latter's face, violently shaking his person, and applying extremely abusive and opprobrious language to him was a brutal and high-handed proceeding entitling the plaintiff to exemplary and not merely compensatory damages, and the effect of the judge's charge taken as a whole was to withdraw from the jury any question of exemplary damages.

Statement

THIS was an action claiming damages for trespass and assault, tried before Drysdale, J., with a jury, at Amherst. The learned Judge instructed the jury that there was little in dispute except a question as to the amount of damages and as to these that the assault itself was a very trifling matter, being an ordinary assault case such as would be properly settled in the Police Court; it was not a serious matter and the plaintiff was not hurt. He also referred to the fact that defendant had paid into Court the sum of five dollars.

The jury returned a verdict in the plaintiff's favour for the sum of four dollars; upon which an order was made, that the money paid into Court be paid out by the prothonotary, four dollars to plaintiff and one dollar to defendant, and that plaintiff have the costs of action up to the time of payment into Court and that defendant have the general costs from that time, and plaintiff the costs of the issues found in his favour.

There was an application for a new trial and an appeal from the order for judgment.

The appeal was allowed and a new trial granted.

F. L. Milner, K.C., in support of application and appeal.

J. L. Ralston, contra.

Sir Charles Townshend, C.J.

Sir Charles Townshend, C.J.:—I agree that the charge of the learned trial Judge is somewhat defective in not pointing out to the jury some considerations which should have affected their deliberations, but I also put my judgment on the ground that he referred to the payment of money into Court which is expressly forbidden by our rules. I do not think that such an objection to the charge could have been waived, and at any rate it was not in this case. For these reasons, I concur that there must be a new trial.

Meagher, J.

Meagher, J. (oral):—I have prepared an opinion in this case but it has been mislaid. I need not go further than to say that at the close of the evidence there was a strong case made out to entitle the plaintiff to have the question of exemplary and not compensatory damages submitted to the jury, but the leading circumstances are not pointed out that would entitle the jury to consider the question of exemplary damages. The charge did not refer to that aspect of the case, but would lead the jury to consider that it was a trivial affair. They were told that it was not a serious matter and that the plaintiff was not hurt. The tendency of the charge was that the damages were to be measured by the extent of the actual injury, whereas the plaintiff had been treated in a high-handed and brutal manner by defendant.

For these reasons, I am of the opinion that there should be a new trial with costs. And I wish to add that in no event should the defendant get the costs of the former trial but they should be reserved to be dealt with by the trial Judge.

With respect to the slip made by the learned trial Judge in his reference to the amount paid into Court, I do not feel under the necessity of dealing with that point. It is not likely to arise again and I find ample material to justify me in setting aside the verdict without reference to that ground.

With respect to the appeal from the order awarding costs, a new trial having been granted, that order falls to the ground, and no judgment can be entered upon it. It would have been a material incident for the defendant if we had refused a new trial. Plaintiff was entitled to maintain his action up to the time the money was paid into Court and he has succeeded on the main issues as to trespass to property and injury to person. The appeal as to that order being well founded, plaintiff

N. S.
S. C.
1913
McLEOD
v.
HOLLAND.
Russell, J.

should have the costs of argument of the appeal, but in the taxation the costs of printing should be limited to the printing of the order and notice of appeal at the most. Of course the plaintiff will have the costs of the motion for a new trial and of the order for judgment.

RUSSELL, J.:—The defendant being under the impression that plaintiff had said something to one of his friends reflecting on the defendant's business, entered the plaintiff's shop, touched him on the shoulder, and on plaintiff rising from his chair and turning to face his visitor, brandished his fist in plaintiff's face, threatened to smash his nose, accompanying the threat with ornamental profanity and following it with abuse too obscene and vulgar to be put in print. While he was exhausting the vocabulary of blackguardism he was also shaking the plaintiff more or less violently, having seized him by the coat collar. He then left the shop and proclaimed his triumph to a number of his friends. An action was brought for damages and the defendant paid into Court five dollars which plaintiff very properly considered inadequate reparation for the insult. Under the instructions of the learned Judge the jury treated the case as one too trivial for their serious consideration and awarded less than the defendant had paid into Court. The consequence is that the plaintiff, in addition to having been assaulted and grossly insulted, finds himself saddled with a judgment against him and a bill of costs to pay, while the defendant is left at large to swagger and boast of his victory.

I do not think that Courts of justice were instituted for the purpose of accomplishing such results as this. There has been a miscarriage of justice and I am glad to know that it can be corrected without making a precedent that would be inconvenient in other cases.

I have no doubt that the jury was misdirected, and I think it most probable that it was the misdirection that led to the result, although the burden of establishing this is not on the appellant who complains of it.

On examining the charge to the jury I find more than one expression of views by the learned Judge for which there is no warrant that I can discover in the evidence. He characterizes the interview between plaintiff and defendant as a wordy war and suggests the possibility of a provocation on the part of the plaintiff. There is no evidence of any provocation and no other evidence of a wordy war than that to which I have alluded of the obscene and violent language used by the defendant. The jury is instructed that the case was a suitable one to be settled in the Police Court and is given to

understand very distinctly that the plaintiff is to be reprehended for resorting to the Supreme Court for vindication of his rights. A reference is made to the fact of money having been paid into Court, a fact the communication of which to the jury is forbidden by the rules—though I think this is a course which is likely to be more injurious to a defendant than to the plaintiff—and the whole cause of action is belittled and presented to the jury as a trifling matter which ought not to have been brought into Court. I am very strongly of the opinion that the plaintiff has not had a fair trial of his case and that there should be another trial by a jury differently instructed.

As to the order for judgment, I think it should be varied in accordance with the rule established by *Hart* v. *Davis*, 28 N.S.R. 303, defendant having judgment in his favour, but plaintiff having the costs of the issues on which he succeeded, namely the trespass and the assault, the costs being set off. Plaintiff should have the costs of the appeal, but only one appeal book should be paid for.

Longley, J. (dissenting) :—I am sorry, and with the greatest deference, to be obliged to differ from my associates in this particular case. The citations from English law books giving an account of the Judge's reference to misdirections in similar cases seem to me to be beside the point. The cases there were distinctly different and in one of them in which the jury brought in a verdict of £500 damages for the mere knocking off of a hat, which damage would have been amply fulfilled by thirty shillings, the Court simply refused to interfere with the finding of the jury. I, in the same manner, would have been indisposed to interfere with the jury if it had awarded $500 instead of $4 but I am compelled to see the circumstances of this case, and it seems to me they are nothing more in the main than was set forth in the charge of the Judge—a little squabble between two men, no man doing the other the slightest damage.

Longley, J. (dissenting)

Such cases are occurring by the hundred every day and only one case in a hundred would ever be brought into a Court of law.

The defendant had heard of the plaintiff making uncomplimentary remarks in regard to his company and he went in and told the plaintiff that he was an arrant slanderer. No one was present when he was in and no harm resulted to the plaintiff in any way. The Judge charged the jury rather for the defendant, but it was only because of a disposition on his part to discourage that class of litigation. I would be distinctly in favour of putting an end to that class of litigation myself.

N. S.

S. C.
1913

McLEOD
v.
HOLLAND.

Longley, J. (dissenting)

I think the verdict is about reasonable, and I, therefore, would dismiss the appeal.

The question has been raised as to the propriety of the Judge referring to the paying of money into Court. It is not necessary to argue the point at length, because the judgment is to be in favour of setting aside the verdict and giving a new trial. I am rather disposed to think that the Judge was justified, especially as he withdrew his reference to money being paid into Court from the jury.

Appeal allowed, LONGLEY, J., *dissenting*.

ALTA.

S. C.
1913

EDMONTON STEAMSHOVELLERS, Ltd. v. JOHN GUNN & SONS.

Alberta Supreme Court, Beck, J. December 1, 1913.

1. PRINCIPAL AND AGENT (§ II D—26)—RATIFICATION—WHAT CONSTITUTES —MACHINERY ORDERED THROUGH SUPPOSED AGENT.

Where a dealer in machinery, as an alleged seller, receives and undertakes to fill a machinery order from a construction company through a middleman, whom the construction company reasonably believes to be the agent of the dealer, the dealer may constitute himself a seller and the middleman's principal by estoppel, unless the transaction is disavowed and the alleged agency repudiated within a reasonable time, where it appears that the dealer had notice of the other party's reliance upon the supposed agency.

Statement

ACTION for damages for breach of contract for the sale of goods.

Judgment was given for the plaintiffs for $2,221.96.

B. Pratt, for plaintiffs.

O. M. Biggar, K.C., for defendant.

Beck, J.

BECK, J.:—This is an action for damages for breach of contract for the sale and delivery of certain machinery. The decision of the case turns upon the question whether one John B. Gunn, who was not a member of the defendant firm, was their agent, or if not, whether there was a ratification of an assumed agency or whether the defendants by their conduct are estopped from denying that he was their agent in relation to the transaction.

One Darby, a director of the plaintiff company, met J. B. Gunn at Edmonton some short time before December 20, 1912. The plaintiff company were engaged in getting gravel out of the river at Edmonton. In the course of several conversations it became known to J. B. Gunn that the plaintiff company wanted to sell a steam shovel they were using and to get in its stead an apparatus with an orange peel bucket.

J. B. Gunn in these and several subsequent conversations so spoke as to lead Darby and later Grady, the manager of the

plaintiff company, to suppose that he was either a member of or agent for the defendant company. He said in effect:—

We have the machinery you want—an engine, derrick and orange peel bucket, which we can sell to you,

and negotiations for the suggested sale and purchase began.

J. B. Gunn sent the following telegram (ex. 1):—

Edmonton, Alta., Dec. 20, '12.

John Gunn & Sons, Winnipeg, Man.

Have buyer for immediate delivery orange peel bucket derrick and engine complete can you supply how soon and price f.o.b. Edmonton answer immediately.

J. B. GUNN.

J. B. Gunn received the following letter in reply (ex. 2):—

Winnipeg, Dec. 21st, 1912.

Mr. J. B. Gunn, Edmonton, Alta.

Your message to hand asking for price on hoist and derrick. We can ship immediately one ¾ orange peel bucket, 10 ton derrick complete with wood, 20 horse-power engine with swinging gear all complete in good order for working for $1,850 f.o.b. cars here.

Trusting that you can make this sale. We can ship material immediately.

JOHN GUNN & SONS,
Per Wm. Gunn.

Having received this letter J. B. Gunn put the price to the plaintiff company at $2,750 instead of $1,850 and the price of the plaintiff's steam shovel was put at $5,200, but J. B. Gunn said that the defendants would not want the steam shovel until the spring; and then it was arranged that the price of the defendants' outfit, $2,500, should be paid partly in cash and partly on time with security for the deferred payments on the steam shovel, which should be taken over by the defendants in the spring at $5,200 cash. This seems to have been the arrangement when J. B. Gunn sent the following telegram (ex. 3):—

Edmonton, Alta., Dec. 31, '12.

William Gunn, care John Gunn & Sons, Winnipeg, Man.

When will machinery be shipped. Wanted at once. Answer.

J. B. GUNN.

In reply J. B. Gunn received the following letter (ex. 4):—

Winnipeg, Jan. 2, 1912.

Mr. J. B. Gunn, Edmonton, Alta.

Very sorry that we are unable to ship the orange peel bucket and hoist. In the first place the hoist does not pass the Alberta specifications, and then we require the derrick and orange peel bucket on some work in Winnipeg, therefore we do not consider that it would be advisable to sell it, as we may then have to buy a new one for ourselves.

JOHN GUNN & SONS,
Wm. Gunn.

ALTA.

S. C.
1913

EDMONTON STEAMSHOVELLERS, LTD. v. JOHN GUNN & SONS.

Beck. J.

Then J. B. Gunn sent the following telegram evidently just before receiving the last letter (ex. 5) :—

Edmonton, Alta., Jan. 3, '13.

William Gunn, care John Gunn & Sons, Winnipeg, Man.

Have not heard from you re shipment of machinery do you intend to deliver. My customers must know immediately or will have to purchase elsewhere I will be disappointed if you do not fill this order answer.

J. B. GUNN.

On receiving the letter of January 2, J. B. Gunn no doubt communicated its contents to the plaintiff company and appears to have sent some communication, which is not produced, to the defendants, and in this missing letter or telegram he must, I think, have given the name of the plaintiff company as the purchasers, though it doesn't appear in the produced correspondence until a telegram addressed to them by the defendants on January 16. Then he received the following telegram (ex. 5*a*) :—

Winnipeg, Man., Jan. 8.

J. B. Gunn, Edmonton, Alta.

Can ship new American hoist and derrick from Calgary bucket from here price twenty-five hundred.

JOHN GUNN & SONS.

Having received this telegram J. B. Gunn put the altered proposition to the plaintiff company substituting for the price named by the defendants $3,350 f.o.b. shipping point payable $500 down and the balance in 30, 60 and 90 days, delivery to be made immediately. This proposal was accepted by the plaintiff company and J. B. Gunn sent the following telegram (ex. 6) :—

Edmonton, Alta., Jan. 9, '13.

William Gunn, care John Gunn & Sons, Winnipeg.

Your telegram received. Have sold machinery got signed acceptance. When can you ship wanted at once. I have sold on understanding that the outfit will be delivered here complete for working.

J. B. GUNN.

On the same day J. B. Gunn signed the following "guarantee" and gave it to the plaintiff company (ex. 6*a*) :—

Edmonton January 9, 1913.

To The Edmonton Steam Shovellers, Ltd., Edmonton, Alta.

I hereby guarantee that the orange peel bucket, derrick and American hoist you are purchasing through me will be in good order when received by you, and that it will be complete in every respect. The price to be $3,350 f.o.b. shipping point and agree to ship same immediately.

J. B. GUNN.

And the plaintiff company gave J. B. Gunn a letter reading as follows (ex. 6*b*) :—

Edmonton, Jan. 9, 1913.

J. B. Gunn, Esq., Edmonton, Alta.

We hereby accept your offer to supply us with an orange peel bucket, derrick and American hoist complete, for $3,350 f.o.b. shipping point, subject to your guarantee that it will be satisfactory when received.

EDMONTON STEAMSHOVELLERS, LTD.,
Chas. E. Darby, *Secy.-Treas.*

The defendants wrote J. B. Dunn as follows (ex. 7):—

Winnipeg, Jan. 10, 1913.

Mr. J. B. Gunn, Edmonton, Alta.

Your message to hand regarding machinery. We can ship this at once. You state that you sold with the understanding that the outfit would be delivered complete for working. The price we quoted you was f.o.b. point of shipment. Now we want you to see that there is no misunderstanding in connection with this, as we have given a pretty low price on the outfit. We will include everything that is necessary to run the orange peel. The hoist and derrick will be shipped from Calgary and the orange peel from here, so kindly see that everything is clearly understood, as we do not want to have any trouble after the machinery arrives, as we prefer to keep the outfit than have anything turn up later on that it should not be satisfactory.

JOHN GUNN & SONS,
Wm. Gunn.

J. B. Gunn sent the following telegram (ex. 8):—

Edmonton, Alta., Jan. 14, '13.

William Gunn, care John Gunn & Sons, Winnipeg.

Your letter received everything O.K. ship immediately.

J. B. GUNN.

The first direct communication between the plaintiff company and the defendants was the following telegram (ex. 9):—

Winnipeg, Man., Jan. 16, 1913.

Edmonton Steam Shovellers, Ltd., Edmonton, Alta.

We have received an order from James Gunn to ship you a hoist engine derrick and orange peel bucket kindly wire us confirmation of order so that there will be no misunderstanding after shipment is made, will ship immediately on receipt of advice.

JOHN GUNN & SON.

This was answered by the following letter (ex. 10):—

Edmonton, Jan. 18, 1913.

Messrs. John Gunn & Sons, Winnipeg, Man.

Replying to your wire of January 16, we are very much disappointed that equipment ordered by us through Mr. James Gunn has not been shipped long ago as we have understood from Mr. Gunn that it had been on the road at least a week. We enclose a guarantee from Mr. Gunn dated January 9, which is apparently of no value, as you will notice he guaranteed immediate shipment and we naturally supposed that he was an authorized agent of your firm.

Our agreement with Mr. Gunn was that you would ship us immediately

ALTA.

S. C. 1913

EDMONTON STEAMSHOVELLERS, LTD. v. JOHN GUNN & SONS.

Beck, J.

one American hoist engine and boiler, equipped with swinging gear, one derrick, complete, with cables and two guys and one heavy orange peel bucket (¾ yd.); unit to be complete and ready to operate. The price to be $3,350 f.o.b. shipping point and the terms $500 cash upon receipt of shipment, balance in 30, 60, and 90 days, secured by lien notes; the outfit to be shipped to the Edmonton Steamshovellers, Ltd., Edmonton Lumber Co.'s siding, Strathcona, Alta.

Upon receipt of this letter we would appreciate it very much if you would wire us when shipment will be made as we have suffered considerable delay already and if you cannot supply us immediately with the equipment we require we will be forced to buy elsewhere.

THE EDMONTON STEAMSHOVELLERS, LTD.,
Thos. T. Grady, *Manager*.

It appears that just before writing this letter the plaintiffs had learned that J. B. Gunn was not a member of the defendant firm. J. B. Gunn sent the following letter (ex. 10*a*):—

Edmonton, Canada, Jan. 20, '12.

John Gunn & Sons, Winnipeg.

Re shipment of orange peel bucket, etc., would like to have some definite word as to when you intend shipping this outfit. These people are after me every day wanting to know when it will be here and, of course, I can give them no information. Please wire me at once when you will ship.

J. B. GUNN.

In consequence of the plaintiffs' letter to the defendants, the defendants wrote J. B. Gunn as follows (ex. 12):—

January 21, 1913.

J. B. Gunn, Edmonton, Alta.

We wired the Steam Shovellers Limited for instructions in and order to ship this material. We got a reply this morning from them, enclosing a guarantee from you and that the price is to be $3,350. In shipping machinery like this it is generally understood that it is sold on a cash basis. We notice that the terms that they state are, $500 cash, balance 30, 60 and 90 days. These terms are not very satisfactory. It is rather strange that you could not let us know all about this order in the first place. We cannot find any rating of the Edmonton Steam Shovellers Limited, and we are afraid to ship this material under these conditions. Moreover, the price you are getting from them, $3,350, is higher than they could buy a new outfit for. Now we cannot understand why they should pay more for a second hand outfit than a new one can be had at.

You have been wiring us about this outfit, but never given us any details of the sale, or the standing of the company. You seem to be more worried about getting your drafts through the bank, which will not be accepted until we are perfectly sure that this is a sale. We would prefer to have the machinery on hand than a bad debt.

JOHN GUNN & SONS.

This was followed by another letter to J. B. Gunn from the defendants as follows (ex. 13):—

January 24, 1913.

J. B. Gunn, Edmonton, Alta.

In regard to the Edmonton Steam Shovellers, Ltd., we have just had word that this company is willing to give a lien on the Marion steam shovel which they have. It seems to us that this is quite satisfactory.

The only trouble now is that the 21′ orange peel bucket, this we are using at the present time. We can get in Winnipeg a 17′ orange peel bucket, which is almost new. We consider just as well as a large shovel. You might take this matter up with them and wire us, and we can ship Monday afternoon.

The hoist and derrick is all rigged up at Calgary ready to load, so wire us as soon as you have taken the matter up in regard to the smaller bucket.

JOHN GUNN & SONS.

Then there was an interview between J. B. Gunn and the plaintiff company in consequence of which the following telegram was sent (ex. 14):—

Edmonton, Alta., Jan. 27, 1913.

William Gunn, care John Gunn & Sons, Winnipeg.

Small bucket O.K. Ship immediately chattel mortgage on Marion shovel executed to-day will be registered to-morrow and forwarded together with notes and six hundred cash. Please wire me on receipt giving me authority to draw on you. Very urgent.

J. B. GUNN.

J. B. Gunn was a drunken fellow and apparently hard up and anxious to get from the defendants the difference between the price they had quoted to him and the price at which the plaintiff had agreed to buy. The statement in his telegram that "chattel mortgage on Marion shovel executed to-day" was not true, though it seems that the document had been drawn and that the plaintiff company was ready to execute it upon delivery of the machinery being made.

My view of the position of the matter at this stage is that J. B. Gunn practically from the commencement of the negotiations with the plaintiff company so conducted himself towards the plaintiff company as to profess to act as an agent for the defendants; that he was acting with respect to property which was both in fact and in the understanding of the plaintiff company owned by the defendants and that, therefore, there can be no doubt that his acts were not incapable of ratification on the ground that he was not professing to act for the defendants. I think too that the proposed sale of the Marion steam shovel by the plaintiff company to the defendants, which appears never to have been communicated to the defendants was in effect a distinct and separate contract or at least a severable portion of the contract which the plaintiff company were at liberty (unless the defendants insisted upon its performance, and they do not do so) to abandon, if indeed there ever was a concluded agreement for its sale.

ALTA.

S.C.
1913

EDMONTON STEAMSHOVELLERS, LTD. v. JOHN GUNN & SONS.

Beck, J.

This being so I think that the defendants had notice of all the terms of the agreement made between J. B. Gunn and the plaintiff company, for the sale of the machinery now in question and of the fact that J. B. Gunn was professing to act on their behalf and that the plaintiff company understood he was so acting; that if they proposed to take the position that he had no right so to act they were under the circumstances bound instantly to notify the plaintiff company to that effect and that not having done so they became bound by the contract he had made, namely, a contract for the sale of one 17' orange peel bucket, a ten ton American derrick complete with wood, a 20 horse-power American hoist engine and boiler with swinging gear all complete in good order for working; the engine and derrick to be shipped from Calgary; the bucket from Winnipeg; these several parts to be a unit complete and ready to work; delivery to be made immediately; price, $3,350 f.o.b. shipping points payable $500 cash on receipt of shipment Edmonton; balance in 30, 60 and 90 days secured by lien notes and by security on Marion steam shovel. (Exhibits 1, 2, 5*a*, 6*b*, 7, 9, 10, 12, 13 and 14.)

At this stage the plaintiff company sent the two following telegrams (ex. 15):—

Edmonton, Jan. 28, 1913.

Jno. Gunn & Sons, Winnipeg.

Has machinery been shipped and when; do we deal direct or through J. B. Gunn. Answer rush care R. G. Dunn.

EDMONTON STEAMSHOVELLERS, LTD.

(Ex. 16.) Edmonton, Alta., Jan. 30, 1913.

John Gunn & Sons, Winnipeg, Man.

Cancel order for machinery. Altogether too much delay.

EDMONTON STEAMSHOVELLERS, LTD.

Then J. B. Gunn again intervened and having given the plaintiff company the following letter they evidently agreed to revive the contract (ex. 17):—

Edmonton, Alta., Jan. 31, '13.

The Edmonton Steamshovellers, Ltd., Edmonton.

Re purchase of machinery from John Gunn & Sons, Winnipeg. I wish to state that if the terms of payment for same which have given me, viz.: $500 cash, balance 30, 60 and 90 days, do not prove satisfactory, owing to the fact that you have been delayed in your work because of the delay in shipment of machinery, that a suitable extension will be granted on these payments.

J. B. GUNN.

P.S.—Should the 17 foot bucket not prove satisfactory to handle your work that we will supplant it with a 21 foot heavy bucket.

J. B. GUNN.

And J. B. Gunn sent the defendants the following telegram (ex. 18):—

Edmonton, Alta., Jan. 31, 1913.

John Gunn & Sons, Winnipeg, Man.

If machinery is shipped immediately they will accept.

J. B. GUNN.

J. B. Gunn followed this by the following telegram (ex. 19):—

Edmonton, Alta., Feb. 4, 1913.

William Gunn, care John Gunn & Sons, Winnipeg, Man.

No word re shipment of machinery. Is Calgary car shipped yet, wire car number immediately. These people very anxious to know wire answer.

J. B. GUNN.

The defendants wrote as follows (ex. 20):—

Winnipeg, Feb. 4, 1913.

Mr. J. B. Gunn, Edmonton, Alta.

The hoist and derrick shipped from Calgary is shipped to our own order. I have instructed them at Calgary to send the bill of lading to you, which you can turn over to them when you make the necessary arrangements with the Edmonton Steam Shovellers. The car number is C.P. 32929. We trust that this outfit will be satisfactory. There is a casting belonging to the swinging gear which we expressed from here. It was lost some way in moving the engine around. You might also let us know if you require a man to put this machinery together.

JOHN GUNN & SONS.

Wm. Gunn.

The shipping bill referred to in this letter was issued at Calgary on February 3, and instead of being sent from there to J. B. Gunn direct was sent to the defendants at Winnipeg and by them sent to J. B. Gunn at Edmonton enclosed in the following letter (ex. 21):—

Winnipeg, Feb. 5, 1913.

Mr. J. B. Gunn, Edmonton, Alta.

We herewith enclose you bill of lading for car shipped from Calgary. We are somewhat surprised that this only mentions hoist and fittings. We cannot understand that the derrick should not have been put on the car. However, we are making enquiries, and will let you know at once. We instructed Langill at Calgary to fix the derrick up in order to run an orange peel bucket, and it seems strange if he has not shipped it.

JOHN GUNN & SONS,

Wm. Gunn.

See and have notes and checks made out in our favour.

The shipping bill was made out in the name of John Gunn & Sons as shippers in favour of "John Gunn & Sons c/o Edmonton Steam Shovellers. It comprised "1 hoist and fittings—contractors' outfit."

On the same day the defendants wrote the plaintiff company as follows (ex. 22):—

ALTA.

S. C.
1913

EDMONTON STEAMSHOVELLERS, LTD. v. JOHN GUNN & SONS.

Beck, J.

Winnipeg, Feb. 5, 1913.

The Edmonton Steam Shovellers, Edmonton, Alta.

We have sent bill of lading for the machinery to J. B. Gunn to hand to you. All cheques and notes will be made payable to us.

JOHN GUNN & SONS,
Wm. Gunn.

There was some mistake made at Calgary, but the engine arrived on the 10th and the derrick on the 12th February. Grady, the plaintiff's manager, on hearing the machinery had arrived went to the railway station and without having the shipping bill paid the freight and got delivery of the machinery. The delay had been very great; it was very important that he should get delivery as soon as possible. Whether J. B. Gunn was away or drunk or couldn't be found he seems either not to have been able to get the shipping bill from him or perhaps owing to a reasonable disinclination to have decided to bother with him no more than necessary.

J. B. Gunn sent the following telegram (ex. 23):—

Edmonton, Alta., Feb. 13, 1913.

John Gunn & Sons, Winnipeg, Man.

Engine and derrick here but where is bucket; hurry.

J. B. GUNN.

The plaintiffs sent the following telegram (ex. 24):—

Edmonton, Alta., Feb. 20, '13.

Jno. Gunn & Sons, Winnipeg.

No "orange peel." Whole deal off if not received immediately.

EDMONTON STEAMSHOVELLERS.

The orange peel bucket seems to have arrived on February 26. The plaintiff company paid the freight and got delivery. Meanwhile Grady had gone to Winnipeg, arriving there February 24. He saw William Gunn, the member of the defendant firm who had conducted all the correspondence. Grady told William Gunn that he had received the engine and derrick, but that they were in poor shape; and that he had not yet received the orange peel bucket. Gunn told him that the bucket had already been shipped by express. Grady asked if it was in good shape so that he could get it working immediately. Gunn told him that it was not; that it needed a new set of teeth; that he had wired to Cleveland for them; that they would be in Edmonton in two or three days. Grady arrived back in Edmonton about March 7. He found that the bucket had been received; that they had tried to get it put in shape but failed and it was finally sent to a foundry to have the old teeth removed in readiness to have the new teeth put in when they should arrive.

Grady saw J. B. Gunn, who sent the following telegram (ex. 25):—

Edmonton, Alta., March 13, 1913.

William Gunn, care John Gunn & Sons, Winnipeg, Man.

Cannot use bucket until new points arrive, advise immediately when they will be here, very important letter following explaining everything.

J. B. GUNN.

If J. B. Gunn wrote as his telegram promised the letter is not produced and the defendants write the plaintiffs as follows (ex. 26):—

Winnipeg, March 20, 1913.

The Edmonton Steam Shovellers, Stratheona, Alta.

We have never heard from you in regard to the outfit shipped you some time ago. The arrangement that we had with you was that we were to get $600 cash, and a mortgage on the steam shovel for the balance. We left this matter with J. B. Gunn to arrange, but we have not been able to get any information from him. Kindly let us know what you are doing in the matter.

After the bucket was shipped to you, we wrote to J. B. Gunn and asked him to send us the shop number of this bucket, so that we could order repairs from the factory, that is, the points and bushings required. We never got any reply from him in regard to this. We would like if you would send us the shop number so that we can have these repairs sent forward by express.

JOHN GUNN & SONS,
Wm. Gunn.

This letter crossed one from the plaintiffs as follows (ex. 26a):—

Edmonton, Alta., Mar. 19, 1913.

John Gunn & Sons, Winnipeg.

On Jan. 9 we placed an order with your representative here, Mr. J. B. Gunn, for a derrick and orange peel outfit complete, and for immediately delivery, the machinery was not shipped, and we cancelled the order on Jan. 28; on Feb. 1, upon the assurance of J. B. Gunn that the machinery was loaded in Calgary, and could be delivered positively, within three days, we renewed our order; it is now March 19 and the complete equipment is not yet here, so we are again cancelling this order, and hold what machinery we have on hand for your advice. We have expended up to date $462 for freight, express, telegrams and necessary repairs, and will be glad to receive cheque from you covering this amount.

EDMONTON STEAMSHOVELLERS, LTD.,
Thomas T. Grady,
per G. Hyne.

This ended the correspondence between the plaintiff and defendants. The defendants' contention throughout has been that they were making a sale to J. B. Gunn and he was making a resale to the plaintiffs. In my view of the facts this is not so. It is clear from the very commencement that they knew he was making a sale to third parties; that they intended that there should be no so-called sale to him until he had first arranged a sale to their satisfaction to third parties so that they could have

ALTA.

S. C.
1913

EDMONTON STEAMSHOVELLERS, LTD. v. JOHN GUNN & SONS.

Beck, J.

the direct personal liability of the third parties; that in effect they were willing for him to make a commission or a "rake off" on a sale in which they would in reality be the sellers direct to the purchasers. If there were room for doubt otherwise, this is in my opinion put beyond doubt by the postscript to the defendants' letter of February 5, to J. B. Gunn: "See and have notes and checks made out in our favour," and the similar expression in their letter of the same date to the plaintiff company.

I therefore hold the defendants to be liable to the plaintiffs in damages for breach of contract. I estimate the damages as follows:—

Freight and express	$ 259.80
Repairs	235.16
Expenses to Winnipeg	70.00
Telegrams	7.00
Cost of unloading	20.00
Bill for electricity	50.00
Loss of profits, 54 days at $20	1,080.00
Loss of wages for men retained during period of delay awaiting delivery and loss of time of plaintiff's manager	500.00
	$2,221.96

I have estimated these damages on the basis that the machinery delivered is not only not in accordance with the contract, but is incomplete and useless to the plaintiff company in its present condition and that they have a right entirely to reject it and that they have done so and that, therefore, it is the defendants' property. I give judgment against the defendants for $2,221.96 with costs.

Judgment for plaintiffs.

SASK.

S. C.
1913

ROSS v. SCHMITZ.

Saskatchewan Supreme Court, Trial before Elwood, J. October 27, 1913.

1. LIMITATION OF ACTIONS (§ IV C—166)—INTERRUPTION OF STATUTE—AS TO MORTGAGOR—BY PAYMENTS BY ASSIGNEE OF EQUITY OF REDEMPTION.

Payments of interest to a mortgagee by an assignee of an equity of redemption who, pursuant to agreement with the mortgagor or by virtue of sec. 89 of the Real Property Act, R.S.M. 1902, ch. 148, assumes the payment of the encumbrance, will prevent the running of the Statute of Limitations in favour of the mortgagor.

[*Forsyth* v. *Bristowe*, 22 L.J. Ex. 255; *Bradshaw* v. *Widdington*, [1902] 2 Ch. 430; and *Alston* v. *Mineard*, 51 Sol. J. 132, followed.]

2. MORTGAGE (§ III—47)—VENDEE OF MORTGAGOR—ASSUMPTION OF DEBT—GRANTEE'S LIABILITY TO GRANTOR—REAL PROPERTY ACT—IMPLIED COVENANT OF INDEMNITY AGAINST PAYMENT BY GRANTOR.

An assignee of an equity of redemption subject to a mortgage, by

virtue of sec. 89 of the Real Property Act, R.S.M. 1902, ch. 148, impliedly covenants, with his assignor unless otherwise expressed, to pay the principal and interest of the mortgage, and to indemnify the assignor from liability thereon. (Dictum *per* Elwood, J.)

[*Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430, referred to.]

3. MORTGAGE (§ III—45)—VENDEE OF MORTGAGOR—ASSUMPTION OF DEBT—PAYMENT BY VENDOR—SUBROGATION.

A mortgagor who is compelled to pay a mortgage debt after its assumption by an assignee of the equity of redemption, either by express agreement, or by virtue of sec. 89 of the Real Property Act, R.S.M. 1902, ch. 148, is entitled to an assignment of the mortgage.

Statement

ACTION for recovery from the mortgagor, after he had sold his equity of redemption, of a balance unpaid on the mortgage. The question involved was whether the right of action was barred by efluxion of time, notwithstanding payments made by the transferee of the equity.

Judgment was given for the plaintiffs.

F. L. Basledo, for plaintiffs.

R. E. Turnbull, for defendant.

Elwood, J.

ELWOOD, J.:—In this case the facts as I find them are as follows: That on or about November 9, 1896, the defendant executed a mortgage under seal, under the Manitoba Real Property Act, in favour of the plaintiffs, for securing the repayment to the plaintiffs of $400 in four equal annual payments of $100 each on the first day of December in each of the years 1897 to 1900, both inclusive, with interest at the rate of 8% per annum, payable on the first day of December each year, and which mortgage provided that upon default in any payment the whole should become due and payable; that the said mortgage was executed on lots Nos. 12 and 13, in block 6, in the village of Morden, in the Province of Manitoba; that at the time of the execution of the said mortgage the defendant was the owner of the land in question; that in 1898 the defendant sold the said land to one Frank Phillips; that there was an agreement in writing between the defendant and Frank Phillips that the said Frank Phillips would assume and pay the plaintiff's mortgage; that the defendant paid nothing on account of the mortgage after the transfer to the said Frank Phillips; that subsequently the said Frank Phillips sold the land to George Selley and James Beckel; that at the time of this sale the defendant had not transferred the land to Frank Phillips, and on the first day of December, 1903, the defendant, at the request of a solicitor, who was apparently acting for Phillips and Selley and Beckel, executed a transfer of said land to the said Selley and Beckel, which transfer was expressed to be subject to the plaintiffs' said mortgage; that at the time of said transfer the defendant was not interested in any way in the purchase price which Frank Phillips was receiving for said land, and had no interest in the land,

SASK.
S. C.
1913
ROSS
v.
SCHMITZ.
Elwood, J.

although at that time the defendant was the registered owner of the land; that the certificate of title to the said land issued to the said Selley and Beckel on December 2, 1903; that subsequently Selley and Beckel transferred the land to one Harry Hunt, and certificate of title issued to the said Harry Hunt, on the 13th December, 1905; that both the said certificates of title have endorsed upon them, and appear to be subject to, the plaintiffs' said mortgage: that the said Frank Phillips paid to the plaintiffs on account of the interest due on said mortgage, on February 27, 1901, the sum of $10, and on November 11, 1901, the sum of $32, and the plaintiffs, with the approval of the said Phillips, collected as rent from the said premises on account of interest on said mortgage on December 31, 1902, the sum of $18.70, on July 22, 1903, the sum of $17.50, on December 1, 1903, the sum of $16; that the said Selley and Beckel made the following payments to the plaintiffs on account of interest on the said mortgage, namely, on December 28, 1903, the sum of $23.65, and on February 2, 1905, the sum of $32.50; and that the amount still due and owing on said mortgage is $512.90, and interest on $490.97 at the rate of 8% per annum from August 23, 1912.

It was argued on behalf of the defendant that the plaintiffs' right to collect from the defendant the amount of said mortgage is barred by the Real Property Limitation Act (Imp.), 1874. In the case of *Forsyth* v. *Bristowe*, 22 L.J. Ex. 255, it was held that payment of the interest by the assignee of the equity of redemption was a sufficient acknowledgment to take the case out of the statute as against the mortgagor. And at p. 257 Parke, B., says as follows:—

> But if the action be on an ordinary covenant to pay money, or on a bond, an acknowledgment made by the party liable, or his agent, though not made to the party entitled or his agent, would be sufficient. . . There has also been a payment ever since of interest by the assignee of the equity of redemption, and that is clearly a payment of interest. The statute does not expressly require that it shall be made by the party liable or his agent; and the assignee of the equity of redemption who covenants to pay is sufficiently an agent for that purpose.

In *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430, it was held that the payment of interest by a person who, as between himself and the mortgagor, was bound to pay it, though he was under no contract with the mortgagee to do so, was a payment "by the person by whom the same shall be payable" within the meaning of sec. 8 so as to prevent the statute from running. In that case Buckley, J., at p. 439, says as follows:—

> It seems to me, therefore, that the whole of the language of those judgments is in favour of the view which I take, and that the principle is that the person bound to pay, and whose payment is material for the purposes of the statute, is not a person bound as between himself and the mortgagee, but a person bound as between himself and the mortgagor.

Cozens-Hardy, L.J., at p. 455, says:—

I think it is abundantly clear that, as between the father and the son, the son was bound to indemnify the father against the mortgage obligations. That being so, although there was no contract between the mortgagees and the son it is in my view quite sufficient that there was a contract between the mortgagor and the son which, as between them, bound and entitled the son to make the payments of interest to the mortgagees; and, that being so, there has been a payment of interest which suffices to prevent the statute from running.

In *Alston* v. *Mineard*, 51 Sol. J. 132, it was held that payments made by the assignee of the property of the mortgagor were sufficient to take the case out of the statute.

By the Manitoba Real Property Act, R.S.M. 1902, ch. 148, sec. 89, and which was in force at the time of the transfer from the defendant to Selley and Beckel, it was provided that in every instrument transferring an estate or interest in land subject to a mortgage there shall be implied, unless otherwise expressed, a covenant by the transferee with the transferor that such transferee shall pay the interest, annuity or rent charge secured by the mortgage after the rate and at the time specified in the instrument creating the same, and shall indemnify and keep harmless the transferor from and against the principal sum and other moneys secured by such instrument.

I find that, as between the defendant and Frank Phillips, there was an obligation on the part of the said Frank Phillips to pay the principal and interest on the mortgage as it came due; and, on the authority of the above cases, I hold that the payments made by Phillips of interest were sufficient payments to prevent the statute running. I also hold that, in consequence of the transfer from the defendant to Selley and Beckel, there was an implied covenant of Selley and Beckel with the defendant to pay the principal and interest of the mortgage as it accrued due, and to indemnify the defendant from and against the principal and other sums secured by the mortgage, and that, therefore, all payments of interest made by Selley and Beckel to the plaintiffs were made on the defendant's behalf and were sufficient to prevent the statute from running. The payments which I hold to have been made so as to prevent the statute running are: the payment on February 27, 1901, by Frank Phillips of $10; the payment on November 11, 1901, by Frank Phillips of $32; the payment on December 28, 1903, of $23.65, and that on February 2, 1905, of $32.50. It is unnecessary that I should express any opinion with regard to the payments as the result of rent collected.

There is no direct evidence before me as to the date of the commencement of this action except that in the copy of the pleadings the statement of claim is dated on August 23, 1912,

SASK.

S. C. 1913

ROSS v. SCHMITZ.

Elwood, J.

and I assume that the action was commenced on that date. The payments made, therefore, would be sufficient to prevent the statute running; and there will, therefore, be judgment for the plaintiffs for the sum of $512.90, and interest on $490.97 at the rate of 8% per annum from August 23, 1912, and costs of the action.

Upon payment of the judgment, the defendant will be entitled to an assignment of the mortgage, the defendant to pay the costs of and incidental to the assignment.

Judgment for plaintiff.

Annotation

Mortgage rights

Annotation—Mortgage (§ III—46)—Equitable rights on sale subject to mortgage.

Liability of purchaser to mortgagor.

On the sale by a mortgagor of an equity of redemption an implied obligation arises on the part of the purchaser to indemnify the vendor against the mortgage debt: *Bridgman* v. *Daw*, 40 W.R. 253; *Waring* v. *Ward*, 7 Ves. 332, 32 Eng. R. 136; *Jones* v. *Kearney*, 1 Dr. & War. 134; *Thompson* v. *Wilkes*, 5 Gr. 594; *Canavan* v. *Meek*, 2 O.R. 636; *Boyd* v. *Johnson*, 19 O.R. 598; *Corby* v. *Gray*, 15 O.R. 1; *British Canadian Loan Co.* v. *Tear*, 23 O.R. 664; *Beatty* v. *Fitzsimmons*, 23 O.R. 245; *Gooderham* v. *Moore*, 31 O.R. 86; *Walker* v. *Dickson*, 20 A.R. (Ont.) 96; *Roberts* v. *Rees*, 5 U.C. L.J. 41. See also remarks of Lord Thurlow in *Tweddell* v. *Tweddell*, 2 Bro. C.C. 152. It is expressly provided by some Real Property Land Titles Acts that in every transfer of land subject to mortgage there shall be implied a covenant on the part of the transferree with the transferror to pay the money secured by the mortgage or other encumbrance, in the manner specified in the instrument creating the charge; and to indemnify and keep harmless the transferror against the money so secured: see R.S.C. 1906, ch. 110, sec. 69; 6 Edw. VII. (Alta.) ch. 24, sec. 52; R.S.M. 1902, ch. 148, sec. 89; R.S.S. 1909, ch. 41, sec. 63; Territories Real Property Act, 57-58 Vict. (Can.) ch. 28, sec. 65. The Alberta Act extends such implied covenants of payment to the mortgagee; while, under the Manitoba Act, they are implied unless otherwise expressed in the conveyance of the land.

This doctrine of indemnity applies to the purchaser of an equity of redemption in a contingent reversionary estate before it falls into possession: *Mills* v. *United Counties Bank*, [1912] 1 Ch. 231; and independently of any contract a Court of equity will compel a purchaser of the equity to indemnify the vendor against the mortgage debt, and he may be compelled to covenant to do so: *Bridgman* v. *Daw*, 40 W.R. 253. But it is a doctrine that bends to the circumstances of the particular case; and is inapplicable where the terms of the purchase deed are inconsistent with the idea that such was the intention of the parties: *Mills* v. *United Counties Bank*, [1912] 1 Ch. 231. And an express agreement between the parties may be shewn even by parol that the vendee was not to assume the payment of the mortgage debt: *British Canadian Loan Co.* v. *Tear*, 23 O.R. 664; *Beatty* v. *Fitzsimmons*, 23 O.R. 245; *Corley* v. *Gray*, 15 O.R. 1.

While it was held in *Re Cozier, Parker* v. *Glover*, 24 Gr. 537, that the acceptance of a deed reciting that property was conveyed subject to a mortgage, while implying an agreement to indemnify the grantor, does not

SASK.

Annotation

Mortgage rights

Annotation (*continued*)—Mortgage (§ III—46)—Equitable rights on sale subject to mortgage.

enure as an undertaking to pay the debt unless the amount is included in the consideration and retained by the vendee as so much money belonging to the incumbrancer, such has not been accepted as the law. See *Frontenac Loan & Industrial Society* v. *Hyslop*, 21 O.R. 577; *Clarkson* v. *Scott*, 25 Gr. 373; *Campbell* v. *Morrison*, 24 A.R. (Ont.) 224.

The equitable doctrine of the right to indemnity of a vendor of land sold subject to the mortgage applies only as against a purchaser in fact, and not to one to whom, at the request of the actual purchaser, an equity of redemption was conveyed by deed absolute in form, for the purpose of security only: *Walker* v. *Dickson*, 20 A.R. (Ont.) 96. See also *Fullerton* v. *Brydges*, 10 Man. L.R. 431. Thus, where one purchases an equity of redemption for the purpose of transferring it to a company subsequently to be formed, the company, and not the purchaser, is liable to indemnify the mortgagor where the nominal purchaser, although still holding the land, has filed a declaration that he holds it in trust for the company which was then in existence: *Fraser* v. *Fairbanks*, 23 Can. S.C.R. 79.

A conveyance of an equity of redemption to a married woman by a deed, although not signed by her, in which she assumed as part of the conveyance the payment of the mortgage, and covenanted to the same effect with her vendor, and, without disclaiming or taking any steps to free herself from the burden of the title, took possession of and enjoyed the land and the benefits therefrom, was held, in *Small* v. *Thompson*, 28 Can. S.C.R. 219, to bind her to the performance of such obligation. But where a woman empowers her husband to sell her land, and instead he exchanges it for other land agreeing that she shall assume the payment of a mortgage thereon, she is not bound by such agreement, since the power conferred on her husband was insufficient to permit him to bind her by such an agreement, since it was not an undertaking or promise in respect to her separate property: *McMichael* v. *Wilkie*, 18 A.R. (Ont.) 464, reversing 19 O.R. 739.

A mortgagor who covenants to pay the mortgage debt, and afterwards sells the equity of redemption subject to the incumbrance, becomes a surety of the purchaser for the payment thereof, and if the debt is allowed to run into default he may call on the purchaser to pay it: *Campbell* v. *Robinson*, 27 Gr. 634. See also *Martin* v. *Arthur*, 16 U.C.R. 483. And the purchaser of a mortgaged estate subject to the incumbrance will be compelled to fulfil his undertaking even after selling the land to a third person: *Joice* v. *Duffy*, 5 U.C.L.J. 141.

Where a purchaser covenants with the mortgagor to pay and discharge an incumbrance and to save the latter harmless in respect thereto, an action may be maintained against the former by the mortgagor even before he has paid anything on the mortgage debt: *Cullin* v. *Rinn*, 5 Man. L.R. 8; or he may obtain specific performance of the purchaser's agreement: *Horsman* v. *Burke*, 4 Man. L.R. 245. And a mortgagor when sued on his covenant to pay, in a third party proceeding against a purchaser of the land, who assumes and covenants to pay the mortgage debt, is entitled to immediate judgment and execution for the amount of the judgment obtained against him by the mortgagee: *McMurtry* v. *Leushner*, (Ont.) 3 D.L.R. 549. And when sued by a mortgagee on his covenant for payment, a mort-

SASK

Annotation

Mortgage rights

Annotation (*continued*)—Mortgage (§ III—46)—Equitable rights on sale subject to mortgage.

gagor may call upon the purchaser of the equity to pay the mortgage money under the implied covenant of indemnity imposed by sec. 89 of the Real Property Act, R.S.M. 1902, ch. 148, payment by the mortgagor not being a condition precedent to a right of action on the purchaser's obligation of indemnity: *Noble* v. *Campbell*, 21 Man. L.R. 597.

A mortgagor who is compelled to pay a mortgage debt after its assumption by a purchaser of the equity of redemption, is entitled to a lien on the encumbered land: *Hamilton Provident L. and I. Co.* v. *Smith*, 17 O.R. 1; or to a reconveyance of the property subject to the existing equity of redemption; the original mortgagor thus becoming a mortgagee; even though the purchaser of the equity has further charged the property to the original mortgagee or a third person: *Kinnaird* v. *Trollope*, 39 Ch. D. 636. So long as the covenant to pay endures, the mortgagor is liable thereon to the mortgagee; and, on payment it is his equitable right to recover the land, or to have unimpaired residue against his assignee if he has sold the land; and, if he can exercise such rights, it is immaterial that at some previous time there have been such dealings between the assignee and the mortgagee as would have interfered with such rights: *Forster* v. *Ivey*, 32 O.R. 175, affirmed 2 O.L.R. 480.

But one purchasing an equity of redemption from the mortgagor's assignee for creditors, is not bound to make good a deficiency on a sale to realize the security: *Nichols* v. *Watson*, 23 Gr. 606.

Liability of mortgagor to mortgagee, after sale.

A mortgagor remains liable to a mortgagee on his covenants for payment even after a transfer of the equity of redemption to one who assumes the payment of the mortgage debt: see *Forster* v. *Ivey*, 2 O.L.R. 480, affirming 32 O.R. 175; *Kinnaird* v. *Trollope*, 39 Ch. D. 636.

Since a mortgagor by assigning an equity of redemption to one who assumes the payment of the mortgage debt does not, in the technical sense, become a surety for the payment thereof, the doctrine as to the discharge of sureties does not apply to its full extent: *Forster* v. *Ivey*, 2 O.L.R. 480, affirming 32 O.R. 175; and a mortgagor is liable to a mortgagee upon his covenants notwithstanding a previous extension of time by the mortgagee to the purchaser, if, when the liability is enforced, the right to redeem is not affected: *Forster* v. *Ivey*, 2 O.L.R. 480, affirming 32 O.R. 175.

But there may be such dealings between a mortgagee and the purchaser of the equity as to relieve the mortgagor from liability to the mortgagee: thus, a mortgagor is released by an extension of time for payment granted by a mortgagee in consideration of the payment of a higher rate of interest by the purchaser: *Mathers* v. *Helliwell*, 10 Gr. 172; or by dealings between a purchaser of the equity and the mortgagee amounting to a new contract between them: *Aldous* v. *Hicks*, 21 O.R. 95. And, where a mortgagor assigned to a mortgagee covenants of a purchaser of the equity to pay the mortgage debt, and afterwards the mortgagee, without the knowledge of the mortgagor, took by assignment from the purchaser the benefit of similar covenants from sub-purchasers, the mortgagee agreeing to exhaust his remedies against such sub-purchaser before pursuing the purchaser, it was held that the mortgagee had dealt with the covenants of

Annotation (*continued*)—**Mortgage (§ III—46)—Equitable rights on sale subject to mortgage.**

SASK.

Annotation

Mortgage rights

the original purchaser assigned him as collateral security, so as to divest himself of power to restore it to the mortgagor unimpaired, and as the extent of its impairment could be determined only by exhaustion of the remedies provided for in the subsequent covenants of such sub-purchasers that the mortgagee had no present right of action against the mortgagor on the covenants in his mortgage: *McCuaig* v. *Barber*, 29 Can. S.C.R. 126, reversing 24 A.R (Ont.) 492. See *McCuaig* v. *Barber*, 31 O.R. 593, for a later action brought to determine the extent of the impairment of such right.

But a mortgagor is not released from liability by dealings between the purchaser of the equity and the mortgagee where the remedy against the mortgagor is expressly reserved: *Trust & Loan Co.* v. *McKenzie*, 23 A.R. (Ont.) 167. However, where a mortgagor sold land to one who took subject to the mortgage, and afterwards the mortgagee took a conveyance of the land from the purchaser under an agreement for a sum less than that due on the mortgage, and then sold it to a third person, the mortgagor cannot be held for the deficiency, even though the mortgagee in dealing with the purchase retained all his rights against the purchaser, since by subsequently selling the land the mortgagee put it out of his power to permit the mortgagor to redeem; *British Canadian L. & I. Co.* v. *Williams*, 15 O.R. 366.

The fact that for several years a mortgagee receives interest from a purchaser of the equity of redemption, and delays enforcing his security, does not amount to such laches as will prevent the enforcement of payment from the estate of a deceased mortgagor: *Re Eustace, Lee* v. *McMillan*, [1912] 1 Ch. 561.

As a covenant by a purchaser with his vendor to pay a mortgage debt on land, and save a vendor harmless from all loss by reason of any default by the purchaser, is one of indemnity merely; and, if the purchaser obtains a release before default from the only person who could in any way damnify the vendor, his liability is satisfied: *Smith* v. *Pears*, 24 A.R. (Ont.) 82.

Administrators of an insolvent estate of a deceased mortgagor are not liable in damages to a mortgagee as upon a devastavit, because of their release of the purchaser of the equity of redemption from his liability to indemnify the mortgagor in respect of the mortgage, no claim having been made on them by the mortgagee in respect of the mortgage: *Higgins* v. *Trusts Corporation of Ontario*, 27 A.R. (Ont.) 432, affirming 30 O.R. 684.

Rights of mortgagee against purchaser.

The mere fact that a purchaser of an equity of redemption covenants with his vendor to pay the encumbrance does not make it the personal debt of the purchaser which can be enforced by the mortgagee: *Barham* v. *Earl of Thanet*, 3 My. & K. 607, 40 Eng. R. 231; *Earl of Oxford* v. *Rodney*, 14 Ves. 417, 33 Eng. R. 581; *Waring* v. *Ward*, 7 Ves. 332, 32 Eng. R. 136; *Butler* v. *Butler*, 5 Ves. 534, 31 Eng. R. 724; *Bruce* v. *Morice*, 2 DeG. & S. 389, 64 Eng. R. 174; *Shafto* v. *Shafto*, 1 Cox 207; *Re Errington, ex parte Mason*, [1894] 1 Q.B. 11; *Canada Landed and National Investment Co.* v.

SASK.

Annotation

Mortgage rights

Annotation (*continued*)—**Mortgage (§ III—46)—Equitable rights on sale subject to mortgage.**

Shaver, 22 A.R. 377. And see the remarks of Lord Thurlow in *Tweddell* v. *Tweddell*, 2 Bro. C.C. 152.

The purchaser of land, subject to a mortgage, does not *ipso facto* become personally liable to the mortgagee for the amount of the mortgage, nor does he become liable to the mortgagee by entering into a covenant with his vendor to pay the mortgage. In other words, the burden of a covenant to pay mortgage moneys does not run with the mortgaged lands: *Canada Landed and National Investment Co.* v. *Shaver*, 22 A.R. (Ont.) 377.

But the purchaser of the equity may so conduct himself by dealings with the mortgagee as to render himself personally liable to the mortgagee: as by entering into a new contract with him for different times and modes of payment of the mortgage debt: *Earl of Oxford* v. *Rodney*, 14 Ves. 417, 33 Eng. R. 581; or it may be implied from all the circumstances of the case; *Re Errington, ex parte Mason*, [1894] 1 Q.B. 11; or where a purchaser, who joined in the execution of a conveyance whereby he covenanted to pay the mortgage debt, afterwards borrows a further sum from the mortgagee and gives a new mortgage for the whole debt: *Woods* v. *Huntingford*, 3 Ves. 128, 30 Eng. R. 930; *Waring* v. *Ward*, 7 Ves. 332, 32 Eng. R. 136. And see the remarks of Lord Thurlow in *Tweddell* v. *Tweddell*, 2 Bro. C.C. 152, 29 Eng. R. 87. So where the purchaser of an equity of redemption, as part of the purchase money, agrees to pay the mortgage debt, and subsequently makes payments thereon to the mortgagee, it is sufficient to imply an agreement to hold the money for the mortgagee's use, and as the latter might have sued for it, he may prove the debt against the estate of the purchaser: *Re Cozier Parker* v. *Glover*, 24 Gr. 537 at 546. But no such liability is created by the fact that the mortgagor and the purchaser ascertained the amount of the mortgage debt from the mortgagee, and that the purchase was made subject thereto: *Colquhoun* v. *Murray*, 26 A.R. (Ont.) 204; or from the payment of interest for two years by the purchaser in the absence of the mortgagor, who could not be found; notwithstanding that the time for payment was altered by agreement between the mortgagee and the purchaser: *Re Errington, ex parte Mason*, [1894] 1 Q.B. 11.

A claim of a mortgagor, against the purchaser from him of the equity of redemption, for indemnification against the mortgage debt may on being assigned by the mortgagor to the mortgagee, be enforced by the latter in an action directly against the purchaser: *Small* v. *Thompson*, 28 Can. S.C.R. 219; *Campbell* v. *Morrison*, 24 A.R. (Ont.) 224, affirmed *sub nom. Maloney* v. *Campbell*, 28 Can. S.C.R. 228; *Gooderham* v. *Moore*, 31 O.R. 86; *British Canadian Loan Co.* v. *Tear*, 23 O.R. 664. The implied obligation of a transferree created by the Real Property Act to indemnify a mortgagor from the mortgage debt is an assignable chose in action: *Glenn* v. *Scott*, 2 Terr. L.R. 339.

Although it was held in *Clarkson* v. *Scott*, 25 Gr. 373, and *The Frontenac Loan & Investment Society* v. *Hysop*, 21 O.R. 577, that although a purchaser of an equity of redemption covenants to pay the mortgage debt, there was no such privity between him and the mortgagee as would permit the latter to maintain an action thereon against the purchaser, it should

Annotation (*continued*)—**Mortgage (§ III—46)—Equitable rights on sale subject to mortgage.**

SASK.

Annotation

Mortgage rights

be noted that the actions in both cases were based on the covenants alone, without any assignment of the benefit thereof from the mortgagor.

An action of covenant is not the appropriate remedy where the deed of conveyance was drawn to contain a formal covenant by the grantee, but was not in fact signed by him, although he had accepted the benefit of the same, and the action was brought in the name of an assignee whose assignment was of the pretended covenant only and not of the equitable claim for indemnity: *Credit Foncier* v. *Lawrie*, 27 O.R. 498.

A personal order against a purchaser of an equity of redemption who did not assume payment of the mortgage debt, cannot be made in a foreclosure action, since there was no privity between the mortgagee and the purchaser: *Real Estate Loan Co.* v. *Molesworth*, 3 Man. L.R. 116. A judgment creditor of a mortgagor upon covenants contained in a mortgage cannot obtain receivership order to enforce the payment by a purchaser of the equity of redemption who, on purchasing, agreed to assume and pay the debt: *Palmer* v. *McKnight*, 31 O.R. 306.

Rights of purchaser.

A purchaser of an equity of redemption who pays off the mortgage debt is not entitled to an assignment of the incumbrance, he can demand only a reconveyance or a discharge of the mortgage: *Thompson* v. *McCarthy*, 13 C.L.J. 226. Nor is he entitled to any covenants from the mortgagee except the usual ones against encumbrances: *Goodeham* v. *Traders Bank*, 16 O.R. 438. So a grantee who covenants to pay a mortgage on land in which the grantor reserves a life estate, is not entitled, on payment of the mortmortgage, to have it assigned to himself or his nominee under sec. 2, R.S.O. 1897, ch. 121, so as to be kept alive: *Leitch* v. *Leitch*, 2 O.L.R. 233. The purchaser of an equity subject to a charge which is his own proper debt, or which he is under contract, express or implied, to discharge, cannot keep such charge alive against a *mesne* encumbrance which he was expressly or impliedly bound to discharge: *Blake* v. *Beaty*, 5 Gr. 359; *Thompson* v. *Warwick*, 21 A.R. (Ont.) 637; *McDonald* v. *Reynolds*, 14 Gr. 691; *Muttlebury* v. *Taylor*, 22 O.R. 312. And a mortgagee who has contracted to sell under his power of sale to a person able to perform the contract, but who declines to do so, has not the option of treating the sale proceedings as a nullity and falling back to his previous position without the consent of the owners of the equity to the rescission: *Patterson* v. *Tanner*, 22 O.R. 364.

Where a mortgage contains a covenant to release land sold during the life of the encumbrance upon the payment of a stipulated sum per acre, and an assignee of the equity made a general payment on the mortgage, and afterwards sold a portion thereof, he is entitled to such release if the mortgagee has received the stipulated sum per acre: *Webber* v. *O'Neil*, 10 Gr. 440. To the same effect see *Clarke* v. *Freehold L. & S. Co.*, 16 O.R. 598. The purchaser of a portion of encumbered land with covenants against encumbrances is entitled, as against a purchaser of the remainder of the land with notice of his rights, to be indemnified out of the latter land for the amount due on the mortgage: *Pierce* v. *Canavan*, 7 A.R. (Ont.) 187. And one who purchases a portion of mortgaged lands with a covenant against encumbrances, for further assurance and quiet possession, is entitled, as

SASK.

Annotation

Mortgage rights

Annotation (*continued*)—**Mortgage (§ III—46)—Equitable rights on sale subject to mortgage.**

against the mortgagor, and a subsequent purchaser of the remainder of the lands with notice of his rights, to be indemnified against the amount due on the mortgage: *Home Building & Sav. Asso.* v. *Pringle*, (Ont.) 7 D.L.R. 20; *Egleson* v. *Howe*, 3 A.R. (Ont.) 566; *Henderson* v. *Brown*, 18 Gr. 79. So where a vendor sells land free from encumbrance the purchaser can insist on having the mortgage kept alive for his benefit: *Barry* v. *Harding*, 1 J. & Lat. 475; *Clark* v. *May*, 16 Beav. 273; *Cooper* v. *Cartwright*, 1 John. 697.

ONT.

S. C. 1913

Re NORDHEIMER.

Ontario Supreme Court, Middleton, J. October 3, 1913.

1. WILLS (§ III A—75)—CONSTRUCTION — HOTCHPOT — WHAT MUST BE BROUGHT INTO.

A bequest of money and income to a son on condition that he keep up and maintain as a "gentleman's residence," certain property acquired under a marriage settlement, but of a lesser amount if he fails to do so, shews a clear intention on the part of the testator that the value of such property was not to be brought into hotchpot under a further testamentary provision that all money, property or interests received by or to which any of the testator's children were entitled under any marriage settlement should be brought into hotchpot in adjusting the several amounts to be set aside from the testator's estate for their benefit; since to hold otherwise would defeat the purpose of the bequest.

2. WILLS (§ III A—75)—CONSTRUCTION—HOTCHPOT — WHAT MUST BE BROUGHT INTO.

A testamentary provision that the testator's children should bring into hotchpot any money, property or interests received by them under any marriage settlement so that the amounts received by each child under the will and such settlements should aggregate a designated amount, is a "direction to the contrary" under a marriage settlement of real property to the effect that a child should, in order to share in the testator's estate, bring the settled estate into hotchpot at a fixed valuation unless the testator should by will "direct to the contrary."

3. WILLS (§ III A—75)—CONSTRUCTION—HOTCHPOT — BRINGING SETTLED PROPERTY INTO—VALUATION.

Under a testamentary provision that the testator's children should, in order to share in the residue of his estate, bring into hotchpot any money, property or interests received by them under a marriage settlement, by which they acquired for life the income only of the settled fund, the full fund, and not merely the present value of the life estate at the testator's death, must be brought into hotchpot.

4. WILLS (§ III A—75)—CONSTRUCTION—HOTCHPOT — BRINGING SETTLED PROPERTY INTO—VALUATION—TIME OF FIXING.

Under a testamentary provision that the testator's children should share in his residuary estate only by bringing into hotchpot in adjusting their respective shares in such residue, any money, property or interests received by them under a marriage settlement, the value of the amount settled is to be ascertained, where the trustees have power to change the investments, as of the date of the settlement and not of the testator's death.

[*Kirkcudbright* v. *Kirkcudbright*, 8 Ves. 51, 32 Eng. R. 269, and *Re Willoughby*, [1911] 2 Ch. 581, applied.]

5. WILLS (§ III A—75)—CONSTRUCTION—HOTCHPOT — BRINGING SETTLED PROPERTY INTO—VALUATION.

On a testamentary provision that certain legacies should be set aside for the use of the testator's children on their bringing into hotchpot property received by them under a marriage settlement, and that the residue of the testator's estate should be divided among them in certain proportions, the settled sums so brought into hotchpot are to be deducted from the legacies and not from their residuary shares.

6. WILLS (§ III G 7—150)—NATURE OF ESTATE OR INTEREST CREATED—INCOME OR SUPPORT—BEQUEST FOR BENEFIT OF LEGATEE.

Under a testamentary direction that executors should set aside and keep invested a certain sum for the benefit of each of the testator's daughters, which was to be deemed their separate estate, free from the control of their husbands, but not to be anticipated, and, in case of the marriage of any daughter that a proper marriage settlement be made to carry out the testator's intention, the daughters do not, on becoming of age, take the corpus of the fund, notwithstanding that the age of twenty-one was fixed as the period of distribution, but it is the duty of the executors to hold the settled sums and to pay the income only to the daughters for life.

7. WILLS (§ III G 7—150)—NATURE OF ESTATE OR INTEREST CREATED—INCOME OR SUPPORT—LEGACY FOR INVESTMENT FOR BENEFIT OF LEGATEE.

Under a testamentary direction that the residue of a testator's estate should be divided among his children in certain proportions and to vest immediately on the testator's death, one-third to be paid each child and the remainder invested by the executors for their benefit; and that the share of each daughter should be deemed her separate estate free from the control of her husband, but not to be anticipated; and, on the marriage of any daughter, that a proper marriage settlement be made to carry out the testator's intention, one-third only of the portion of each daughter in the residue vests absolutely, the remainder being held by the executors and the income only paid them for life.

8. WILLS (§ II G 4—137)—ESTATE OR GIFT UPON CONDITION—GIFT OF INCOME—CONDITION SUBSEQUENT—DUTY OF EXECUTOR TO ASCERTAIN WHETHER COMPLIED WITH.

Before paying income to a legatee to whom it was given on condition of his keeping up and maintaining certain property as a gentleman's residence in a specified manner, it is the duty of the executor to ascertain from time to time whether such condition is being fulfilled by the legatee.

Statement

MOTION upon originating notice by the trustees under the will of Samuel Nordheimer, deceased, for an order determining certain questions arising upon the construction of the will and of certain marriage settlements.

D. W. Saunders, K.C., for the trustees.

I. F. Hellmuth, K.C., for Roy Nordheimer, the son of the testator.

A. W. Anglin, K.C., for Mrs. Cambie, a daughter.

Travers Lewis, K.C., for Mrs. Houston, a daughter.

Christopher C. Robinson, for the other daughters.

H. S. Osler, K.C., for the Official Guardian, representing issue born and that may be born, entitled under the marriage settlements of Mrs. Cambie and Mrs. Houston.

ONT.
S. C.
1913
RE NORDHEIMER.
Middleton, J.

October 3. MIDDLETON, J.:—Samuel Nordheimer died on the 29th June, 1912, leaving him surviving his widow (who died on the 14th November, 1912), seven daughters, and one son, all of whom are of age.

Upon the marriage of Mr. Nordheimer, a settlement was made, dated the 15th November, 1871, by which the property known as "Glen Edyth" and certain personal property were conveyed to trustees. Under the settlement, the land has passed to the son in tail, and the entail has now been barred. The personal estate, on default of appointment, has passed to the children in equal shares. The land which passed to Mr. Roy Nordheimer is now of very great value. The share of each child in the settled personal estate is approximately $20,000.

During the lifetime of the testator, three of his daughters married. In the cases of two, marriage settlements were made. In the case of the third there was no settlement.

The first settlement was that executed upon the marriage of Mrs. Cambie, and is dated the 9th October, 1907. The property settled was of about the value of $50,000; the settlement is said, by a recital, to be on account of the prospective interest of the daughter in the estate of her father. The property consists of a dwelling-house and of certain securities set forth in a schedule, values being attached in each case. The total of the securities amounted to $37,000, this being the par value. The trustees have the right, with the consent of the daughter, to convert into money and re-invest.

The income derived from the fund, up to $1,500 per annum, is to be paid to the daughter; then certain premiums on life insurance policies are to be paid; and the balance of the income is to be accumulated. The settlor then covenants to give to his daughter "such share and interest in his residuary estate as shall be equal to the share of his other daughters under his said will," with the proviso that the daughter "shall not take any share in said residuary estate of the party of the first part without bringing the value of the lands hereby conveyed to the trustees (and which are hereby valued for such purpose at $14,000) and the stocks, bonds, and securities . . . into hotchpot and accounting for the same accordingly, unless the said party of the first part shall by his said will direct to the contrary."

Some time after the marriage of Mrs. Houston, by deed of the 1st April, 1910, a trust fund was settled for the benefit of the daughter, her husband, and issue. This settlement differs from the former settlement in that the whole income goes to the daughter for life, and there is no provision for accumulation. There is in the settlement a similar covenant on the part of the testator.

The proviso is very different. It reads that the daughter "shall not take any share in the said residuary estate of the party of the first part without bringing into hotchpot the value of the stocks, bonds, and securities . . . and any securities substituted therefor as of the date of the death of the party of the first part, and accounting for the same accordingly, unless the said party of the first part shall by his said will direct to the contrary."

The testator made his will on the 9th July, 1908. He subsequently made codicils dated the 10th August, 1911, 11th June, 1912, 17th June, 1912, and 27th June, 1912.

The will first provides for the residence of the testator's widow at Glen Edyth and for its upkeep during her lifetime. None of these provisions are now material, save as they may incidentally throw light upon the meaning of the whole will.

By clause 15, provision is made for the raising of the sum of $100,000 for each of the daughters of the testator, and $200,000 for the son.

By clause 16, a provision is made for the charging against these sums of any moneys which any of the children might receive under the testator's marriage settlement, or which they had received under their marriage settlements; and, by clause 18, a provision is made for the distribution of the residue of the estate among his children in such a way that the son should receive twice as much as each daughter.*

*Clause 16 is set out by the Judge. Clauses 15 and 18 are as follow:—

"15. I direct that my executors set apart out of my said estate, so soon as sufficient moneys have been realised for that purpose, or set apart sufficient securities to realise, the sum of $100,000 for each of my daughters, and the sum of $200,000 for my son, and that they do invest and keep such sums invested during the lifetime of such children for their benefit respectively, and do pay the income arising from such sums so invested to them respectively, subject to the contributions provided for in the eleventh paragraph hereof. My executors may expend for the benefit of any child, while under the age of twenty-one years, out of the income of the share of such child, whatever may be necessary for the advancement and education of such child; but so much of the income as may not, in the opinion of my executors, be required for that purpose shall be accumulated and invested; and such accumulations shall be paid to such child when the youngest of my children shall reach the full age of twenty-one years, hereinafter called the period of distribution. If any of my children shall die before the said period of distribution, the share of such child so dying, and the accumulations in respect of such share, shall be paid or applied at said period of distribution as he or she may by his or her last will and testament direct and appoint; and in default of any such direction or appointment, the same shall be divided as in the case of an intestacy. The shares of my daughters in my estate shall be deemed separate estate, free from the control of their husbands respectively, and shall not be anticipated. And in the case of the marriage of any of my daughters, I direct that proper settlements shall be made to carry out this intention."

"18. I further direct that the rest, residue and remainder of my property, or other property over which I may have any power of appointment or disposition, be divided by my executors among my children in such shares or proportions that each son shall have twice as much as each

ONT.

S. C.

1913

RE NORDHEIMER.

Middleton, J.

The several questions which arise upon the will and settlements depend mainly upon the true meaning of these three clauses.

To deal with the questions argued in the order in which they were presented by counsel, rather than the order in which they are set forth in the notice of motion, the first question arises in respect of the son's position, in view of the fact that Glen Edyth is given to him by virtue of the original marriage settlement. Is this a property which he must bring into hotchpot under clause 16? If it is, its value far exceeds the $200,000 therein mentioned.

The clause in question reads: "16. I hereby declare that the moneys, property, or interests which any of my children shall receive or be entitled to under the marriage settlement (between myself and my wife, dated the 15th of November, 1871, and of which William Henry Boulton and William Cameron Chewett were the original trustees, and of which the present trustees are Melfort Boulton and Nicol Kingsmill), or pursuant to any of the terms thereof, or any moneys, property, or interests which any of my children shall receive or be entitled to under any settlement made or to be made upon the marriage of any of them, shall be brought into hotchpot in adjusting the amounts so to be set apart; it being my intention that the provision made in the preceding paragraph for my said children shall be supplemental to the provision which they or any or some of them may receive under any such settlement, to the intent that the amount received from any such settlement and the amount to be received under this my will shall make up the said amount of $100,000 for each of my daughters, and $200,000 for my son."

I have come to the conclusion that the testator in this clause was not referring to the Glen Edyth property at all, and that full effect can be given to the words used—"moneys, property, or interests"—by treating them as referring to the personal property which was covered by the settlement. By the settlement, this family residence was treated as a thing apart, and entailed. The other property settled was left subject to the power of appointment given to the testator's widow. The whole scheme of the testator's will is, that the son shall have this ancestral residence, to be kept up and maintained, and that he shall have a double portion for the purpose of keeping it up and main-

daughter, such shares to vest immediately upon my decease; and that the child or children of any deceased son or daughter of mine shall together have the same share as such son or daughter would have had under this will if he or she had survived me. And I further direct that one-third of the share of each son or daughter in such residue shall be paid over to him or her, as the case may be, upon my youngest child attaining the age of twenty-one years, and that the other two-thirds be invested by my executors for the benefit of the said children respectively as hereinbefore directed by the fifteenth paragraph of this my will."

taining it. What the testator desired to have credited upon the portions set apart for the different children was, in the first place, any sum settled on the marriage of that child, and, in the second place, any sum which the child might receive under the power of appointment contained in his own marriage settlement. In effect his desire was to neutralise in this way the power of discrimination given to the widow under the settlement.

This view is much fortified by clause 22, which provides as follows: "The bequest of $200,000 to my son, being twice the amount left to each of my daughters, is made upon the condition that after he comes into possession and ownership of the Glen Edyth property, he shall keep up and maintain the house with sufficient grounds about it, not less than ten acres, as a gentleman's residence; and that, in default of his doing this, he shall only receive an equal share with my daughters, and that the additional $100,000 so forfeited, and which but for this provision he would be entitled to under the fifteenth paragraph of this my will, shall become part of my residuary estate."

This clause could have no operation if the descent of Glen Edyth to the son wiped out and more than wiped out the fund to be provided for its maintenance.

The next question arises under the two settlements above referred to, upon the marriages of Mrs. Cambie and Mrs. Houston. These settlements contain the hotchpot clause above-quoted; each of these clause being operative only "if the testator does not by his will direct to the contrary."

I think that clause 16 of the will, above-quoted, is a direction to the contrary, and is the controlling and operative provision, superseding the hotchpot clauses in the settlements. The sums received by the children under the testator's marriage settlement, and the sums settled upon the two daughters, are to be brought into hotchpot and treated as part of the $100,000 and $200,000 to be raised and settled under clause 15.

Then the question is raised, upon what basis are these settled amounts to be brought in? In each case, the daughter receives less than the fund. Mrs. Cambie has $1,500 per annum only; Mrs. Houston has the income only. Are they to give credit for the present value of the life estate, or are they to give credit for the full fund brought into settlement?

I think the latter. In the clauses of his will in question the testator is speaking of funds to be settled. He is speaking in general terms of the sums which his children have received in settlement; and I think that his idea manifestly is, that the sums which he has already settled upon any daughter, her husband and issue, is to be regarded as an amount received on account of the $100,000 which by the will is to be settled.

The next question raised is as to the time when the amount

ONT.
S. C.
1913
RE NORDHEIMER.
Middleton, J.

settled is to be ascertained; is it at the date of settlement or at the date of the testator's death? Part of the property in each case consists of stock. It is said that this stock has very largely increased in value.

The conclusion at which I have arrived is, that the date of the settlement is the date which governs. It is astonishing how little authority is to be found upon the question. In Thornton on Gifts and Advancements, ed. of 1893, pp. 605, 606, the matter is thus dealt with: "Shall the advanced distributee be charged with the property advanced at its value when advanced, or when the intestate dies, or when the final distribution of the estate is made? These questions are usually answered by the statutes which provided that the advanced distributee shall be charged with the value of the property as of the date of its advancement. This is eminently proper; for the property, especially if personalty, might be of little value at the death of the intestate or at the time of the final distribution; and it would be manifestly unfair to the other distributees that the advanced distributee might have the use of property for many years, and then be required to account only for its value less the decrease in value from wear and tear and usage. Such is the equitable rule, also, aside from any statute."

The cases cited are American cases, most of them based upon the provisions of particular statutes. In many of them *Kircudbright* v. *Kircudbright* (1802), 8 Ves. 51, is relied upon. That was the case of an annuity granted to a son. It was contended that the annuity bond was not an advancement within the meaning of the rule; it apparently being conceded that, if the annuity had to be brought into hotchpot, the date of valuation would be the date of its grant; the main question being the legality of the particular bond. The direction given, without discussion, was, that it should be brought in upon the value at the date of the grant.

In the present case, owing to the provisions in the settlements by which the trustees are given full power to change the investments, it is clear that the reasoning in the extract from Thornton is very cogent. If the property had been lost, the justice of charging at the date of settlement would not have been questioned.

The statement of principle by Buckley, L.J., in *In re Willoughby*, [1911] 2 Ch. 581, in the course of a discussion as to the date from which interest should be charged, seems to me to place the matter beyond question: "Equality under the hotchpot clause is to be equality in respect of the testator's estate, meaning by that expression that of which he dies possessed; that the benefit accruing during the testator's lifetime in respect of an advance made in his lifetime is a benefit enjoyed, it is true, at

the expense of the living testator's pocket, but not at the expense of the dead testator's estate."

In other words, the testator, by making the advancement, desires the capital sum advanced to be treated as a payment *pro tanto* on account of the ultimate portion of the child. He forgoes the enjoyment of the income of this fund during the rest of his life, but neither that income nor any increment of the settled fund is, in the absence of special direction, to be credited upon the ultimate portion.

The case of *In re Willoughby* and the earlier authorities—*In re Rees* (1881), 17 Ch. D. 701, *In re Dallmeyer*, [1896] 1 Ch. 372, *In re Lambert*, [1897] 2 Ch. 169—all go to shew that the settled sum is to be treated as a payment made at the date of the testator's death, and that, in addition to this sum, credit must be given, in making the adjustment under the hotchpot clause, of interest upon it from that date.

The question is then raised whether the settled sums and the sums apportioned under the testator's settlement are to be deducted from the lump sum mentioned in clause 15 of the will, or from the residuary shares under clause 18. I think that clause 16 makes it plain that these amounts are to be deducted from the sums set apart under clause 15.

Under clause 15, I think, it is the duty of the trustees to hold the sums dealt with by that section, during the lifetime of the children, paying them the income. The period fixed for distribution is now past; but this does not justify the trustees in paying over the shares of the daughters to them. These shares are to be held free from the control of the husbands of the daughters when they marry, and are to be deemed separate estate and are not to be anticipated. Upon the marriage of any of the daughters, a proper settlement—which I understand to be what is called in the English conveyancing books "a strict settlement"—is to be made, to carry out that intention. Put shortly, such a settlement will secure the income to the daughter, and the corpus to any issue of her marriage.

As to the residuary estate to be divided under clause 18, one-third of the residuary share will be payable at once to the daughter, and the remaining two-thirds will be held for the daughter, to be settled upon her marriage, as already indicated.

The share of the son is similarly dealt with. Under clause 15, he has a life interest in the $200,000 fund, and he would take immediately and absolutely a one-third interest in his double portion of the residuary estate; the remaining two-thirds being held in trust.

I do not understand that I am now asked to determine whether, under the will, the son is absolutely entitled to the whole share to be held as indicated.

ONT.
S. C.
1913
RE NORDHEIMER.
Middleton, J.

I am, however, asked to determine the effect of clause 22. I think that it is the duty of the executors, before paying to the son the income from the additional $100,000 given him under clause 15, to ascertain from time to time whether he is fulfilling the obligation imposed upon him by the will of keeping up Glen Edyth as a gentleman's residence.

A question is asked with reference to taxes and insurance. There does not appear to be any dispute about this. The son is ready to assume and pay the taxes from the date of his mother's death. This is, I think, the extent of his obligation.

Costs to all parties will come out of the estate.

Order accordingly.

ONT.
S. C.
1913

WHELAN v. KNIGHTS OF COLUMBUS.

Ontario Supreme Court, Middleton, J. December 5, 1913.

1. COURTS (§ I D 1—120)—JURISDICTION OVER ASSOCIATIONS—FRATERNAL SOCIETY—NECESSITY OF PROPERTY RIGHTS BEING INVOLVED.

The courts are without jurisdiction to determine whether the establishment of a branch or off-shoot of a fraternal society is *ultra vires* where no property rights are affected by such action.

[*Rigby* v. *Connoll*, 14 Ch.D. 482, applied.]

Statement

ACTION for a declaration that the establishment by the defendant society of a "fourth degree" as a branch or offshoot of the society, and the provisions made for the government of the branch, were illegal and beyond the powers of the defendant society. The action was originally entered for trial at Ottawa, but was, by consent, heard upon a stated case, at Toronto, on the 28th November, 1913.

The action was dismissed for want of jurisdiction.

J. J. O'Meara, for the plaintiff.

D. O'Connell, for the defendant society.

Middleton, J.

MIDDLETON, J.:—The defendant society is a fraternal organisation, incorporated by an Act of the General Assembly of the State of Connecticut, passed on the 29th March, 1882, and since then several times amended. . . .

The object for which the body is created is partly insurance and partly purely social and fraternal. The corporation is given power to adopt a constitution, by-laws, rules, and regulations, and from time to time to alter, amend, and repeal the same, provided that it shall continue to be governed by the constitution then already in force under a similar authority conferred by earlier Acts, until such constitution, by-laws, and regulations shall have been altered or changed in manner provided by such constitution, etc. Power is given to the corporation to establish subordinate councils, or rather branches and

divisions thereof, in any town or city of its State of origin or any other State of the Union or any foreign country.

The constitution provides that the Order shall be governed by a supreme council and State council; and each local body is created a subordinate council, having certain limited powers.

Membership is limited to "practical Roman Catholics," who are initiated, and, according to the original constitution, receive three degrees on passing certain ceremonial rites, the nature of which has not been stated, but which, no doubt, import certain moral obligations.

The Order has a large membership in Canada, but it has never been authorised to transact and does not transact insurance business in this Province, its sole function in Ontario being fraternal, or, as defined by the constitution, "of promoting such social and intellectual intercourse among its members as shall be desirable and proper, and by such lawful means as to them shall seem best."

The plaintiff has been a member of the organisation since the year 1900. He duly paid his initiation fee, $10, and was admitted to the first, second, and third degrees of the order, and has ever since been a member in good standing.

It was deemed desirable by some of those interested in the association to institute what is known as "the fourth degree." This degree was intended to be a select body within the parent association. Rules and regulations relating to this degree were in effect from July, 1902; but new and revised rules were passed relating to it in 1910. Constitutional amendments were made relating to this degree. Under these and under the constitution of the fourth degree, the supreme power and control over the degree is vested in the board of directors of the body, and a board of government for the fourth degree was established, known as the "National Assembly," with subordinate district and local assemblies, each having its own sphere of government and its own officers.

I was told upon the argument that the fourth degree was established for the purpose of inculcating a spirit of patriotism, and that for that reason the membership is, as appears by the constitution relating to the fourth degree, confined to citizens of the respective countries where membership is sought. There are certain other requirements which make the fourth degree more or less an eclectic body. Upon initiation into this degree a further special fee is required.

The plaintiff attacks all this, mainly upon two grounds. In the first place, he says that this is an attempt to confine some of the privileges which ought to belong to every member of the Order to certain members only; secondly, that the amendments by which this fourth degree is organised are fundamentally

ONT.
S. C.
1913
WHELAN
v.
KNIGHTS
OF
COLUMBUS.
Middleton, J.

wrong, inasmuch as they hand over to the board of directors and to the different fourth degree legislative bodies certain portions of the legislative and administrative powers which by the constitution are, and ought to remain, vested in the governing bodies of the Order itself.

The defendant society in the first place denies the right of the Court to enter into this controversy at all; relying upon the line of authority of which *Rigby* v. *Connoll*, 14 Ch.D. 482, is the leading case.

This contention of the defendant society must, I think, prevail. It is not shewn that any property right is affected; and in the absence of this, the Courts have no jurisdiction.

I listened to the argument on the other question with much interest; and, if it is any satisfaction to those concerned, I may say that I am rather strongly of the view that in what was done there was nothing unconstitutional or improper. I can see nothing to prevent the formation, in a fraternal and social organisation such as this, of a subordinate body or organisation which confines its membership to those qualified by membership in the parent society, and which is practically a self-governing body, subject to some supervision and oversight remaining vested in the parent society.

This matter has come before me as a stated case. The questions submitted in this case do not touch the point upon which the case must be determined, that is, the absence of any jurisdiction in the Court; and I do not think that the Court ought to deal with a matter in respect of which it has no jurisdiction to entertain an action, when that matter is submitted to it in the form of a stated case. The parties thus fail to obtain any answers to the questions submitted, and I think this affords sufficient reason to refuse to award costs.

Action dismissed.

ONT.
S. C.
1913

Re HAVEY.

Ontario Supreme Court, Boyd, C. September 22, 1913.

1. INSURANCE (§ IV D 2—385)—TRUSTEES—APPOINTMENT OF — INSURANCE MONEYS PAYABLE TO INFANTS.

Under sec. 175 of the Ontario Insurance Act, 1912, as amended by sec. 10 of the Ontario Insurance Amendment Act, 1913, [R.S.O. 1914, ch. 331], shares of infant children, where no trustee of the insurance money has been appointed by the assured, will be payable only to a trustee appointed by the High Court sitting as a court of equity, the intention of the Legislature being to keep under the best possible protection, moneys intended for the benefit of infants, so that the corpus will be forthcoming when the beneficiary is entitled to call for it; where, however, the fund does not exceed $3,000 and is payable to the wife and children of the deceased, the widow, also being the mother of the children, the court may appoint the widow a trustee to receive the fund.

2. INFANTS (§ I B—5)—COURT ALLOWANCE FOR MAINTENANCE OUT OF INFANT'S ESTATE—INSURANCE MONEY.

The general rule is that, on an application to get in the shares of infant children under a policy of insurance, the fund must be brought into court; but under its discretionary power as to allowances for maintenance, the court in a proper case may dispense with payment in and permit the trustee to expend the entire sum for maintenance under an undertaking so to apply.

[*Re Smith's Trusts*, 18 O.R. 327; *Re Harrison*, 18 P.R. (Ont.) 303, and *Re Humphries*, 18 P.R. (Ont.) 289, referred to.]

ONT.
S. C.
1913
RE HAVEY.

APPLICATION by the widow (also the mother of two infants) to be appointed trustee to receive their share of the insurance moneys to which their deceased father, who died intestate, would have been entitled had he survived the assured. Statement

The fund being only $500 the application was granted on her undertaking to apply the fund for their maintenance and benefit.

By a life insurance policy or certificate, dated the 10th January, 1893, the Catholic Mutual Benefit Association of Canada insured the life of James Havey to the amount of $2,000, payable at his death to his wife Catherine Havey and to his three children, James A. Havey, Gertrude Havey, and Minnie McDermott.

James Havey died on the 15th April, 1913. His son James A. Havey predeceased him, dying on the 6th February, 1912.

James A. Havey died intestate, leaving a widow, Catherine Havey, and two infant children, Catherine Pauline Havey and Anna Gertrude Havey.

By letters of guardianship issued out of the Surrogate Court of the County of Carleton on the 18th July, 1913, Catherine Havey was appointed guardian of the persons and estates of the two infant children aforesaid, having given a bond for $500 to the satisfaction of the Surrogate Court.

By the Ontario Insurance Act, 1912, 2 Geo. V. ch. 33, sec. 175(1), "if no trustee of the insurance money is named or appointed, shares of infants may be paid to the executors of the assured, or to a guardian of the infants appointed by the Surrogate Court, or by the High Court, or to a trustee appointed by the last named Court upon the application of the widow of the assured, or of the infants, or of their guardian, and such payment shall be a discharge to the insurer."

By the Ontario Insurance Amendment Act, 1913, 3 & 4 Geo. V. ch. 35, sec. 10, the above-quoted sub-sec. (1) of sec. 175 of the Act of 1912 was repealed and the following substituted therefor: "175.—(1) If no trustee of the insurance money is named or appointed, shares of infants may be paid to a trustee appointed by the High Court Division upon the application of the widow of the assured, or of the infants, or of their guardian, and such payment shall be a discharge to the insurer."

Pursuant to this amendment, which became law on the 6th

ONT.
S. C.
1913
RE HAVEY.

May, 1913, Catherine Havey applied to the High Court Division to be appointed trustee for the infants to receive the share of the insurance moneys to which their deceased father would have been entitled if he had survived the assured, and for payment of the moneys to her.

F. A. Magee, for the applicant.

Boyd, C.

September 22. BOYD, C.:—By the latest amendment to the Insurance Act, where there is no trustee designated by the assured, the shares of infants may be paid to a trustee appointed by the High Court, and such payment shall be a valid discharge. This amendment restricts the provisions of the law repealed, which, from the R.S.O. 1897, permitted the Surrogate Court, as well as the High Court, to intervene. Acting under 2 Geo. V. ch. 33, sec. 175, the applicant, widow of the assured, in July, 1913, obtained letters of guardianship for the purpose of receiving the money, $500 (that sum being payable to the two infants). But, as the new law 3 & 4 Geo. V. ch. 35, sec. 10, came into force in May, 1913, the letters were and are nugatory for the purpose. Hence this application to the High Court. The mother has given security, and she is the natural guardian of the infants, both girls, of three and five years respectively, and will have charge of them probably for many years, and the amount in question is comparatively small. The new Act gives a discretion to the Court to dispense with security in the case of mothers where the insurance money does not exceed $3,000.* These changes indicate that the purpose of the amended law is to commit insurance moneys to the supervision of the High Court as a Court of equity, and to recognise the necessity of safeguarding the money of infants. Since 1889 at least, the policy of the Court has been definitely fixed to keep under the best possible protection moneys intended for the benefit of infants, so that the corpus will be forthcoming when the beneficiary is entitled to call for it.

The rule is, that on any application to the Court with respect to the handling or the obtaining of infants' money the fund must be brought into Court; subject, of course, to the discretionary power of setting aside so much for purposes of maintenance. This policy, set forth in many decisions such as *Re Smith's Trusts* (1889), 18 O.R. 327, *Re Harrison* (1899), 18 P.R. 303, and *Re Humphries* (1899), 18 P.R. 289, has in effect been recognised by the Legislature.

*Sub-section (3) of sec. 175 of the Act of 1912, as amended by sec. 10 of the Act of 1913, provides: "Where insurance money not exceeding $3,000 is payable to the wife and children of the assured, and some or all of the children are infants, the Court may appoint the widow of the assured, if she is the mother of such infants, as their guardian without security, and such insurance money may be paid to her as such guardian."

ONT.

S. C.
1913

RE HAVEY.

Boyd, C.

The present case may fall within the exception which permits the whole fund to go out to be applied for the welfare of the infants by the mother as occasion arises. The mother is to be appointed trustee under the Act, and the share of the children is to be paid to her, on her undertaking to apply it for their maintenance and benefit.

The fixed sum provided by the new regulations is to be allowed for costs.

Order accordingly.

McINTOSH v. WILSON.

MAN.

C. A.
1913

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 24, 1913.

1. LANDLORD AND TENANT (§ III C—55)—LIABILITY OF LANDLORD FOR DEFECTIVE PREMISES—COVENANT AGAINST LIABILITY.

A lessor of unfurnished premises is not answerable for damages occasioned his tenant by reason of the defective condition thereof where the former did not covenant to keep them in repair, but expressly stipulated for freedom from responsibility for damages from such cause, and where the lease contained an acknowledgment that the tenant had examined the premises, and that no representations as to their condition or as to repairs had been made by the lessor.

[*Robbins* v. *Jones*, 15 C.B.N.S. 221; *Lane* v. *Cox*, [1897] 1 Q.B. 415; *Cavalier* v. *Pope*, [1906] A.C. 428; and *Chappell* v. *Gregory*, 34 Beav. 250, followed; *Brown* v. *Toronto General Hospital*, 23 O.R. 599; and *Cameron* v. *Young*, [1908] A.C. 176, referred to.]

2. LANDLORD AND TENANT (§ III C—55)—LIABILITY OF LANDLORD FOR DEFECTIVE PREMISES—COVENANT AGAINST LIABILITY.

A lessor's covenant to supply steam for heating demised premises does not give him such possession and control of the heating system and radiators as to render him liable to a tenant as on an implied covenant to keep the premises in repair, for the fall of a radiator that was insecurely fastened to the ceiling, where the lease expressly negatived the lessor's duty to repair, and also relieved him from liability for all damages occasioned by defects in or accidents to any part of the heating plant or service.

Statement

APPEAL by the defendant from a judgment for the plaintiff in an action against a lessor for injuries occasioned a tenant by the fall of a radiator which was insufficiently fastened to a ceiling of demised premises.

The appeal was allowed.

J. C. Collinson, for the plaintiff.

J. Auld, for the defendant.

Perdue, J.A.

PERDUE, J.A.:—This is an action by a tenant against his landlord in respect of damages caused by the fall of a radiator, being part of the fittings for steam heating in the demised premises. These premises consisted of a suite of rooms in the basement of an apartment building in this city. The radiator which caused the damage had been attached to the ceiling in one of the bedrooms. The object of so doing was to place the

MAN.
C. A.
1913
McINTOSH
v.
WILSON.
Perdue, J.A.

radiator at such a height that the water formed by the condensed steam would flow back to the boiler which was also situated in the basement.

The defendant is a contractor and he constructed the building in question.

The evidence shews that the radiator was fastened in a very insecure and unsafe manner. Two strips of wood were fastened to it by screw nails and these strips were nailed to the plastered ceiling with ordinary wire nails which the plaintiff states were only two and a half inches in length. The thickness of the strips was at least seven-eights of an inch, and that of the lath and plaster six-eights of an inch. This gave a very slight hold to the nail even if it struck the joist. But the County Court Judge was of opinion that the nails did not reach the joists, but simply went into the lath and plaster. The radiator was a heavy body, weighing at least a hundred and fifty pounds.

The accident took place at about eleven o'clock at night, in January last. The tenant had no warning of the unsafe condition of the radiator until it actually fell. The weight of the structure simply pulled out the nails. In its fall it destroyed a child's crib. Fortunately, the child had been restless and it had been taken out of the crib a few minutes before the accident. The radiator in falling also injured a bed and dresser, and the steam, water and rust from the radiator and steam pipes destroyed a quantity of clothing and other goods. The damages were assessed by the Judge at $103 and a verdict for that amount was entered for the plaintiff.

The lease was in writing, under seal, and was put in evidence. It was prepared by the landlord, and its provisions were framed almost wholly in his interest, with a view to guarding him against every possible liability on his part, for his own negligence or that of his servants or that of other tenants in the building.

In considering the question as to the liability of the landlord for the injury in question, I will refer to the following provisions in the lease which, in my opinion, particularly affect this question, giving the actual wording as it appears in the document:—

The said lessee hereby covenants with the lessor as follows:—

3. That he.. ha.. examined and know.. the condition of said premises and ha.. received the same in good order and repair except as herein otherwise specified, and that no representations as to the condition or repair thereof have been made by the party of the first part (the lessor) or the agent of said party, prior to or at the execution of this lease, that are not herein expressed or endorsed hereon; . . .

4. That said lessor shall not be liable for any damage occasioned by

failure to keep said premises in repair, and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam or other pipes or sewerage or the bursting, leaking or running of any cistern, tank, washstand, water-closet or waste pipe in, above, or upon, or about said building or premises, . . .

11. The lessor agrees to furnish steam for steam-heating purposes in said building from the 1st day of October until the first day of May in the succeeding year; provided, that the lessor shall not be liable for any injury or damage arising from any cause beyond . . control or from any defects in or accident to any of the heating, gas, electric light or water plant or service, in the said suite and premises, or from any act of negligence of any other tenant, etc.

I think the evidence would justify the Court in finding that the premises were in a dangerous condition at the time they were let to the plaintiff. But, assuming this finding to have been made, what remedy has he against his lessor? It is well-settled law that,

> fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any: *per* Erle, C.J., in *Robbins* v. *Jones*, 15 C.B.N.S. 221.

In *Lane* v. *Cox*, [1897] 1 Q.B. 415, at 417, Lopes, L.J., said:—

> There is no liability either on the landlord or the tenant to put or to keep the demised premises in repair, unless such liability is created between them by contract. No contractual relation in this respect is implied on the letting of an unfurnished house. A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant, or to the customers or guests of the tenant, for any accident which may happen to them during the term, unless he has contracted to keep the house in repair.

The other two Judges of the Court of Appeal, Lord Esher, M.R., and Rigby, L.J., agreed with this statement of the law. These cases were followed and approved in *Cavalier* v. *Pope*, [1906] A.C. 428. I would also refer to *Brown* v. *Toronto General Hospital*, 23 O.R. 599.

In the present case there is no evidence of fraud upon the part of the lessor. The plaintiff has in fact by the statements made by him in the third clause of the lease expressly declared that there was no such thing as misrepresentation or concealment on the part of the lessor. Further, there is no covenant by the lessor to repair. On the contrary, liability of the lessor to repair is expressly negatived. The plaintiff, therefore, has no action *ex contractu* or *ex delicto* against the defendant in respect of the injury arising from the dangerous state of the premises.

It was argued that, because the defendant had agreed, as part of the contract, to heat the premises, the plant placed and used in the apartment block for heating purposes was

MAN.

C. A.
1913

McINTOSH
v.
WILSON.

Perdue, J.A.

under the control of the lessor and was not, therefore, nor was any part of it, demised to the plaintiff. Assuming that proposition to have been established, it was argued, on the authority of *Miller* v. *Hancock*, [1893] 2 Q.B. 177, that there was an implied covenant by the lessor to keep the heating plant in a sufficient state of repair. When, however, we examine the eleventh clause, we find that the lessor only agrees "to furnish steam for steam heating purposes in said building" during the period specified. But by the fourth clause his liability to repair the demised premises is expressly negatived, and in the same clause it is declared that he shall not be liable for damage done or occasioned by plumbing, steam or other pipes. I can see no ground on which it can be held that the radiator and the pipes within the room in question did not form part of the demised premises. Then we find in the eleventh clause, immediately after the agreement to furnish steam, an express provision that the lessor should not be liable for damage arising from any defect in or accident to "any of the heating . . . plant or service in the said suite and premises." The intention appears to be clear that, although the lessor agreed to furnish steam for heating, he should not be liable for any damage caused by defect, want of repair or accident.

For the reasons I have given, I have, with great reluctance, come to the conclusion that the appeal must be allowed and the judgment in the County Court set aside. In view of the fact that the defendant let premises which he, as the builder of them, knew, or should have known, were dangerous to life and property, he should, although he has succeeded in evading liability in the present case, be denied any costs either in this Court or in the County Court.

Cameron, J.A.

CAMERON, J.A.:—The general rule is that in leases no covenant will be implied on the part of the landlord to do repairs of any kind. He does not "undertake that the premises will receive proper support, or endure during the term, or that they are fit for occupation, or for the purpose for which they are intended to be used": Foa, Landlord and Tenant, 4th ed., 144. It follows that the tenant cannot recover against the landlord for injuries sustained through want of repair: *Ib.* 145. This, however, does not do away with the liability of the landlord to keep in repair those parts of the premises remaining under his control, as was held in *Miller* v. *Hancock*, [1893] 2 Q.B. 177, and other cases.

There is here no question of representation, as that is expressly excluded by the third clause of the lease.

In England there has grown up an exception to the general rule that in the letting of furnished houses and apartments

an undertaking is implied, on the part of the lessor, that they are reasonably fit for the purposes of habitation. In *Smith* v. *Marrable*, 11 M. & W. 5, it was decided that there is an implied condition of law that the landlord undertakes on leasing furnished premises, to let them in a habitable state. According to Lord Abinger, this was so obvious that he thought no authorities were necessary on the point, and that, where the premises were not habitable, the tenant was justified in repudiating the lease. This exception to the rule was confined to furnished houses in *Sutton* v. *Temple*, 12 M. & W. 52. In *Hart* v. *Windsor*, 12 M. & W. 68, it was held that there is no implied warranty in the lease of a house that it is fit for the purpose for which it is let, and the decision in *Smith* v. *Marrable*, 11 M. & W. 5, was distinguished as being the case of the demise of a ready furnished house for a temporary residence. In *Wilson* v. *Finch-Hatton*, L.R. 2 Ex.D. 336, it was decided that in the case of a furnished house there is an implied condition that the house shall be fit for occupation when the tenancy begins, and *Smith* v. *Marrable* was approved; see *Gordon* v. *Goodwin*, 20 O.L.R. 327. This undertaking extends to every part of the premises, but applies only to their condition at the commencement of the tenancy: Foa, 4th ed., 148. The question has been raised by the Court of Appeal, whether the exception does not apply to unfurnished houses taken for immediate occupation, but is left open: *Bann* v. *Harrison*, 3 T.L.R. 146; but until affirmatively answered by that Court, the law is as above stated: Foa, 4th ed., 148, note.

As to an unfurnished house the rule remains that there is no implied warranty on the part of the landlord that it is habitable.

> The intending tenant is presumed to make his own inquiries as to its condition, and, in the absence of special stipulation, he takes the house as it stands: 18 Halsbury 532.

"Fraud apart, there is no law against letting a tumbledown house," and the tenant's remedy is upon his contract, if any: *Robbins* v. *Jones*, 15 C.B.N.S. 221; *Chappell* v. *Gregory*, 34 Beav. 250.

> A landlord who lets a house in a dangerous or unsafe state incurs no liability to his tenant . . . for any accident which may happen . . . during the term unless he has contracted to keep the house in repair: *per* Lopes, L.J., *Lane* v. *Cox*, [1897] 1 Q.B. 415, at 417.

Robbins v. *Jones* is cited with approval in *Cavalier* v. *Pope*, [1906] A.C. 428:—

> No duty is cast upon a landlord to effect internal repairs unless he contracts to do so: *per* Lord James of Hereford, at p. 431.

It is stated in 18 A. & E. Encyc. 224, that,

MAN.
C. A.
1913
McINTOSH
v.
WILSON.
Cameron, J.A.

when there are concealed defects in the demised premises, attended with danger to an occupant, and which a careful examination would not discover, but which are known to the landlord, the latter is under an obligation imposed by law to reveal them, in order that the tenant may guard against them; and upon the landlord's failure to perform such duty he will become liable for whatever damages naturally result to the tenant therefrom.

This is also stated in other words in 24 Cyc. 1114:—

Even in the absence of express covenant to repair, where the landlord leases the premises with the knowledge of latent defects therein, which he conceals from the tenant, he is liable for all injuries resulting to the tenant from such defects in the premises.

In *Finney* v. *Steele*, 12 A. & E. Ann. Cas. 510, various authorities are cited for the above, and in particular a decision of the Supreme Court of Tennessee, where it was held that the landlord, in the case of a lease of unsafe premises, is liable, if he knows of the defect or could discover it with reasonable care and diligence. We were also referred to *Steefel* v. *Rothschild*, 1 A. & E. Ann. Cas. 676.

This is, no doubt, the view taken by the Courts of the United States, and there is much in the view to be commended. In the case before us the owner of the building was also the contractor who erected it, and it can fairly be argued that he, through his agents and workmen, was cognizant of the condition of the structure.

I do not find, however, that the distinction so drawn between defects that are apparent and discoverable by inspection and those that are latent and not discoverable with ordinary care and diligence has been recognized by the English authorities, which we are bound to follow. The English decisions have gone so far as to recognize an implied warranty or condition in the case of furnished houses (that they are fit for habitation), but have not as yet gone further, though it was intimated in *Bunn* v. *Harrison*, 3 Times L.R. 146, that the question might, to a certain extent, still be held to be an open one. Until, however, a direct ruling to that effect is given, we are obliged to follow the decisions of the English Courts, and hold that there is no implied warranty or condition applicable to this case.

It was argued that, inasmuch as the defendant was bound to heat the premises, the radiator was part of the general heating system used in the building under his control and that therefore he remains liable. We were referred to 24 Cyc. 1115; *Miller* v. *Hancock*, [1893] 2 Q.B. 177, and *Iowa Apartment Co.* v. *Herschel*, 24 A. & E. Ann. Cas. 206. But the radiator here was clearly part of the demised premises. It was intended so to be and was in the possession and under the con-

trol of the tenant. The obligation of the landlord with respect to it was to keep it supplied with steam during the stipulated period. It cannot be reasonably said that the defendant retained control of the radiator in the sense that he retained control of the stairways or halls used in common by all the tenants and by strangers. The cases cited on this branch do not seem to me applicable.

Apart from the foregoing considerations of general application, we have in this case a document under seal containing elaborate provisions defining the rights and liabilities of the parties.

The lessee is bound "to keep clean and in good and perfect order and condition all furniture, fittings and fixtures in said building" (clause 6); he agrees that he has received the premises in good order and repair, that no representations have been made in regard thereto, and that he will return the same in as good condition as when entered upon (clause 3). The lessor is not to be liable for damage by failure to keep in repair or for any damage done "by or from plumbing, gas, water, steam or other pipes" (clause 4). The lessor agrees to furnish steam heating, but is not to be liable for "any injury or damage arising . . . from any defects in or accidents to any of the heating, gas, electric light or water plant or service in the said suite or premises" (clause 11).

Here, then, is a contract under seal and the radiator in question, a part of the heating plant in the suite, is clearly included in the contract, and the defendant is declared free from liability for any damage arising from a defect in the heating plant. On the other hand, the lessee is bound to keep in order all fixtures and fittings in the premises. It does seem to me, therefore, that the express provisions of this contract lead to no other conclusion than that the defendant is exonerated from liability.

I am of opinion that the appeal must be allowed.

Haggart, J.A.

Haggart, J.A.:—Under the demise in question there is no implied obligation to the tenant that the house is or shall continue fit for the purpose for which it is leased. There is a contract for title which amounts to a covenant for quiet possession.

Baron Parke, in *Hart* v. *Windsor*, 12 M. & W. 68, at p. 85, says:—

> There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise and there are many which clearly shew that there is no implied contract that the property shall continue fit for the purpose for which it is demised. . . . It appears, therefore, to us to be clear upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that

MAN.

C. A.

1913

McINTOSH v. WILSON.

Haggart, J.A.

it is, or shall be, reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property.

The plaintiff urged that there was a duty which the defendant owed to the plaintiff, and a breach of that duty was evidenced by the character of the accident and cited some American authorities to support his contention; but I cannot find any English cases along those lines.

The English authorities do not support that proposition. A landlord who lets an unfurnished house in a dangerous condition, he being under no liability to keep it in repair is not liable to his tenant or to a person using the premises for personal injuries happening during the term and due to the defective state of the house: *Lane* v. *Cox*, [1897] 1 Q.B. 415. See *Cavalier* v. *Pope*, [1906] A.C. 428; *Cameron* v. *Young*, [1908] A.C. 176.

Here the rights and obligations of the respective parties are settled by the demise in writing signed and sealed by the plaintiff and the agent for the defendant. This lease was prepared by the defendant and contains all the stipulations that an ingenious lawyer could suggest for the protection of the lessor, but it is unimpeached, and we have to interpret it.

Clause indicated as 3, stipulates that the plaintiff

> has examined and knows the condition of said premises . . . and that no representations as to the condition or repair thereof have been made by the party of the first part (the lessor).

And clause 4 provides

> that the said lessor shall not be liable for any damage occasioned by failure to keep said premises in repair and shall not be liable for any damage done or occasioned by or from . . . steam or other pipes,

and in clause 11, it is covenanted

> that the lessor agrees to furnish steam for steam heating purposes in said building from the 1st day of October until the 1st day of May in the succeeding year; provided that the lessor shall not be liable for any injury or damage arising from any cause beyond .... control or from any defects in or accident to any of the heating . . . plant or service in the said suite or premises.

I have eliminated from the different clauses what does not apply to the questions involved in this suit.

The relations between the parties are contractual and are definitely set out in the writing, and if the plaintiff ever might have had any claim for such an accident, he has contracted himself out of his remedy.

The plaintiff strongly urged that the radiator which broke loose from its fastenings was not a part of the demised premises, and that it was retained in the possession and control of the defendant. I could not agree with this contention. The surface at any rate which radiated the heat was a part of the

demise, although under the last proviso the defendant had a qualified property in it and control for the purpose of furnishing the steam heating.

I must say that I would like to have been able to support the plaintiff's verdict. Some American cases are authority for a more humane law, and some of our Canadian Judges, in similar cases, have said they would like to follow them. The foregoing is the English law.

We must, however, give force to the written agreement deliberately entered into between the parties.

The appeal should be allowed, but the defendant should not have his costs in the Court below or of this appeal.

Haggart, J.A.

HOWELL, C.J.M., and RICHARDS, J.A., concurred.

Howell, C.J.M.
Richards, J.A.

Appeal allowed.

Re INSTALLATIONS, Limited.

ALTA.
S. C.
1913

Alberta Supreme Court, Beck, J. December 1, 1913.

1. CORPORATIONS AND COMPANIES (§ VI F 1—346)—WINDING-UP—ACTS OF INSOLVENCY.

A winding-up order is authorized under the Dominion Winding-up Act, R.S.C. 1906, ch. 144 (sec. 11), on proof of an execution remaining unsatisfied against the company for fifteen days after its goods were levied upon, although there may not have been a default of sixty days following the demand for payment under sec. 4 of the Act; the latter section does not affect clause (*h*) of sec. 3 as to insolvency presumed from executions remaining unsatisfied.

2. CORPORATIONS AND COMPANIES (§ VI D—337*a*)—EFFECT OF WINDING-UP ORDER—EXECUTION AND INTERPLEADER.

Where during the pendency of interpleader proceedings between execution creditors of the company and claimants of the goods seized, the company consents to a winding-up order which is made without notice to execution creditors, the latter may, on a motion to stay proceedings under the winding-up order, be given leave to proceed with the interpleader issue upon which the winding-up order had operated as a stay, and to apply again for the further disposal of the rights of the parties after the trial of the issue.

Statement

MOTION to set aside a winding-up order or to stay proceedings thereunder until the determination of an interpleader issue between claimants in respect of property of the company seized on executions against it.

S. W. Field, for the Great West Supply Co.
G. B. O'Connor, for Paul Max Shubert.

Beck, J.

BECK, J.:—This is a motion to set aside or stay proceedings under a winding-up order made under the Dominion Winding-up Act, R.S.C. 1906, ch. 144. The petition for the winding-up order set forth:—

1. That the company was incorporated under the Provincial Companies Ordinance in 1912, with its head office at Edmonton.

ALTA.

S. C.
1913

RE INSTALLATIONS, LTD.

Beck, J.

2. That the nominal capital stock was $25,000, of which $8,000 was subscribed, of which $6,050 was paid up.

3. That the company was immediately organized and commenced business and was still carrying on business.

4. That the petitioner—Paul Max Shubert—was a creditor to the amount of $7,000, past due, for moneys advanced to the company.

5. That the company was unable to pay its debts as they became due.

6. That on July 12, 1913, the Great West Supply Co. obtained judgment against the company for about $600, on which execution was issued and that on July 15, the sheriff seized certain goods of the company, and remains in possession of them.

7. That on August 15, 1913, the Mainer Electric Co. obtained judgment against the company for about $600 and issued execution which is in the sheriff's hands.

8. That both judgments are wholly unsatisfied.

9. That according to the annual statement of the company, made on June 30, 1913, the assets of the company were $33,000 and the liabilities $32,000, but the amount of the assets is over stated by reason of the fact that "many of the assets are difficult to realize upon and are only worth the amount of such valuation to the company in the course of its business and will not bring more than 50 per cent. of such value if sold."

The winding-up order was made by myself on September 5, 1913. The motion to set aside is made on behalf of the Great West Supply Co. It is claimed, in the first place, that there was no jurisdiction to make the order, on the ground that the company was not shewn to be insolvent within the meaning of that term as declared in sec. 3 as interpreted by sec. 4. I think there was jurisdiction because the facts brought the case within sec. 3, clause (*h*), which, I think, is in no way affected by sec. 4.

Clause (*h*) is:—

If it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon, or taken in execution, to remain unsatified till within four days of the time fixed by the sheriff or proper officer for the sale thereof or for fifteen days after such seizure.

This condition was shewn to exist.

There are some facts which it is necessary to state and consider. An interpleader summons was taken out by the sheriff on August 6, on an affidavit of the bailiff of the sheriff, alleging notice of a claim to the goods seized under the execution of the Great West Supply Co., by Paul M. Shubert (the petitioner for the winding-up order) and Max Wenzel, under a chattel mortgage. An interpleader order was made on August 20, Shubert & Wenzel, the claimants, being made plaintiffs on the issue, and the Great West Supply Co. and the Mainer Electric Co., defendants. Although this interpleader order was made by myself, I have no reason to suppose that I had any recollection of it, or that the fact of there being an interpleader issue pending, and the circumstance of Shubert being a secured

creditor and one of the claimants, were brought to my notice on the application for the winding-up order and no reference to this condition of things appears in the material upon which the winding-up order was granted. That order was in fact made on an affidavit of Shubert, verifying the petition, and the consent of the company, and without notice to anybody. The result of the winding-up order is a stay of the proceedings on the interpleader issue (sec. 22). It is urged that, under the circumstances above detailed, the obtaining of the winding-up order was improper and an abuse of the process of the Court, and an unjust interference with the rights of the execution creditors, parties plaintiff in the interpleader issue. I am not at all sure that had I been informed of all these facts and circumstances I should have made the winding-up order—the making of such an order being discretionary (sec. 14). I feel sure I should not have done so without notice to the execution creditors. I shall not, however, set aside the order now. In the light of the case of *Re Crigglestone Coal Co.*, [1906] 2 Ch. 327, I think the order I should now make is to stay all proceedings under the winding-up order until the trial of the interpleader issue, in order that the petitioners' claim in that issue may be properly investigated, with the restriction that, inasmuch as on September 11, an order was made for the liquidator to continue to carry on the business, he is to continue to do so until further order. Upon the determination of the interpleader issue the present applicant may renew his present motion, or he or any other party interested may move for such other order as may be thought proper. The costs of this application will be reserved to be dealt with on the subsequent motion.

Order accordingly.

ROBINSON v. McCAULEY.

(Decision No. 2.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. December 8, 1913.

1. JUDGMENT (§ III A—200)—LIEN ON LAND—REGISTRATION AFTER CONVEYANCE—CONSTRUCTIVE NOTICE.

Where land was conveyed to and the title registered in the name of a creditor merely as security for a debt, it was not bound, under sec. 2(*f*) of the Judgments Act, R.S.M. 1902, ch. 91, by the subsequent registration before the sale of the land by the grantee, of a judgment against the grantor, where the conveyance was not attacked until after the latter sale and the payment of the surplus (above the debt secured) to the debtor, without notice of such judgment.

[*Robinson* v. *McCauley*, 13 D.L.R. 437, affirmed.]

2. FRAUDULENT CONVEYANCES (§ III—10)—UNJUST PREFERENCE—CONVEYANCE OF LAND AS SECURITY—INSOLVENCY, WHAT IS.

A transfer of land to a creditor as security for a debt will not be

MAN.

C. A.
1913

ROBINSON
v.
MCCAULEY.

set aside under secs. 38 and 39 of the Assignments Act, R.S.M. 1902, ch. 8, as a fraud on the grantor's other creditors, where the land was actually worth and was subsequently sold for more than the amount of all his indebtedness, notwithstanding that at the date of the transfer he did not have ready money enough to pay all his creditors.

[*Robinson* v. *McCauley*, 13 D.L.R. 437, affirmed.]

3. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCE—CONVEYANCE OF LAND AS SECURITY—INTENTION TO DELAY OR HINDER CREDITORS.

Under secs. 38 and 39 of the Assignments Act, R.S.M. 1902, ch. 8, a conveyance of land as security for a debt of the grantor to a creditor who was not aware of the former's financial condition, and who did not knowingly obtain an unjust preference, will not be set aside in the absence of evidence shewing that both parties intended to prefer or defraud the grantor's creditors, unless it is attacked within the sixty days specified in the Act.

[*Robinson* v. *McCauley*, 13 D.L.R. 437, affirmed.]

Statement

APPEAL by the plaintiff from the judgment of Curran, J., in *Robinson* v. *McCauley*, 13 D.L.R. 437.

The appeal was dismissed.

A. E. Hoskin, K.C., and *W. S. Morrisey*, for the plaintiff.

C. P. Wilson, K.C., and *E. P. Garland*, for the defendant.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—The conveyance to Gunn was absolute in form, and he properly procured a certificate of title in his own name with all the rights and powers which such title gives.

The learned trial Judge finds that the land was vested in Gunn as security for the indebtedness due him and he further finds that Gunn had power to sell the land, apparently even without the consent of McCauley, and apply the proceeds, 1st, in payment of a mortgage then upon the property; 2nd, in payment of his own claim, and 3rd, to pay the balance to McCauley.

There is ample evidence to support this finding. Gunn in his uncontradicted testimony says:—

> And he offered me the land for the account, or I could take it as security. . . . I told him if the land was sold and the proceeds were more than the amount of the account, that he could have the difference.

The evidence shews that upon this understanding the property was absolutely vested in Gunn. The position of Gunn was that the absolute title to the property was vested in him with power of sale without the concurrence of the grantor and the only right which the latter would have would be to ask for an account of the purchase money. Before sale perhaps McCauley might have a right of redemption, that is, a right to prevent the sale, but after the sale that right was gone.

Both parties agreed, as they lawfully might, that without regard to the Land Titles Act, Gunn should hold, sell and convey the land as owner and account only for money. If the land was mortgaged to Gunn under the Act he would have no title to the land and could only cut out McCauley by proceeding in the

manner by that Act provided. They chose not to take that course. The parties agreed to a different course and McCauley agreed to divest himself of all title and make Gunn his trustee, as he lawfully might. Gunn sold the land and conveyed it away as agreed upon, and he further accounted to McCauley for the purchase money, as he had agreed to do, without any notice or knowledge of the plaintiff's claim, unless the registration of the judgment alone is notice and is a charge on this money.

The effect of a registered judgment is provided for by sec. 3 of ch. 91, R.S.M. 1902, which states that

> the said judgment shall . . . bind and form a lien and charge on all the lands of the judgment debtor.

Section 2, sub-sec. (*f*) defines "lands" to be

> every estate, right, title and interest in land or real property both legal and equitable.

In no place in the Judgments Act is there any statement that the registration of a judgment shall be notice, nor is there any provision to that effect in the Real Property Act; but apparently it might be charged upon the title of a debtor under sec. 81 of that Act. The principle of that Act is the registration of the title and not of instruments, and I would expect to find on the title only the certificates of judgments against the registered owner; but, without deciding anything on this subject, I cannot see that this last mentioned section charges Gunn with notice of the judgment.

Suppose the debtor had granted to the plaintiff a transfer of his claimed equitable right and also an assignment of the moneys in case of sale, still, if Gunn had no notice, he could quite safely pay over the money to the debtor. The difference between statutable notice and actual notice is thus expressed by Lord Redesdale in *Underwood* v. *Courttown*, 2 S. & L. 41:—

> Actual notice might bind the conscience of the parties, the operation of the Registry Act may bind their title, but not their conscience.

Certainly in this case Gunn's conscience is not bound.

Under the old Registry Act the question as to the effect of subsequently registered instruments binding parties acting under prior registered instruments has frequently been discussed. In the case of *Pierce* v. *Canada Permanent*, 25 O.R. 671, affirmed in appeal, 23 A.R. (Ont.) 516, it was held that where a mortgagee under a duly registered mortgage advanced money on his mortgage after the registration of a subsequent mortgage, without actual notice thereof, the prior mortgagee was protected. In the case of *Hutson* v. *Valliers*, 19 A.R. (Ont.) 154 at 161, Mr. Justice Maclennan, in a dissenting judgment, held that the registration of a mechanic's lien affected a prior registered mortgagee with notice, and Mr. Justice Ferguson followed him in the first judgment in *Pierce* v. *Canada Permanent*,

MAN.

C. A.

1913

ROBINSON v. MCCAULEY.

Howell, C.J.M.

24 O.R. 426; but was reversed by the Divisional Court and the Court of Appeal, as above referred to.

The position taken by the Ontario Court, it seems to me, is amply supported by English cases referred to, and fully discussed in that case, and if this was a case under the old Registry Act, I should have no difficulty in holding that Gunn was fully protected in acting under his prior registered instrument without actual notice.

If, as was argued, the debtor had an equitable estate in this land the Act gives the plaintiff ample means to protect himself against the transfer by Gunn; the plaintiff could have registered a caveat against the title.

The defendants fully complied with all the requirements of the Real Property Act and placed the title in such a way that Gunn could, and should, convey without reference to the register, and I know of no duty or statute requiring him to search.

I think that in this case where the grantee had the absolute title and power to sell and convey, and was only required to account for the purchase money, the registered judgment, at all events after the sale, did not bind or make a charge on the purchase money in Gunn's hands, he having paid or otherwise disposed of it without notice.

Whether the statute did away with legal and equitable estates and created in their place a "registered estate" and whether a person, who, under the old law, was the owner of an equitable estate which he could convey like real estate, has now only a right to bring an action and charge the "conscience" of the registered holder, need not in this case be decided. See *Crowley* v. *Bergtheil*, [1899] A.C. 374 at 390.

The question also whether this right of action is tangible enough to be bound by a registered certificate of judgment can also be passed over.

The subject is discussed in several Australian cases, and in Hogg on Australian Torrens System, at 796, 881, 972. The author states that these equitable rights which exist only by the right to charge the conscience of the holder of the title are mere personal rights, and do not create equitable estates as usually understood in English Courts.

Without, however, in any way deciding these last mentioned questions, I would dismiss this appeal with costs.

Appeal dismissed.

GONYEA v. CANADIAN NORTHERN R. CO.

SASK.

S. C.

1913

(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown, and Elwood, JJ. November 15, 1913.

1. MASTER AND SERVANT (§ II A 2—49)—LIABILITY OF MASTER—COURSE OF EMPLOYMENT—SASKATCHEWAN WORKMEN'S COMPENSATION ACT.

Where a railway employee is injured while removing personal belongings from the defendants' car with the permission of the defendant company, the accident is one arising out of and in the course of his employment for which he is entitled to compensation under the provisions of the Saskatchewan Workmen's Compensation Act, even though an action brought by him at common law for damages had been dismissed on the ground that at the time of the accident he was on business of his own and was a mere licensee, if the accident occurred during the time he was in defendants' employment.

[*Gonyea* v. *C.N.R.*, 9 D.L.R. 812, affirmed on an equal division.]

Statement

APPEAL by the defendants from the judgment of Newlands, J., *Gonyea* v. *Canadian Northern R. Co.*, 9 D.L.R. 812.

J. N. Fish, for the appellants, defendants.

G. H. Barr, for the respondent, plaintiff.

Haultain, C.J.

HAULTAIN, C.J., concurred with ELWOOD, J.

Lamont, J.

LAMONT, J.:—This is an appeal from a decision of my brother Newlands awarding compensation to the plaintiff under the Workmen's Compensation Act for injuries received while in the defendants' employment. The plaintiff was employed by the defendants as a night watchman in their yards at Regina. His hours of employment were from 7 p.m. to 7 a.m. He was under the authority of the hostler, whose instructions it was his duty to obey. His duties were chiefly to look after the engines brought out of the roundhouse by the hostler, and to keep up steam until they were taken possession of by the crew, and to take charge of incoming engines from the time the crew left them until the hostler was ready to take them in the roundhouse. On the evening of March 28, the plaintiff went to the roundhouse a little before 7 p.m. On his way down he had been informed that one of the defendants' conductors, How, by name, had brought down some clothes and bedding belonging to the plaintiff from a point up the line where he had previously been working. When the plaintiff reached the roundhouse, he suggested to the hostler that he should not ring in for work just then, but he would go to How's van and get his clothes. The hostler said: "Well, these engines have got to be got in, and you had better go ahead and attend to these engines, and you will have lots of time to go up before the train goes out in the morning." The plaintiff rang in and went to work.

SASK.
S. C.
1913
GONYEA
v.
C. N. R. Co.
Lamont, J.

About three o'clock in the morning, the plaintiff went to the coal-chute on the engine that was to take How's train out of town. He fixed up the fire, and left the engine there in charge of the crew. He then went to the yard office to ascertain where How's van was situated. Finding that it was up at the west end of the yard, he went to the main line, and then west until he reached the van. He then transferred his clothing to the yard engine, which was standing on the adjoining track, and started to return along the main line. After walking a short distance, he came to an opening in a line of cars which were standing along the side track. It was his intention to go through this opening, and then in a northerly direction straight to the roundhouse. When he looked through the opening towards the roundhouse, he saw that the engine for the next passenger train was being taken from the roundhouse to the coal chute. Both the roundhouse and the coal chute were on tracks which ran north-westerly from the main line, but the coal chute was much nearer to the main line. The plaintiff, seeing the passenger engine going to the coal chute, and knowing that it was his duty to take charge of it there until the crew came on, altered his course from the direction he had intended to take to the roundhouse, and continued his course along the main line, intending to take another opening which would enable him to go in a direct line to the coal chute. When he had gone about 25 yards, and before he had reached the second opening, he was struck by the yard engine and injured.

On cross-examination the plaintiff gave the following evidence:—

Q. Well, in the ordinary course of your work, I suppose, you would have been nowhere about that part of the yard? A. Well, that is a thing I can't swear to.

Q. Well, how long were you there? A. I was there from January to March.

Q. When working in that way, had you occasion at any other time to visit that part of the yard? A. Yes, sir; I had been sent up to the point where I got struck, only on track No. 1, instead of the next track, to the main line, with oil for engines which had been forgotten.

On re-examination he was asked:—

Q. Under what circumstances were you at that spot before? A. I went up there to put stores on the engine.

Q. Was that part of your duty, part of your work? A. Yes.

Q. What do you mean by stores? A. I mean oil and waste.

Q. And after doing your duty in that vicinity, how did you return to the roundhouse? A. Walked down the main line same way I was going the night I got struck.

For the defendants two grounds of appeal are set up:—

(1) That the learned trial Judge erred in holding that the plaintiff's

absence from duty at the time of the accident was with the permission of the defendants;

(2) That the learned trial Judge erred in holding that the accident arose out of and in the course of the employment of the plaintiff by the defendants.

The first of these grounds cannot be supported. The statement of the hostler can only mean that the plaintiff would have time to go for his clothes before How's train went out. It was understood by the plaintiff as giving him permission, and there was no evidence that it was not so intended. He, therefore, went for his clothes with the defendants' permission.

The defendants' second contention presents more difficulty. To be entitled to succeed, the plaintiff must shew that the accident arose out of and in the course of the employment.

In *Pierce* v. *Provident Clothing and Supply Co.*, [1911] 1 K.B. 997, at 1003, Buckley, L.J., says:—

> The words "out of" necessarily involve the idea that the accident arises out of a risk incidental to the employment. An accident arises out of the employment where it results from a risk incidental to the employment as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind.

The risk of being struck by a train in a railway yard, where trains are constantly passing to and fro, is a special risk to which every one employed in such yard is liable, and is incidental to the employment. The plaintiff's accident, therefore, arose out of his employment. Did it arise "in the course of" his employment?

Counsel for the defendants contended that the cases cited by the learned trial Judge were distinguishable from the case at bar, in that those cases the partaking of the meal by the workman was necessary for and contemplated by his employment.

As was pointed out, however, by Lord Justice Farwell in *Gilbert* v. *Owners of Steam Trawler Nizam*, [1910] 2 K.B. 555:—

> The necessity for food no more arises out of his employment than the necessity for sleep. The man who is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment, and not because he was eating his dinner; but it is no part of his contract of employment that he should go home or eat or drink or sleep at home or anywhere else.

In *Low* v. *General Steam Fishing Co.*, [1909] A.C. 523, the plaintiff's husband was employed as watchman of certain trawlers moored to a quay. He had to provide himself with food and refreshment. This his family usually brought. On the night in question they failed to bring it, and he went to a near-by hotel, where he got half a glass of whisky and a glass of beer. Returning after a short absence, he proceeded to descend a fixed

SASK.

S. C.
1913

GONYEA
v.
C. N. R. Co.

Lamont, J.

ladder attached to the quay, for the purpose of getting aboard one of the trawlers, and in doing so he slipped and was drowned. In connection with his duties it was occasionally necessary that he should be upon the quay. In an action for compensation it was held by the House of Lords, the Lord Chancellor and Lord Gorell dissenting, that the accident arose out of and in the course of the deceased's employment. The ground upon which the majority seemed to base their judgments was that, although the deceased was away without permission, he had, when the accident happened, returned to the scene of his employment, and, having returned, was in the same position as if he had not left it. As put by Lord Atkinson, at 538:—

> His field of operation, so to speak, embraced this quay, the trawlers, and the means of approach to each of them. At the time the accident happened he had a right to be at the place in which he actually was.

In their dissenting judgments, the Lord Chancellor and Lord Gorell took the view that, in descending the ladder to get into the trawler, the deceased was merely in the act of returning from an unlawful excursion for his own purposes.

In *Moore* v. *Manchester Liners, Limited,* [1910] A.C. 498, a seaman employed on a steamship in port went ashore with leave, bought necessaries for himself, and spent some time in drinking. On returning to the ship, while attempting to climb a ladder insecurely fixed between the quay and the ship, he fell into the water and was drowned. It was held that the accident arose out of and in the course of his employment. In giving judgment, Lord Loreburn said, at p. 500:—

> If the question be whether an accident befell him "in the course" of that employment, the first inquiry is, Was he doing any of the things which he might reasonably do while so employed? A seaman going ashore without leave is not doing what he might reasonably do. He simply quits his employment for the time. Otherwise, if he goes ashore with leave, for the employment is continuous and implies leisure, as well as labour. The next inquiry is, did the accident occur within the time covered by the employment? A man engaged for so many hours a day is in the employment only during those hours. If engaged for a month continuously day and night, he is in the employment during the whole month, except, of course, during any time he quits the employment. The last inquiry is, did the accident occur at a place where he may reasonably be while in the employment. In some classes of work, especially where the engagement is intermittent, for so many hours a day, the place is the actual scene of his labour, a railway or quarry or factory. In other classes of work, where the engagement is continuous for day and night over a period of time, the place is wherever he may reasonably be during that time. And so, to sum it up, I think an accident befalls a man "in the course of" his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing.

In a subsequent case, that of *Kitchenham* v. *Owners of SS. Johannesburg*, [1911] A.C. 417, a steward on board a ship in port had liberty to go on shore without special leave. He went ashore for his own purposes. On returning he fell into the water between the quay alongside which the ship was moored and the ship. It was held that the accident occurred "in the course of" his employment, but did not arise "out of" his employment. When this case was before the Court of Appeal, Fletcher Moulton, L.J., after a consideration of the case of *Moore* v. *Manchester Liners Limited*, [1910] A.C. 498, said, [1911] 1 K.B. 523, at 526:—

> I consider it therefore to be settled that when a ship is in port and a sailor goes on shore with leave, his employment is not interrupted thereby.

And, when the *Kitchenham* case was before the Lords, the Lord Chancellor, in giving the judgment of the Court, said that Fletcher Moulton, L.J., had correctly stated the decision of the House in *Moore* v. *Manchester Liners Limited*, [1910] A.C. 498.

We must take it, therefore, as established law that, if a seaman goes on shore with leave, the continuity of his employment is not broken. Does a seaman stand in this respect in a different position from any other workman during the hours of employment of that workman? I cannot see that he does.

The result, therefore, would seem to be that, if any workman, during the hours of his employment, with the permission of his employers, ceases working for a short time for purposes of his own, the continuity of his employment is not thereby impaired. By granting permission the employer in effect says: "Your time is mine, but I will give you the short period you require." If, however, no permission is given, or the circumstances shew that the time taken was not to be considered the employer's time, the workman ceases his employment if he goes about his own business. In the case at bar the plaintiff had, as I have found, permission to go for his clothes at the time he did go for them. His employers made him a gift of the necessary time. I am, therefore, of opinion that he was "in the course of" his employment when the accident occurred.

I am also of opinion that he was in the course of his employment for another reason. When he got back to the first opening of the line of cars, he intended going through that opening, and thence straight to the roundhouse; but, seeing the passenger engine going to the coal chute, and knowing that it was his duty to take charge of it there, he altered his course and continued down the track. His continuing down the track was not for his own purposes, but to perform his duty in respect of that engine. From the evidence quoted above it seems to me that when the accident occurred he was back within the

SASK.

S. C.
1913

GONYEA
v.
C. N. R. Co.

Lamont, J.

ambit of his employment, and from the moment he altered his course to take charge of his engine, he was in the performance of his duty. He was, therefore, doing that which he might reasonably do at a place where he might reasonably be, within the time during which he was employed.

The accident having, in my opinion, arisen both out of and in the course of the plaintiff's employment, the judgment of the trial Judge should be affirmed, and this appeal dismissed.

Brown, J.

BROWN, J.:—This is an action brought by the plaintiff to recover damages for injuries sustained while in the defendants' employ. He was at the time employed as night watchman, and his duties as such are set out in his own evidence as follows:—

Q. What were your duties as night watchman? A. I always understood, to look after the engines when they were put outside the roundhouse by the hostler, and keep water in the boiler and keep up steam until such time as the fireman or engineer would come round to take charge of them.

Q. Were there intervals in the night when there were no engines there to be looked after? A. Yes, sir.

Q. During those intervals was there any particular duty that you had to perform? A. I have always, when I have done watchman's duty, I was expected to watch engines, and that is all I was expected to do.

Q. When there were not any engines there, what would you have to do? A. I would have to wait around until there was.

Q. You might explain now the hostler's duty, what it had to do with you? A. The hostler takes out all engines that is ordered, and brings in engines when they are brought in from the road when the crew leaves them, and takes general charge of the shop.

Q. Have you any duties in the roundhouse? A. It is my own free will whether I do or not. I am not compelled.

Q. Your duty is to take charge of the engines and keep the fire going? A. Yes.

Q. Your duties, you say, were those of a watcher? A. Yes, sir.

Q. You sometimes did other things around the roundhouse? A. Oh, I have helped the fellows out.

Q. And you have told us you were not compelled to do that? A. I was not compelled to do that, no.

Q. Your duties as a watcher you have already told us about. They were apparently to take care of engines before they were taken out by the crew and after they had been abandoned by the crew? A. Yes, sir.

Q. Until they were in the hands of the roundhouse employees or until they were in the hands of the crew; is that it? A. Yes.

These engines which the plaintiff was required to look after would invariably be left somewhere on the track leading from the main line to the roundhouse, and it was not necessary that the plaintiff should ever leave the region of this track in attending to the engines as night watchman. The plaintiff had, during part of the summer of 1911, worked for the defendants

SASK.

S. C.
1913

GONYEA
v.
C. N. R. Co.

BROWN, J.

at Findlater as pumpman. He left that place and the defendants' employ in September and came to Regina. He again entered the defendants' employ as night watchman shortly after the beginning of the year 1912. In the meantime he had worked for other persons. When leaving Findlater, the plaintiff had left behind him certain clothes and bedding. On the evening of March 28, 1912, while the plaintiff was going to his work as night watchman, he was informed by conductor How, who was in charge of one of the defendants' freight trains, that he (How) had brought the plaintiff's clothes and bedding from Findlater in his van, where they were at that time, and How insisted on the plaintiff taking these clothes out of the van that night, because, as he said, he was going out of Regina in the morning and did not know when he would return again. When the plaintiff arrived at the roundhouse, he informed the "hostler," being the man under whom he worked, of what How had told him. At about three o'clock on the morning of March 29, the plaintiff went to the van mentioned, for his clothes, and, in going at the time he did, he claims he did so with the permission of the "hostler." This permission was obtained before the plaintiff started work the prior evening. The plaintiff's evidence on this point is as follows:—

Q. What did you request of the hostler or suggest in regard to those clothes? A. I suggested that before I would ring in for work I would go up to How's van and get my clothes, that How was standing waiting for me to go up and get the clothes out of the van, and after I got the clothes I would begin to work.

Q. That is you would not be charging up time against the company? A. No.

Q. And what did the hostler say? A. The hostler says: "Well, these engines have got to be got in, and you had better go on and attend to those engines, and you will have lots of time to go up before the train goes out in the morning."

Q. Is the hostler the man under whom you work? A. At the night time, when the foreman is not there, yes.

The van at this time was standing towards the west end of the defendants' yard, on a track adjacent to the main line of the defendants' railway; and in reaching the van the plaintiff walked along the main line in a westerly direction, having first gone to the yard office to ascertain exactly where the van was located. He obtained the clothes and placed them on the yard engine, which at the time was on a track close to the van. The plaintiff then proceeded to return to his work, and in doing so walked back along the main line in an easterly direction; and, when he came to a point where he intended leaving this line to go south towards the roundhouse, he saw an engine proceeding from the roundhouse in an easterly direction towards the coal chute. This engine was one which the plaintiff was

SASK.

S. C.
1913

GONYEA
v.
C. N. R. Co.

Brown, J.

supposed to take charge of, and he decided to take the shortest route to reach it. In taking this route he proceeded further along the main line. While so doing he was struck down by the very yard engine on which he had placed his clothes, and was injured.

The learned trial Judge dismissed the plaintiff's claim at common law, on the ground, among others, that at the time he received the injuries he was attending to his own business. The plaintiff then applied to have damages assessed under the Workmen's Compensation Act, and the learned trial Judge assessed the damages at $750, holding that the plaintiff was entitled to such damages because the accident occurred on the defendants' premises and during the time the plaintiff was in the defendants' employment. The defendants now appeal from that decision.

The following questions are involved in this appeal:—

(1) Was the plaintiff away with the permission of the defendants?

(2) Assuming that he was, did his action in so going away constitute a "break" in his employment until his return, notwithstanding such permission?

(3) Did the accident arise "out of" the employment?

(4) Did the accident arise "in the course of" the employment?

I have come to the conclusion, not without some difficulty and hesitation, that all of these questions should be answered favourably to the plaintiff.

A study of the cases decided under the English Act, which, in so far as the matters at issue are concerned, is identical with our Act, shews a tendency, and it seems to me an increasing tendency, on the part of the Courts, to construe the Act very liberally in favour of the workman. I am of opinion that the conversation which took place between the "hostler" and the plaintiff constituted a permission to go, and that the "hostler" would have authority to grant such permission. I am further of the view, not without some hesitation, that in so leaving with such permission there was no "break" in the employment under the circumstances of this case. The plaintiff got permission to go and went at a time when he was not busy; and, although he went for his own purposes, it was because of the urgency on the part of the defendants that the clothes must be taken out of the van that night. There cannot, I think, be any question that the accident arose out of the employment. It was something reasonably incidental to the employment, and would not, in all probability, have happened had it not been for the employment, and that appears to be sufficient to bring it within the Act: *Clover Clayton & Co.* v. *Hughes*, [1910] A.C. 242; *Barnes* v. *Nunnery Colliery Co.*, [1912] A.C. 44; *Moore* v. *Manchester Liners Limited*, [1910] A.C. 498.

This brings me to a consideration of the last question, "Did the accident arise in the course of the employment?" I was, during the argument of this appeal, strongly of the view that an accident could not be held to have arisen in the course of the employment unless it happened within the sphere or ambit of the employment. This would seem to be the view expressed and emphasised in many of the English decisions bearing on the point; and, if that were the correct view of the law, I would not hesitate to hold that the plaintiff in this case could not recover. In my view, he had not at the time of the accident as yet returned to the ambit or sphere of his employment. It is clear from the plaintiff's own evidence which I have already quoted that his work required him to be where, and only where, engines were left by the crew or were to be taken possession of by the crew, and that this was invariably on the track leading to the roundhouse. The place where the van in which the plaintiff's clothes were was situated several hundred yards away from this track, as was also the place where the accident occurred. It was, in my judgment, looking to his employment, and apart from the permission granted as aforesaid, absolutely unreasonable that the plaintiff should be where he was at the time of the accident. He was several hundred yards away from where he was required to be, and therefore he had not returned to the ambit of his employment. The mere fact that at the time of the accident the plaintiff had altered his course in order to take a short cut to his immediate work does not, in my opinion, make any difference. His action in that respect did not bring him any more within the ambit of his employment than if he had pursued the course which he at first intended to take. He was not thereby doing something for his employers; he was simply taking a short cut to get back where he could do something for his employers. But, in view of what has been laid down in *Moore* v. *Manchester Liners Limited*, [1910] A.C. 498, as interpreted by the later case of *Kitchenham* v. *Owners of SS. Johannesburg*, [1911] A.C. 417, and [1911] 1 K.B. 523, it does not seem necessary that the workman should have returned to the actual sphere of his employment at the time of the accident in order to recover. In the *Moore* case, a seaman, after being ashore with some of his comrades, in climbing over the quay to the ship by a ladder, fell into the water and was drowned. He was ashore with leave, but for his own purposes. The majority of the House of Lords held that the accident which caused death arose out of and in the course of his employment. Fletcher Moulton, L.J., in giving judgment in the *Kitchenham* case in the Court of Appeal—and his judgment is approved in the House of Lords—distinctly says, in referring to the *Moore* case, that the seaman's right to recover was not dependent on

SASK.

S.C.

1913

GONYEA v. C. N. R. Co.

Brown, J.

whether the seaman was on board the vessel or not. Lord Loreburn, in the *Moore* case, at p. 500, said:—

> And so, to sum it up, I think an accident befalls a man in the course of his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing.

In the case at bar the plaintiff was where he was at the time of the accident with the permission of the defendants, and, therefore, where he had a right to be; he was returning to his work, and therefore doing what he had a right to do; and the accident occurred during the time of his employment. Thus, it seems to me, the case is brought within the Act.

I am of opinion, therefore, that the appeal should be dismissed with costs.

Elwood, J.

ELWOOD, J.:—In this case I have had the privilege of reading the judgments of my brothers Lamont and Brown.

I regret that I cannot agree with the result which they have arrived at.

In *Fitzgerald* v. *Clarke*, [1908] 2 K.B. 796, at 799, Buckley, L.J., says:—

> The words "out of" point, I think, to the origin or cause of the accident; the words "in the course of" to the time, place, and circumstances under which the accident takes place.

That is, in determining whether the accident took place "in the course of" the employment, we must consider the time, place, and circumstances under which it took place.

In *Harding* v. *Brynddu Colliery Co.*, [1911] 2 K.B. 747, at 753, the same Lord Justice says:—

> I want to add something lest this judgment should be misunderstood. The question is not whether the man in the course of his employment went to a forbidden place. If that be it, there may be simply serious and wilful misconduct, and he may be entitled to recover. The question is: Has the man done an act outside the sphere of his employment, or has he in doing an act within the sphere of his employment been guilty of serious and wilful misconduct? If it be the former, he is not entitled to recover; if it be the latter, he is. Let me give an illustration as to the place. Suppose a man is employed in a factory, and his duty is to go to and fro in the factory to carry goods, and he is told that he must always go by this passage and return by that passage. I am supposing a rule or regulation simply for the purpose of freedom of circulation in the factory. If he goes by the passage by which he ought to return, he will have broken a rule as to place, but he will not be out of the course of his employment; he will be there for the purpose of his employment, doing an act within the sphere of his employment, carrying goods or whatever it may be, but doing it in a forbidden way.

In *Moore* v. *Manchester Liners Limited*, [1909] 1 K.B. 417, at 428, Fletcher Moulton, L.J., says:—

It suffices if it happened on an occasion which was a normal incident in the employment. In the present case—that of a fireman on a ship—the employment is a continuous one, not ceasing during the time that the ship is in port, and it must have been contemplated between the parties that from time to time he would be permitted to go on shore to obtain needful supplies of various articles; and the evidence as to the selection of Sabbath's store, and its announcement to the crew as the authorized house for purchasers, would itself be conclusive on this point if specific evidence were needed. Such visits on shore were, therefore, to my mind, normal incidents of the employment, and an accident due to the dangers of access to the ship when the fireman in the course of his duty was returning thereto on such an occasion appears to me to be a typical example of an accident arising out of and in the course of his employment under the general principle which I have above enunciated.

The facts in the above case make it distinguishable from the case at bar. There it was a normal incident of the employment that the deceased should go to and from the ship, and any accident happening while he was going to and from the ship would be "in the course" of the employment.

In the case at bar the duties of the deceased did not take him to the part of the property of the defendants where the accident occurred. He had once before gone there, but not as part of his duties. It was on an isolated and special occasion. Was then the act of going for his clothes, over a portion of the defendants' property that his duties did not take him to, "outside the sphere of his employment?" I think it was.

Was the occasion a normal incident of the employment, or was it contemplated between the parties? I think not.

If the time during which the accident takes place is alone sufficient to determine whether it is in the course of the employment, there would be no necessity for considering the place or the circumstances.

Buckley, L.J., as quoted above, seems to be of the opinion that one should also consider the place and the circumstances, as well as the time. This seems to me to be the correct view. Considering this case then in the light of the place and circumstances, I am of the opinion that the accident did not arise in the course of the employment.

I would allow the appeal.

Appeal dismissed on an equal division.

ONT.

S.C.
1913

Re NATIONAL HUSKER CO.; WORTHINGTON'S CASE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 1, 1913.

1. APPEAL (§ VII L 5—515)—REVIEW OF FACTS—FINDINGS OF COURT—CONFLICTING TESTIMONY.

Where a finding of a referee or master on conflicting facts was affirmed by a judge on appeal, an appellate court will not ordinarily disturb the finding on a second appeal.

2. CORPORATIONS AND COMPANIES (§ V F 3—262)—SHAREHOLDER'S LIABILITY—FRAUD AS A DEFENCE—WAIVER AFTER DISCOVERY.

A subscriber to company shares will be listed as a contributory for the amount unpaid thereon in a winding-up proceeding, although his subscription may have been induced by a fraudulent prospectus, if, after discovery of the fraud, the subscriber elects by his conduct to remain a shareholder instead of repudiating liability on his subscription.

[*Re National Husker Co., Worthington's Case*, 10 D.L.R. 643, 4 O. W.N. 1077, affirmed.]

Statement

APPEAL by E. P. Worthington from an order of Meredith, C.J.C.P., 10 D.L.R. 643, 4 O.W.N. 1077, dismissing without costs an appeal from an order of the Master in Ordinary, in a proceeding for the winding-up of the company, under the Dominion Winding-up Act, placing the appellant on the list of contributories for $3,760, the balance due upon a subscription for $5,000 worth of shares.

The appeal was dismissed.

W. E. Raney, K.C., for the appellant.

J. M. Ferguson, for the liquidator, the respondent.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The winding-up order was made on the 6th July, 1911, and the appellant had, on the 27th of the previous January, begun an action in the High Court to rescind and set aside his subscription for 50 shares made on the 12th January, 1907, as having been obtained by fraud, and the action was at issue when the winding-up order was made. The action was tried before the Master in Ordinary on the 28th March, 14th and 24th June, and 4th October, 1912, and he found the issues in the action in favour of the defendants, and settled the appellant on the list of contributories in respect of 66 shares.

The evidence as to the alleged misrepresentation by which, as the appellant alleges, he was induced to become a subscriber for the shares, was conflicting, and the Master gave credit to Adams, a witness for the respondent, preferring it to that of the appellant and three of his relatives, all of whom are seeking to be released from their subscriptions for shares, on practically similar grounds to those relied upon by the appellant; and the

ONT.

S. C. 1913

RE NATIONAL HUSKER CO

Meredith, C.J.O.

Master's finding was concurred in by the Chief Justice, from whose judgment the appeal is brought.

In such a case as this an appellate Court is rarely warranted in reversing the findings of fact; but, if the question were merely one as to the weight of evidence, the appellant would not have satisfied us that the Master's conclusions were wrong; on the contrary, I think that he came to a right conclusion on the evidence.

As we have come to this conclusion, the appeal fails; but, if there were doubt as to its being a proper conclusion, the further fact, which the Master has found, that the appellant, with full knowledge of the true facts as to the matter with respect to which the representations are alleged to have been made, elected to remain a shareholder, that his finding is concurred in by the Chief Justice, and that there was ample evidence to warrant it, is fatal to the appellant's case; and the appeal must be dismissed.

We were asked by the appellant's counsel, if we should be against him, to vacate the winding-up order; but it is not open to us to do so, even if we were of opinion that it was wrongly made. This decision will not, however, prejudice any application which the appellant may be advised to make to vacate or set aside the order.

For the same reasons which influenced the Chief Justice to give no costs of the appeal before him, we may properly leave the respondent to bear his own costs of this appeal.

Appeal dismissed.

FIFE v. McLAREN.

SASK.

1913

Moose Jaw District Court, Saskatchewan, Judge Ouseley, District Judge, November 12, 1913.

SOLICITORS (§ II C 2—35)—*Lien on costs awarded client—Adverse garnishment.*]—Hearing in a garnishment proceeding.

O. Benson, for attaching creditor.

The claimants in person.

JUDGE OUSELEY held that on a successful appeal from a summary conviction and an order being made quashing same with costs against the informant, the appellant's solicitors have a claim in respect of their solicitor's lien on the amount of such costs in the hands of the informant or paid into Court by him, under a garnishee summons issued by a creditor of the appellant in the District Court which will be given priority over the garnishment proceedings on an intervention therein by the solicitors as claimants. *Palgrave* v. *McMillan*, 31 N.S.R. 488; and *Williams* v. *McDougal*, 12 W.L.R. 381, applied.

SASK.

1913

KIRBY v. McINTOSH.

Moose Jaw District Court, Saskatchewan, Judge Ouseley, District Judge. November 7, 1913.

RECORDS AND REGISTRY LAWS (§ III B—16)—*When registration complete — Failure of registrar to enter on record.*]— Trial of a replevin action against the conditional vendor under a lien note contract, reserving title to him until the chattels should be fully paid for. The question at issue was whether the statute R.S.S. 1909, ch. 145, "respecting Lien Notes" had been complied with in so far as the vendor's rights were concerned by his deposit of the document evidencing the conditional sale with the registration clerk in a case where the latter had omitted to record it in the registration book.

J. E. Chisholm, for plaintiff.

W. B. Willoughby, for defendant.

JUDGE OUSELEY, District Judge at Moose Jaw, gave judgment for the defendant. He said: I am strongly of the opinion that it is not sufficient merely to leave the instrument with the clerk, but that the instrument is not registered until it has been entered in the registration book kept for that purpose by the clerk. In *Trinder* v. *Raynor*, 56 L.J.Q.B. 422, an interpleader action, the plaintiff filed a bill of sale of horse and mare with the registrar of bills of sale. The registrar failed to transmit an abstract of the registered bill of sale to the registrar of the County Court within the district where the chattels were situated, and it was held that this did not void the bill of sale, which had priority over the execution of the execution creditor, who had searched the register of the County Court and found no registration of any bill of sale affecting the animals, and in consequence had filed his execution. I adopt the argument of counsel for the defendant that the registration laws are intended for the benefit of subsequent purchasers, and it seems a reasonable rule that if the first grantee does all that is in his power to do to secure to the subsequent purchaser the benefit of this notice by the records, he should not be held responsible because the public officer failed to do his duty.

He referred to 6 Cyc. 1086; Wade on Notice, 2nd ed., 162, and *Jost* v. *McCuish*, 25 N.S.R. 519, and added: From these authorities it appears to me that the plaintiff's remedy is against the negligent public officer and that the defendant has done all that the statute requires him to do. It would be practically impossible for the parties to remain in the office of the registration clerk and wait to ascertain whether the clerk carried out his duties which the statute imposed upon him, as it might well be that the clerk would not be able to transfer all the instruments to the register on the same day that they were received.

Judgment for defendant.

STEVENS v. MORITZ.

ONT.

S. C.

1913

Ontario Supreme Court, Meredith, C.J.C.P. December 1, 1913.

1. CONTRACTS (§ II C—140)—REALTY SALE—INCOMPLETENESS OF AGREEMENT—TIME AND MODE OF PAYMENT.

There is not a completed agreement where essential things are not provided for expressly or tacitly or otherwise; so in an agreement for the sale of land, which provided for payment of a comparatively small proportion in cash, the only stipulation as to the time for payment of the remainder was as follows: "balance to be arranged by mortgage bearing six per cent. interest," there was an omission of an essential part of the agreement, inasmuch as neither of the parties was to be at liberty to fix the terms and mode of payment of the mortgage.

[*Reynolds* v. *Foster*, 9 D.L.R. 836, 4 O.W.N. 694, approved.]

2. PLEADING (§ VII F—390)—DEMURRER OR PRELIMINARY HEARING—POINTS OF LAW DISPOSING OF CASE.

While a plea of demurrer in a civil action is no longer permissible, it is still frequently, under Ontario Consolidated Rules 122, 123 and 124 (Rules of 1913) not only a privilege but a duty to raise in the pleadings and submit for preliminary determination any point of law substantially disposing of the whole action.

[See *Bristol* v. *Kennedy*, 8 D.L.R. 750.]

Statement

ACTION by the vendor for specific performance of an agreement for the sale of land.

The action was dismissed.

C. L. Dunbar, for the plaintiff.

H. Guthrie, K.C., for the defendant.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The complete absence of the word "demurrer" from the legal vocabulary of the present day, is, doubtless, the result of giving a dog a bad name: a demurrer was a commendable time-saving and cost-saving proceeding; but it was also put to highly technical time-losing and cost-increasing uses, and thus came into such bad repute that even the name seems to have become unbearable, and was obliterated; and yet its better part still remains under a new name, and ought always to remain, by whatever name it may be called, though "demurrer" still holds the mind, whatever the tongue may say. And that this case ought to have been heard upon demurrer, speedily and inexpensively, instead of being, in the first instance, brought down to trial, involving much delay, much greater cost, and an unfortunate conflict of testimony between equally highly reputable fellow-citizens, I consider obvious; so obvious that I would not have mentioned it except that it may be necessary to do so in dealing with the question of costs.

At the close of a hard-fought trial upon a question of fact, involving such a conflict of testimony as I have mentioned, it turns out that there is a vital preliminary question to be considered: a question which might, and ought early in the action, to have been raised and determined under that practice which

ONT.

S. C.
1913

STEVENS
v.
MORITZ.

Meredith,
C.J.C.P.

is now the equivalent of a general demurrer. If the demurrer were held to be good, the action was ended; otherwise the parties would be obliged to go to trial; so that, plainly, it was not the better course to bring all questions down to a trial, where, after all, the demurrer must be considered, and, if given effect to, render all the proceedings upon the other question worse than useless.

The question raised upon the demurrer is, whether, admitting all that the plaintiff alleges as to the extent of the agreement entered into respecting the sale and purchase of the land in question, there is an enforceable contract for the purchase of it.

There is no dispute as to the facts on this branch of the case: the whole agreement, it is said on both sides, is contained in the writing in question, and so no question under the Statute of Frauds can be raised; there is nothing that is not in writing; and the single question is, whether that writing contains all the essentials of an enforceable agreement for the sale of land.

This question is further simplified, too, by the fact that the only point in it is, whether the want of any definite agreement as to the terms of payment of that part of the price of the land to be secured by a mortgage upon it renders the agreement unenforceable because incomplete.

That the omission is an omission of an essential part of a contract, I can have no doubt; and, if so, how can there be specific performance? Specific performance of what? Of what in respect of the mortgage? It must be of something the parties had never agreed upon. It must in that respect be a court-made contract, not the contract of the parties.

It does not follow that, if the plaintiff cannot have specific performance in this case, no one can have specific performance in any case in which the parties have not expressly agreed upon all the details of the sale; that is far from being so; much may be tacitly agreed upon; and the law sometimes covers terms which need not be expressed. But where essential things are not provided for, expressly or tacitly or otherwise, there is not a completed agreement; there is not an enforceable contract.

The fact that delivery and payment are generally concurrent acts cannot apply, because, expressly, in this case, payment is to be of only about one-quarter of the price, the "balance to be arranged by mortgage bearing six per cent. interest."

It is plain, from that which is expressed, that neither party was to be at liberty to fix the mode and time of payment under the mortgage. That was to be "arranged" by the parties; and was a thing of substance, of very considerable importance, about which there might be wide differences of opinion; even eventually an inability to agree upon them.

The subject was discussed recently, in the case of *Reynolds* v.

ONT.

S. C.
1913

STEVENS
v.
MORITZ.

Meredith, C.J.C.P.

Foster, 9 D.L.R. 836, 4 O.W.N. 694; and so I shall not now say anything more upon the subject which would be but a repetition of that which was in that case said.

On this ground the action will be dismissed, and the defendant may have his costs of it, limited, however, to such only as relate to this branch of the case, and which would have been incurred if the speediest mode of bringing this question alone up for consideration had been taken.

The other branch of the case involves several questions of considerable difficulty, such as the relationship of the witness Oates to the parties in the transaction; whether any misrepresentation respecting the land was made by him; and, if so, what would be the effect of it; questions which need not now, and so, as I think, ought not now, to be considered; nor anything further said upon the subject except this: that there was nothing in the demeanour of any of the witnesses which in itself would incline me to discredit him or her.

Action dismissed.

ASHBEE v. CANADIAN NORTHERN R. CO.

SASK.

S. C.
1913

Saskatchewan Supreme Court, Brown, J. November 6, 1913.

1. EVIDENCE (§ II H 1—226)—PRESUMPTIONS—AS TO NEGLIGENCE—REBUTTAL—INJURY TO PASSENGER—DERAILMENT.

The presumption of negligence arising from an injury to a passenger as the result of the derailment of a car at a switch over which many passenger trains passed daily, is not displaced by the railway company shewing that the accident was caused by the working out of an insecurely fastened bolt from a switch rod, if the defective condition should have been discovered by ordinary care.

2. CARRIERS (§ II C 2—40)—WHO ARE PASSENGERS—PERSON OBTAINING REDUCED FARE BY WRONGFUL USE OF COMMERCIAL TRAVELLER'S CARD—LIABILITY OF CARRIER FOR INJURY TO.

The fact that a person who was injured by the derailment of a passenger car, obtained his ticket at a reduced rate by presenting a commercial traveller's card after he had ceased to be entitled to use it, does not make him a trespasser on the train so as to relieve the carrier from liability.

Statement

TRIAL of an action by a passenger for damages for personal injury by the derailing of a car at a switch.

Judgment was given for the plaintiff.

H. Y. MacDonald, and *B. D. MacDonald*, for plaintiff.

O. H. Clark, K.C., and *A. M. McIntyre*, for defendant company.

Brown, J.

BROWN, J.:—The defendants have a line of railway running from Regina to Prince Albert, which passes through Saskatoon, and operate passenger trains thereon. On March 4, 1912, the plaintiff boarded one of the defendants' trains at Saskatoon,

SASK.

S. C. 1913

ASHBEE v. C. N. R. Co.

Brown, J.

intending to go to Regina. He entered the rear car, which was a Pullman, and took a seat in the smoking compartment thereof. The railway at this point crosses the Saskatchewan river at a distance of from 350 to 400 yards from the station; and between the station and the bridge over the river there is a switch which leads to a branch line extension of the defendants' railway, known as the Goose Lake branch. The train in which the plaintiff was travelling, after pulling out of the station, proceeded in a southerly direction, and all went well until the car in which the plaintiff was riding reached the switch referred to, when the wheels of the last truck of this car left the main line, being carried down the Goose Lake branch. The force of the engine naturally pulled the truck from the side line, and the wheels under this truck were dragged along over the ties of the main line. The forward truck being over the rails and the rear truck being over the ties had the effect of giving the car a swaying motion, so that when it reached the bridge it came in contact with the bridge, and the result was that the car was precipitated to the embankment some distance below, and the plaintiff seriously injured.

An inspection made by the defendants' employees immediately after the accident revealed the fact that the points of the Goose Lake switch were slightly open, and the connecting rods which were supposed to keep these points in place were disconnected. These connecting rods were ordinarily held together by means of a bolt. This bolt is about one and a half inches long and three-quarters of an inch thick. When in place, the bolt is inserted through overlapping holes in the connecting rods from above, and there is provision for a split key being put through the bolt underneath the rods, thus rendering it impossible for the bolt to come out or for the rods to become disconnected. The inspection following the accident to which I have referred shewed that the bolt was out and lying on the ground. No split key was found, and there is no evidence that any split key was ever inserted in the bolt.

The witness Poucher, who was one of the investigating party, says that he saw the bolt lying on the ground, but did not look for the split key. The witness O'Donnell, another of the investigating party, stated that it appeared to him that there was a key lying in the snow; but, when he says that, I simply do not believe him. It seems to me that, when these men were there for the very purpose of investigating the cause of the accident, if there had been any split key there they would have seen it and emphasized it; and, if O'Donnell did imagine that he noticed a split key on the ground, he would have considered it a matter of sufficient importance, under the circumstances, to make sure of its presence and to have called Poucher's attention

to it. I am of opinion, upon the evidence, that, although provision was made in the bolt for the split key, as a matter of fact no split key had ever been inserted. It seems clear, upon the evidence, that, if the split key had been inserted, the bolt could not have been out, and the accident would not have happened. The evidence of Poucher is to the effect that the bolt must have worked up gradually and fallen out just before the last truck passed the points of the switch, and that in doing so it was only what might be expected to happen. The evidence of O'Donnell is to the effect that, with the bolt out, the jarring caused by the train passing over the track would move the points and open the switch. These are explanations offered by the defendants' own employees as to the cause of the accident. O'Donnell stated that he examined this switch twenty-five minutes before the accident, and that at that time he found the same in good condition—that he found the points lined for Regina and the connecting rods and bolt in place. I may say that this witness did not impress me at all favourably, and it is clear that, if the inspection was made at all—which I very much doubt—it was of the most casual character. It was made while he was going home for the night after his day's work, and he does not pretend to state that there was any key in the bolt at that time, or that he ever inspected to see if there was any key put in this bolt, although it was O'Donnell's duty to look after the condition of the track, including the switch. Draper, another of the defendants' witnesses, stated that it was a common thing for cars to be derailed at switching points. The switch in question, being one leading from the main line, over which many passenger trains ran, was one where every reasonable precaution should have been taken to avoid any accident. There should have been a key inserted in this bolt in the first instance, and there should have been reasonable inspection to see that neither the key nor the bolt was out of place.

The plaintiff having proved that the accident was due to the car becoming derailed, the doctrine of *res ipsa loquitur* applies, and the defendants are bound to shew that they have not been guilty of negligence. This they have failed to do, for the reasons which I have already stated.

The plaintiff's claim was contested at the trial on another ground. The plaintiff, up to the 1st March, 1912, had been a commercial traveller, and had as such obtained a commercial traveller's certificate. This being the case, he was, under the defendants' tariff, entitled to travel at a reduced fare. The plaintiff's home was at Saskatoon; and, being at Regina on the 3rd March, he purchased a return ticket to Saskatoon; and, when returning to Regina on the 4th March, at the time of the accident, he had in his possession the return portion of this ticket,

SASK.
S. C.
1913
ASHBEE
v.
C. N. R. Co.
Brown, J.

intending to use it for his transportation. When this ticket was purchased, the plaintiff had ceased to be a commercial traveller, but he still retained in his possession his commercial traveller's certificate.

When getting his ticket at Regina, he produced this certificate to the agent, and on the strength of it secured his transportation at the reduced rate. It was not suggested that he made any representation at that time other than producing this certificate. It is contended on the part of the defendants that the plaintiff was, under the circumstances, a trespasser, and that they were not under any obligation to him. This defence was not set up in the pleadings, but I was asked by counsel at the close of the case to allow such amendment as would be necessary in order to set this defence up. As the evidence on which the defence is based was given by the plaintiff himself, I will allow the amendment, as I cannot see that any injustice can be done by so doing.

Even assuming that the mere holding of a commercial traveller's certificate did not entitle the plaintiff to the reduced fare, on which point I express no opinion, I cannot accede to the defendants' contention. There is here no suggestion of fraud. If fraud had been established against the plaintiff, his position would have been quite different. In my opinion, the only right which the defendants would have, if any, under the circumstances, is the right to recover the difference between the regular fare and what the plaintiff actually paid. This is something which, it may be, the conductor himself would have the right to insist on when the ticket was presented. Up to the time of the accident no attempt had been made on the part of the conductor to collect any fare; and it is a matter of common knowledge that it is the practice of railway companies in this province to allow passengers to board their trains without payment of fares or presentation of tickets, and to remain thereon without such payment or presentation until such time as the conductor has had an opportunity of collecting the same.

I hold, therefore, that the plaintiff was not a trespasser, and that the defendants were liable to him for any injury which he may have sustained.

This brings me to a consideration of the question of damages. The plaintiff's injuries were very severe. His head was injured to such an extent that a part of the skull had to be removed, a rib was broken, a leg cut, and his back hurt. He was removed to the hospital immediately after the accident in a state of unconsciousness, and remained in that state until March 18. He did not leave the hospital until August 29, when he went to his own home. He had not, up to the time of the trial, been able to do any work; and the medical evidence is to the effect that it is

doubtful if he will ever again be able to do any work; that one side of his brain is capable of performing only part of its functions. He is a comparatively young man, being only 38 years of age, and for some time prior to the accident had been earning $150 per month. As a result of the accident, he necessarily incurred the following heavy items of expense:—

Hospital account	$ 527.00
Item of expense at hospital	1.75
Private nurses	225.00
Dr. Munro's account	1,746.50
Total	$2,500.25

I, therefore, allow as special damages $2,500.25, and as general damages, including loss of time and injuries, $7,000; the result being that the plaintiff will have judgment for $9,500.25 and costs of action.

Judgment for plaintiff.

CHECHIK v. FINN.

Manitoba King's Bench, Galt, J. November 10, 1913.

MAN.
K. B.
1913

1. SALE (§ III B 66*a*)—LIEN FOR PRICE—LIEN NOTES—TAKING AFTER SALE—RIGHT OF SUBSEQUENT PURCHASER.

A lien note to the seller given for unpaid purchase money by the buyer of chattels long after the transaction of sale and after title had passed to the buyer, will not be effective to confer a title or right of seizure as against a subsequent purchaser from the original buyer taking without notice of the original seller's pretended lien.

[*Brett* v. *Fearsen*, 17 Man. L.R. 241; and *Collom* v. *McGrath*, 15 Man. L.R. 96, referred to.]

Statement

ACTION by a vendor claiming under a lien note, for the recovery of chattels or their value, and damages for their detention, against a subsequent purchaser.

The action was dismissed.

R. M. Noble, for plaintiff.

J. P. Foley, H. V. Hudson, W. D. Lawrence, and *H. J. Symington*, for various defendants.

Galt, J.

GALT, J.:—The defendant Finn pleads that any dealings he had with the said goods were had and done by the plaintiffs' leave and as agent of the plaintiffs.

The defendant Smith pleads that the plaintiffs represented that Chechik Bros. were the owners of the hay, vegetables and wood in question, and of certain cattle, and that he bought the said goods and paid certain moneys thereon, and after doing so, that the plaintiffs seized 18 cows and other goods, belonging this defendant, and have wrongfully removed the same from the plaintiffs' property and converted them to their own use.

MAN.

K. B.
1913

CHECHIK
v.
FINN.

Galt, J.

Smith counterclaims for damages against the plaintiffs, Gordon, Ironside & Fares Co., Ltd., David Finn and Chechik Bros. The defendants by counterclaim file defences.

The evidence given on behalf of all parties was very lengthy; but the main features of it may be described with reasonable brevity.

It appears that in the year 1910, the plaintiffs owned a certain farm at Bird's Hill, Manitoba, and certain milch cows and other chattels. The plaintiffs sold the farm to Chechik Bros., receiving a small cash payment on account of the land, and on June 1, 1911 (being the year following the sale), the plaintiffs took from Chechik Bros. a lien note for $2,200 payable on or before September 1, 1911. The note is expressed to be given for 20 horses, 4 cows and a lot of other farm implements, and it was provided that the title, ownership and right to the possession of the property for which the note was given should remain at the risk of the plaintiffs until this note or any renewal thereof be fully paid with interest, and that if default were made in payment of the note or if plaintiffs should consider the note insecure, they have full power to declare this and all notes made by Chechik Bros. in their favour, due and payable forthwith, and they may take possession of the property and hold it until the note be paid or may sell the said property at public or private sale, etc. In the summer of 1912, Chechik Bros. became financially embarrassed to the extent of about $35,000. They held a meeting of their creditors and agreed to turn over all their assets or equities to Henry Detchon, of the Credit Manufacturers' Association, for the benefit of their creditors; but, after some weeks, an arrangement was made by which Chechik Bros. agreed to pay $20,000 or thereabouts, over and above said equities.

It was next arranged that Chechik Bros. should give a quit claim of the lands and goods to the plaintiffs, and the plaintiffs should give an agreement of sale of the lands alone to Gordon and Strotz on behalf of creditors.

The creditors had sent the defendant Finn out to examine the property, and he reported that it was not worth their while to take the goods and chattels owing to the outstanding lien note on which $1,500 remained due. The farm accordingly was conveyed to Gordon and Strotz.

At or about the end of August, 1912, the defendant Zelik Smith came on the scene. Smith is a married man and a foreigner. He speaks very poor English, but appears to be an honest hard-working man. He was possessed of about $400 in cash, and was anxious to secure a farm mainly for dairy purposes.

At this period there were 18 milch cows on the property.

The plaintiff Mayer Chechik had sown a certain amount of hay and a vegetable garden.

Under the terms of the transfer from the plaintiffs to James T. Gordon and Charles Roy Strotz, the latter, as purchaser, agreed to allow the plaintiffs, as vendors, possession of the said land until October 1, 1912, or in case the purchasers should sell before that date, they should then give the vendors sixty days' notice to vacate. The time limit had almost expired when Smith came forward as a tenant of the farm.

The defendant Finn had been mixed up in business transactions with all the Chechik brothers for some years, and Smith dealt almost entirely with Finn in his negotiations for the renting of the farm and for the purchasing of the cows, hay, vegetables, etc. The farm was accordingly rented to Smith.

Finn told Smith that if he wanted to buy the cows, hay, etc., he, Finn, could secure them more cheaply than Smith could. Finn also gave Smith to understand that he could assist him financially in closing out the deal, and for these services Smith agreed to pay Finn the sum of $50.

Practically all the information which Smith got respecting the ownership of the property was got by him from Finn. Smith understood that in some way Gordon, Ironside & Fares Co. and the Chechik brothers (that is to say, Mayer Chechik, Louis Chechik and Libir Chechik) were interested in the ownership; but that Finn had the power of dealing with the property.

After an inspection of the farm and cattle, Smith agreed with Finn to buy the cattle, hay, vegetables, etc. for $1,175. Smith paid Finn the $50 as agreed, and took possession of the farm, including the 18 cows and other chattels. Finn knew from Smith that the latter had only $400 in cash.

The plaintiffs Chechik & Gold, and the defendants by counterclaim Louis Chechik and Libir Chechik, all did business in the same building, and, so far as Smith was concerned, all these parties were spoken of during the negotiations and proceedings as "them Chechiks."

Owing to the transfers which had been made between the plaintiffs and the Chechik Bros. and the representatives of the creditors, it is somewhat difficult to ascertain the exact ownership of the goods in question, including the cows. It appears to me that the creditors, having abandoned any claim to the goods, the Chechik Bros. were, at the date of Smith's purchase, the owners of these goods, subject to the lien note which they had given to the plaintiffs, on which $1,500 still remained due. Mayer Chechik practically admitted this also in answer to a question I asked him.

As the plaintiffs were obliged to give up possession of the farm on or about October 1, they were naturally anxious to

MAN.

K. B.
1913

CHECHIK
v.
FINN.

Galt, J.

get rid of the chattels, but Mayer Chechik was very anxious to sell them for cash. However, I find upon the evidence that the plaintiffs authorized Libir Chechik to sell all the chattels, including the cows for $1,175 and to arrange so that the purchase money might be paid in cash. The parties met, and it being well understood by all parties concerned that Smith had only $400 cash, an arrangement was suggested by which Smith should give a chattel mortgage on the cattle and other goods for an amount sufficient to cover the balance of the purchase money, and Smith was quite willing to execute this mortgage. Particulars of the chattels were taken down and instructions were given to draw a mortgage.

Smith had paid the sums of $350 and $50 to Finn on the purchase, and had also paid Finn $50 as his profit or commission on the deal. Cheques for the two first-mentioned sums were handed over by Finn and Smith to the bookkeeper at Gordon, Ironside & Fares Co.'s office for safe-keeping. Libir Chechik admits that the sale was made at the meeting on Sunday, but says it was to be for cash, and the cash was to be raised on mortgage.

A few days afterwards Mayer Chechik appears to have decided upon another course of action.

On October 18, 1912, under the instructions of Mayer Chechik, a bailiff was sent out to the farm, armed with a notice addressed to L. Chechik, at Bird's Hill, stating that Chechik & Gold have this day seized the goods and chattels set forth in the following inventory to satisfy a claim for $2,200 and costs, being a lien note now past due, and that he should proceed to have the said goods and chattels appraised and sold according to law, unless said claim with costs of this distress be paid. Then a pencil note at the foot of the notice mentions 18 cows as per lien note. The note, however, only covered 4 cows.

The lien note in question, as I have already pointed out, was not given until the year after the sale by Chechik Bros. to the plaintiffs, and it was invalid as against Smith, who had no notice of it. See *Brett* v. *Foorsen*, 17 Man. L.R. 241, and *Collom* v. *McGrath*, 15 Man. L.R. 96.

Mr Noble, who appeared as counsel and solicitor for the plaintiffs, stated in answer to a question from the Bench, that at that time the plaintiffs insisted on getting their cattle by hook or by crook, and the above was the method adopted. As a matter of fact, as I have already found, the cattle were not owned by Mayer Chechik, but by the Chechik Bros. subject to the lien note.

Not only were the cattle seized and taken away, but Smith and his family were warned not to touch any of the hay or vegetables, and the latter, being left in the ground, were, of

course, rendered useless by frost. The plaintiffs contend that any negotiations which they had in connection with the goods were with Finn, and that they did not recognize Smith in the matter. Smith, on the other hand, thought that in dealing with Finn he was dealing with the man who controlled the ownership of the goods. I find that Mayer Chechik, on behalf of himself and his partner, authorized Libir Chechik to sell the goods, and that he left it in the hands of his brother to arrange the terms on a cash basis. Furthermore, Mayer Chechik, after knowing that Smith had taken possession of the cattle and goods, extended time of payment from day to day. I find also that Libir Chechik agreed to the sale through Finn to Smith for $1,175 and was quite content at first that the chattel mortgage transaction should go through, whereby it was expected that the requisite balance of cash would be forthcoming.

I think the evidence of Smith was given honestly and frankly, whereas the evidence of the Chechiks, that is to say, Mayer Chechik and Libir Chechik, was in many respects unreliable and given as it would at the moment appear to best suit their purposes.

The seizure of the cattle under the instructions of Mayer Chechik on October 18, was an utterly unjustifiable act. Smith had purchased the cattle in good faith and was endeavouring, with the expected assistance of Finn, to arrange the chattel mortgage when Mayer Chechik, without any warning and under the pretended justification of an invalid lien note, seized the cattle and immediately resold them without advertisement or any chance of relief given to Smith. For the above reasons, I think this action must be dismissed with costs.

As regards the counterclaim, I find that although the moneys paid by Smith to Finn were handed over to the bookkeeper at the office of the defendants Gordon, Ironside & Fares Co., the bookkeeper knew nothing of the transaction, and merely held the money for safekeeping. Shortly afterwards Gordon, Ironside & Fares Co. offered to pay the moneys over to one of the Chechiks or to return them to Smith, but these parties, not knowing what effect such a payment might have upon their rights, declined to receive them. The moneys might have been paid into Court, but Gordon, Ironside & Fares Co. cannot be said to have done anybody an injury by simply retaining the cheques as they did, without cashing them, and they say in their defence that they are ready and willing to hand over and deliver the said cheque, if so directed by this Court, to the said Zelik Smith.

At the same time, by taking the cheques as they did, and by issuing a receipt for the moneys, as they did, these defendants allowed Smith to understand that his purchase was going

MAN.

K. B.
1913

CHECHIK
v.
FINN.

Galt, J.

through all right, and Smith was left under the impression that in a day or two the mortgage transaction would be completed and the whole purchase closed out.

I think the counterclaim against Gordon, Ironside & Fares Co., Ltd., must be dismissed, but, under the circumstances, without costs.

As regards David Finn, as defendant by counterclaim, I think that he was acting throughout as agent for Smith. He took Smith's money and his own commission, and gave Smith to understand that he would "carry him through" satisfactorily as regarded financial arrangements. He brought about the sale, but instead of consummating the chattel mortgage, he appears to have dropped out of the proceedings after delivering the cheques for $350 and $50 to Gordon, Ironside & Fares Co. and taking their receipt. He had nothing to do, however, with the seizure of Smith's cattle. I must, therefore, dismiss the counterclaim as against him also, but under the circumstances, without costs.

As regards the other defendants by counterclaim, namely, Mayer Chechik, and Solomon Gold, Louis Chechik and Libir Chechik, I think that all of these defendants were thoroughly cognizant of the situation of Smith. They knew that he had only about $400 in cash, but was willing to give the chattel mortgage, and they were quite willing that Mayer Chechik should resort to the tactics which he did resort to in order that Chechik & Gold and possibly Chechik Bros. might realize what ready cash they could by a resale of the cattle. It appeared by the evidence that all of these Chechik brothers were in constant communication with one another, and doing business in the same building, so I do not for a moment doubt that the proceedings adopted by Mayer Chechik were fully known to and approved by the Chechik brothers.

The lien note only covered 4 cows, and the other 14 were owned by Chechik Bros. and not by the plaintiffs.

The counterclaim against these four parties will therefore be allowed.

It appeared by the evidence that the value of cows had about doubled during the year that has elapsed since the seizure. The value of the cows was estimated originally at $40 apiece, and the Chechiks knew that Smith had no money wherewith to buy others. I would allow damages in respect of their seizure at $75 apiece, making $1,350.

The vegetables were sworn to be worth at least $100.

Smith shewed in his evidence that, assuming a certain amount of milk was given by the cows during the winter, his profits would have amounted to $250 a month for eight months of the year. On the other hand, it was shewn that the cows

MAN.

K. B. 1913

CHECHIK v. FINN.

Galt, J.

in question could not have been expected to yield nearly so much month by month as the plaintiff estimated. As regards this item, I would fix $500 as a reasonable and moderate amount of loss which the plaintiff sustained by the loss of his cows.

Judgment will therefore be entered dismissing the action with costs, and dismissing the counterclaim without costs as against David Finn and Gordon, Ironside & Fares Co. Ltd. The latter defendants must re-deliver the two cheques, with indorsement, if necessary, to Zelik Smith.

The counterclaim as against Mayer Chechik and Solomon Gold, trading as Chechik & Gold, and Louis Chechik and Libir Chechik, trading under the name of Chechik Bros. is allowed with costs.

I assess the damages at $1,950, from which will be deducted the $1,175, the price of the goods as agreed, leaving a balance of $775 to be paid by Chechik & Gold and Chechik Bros. to Zelik Smith.

I think the circumstances of this case justify me in removing the statutory limit in taxing the costs of the counterclaim, which I accordingly do.

Judgment accordingly.

WILSON CO. v. MAYFLOWER BOTTLING CO.

N. S.

S. C. 1913

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell, and Ritchie, JJ. November 29, 1913.

1. INTOXICATING LIQUORS (§ III C—65)—UNLAWFUL SALE CONTRACTS — SALES BY AGENT.

Knowledge of the agent making sales of liquor in bulk for a non-resident seller, that the buyer intended to re-sell same in a district in which its delivery by re-sale would be illegal as contravening the Nova Scotia Temperance Act, 1910, will be imputed to the non-resident principal so as to debar him from recovery in Nova Scotia in an action for goods sold or delivered or upon bills of exchange given for the price.

2. CONTRACTS (§ III B—211)—VALIDITY AND EFFECT—SALES OF LIQUOR FOR RE-SALE IN VIOLATION OF LAW.

A non-resident vendor who contracts to sell an article (*ex. gr.*, intoxicating liquor) with the knowledge that it is to be used for re-sale in violation of law cannot recover the price by action in the courts of the province, the laws of which would be infringed by the contemplated re-sale.

Statement

THIS was an action brought by plaintiff, doing business at Montreal in the province of Quebec, against defendant doing business at Sydney, in the province of Nova Scotia, to recover the amount of two bills of exchange, drawn by plaintiff upon defendant and accepted by defendant, and duly presented for payment and dishonoured; also for the price of goods sold and delivered by plaintiff to defendant, at defendant's request. The

N. S.

S. C.
1913

WILSON CO. v. MAYFLOWER BOTTLING CO.

Statement

principal defence to the action was, that the bills of exchange sued on were given for the price of intoxicating liquor, sold by plaintiff to defendant, in Sydney, in the county of Cape Breton, in violation of the Nova Scotia Temperance Act, being ch. 2 of the Acts of the province of Nova Scotia for the year 1910, plaintiff knowing that said Act was in force in Sydney and that the sale was a violation of the provisions of the Act. A similar defence was pleaded to the claim for goods sold and delivered. The cause was tried before Longley, J., who gave judgment in favour of defendant, on the ground that the goods in question were sold by plaintiff to defendant through plaintiff's agent, who knew that it was contrary to law for defendants to re-sell the liquor.

The appeal was dismissed on an equal division of the Court.

H. Mellish, K.C., for appellant.

W. F. O'Connor, K.C., and *A. D. Gunn*, for respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This action is on two bills of exchange, accepted by defendant company, payable at the Royal Bank and Canadian Bank of Commerce, Sydney, Cape Breton. As appears by the record, plaintiff's case was admitted, with the qualification that the amount claimed covered intoxicating liquor to be re-sold in the county of Cape Breton, where the Nova Scotia Temperance Act is in force. The defence set up is, that the sale was illegal, as it was in violation of the Nova Scotia Temperance Act, ch. 2, Acts of 1910, and that the plaintiff knew such Act was in force in the city of Sydney, and that the sale was in violation of the said Act.

The sale was made at Sydney, through plaintiff's agent, B. J. Beckwith. It is shewn that Beckwith was at the time well aware that defendant company was engaged in the sale of liquor in Sydney. This knowledge is brought home to Beckwith, through many conversations on the subject of liquor selling in Sydney, and not denied.

Cases of this nature have been many times before the Court, varying only in details, and it has been held again and again that sales, made by an agent, knowing the business defendant was engaged in, were and are illegal and void; that the knowledge of the agent, in such cases, is the knowledge of the principal. The only one to which I need particularly allude is *St. Charles Co.* v. *Vassallo*, 45 N.S.R. 195, in which it was held that where a sale of intoxicating liquor is made by a principal through an agent to a purchaser who, to the knowledge of the agent, acting in the course of his employment and within the scope of his authority, intends to dispose of the same in violation of law, the contract is void for illegality, and the principal cannot recover the purchase price.

All these elements are to be found in the present case, but it has been suggested that it was incumbent on the defence to prove conclusively knowledge on the part of the agent that this liquor was purchased by defendant from plaintiff for the purpose of selling to customers in Sydney, which would be in violation of the law. The only witness for the defence was Philip Cohen, manager of defendant company in Sydney, Cape Breton. He says the transaction took place at Sydney, with B. S. Beckwith, plaintiff's representative; that he has been dealing with him for the last two or three years, indeed opened the account with him; that Beckwith has been many times at his place of business; that they talked it over in a general manner about the liquor business, and that he was subpœnaed as a witness against Beckwith for selling liquor in Sydney. He is then asked:—

Q. You might detail fully the conversation that took place? A. We had many conversations about the liquor business here in this town. The conversation was always this way; that the business to sell goods here to customers is very uncertain, because you could not collect whatever you sell. I could not collect money for liquor as it is illegal business down in this county; the Nova Scotia Temperance Act is in force.

Q. Did you have those conversations with him each time an order was given? A. Many time we used to talk it over how bad it is. I used to tell him people got as high as two and three hundred dollars from us. Whatever time Mr. Beckwith used to come in the office we always used to have this same conversation about the hard job to get money from the customers. . . . He used to tell me the same thing; they had the same trouble to get money from their customers.

Now, if this evidence is true and there is no denial, how is it possible to doubt that Beckwith was fully aware of the purpose for which this liquor was purchased, unless we are to close our eyes and understandings to the plain inferences we are bound to draw. He knew the nature of defendant's business. He knew that he was selling liquor in Sydney where it was unlawful. He knew that defendant was selling liquor and unable to collect his bills for the same. There is not a hint or suggestion that it was for sale elsewhere.

It has been further argued that sec. 4, ch. 2, Acts of 1910, relieves plaintiff from responsibility. It provides that:—

This part shall not affect any *bonâ fide* transaction in respect to liquor between a person in any portion of the province in which this part is in force and a person in another province or in a foreign country.

If the evidence above given be true, can it be reasonably believed that this sale was a *bonâ fide* transaction; that is to say, really innocent on the part of the vendor?

I am unable to see that this section affects the question here. No doubt any person may purchase liquor in any other province,

N. S.
S. C.
1913
WILSON CO. v. MAYFLOWER BOTTLING CO.

or in any foreign country, for his own use, and not violate the Act, but if he purchases the liquor for re-sale in this province where it is prohibited, and to the knowledge of the seller it is to be so retailed, the price cannot be recovered. In making such a sale, the intention of the vendor is to violate the law of the province, and this saving section was never meant, nor can it be construed to mean, that such a sale would not be illegal.

I am of opinion this appeal should be dismissed with costs.

Meagher, J.

MEAGHER, J., read an opinion to the effect that it being possible for plaintiff to make a legal sale to defendant, the burden was upon defendant to prove that the intention was to sell the liquor in question otherwise than legally, and in his opinion there was not a word of evidence to shew such intention. Conceding that plaintiff knew that defendant was selling contrary to law, there was no proof that he knew that he intended to sell this particular liquor in violation of law. The case of *St. Charles* v. *Vassallo*, 45 N.S.R. 195, had nothing to do with this case. The only thing determined there, was the question of fact. He was of the opinion that the proof necessary to overcome the presumption against illegality was wanting here.

Russell, J.

RUSSELL, J.:—The plaintiff, through his agent Beckwith, sold in Sydney, several lots of whiskey to the defendant who was engaged in the liquor trade at Sydney, and the present action was brought to recover from defendant $1,308.56, being the price of the liquor, part of it covered by dishonoured acceptances. The learned trial Judge found for the defendant, but his decision does not touch, in any way, the only question on which the right of the plaintiff to recover depends. He finds that "Beckwith knew the law, and knew that in selling to defendant, he was liable to have the action declared void in the matter." Whatever may be the meaning of the last clause of this finding, it is plain from the whole sentence that the decision is based entirely upon the answer to a perfectly irrelevant inquiry, by the learned trial Judge, as to the agent's knowledge of the law. The answer to that question is, of course, found in the irrebuttable presumption which lies at the foundation of our legal system, and is embodied in a maxim too trite and familiar to bear citation. There is, I believe, but one case of this class in which a defendant's knowledge of the law was ever assumed to have any effect on the result, the cause of *Waugh* v. *Morris*, L.R. 8 Q.B. 202. Waiving, altogether, any possible criticism of the anomalous nature of the inquiry made in that case, it can have no application whatever to the circumstances of the case now under consideration, in which the only question to be considered was, whether the plaintiff, through his agent,

was aware of the illegal object with which the liquor was purchased. The burden of proving such knowledge was, of course, on the defendant, and as there is unfortunately no finding by the trial Judge we must only do the best we can with the evidence before us.

I am unable, for my own part, to come to any other conclusion than that the agent was fully aware of the purpose with which the liquor was purchased. I think the defendant's evidence may be fairly paraphrased as importing that the conversation between himself and Beckwith had reference to the nature of the business in which the defendant was engaged, which was the illegal selling of intoxicating liquor. The business, defendant said, in one of these conversations, was very uncertain because he could not collect money for liquor, "as it is an illegal business done in this county." Defendant proceeds to say: "He," that is Beckwith, "used to tell me the same thing." Possibly that might be read to mean merely the same thing that he had told him before. But what does he mean when he says that the agent told him that they had "the same trouble to get the money from their customers." The same as what. Surely the same trouble as the defendant had for the same reason, that the business was illegal, and collections could not be enforced. If conversations of this nature took place every time the agent came into the defendant's office, and he came in every time he visited Sydney, I cannot resist the conclusion that the agent knew the nature of the defendant's business, and was fully aware of the purpose with which the liquor was purchased. I do not agree in the plaintiff's contention that the evidence to warrant such a finding need be as clear as if the plaintiff were being tried on a charge of conspiracy to commit an offence, or as an accessory before the fact to a crime committed by the defendant. A preponderance of evidence is sufficient for the present purpose and the evidence in this case, such as it is, is not contradicted.

The authorities are too clear to require citation that a vendor, who sells an article with the knowledge that it is to be used for the purpose of violating the law, cannot recover the price, and that a note or bill, given in connection with such a sale, is given on an illegal consideration, and cannot be recovered on, except in the hands of a *bonâ fide* holder for value without notice of the illegality.

But it is said that the Nova Scotia Temperance Act enables the plaintiff to recover, notwithstanding the illegality of the consideration. It enacts, in effect, that the prohibitory sections of the statute shall not affect any *bonâ fide* transaction, in respect to liquor, between a person in any portion of the province, in which the Act is in force, and a person in another pro-

N. S.

S. C. 1913

WILSON CO. v. MAYFLOWER BOTTLING CO.

Russell, J.

vince, or in a foreign country. I can have no manner of doubt that all that is meant by this provision as applied to this case is that the statute shall not be read as being intended to prohibit the sale of liquor by a dealer in Montreal to the dealer in Sydney. So far as the prohibitions of the statute are concerned such a sale is perfectly lawful. The defendant could lawfully buy for his own use, or, as I assume, for exportation to some other province where the liquor could be lawfully sold or used, but he could not lawfully buy for the purpose of re-sale in the county of Cape Breton. The sale from the plaintiff to the defendant is not illegal because it is prohibited by the statute. It is not prohibited by the statute. It is void for illegality, because, although *primâ facie* innocent, it is designed to further the unlawful purpose of violating the Temperance Act of Nova Scotia. There is, of course, a sense in which this conclusion does allow the statute to "affect the transaction." Confessedly the transaction would be innocent under all the existing conditions if it were not for the statute. When we say that the sale is void, not because the statute prohibits it, which I concede, but because the plaintiff knows that the liquor is to be used for an unlawful purpose, we must be allowing the statute to "affect the transaction," because the unlawfulness of the purpose is due to the provisions of this very statute. But this is a subtlety which was never in the mind of the Legislature. I should incline to characterize it as a quibble. The purpose of the clause was, I have no doubt, merely to except from its provisions the case of a sale by a dealer outside of the province. The Legislature meant to say no more than that the prohibitions in the statute did not apply to such a sale.

Ritchie, J.

RITCHIE, J.:—This is an action brought to recover $1,308.56, the price of intoxicating liquors sold by the plaintiff company to the defendant company. Part of the amount is covered by bills of exchange. The defence of illegality is set up, the ground of such illegality being that the liquor was sold with the knowledge on the part of the plaintiff company that it was purchased for sale in violation of the Nova Scotia Temperance Act. This knowledge is essential to the defence because it is provided in the Nova Scotia Temperance Act, sec. 4, that it

> shall not affect any *bonâ fide* transaction in respect to liquor between a person in any portion of the province in which this part is in force, and a person in another province or in a foreign country.

The plaintiff company carrying on business in Montreal, a sale of intoxicating liquors by this company to a man in Sydney, where the Act is in force, for his own use, or to be disposed of by him in a way not in violation of the Act, is a perfectly lawful sale. If, however, the vendors know (and the knowledge

of their agent must be imputed to them) that the liquor is purchased for re-sale in Sydney in violation of the Act, a recovery of the price cannot be had, because the vendors have participated in the illegal transaction, by selling the liquor knowing that it was to be used for an illegal purpose. The burden of proof is on the defendant company to establish the fact that it intended to re-sell the liquor in violation of law, and that the plaintiff knew that by selling the liquor it was assisting in the illegal transaction. In Leake on Contracts, 6th ed., 515, the law as to the burden of proof, where illegality is set up, is stated as follows:—

> An agreement may involve some matter or purpose which is illegal, and therefore renders it void of legal effect as a contract. The general presumption of law in favour of validity casts the burden of establishing illegality as a fact upon the party asserting it.

I think it follows, from this statement of the law, that if the evidence is doubtful, as to whether the purpose was illegal or not, the inference of fact is to be preferred which is in favour of legality rather than illegality. In the case of *Hire Furnishing Co.* v. *Richens*, 20 Q.B.D. 387, at p. 389, Lord Justice Bowen said:—

> There is a broad principle that where a defendant is attempting to set aside a proceeding for illegality, and the facts connected with it are equally consistent with the transaction being legal or illegal, it lies on the defendant to prove the illegality.

In my opinion, the only question in this case is, has the defendant company sustained by clear and satisfactory evidence the burden of proof which the law casts upon it. After very careful consideration, I have come to the conclusion that this burden has not been sustained. Could the defendant company have bought this quantity of liquor without any intention of violating the Act, and for the purpose of lawful re-sale? The answer to this, I think, must be in the affirmative. For instance, the liquor might have been purchased for the purpose of being shipped from North Sydney to Newfoundland for re-sale there. This would have been a perfectly lawful transaction. I have read and re-read the evidence, and I cannot find any evidence of what the defendant company intended to do with these particular liquors. Nor can I find any evidence as to what was in fact done with the liquors. Every drop of it may have been shipped from North Sydney to Newfoundland, so far as the evidence goes. It is a fair inference from the evidence that the defendant company were engaged in illegally selling liquor in Sydney, but the evidence is silent as to how they disposed of or intended to dispose of this particular liquor. The defendant company could dispose of this liquor legally or illegally. The evidence does not tell me what it intended to do

N. S.

S. C.
1913

WILSON CO.
v.
MAYFLOWER BOTTLING CO.

Ritchie, J.

or what in fact was done. The burden of proof rests upon the defendant company, and the presumption is against illegality. All the evidence amounts to is that both the defendant company and the agent of the plaintiff company were in the liquor business and fully recognized that the price of liquor disposed of in violation of the Act could not be recovered, but, notwithstanding this, it does not follow that the defendant company intended to continue to act illegally when there was a legal way of disposing of the liquor purchased from the plaintiff company. I decline to find in favour of an illegal intent without clear and satisfactory proof.

As I read the learned trial Judge's decision there is no finding against the plaintiff company on the crucial point of the case to which I have referred, but if there was such a finding I would not, having regard to the rule as to burden of proof be able to agree with it. In my opinion the appeal must be allowed with costs.

Appeal dismissed on equal division of Court.

N. S.

S. C.
1913

WHITE v. McDOUGALL.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Meagher, Russell and Longley, JJ. November 22, 1913.

1. TENDER (§ I—2)—PAYMENT INTO COURT.

A defendant sued in a civil matter in a magistrate's court in Nova Scotia cannot effectually pay a lesser sum to the magistrate as a payment into court under R.S.N.S. 1900, ch. 160, to answer the plaintiff's demand, and thereby avoid payment of further costs of suit if his contention as to the amount is sustained, unless he has first made a tender of the amount to the plaintiff and proves the tender at the trial.

Statement

APPEAL from the judgment of Chipman, County Court Judge, in favour of plaintiffs in an action to recover money alleged to be due by defendant to plaintiffs. The action was brought to recover the sum of $67.75 and was originally tried before George W. Smith, stipendiary magistrate for East Hants with a jury. Defendant pleaded a set-off of $50, money paid, and paid into Court the balance of $17.75. There was an appeal to the County Court and a re-trial before Chipman, County Court Judge, when judgment was given in favour of plaintiffs for the amount originally claimed without reference to the sum of $17.75 paid into Court.

From this part of the judgment and order defendant appealed.

The appeal was dismissed.

H. W. Sangster, for appellant.

W. M. Christie, K.C., for respondents.

N. S.
S. C.
1913
WHITE
v.
McDOUGALL.
Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The only question on this appeal is whether a defendant sued in a magistrate's Court can effectually pay money into Court and avoid payment of costs of suit without first having made a tender of the amount to the plaintiff and proved the tender at the trial. It is to be noted that even in the Supreme and County Courts, payment into Court can only be made by virtue of a statute authorizing this to be done, and no previous tender is required. The same may now be done in a magistrate's Court, but with this difference, that a tender must have been made before action and proved. Sec. 22, ch. 160, R.S.N.S. 1900, enables this to be done. In this case no tender of any kind is shewn to have been made before action, and, therefore, neither the magistrate nor the County Court Judge could have given effect to the payment.

The Judge of the County Court could not have ordered the magistrate to return the money so paid to that Court, and the plaintiff would have no right to demand it from the magistrate. The order below, therefore, giving judgment in plaintiff's favour for the full amount was perfectly correct. I see no difficulty whatever in defendant's right to have the money returned to him by the magistrate. If not repaid on demand he has a clear action against the magistrate, and I, further, am inclined to think the magistrate refusing to pay would be liable to punishment in other ways. For the magistrate to retain or refuse to give back to the defendant the money as paid would be nothing short of a crime, and if proved in addition, he should be removed from his office.

This appeal should be dismissed with costs.

Meagher, J.

MEAGHER, J.:—I have reached the same conclusion, except as to the magistrate's liability, as to which I do not think it advisable to say anything. Whether the defendant could recover from the magistrate or not cannot make any difference. The appeal must be dismissed in any event.

Russell, J.

RUSSELL, J.:—The defendant paid $17.75 to the justice in whose hands plaintiff had placed an account of $67.50 for collection. It was paid in after the justice had issued his summons, as I infer from the verdict of the jury empannelled by the justice in which the sum is referred to as the "$17.75 now paid into Court."

I doubt if the defendant can be called upon to pay this amount twice to the plaintiff. Sec. 22 of the chapter as to civil procedure in justices' Courts, [R.S.N.S. 1900, ch. 160] clearly warrants the payment of money into the hands of the justice. The only consequence of paying it without a previous tender, or paying less than the amount due is inferentially to affect the question of costs. If defendant proves that he tendered the

N. S.
S. C.
1913
WHITE
v.
McDOUGALL.
Russell, J.

amount before action brought and paid it into the hands of the justice before trial he will be entitled to his costs. If not, it is to be inferred that he will not be entitled to his costs and the usual result as to costs will follow. The question whether the money is paid into Court and in the custody of the law or is a payment to the justice in his individual capacity ought not to depend upon the proof or failure to prove a tender, or on the question whether it turns out to be or not to be sufficient to satisfy the plaintiff's claim.

The procedure is defective in reference to such cases when appealed to the County Court. I am of opinion that it was the duty of the justice to send the money paid, along with the papers, to the clerk of the County Court. Had he done so there would have been no difficulty. Judgment would have been given as a matter of course and an order would have been made for the payment out of the money paid into Court.

In *Elliot* v. *Callow*, 2 Salk. 597, 91 Eng. R. 506, it was held that the money paid into Court must be paid to the plaintiff, although the latter had become nonsuit, and on the authority of this case it is said in Chitty's Archbold, 14th ed., 347, that in general, in any event, the money paid into Court belongs to the plaintiff whatever be the result of the action and he is entitled to it although he be nonsuit, and further authority is cited, that if the plaintiff dies his executors will be entitled to it. It has also been said that the defendant can in no case recover it back, for which the dictum of Buller, J., is cited in *Malcolm* v. *Fullerton*, 2 Term Reps. 648.

One or other of the parties in this case must lose the money which the justice has embezzled. The plaintiff having had the selection of the justice it may fairly be contended he is the party on whom the loss should properly fall.

Of course the case is not free from doubt, so very doubtful indeed, that I do not feel able to dissent from the opinions expressed by the learned Chief Justice.

Longley, J.

LONGLEY, J.:—From the judgment which has just been rendered by Mr. Justice Russell, I should draw the inference that a judgment should be entered in favour of the appeal, but as he reaches the conclusion that it is doubtful, and his vote goes with the majority of the Court, I feel it would be useless for me to attempt to dissent.

Appeal dismissed.

REX v. LICENSE COMMISSIONERS OF POINT GREY.

B. C.

C. A. 1913

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 18, 1913.

1. CERTIORARI (§ I A—9)—JURISDICTION — USE OF WRIT—INTOXICATING LIQUOR CASES—LICENSE COMMISSIONERS—DECISION OF—REVIEW.

The proceedings of a Board of License Commissioners in granting a license for the sale of intoxicating liquors may be reviewed on *certiorari*. (*Per* Macdonald, C.J., and Irving, J.)

[*Rex* v. *Woodhouse*, [1906] 2 K.B. 501; *Re Constables of Hipperholme*, 5 D. & L. 79; *Reg.* v. *Aberdare Canal Co.*, 14 Q.B. 854, 117 Eng. Rep. 328, followed; *Boulter* v. *Kent Justices*, [1897] A.C. 556; and *Bunbury* v. *Fuller*, 9 Ex. 109, considered.]

2. CERTIORARI (§ II—21)—PROCEDURE—AFFIDAVITS — SUFFICIENCY — INFORMATION AND BELIEF.

Affidavits in support of an application for a writ of *certiorari* cannot be accepted as evidence when the essential matters are sworn to on information and belief without the grounds therefor being stated. (*Per* Macdonald, C.J., Irving, and Martin, JJ.)

[*Re J. L. Young Mfg. Co., Young* v. *J. L. Young Mfg. Co.*, 69 L.J.Ch.D. 868; and *United Buildings Corporation Ltd.* v. *Vancouver* (B.C.), 13 D.L.R. 593, at 600, specially referred to.]

3. INTOXICATING LIQUORS (§ II A—35)—LICENSES—GRANT OF "REGISTERED TOWNSITE"—WHAT CONSTITUTES.

A subdivision of land into lots of ordinary town size, duly registered in the land titles office, constitutes a "registered townsite" within the meaning of sec. 355 of the Municipal Act, R.S.B.C. 1911, ch. 170, relating to granting licenses for the sale of liquor in "registered townsites." (*Per* Macdonald, C.J., Irving, and Martin, JJ.)

4. INTOXICATING LIQUORS (§ II A—35)—LICENSES — GRANTING—HOTELS —STATUTORY REQUIREMENTS.

Although license commissioners are directed by statute to take evidence "on oath" upon determining an application for license, they may, nevertheless, proceed upon admissions made by the parties and their counsel at the hearing, and so take cognizance of tacit acquiescence of both parties in a proposal to obtain the report of the license inspector and in the subsequent consideration of his report by the commissioners without objection from counsel. (*Per* Martin, J.A.)

[*R.* v. *Farnham, JJ.*, 18 Times L.R. 614, applied.]

Statement

APPEAL from an order quashing on *certiorari* the allowance by the Point Grey Board of License Commissioners of a license for the sale of intoxicating liquors.

The appeal was allowed.

Ritchie, K.C., for appellant.

Savage and *Harvey*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.:—The respondents' case is that the requisite number of qualified persons did not sign the petition for the hotel license in question, and secondly, that the premises are not such as could be licensed under the Act. I agree with my brother Irving, that the proceedings are such as may be brought up on *certiorari;* but granting this, I think the material

B. C.

C. A.

1913

REX
v.
LICENSE COMMISSIONERS OF POINT GREY.

Macdonald, C.J.A.

before us fails to make out a *primâ facie* case in support of the order *nisi*.

The affidavits offered to shew that the petition for the license was informal cannot be accepted as evidence for this reason, that the deponents state the essential matters on belief only, and do not state the grounds of that belief. Statements founded on mere belief are not evidence. There is, therefore, no evidence that the petition was insufficiently signed.

With respect to this class of evidence I should like to quote some of the observations of the Judges in *Re J. L. Young Manufacturing Co., Young* v. *J. L. Young Manufacturing Co.* (1900), 69 L.J. Ch.D. 868. Lord Alverstone, C.J., said:—

> I notice that in several instances the deponents make statements on their "information and belief," not only without saying what is the source of the information and belief, but in many respects what they so state is not confirmed in any way. In my opinion, so called evidence on "information and belief" ought not to be looked at at all unless the Court can ascertain not only the source of the information and belief, but also that the deponent's statement is corroborated by some person who speaks from his own knowledge. It should be understood that such affidavits, in case they should be made in future, are worthless, and ought not to be received as evidence in any shape whatever. The sooner that affidavits are drawn so as to avoid stating matters that are not evidence, the better it will be for the administration of justice.

Rigby, L.J., said:—

> Every affidavit of that kind is utterly irregular; and, in my opinion, the only way to bring about a change in that practice is for the Judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit.

Vaughan Williams, L.J., observes that:—

> The only satisfactory remedy would be that no one should pay for such affidavits at all, and that the solicitor who has drawn them and made copies of them should be left out of pocket in respect of them.

I think the hotel is situate in a registered townsite within the meaning of sec. 355 of the Municipal Act, R.S.B.C. 1911, ch. 170. There are no such things, strictly speaking, as registered townsites, but it is a matter of common knowledge that subdivisions are made for townsite purposes and registered in the land registry office. There is such a subdivision at the place in question here. Such subdivisions are the only things which the Legislature could have had in mind when enacting said sec. 355. Therefore, the signatures of the majority of qualified persons within the prescribed area was all that was necessary to the petition. Hence, the report of the license inspector, if indeed it could be considered as evidence in this case at all, does not help the respondents.

I am also against the respondents on the other grounds of their attack on the license.

The appeal should be allowed and the order *nisi* discharged with costs here and below.

IRVING, J.A.:—The applicants (George Grauer and Joseph Dumaresq), on March 31, 1913, obtained a liquor license for the sale of liquors in a hotel under the alleged authority of sec. 355 of the Municipal Act, R.S.B.C. 1911, ch. 170, and by-law No. 15, Point Grey, 1911. On May 7, 1913, an order was made that a writ of *certiorari* should issue directed to the commissioners to return into the Supreme Court the application for the license together with the petition, evidence, and all proceedings relating to the application, the ground of the judgment being that the Board had no jurisdiction to grant the said license as the applicants had not complied with the provisions of the Municipal Act, and the said by-laws governing the granting of such a license.

Mr. Ritchie argued before us that *certiorari* was not the method by which the proceedings before the Licensing Board could be reviewed. A clear understanding of the nature of the cases in which the writ will lie will, I think, assist in the determination of that question.

In the case of *Rex* v. *Woodhouse* (Justices of Leeds), [1906] 2 K.B. 501, the question of whether or not a *certiorari* would lie to quash a provisional license to sell liquor and a subsequent order referring the matter to the compensating Board under the Licensing Act, 1904, was discussed very fully by Vaughan Williams and Fletcher Moulton, L.JJ., who differed in the result, but both agreed that a *certiorari* would lie. The earliest case cited, *Rex* v. *Lediard* (1751), Sayer 6, 96 Eng. R. 784, settled the point that a *certiorari* does not lie to remove any other than judicial acts; *Rex* v. *Pryse Lloyd* (1783), Caldecott 309, was the next in point of date. There the Court of Quarter Sessions had ordered Mr. Edward Jones, an attorney, to bring an information against the defendant for several misdemeanours committed by him in his office of justice of the peace. A rule *nisi* for a *certiorari* had issued to bring up this order, but later the rule was discharged and the *certiorari* quashed. The next case referred to was decided in 1788 (*Rex* v. *King et al.*, 2 Term Rep. 234). That case, though cited as an authority for the proposition, that common laws Courts had no jurisdiction to examine into rates by *certiorari* is really an authority the other way, because the refusal to grant the writ there was based on reasons of expediency, and not on account of the want of jurisdiction. In *Re the Constables of Hipperholme* (1847), 5 D. & L. 79, the Court held that the order of two jus-

B. C.
C. A.
1913
REX
v.
LICENSE COMMISSIONERS OF POINT GREY.
Irving, J.A.

tices, appointing a constable under the powers of 5 & 6 Vict. ch. 109, sec. 19; and in *Reg.* v. *Aberdare Canal Co.*, 14 Q.B. 854, 117 Eng. R. 328, where the Canal Company being "bound to make such bridges . . . and other conveniences . . . as the commissioners shall from time to time judge necessary, and appoint" a *certiorari* was allowed to issue to bring up an order approving the making of a bridge. In *R.* v. *Woodhouse*, [1907] A.C. 420, *sub nom. Lord Mayor of Leeds* v. *Ryder*, the House of Lords did not express any opinion on the question of *certiorari* being the proper remedy. Counsel assumed that it was, and the argument proceeded on that basis.

The result of these cases is to shew that the procedure by *certiorari* applies in many cases in which the body whose act is criticised would not ordinarily be called a Court, nor would its act be ordinarily termed "judicial acts." That phrase must be taken in a very wide sense. Lord Fletcher Moulton (then Lord Justice) in *Rex* v. *Woodhouse* (*Justices of Leeds*), [1906] 2 K.B. 501, at p. 535, says:—

> The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance, to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law.

Boulter v. *Kent Justices*, [1897] A.C. 556, did not decide that in no case will a *certiorari* lie to bring up the determination of the licensing justice, or that it will not lie in cases where the justices have no jurisdiction, because either of their personal want of qualification, or if the subject matter being outside the jurisdiction, some of the conditions on which the right to exercise jurisdiction depended has not been satisfied, there *certiorari* would lie. The compliance with these conditions goes to the jurisdiction, and no Court of inferior jurisdiction can give itself jurisdiction by proceeding on an assumed fact which is not a fact; and in my opinion you cannot by drawing an order or record with no defects on its face escape the consequences of acting without jurisdiction.

In *Bunbury* v. *Fuller* (1853), 9 Ex. 109, in delivering the judgment of the Exchequer Chamber, Coleridge, J., said, p. 140:—

> Now it is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter, which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary in-

quiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court. Then to take the simplest case—suppose a Judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented, the Judge must not immediately forbear to proceed, but must inquire into its truth or falsehood and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error, on this Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake.

Irving, J.A.

On these grounds I think *certiorari* was the proper method by which the proceedings could be reviewed.

But for the reasons given by the learned Chief Justice the writ cannot be allowed. The appeal will therefore be allowed.

MARTIN, J.A.:—It is necessary to decide at the outset whether or no the hotel in question is "in any registered townsite" because upon the answer to that question depends the application of sec. 355.

Martin, J.A.

It is stated in the respondents' notice of motion for an order *nisi*, and also in the appellants' notice of appeal, that the hotel is on a lot

> situate at the corner of Fourth street and River road, being the land and premises known and described as lot six (6) in subdivision of block A, in district lot 318, in the municipality of Point Grey, said land and premises being at Eburne in the said municipality,

and in the affidavits of the appellants Eburne is described as "the town of Eburne," and on the argument respondents' counsel admitted that the said subdivision, with lots of the ordinary town size, was duly registered in the Vancouver land registry office as "Subdivision Map number 3068," but contended that as it was not "designated by any name indicating the land to be a city, town, townsite, etc.," under sec. 19, sub-sec. 3 of the Land Registry Amendment Act, 1912 it cannot be said to be a registered townsite under said sec. 355. But said sub-sec. (3) only in effect directs that in future no map or plan which is so designated shall be deposited "unless the Attorney-General directs" and it has no application to maps or plans already deposited or to those which are not designated as aforesaid. The expression "registered townsite" is a loose one, and is not defined in the Act, but I do not doubt that it includes such a *de facto* one as that in question—commonly known as the "town of Eburne"—having a duly registered subdivision of town lots.

Such being the case, sec. 355 applies and the respondents

B. C.
C. A.
1913
REX
v.
LICENSE COMMISSIONERS OF POINT GREY.
Martin, J.A.

undertook to shew that the license commissioners had no jurisdiction because there was before them no

> petition signed by a majority of the resident landowners and resident householders (not being Chinese, Japanese, other Asiatics or Indians) within a radius of three miles. . . .

It is objected that they have not done this because their affidavits are based on the bald statements of belief, the exact words used being, "I verily believe," without disclosing the grounds thereof as required by rule 523.

I recently considered and cited the authorities on this point in the *United Buildings Corporation Ltd.* v. *City of Vancouver*, 13 D.L.R. 593, at 600, where the same words were used, and it is the settled practice that "such statements are worthless and ought not to be received." But it is further objected that, even if they could be received, they only depose that the petition was not signed by "at least three-fifths" of said landowners and residents "and their wives living with them," which is something required by sec. 354 and not by sec. 355, which only requires a majority of said owners and residents without their wives. This objection also is fatal on the face of it, and therefore it must be held that sec. 355 governs the case, and that the Board had jurisdiction.

Then, with respect to the objection taken under 356, that the premises were not provided with and did not contain "at least twelve bedrooms, hotel accommodation "for at least six travellers, and stabling and provender for at least six horses," I am satisfied, on the evidence, assuming that we can review it on these *certiorari* proceedings, that there was a substantial compliance with the Act. So far as regards the stabling, the premises were clearly provided with what was necessary, and at the hearing, we informed the appellants' counsel that we would not call upon him to answer that point, the temporary accommodation adjoining the hotel, which was provided for that purpose, being ample and adequate.

As to the bedrooms and accommodation, there was no evidence of any kind before the Board of Commissioners at the hearing (as the minutes thereof shew) to raise any doubt as to the accuracy of the report of the license inspector (the proper officer appointed by by-law No. 15, sec. 22, to report on all applications) which was submitted to them at the final meeting, pursuant to resolution passed at the first meeting, and although both applicants and their opponents were represented by counsel at the hearing, no objection was taken to the proposal to obtain the report nor to the reception of it at the final meeting, which was held for the express purpose of receiving and considering it. That report states that, "to the best of my knowledge, all the provisions of sec. 355 of the Municipal Act are complied

with," and, as no one had anything to say in answer or opposition to it, it was formally adopted, and the license granted. In such circumstances, apart from any question of evidence at all, the relevant statements in the report must be regarded as equivalent to admitted facts between the litigants on which any tribunal would be justified in acting. If authority were wanted on such a point it will be found in *The King* v. *Justices of Farnham*, [1902] 18 Times L.R. 614, wherein, at p. 616, no one questioned the right of commissioners to act upon "admissions made in open Court during the hearing." As the matter came before it, I am at a loss to conceive how the Board could act in any other manner than it did, and it had no more reason than any other tribunal to suppose that parties before it would endeavour to play fast and loose with its procedure, or escape the consequences of their open and formal acts with respect to the issues being fought out.

In this view it is really unnecessary to decide what kind of evidence the Board is restricted to receiving under sec. 337 (2), and I shall content myself by observing that the section obviously must be read with sec. 447 (as applied by sec. 362), and if it is to be held to mean that "the party or witnesses" can only be examined "on oath," that means *viva voce* and nothing else, and therefore the contention of the respondents' counsel as to "sworn evidence" only being allowed in, is a self-destructive one, because the statutory declarations which he relied upon and are stated in the respondents' affidavits to have been filed with the Board, are unquestionably not *viva voce* evidence, and therefore were wholly inadmissible.

The appeal, I think, should be allowed.

GALLIHER, J.A., concurred in allowing the appeal. Galliher, J.A.

Appeal allowed.

REX v. DAVEY.

ONT.
S. C.
1913

Ontario Supreme Court, Lennox, J., in Chambers, December 13, 1913.

1. CERTIORARI (§ II—30)—CONTROVERTING THE RETURN—SUMMARY CONVICTION—USE OF EVIDENCE IN A PRIOR CASE.

A magistrate's return in *certiorari* proceedings is conclusive only as to matters which are required to be included and does not prevent the controverting of the magistrate's statement therein that it had been agreed that the evidence in another case previously tried should be considered as applicable, where the record of the depositions and proceedings contained no reference to such consent or agreement.

[*R.* v. *Strachan*, 20 U.C.C.P. 182, referred to.]

Statement

MOTION by Ezra E. Davey, the defendant, for an order quashing his conviction by the Police Magistrate for the Town of Amherstburg, for the offence of being found upon enclosed

ONT.

S. C.
1913

REX
v.
DAVEY.

LENNOX, J.

lands of another with a sporting implement, after notice not to hunt or shoot thereon.

D. C. Ross, for the defendant.

H. E. Rose, K.C., for the prosecutor.

LENNOX, J.:—It is contended by the defendant that the only evidence against him is the deposition of James Moore. It is not and cannot be denied that this evidence alone will not support a conviction. The prosecution contends that, by agreement at the trial, the evidence in a previous case was to apply in this case. The evidence was taken in shorthand, has been extended, and is returned by the Police Magistrate as the evidence in the case. There is nothing in the evidence to shew that any arrangement was made that the evidence in the earlier case would be accepted in this.

Mr. Ross proposed to fortify his position by filing an affidavit shewing that counsel for Davey refused to accept the earlier evidence as applying in the Davey case. This was strenuously opposed by Mr. Rose, who referred me to *Regina* v. *Strachan*, 20 U.C.C.P. 182, as shewing that the magistrate's return is conclusive, and that I have no right to go behind it; and, subject to this, Mr. Rose produced a counter-affidavit. The doctrine of the case cited is beyond dispute, I think. The proper application of it to this case is not without difficulty. In the Strachan case the rule was invoked to confine the evidence in the case to the evidence recorded by the magistrate at the trial. Mr. Rose presses this rule of law, but desires me not only to accept the recorded evidence but to supplement it by a voluntary statement made by the magistrate. I do not think that I can do this. If this may be done, where is the matter to end?

Section 63 of the Judicature Act, 3 & 4 Geo. V. ch. 19, is explicit as to what return the magistrate shall make upon a motion to quash a conviction. Within these lines, his return cannot be questioned; outside these limits his statements are extra-judicial and irrelevant.

The conviction will be quashed with costs. Order protecting the magistrate, if necessary.

Conviction quashed.

WEPPLER v. CANADIAN NORTHERN R. CO.

MAN.

C.A.

1913

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 7, 1913.

1. MASTER AND SERVANT (§ II A 4—70)—LIABILITY OF MASTER TO SERVANT—SAFETY AS TO PLACE AND APPLIANCES—MACHINERY—PROHIBITING STOPPAGE OF MACHINERY WHILE CHANGING WORK.

For an employer to require a servant to work in close proximity to a rapidly revolving drill, which caught his arm and injured it while he was changing work in the machine, which he was forbidden to stop, amounts to a failure to provide a safe place for the servant to work and renders the employer liable at common law.

[*Ainslie Mining & R. Co.* v. *McDougall*, 42 Can. S.C.R. 420; *Brooks Scanlon O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412; and *Lafrendal* v. *Northern Foundry Co.*, 2 D.L.R. 155, 22 Man. L.R. 207, specially referred to.]

2. MASTER AND SERVANT (§ II A 4—70)—LIABILITY OF MASTER TO SERVANT—SAFETY AS TO PLACE AND APPLIANCES—OPERATION OF MACHINERY—DELEGATION OF DUTY TO ESTABLISH SAFE SYSTEM OF OPERATION.

An employer cannot, by delegating to an employee the duty of establishing a safe system, escape liability at common law for injuries sustained by a servant as the result of a defective system of operating dangerous machinery.

[*Ainslie Mining & R. Co.* v. *McDougall*, 42 Can. S.C.R. 420; and *Brooks Scanlon O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412, specially referred to.]

3. MASTER AND SERVANT (§ II B 1—12*d*)—SERVANT'S ASSUMPTION OF RISK—CONTINUANCE IN EMPLOYMENT WITH KNOWLEDGE OF DANGER.

Mere proof that the employee knew the danger and continued in the employment is not conclusive evidence to prove that he consented to assume the risk, and the trial tribunal is at liberty, notwithstanding, to find that the employee suing for personal injuries sustained by continuing in the dangerous work had not contracted or consented to run the risk.

[*Montreal Park, etc., R. Co.* v. *McDougall*, 36 Can. S.C.R. 1; and *Williams* v. *Birmingham, etc., Co.*, [1899] 2 Q.B. 338, specially referred to.]

Statement

APPEAL by defendant from the verdict in favour of plaintiff for $4,500 damages for personal injuries in an action brought by a workman whose arm had been broken while working at a drill in defendant's railway shops.

The appeal was dismissed.

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

T. J. Murray, for plaintiff.

Howell, C.J.M.

HOWELL, C.J.M.:—Four drills in a row, all operated from one counter-shaft, and so connected that all must run or stop together, used for boring holes in iron or steel, were operated in the defendants' shops under the direction and control of certain foremen. The drills could be moved from side to side, and, while in motion, could individually be raised out of the work, and, when thus raised from the work which was being done at the time of the accident, there could be a clear space of six inches

MAN.

C. A.
1913

WEPPLER
v.
CANADIAN NORTHERN R. CO.

Howell, C.J.M.

between the point of the rapidly revolving drill and the material upon which the work was being done. The plan of operating required two workmen to put material upon the table beneath the drills, and then lower the drills to the material, which had been so fixed as to have the holes bored in the proper place.

The plaintiff had, about three weeks before the accident, entered into the defendants' employment, and had at once been put to work upon this multiple drill; and, soon after, one McGrath, an apprentice, was set to work with him as a helper or assistant, and so continued until the accident. Each of these men had previously operated a single drill, but neither had ever before operated a multiple drill. Their work at first was what is called single-piece work, that is, one piece of metal, occupying the whole space covered by the four drills, was placed upon the table, and holes were bored where required. As soon as the work on this was done, the drills were lifted, the machine was stopped and not again started until other material was placed and clamped or fixed for new work. It was thus quite safe for the men to remove or adjust the material.

After about two weeks so working, the plaintiff and his assistant were given what the defendants call two-piece work, that is, each was required to do work independently upon separate pieces of material, the plaintiff using the two right hand drills and the helper the other two. At first the two men conducted this work as formerly, and, when it became necessary to turn the material or put in a new piece, the machine was stopped, and, if each had not finished his piece, the work of the one not so finished was suspended until the other put in or changed the material and clamped it down. The defendants' foreman having general charge of the machinery, seeing this method of procedure, interfered and told the plaintiff and his helper that the drills must not be stopped to change the work. The plaintiff and his helper thought it unsafe, and continued as before; and, soon after, that foreman and a higher foreman of the defendants' shops came up and instructed the plaintiff and his helper that the drills must not be stopped to change material, and thereafter they endeavoured to conform to this system of working, and both swear that they thought it dangerous.

The general foreman of all the shops, one Galloway, swears that the plan or system of operating this four-drill machine, insisted upon by these two foremen, was approved of by him, and at the trial counsel for the defendants urged that it was the proper system, and there was no intimation that the two foremen acted improperly or beyond their powers.

The material or structure upon which they were working on this two-piece work took up about one foot of space above the table, and was required to be bolted to the table by an iron bar, called a strap, going over the top fastened on each side by a bolt

about one foot long. To adjust this strap it was necessary for the plaintiff to put his arm over the material and reach down to the table in proximity to the drill. Soon after this change, and while the drill was rapidly revolving, the plaintiff, while so adjusting the strap, had his sleeve caught in the rapidly revolving drill, and his right arm was rendered useless.

The case for the defence is that, if the table with that sized material upon it had been properly adjusted, there would have been six inches of space between the material and the lower end of the drill after it had been run up, and that this would be safe. Counsel for the defendants urged strongly that, if this method of working was dangerous, the plaintiff was fully aware of it and accepted the risk; and counsel relied upon the maxim *volenti non fit injuria*.

In *Woodley* v. *Metropolitan R. Co.*, 2. Ex. D. 384, at 389, Cockburn, C.J., says:—

> Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible . . . The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But, looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues it with a knowledge of its risks, he must trust to himself to keep clear of injury.

The same cold-blooded law was laid down twenty years previously by Lord Bramwell and Channell, B., in *Dynen* v. *Leach*, 26 L.J.Ex. 22. Happily, it seems to me, for humanity's sake, the House of Lords in *Smith* v. *Baker*, [1891] A.C. 325, laid down the law the converse of the above. Lord Herschell there states that the mere fact of the employee continuing his work, knowing the risk and not remonstrating, does not preclude him from recovering. One English Judge uses this expression: "His poverty not his will consented to incur the danger." The defendant must set up and prove affirmatively, first, that the plaintiff well knew the danger and the risks, and, second, that the plaintiff contracted or consented to run the risk. Mere proof that the plaintiff knew the danger and continued in his employment is not conclusive evidence to prove the second point. Such evidence may be given fully and completely shewing that the plaintiff had full knowledge of the danger and continued the work, and yet the tribunal finding the facts may find the plea not proved: *Montreal Park and Island R. Co.* v. *McDougall*, 36 Can. S.C.R. 1; *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338, 68 L.J. Q.B. 918, 15 Times L.R. 468 (C.A.).

Many American cases seem to hold the contrary; and after a careful review of them and of the English decisions, a writer in 20 Harvard Law Review 115, uses the following language:—

> Thus it has been seen that, while in England the pressure of the ser-

MAN.

C. A.
1913

WEPPLER
v.
CANADIAN
NORTHERN
R. CO.

Howell, C.J.M.

vant's necessities has finally come to be regarded as destructive of his free will when placed in a position where he must either encounter some probable though not imminently threatening danger, or else give up his employment, the American cases stoutly deny it any such effect.

The charge of the learned Judge was not out of harmony with this law, and the jury did not find this fact in favour of the defendants. The defendants fail on this plea.

The defendants also contended that there was no common law liability, and that at most there was only liability under the statute. The defendants possessed a four-drill machine, and wished to operate it so that each of the two men would operate two drills; and, to operate it most economically, all the drills must be kept revolving continuously, thus changing the system of operation from that of one-piece work. If it had been constructed so that each two drills were connected with the shaft separately, then each could be stopped independently, and then there would be no necessity for continuous running. If a guard by way of a bar of iron or strip of wood had been fixed between the workman and lower end of the drill, when raised to the highest point, so that the lowest point of the drill was an inch higher than the lower side of the guard, the workman's arm would be protected. If the workmen had been permitted to use this machine for two-piece work—it being manifestly constructed for one-piece work—as they first used it, there would have been no danger; there would have been a little loss of time, but there would not have been an accident.

A model of the structure being drilled and the strap or bolts was before the jury, and was also shewn to the Court, and some of the witnesses thought it dangerous.

The defendants erected or constructed this machinery, and established a system for operating it on "two-piece" work, and I agree with the jury that the system was a dangerous one. If either of the three above-described plans had been taken, it would have been reasonably safe.

The defendants, by requiring the plaintiff to work at this machine so that he must put his arm in such close proximity to the revolving drill, did not provide him with a reasonably safe place for the performance of his work; and, in my view of the law, the defendants are liable at common law: see *Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. 420; *Brooks Scanlon O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412; and *Lafvendal* v. *Northern Foundry Co.*, 2 D.L.R. 155, 22 Man. L.R. 207.

The appeal must be dismissed with costs.

Richards, J.A.

RICHARDS, J.A.:—The work was dangerous in any case, and admittedly, much more dangerous while the drills were kept running during the changing of the material to be bored. The

order so to keep running was given, the defendants say, to economise time, and to get more work turned out in a day. Galloway, the foreman over all the shops, and Hobkirk, whose work was to see that work was speeded, and Hough, the foreman of the shop in which the plaintiff was injured, were all aware of the increase in the danger. Knowing that such increase would result, Galloway and Hobkirk, nevertheless, decided to, and did, order the continuous running of the drills.

Dolton, an expert witness for the defence, stated that the machine could be instantly stopped with a brake, and that he had seen an electric brake used for that purpose. The saving of time, by the use of such a brake, would, probably, have so minimised the time lost in stopping as to make its loss of little importance. There is no evidence that Galloway, Hobkirk, and Hough did not know that a brake could be so used.

There is also no evidence that, when so ordering, they considered the question of guarding against the increased danger. There is no evidence to shew that it could not be guarded against. There is no evidence that a guard could or could not be so placed as to decrease or prevent the danger. It seems to me, however, that, as the drills did not move towards or from the operator, but only in a straight line to one side or the other, a valuable guard could be made by placing two pieces of iron above and along the line of and from end to end of the table. There could be a space between these pieces sufficient to allow the drills to move freely laterally and up or down. They could be at such a height that their lower edges would be a little below the points of the drills, when the latter were raised. Though there is no evidence that such a guard could have been used, common sense suggests that it could. But, even if no such guard or brake could be used, I cannot see that the gain in time justified such an increase in the danger to the operator as was caused by the continuous running, especially as some of the evidence seems to shew that the loss was largely the result of defect in the working of the apparatus by which the belt was shifted.

The argument that it was the ordinary usage to run such drills continuously does not seem to me to be borne out by the evidence. On the contrary, there is much evidence that it was not. It is argued that the continuous running was not a part of a system, for a defect in which the defendants would be liable at common law if it resulted in injury. It was urged that the injury was merely brought about by the order of a fellow-servant of the plaintiff, whose orders the plaintiff was bound to obey, and that, therefore, there was no liability beyond that provided by the Workmen's Compensation for Injuries Act. If that were so, the verdict of $4,500 would have to be reduced to $2,150, the agreed limit of liability, in this case, under that Act.

I am unable to agree with such a contention. The evidence

MAN.
C. A.
1913
WEPPLER
v.
CANADIAN
NORTHERN
R. Co.
Richards, J.A.

shews that the system of running the machines was settled on by Galloway as part of his duty as a servant of the defendants, and that the defendants delegated to him the performance of their duty to provide the system.

In *Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. at 426, Sir Louis Davies, in a judgment concurred in by Duff and Anglin, JJ., says:—

> 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.

That decision was approved of and affirmed in *Brooks Scanlon O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412. It binds this Court; and, in my view of the present facts, disposes of the fellow-servant defence.

The plaintiff realised the danger, but continued to work. It is argued that he thereby voluntarily assumed the risk. The verdict of the jury here and the decision in *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338, negative that defence.

I would dismiss the appeal with costs.

Perdue, J.A.

PERDUE, J.A.:—The only point in this appeal as to which, in my opinion, there is any difficulty is that in relation to the common law liability of the defendants for the accident in question.

There is sufficient evidence to shew that the defendants' shops engineer, Hobkirk, and their machine-shop foreman, Hough, ordered the plaintiff to keep the drills running while the material to be bored was being inserted and removed. The evidence also shews that Galloway, the general foreman of the defendants' shops, approved and adopted this plan of operating the drilling-machine, and that the object of it was to get more work done in a given time, by the machine, and the men employed on it. There is ample evidence that this mode of operation was dangerous to the men using the machine. Galloway was foreman over all the other foremen, and had general control of all shops of the defendants at Winnipeg in which repair work to locomotives is done.

I think it should be held that the plan of operation devised and put in practice by Galloway and his subordinates, in the interests of the defendants, was adopted by the defendants. The defendants placed these men in control of the shop and of the workmen engaged in tending the machines. The defendants reaped the benefit of the speedier but more dangerous plan of operation.

There is, as I have stated, ample evidence to shew that the operation of the drilling-machine, while it was constantly kept in

motion, was dangerous to the men employed upon it. If the plaintiff had been permitted to use the machine as he desired, that is, by stopping it while the material to be drilled was being changed, the operation of it would have been attended with much less danger. In *Smith* v. *Baker*, [1891] A. C. 325, the common law principle is stated by Lord Watson in these words:—

> A master is no less responsible to his workman for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself (p. 353).

Perdue, J.A.

He further says:—

> The judgment of Lord Wensleydale in *Weems* v. *Mathieson*, 4 Macq. 226, clearly shews that the noble and learned Lord was also of opinion that a master is responsible in point of law, not only for a defect on his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used.

I would also refer to *Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. 420, and *Brooks Scanlon O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412, as embodying and applying the same principle.

I think the appeal should be dismissed with costs.

CAMERON, J.A., concurred with HAGGART, J.A. Cameron, J.A.

HAGGART, J.A.:—I do not think that the defendants seriously contended that they were not liable under the Workmen's Compensation for Injuries Act, which would have limited the damages to $2,150, but counsel strongly urged that there was no liability at common law, where the damages were assessed by the jury at $4,500, and they further contended that at most the cause of the accident was a negligent order given by a fellow-workman, and that consequently the doctrine of common employment applied to the common law action. Haggart, J.A.

The plaintiff in his pleadings charged that the defendants employed a dangerous and negligent system of carrying on their business, and used and employed defective machinery to enable the plaintiff to discharge his duty.

The trial Judge, after explaining the issue very clearly to the jury, says in his charge:—

> And it is for you to say, from all the evidence you have heard, whether or not the adoption of that system by the defendants was negligence, and whether or not that negligence resulted in the plaintiff's injury, or whether or not it resulted from an order. If you cannot find it was part of their system you can find whether or not it was a result of an order or direction given by an employee of the company who had the power and right to give such an order to one under his control.

And, amongst other questions, he submitted to the jury those which, with the answers to them, follow:—

MAN.

C. A.
1913

WEPPLER
v.
CANADIAN
NORTHERN
R. Co.

Haggart, J.A.

Q. Did the defendants adopt any system in regard to the operation of the gang-drill in question? A. Yes.

Q. If so, were the defendants guilty of negligence in respect of the system so adopted? A. Yes.

Q. If so negligent, in what did the negligence consist, and was the plaintiff injured in consequence thereof? A. Yes, in keeping the machinery running while drilling that kind of work.

I do not think it matters much whether we refer to the operation of this drill by the plaintiff as a negligent system, a negligent use of a good system, a defect in original installation, or a negligent mode of using perfectly sound machinery, because it resulted in creating a dangerous place for men to work; and, in substance, the jury so found. The happening of the accident, under the circumstances detailed, is evidence of this fact. The plaintiff and his witnesses testify that it was a dangerous place; McArthur, a witness called by the defendants, gave evidence to the same effect, and even Hough, the defendants' foreman, on his examination for discovery, swore that the place was one of danger, although he tried to explain or qualify this when in the witness-box. There was ample evidence, and the jury believed the plaintiff and his witnesses, and their finding is, in substance, that the construction of the works and the manner in which they were operated were dangerous to the workmen.

In *Ainslie Mining and R. Co.* v. *McDougall*, 42 Can. S.C.R. 420, it was held that an employer is under an obligation to provide safe and proper places in which his employees can do their work, and cannot relieve himself of such obligation by delegating that duty to another; and it follows that, if an employee is injured through failure to fulfill such obligation, the employer cannot, in an action against him for damages, invoke the doctrine of common employment. Davies, J., at p. 424, says:—

> I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable, cannot be extended to cases arising out of neglect of the master's primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others.

Common employment is not a defence to actions for injuries resulting from defective places in which to work, defective machinery with which to work, and defective systems of carrying on work. *Ainslie Mining and R. Co.* v. *McDougall* was followed in *Brooks Scanlon O'Brien Co.* v. *Fakkema*, 44 Can. S.C.R. 412. See also *Smith* v. *Baker*, [1891] A.C. 325; *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72; *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338.

I think that the action lies against the defendants both under the Workmen's Compensation Act and at common law. Al-

though, as a juror, I might not assess the damages at the amount mentioned in the verdict, yet, when we consider the months in the hospital, the pain of many operations, and the existence of a serious permanent injury, it is not so excessive as to warrant the interference of the Court.

I would dismiss the appeal.

Appeal dismissed.

MAN.

C. A.

1913

WEPPLER v. CANADIAN NORTHERN R. Co.

VANDEWATER v. MARSH.

ONT.

S. C.

1913

Ontario Supreme Court (Appellate Division). Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Leitch, J. November 3, 1913.

1. CONTRACTS (§ II D 4—192)—BUILDING CONTRACTS—EXTRAS ONLY ON ARCHITECT'S WRITTEN ORDER.

A building contractor is bound by the strict terms of a building contract whereby he has agreed to make no claim for extras done without the written order of the architect, nor can he set up in support of his claim for extras the verbal order of the architect in the face of such condition of the contract where no fraud or collusion is shewn between the owner and the architect.

[*Vandewater* v. *Marsh*, 10 D.L.R. 810, 4 O.W.N. 882, affirmed; and see Annotation to this case, *infra*.]

2. COSTS (§ I—10)—DISCRETION—REFUSAL WHERE SUCCESS WHOLLY ON TECHNICAL GROUNDS.

That the respondent was protected from paying for extras under the building contract sued upon by reason of a condition requiring the written sanction of the architect, while only a verbal order of the latter could be shewn, is a sufficient ground for exercising the discretion of the appellate court in refusing to award to the respondent the costs of successfully opposing an appeal upon which it was found that the appellant would be entitled to recover for the extras, but for the condition; but the appellate court may, in such case, give the successful respondent the option of taking his costs of the appeal on consenting to pay for the extras.

Statement

APPEAL by the plaintiff from the judgment of Kelly, J., *Vandewater* v. *Marsh*, 10 D.L.R. 810, 4 O.W.N. 882.

The appeal was dismissed.

E. G. Porter, K.C., for the plaintiff.

W. S. Morden, K.C., for the defendant company.

W. N. Tilley, for the defendant Herbert.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The action is brought to recover the contract-price for "the excavating, erection of wooden forms and concrete work and supplying the materials therefor, for a foundry building," for the respondent company, and the value of extra work done and materials provided by the appellant in connection with the building.

The contract is dated the 10th May, 1912, and provides that the work shall be done conformably to the plans, specifications,

ONT.
S. C.
1913
VANDEWATER
v.
MARSH.
Meredith, C.J.O.

and details prepared by the respondent Herbert, who was the architect of the building, and that it shall be done "in all things to the entire satisfaction of the architect."

The provision as to payment for the work is made subject to the condition that the covenants, conditions, and agreements of the contract have been in all things strictly kept and performed by the appellant; and the contract also provides that no payment shall be made without the production of the architect's certificate "as in the conditions provided."

The contract contains no other provision as to the architect's certificate; and no other document was adduced providing that the production of it should be a condition precedent to the right of the appellant to claim payment.

The appellant has been unable to obtain the certificate of the architect; and in his statement of claim—presumably because the production of the certificate was, in the opinion of the pleader, a condition precedent to the right of the appellant to claim payment, and to get rid of the supposed effect of that condition—it is alleged that the appellant performed the work and supplied the material as provided by the contract, and that, "after all necessary times had elapsed," he requested the respondent Herbert "to issue to him the usual certificate to enable him to receive his payment from the defendants Marsh and Henthorn Limited (the respondent company), but the said defendant Herbert refused to grant the said certificate and still refuses to grant the same, with the knowledge of his co-defendants Marsh and Henthorn Limited, and the said Marsh and Henthorn Limited, although requested by the plaintiff to pay him the amount of the said contract-price, refused and still refuse to do so."

The reason for the refusal of the architect to give the certificate was due to the fact that the appellant had so laid out one of the buildings and done the concrete work that the walls of the foundation were so placed that it was not, and the building to be erected on it would not, have been, as they were designed and shewn on the plans and drawings to be, rectangular in form, which necessitated a change in the structural steel work for the building, and other changes, which involved considerable additional expense to the respondent company.

It was sought by the appellant to throw the responsibility for this mistake on the respondent company, because, as it was said, the appellant when beginning his work was misled by stakes which had been planted by the engineer of the respondent company, and which the appellant assumed were intended to indicate the position which the building was to occupy. In this attempt the appellant failed at the trial; and we see no reason for differing from the conclusion of the learned trial Judge as to it.

It was also contended that, as the respondent company had gone on with the erection of the superstructure upon the foundation which the appellant had constructed, instead of requiring him to rectify the mistake, as he contended he could have done at a comparatively small expense, the respondent company was now not entitled to rely upon the departure from the terms of the contract which the mistake involved.

This contention also failed at the trial, and rightly so, we think. What was done by the respondent company was really in case of the appellant; and the proper conclusion upon the evidence is, that the appellant was informed that, while the respondent company would not insist upon the foundation walls being rebuilt, there would be deducted from the contract-price of his work the amount of any additional expense the respondent company should be put to in connection with the work the other contractors were to do, and that the appellant assented, or at least did not object, to that course being taken.

No case was made, on the pleadings or at the trial, of collusion between the respondents so as to dispense with the necessity of the production of the architect's certificate, if, by the terms of the contract, the production of it was a condition precedent to the right of the appellant to claim payment for his work.

The appellant is not, in our opinion, entitled to recover, even if the production of the architect's certificate is not a condition precedent to his right to be paid. It was by the contract a condition precedent to the right of the appellant to be paid the contract-price that the covenants, conditions, and agreements of the contract should have been in all things strictly kept and performed by him, and that the work should have been done conformably to the plans, specifications, and details prepared by the architect and in all things to his entire satisfaction, and neither of these conditions has been performed by him.

It is open to grave question whether the production by the appellant of the architect's certificate is necessary. The provision of the contract as to this is incomplete. The words "as in the conditions provided" qualify the preceding words "but no payment to be made without the production of the architect's certificate." There is, as I have said, no other provision as to it in the contract, and no other document to which the contract refers, containing any provision as to it; and it may be, therefore, that the provision of the contract which the respondents invoke has no effect. It is, however, unnecessary, in the view we take as to the effect of the other provisions of the contract to which I have referred, to decide that question.

The claim for extra work and materials, so far as it is in question on the appeal, is for work done and materials supplied owing to an increase in the size of the building. The contract

ONT.

S. C.
1913

VANDEWATER
v.
MARSH.

Meredith, C.J.O.

provides that no claim for any work in addition to that shewn in the drawings or mentioned in the specifications, unless it was sanctioned by the architect in writing previous to its having been done, shall be allowed.

There was no written sanction of the architect for the doing of the extra work and supplying the extra materials, payment for the value of which the appellant claims, and the right to recover it is, therefore, excluded by the contract.

The work was done and the materials were supplied upon the verbal order of the architect, and there is no just reason why the appellant should not be paid for it.

If the respondent company stands upon its strict right and will not pay for them, it will be proper, in the exercise of our discretion as to the costs, to deprive the company of the costs of the appeal.

The result is that the judgment must be affirmed and the appeal dismissed with costs if the respondent company elects to pay for the extras, but otherwise without costs.

We cannot part with the case without expressing regret that the litigation should have been rendered necessary by the refusal of the appellant to agree to what appears to be the reasonable deduction from the contract-price which was proposed by the respondent Herbert.

Appeal dismissed.

Annotation

Annotation—Contracts (§ II D 4—192)—Extras in building contracts.

Extras in building contracts

When by the terms of the contract written orders must be obtained before claiming for extra works, a builder cannot recover payment for such extras from the employer without written orders: *Russell* v. *Sa da Bandeira*, 7 L.T. 804; *Brumsdon* v. *Staines Local Board* (1884), 1 Cab. & El. 272; *Houston and East and West Texas Railway Co.* v. *Trentem* (1884), 63 Tex. 442; Hudson on Building Contracts, 3rd ed., vol. 1, p. 468.

Parties may agree that any number of conditions precedent must be performed prior to the accrual of any right to payment, but each condition and every contract must be construed by reference to its particular scope and terms.

The conditions precedent relating to extras most commonly found in building contracts, one or more of which may be found in most contracts, are as follows:—

(1) The builders must obtain written orders; (2) the orders must be signed and (sometimes) countersigned; (3) the orders must have been given prior to the execution of the work ordered; (4) the orders must have been given during the performance of the work; (5) the orders so obtained must be produced; (6) weekly accounts must be delivered; (7) the architect must ascertain the value of the extra works and certify the value; (8) a previous contract must be made for any extra work; (9) in case of dispute the price must be settled by arbitration prior to a claim being made.

Such provisions are inserted in contracts to limit the power of architects, and to make it clear to the builder that he must not rely upon any

Annotation (*continued*)—Contracts (§ II D 4—192)—Extras in building contracts.

ONT.

Annotation

Extras in building contracts

representation of authority by the architect to order by parol or any ostensible or implied authority as agent of the employer: *Ford* v. *United States* (1883), 17 Ct. of Cl. 60, U.S. Dig. (1883), p. 158; *United States* v. *Walsh* (1902), 115 Fed. Rep. 697; Hudson on Building Contracts, 3rd ed., vol. 1, p. 469.

There may, however, be a waiver of the condition as to written orders, or some acceptance or acts on the part of the employer, from which a new contract to pay for the extra work may be inferred; which contract in the case of a corporate body incapable of contracting excepting under seal must be under seal. So where the extras are in fact not extras at all, but independent works; or where there is a prevention by the employer; or where fraud is alleged and proved; or where a final and conclusive certificate has included the extras, a claim may be supported, although the architect did not sign a prior written order.

Equity will not give relief to a contractor who has done work under a contract in which it is provided that no claim shall be made without written orders unless he can shew, either that he has obtained the written orders or some conduct on the part of the employer preventing the performance of the condition: *Kirk* v. *Bromley Union* (1848), 2 Phil. 640, 17 L.J. Ch. 127. Nor will the Court decree an account of extras not ordered in writing: *Nixon* v. *Taff Vale Railway Co.* (1848), 7 Hare 136.

The employer will not be bound to pay for work included in the contract upon the faith of an oral promise by the architect that it shall be paid for as an extra, or that he will effect savings in other parts of the work to make up for the alleged extra work: *Sharpe* v. *San Paulo Rly.* (1873), L.R. 8 Ch. 597; *Stuart* v. *City of Cambridge* (1878), 125 Mass. 102.

Where the plaintiff was entitled to his certificate under the contract, the Court has power to interfere and direct the architects to make an inquiry and grant a certificate: *Lawrence* v. *Kern*, 3 Sask. L.R. 253.

There would, it would seem, be strong evidence of fraud if an employer himself, or by his engineer or architect, desiring alterations or additions to be made by a builder and knowing that they will cost more than the contract price, stands by and sees the expenditure going on upon them, and takes the benefit thereof, and then refuses to pay because proper orders have not been given. Lord Justice Turner, in an English leading case said: "I think . . . . it would be a fraud on the part of the company to have desired by their engineer these alterations, additions, and omissions to be made, to have stood by and seen the expenditure going on upon them, to have taken the benefit of that expenditure, and to refuse payment on the ground that the expenditure was incurred without proper orders having been given for the purpose:" *Hill* v. *South Staffordshire Ry.* (1865), 12 L.T. (N.S.) 63, at 65.

On appeal from a decision of the Court of Appeal for Ontario, *Metallic Roofing* v. *Toronto*, 6 O.W.R. 656, affirming the judgment at the trial, 3 Ont. W.R. 646, in favour of the plaintiffs, the Supreme Court held that plaintiffs could not recover for extras as the terms of the contract in respect thereto had not been observed. They held, however, that plaintiffs were entitled to damages for wrongful dismissal and directed that the reference ordered by the Chancellor should include such damages: *City of Toronto* v. *Metallic Roofing Co. of Canada*, 37 Can. S.C.R. 692.

ONT.

Annotation

Extras in building contracts

Annotation (*continued*)—Contracts (§ II D 4—192)—Extras in building contracts.

A contract for the carpenter's work at the defendant's house provided that the contractor should be paid for work and extras, if any, on "certificate of superintendent of work." The contractor died after doing part of the work, and the plaintiffs thereupon agreed to deliver at the house "all the material referred to in the late (contractor's) contract, and all the conditions of that contract are to apply." The superintendent of work was a relation of and indebted in a large sum to the defendants, and the plaintiffs did not know this. Disputes having arisen, the superintendent of the work gave to the plaintiffs, under the defendant's instructions, a certificate that the plaintiffs had furnished all the material according to specifications, "except small matters which I will adjust under the terms of the contract." Held, that as to extra material furnished by the plaintiffs, the condition as to the superintendent's certificate did not apply; and that, at all events, the certificate in fact given put an end to the contract and relieved the plaintiffs from doing anything further under it, so that the non-completion of the "small matters" in dispute formed no defence. Held, also, *per* Armour, C.J.O., that the relationships, family and financial, of the superintendent to the defendant should have been disclosed to the plaintiffs, and that under the circumstances the plaintiffs were not bound to obtain a certificate at all: *Ludlam* v. *Wilson*, 2 O.L.R. 549 (C.A.).

A contract provided that no alterations should be made in the work shewn by the plans and specifications, except upon the written order of the architect, approved by the defendants, and that the value of any such extra work should be submitted every month to the architect. Held, that the furnishing by the architect of plans shewing that extra stone-work was to be done constituted a written order for the work, and the failure of the plaintiff to submit monthly statements should not in itself disentitle them to recover the value thereof. And, although the city council as a body did not give its formal approval, the conduct of the members thereof was such that it must be considered that the extra work was done with their approval: *Alberta Building Co.* v. *City of Calgary*, 16 W.L.R. 443 (Alta.).

The plaintiff, a Vancouver builder, contracted to erect a building in Vancouver for the defendants, a Milwaukee company, the contract providing that no extras would be allowed unless their value was agreed upon and indorsed on the contract. On the instructions of S., who intended to occupy the building for the purpose of a bottling company, of which he was a member, and bottle defendants' beer amongst other things, the plaintiff made alterations and additions, but no indorsement was made on the contract, such indorsement was held to be a condition precedent to plaintiff's right to recover: *McKinnon* v. *Pabst Brewing Co.*, 8 B.C.R. 265.

A building contract contained a provision that the work should be completed by the contractor by a specified date, with a penalty of $5 a day, as liquidated damages, for each day that the work should remain unfinished after that date. It was agreed, on the part of defendant, that the contractor should be put in possession of the premises, and should be furnished with the lines and levels, by another fixed date, and that, for every day thereafter, he should be entitled to have two days added to the time for the completion of his contract. It was further agreed that the contractor should have no action for damages, or otherwise against the defendant

Annotation (*continued*)—Contracts (§ II D 4—192)—Extras in building contracts.

ONT.

Annotation

Extras in building contracts

by reason of said delay. The Court held that the clause of the contract denying plaintiff's right to an action for damages applied to the giving possession of the premises only, and not to the delay in furnishing lines and levels, and that plaintiff was entitled to recover for extra work resulting from the latter delay. The delay in putting plaintiff in possession of the premises, and in furnishing lines and levels, and delay caused by extra work which he was called upon to do, relieved plaintiff from the obligation to complete his work by the date agreed, and that defendant was debarred from enforcing payment of the penalty agreed upon. One of the clauses of the contract provided that, if alterations were required in the work, a fair and reasonable valuation of work added or omitted should be made by the architect, and that the sum payable to plaintiff should be increased or diminished by such amount, provided that, where the amount was not agreed upon the contractor should proceed with the work on the written order of the architect, and that the amount payable therefor should be fixed as further provided. Alterations under this clause only required a written order where the architect and contractor differed as to the valuation. The furnishing of plans by the architect, shewing additional work, was a "written order" within the meaning of the contract. The burden was upon plaintiff of shewing that work claimed for as extras was ordered by the architect: *Munro* v. *Town of Westville*, 36 N.S.R. 313.

A contract to build a tavern and stores contained this clause: "No additional work or deductions or extras of any kind shall be permitted or allowed unless the same hath been agreed upon, and the price of such work duly ascertained and embodied in such writing, and the writings shall be produced before the payments shall be allowed." Held, that production of writing was an absolute condition precedent to recover for extras: *Oldershaw* v. *Garner* (1876), 38 U.C.Q.B. 37, 49. The same conclusion was reached in the Victorian case, *Young* v. *Ballarat Commissioners* (1878), 4 Vict. L.R. (Law) 306; Hudson on Building Contracts, 3rd ed., vol. 1, p. 470.

A contract for the construction of large iron buildings for a lump sum contained a clause, *inter alia*, that no alterations or additions should be made without a written order from the employer's engineer, and no allegation by the contractors of knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers or inspectors, should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions. During the execution of the contract the contractors alleged it was impossible to cast certain iron trough-girders of a specified weight, and subsequently they were allowed to erect girders of a much heavier weight; and the actual weights were entered in the engineer's certificates issued from time to time authorizing interim payments. On the completion of the work the contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied. It was held, reversing the decision of the Court below, that the engineer's certificates were not written orders within the stipulation and that the claim was therefore excluded by the terms of the contract: *Tharsis Sulphur and Copper Co.* v. *McElroy* (1878), 3 App. Cas. 1040.

ONT.

S. C.
1913

CANADIAN LAKE TRANSPORTATION CO. v. BROWNE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, and Magee, JJ.A., and Leitch, J. December 1, 1913.

1. CONTRACTS (§ I E 3—75)—STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED WITHIN YEAR—SUFFICIENCY OF MEMORANDUM.

A memorandum of an agreement not to be performed within the year, sufficient to satisfy the Statute of Frauds, is shewn, notwithstanding that one of the parties made alterations in the terms of the agreement after execution by the other party, where the latter subsequently assented thereto, although he did not re-execute the agreement.

Statement

APPEAL by the plaintiff company from the judgment of Falconbridge, C.J.K.B., 4 O.W.N. 880, in favour of the defendants (wharfingers at Hamilton) upon their counterclaim.

The appeal was dismissed.

J. Bicknell, K.C., and *T. Hobson*, K.C., for the appellant company.

E. F. B. Johnston, K.C., and *J. G. Gauld*, K.C., for the defendants, the respondents.

Meredith, C.J.O.

MEREDITH, C.J.O.:—By their counterclaim the respondents claim damages for breaches by the appellant of an agreement between the parties in respect of the following matters:—

1. Wrongfully unloading at another wharf a shipment of wire from the steamship "Regina," which resulted in a loss to the respondents of $134.34, which they would have earned if the wire had been unloaded at their wharf.

2. Failing to unload at the respondents' wharf 6,000 tons of freight in each of the years 1911 and 1912.

3. Failure to pay one-half of the checker's wages in the years 1908, 1909, and 1910.

The learned trial Judge found in favour of the respondents as to the whole of their counterclaim, and directed a reference to the Local Master at Hamilton "to inquire, ascertain, and state what damages the defendants have sustained by reason of the matters in the defendants' counterclaim mentioned."

The evidence was very conflicting as to the terms of the contract, which both parties agreed had been entered into between them; and we are unable to say that the learned trial Judge erred in coming, as he did, to the conclusion that the evidence preponderated in favour of the respondents.

That the contracting parties met in Toronto in the spring of 1908, and there arrived at an agreement by which the respondents, who had acted as wharfingers for the appellant company in the previous year, were to be continued in that employment, on terms which were then settled, was not disputed; but there was a direct conflict of testimony as to the terms of the

agreement. According to the testimony of Edward H. Browne and Edward J. Jordan, the employment was to be for five years (1908 to 1912 inclusive), and the agreement was that the appellant company was to be bound to unload at the respondents' wharf at least 6,000 tons of "freight" in each year, and was to pay one-half of the wages of the checker who was employed at the respondents' wharf; but, according to the testimony of Hugh Young, the traffic manager of the appellant company, the agreement was for the years 1908, 1909, and 1910 only, and there was no agreement as to the quantity of freight to be unloaded at the respondents' wharf, and no agreement that the appellant company should pay any part of the checker's wages.

It was argued by Mr. Bicknell that the agreement, being, as it was, one not to be performed within a year, and not being, as he contended, in writing, was not enforceable, and he applied for leave to set up the Statute of Frauds as a defence to the action.

I am inclined to think that there was a sufficient memorandum in writing to satisfy the statute. According to Young's testimony, the agreement sent to the respondents was signed by the appellant company. The alterations were made on the face of one of the duplicates, which was signed also by the respondents, and there was a sufficient assent to the alterations made by the appellant company. The documents were not under seal; and, although an unauthorised material alteration of them would have vitiated them, I apprehend that a verbal assent to the alterations which were made would be sufficient to make the document as altered binding on the appellant company, and that re-execution was not necessary.

If, however, that is not the proper conclusion, I do not think that the appellant should be allowed to amend by setting up the Statute of Frauds as a defence. If, however, such leave to amend had been asked at the trial, it should have been granted. The respondents in their pleading rely upon a written agreement; and if, at the trial, they failed to prove such an agreement, and sought to rely on the parol agreement of which they gave evidence, the authorities are clear that the appellant should have been allowed to amend by setting up the statute if application to amend had then been made.

This Court, no doubt, has power to allow the amendment; but the exercise of the power is in its discretion, and an amendment should not be allowed except to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case (Rule 183); and in *Sales* v. *Lake Erie and Detroit River R. Co.* (1890), 17 P.R. 224, acting on the corresponding rule

ONT.
S.C.
1913
CANADIAN LAKE TRANSPORTATION CO. v. BROWNE.
Meredith, C.J.O.

then in force, the Court of Appeal refuse to permit the defendants to set up a defence which they had not raised at the trial.

I may point out here that one of the cases cited in the judgment (*Odhams* v. *Brunning* (1896), 12 Times L.R. 303) was reversed on appeal to the Lords (1896), 13 Times L.R. 65.

The Statute of Frauds is a defence which a litigant need not avail himself of, and there may be litigants who decline to use it as a defence against a just claim; and it appears to me that where, as in this case, it was obvious at the trial that the Statute of Frauds would be a complete defence to the respondents' counterclaim, if they had failed to prove an agreement in writing, and no application for leave to amend was made, the appellant may fairly be assumed to have deliberately refrained from making the application, and should not now be permitted to amend.

Although the respondents' case as to the wages of the checker was not made out very satisfactorily, I am unable to say that the learned trial Judge was clearly wrong in allowing them. It may be that he accepted the excuse given by Browne for not claiming them sooner, and there was evidence that it was part of the agreement made in Toronto that the appellant should pay one-half of the checker's wages.

The only other item allowed was that in respect of the wire unloaded at another wharf, and as to this there was evidence that amply warranted the conclusion that there was no justification for not unloading the wire at the respondents' wharf.

The appeal should be dismissed with costs.

Magee, J.A.

MAGEE, J.A.:—I agree that the weight of evidence leads to the conclusion that there was a written contract for five years. As to the plaintiff company's application to plead the Statute of Frauds against the counterclaim, it is, I think, unnecessary, and, therefore, should not be allowed. The counterclaim alleged a written contract. If the defendants could not prove one, they would need to amend. Having proved one, they did not require, and do not now ask, any amendment. If they were being allowed to amend now in order to do justice, then the plaintiff company should, I think, have liberty also to amend by setting up the statute, which hitherto, as against the defendants' allegation of a writing, was not called for.

Maclaren, J.A.
Leitch, J.

MACLAREN, J.A., and LEITCH, J., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

EGGERSON v. SMITH.

SASK.

S. C.
1913

Saskatchewan Supreme Court, Haultain, C.J., in Chambers.
November 18, 1913.

1. TIME (§ I—10)—EXTENSION OF—TO REVIEW TAXATION OF SHERIFF'S COSTS—WHEN GRANTED.

As the granting of an extension of time under Sask. rule 704 for reviewing the taxation of a sheriff's bill of costs rests in the discretion of the court, special circumstances justifying the extension need not be shewn; although every case is not to be treated in a spirit of plenary indulgence, but to be dealt with on its merits when reasonable ground for indulgence is shewn.

[*Baker* v. *Faber*, [1908] W.N. 86 (C.A.), and *Rumbold* v. *London County Council*, 100 L.T. 259, followed; *Crapper* v. *C.P.R. Co.*, 11 D.L.R. 486; and *Re a Taxation*, 11 D.L.R. 191, distinguished.]

Statement

APPLICATION under Sask. rule 704 for an extension of time for reviewing the taxation of a sheriff's bill of costs.

The application was granted.

W. A. Goetz, for applicant, defendant.
R. E. Turnbull, for the sheriff.

Haultain, C.J.

HAULTAIN, C.J.:—This is an application under rule of Court 704 to extend the time for the review of the taxation of the sheriff's bill of costs herein. The bill was taxed by the local registrar at Battleford on September 17, 1913. Notice of application for review was given on September 19, and the application was made to the Local Master at Battleford on September 23. The Local Master decided that he could not hear the application, but referred it to a Judge in Chambers. The matter then came before Mr. Justice Brown in Chambers on October 23, and the application was refused by him on the ground that it was not made within the time fixed by rule of Court 732. I am informed by my brother Brown that in dismissing the application he suggested that the defendant should make an application such as the present one.

It is objected to the present application that it falls within the decisions in *Crapper* v. *C.P.R. Co.*, 11 D.L.R. 486; and *Re a Taxation*, 11 D.L.R. 191, in which it was held that we are bound by the "stringency" of the decisions in a line of English cases, the latest of which was *Re Coles & Ravenshear*, [1907] 1 K.B. 1, 76 L.J.K.B. 27. These cases are mentioned in the judgment of Brown, J., in *Re a Taxation*, 11 D.L.R. 191.

All of these cases were decided under the original English order 58, r. 15, which until amended by R.S.C. May, 1909, and R.S.C. August, 1913, read as follows:—

No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days, and no other appeal shall, except by such leave, be brought after the expiration of three months.

SASK.

S.C.
1913

EGGERSON
v.
SMITH.

Haultain, C.J.

The rule as amended is now as follows (see Annual Practice, 1914):—

Subject and without prejudice to the power of the Court of Appeal under order 64, r. 7, no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks unless the Court or Judge at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time.

Our r. 704 is identical with the English order 64, r. 7, and in cases falling within that rule the decisions under the original English order 58, r. 15, never applied: *Baker* v. *Faber*, [1908] W.N. 86 (C.A.); *Rumbold* v. *London County Council*, 100 L.T. 259, 53 S.J. 227.

It would seem that under the amended order 58, r. 15, the Court of Appeal is not fettered by the stringency of the earlier decisions, for in cases falling within order 64, r. 7, special circumstances were never required but the matter rested in the discretion of the Court: Annual Practice, 1914, 1099; *Baker* v. *Faber*; and *Rumbold* v. *London County Council, supra*.

On applications to extend the time for appealing which are brought under this rule (order 64, r. 7), the Court of Appeal is not bound by the stringency of the decisions defining the special circumstances required by order 58, r. 15, but has an "unfettered discretion:" Annual Practice, 1914, 1152.

In dealing with this application, therefore, I am at liberty to exercise my discretion and am not bound by any of the decisions of our own Court or the English Courts referred to above. But I must not be considered to mean in saying this that all applications under our r. 704 will be considered in a spirit of plenary indulgence. Each case must be dealt with on its merits and reasonable grounds for granting the indulgence must be shewn.

In the present case I think that reasonable grounds have been shewn, and the defendant will be allowed three more weeks within which to make an application for a review of the taxation in question: see *Clark* v. *Virgo*, 17 P.R. 260. The sheriff's costs of this application will be paid by the defendant.

I might call attention to the fact that by an amendment to the rules of Court promulgated on November 16 instant, applications for review of taxation may now be made to Local Masters.

Application granted.

VERMA v. DONOHUE.

B. C.

C. A.

1913

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. November 4, 1913.

1. SPECIFIC PERFORMANCE (§ I A—12)—PERSONS ENTITLED TO—DEFAULT ON INSTALMENTS, EFFECT—REALTY SALE.

In a speculative land purchase payable by instalments, the purchaser not being in possession, his failure to meet the purchase instalments either because of holding off to watch the ebb and flow of the land market or through gross negligence, disentitles him to specific performance, where he has not shewn himself "ready or eager" to perform his part of the contract.

[*Lamare* v. *Dixon*, L.R. 6 H.L. 414, at 423; *Oxford* v. *Provand*, L.R. 2 P.C. 135, at 151; *Kilmer* v. *B.C. Orchards Ltd.*, 10 D.L.R. 172, [1913] A.C. 319, specially referred to.]

2. VENDOR AND PURCHASER (§ I E—28)—INSTALMENT CONTRACTS—RESCISSION FOR PURCHASER'S FAILURE TO PAY.

Upon an agreement to purchase lands, imposing on the purchaser, in the event of default on any instalment, a forfeiture of all partial payments, there may be a default, through negligence or temporizing on the purchaser's part, of such a character as to disentitle him to specific performance without at the same time enforcing the forfeiture against him of the payments made, especially where the amount claimed to have been forfeited bears no just relation to the breach, the governing principle being relief against the penal clause rather than sympathy with the party penalized.

[*Barclay* v. *Messenger*, 43 L.J. Ch. 449, referred to.]

Statement

APPEAL by the defendant purchaser from the judgment of the trial Court rescinding a contract for the sale of lands and imposing a money penalty under a forfeiture clause of the agreement.

The appeal was allowed to the extent of remitting the forfeiture.

H. E. Bray, for appellant, defendant.

C. J. Fillmore, for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The judgment of the Judicial Committee of the Privy Council in *Kilmer* v. *B.C. Orchards Ltd.*, 10 D.L.R. 172, [1913] A.C. 319, was relied upon by appellant's counsel as in effect deciding that given an agreement, executory except as to a down payment in cash, for the purchase and sale of land, containing stipulations that time should be of the essence of the agreement, and that on default of subsequent payments of purchase money, and after thirty days' notice in writing to the purchaser to make good his default, the vendor should have the right to cancel the agreement and retain so much of the purchase money as had already been paid, the Court is bound to relieve, not only against forfeiture of purchase money, but as well against the cancellation of the agreement; that specific performance must be decreed in such a case without reference to the circumstances of the case, or the pur-

B. C.
C. A.
1913
VERMA
v.
DONOHUE.
Macdonald, C.J.A.

chaser's own conduct, short of actual or implied abandonment of the purchase.

This contention is based upon some observations of their Lordships from which we are asked to infer that the circumstances surrounding the default are of no consequence.

In the case at bar two equitable doctrines have to be considered in relation to, (1) relief from a money penalty, and (2) specific performance of a contract.

It may well be that the conduct of a party seeking the remission of a penalty, such as the forfeiture of a sum of money, which bears no just relation to the breach, is of little or no relevance to the issue. Our Courts are opposed to penalties as such, and relieve against them because of their penal nature, and not out of sympathy with the party penalized. Such penalties are regarded as unconscionable, and will not be allowed to prevail even where the conduct of the party seeking relief is open to grave censure.

Different considerations, I apprehend, present themselves when the question is: Shall specific performance be decreed at the instance of the defaulting party?

> The doctrine of the Court thus established, therefore, is that laches on the part of the plaintiff (whether vendor or purchaser) either in executing his part of the contract or in applying to the Court will debar him from relief. "A party cannot call upon a Court of equity for specific performance," said Lord Alvanley, M.R., "unless he has shewn himself ready, desirous, prompt, and eager": Fry on Specific Performance, 5th Canadian ed., 540.

Lord Chelmsford in *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414, at 423, said:—

> Now, my Lords, the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court—not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration.

And in *Oxford* v. *Provand*, L.R. 2 P.C. 135, Sir William Erle said, at p. 151:—

> It is clear that the Court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion the circumstances of the case, and the conduct of the parties, and their respective interests under the contract, are to be remembered.

If the agreement here were stripped of the articles which impose the forfeiture of the money and empower the vendor to declare the agreement at an end because of the purchaser's default in observing the times of payment, a Court of equity would, I think, refuse a decree of specific performance if it ap-

peared that the party seeking it had been guilty of wilful or reprehensible delay in which the vendor in no way contributed.

In that result the Court in effect declares the agreement at an end. By the breach of it the purchaser forfeits at law his right to call upon the vendor to perform his part, and by his conduct he in equity disentitles himself to relief.

That the contract contains a stipulation agreeing to a like result cannot, it seems to me, make the purchaser's case better or the vendor's case worse.

Then, have the defendants shewn themselves ready, desirous, prompt and eager to carry out their part of the agreement?

The plaintiff's brother, acting for him, called on defendant Pelletier, who was the assignee of Donohue, the purchaser, and demanded payment of the first instalment of $250. He was put off with an excuse, and an appointment was made with him to call at said defendant's office on another day. He called not only on that, but on many subsequent days, but was unable to find the defendant, or to get any satisfaction from his clerk. From the evidence I am convinced that the defendant deliberately broke his appointment, and from time to time avoided the plaintiff's said agent. After his patience was exhausted, the plaintiff served the notice provided for in the agreement, and, on the expiration of the period of grace, namely, thirty days, served formal notice of his election to treat the agreement as at an end. It was only when the plaintiff brought this action to clear the title of the cloud which was placed on it by the defendant, who applied for registration of his agreement, that the defendant tendered the long delayed instalment and asked for specific performance. The purchaser was not in possession of the land, and the transaction was purely speculative.

I do not go to the length of saying that defendant actually abandoned the purchase, but I do think there was such laches as to disentitle him to specific performance. It was a default for which no reasonable excuse has been offered. Defendant said he had the money with which to pay; there was therefore the less excuse for his conduct in not paying. He was either grossly negligent and indifferent, or he was holding off with the intent to pay if the market continued strong and to abandon should the market drop.

It may perhaps be said with truth that the judgment in the *Kilmer* case [*Kilmer* v. *B.C. Orchards*, 10 D.L.R. 172], indicates that the words "ready, desirous, prompt and eager" are not to be taken too literally. The Court would relieve where there had been some default, but where the purchaser is in possession and his default had been of short duration, and attributable rather to misfortune or misadventure than to wilful negligence or indifference, relief by way of specific performance will be decreed; but without something more than appears

B. C.
C. A.
1913
VERMA
v.
DONOHUE.
Macdonald, C.J.A.

in the observations above referred to, I am not convinced that under circumstances such as we have in this case, relief should be given beyond the remission of the penalty.

The circumstance that the purchase money was payable in instalments does not, I think, make it incumbent on the Court of necessity to grant specific performance, though it may well enter into the consideration in relation to the hardship or otherwise of granting or refusing such a decree.

Default in payment of an instalment might more easily be condoned than default in payment of the whole purchase money, and the fact of its being an early or a late instalment would greatly and properly influence the decision: *Barclay* v. *Messenger*, 43 L.J. Ch. 449.

I would allow the appeal to the extent of relieving the appellant from the forfeiture of the $250, and as the appellant has partly succeeded and partly failed, there should be no costs of this appeal, and the order as to costs below should stand.

Irving, J.A.
Martin, J.A.
Gallihier, J.A.

IRVING, MARTIN, and GALLIHER, JJ.A., concurred with MACDONALD, C.J.A.

Appeal allowed in part.

N. B.
S. C.
1913

NIPISIQUIT CO. v. CANADIAN IRON CORPORATION.

New Brunswick Supreme Court, McLeod, J. December 5, 1913.

1. WATERS (§ II E—102)—RIPARIAN RIGHTS—INTERFERENCE BY POLLUTION OF STREAM.

A riparian owner has the right to the full flow of the water in its natural state without any diminution or pollution.

[*Chasemore* v. *Richards*, 7 H.L.C. 349, applied.]

2. INJUNCTION (§ I F—58)—WATER RIGHTS—RESTRAINING POLLUTION OF STREAM—DELAY TO MAKE CHANGES IN MINING CONCENTRATOR PLANT.

On decreeing a permanent injunction in favour of riparian owners against the pollution of the stream by a mining company in the working of its concentration plant, a reasonable stay of the injunction may be granted to enable defendants to make alterations to their works to obviate the damage to riparian rights.

Statement

ACTION by owners of fishing privileges and other riparian rights on a river against an iron mining company to restrain pollution of the stream by the leakage from the defendant's settling tank used in ore-washing operations.

An injunction was decreed with a reference as to damages.

M. G. Teed, K.C., and *George Gilbert*, for plaintiff.

W. C. H. Grimmer, A.-G., and *O. S. Crocket*, K.C., for defendant.

McLeod, J.

MCLEOD, J.:—The plaintiff company is the owner of certain lots of land situated on the Nipisiquit river, in the county of Gloucester. This river empties into Bathurst Bay and about

twenty-two miles above its mouth are falls that are known as the Grand Falls. The plaintiff company own a number of lots of land on this river immediately below the Grand Falls and on these lots there are a number of salmon pools which the members of the company are in the habit of fishing every summer. The plaintiff company also owns the riparian rights, salmon fishing, and trout fishing rights in a number of other pools on the river but it does not own the fee in the land and the members of the company are also in the habit of fishing these pools during the fishing season. By an arrangement between the members of the company the different pools are allotted among the members for a certain period during the fishing season, and if during any period the pools are not fished by the members to whom they are allotted, the fishing of them for that period is sold to an outside party. The fishing pools which the company owns on the Nipisiquit river, are situated, the first, at what is called the gorge, which is just below the Grand Falls. The second are situated on what is called the little chain of rocks about three miles below the Grand Falls. The third at what is called Middle Landing, about three miles below the little chain of rocks. The fourth at what is called Papineau Falls, about five miles below Middle Landing.

The defendant company owns or controls a large tract of land fronting on the northerly side of the Nipisiquit river about a mile and half above the Grand Falls, on which land there is an iron mine. The mine is situated on a brook, known as Austin Brook, which enters into the Nipisiquit river, about a mile and a half above the Grand Falls. The defendant company has built on this brook about a quarter of a mile from the Nipisiquit river a plant or building for the purpose of working the iron mine, and in working the iron mine in order to treat the ore they have what is called a concentrating plant, that is, the ore is ground up and washed. The process of dealing with the ore is thus described by the superintendent of the defendant company.

The ore is crushed from 2 inches down and this ore is put into storage bin and from this bin taken to the top of the mill by an elevator and it is discharged from this elevator into a set of revolving screens. The first screen has an inch and an eighth holes in it, and everything which is larger than an inch and one eighth goes through a hole to a certain jig; the washing machines are called jigs, and refuse material falls through these holes and goes to the next screen which has three quarter inch holes. There is a certain part retained which is between an inch and one and one-eighth inch and three-quarter. That goes to another jig and the undersize, everything that will go through three-quarter inch, goes down on the screen with half-inch holes, and the other size of one-half inch goes into this jig, and the undersize goes down to the next screen, which is one-quarter inch. The oversize goes to a separate jig, and the undersize goes to another jig, then each of these sizes goes to its own wash machine.

N. B.
S. C.
1913
NIPISIQUIT CO. v. CANADIAN IRON CORPORATION.
McLeod, J.

The ore is ground up and washed; it all flows out into what is called a settling tank, and the ore is scooped up from the bottom of that tank. No water is intentionally discharged from the mill, it is used over and over again for the purpose of washing the ore, but in the process of washing the ore there is quite a large leakage and this leakage flows into Austin Brook, and then into the Nipisiquit river.

The claim of the plaintiff is that this foul water flowing down Austin Brook into the Nipisiquit river and down the Nipisiquit river injures and practically destroys any fishing privileges they have on that river and also any spawning grounds that may be on that river. The plaintiff company by its bill asks damages for the injuries and the damage done to its riparian rights and other rights of fishing and also for damages that it may or does suffer by reason of the injury done to the spawning beds on the river and it asks an order of injunction restraining the defendant company from allowing or permitting this foul water from flowing into the Nipisiquit river. The defendant company denies that the water that flows from its mine is injurious to the plaintiff company's rights of fishing. It further claims that it is operating its lease under leases from the Crown and that by virtue of these leases it has a right to discharge this water into the river.

The right of a riparian owner on a natural stream has been determined in a grea many cases. He has the right to the full flow of the water in its natural state, without any diminution or pollution. In *Chasemore* v. *Richards*, 7 H.L.C. 349, Lord Wensleydale, at 382, speaking of the rights of an adjoining proprietor of lands on streams flowing on the surface, says as follows:—

> He has the right to have it come to him in its natural state, in flow, quantity and quality and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state.

See also *Crossley Sons, Ltd.* v. *Lightowler*, L.R. 2 Ch. 478; *John Young & Co.* v. *Bankier Distillery Company*, [1893] A.C. 691; *Clowes* v. *Staffordshire Potteries Waterworks Company*, L.R. 8 Ch. 125; *Attorney-General* v. *Birmingham*, 4 K. & J. 528. Numerous other cases may be cited in support of the proposition that the riparian proprietor is entitled to the flow of the water in its natural state, and the cases all hold that the party interfering with this right may be restrained by an order of injunction.

Dealing first with the question that the defendant company under its mining leases has the right to discharge this water into the Nipisiquit river, I think that contention cannot prevail. The General Mining Act, C.S.N.B. 1903, ch. 30, undertakes to grant no such right to a lessee. It authorizes the Government to make leases of mining rights and the form of the lease as given and the form itself shews that it is not intended to give any right

as claimed by the defendant. A form of lease was put in evidence and by it after describing the land that is to be leased it is provided as follows:—

> Also, as far as His Majesty lawfully may grant the same, free license and authority to, etc., etc.

This shews that it was not intended to interfere with the rights of private individuals, and indeed the Governor-in-council could not make a lease or a grant to affect the rights of private individuals. The defendant's contention on that point therefore must fail.

The matter is then reduced to a question of fact, and that is: Does the water escaping from the defendant's mill pollute this stream? The evidence was contradictory. On the part of the plaintiff company, some eight or nine witnesses were called, who all swore that during the summer of 1912 they had been at what is called the gorge pool, just below the Grand Falls, and that the water was very much discoloured; foreign matter was in it, and the fishing was destroyed. Some of them were guides who had been on the river for a good many years, and stated that during the summer of 1912, at the different times they were there, the water was discoloured and polluted by this discharge from the mill, and the fishing was very much injured. On behalf of the defendant company, it was contended, and witnesses were called to prove, that although this discoloured water did come from the mills and flowed from Austin Brook into the Nipisiquit river, that when it got to Grand Falls it was mixed up with the other water, so that it was not perceptible, and that the water was clear. There was also expert evidence given as to the condition of the water below Grand Falls, and the experts said that the samples of water examined by them which were taken from just below Grand Falls were pure and would not affect the fishing. The only way of accounting for the difference between the witnesses is that they saw the river at different times, sometimes it might be clear and free from this matter, whilst at other times it was not. It is impossible to think that eight or nine different witnesses who were there at different times and described the state of the water could be entirely mistaken. I do not attach so much importance to the evidence of these expert witnesses as I do to the evidence of those witnesses who were on the ground and saw the condition of the water. In addition to this, at the request of both parties, I visited the river and defendant company's works, and with the manager of the defendant company and the solicitors of both the plaintiff and defendant companies examined the stream myself, and there was the flow of dirty, muddy water down Austin Brook, and plainly to be seen down the Nipisiquit river and to Grand Falls, and the muddy water was perceptible, and the water was practically in the condition described by the plaintiff's witnesses in the gorge below the Grand Falls.

N. B.

S. C.
1913

NIPISIQUIT CO. v. CANADIAN IRON CORPORATION.

McLeod, J.

As I have said, the plaintiff company is entitled to have the water come in its natural condition, and from the evidence as well as from my own observation it is clear to me that it does not at all times come to it in its natural state. There will therefore be an injunction order restraining the defendant company from letting the flow of polluted water from its works into the Nipisiquit river, but as the works of the defendant company are important, and it may be that they can make such changes or improvements as will overcome the difficulty, I will give them time to do so, and the order of injunction therefore will not come into effect until the first of April, giving the defendant company time to make any necessary changes that may be made. If the defendant company does not within that time take the necessary steps to stop this flow of water, then the plaintiff company will be at liberty to apply for a perpetual injunction.

The plaintiff company claim damages for the injury done to its fishing rights for the seasons of 1912 and 1913. There was not much evidence given as to the damage done; there is no doubt that the fishing rights were injured during those two seasons; but I have not sufficient evidence before me to assess the damages. Therefore, if the parties cannot come to an agreement as to the damages, there will be a reference to a Master in Chancery to take evidence and assess them. There will be leave for either parties to apply. The defendant company must pay the costs of this suit.

Judgment for plaintiff.

B. C.

C. A.
1913

JOHNSON v. JOHNSON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. November 4, 1913.

1. CONTRIBUTION (§ I—1)—BETWEEN WRONGDOERS—COMPANY DIRECTORS—JUDGMENT AGAINST ONE FOR FALSE STATEMENTS IN PROSPECTUS—PRIMA FACIE CASE—WHAT NECESSARY TO ESTABLISH.

In an action by a director of a company against his co-directors for contribution in respect of a judgment against him obtained by one induced to subscribe for shares by misrepresentations contained in the prospectus, in order to recover under sec. 92 (4) of the Companies Act, B.C. Stat. 1910, ch. 7, R.S.B.C. 1911, ch. 39, sec. 93, rendering all directors jointly and severally liable for any loss or damage sustained by those subscribing for shares on the faith of the prospectus, the plaintiff must establish such a case as the subscriber himself would be required to make were he the plaintiff in the action.

[*Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q.B. 504, referred to.]

2. DAMAGES (§ III E—135)—MEASURE OF COMPENSATION—TORTS—FALSE STATEMENTS IN COMPANY PROSPECTUS—CONTRIBUTION BETWEEN JOINT TORTFEASORS.

In an action by a director of a company in respect of a judgment obtained against him (which he paid) by one induced to subscribe for shares by reason of false statements in the prospectus, against his co-directors for contribution under sec. 92 (4) of the Companies Act, B.C. Stats. 1910, ch. 7, R.S.B.C. 1911, ch. 39, sec. 93, rendering all di-

rectors jointly and severally liable to those subscribing for shares in reliance on false statements in the prospectus for all damages sustained therefrom, the measure of damages, where the subscriber does not retain his shares, is the amount he paid for them.

[*Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q.B. 504, followed; *McConnell* v. *Wright*, [1903] 1 Ch. 546; and *Shepheard* v. *Broome*, [1904] A.C. 342, distinguished.]

3. PLEADING (§ II P—250)—SUFFICIENCY OF STATEMENT OF CLAIM—ACTION FOR CONTRIBUTION BETWEEN JOINT TORTFEASORS—COMPANY DIRECTORS—JUDGMENT AGAINST ONE FOR FALSE STATEMENTS IN PROSPECTUS.

The statement of claim in an action by a director of a company against his co-directors for contribution under sec. 92 (4) of the Companies Act, B.C. Stat. 1910, ch. 7, R.S.B.C. 1911, ch. 39, sec. 93, in respect of a judgment obtained against him by one induced to subscribe for shares in reliance on false statements in the prospectus, must allege the responsibility of the co-directors for the issuance of the prospectus, that the subscription was made on the faith of untrue statements therein, and that the subscriber suffered loss by reason thereof; and it is not sufficient to allege merely a claim for contribution on account of the judgment against the plaintiff, and its payment by him.

4. PLEADING (§ I A—6)—NECESSITY—WHEN DISPENSED WITH — ISSUE CONTESTED AT TRIAL ALTHOUGH NOT PLEADED.

The rule that issues not pleaded may be considered on appeal was not intended to dispense with pleadings, but merely to meet exceptional cases where, by the tacit consent of both parties, unpleaded issues were clearly and unquestionably fought out at the trial.

[*Scott* v. *Fernie Lumber Co.*, 11 B.C.R. 91, limited.]

5. FRAUD AND DECEIT (§ I—1)—FALSE STATEMENTS IN COMPANY PROSPECTUS—OWNERSHIP OF LAND—HOLDING OPTION—SUBSEQUENT CONVEYANCE TO COMPANY.

The fact that, at the time a company stated in its prospectus that it had taken up certain lands, it merely held an option for their purchase, does not render the statement false so as to permit one who subscribed for shares in reliance thereon to recover the amount paid by him, where the company acquired title to the lands before the subscriber repudiated his subscription.

6. FRAUD AND DECEIT (§ I—1)—FALSE STATEMENT IN COMPANY PROSPECTUS—SUBSCRIPTION INDUCED BY—WHEN SUBSCRIBER MAY RECOVER.

One who is induced to subscribe for company shares by false statements in the prospectus cannot recover the amount paid thereon where, with full knowledge of their falsity and without repudiating his original subscription, he subscribed for additional shares, since his conduct shewed that he did not consider that he had been misled to his prejudice by such statements.

Statement

ACTION by a company director against co-directors under sec. 92 (4) of the Companies Act, B.C. Stat. 1910, ch. 7, R.S.B.C. 1911, ch. 39, sec. 93, for contribution in respect of a judgment obtained against the plaintiff by one who subscribed for shares in reliance on false statements contained in the prospectus.

Judgment was given for the defendants.

Bodwell, K.C., for appellant (defendant).

W. Martin Griffin, for respondent (plaintiff).

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This action is founded on sec. 92 of the Companies Act, 1910.

The plaintiffs and one George Gore were the promoters of the Salmon Arm Fruit and Land Company, Ltd. which was incor-

B. C.
C. A.
1913
JOHNSON
v.
JOHNSON.
Macdonald, C.J.A.

porated on September 14, 1910. The prospectus (there were two, but only the first is in issue here) which gave rise to this action was drawn up about a month earlier. In November, 1910, one J. L. Clark subscribed for shares in the company, first for 100 on the 4th, and again on the 21st for 400 shares of the par value of $10 per share. He paid half the subscription price, $2,500, in cash and gave his promissory notes for the balance.

About the beginning of 1911 he claimed to have discovered falsehoods in the prospectus, and repudiated his subscription, and later sued the company and the plaintiffs herein as directors, but not the defendants, to recover the moneys he had paid. In that action he succeeded. The plaintiffs herein then paid the judgment, and subsequently brought this action for contribution. The defendant E. K. Johnson did not defend, so that only Nicholson, Banks and Turner are now resisting.

The plaintiffs can only succeed by making out the case that Clark would have had to make out against these defendants under sub-sec. 4 of said sec. 92. That section was originally enacted in England immediately after the decision of the House of Lords in *Derry* v. *Peak*, 14 A.C. 337, in which it was held that a shareholder could not succeed in an action for damages against directors for innocent misrepresentations contained in a prospectus.

The representations here, if they amount to such, were held by the learned trial Judge to have been made innocently, and I accept that view of them.

The effect and intention of the statute appears to me to be twofold; it enables the shareholder to recover damages for misrepresentations in a prospectus, where there was no deceit, and it places those directors, who have been made liable at the suit of the shareholder, in a position to recover contribution from other directors or promoters who were not sued with them, without being met by the defence that contribution cannot be claimed by one tortfeasor from another, assuming that the said section makes the innocent misrepresentations a tort, which is a moot question: *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q.B. 504.

The appellants' counsel contended that no loss or damage had been proven in this case. I think it sufficiently appears from the evidence that the loss and damage suffered by Clark, assuming that he was entitled to succeed at all, was the amount of money he had paid for his shares, namely, $2,500. He is within the *Frankenburg* case above mentioned, and not *McConnell* v. *Wright*, [1903] 1 Ch. 546; and *Shepheard* v. *Broome*, [1904] A.C. 342, where the shareholders still held their shares and were suing for their losses without seeking cancellation.

I now come to the consideration of the question of whether or not these plaintiffs have made out the case that Clark would have been bound to make out against these defendants.

It appears that the said three defendants were persuaded by the plaintiffs and the said Gore, as promoters, to consent to act as directors. They were reluctant to do so as they were not willing to invest in the company. They were told that they need not purchase shares beyond the nominal number required to qualify them for the Board; they were also told that the plaintiffs proposed to put their own lands into the undertaking, which was one organized to acquire and utilize lands suitable for fruit culture. Their consent appears to have been given out of good nature and a desire to aid an enterprise which plaintiffs represented to them would be of advantage to the district in which they lived. The defendants had nothing to do with the preparation of the prospectus. Nicholson and Banks read it and noticed certain inaccuracies, but were assured by one or other of the plaintiffs, who came to them for their signatures, that it would not be used, but would be replaced by a corrected one. Nevertheless it was used by Gore. Turner says that Johnson told him it was a paper relating to his becoming a director; that he did not read it, and had no knowledge of its contents, or that it was a prospectus. Their carelessness cannot excuse them to strangers, but the plaintiffs are not strangers. It is therefore not surprising that the learned trial Judge deplored that the law as he understood it compelled him to decree contribution by these defendants for the relief of the plaintiffs, who by their inducements, innocent though they may have been, brought the defendants into their present predicament. Moreover, it appears that as soon as Clark recovered judgment, the three plaintiffs, who had actually deeded their lands to the company, procured, in some manner which is not made quite plain, the return of their deeds from the company's solicitors, or from the land registry office, where some of them at least had been deposited for registration, and which on recovery they at once destroyed, thus depriving the company of the only assets it had. The plaintiffs try to excuse this by saying they did not receive payment for their lands from the company, an excuse which will not bear examination. The consideration for these deeds agreed upon with Currie was shares in the company with Leonard, shares in part and what were called "unit deeds" in part; and with Johnson $700 cash and the balance in "unit deeds." The cash was actually paid to Johnson out of the moneys received from Clark. At a meeting of the Board held on December 16, 1910, at which among others two of the plaintiffs were present, the following resolution was passed by the Board:—

> That the necessary shares and unit deeds be issued to Messrs. W. V. Leonard, S. H. Currie and John Johnson in connection with the transfer of their various properties to the company.

Another matter to be observed in connection with this case is that while Leonard appears as a plaintiff and has been awarded

B. C.

C. A.

1913

JOHNSON v. JOHNSON.

Macdonald, C.J.A.

contribution, at the trial he denied that he had been joined as a plaintiff with his consent, but added:—

> Well, I am down here now right in Court so that it is immaterial if his Lordship puts me in as a plaintiff—I go in willingly.

Then again Johnson's land which was deeded to the company was subject to a mortgage of $700. The moneys already mentioned which he received from the company out of the payment made by Clark was given him to pay off this mortgage, which was done. When he recovered back his deed he retained the land free from the mortgage.

These matters have not been taken into account in the decree made in the Court below, nor have they been made the subject of appeal or of argument in this Court, perhaps for undisclosed reasons which deprive them of significance. I do not mention them for the purpose of making them the grounds of my decision, but as adding to what has already been said as to the relative positions, in equity at all events, of the parties to this action. In these circumstances I think I should be most careful to see that the plaintiffs have fully made out their case.

Turning to the statement of claim in the Clark action, which was put in at the trial, and which presumably contained his real complaint, I find that the only misrepresentations in the prospectus of which he complained were, with two exceptions, which I shall presently mention, not representations of fact at all, but of the objects and intentions of the company. The said exceptions are:—

> (1) Trustees—Dominion Trust Co. Ld., Vancouver, B.C.

This statement, if it can be called such, was true.

> (2) That fifty shares of the company had been allotted and paid for.

The only foundation for that statement appears to be that shares to that number had been taken by the directors to qualify them for the Board. These were not paid for in cash, but that might be a matter of adjustment with at least the three plaintiffs in connection with the lands which they were conveying to the company. When asked, as witness for the plaintiffs in this case, what representations he complained of, Clark makes no reference to either of the above alleged misrepresentations. I therefore eliminate these as having neither been pleaded in this action nor made issues in the course of trial.

Whether the judgment in Clark's action was right or wrong it cannot, it is conceded, affect the rights of the defendants in this. The liability of directors or others in their position is strictly limited. It is

> to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein.

Now instead of alleging, as I think they ought to have done in their statement of claim, the defendants' responsibility for the issue of the prospectus, that Clark subscribed for the shares on the faith of it, and that he suffered loss by reason of one or more untrue statements therein, the plaintiffs confined themselves to a claim for contribution on account of the judgment which Clark had obtained against them, and which they had paid. The initial issues were not raised at all, and in this way the action went to trial.

I think I should be quite justified were I to allow this appeal and dismiss the action on the ground that the statement of claim discloses no cause of action. I shall not, however, do so in this case, but I wish to make this observation, that the doctrine of *Scott* v. *Fernie*, 11 B.C.R. 91, was not intended to dispense with pleadings, but only to meet exceptional cases when it was manifest that the issue not pleaded was by the tacit consent of both parties clearly and unequivocally fought out at the trial. I think greater care should be taken to confine the evidence at trials to the issues raised in the pleadings, and if it should be found proper, as it often may, to broaden those issues, it should be done by formal amendment.

The following from Clark's evidence, read with the rest of his testimony, and bearing in mind his case as disclosed in his own statement of claim, and applying the principles adopted in *Nash* v. *Calthorpe*, [1905] 2 Ch. 237; and *Macleay* v. *Tait*, [1906] A.C. 24, leads me to the conclusion that the plaintiffs have failed to make out a case under the statute. Giving evidence, not in his own, as the first question might suggest, but in this action, he, referring more particularly to the 400-share subscription, said:—

Q. Now what were the misrepresentations on which you founded this (your) action? A. Well, the principal misrepresentation was that the land did not (sic) belong to the company.

Q. And where was that contained in? A. In the prospectus, I think, and in this little folder here.

And on cross-examination:—

Q. Mr. Clark, you state you were induced to subscribe for this stock by the statements made to you by Mr. Gore and others? A. Yes.

Q. Who were the others referred to in that answer? A. Well, the only ones that I remember distinctly were Leonard and Gore.

Q. Did Leonard tell you whether he had or had not already transferred his land to the company? A. Well, he gave me the impression that they had all deeded the land to the company, and the deeds were held by these solicitors.

Before referring to the following evidence I may state that Clark was elected a member of the board of directors, and elected vice president of this company on November 18, three days before he subscribed for the 400 shares.

About that time—the exact date is not made certain—he

B. C.
C. A.
1913
JOHNSON v. JOHNSON.
Macdonald, C.J.A.

signed what is called the second prospectus, which is not attacked, and with reference to it he was asked:—

Q. Well, on the faith of what did you sign the second prospectus? A. Well, I signed it on the faith of assets that I was led to believe the company had in the way of lands and deeds, and another thing on account of the directors telling me that the Dominion Trust Co. had offered to loan them $50,000 on the property.

That he had read that prospectus which differed from the first, appears from this:—

Q. Now I think you stated before at the previous trial you made the following statement: I might state when I signed that I drew the directors' attention to the fact that the prospectus was not the same as the one handed to me, and they said that they had made some changes in the memorandum of association, and had also left out some cuts in that prospectus that were in the first one.

It therefore in my view of the evidence comes to this: Clark's only substantial complaint, and the only issue in this action developed by the evidence though not pleaded in either action, was that the following statement:—

We might here say that property A of 200 acres had already been taken up and also part of property B

was untrue, and that the statement about the proposed loan was untrue. Nothing need be said about the latter statement as it was not contained in the prospectus.

Some reference has been made to a statement in the prospectus that there were 20,000 acres of land in the district suitable for orchard purposes which the company controlled. It appears that the company did not control that acreage of land, but Clark did not complain of that statement, either in his statement of claim in his own, or in his evidence in this case.

Now coming back to the only complaint left—that respecting properties A and B that is to say, that they had already been taken up, it seems to me that the statement was true in the proper sense of the words, and in the sense in which they were understood by Clark.

It as a matter of expression the language of a prospectus is to be absolutely true the most prolix language that conveyancers ever knew would not suffice so to qualify any but the most simple statement as to make it absolutely true: Buckley on Companies, 9th ed., p. 186.

The company on November 4, the day on which Clark first subscribed for shares, had acquired options to purchase from Leonard, Currie and Johnson, and others, more than 600 acres of land. These were the lands the plaintiffs anticipated acquiring for the company when the first prospectus was drawn up. The acquisition of these options was followed by conveyances by the three plaintiffs of lands to the extent of 200 acres, thus making up "Property A," and these conveyances were in the hands of the

solicitors of the company as early as November 21, 1910, not as was suggested by one of the plaintiffs to be held in escrow, but for registration (Leonard, p. 153).

As to "Property B," if I understand aright the scheme of the prospectus, this was to be the second property of 200 acres. The options already mentioned covered more than would be required for this parcel. At the time he subscribed for the 400 shares Clark was quite aware of the state of the company's titles, or at all events had notice that the company had not acquired registered titles of their lands.

This evidence also relieves me of doubt as to whether or not the first subscription is to be treated in the same way as the second. The evidence as to dates of meetings of Clark and Leonard and other directors is so vague that I am unable to learn just when they did first meet. But it does not now seem to me to be material in view of the fact that Clark was made aware of the condition of these titles before November 21. That was the time for repudiation of the first subscription if he felt he had been misled, and the fact that he did not do this, but on the contrary took a further and larger block of shares, is the best evidence that he did not feel he had been misled, at all events to his prejudice.

I think the plaintiffs have failed to make out their claim, and that the appeal should be allowed, and the action dismissed with costs here and below.

Irving, J.A.
Galliher, J.A.

IRVING, and GALLIHER, JJ.A., concurred with MACDONALD, C.J.A.

Appeal allowed.

DAY v. HORTON.

MAN.
C. A.
1913

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 24, 1913.

1. TROVER (§ I A—1)—RIGHT OF ACTION—BY ADMINISTRATOR—SEIZURE OF CHATTEL DURING INTESTATE'S LIFETIME.

Where a wrongful seizure under execution had been made under defendant's direction of an automobile in the possession of the decedent who would not have made use of same nor derived any benefit from its possession, and the automobile is afterwards returned undamaged to the administrator of the deceased owner on the seizure being held to be illegal, no cause of action survives to the administrator for the mere detention during the period prior to the decedent's death, nor does a cause of action arise in favour of the administrator for such detention for the period between the decedent's death intestate and the date of the grant of letters of administration.

2. DAMAGES (§ III J—200)—MEASURE OF COMPENSATION—TAKING OR DETENTION OF PERSONAL PROPERTY—NOMINAL DAMAGES.

An administrator is entitled to nominal damages for the deprivation, from and after his appointment, of the use and possession of goods belonging to his intestate which had been wrongfully taken from her during her lifetime, but which had been returned in good condition to the administrator, where no special damage had been sustained by the

MAN.

C. A.

1913

DAY v. HORTON.

deceased in her lifetime or afterwards by her estate by reason of the wrongful detention.

3. NEW TRIAL (§ II—6a)—FOR ERROR OF THE COURT—IN GRANTING NONSUIT —WHEN JUDGMENT FOR NOMINAL DAMAGE SHOULD HAVE BEEN ENTERED—ENTRY BY APPELLATE COURT.

On appeal from a judgment nonsuiting the plaintiff when he should have been awarded nominal damages a new trial will not be granted, but the appellate court may direct judgment to be entered for a nominal sum.

[*Simonds* v. *Chesley*, 20 Can. S.C.R. 174; *Scammell* v. *Clarke*, 23 Can. S.C.R. 307; and *Milligan* v. *Jamieson*, 4 O.L.R. 650, applied.]

Statement

APPEAL by the plaintiff, an administrator, from the dismissal of an action in the County Court for the recovery of damages for the wrongful seizure and detention of an automobile belonging to his intestate, during her lifetime, on an execution against a third person.

The judgment below was varied by directing judgment for the plaintiff for nominal damages.

W. Morrissey, for plaintiff.

P. C. Locke, for defendant.

Richards, J.A.

RICHARDS, J.A.:—The present defendant obtained an execution against the goods of a son of a woman whose administrator the present plaintiff is. Under this execution he directed the seizure of an automobile. The judgment debtor's mother claimed it as her property and the sheriff interpleaded. During the course of the interpleader the mother died, and the action was revived in the name of the plaintiff, as her administrator.

The plaintiff succeeded in the interpleader issue, and thereafter the automobile was returned to the plaintiff. He brought this action in the County Court of Winnipeg, claiming damages for the conversion.

There is no evidence to shew that the intestate was in any way deprived of the beneficial use of the machine in her lifetime, there being nothing to suggest that she would have used it or gained any benefit from its possession. I do not think, therefore, that any cause of action survived from her to the administrator for the conversion during that period.

I also am of the opinion that for the period between her death and the issue of the letters of administration, no cause of action arises.

As to the third period, that between the issue of the letters of administration and the time of the return of the automobile, the plaintiff was, I think, entitled to bring an action.

He gave no evidence whatever to shew that he was deprived of any chance to sell the machine, or to otherwise deal with it, for the benefit of the intestate's estate. His damages, therefore, were, at most, nominal; but I think he was entitled to nominal damages.

The learned trial Judge, before whom the case was tried, entered a judgment of nonsuit with costs to the defendant, and the question arises whether he rightly did so.

The cases of *Simonds* v. *Chesley*, 20 Can. S.C.R. 174, and *Scammell* v. *Clarke*, 23 Can. S.C.R. 307, hold that where there has been a verdict for the defendant in a jury trial and the plaintiff on appeal shews that he was entitled to nominal damages, but only to nominal damages, the Court will not subject the defendant to the expense of a new trial to enable the plaintiff to recover these nominal damages, although, strictly speaking, he would be entitled to them.

In *Hiort* v. *London & N.W. R. Co.*, L.R. 4 Ex. D. 188, and *Hogarth* v. *Jennings*, [1892] 1 Q.B. 907, the appellate Court apparently had jurisdiction to enter the judgments which should have been entered in the Courts below. In those cases judgments had been entered in the lower Court for the defendants, although the plaintiffs were entitled to nominal damages. The appellate Court, having, apparently, the power to enter the proper verdict, in each case entered a verdict for the plaintiff for nominal damages.

I take the result of all the foregoing cases to be this: that where the plaintiff is entitled to damages, but only to nominal damages, and a judgment has been entered for the defendant, the appellate Court will enter the proper judgment, if they have power to do so, but that they will not order a new trial, if they have not that power to themselves enter the proper judgment.

Following the above, I think that, in this case, the nonsuit should be set aside, and a verdict for nominal damages, say $1, entered for the plaintiff.

The question of costs is a more troublesome one. Apparently, although the automobile was the property of the mother and not of the son, there was ground for the judgment execution creditor to believe that it was the son's property. There is no suggestion that the seizure was made in bad faith, or for the purpose of harassing, or for that of forcing a settlement. The plaintiff, although he had the right to bring the present action must, I think, be held to have brought it vexatiously. I would, therefore, allow no costs of this appeal, and I would not disturb the finding of the trial Judge as to costs; that is to say, although the plaintiff has succeeded, I would leave him liable to pay the costs of the County Court. That was the course taken in the *Hiort Case*, 4 Ex. D. 188, as I understand it.

The result, I take it, is that the plaintiff will still have to pay those costs, less the sum of $1 awarded as damages, which is to be set off against them.

MAN.
C. A.
1913
DAY
v.
HORTON.
Cameron, J.A.

CAMERON, J.A.:—The defendant had a judgment against one Sidney E. Hoover, and under his instructions the sheriff, on May 10, 1912, seized an automobile which was claimed by Mrs. Katie E. Day, Hoover's mother, as her own property, and the sheriff thereupon took out an interpleader order. Mrs. Day died July 28, 1912, and the interpleader action was revived in the name of this plaintiff, her husband, who took out letters of administration.

The interpleader issue directed was decided in the claimant's favour November 28, 1912, and the automobile was accordingly returned by the sheriff on December 5, 1912. This action was brought by the administrator of Mrs. Day on March 17, 1913, to recover damages for the entry on her premises and the seizure thereon of the automobile and for being deprived of the possession and use of the automobile and depreciation thereof, loss of interest on investment and other damage as set forth in the statement of claim.

The administrator has a right of action for injury done to the personal estate of the deceased in his (or her) lifetime whereby it has become less beneficial to the administrator, under the statute 4 Edw. III. ch. 7, which has received a liberal construction. William on Executors, 10th ed., 606, 607. There is no evidence here on which there can be based a claim for damages sustained by the personal estate of Mrs. Day in her lifetime. Nothing is shewn to lead to the belief that the automobile was damaged, or the estate of the deceased depreciated by the seizure, in that period. On the contrary, the motor was carefully preserved. Nor is there any evidence of actual damage to the motor or to the personal estate of Mrs. Day during the period between her decease and the grant of letters of administration.

Whether we regard the plaintiff's action as one for conversion or detention, he may be considered, in either case, entitled to some damages for being deprived of the use and possession of the automobile after the grant of the letters. But such damages, on the evidence, can, at the most, be nominal only, and there was, before the Court for determination, no question of right or any other question than the question of damages.

The matter before us, therefore, comes down really to a question of costs. A new trial, it is well settled, will not be granted merely to enable a plaintiff to recover nominal damages: *Scammell* v. *Clarke*, 23 Can. S.C.R. 307; *Simonds* v. *Chesley*, 20 Can. S.C.R. 174; *Milligan* v. *Jamieson*, 4 O.L.R. 650. Applying that principle here, where we have power to enter the verdict that should have been entered in the County Court, we ought not to set aside the judgment of nonsuit entered at the trial merely for the purpose of entering a judgment for the plaintiff for a nominal amount.

I think the appeal should be dismissed without costs, but I would not interfere with the disposition of costs made in the Court below.

HOWELL, C.J.M., PERDUE, J.A., and HAGGART, J.A., concurred with CAMERON, J.A.

Appeal dismissed.

ROBINSON v. STARR.

Manitoba King's Bench, Curran, J. December 3, 1913.

1. VENDOR AND PURCHASER (§ II—33)—VENDOR'S LIEN—ENFORCEMENT—DEFICIENCY JUDGMENT.

The better practice on settling the form of judgment in favour of vendor for a judicial sale to realize the balance of purchase money on the purchaser's default, is not to include an order for payment by the purchaser of the deficiency, if any, which may arise on the judicial sale yet to take place, but to reserve leave to plaintiff to make a future application in the event of there being a deficiency.

Statement

ACTION against three defendants, G. L. Starr, F. W. Finch, and P. Clyne.

On May 20, 1912, Starr entered into an agreement to sell to Finch certain lands in the city of Winnipeg for the sum of $5,500 payable as follows: $500 in cash; $2,500 by the purchaser assuming a mortgage upon the property; $300 on December 1, 1912; $300 on June 1 and December 1 of each of the years 1913, 1914 and 1915; $300 on June 1, 1916, and the balance on December 1, 1916, with interest.

The agreement contained a proviso that all interest becoming overdue should forthwith be treated as purchase money and bear interest, and, in the event of default being made in the payment of principal, interest, taxes or premiums of insurance, or of any part thereof, the whole purchase money should become due and payable.

On November 14, 1912, Starr assigned the agreement to the plaintiff Robinson. Finch made default in payment of the instalment of principal and interest which fell due on June 1, 1913, and also made default in payment of the mortgage which he had assumed. The plaintiff had been required to pay $127.10, the insurance and overdue interest on such mortgage.

Clyne was in possession of the lands and premises and claimed that he was a purchaser of the lands from Finch. Plaintiff had notified defendants of the various defaults made and demanded payment from each of them for the sums overdue. She had also demanded from Clyne possession of the lands.

The plaintiff claimed as follows:—

(*a*) Judgment against the defendant Finch and Starr for the sum of $2,200, with interest thereon at the rate of 6 per cent. per annum from December 1, 1912, until judgment, and for the sum of $127.10 with interest thereon at seven per cent. per annum from September 1, 1913;

(*b*) That a time be fixed for the payment of the above amount due to

MAN.

K. B.
1913

ROBINSON
v.
STARR.

Statement

the plaintiff and that the defendants may be ordered to pay the same within the time so fixed together with the plaintiffs' costs of this action and in default the said lands be ordered to be sold and the proceeds applied in or towards the payment of the plaintiffs' said claim, and that the defendants Starr and Finch do pay the deficiency, if any, after the said sale;

(*c*) That the defendants Starr and Finch be ordered to indemnify and save harmless the plaintiff from the payment of the money due and owing upon the mortgage to the Credit Foncier Franco-Canadien and be ordered to pay forthwith such moneys to the plaintiff, or the said mortgagee, or into this Court;

(*d*) That the defendants Finch and Clyne be ordered to deliver up immediate possession of the said land and premises to the plaintiff and to pay for the use and occupation thereof from December 1, 1912;

(*e*) For the purposes aforesaid that all proper directions be given and accounts taken;

(*f*) The costs of this action;

(*g*) Such other order and relief as to this Honourable Court may seem just.

The matter came up by way of motion for judgment.

A. Monkman, for plaintiff.

No one for defendants.

Curran, J.

CURRAN, J.:—I think the plaintiff is entitled to the following judgment:—

1. As prayed for in clause (*a*) of the prayer for relief.

2. As prayed for in clause (*b*) of the prayer for relief, except that there will be no order for payment of deficiency, if any, arising from the sale. As to this the plaintiff will have liberty after the sale, if there be a deficiency, to apply to the Court for such an order, and if there be a surplus, the defendants will have liberty to apply to the Court for payment to them, or such of them as may be entitled thereto, of any such surplus.

3. I appoint three months from the date of judgment within which the defendants, or some of them, must pay into Court the amount found due the plaintiff, and in default, the usual order for sale, under the direction of this Court.

I refuse judgment as prayed in clauses (*c*) and (*d*) of the prayer for relief.

I think the statement of claim is defective in failing to allege that the plaintiff is entitled to a vendor's lien for his unpaid purchase money, and in not asking for a declaration of the Court that she is so entitled; but, in view of the specific prayer for relief as contained in paragraph (*b*) of the claim for relief, I think this may be overlooked, as the defendants certainly had clear intimation that the plaintiff was asking for a sale of the lands in any event, and perhaps the Court ought to draw from the allegations of fact in the body of the pleading the inference, as a matter of law, that the plaintiff's right to such lien as an unpaid vendor existed whether specially pleaded or not. The costs of the action to be taxed will of course be added to the plaintiff's claim.

Judgment accordingly.

SPORLE v. EDMONTON EXHIBITION ASSN., Ltd.

ALTA.

S. C.

1913

Alberta Supreme Court, Beck, J. November 6, 1913.

1. PRIZE CONTEST (§ I—5)—EXHIBITION ASSOCIATION—HORSE RACE—CONDITIONS OF QUALIFICATION.

A condition in a horse race for a prize donated by an exhibition association that each horse contesting should be "trained" in a specified district implies that the training should have taken place wholly in such district and a horse is disqualified from the contest, and its owner disentitled to the prize money on his horse taking first place, where the horse, although trained partly in such district, had been taken out of it and trained elsewhere within a few months prior to the race.

Statement

ACTION for prize money in the hands of the Exhibition Association, claimed by plaintiff as the winner of the first prize at a horse race held by the Exhibition Association, as against the owner of the horse which came in first and whose claim thereto was protested by the plaintiff on the ground of disqualification.

The plaintiff had entered the two horses which came in second and third at the race, but he claimed "first and second money" on the ground that the horse which came in first was disqualified by reason of the advertised condition that the race should be "for foals of 1910, open only to foals owned and foaled in Canada west of Great Lakes, raced *and trained* in the above territory. It appeared that the horse which came in first had been shipped to Idaho several months before the race and was there trained for two months.

Judgment was given for the plaintiff.

J. Cormack and I. *B. Howatt*, for plaintiff.

J. C. F. Bown, K.C., for defendants.

Beck, J.

BECK, J.:—My view is, that the word "trained" involves continuity; and that, while it may, under the words of the condition, be possible that the horse might be taken out of the territory for the sole purpose of a race, with the necessary days of rest before and after, without breach of the condition, I think that what took place with regard to this horse was "training," and that training out of the territory is prohibited by the condition that the whole training must take place within the territory stated. This being my view, I find in favour of the plaintiff, and give judgment for the amount claimed, without interest.

As it is a "sporting case," I presume that the defendants will continue the sport, and test the correctness of my view on appeal; and, as the money is safe, if the defendants give notice of appeal within thirty days, accompanied by an affidavit of *bonâ fide* intention to appeal, the proceedings will be stayed till next proper sittings of the Court *en banc*.

Judgment for plaintiff.

ONT.

S.C.
1913

LLOYDS PLATE GLASS INSURANCE CO. v. EASTMURE.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 16, 1913.

1. PRINCIPAL AND AGENT (§ I—2)—REVOCATION OF AGENCY—SUBSTITUTION OF COMPANY UNDER FORMER AGENT'S CONTROL.

On an incorporated company formed by a partnership of insurance agents taking over, with the consent of the principals, the agencies formerly operated by the partnership, the liability of one partner does not extend to the transactions of the company entered into by his former co-partner, unless there has been a guaranty in writing under the Statute of Frauds on the part of the defendant partner in respect of the company's liabilities.

Statement

APPEAL by the defendant Eastmure from the judgment of Latchford, J., in favour of the plaintiff company as against the appellant, after trial of the action without a jury at Toronto on the 30th September, 1913.

The appeal was allowed in part.

J. E. Jones, for the appellant.

R. McKay, K.C., for the plaintiff company, the respondent.

G. Larratt Smith, for the defendant Lightbourn.

Newman, for the defendant Eastmure & Lightbourn Limited.

Meredith, C.J.O.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The respondent is an insurance company, having its head office at New York, and the action is brought to recover money alleged to be due to it from its general agent for Canada, in respect of premiums collected and not accounted for and other money alleged to be owing by the agent.

The action was brought against the appellant and the defendant Lightbourn, trading under the firm name and style of Eastmure & Lightbourn, and in the statement of claim it was alleged that that firm was the general agent for Canada of the respondent and accountable for the money that the respondent claims. Eastmure & Lightbourn Limited was subsequently added as a defendant, and the statement of claim was amended by introducing an allegation that Eastmure & Lightbourn Limited is an incorporated company carrying on business at Toronto as an insurance agent, and an allegation that, in the event of its being held that the defendants Arthur L. Eastmure and Frank J. Lightbourn were not the agents of the respondent after the incorporation of the company or at any subsequent time, that company acted as agent of the respondent throughout Canada and is responsible for its claim. The appellant in his individual capacity was subsequently added as a defendant.

The finding of the trial Judge was, that after the 1st May, 1907, the appellant was the agent of the respondent and was liable for whatever balance may be found to be due to the respondent upon a proper taking of the account of moneys re-

ceived for or on behalf or on account of the respondent, or which it was the duty of the appellant to collect and remit to the respondent, including any balance which may have been owing on that day by the defendant Eastmure & Lightbourn Limited, to the respondent, which has not been liquidated or paid off by payments made by the appellant, and that the defendant Eastmure & Lightbourn Limited was liable to the respondent for such balance, if any, as was due and owing by the defendant Eastmure & Lightbourn Limited to the respondent in respect of the agency business of the respondent conducted by that defendant down to the 1st May, 1907, which has not been paid or liquidated by payments made by the appellant subsequently, and the judgment was directed to be entered accordingly, with a reference to the Master in Ordinary to take the accounts, and dismissing the action as against Lightbourn and the firm of Eastmure & Lightbourn, with costs, and reserving further directions and costs as between the respondent and the appellant and the defendant Eastmure & Lightbourn Limited until after the report; and from that judgment this appeal is brought.

It was argued on behalf of the appellant that the finding of the trial Judge that the appellant became the sole agent of the respondent on the 1st May, 1907, was not supported by the evidence, and that the action as against the appellant should have been dismissed.

We are of opinion that there was evidence which supports the finding that is attacked by the appellant.

The firm of Eastmure & Lightbourn was appointed general agent for the respondent for Canada in 1898. In 1904 or 1905, a company was incorporated bearing the name of Eastmure & Lightbourn Limited, which took over the business of the firm, and subsequently acted as general agent for Canada of the respondent. The only shareholders in the company were the appellant and Lightbourn and three other persons each holding five shares. These three persons were nominees of the appellant and Lightbourn, and the shares were allotted to them in order to comply with the requirement of the Ontario Companies Act that there shall be five applicants for letters patent of incorporation.

Owing to difficulties between the appellant and Lightbourn, and losses which the company met with, owing, as was alleged, to the actions of Lightbourn, he withdrew from the company in the year 1907, and after that time the appellant was practically the company, though it was of course a separate entity.

Owing to these difficulties and losses having occurred, and probably fearing that, if knowledge of them came to the respondent, the general agency which the company had would be

ONT.
S. C.
1913
LLOYDS PLATE GLASS INSURANCE CO. v. EASTMURE.
Meredith, C.J.O.

put an end to, the appellant went to New York and had there an interview with Mr. Woods, the president of the respondent; and it is upon what took place at this interview that the determination of the matter in issue mainly depends. The account of what took place given by Mr. Woods differs from the account given by the appellant. The testimony of Mr. Woods was corroborated by that of Mr. Chambers, the secretary of the respondent, and the trial Judge gave credit to them, preferring their testimony to that of the appellant, and found that the arrangement then made was that thereafter the appellant should be the sole general agent for Canada of the respondent; and with that finding we agree. It is reasonably clear, we think, that, although it may not have been expressed in so many words, the intention of the parties was that this change should take place. There was no reason why the appellant should have been unwilling that it should be made, but every reason in the circumstances why he should have been willing, and all the probabilities of the case are in favour of the view that it was agreed that the change should be made.

While I agree with the conclusions of the learned trial Judge as to the matters with which I have dealt, I am unable to understand upon what ground the appellant is made personally liable for anything that may have been owing by Eastmure & Lightbourn Limited in respect of the transactions of the agency prior to the 1st May, 1907. No case is made on the pleadings for such relief, and there is no evidence to support a finding that it was part of the arrangement made in New York that the appellant should assume any such liability; and, even if it was so agreed, the agreement could not be enforced, as it would have been an undertaking to answer for the debt of another, and not enforceable because not evidenced as required by the Statute of Frauds.

The judgment should, therefore, be varied by striking out so much of it as declares that the appellant is liable to the respondent for what, if anything, is owing by Eastmure & Lightbourn Limited; and, with that variation, the judgment should be affirmed.

This variation of the judgment is of no importance practically, because, as Mr. McKay stated upon the argument, the respondent does not claim anything in respect of the transactions of the agency prior to 1910.

There should, I think, be no costs of the appeal to either party.

Judgment below varied.

HOUGHTON LAND CORPORATION v. INGHAM.

MAN.

K. B.

1913

Manitoba Court of King's Bench, Metcalfe, J. November 17, 1913.

1. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT—FRAUD —MISREPRESENTATION.

A representation by a vendor that a "good road" lead to farming land sold, is satisfied if the road is such as is usually travelled in the vicinity, and over which, under ordinary circumstances, but not necessarily at all times, farm implements may be transported.

2. VENDOR AND PURCHASER (§ I E—27)—RESCISSION OF CONTRACT—FRAUD —MISREPRESENTATION AS TO QUALITY OF LAND.

A representation by a vendor that a farm was as good as any in the district means, as compared with any in the immediate vicinity, especially where the purchaser inspected the land before buying, and was aware of the nature of the surrounding land.

3. VENDOR AND PURCHASER (§ I B—5*a*)—PAYMENT OF PURCHASE MONEY— ACCELERATION.

On the refusal of a vendee to pay the first instalment due under a contract for the sale of land, the vendor may, in the absence of a claim on the part of the vendee for equitable relief, invoke an acceleration clause permitting him to declare all of the principal and interest due and payable on the vendee's default in paying any instalment thereof.

[*Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555; and *Newberry* v. *Langan*, 8 D.L.R. 845, 47 Can. S.C.R. 114, considered.]

4. CONTRACTS (§ I D 2—52)—MEETING OF MINDS—MUTUALITY—CONTRACT FOR SALE OF LAND—FAILURE TO MAKE INITIAL PAYMENT—EFFECT.

The purchaser cannot take advantage of his own default to make a cash payment as provided on the execution and delivery of a contract for the sale of land to claim that there was no concluded agreement.

[*Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555; and *Newberry* v. *Langan*, 8 D.L.R. 845, 47 Can. S.C.R. 114, distinguished.]

5. CORPORATIONS AND COMPANIES (§ IV D 3—85) — CONTRACTS — FORMAL REQUISITES—STATUTORY REQUIREMENTS—CONTRACT FOR SALE BY LAND COMPANIES.

The provisions of sec. 1, ch. 8, of the Manitoba Stat., 1911, that every land company may convey, mortgage or make agreements for the sale of land when each transaction is specially authorized by a by-law of the board of directors, was not intended to lay down any hard or fast rule by which such a company must alienate its lands, but rather to establish a definite procedure which if followed will legalize a transaction, and its purpose was not to deprive a company, such as a loan and investment company, of the right to carry on its business and alienate its land according to the law in force prior to the passing of such statute.

Statement

ACTION by the seller of land to recover money due on a contract of sale.

Judgment was given for the plaintiff.

I. Pitblado, K.C., and *P. J. Montague*, for plaintiffs.

C. S. Tupper, for defendant.

Metcalfe, J.

METCALFE, J.:—The plaintiffs are a land and investment company. The defendant has a farm at Gilbert Plains, some little distance from Oehre River, and being desirous of purchasing

MAN.

K. B.
1913

HOUGHTON LAND CORPORATION v. INGHAM.

Metcalfe, J.

another farm in a locality not too far from Gilbert Plains so that he could use the same farm implements and farm stock for both, called upon Mr. Houghton, the manager of the plaintiff company, who told him they had for sale the land in question.

The plaintiffs had what Mr. Houghton calls a "topography" of the land. He handed this to the defendant. It was not returned. Houghton says it was a map or plan, in a general way describing the surface conditions of the farm.

Afterwards Houghton met the defendant at Ochre River and they drove from there to and over the farm, which the defendant inspected in company with Houghton. The road from Ochre River to this farm leads first through some exceedingly fine agricultural country, then through perhaps a mile and a half of stony and more or less unoccupied country, which lies close to the vicinity of the farm in question, and between it and Ochre River. Near the farm there were two or three small coulees running across this road or trail. Sometimes these were wet and unfit for heavy traffic. The defendant says they were then wet, and that he called Houghton's attention to this and told him that this road would not be good enough to take in and out his farm stock and implements from Gilbert Plains.

The defendant gave evidence on commission. He says that while in Winnipeg Houghton told him the farm was of the very best quality so far as the land was concerned, that there was a good road to the farm from Ochre River, and he further says that Houghton told him this knowing that it was essential, if he took the Ochre River farm, that he should be able to take the implements from Gilbert Plains to the farm. Upon being further questioned by his counsel, to the question, "Be fairly careful about this. What were the representations that you relied upon?" he says:—

> A good road from Ochre River to the farm; a good road from Gilbert Plains to the farm; the whole of the summer fallowing being properly performed, and upon his statement that the farm was a good one, as good as any in the district.

The defendant further says that Houghton told him there were two roads to the farm, one from Ochre River and one from Gilbert Plains; but he is indefinite as to this, and I am inclined to the view that Houghton did not make any statement as to any road other than from Ochre River. Other than as above there is no evidence to support the allegations of misrepresentation. After inspecting the farm they came back to Ochre River and both of them talked the matter over with one Wilson, who seemed to know the country, and who substantiated Houghton's statement that there was a road to the south. It now appears that Houghton and Wilson did not mean a road on the south side of the farm, but a road lying south of the one which they had taken.

The defendant thereupon, on June 25, 1910, executed the agreement in question, which was an agreement to purchase the land for $11,000, payable as follows: $500 on the execution of the agreement; $500 on July 1, 1911; and the balance of the purchase price and interest by turning over the proceeds of half the crop each year until the principal and interest were fully paid. He also agreed to break and back-set and to crop, and to do various other things as set forth in the agreement.

He did not pay the $500 acknowledged in the agreement, giving satisfactory reasons therefor, but stated that he would send his cheque for the same in a few days. Mr. Houghton thereupon brought both copies of the agreement back to Winnipeg for execution, and the same were executed by the company immediately upon his return.

The defendant did not send his cheque and the plaintiffs did not send the agreement; but on the 8th July he wrote to Houghton as follows:—

I have just returned from Ochre River. I am very much disappointed with the farm. There is no road to the south end of the farm to Ochre River at all and there only remains the trail on which you and I drove; and this, as you know, is quite out of the question for farming purposes; there being no trail absolutely precludes me from sending horses, implements, etc., from Gilbert Plains as I intended doing.

On going over the land thoroughly I found the S.W. ¼ much fuller of gravel and shale than we previously thought, and the S.E. ¼ wetter, and in fact almost all clay.

There is considerably more timber than you estimated, but I am more concerned about the quality of the cultivated portion of the land.

I am sincerely sorry for the inconvenience I have caused you, but I must ask you to cancel the agreement and give me release, as the farm is entirely out of the question, at any rate, for my requirements, etc.

The defendant has paid no money on the agreement and has not performed his covenants.

I cannot find for the defendant upon misrepresentation. Even if Houghton did tell him that there was a good road to the farm, and if he did rely upon that representation, I think that the expression "good road" means, under the circumstances, only such a road as is usually travelled in the vicinity, and over which, under ordinary circumstances, but not necessarily at all times, the farm implements, etc., may be transported.

The defendant had gone over the trail already mentioned and had inspected the land. The only objection that he took to that trail was that there existed these small coulees. The south trail was a better trail and was, I think, a road upon which he could, under all reasonable and ordinary conditions, have transported his implements to and from that farm.

As to the misrepresentation of the quality of the farm, he saw

MAN.

K. B.

1913

HOUGHTON LAND CORPORATION v. INGHAM.

Metcalfe, J.

it himself. He now says that after travelling over this mile and a half of stony, barren country and arriving at the farm, that he understood Houghton to mean that the farm in question was as good, not as any in its immediate vicinity, but as good as any in the Ochre River district, where, along the river and distant some miles from this particular vicinity, are some of the finest and best cultivated farms. I cannot believe this. I believe that if any such representation was made, it was made with respect to the land in the immediate vicinity of this farm, and that it was so relied upon at the time. If such representation was made, I find it a true representation.

The defendant flat-footedly repudiated the contract and has not performed any of his covenants. There was some verbal arrangement between the parties not reduced to writing. It appears that had the defendant carried out his agreement, he was to get not only the land referred to in the agreement, but a building to be erected thereon, and summer fallowing to be done. During the trial it appeared to me that it might work a hardship if I compelled him to take less than he really bought. No attempt was made to amend or to seek equitable relief in case of judgment against the defendant. Of course it may be that this work has been done. In fact counsel for the plaintiff went so far as to state it had been done, and this is not denied.

The defendant, for reasons best known to himself, gave evidence that he is able to pay the whole amount of this purchase price at once if called upon.

In view of all the circumstances, I feel that I must now approach the case from a strict legal attitude, leaving out of mind any hardship which might fall upon the parties, and without considering any claim for equitable relief which the defendant may have, but which he has not seen fit to invoke.

It was provided in the contract as follows:—

> And the purchaser further covenants and agrees with the vendor that on default in payment of any instalment of interest at the rate aforesaid, which interest shall be payable from day to day, and which shall itself bear interest at the rate aforesaid, if not paid prior to the next gale day, it being agreed that all interest as well that upon principal as upon interest is to be compounded on each day mentioned for payment of interest and that on default in the payment of any instalment of either principal or interest the whole of the principal and interest hereby secured shall become due and payable.

The plaintiff has invoked this provision and the defendant has not asked to be relieved therefrom.

If the contract had been wholly a crop agreement, and if this provision were invoked with reference to the non-delivery of some of the crop, I would hesitate to declare the whole amount due under this provision. There has, however, been default in

the payment of the instalment due on July 1, 1911, thus bringing the case strictly within the provisions of the contract.

Almost at the close of the hearing the defendant applied to amend his defence as follows:—

1. The defendant further says that it was implied between the plaintiffs and the defendant that the contract referred to in the plaintiffs' statement of claim should not become operative until the cash payment of five hundred dollars ($500) referred to therein was paid, and that the said payment never having been paid, no contract ever existed between the parties.

2. The defendant further alleges that there was not at any time any mutuality in the contract between the plaintiffs and the defendant referred to in the plaintiffs' statement of claim.

3. The defendant further says that if the said contract was ever executed by the plaintiffs, which he does not admit but denies, before the said contract was so executed and before he was notified thereof, he withdrew from the said contract and so notified the plaintiffs.

Dealing with the first paragraph, I think that the parties came to an agreement, the one to buy and the other to sell, and that there was a concluded contract.

But the defendant now says, in effect, that because of his own default there never was any agreement and he cites for this proposition *Cushing* v. *Knight*, 6 D.L.R. 820, 46 Can. S.C.R. 555, referred to in *Newberry* v. *Langan*, 8 D.L.R. 845, 47 Can. S.C.R. 114, I do not think it was intended to enunciate so wide a proposition. The various judgments do not justify any such express interpretation. I think, if such is to be implied, that the finding was unnecessary.

But the defendant further says that there was a want of mutuality because the plaintiff company was not bound. He says that in Manitoba a company may sell land only by following the provisions of the statute, and not having followed the provisions of the statute, it was not, and never has been, bound to convey the land. In support of this proposition he cites sec. 1 of ch. 8, of the Statutes of Manitoba, 1911, the material portion of which is as follows:—

(a) Every such land company may mortgage or convey or make an agreement of sale of land without the assent of the shareholders, and it shall be sufficient if each such conveyance, mortgage or agreement be specially authorized by a by-law passed by the board of directors. This provision shall be retroactive and shall apply to all such transactions heretofore entered into by any such land company.

I do not think the Legislature intended to lay down a hard and fast rule by which a company must alienate its lands; but rather to establish a definite procedure which, if followed, would legalize a transaction. At all events, if there was any such intention it has not been so expressed as to deprive a trading company such as this of its rights to carry on its business according to the law which was in force prior to the passing of the statute.

MAN.

K. B.
1913

HOUGHTON LAND CORPORATION v. INGHAM.

The defendant does not desire to call further evidence, but asks me to allow the amendments upon the evidence now in. In view of all the circumstances, and believing that neither the facts shewn, nor the law, justify these amendments, I refuse to allow them.

There is now, therefore, due and owing from the defendant to the plaintiff the sum of $11,000 and interest as provided in the contract, and judgment will be entered accordingly. The plaintiff to have the costs of the action.

Judgment for plaintiff.

SASK

S. C.
1913

Re SOLICITOR.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown and Elwood, JJ. November 15, 1913.

1. SOLICITORS (§ I—9)—REINSTATEMENT AFTER ORDER STRIKING OFF — PROOF OF SUBSEQUENT GOOD CONDUCT AND OF RESTITUTION.

Although the default which was the basis of an order for striking a solicitor off the rolls has since been made good, the court, on a motion to reinstate, may postpone the application for six months or more if the gravity of the original charge were such as to make it appear that an insufficient period of subsequent good conduct had elapsed.

Statement

MOTION to reinstate a solicitor whose name had been struck off the rolls.

H. Y. MacDonald, for the solicitor.

H. E. Sampson, for the Law Society of Saskatchewan.

G. F. Blair, for Lount, Bowen & Smith.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—While we are glad to be shewn that the applicant has made restitution, and has during the past eighteen months conducted himself in such a manner as to gain the confidence and approbation of the business and professional gentlemen with whom he has been associated, we are all agreed that this application has been made too soon. The facts which led to the applicant being struck off the roll might very well have led to more serious consequences, which would have forfeited all claim to our indulgence and consideration for a very much longer period than eighteen months. We will, therefore, not consider the application at the present time; but will allow the applicant to renew it at the sitting of this Court in June, 1914.

Further material with regard to his conduct in the interval will be required, and should be furnished to the Law Society in due time before the renewal of the application. The question of the costs of this application may stand until that time.

Direction accordingly.

BARNES v. ELLIS.

SASK.

S. C.
1913

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 17, 1913.

1. JUDGMENT (§ VII—272)—RELIEF AGAINST—JUDGMENT IN PLAINTIFF'S ABSENCE—WITHDRAWAL OF COUNSEL.

Rule 351 of the Saskatchewan Rules of Court, 1911, by which any verdict or judgment obtained where one party does not "appear at the trial," may be set aside upon terms which the court may impose, does not apply to a case where plaintiff's counsel had appeared at the commencement of the trial and left the court-room without informing the court that he was withdrawing from the case which was proceeded with and tried in his absence.

Statement

MOTION to set aside a judgment entered at the trial in plaintiff's absence.

The motion was denied.

G. A. Cruise, for plaintiff.

P. H. Gordon, for defendants.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an application, under Rule 351, to set aside the judgment, on the ground that the plaintiff did not appear at the trial. The application was made to the trial Judge, who refused it. No reasons are given in the appeal-book why the application was refused, so I consulted my brother Brown, who was the Judge in question, and he informs me that he dismissed the application because the same did not come under Rule 351, the plaintiff being represented at the trial by his solicitor, who left the Court-room, but did not intimate that he was withdrawing from the case to the knowledge of the learned Judge, and, under any circumstances, had not withdrawn from the case when the trial commenced; and he (the Judge), after hearing the case, gave judgment for the defendants both in the action and on the counterclaim.

It is only when the plaintiff does not appear either by himself or his counsel, and a judgment is given dismissing the action, that an application can be made under Rule 351. Even if the application was one which could properly be made under that Rule, it should not be granted, as there are no reasons given why the plaintiff was not present at the trial. The affidavits simply say that he was not present; and, as the case had been peremptorily set for that day, some excuse must be given for his non-attendance, and that given by his solicitor, on the argument of the appeal, that he did not attend because his partner told him that he need not, as the case would be postponed because of the absence of a necessary and material witness (such not having been the case, as the trial Judge decided), is no ground for reopening the case. The application is, therefore, dismissed.

Motion denied.

ONT.

S. C.
1913

BURKE v. SHAVER.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. October 7, 1913.

1. SOLICITORS (§ II A—22)—RELATION TO CLIENT—CONTRACT TO DO A SPECIFIC ACT—LIABILITY—TORT DISTINGUISHED.

Where a client purchasing certain lands entrusts his solicitor with a cheque for the amount of the purchase-money with specific instructions not to pay it over until the taxes on the land shall have been paid, the solicitor's undertaking to follow such instruction constitutes a positive contract to do a specific act and his subsequent breach thereof is so construed as distinct from a breach of a general duty, arising out of the retainer, to bring sufficient care and skill to the performance of the contract.

[*Laidlaw* v. *O'Connor*, 23 O.R. 696, 698; *Sachs* v. *Henderson*, [1902] 1 K.B. 612, 616; *Steljes* v. *Ingram*, [1903] 19 Times L.R. 534, specially referred to.]

2. COURTS (§ II A 1—150)—JURISDICTION — DIVISION COURT — SOLICITOR AND CLIENT—CONTRACT—TORT.

A promise by a solicitor by way of a positive contract to do a specific act for his client (for instance, to hold the purchase money of certain lands entrusted to the solicitor by the client and not to pay it over until the taxes on the land shall have been paid) being one the breach of which constitutes a breach of contract and not a tort, a cause of action for less than $100 but more than $60 arising thereunder falls within the competency of a Division Court.

Statement

APPEAL by the plaintiff and cross-appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Wentworth.

The action was brought in the County Court against a solicitor, to recover the amount of the plaintiff's loss by reason of the solicitor's failure to carry out instructions given to him, and judgment was given for the plaintiff for $92.84, but with Division Court costs only.

The plaintiff appealed on the ground that County Court costs should have been allowed; and the defendant, from the judgment against him. The defendant's cross-appeal was abandoned at the hearing.

The appeal and the cross-appeal were dismissed.

Argument

J. G. O'Donoghue (*M. Malone*, with him), for the plaintiff, contended that the action was one of tort, and that the amount recovered was not within the Division Court jurisdiction, citing *Laidlaw* v. *O'Connor* (1892), 23 O.R. 696, at p. 698; *Godefroy* v. *Jay* (1831), 7 Bing. 413; *Hill* v. *Finney* (1865), 4 F. & F. 616, at p. 635; the Division Courts Act, 10 Edw. VII. ch. 32, sec. 62 (*a*), (*c*).

W. S. McBrayne, for the defendant, referred to *Turner* v. *Stallibrass*, [1898] 1 Q.B. 56, at p. 58, *per* A. L. Smith, L.J.: "The rule of law on the subject . . . is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on

the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract."

At the conclusion of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—The plaintiff appeals upon the ground that the learned Judge of the County Court erred in holding that the action was one within the proper competency of a Division Court.

It was contended by counsel for the appellant that the action was one of tort, and not founded on contract, and therefore not within the competency of a Division Court. In support of this contention *Laidlaw* v. *O'Connor*, 23 O.R. 696, was cited; but what was said by Armour, C.J., in that case makes against it. The learned Chief Justice, p. 698, quotes from note (*a*) to *Hill* v. *Finney*, 4 F. & F. 616, at p. 635, as follows: "But in an action against an attorney, not for a direct breach of a positive contract to do a specific act, but for breach of a general duty arising out of the retainer to bring sufficient care and skill to the performance of the contract, the action is not in contract, but in tort, and its essence is negligence."

To the same effect is what was said by the Master of the Rolls in *Sachs* v. *Henderson*, [1902] 1 K.B. 612, 616.

In *Steljes* v. *Ingram* (1903), 19 Times L.R. 534, Phillimore, J., reviewed the authorities and decided that an action against an architect to recover damages for not using due care and skill in supervising the erection of a house which the architect had undertaken to supervise, was an action founded on contract.

In the case at bar, the respondent was acting for the appellant in completing a purchase of land in another Province, and was intrusted by him with a cheque for the amount of the purchase-money, with instructions not to pay it over until the taxes on the land were paid. The respondent did not follow these instructions, and the appellant was subsequently compelled to pay a sum of money to save his land, which had been sold for the taxes.

It appears to us that the action is, therefore, for the direct breach of a positive contract to do a specific act, and not for breach of a general duty, arising out of the retainer, to bring sufficient care and skill to the performance of the contract, and, being so, was within the proper competency of a Division Court.

There is a cross-appeal by the defendant, but it was abandoned on the argument.

Both appeals will be dismissed, and there will be no costs of them to either party.

Appeal and cross-appeal dismissed.

MAN.

K. B.

1913

Re CANADA PROVIDENT AND INVESTMENT CORPORATION.

Manitoba King's Bench, Galt, J. December 13, 1913.

1. CORPORATIONS AND COMPANIES (§ VI E—342)—WINDING-UP—PREFERRED CREDITOR'S APPLICATION.

The holder of fully paid preference shares is a "shareholder" within sec. 12 of the Winding-up Act, R.S.C. 1906, ch. 144, and as such has a status to apply for an order winding up the company.

2. CORPORATIONS AND COMPANIES (§ VI E—340)—WINDING-UP—FORM OF AFFIDAVIT VERIFYING PETITION—MANITOBA RULES.

A petition in Manitoba for a winding-up order under the Winding-up Act, R.S.C. ch. 144, may be verified by an affidavit referring to the allegations of the petition in conformity with the English practice which is expressly sanctioned by the Manitoba Winding-up Rules.

[*Re Colonial Investment Co. of Winnipeg*, 14 D.L.R. 563, discussed.]

Statement

APPLICATION by way of petition for the winding-up of an insurance company under the provisions of the Dominion Winding-up Act, R.S.C. 1906, ch. 144.

The application was granted.

H. J. Symington, for petitioners.

W. H. Curle, for the company.

Galt, J.

GALT, J.:—This is an application by way of petition on behalf of the London and Western Trusts Co., Ltd., to wind up the Canada Provident Insurance & Investment Corporation (hereinafter termed the company), under the provisions of the Dominion Winding-up Act.

The application came before me in Chambers on December 8th, when Mr. Symington appeared for the petitioners and Mr. Curle for the company. It was explained to me that, owing to a recent change of the company's solicitors, Mr. Curle was unable to proceed with the application and desired time to obtain material with which to oppose the application. It also appeared that the company had obtained an enlargement of the application last week for the purpose of getting certain material from Toronto upon which to oppose the petition, but when this material arrived it was wholly insufficient. I therefore enlarged the application until to-day in order that further material, if any, might be furnished to the company's solicitors here. Mr. Curle states that on December 8, he wired to his clients accordingly, but the only answer received by him was a telegram yesterday stating that material was now on its way, but not indicating in any way its nature or applicability. Mr. Symington strenuously protested against any further delay in the hearing of the petition, and under the circumstances I do not feel justified in delaying the petitioners any further.

The petition shews that the company was incorporated by

a special Act of the Legislature of Manitoba, 63-64 Viet. ch. 66, the first section of which incorporates the company for the purpose of carrying on the business of life insurance and doing all things appertaining thereto or connected therewith, etc.

Sec. 49 provides that it shall be lawful for the company from time to time to invest its funds or any portion thereof in the purchase of the following securities and to acquire and hold the same absolutely or conditionally, and amongst others, in the debentures, bonds, stocks or shares or other securities of any building society, loan or investment company or the stocks or shares of any other chartered or incorporated company, etc.

Under sec. 50 the company is authorized to lend its funds or any portion thereof on the security of any of the bonds, stocks, shares, debentures, mortgages on real estate and other securities already mentioned.

Under sec. 53 the head office of the company shall be in the city of Winnipeg; but under the authority of the by-laws of the company it may be changed to some other city either within or without the Province of Manitoba.

Upon the material before me, the head office of the company is in Winnipeg.

The company's Act of incorporation was subsequently amended in different particulars, but not so as to affect any question arising out of the present application.

The petition shews, amongst other things, that the nominal capital stock of the company is $2,500,000, divided into 25,000 shares of $100 each, and of these $1,250,000 have been fully subscribed and $125,000 have been fully paid up; and there are cumulative preference shares authorized to the extent of $4,866,666.66, of which $804,021.87 cumulative preference shares have been subscribed and fully paid up.

The petitioners are alleged to be shareholders in the corporation holding cumulative preference shares to the extent of $58,400, the said shares being held by them as executors and trustees of the last will and testament of Richard Shaw Wood, deceased.

The following allegations also appear in the petition:—

7. The said corporation has impaired its capital to the extent of twenty-five per cent. and its lost capital will not likely be restored within one year, and the said company is insolvent.

8. The said corporation has invested about $300,000 in the National Land and Fruit Co. and Packing Co., and such company is in liquidation and will pay but a very small dividend, and $300,000 in the National Agency Co., which company is insolvent and in liquidation and will pay but a very small dividend, and $480,000 in the Imperial Loan & Investment Co. of Canada, which company is on the eve of liquidation, and petitions are now filed against it, and their shares have practically little or no value.

MAN.

K. B.
1913

RE CANADA PROVIDENT AND INVESTMENT CORPORATION.

Galt, J.

9. The Imperial Loan & Investment Co. has also invested in the Canada Provident Insurance & Investment Corporation the sum of $540,000, and such investments are cross-investments and there is no reality to them and the Canada Provident Investment Corporation did not pay their dividend at the last regular dividend time and their former dividends for some time have been paid to a large extent by cross entries with the Imperial Loan Co.

The petition is amply verified by two affidavits made by John S. Moore, of the city of London, in the county of Middlesex, manager of the petitioner company.

While the head office of the company appears to be in Winnipeg, its affairs appear to be largely in the hands of directors in Toronto, and it was stated by Mr. Symington and not contradicted by Mr. Curle that the directors of the company are the same individuals who control the other companies mentioned in the petition, and which appear to be in process of winding-up or on the eve of it.

The so-called investments referred to in the petition appear to me to be of such a suspicious nature that any delay in granting the relief which the petitioners seek might be highly prejudicial to the petitioners and to others interested in the company. Had it not been for this circumstance and for the fact that the company appears to be merely playing for time, I should have acceded to Mr. Curle's application for a slight further postponement.

The objections raised on behalf of the company to a winding-up order were as follows:—

1. The petitioners have no status, as they are not ordinary share holders and have no right to vote, etc.

They are, however, the holders of fully paid-up shares, non-assessable for calls, under the provisions of sec. 8 of the company's incorporation Act, and as such I consider that they are shareholders for the purposes of this application.

2. It is objected that the petition shews that the company has been carrying on a "general financial business," and therefore they are not within the provisions of the Winding-up Act.

I think, however, that as the petitioners refer expressly to the Act of incorporation and as this Act shews that the company is "an incorporated insurance company," this objection also fails.

3. That the petition has not been sufficiently verified.

The affidavit attached to the petition follows the statutory form of affidavit in use in England under winding-up proceedings there. In the recent case of *The Colonial Investment Company, Limited*, 14 D.L.R. 563, in which I made a winding-up order, a reference was made to the state of our law on the

subject of verifying winding-up petitions. Since that decision my attention has been called to the fact that under our own winding-up rules the form of affidavit verifying a winding-up petition in use in England has been expressly introduced into our practice.

It is not surprising that this was overlooked by all parties concerned in the *Colonial Investment Co.* case, 14 D.L.R. 563, because our winding-up rules, passed over twenty-five years ago, seem to have passed into desuetude, so much so that it is very difficult to find a copy of them either at the Court House or in any lawyer's office. It is highly probable that in the near future a new set of rules and forms will be promulgated.

In view, however, of the difficulty which I pointed out in my judgment in *Re Colonial Investment Co.*, 14 D.L.R. 563, at 574, the petitioners in the present case have added a further affidavit verifying the petition by direct evidence.

It is quite true that if the company had produced material denying the material allegations in the petition and explaining the extraordinary situation in which their financial affairs are, and in particular shewing that their assets exceeded their liabilities, the petitioner's affidavit would not be sufficient to establish insolvency; but, in the absence of any material whatever in answer to the application, I think I am justified in accepting the material now before the Court as sufficient *primâ facie* verification of the petition, including the fact of the company's insolvency.

I find then that the company is an incorporated insurance company doing business in Canada, and that it is insolvent within the meaning of sec. 6 of the Dominion Winding-up Act. I also find that the petitioners have complied with the requirements of sec. 11 of the Dominion Winding-up Act by shewing—(*c*) that the company is insolvent; (*d*) that the capital stock of the company is impaired to the extent of twenty-five per cent. thereof, and that the lost capital will not likely be restored within one year, and (*e*) that it is just and equitable that the company should be wound up.

I grant the winding-up order accordingly. The petitioners are entitled to their costs out of the assets of the company. Since dictating the above judgment counsel for both parties have appeared before me, and the petitioner asks that George Stanley Laing be appointed provisional liquidator. An affidavit having been filed shewing that Mr. Laing is a chartered accountant, and is a fit and proper person to be appointed, and Mr. Curle not objecting, I appoint the said George Stanley Laing provisional liquidator accordingly.

Application granted.

SASK.

S.C.

1913

SCOTNEY v. SMITH BROS. & WILSON.

(Decision No. 2.)

Saskatchewan Supreme Court, Newlands, Lamont, Johnstone, and Elwood, JJ. November 15, 1913.

1. MASTER AND SERVANT (§ II B 4—162)—ASSUMPTION OF RISK.

There is no assumption of risk unless the workman knew of the danger; and the doctrine will not bar a bricklayer's action for damages for injuries sustained by the falling of the wall in the construction of which he was assisting where he followed the line, stretched to lay brick to, and which it was the duty of the corner-men to turn over as occasion required so that the wall could be properly backed, where the plaintiff did not know that such duty of his fellow-workmen had been neglected to the extent of making the wall dangerous.

[*Scotney* v. *Smith Bros. & Wilson*, 4 D.L.R. 134, 5 S.L.R. 131, affirmed.]

2. MASTER AND SERVANT (§ II F 4—225)—MASTER'S LIABILITY—NEGLIGENCE OF FELLOW-SERVANT—STATUTORY LIABILITY.

The effect of the Judicature Act, R.S.S. 1909, ch. 52, sec. 31 (14), is to make the employer liable to a workman if the accident whereby the latter sustains personal injuries in the course of his employment is due to the negligence of a fellow-servant.

Statement

APPEAL by defendants from the judgment given in favour of plaintiffs at the trial before Brown, J., *Scotney* v. *Smith Bros. & Wilson*, 4 D.L.R. 134, 5 S.L.R. 131, 21 W.L.R. 287.

The appeal was dismissed.

G. A. Colquhoun, for defendants.

J. A. Cross, for plaintiff.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—This is an action by a workman against his employers for damages on account of an accident which happened to him by the falling of a wall upon which he was working as a bricklayer for the defendants. In his statement of claim the plaintiff alleges that "the wall of the said building upon which the plaintiff was working as aforesaid was, by the negligence and default of the defendants, constructed unsafely and in a defective and improper manner, and was in an unsafe condition, which the defendants knew or ought to have known."

In his particulars, given in pursuance to a demand therefor, he says:—

The wall mentioned in par. 2 of the statement of claim was constructed unsafely and in a defective and improper manner, inasmuch as the cornice on the top of the wall was too heavy to be constructed without backing up or without tie-irons or the use of props during its construction, and neither were used, and it was not properly backed up nor were tie-irons or props used or either of them.

The defence is a denial of negligence, an allegation that the wall was being constructed in a safe and proper manner, and a

further allegation that the plaintiff was a competent bricklayer and assumed the risk; and, as a further defence, that the plaintiff was guilty of contributory negligence.

The trial Judge found that the whole structure was architecturally sound, and that there was no necessity for using either tie-irons or props in the construction of the wall or any part of it, and in the ordinary course of events it would not have fallen if it had been properly backed up; that any departure from the custom of backing up each course of brick in building a cornice is fraught with more or less danger, because it is difficult for an operative to know at what time the equilibrium had been so shifted that the protecting portion has lost its support; that the material used, both lime and brick, was of good quality, and the wall did not fall because of defective material; and he says:—

> I am convinced, however, notwithstanding the opinion of some witnesses to the contrary, that the wall at the time it fell had reached the danger point.

And he further says:—

> The wall had reached that position where there was great danger of it falling, and great danger to the men working on it. Both the plaintiff and Lloyd were standing on the back of the wall at the time it gave way; for, although there was a platform four inches back from the inside of the wall, yet at this point the wall was eighteen inches wide, and it was necessary to stand on the wall itself in order to do their work effectively. They both state that they were in the act of laying a stretcher brick when the wall gave way from under their feet. In so laying their bricks, they were doing only what it was natural for them to do; and, although it was suggested that they must unnecessarily and carelessly have applied some force to the outside of the wall, I do not so find. It gave way so rapidly that they had no time to get on the platform or save themselves. I am of opinion, and find, that the wall fell while the plaintiff was working on it in the natural course of his employment.

We are asked to reverse two of these findings of the learned trial Judge; that the wall at the time it fell had reached the danger-point, and fell because it was not backed up; and that the plaintiff was not guilty of the suggested contributory negligence of applying force to the wall. These two findings may properly be considered together, because some of the expert witnesses called for the defence testified that, at the time the wall fell, it was in a safe condition, and could not fall of its own weight, and that to make it fall some force must have been applied to it, and suggested that the plaintiff must have applied such force and thus overbalanced it and caused it to fall.

As to the first finding, that the wall had reached the danger-point, and fell because it was not properly backed up, there is not only the evidence of the plaintiff's witnesses, but James H.

SASK.

S. C.

1913

SCOTNEY v. SMITH BROS. & WILSON.

Newlands, J.

Puntin, an architect who was called as an expert witness for the defendants, says:—

I think, if this cornice were backed up to this line, it would be stable, but, according to the nature of this drawing here, it would appear that these were left out, and in that case, why, there is a tendency there to go over.

The drawing referred to, it was agreed, shewed the way the brick work was at the time the wall fell. In the face of this evidence, I do not see how this Court can disturb this finding of the trial Judge.

As to the other finding, the only evidence to contradict the plaintiff's evidence that he did not apply force to the wall, thus causing it to overbalance, is the opinion of some of the experts called for the defence, that the wall, in the condition it was, could not go down without some force being applied to the cornice; but, as this is inconsistent both with the above finding of the learned trial Judge and the evidence of Puntin, which I have quoted, and also the positive testimony of the plaintiff that he did not do so, it is not such evidence as would justify this Court in reversing the trial Judge's finding that the plaintiff was not guilty of contributory negligence in applying force to the cornice, thereby toppling it over.

Having arrived at this conclusion, I have to consider the further contention of the defendants, that the plaintiff, in building this wall and cornice in the way he did, *i.e.*, without backing up each course of brick as laid, was guilty of negligence; and, further, that he knew that this was a dangerous method of proceeding, and he therefore assumed the risk himself, the defendants not being liable, under the doctrine *volenti non fit injuria*. These two contentions may also be considered together. The plaintiff states that the two corner-men working on this wall and cornice drew a line from each corner, and all the intermediate men, of whom he was one, had to work to this line so as to keep their work straight. Chambers, the defendants' foreman on the brickwork, says, in answer to the question, "What orders did you give?":—

Well, when the bricklayers started the cornice, when they first went up there, I gave the corner-men orders for to run one course on the front and turn the line over and then back up and so on right the way up the wall, and I also got in the middle of the scaffold; as I was going along to get down the ladder, I called out for them to run one course on the front, turn the line over, and back up.

In my opinion, Chambers's orders support the plaintiff's evidence that he had to work to the line; and the learned trial Judge has found that

the method of construction adopted in this case, and which in this respect was the customary method, was to stretch a line the full length of the

building. The corner-men, also called the linemen, had control of this line. They raised and placed it, and the intervening men were supposed to work to the line.

Under these circumstances, I do not see how the plaintiff would be guilty of negligence in working to the line, and not backing up until the line had been stretched on the back of the wall for him to lay his brick to. As to the plaintiff having taken the risk, he could only have done so if he had known the danger. Upon this question, even the expert testimony was contradictory, several of the experts being of the opinion that the wall was stable at the time it fell; and, under these circumstances, the finding of the trial Judge, that the plaintiff did not know that the wall had reached the danger-point when it fell, should not be disturbed.

Upon the whole case, I am of the opinion that the findings of the learned trial Judge are supported by the evidence. The accident, in my opinion, happened through the negligence of fellow-workmen, viz., the corner-men, who did not obey the instructions of the foreman to turn the line over and back up, the want of the backing up being the cause, as the learned Judge has found, of the wall falling.

Sub-sec. 14 of sec. 31 of the Judicature Act, R.S.S. 1909, ch. 52, provides:—

> It shall not be a good defence in law to any action against any employer or the successor or legal representative of an employer for damages for the injury or death of an employee of such employer, that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee, any contract or agreement to the contrary notwithstanding.

The effect of this provision is to make the employer liable to a workman if the accident happens from the negligence of a fellow-employee.

For these reasons, I think the appeal should be dismissed with costs.

Appeal dismissed.

ARKLES v. GRAND TRUNK R. CO.

Ontario Supreme Court, Falconbridge, C.J.K.B. December 12, 1913.

1. TRIAL (§ IV—265)—FINDINGS BY THE COURT—EQUITABLE ISSUE AS TO FRAUD IN OBTAINING PLAINTIFF'S RELEASE.

Where an equitable issue is raised as to whether a release under seal pleaded by a defendant railway company in answer to plaintiff's damage claim for personal injuries had been obtained by fraud or undue influence, such issue may, unless the judge otherwise directs, be tried by the judge without a jury and the action dismissed on his finding the release binding.

[*Doyle* v. *Diamond Flint Glass Co.*, 10 O.L.R. 567; and *Gissing* v. *Eaton Co.*, 25 O.L.R. 50, referred to; and see Ont. C.R. 1913, rule 258.]

ONT.

S.C.
1913

ARKLES
v.
GRAND
TRUNK
R. CO.

ACTION for damages for personal injuries sustained by the plaintiff by reason, as he alleged, of the negligence of the defendants. Negligence was denied by the defendants, and they also pleaded a release executed by the plaintiff under seal. The trial was at Owen Sound.

W. H. Wright, and *J. C. McDonald*, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—This is an action for injuries said to have been sustained by the plaintiff owing to the negligence of the defendants. The defendants filed the usual pleadings denying negligence and alleging contributory negligence, and further setting up a release under seal. The plaintiff replied that the release had been obtained by fraud and undue influence on the part of the defendants and their agents, and therefore was not binding upon him.

I proceeded to try the issue on the release first, and reserved judgment thereon, meaning to go on and try the remaining issues with the aid of the jury so that the case would be finally disposed of as far as the trial was concerned. Then counsel for the defendants made an application to put off the trial until the next jury sittings for the purpose of having an X-ray examination of the plaintiff. This application I granted, on certain terms as to costs to be paid by the defendants.

As I have stated above, I was extremely anxious to dispose of the case once for all, but now, inasmuch as I have a strong view regarding the portion of the case which I tried myself, I conceive it to be my duty to decide that issue before the parties incur any more expense.

The defendants filed a release under seal, the consideration being $40 and payment of hospital fees and of the physician's services in connection with the plaintiff's injuries. The plaintiff is not a marksman, but signs his own name, and he also endorsed two cheques for $20 each, and his wife got them cashed. The cheques themselves say, on their face, "this amount being in final settlement of claim known as number 2731 on the records of the claims agent of this company."

The evidence may be summarised as follows. The plaintiff swears: "I don't mind putting my signature there; I don't remember seeing Heyd" (the Grand Trunk agent at Owen Sound) "at the hospital. I had not consulted a lawyer or made any claim on the Grand Trunk in the hospital. I don't remember getting the money on the cheque." His wife swears that "his memory is not of much account. He would talk with me one day and argue with me the next day that I had not been there the day before." Oscar Arkles, son of the plaintiff, says that "when he was in the hospital sometimes he would

know me and sometimes not; he does not remember things. I did know what was in them when I took the cheques to mother. Father told me to take them home to mother." Arthur Little said that he knew the plaintiff and saw him three or four times in the hospital, and that the plaintiff did not recognise him. Samuel Graham knew him a week or two and saw him about two weeks after the accident, and thinks that the plaintiff knew him.

For the defence was called Brown, foreman for Wright & Company. The plaintiff told Brown that he had made a settlement. Brown had warned him not to make any settlement until he went out. Dr. Dow was sent for by Wright & Company. "I never knew there was anything the matter with the man mentally. He recognised me from day to day." (He was 50 days in the hospital). J. G. Heyd, Grand Trunk agent at Owen Sound, says that the plaintiff was certainly sensible enough when he and Shepherd, the claims agent, were there. Shepherd handed the release to the plaintiff to read, and also read it over to him, and asked him, "Do you understand it?" The answer was: "Yes; I guess it is all up with me now." Shepherd, the claims agent: "I read it to him, and he read it over and signed it. He recognised me. I told him we would not recognise any liability, but were willing to help him out financially. He said, 'Is that the best you can do for me?' And I said 'Yes.' He read the release, and handed it back to me, and I read it over to him, and asked him if he fully understood it. He answered: 'Yes, I understand; it is all up with me' (meaning that that was all he expected to get)." Miss Stella Benton, a remarkably alert and intelligent witness, was the nurse in charge of the plaintiff: during the last two or three weeks "the condition of his mind was all right."

It is not possible for me, upon this evidence, to find that the release was obtained by fraud and undue influence. I find, on the contrary, that the plaintiff fully understood what he was doing, and did accept the sum of $40 in full settlement of the cause of action.

I have consulted the following cases: *Doyle* v. *Diamond Flint Glass Co.* (1904), 8 O.L.R. 499; the same case in appeal (1905), 10 O.L.R. 567; *Clough* v. *London and North Western R. Co.* (1871), L.R. 7 Ex. 27; *Johnson* v. *Grand Trunk R. Co.* (1894), 21 A.R. 408; *Disher* v. *Clarris* (1894), 25 O.R. 493; and finally *Gissing* v. *T. Eaton Co.* (1911), 25 O.L.R. 50, which is the last word on the subject.

The action will be dismissed, with costs, if exacted.

Judgment for defendant.

ONT.

S.C.
1913

REX v. RUSSILL.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A., and Leitch, J. October 8, 1913.

1. CRIMINAL LAW (§ I E—23)—PARTIES TO OFFENCES—PRINCIPAL—LIABILITY OF—SALE OF WOOD ALCOHOL BY EMPLOYEE IN VIOLATION OF LAW.

A sale of wood alcohol in a vessel not labelled "Wood Alcohol, Poison," as required by sec. 372 of the Dominion Inland Revenue Act, R.S.C. 1906, ch. 51, 7-8 Edw. VII. ch. 34, sec. 27, by a clerk in the absence of and without the knowledge of his employer, renders the latter liable for the penalty imposed by the Act; since the statute prohibits absolutely the sale of wood alcohol except in compliance with its terms.

[*Caldwell* v. *Bethell*, [1913] 1 K.B. 119; *Brooks* v. *Mason*, [1902] 2 K.B. 743; *Strutt* v. *Clift*, [1911] 1 K.B. 1; *Coppen* v. *Moore*, [1898] 2 Q.B. 306, considered.]

2. CRIMINAL LAW (§ I E—23)—PARTIES TO OFFENCES—PRINCIPAL—LIABILITY OF—SALES OF WOOD ALCOHOL BY EMPLOYEE IN VIOLATION OF LAW.

The fact that sec. 111 of Part II. of the Inland Revenue Act, R.S.C. 1906, ch. 51, expressly declares an employer liable for the failure of his employees to comply with the provisions of the Act with respect to keeping records of sales, which, by sec. 368 of the Act, as amended by 7-8 Edw. VII. ch. 34, sec. 27, is extended to sales of wood alcohol, while the provisions of the latter Act are silent as to the responsibility of an employer for sales of such liquid made by his employees in violation of the Act, does not shew a legislative intention to relieve the employer from liability for such illegal sales, since the two sections deal with entirely different offences.

[*Paul* v. *Hargreaves*, [1908] 2 K.B. 289, distinguished.]

Statement

CASE stated for the opinion of the Appellate Division of the Supreme Court of Ontario, by R. E. Kingsford, K.C., one of the Police Magistrates for the City of Toronto, as follows:—

"The defendant was charged with selling wood alcohol in a vessel not having affixed thereto a label bearing the words 'Wood Alcohol, Poison,' in black letters not less than one-quarter of an inch in height, in violation of the provisions of sec. 372 of the Inland Revenue Act, as enacted by 7 & 8 Edw. VII. ch. 34, sec. 27.

"I reserved judgment, and on the 19th May, 1913, delivered judgment acquitting the defendant, for reasons set out in a memorandum, and upon application of Mr. N. F. Davidson, K.C., of counsel for the Crown, I grant a reserved case for the opinion of the Appellate Division as follows:—

"On the evidence in this case, was I justified in refusing to convict the defendant?

"The information, evidence, exhibits, and reasons for judgment are submitted herewith."

The reasons of the learned magistrate were as follows:—

"I do not feel that I ought to convict in this case. I am not satisfied that the cases go so far as to compel me to fine or

punish an employer for the act of his employee. The sale is proved, but it was not made by the defendant, nor was he present when the sale was made. If the prosecution desires it, I will give a special case in these terms: 'On the evidence in this case, was I justified in refusing to convict the defendant?'

"I would point out that Part II. of the Act is incorporated with the sections relating to the matter in question in this prosecution. In one section (relating to books) a clear distinction is made between the acts of the employer and employee, making the employer liable for the act of the employee. In sec. 27, no such distinction is made, and it leaves open the question, how far, under that section, an employer is liable for the act of an employee. Subject to the right to ask for a special case, the charge is dismissed."

Statement

The questions were answered in the negative.

N. F. Davidson, K.C., for the Crown. The magistrate should have convicted the defendant, as he was in law liable as the seller, although the clerk made the actual sale. The seller is the person who conducts the business of sale: *Coppen* v. *Moore*, [1898] 2 Q.B. 306, especially at p. 313. In that case it was decided that a master was criminally liable for the acts of his servants while acting within the general scope of their employment, although contrary to the master's orders, unless the latter could shew that he acted in good faith and did all that was reasonably possible to prevent the commission of the offence by his servants. See also *Regina* v. *Williams* (1878), 42 U.C.R. 462; *Templeman* v. *Trafford* (1881), 8 Q.B.D. 397; *Commissioners of Police* v. *Cartman*, [1896] 1 Q.B. 655; *Pharmaceutical Society* v. *White*, [1901] 1 K.B. 601; *Parker* v. *Alder*, [1899] 1 Q.B. 20; *Brown* v. *Foot* (1892), 66 L.T.R. 649. The intention of sec. 372 of the Inland Revenue Act, R.S.C. 1906, ch. 51, as enacted by sec. 27 of ch. 34 of 7 & 8 Edw. VII., is to prohibit absolutely the sale of wood alcohol, a poison, except in labelled bottles. The Act is for the protection of the public.

Argument

T. N. Phelan, for the defendant. The magistrate's decision should be sustained. I submit that the Legislature here intended to deal directly with the person actually making the sale, be he the master or the servant. In this case the servant should be held liable: *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857; *Pharmaceutical Society* v. *Wheeldon* (1890), 24 Q.B.D. 683; *Pharmaceutical Society* v. *White*, [1901] 1 K.B. 601, at p. 605. There was no *mens rea* in the defendant: *Paul* v. *Hargreaves*, [1908] 2 K.B. 289. I also submit that the defendant did not have the bottle "in possession," as required by sec. 372 of the Act. The clerk had only the custody of it. See Stroud's Judicial Dictionary, p. 1517. Where the Act intends to make the master liable for acts

ONT.
S. C.
1913
REX
v.
RUSSILL.
Hodgins, J.A.

of his servant, it says so: for example, in secs. 111 and 113. A fair inference is, that, where such vicarious liability is not stated, it is not intended to be imposed.

Davidson, in reply, cited *Regina* v. *King* (1869), 20 U.C.C.P. 246.

October 8. The judgment of the Court was delivered by HODGINS, J.A.:—In the case submitted, the Police Magistrate states that the defendant was charged with selling wood alcohol in a vessel not having affixed thereto a label bearing the words "Wood Alcohol, Poison," in black letters not less than one-quarter of an inch in height, in violation of the provisions of sec. 372 of the Inland Revenue Act, as enacted by 7 & 8 Edw. VII. ch. 34, sec. 27.

In his reasons for judgment, which are part of the case, he finds that the sale is proved. This sale is, upon the evidence, contrary to the statute referred to, by which, "any person who holds in possession, sells, exchanges or delivers any wood alcohol contrary to the provisions of this section" (372) "shall incur a penalty of not less than $50 and not exceeding $200."

The question to be answered is, whether the magistrate was justified in refusing to convict the defendant.

The latter did not personally make the sale, nor was he present when it was effected, but it was made, in the sense hereafter mentioned, to one Johnston, by the hand of the clerk of the defendant, in the latter's hardware store in King street, in the city of Toronto, on the 10th February last.

The Crown contends that the defendant is, in law, liable as the seller, although the clerk actually carried out the sale.

The principle upon which this vicarious liability is imposed is stated by Lord Russell of Killowen in the case of *Coppen* v. *Moore*, [1898] 2 Q.B. 306—speaking for a special Court convened for the purpose, consisting of the Lord Chief Justice, Sir Francis Jeune, P., Chitty, L.J., Wright, Darling, and Channell, JJ. The defendant in that case was the proprietor of several supply stores, and the Court held (p. 313) that the defendant "sold the ham in question, although the transaction was carried out by his servants," and that he (the defendant) "was the seller, although not the actual salesman." This sale was contrary to a statute which provided that "every person who sells, or exposes for, or has in his possession for, sale . . . any goods or things to which any . . . false trade description is applied . . . shall, unless he proves—(*a*) that having taken all reasonable precautions against committing an offence against this Act, he had . . . no reason to suspect the genuineness of the . . . trade description; and (*b*) that . . . he gave all the information . . . with respect to the person from whom he

obtained such goods or things; or (c) that otherwise he had acted innocently; be guilty of an offence against this Act."

After stating the general principle of law applicable to a criminal charge, "*nemo reus est nisi mens sit rea*," Lord Russell observes (p. 312): "There is no doubt that this is the general rule, but it is subject to exceptions, and the question here is whether the present case falls within the rule or within the exception. Apart from statute, exceptions have been engrafted upon the rule. . . . But by far the greater number of exceptions engrafted upon the general rule are cases in which it has been decided that by various statutes criminal responsibility has been put upon masters for the acts of their servants. . . . The decisions in these and other like cases were based upon the construction of the statute in question. The Court in fact came to the conclusion that, having regard to the language, scope, and object of those Acts, the Legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorised by the master, and might even have been expressly prohibited by him. The question, then, in this case, comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the *primâ facie* presumption of guilt by one or other of the methods pointed out in the Act." And (p. 314): "It is obvious that, if sales with false trade descriptions could be carried out in these establishments with impunity so far as the principal is concerned, the Act would to a large extent be nugatory. We conceive the effect of the Act to be to make the master or principal liable criminally (as he is already, by law, civilly) for the acts of his agents and servants in all cases within the sections with which we are dealing where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act."

The principle thus enunciated was applied by the Court in *Parker* v. *Alden*, [1899] 1 Q.B. 20, in directing the conviction of a master for an offence against the Sale of Food and Drugs Act, 1875, where the milk he supplied was adulterated by

ONT.
S. C.
1913
REX
v.
RUSSILL.
Hodgins, J.A.

strangers; and in *Brown* v. *Foot*, 66 L.T.R. 649, to a case where milk supplied by the person convicted was adulterated by his servant against his express order; in *Fitzpatrick* v. *Kelly* (1873), L.R. 8 Q.B. 337, where adulterated butter was sold without knowledge of this condition; and in a recent case, where the language of the Act is very similar, *Caldwell* v. *Bethell*, [1913] 1 K.B. 119. The Courts considered that these were cases in which the Legislature had in effect determined that *mens rea* was not necessary to constitute the offence, because, when the language, scope, and object of the Act was considered, it appeared that, if the master was to be relieved of responsibility, a wide door would be opened for evading the beneficial provisions of the legislation.

In none of the other cases cited is this principle disputed, and in the one chiefly relied upon by Mr. Phelan, namely, *Pharmaceutical Society* v. *London and Provincial Supply Association*, 5 App. Cas. 857, the reason for holding that the expression "any person who shall sell . . . poisons . . . not being a . . . pharmaceutical chemist," etc., in sec. 15 of 31 & 32 Viet. ch. 121, included both the master and the servant, the principal and the agent, whichever of them was the actual salesman, was that otherwise a sale by the unqualified servant of a registered pharmaceutical chemist would not be an offence, and the Act would be rendered inoperative. Although the result of that case was to confine the offence to the person actually conducting the sale, the test stated by Lord Russell in the *Coppen* case was applied, and the statute was construed so as to render the legislation effective for the purpose in view.

Lord Alverstone, C.J., in *Emary* v. *Nolloth*, [1903] 2 K.B. 264, gives three exceptions to the general rule that a guilty mind is necessary before a person can be convicted. These are: (1) if the offence is prohibited in itself, knowledge is immaterial; (2) where there is an absolute prohibition against selling, it is unnecessary to prove knowledge; (3) if knowledge is essential, it will be imputed, where the master has delegated his authority or his own power to prevent.

Of the first exception, *Brooks* v. *Mason*, [1902] 2 K.B. 743—where the offence was delivery to a child of intoxicating liquor in a bottle not sealed in the prescribed manner—and *Rex* v. *Coulombe* (1912), 20 Can. Crim. Cas. 31—where the employer alleged that the bottles upon which another's name was impressed had been received by his driver in exchange for his own bottle—are examples.

Channell, J., in *Pearkes Gunston & Tee Limited* v. *Ward*, [1902] 2 K.B. 1, thus states the second exception (p. 11): "But there are exceptions to this rule" (that a master cannot be made liable criminally for an offence committed by his servant) "in

ONT.
S. C.
1913
REX
v.
RUSSILL.
Hodgins, J.A.

the case of quasi-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the Legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely."

Examples of the third exception are found in *Commissioners of Police* v. *Cartman*, [1896] 1 Q.B. 655, and *Strutt* v. *Clift*, [1911] 1 K.B. 1. In the latter case the owner of a van was held liable for keeping a carriage without a license, because of the use of the van in question by his servant without his knowledge for a purpose unauthorised by his license. It was held that he had delegated his authority.

These exceptions, however, are, when analysed, covered by the principle stated in the *Coppen* case, which is more shortly put in the case last cited, in this way, that the *mens rea* is a necessary ingredient in a criminal offence, unless the statute either expressly or by necessary implication from its language dispenses with it.

That this is no new principle is seen from an examination of the case of *Regina* v. *Prince* (1875), L.R. 2 C.C.R. 154, where, out of a Court of seventeen Judges, ten Judges held that reasonable ground for believing that one of the elements of the offence did not exist was no defence, because it was impossible to suppose that, having regard to the offence, it was the intention of the Legislature to allow an offender to escape by proving his state of mind on the subject.

The decision in *Williamson* v. *Norris*, [1899] 1 Q.B. 7, in which it was held that a servant was not liable for selling liquor without a license under sec. 3 of the Licensing Act of 1872—which enacted that "no person shall sell . . . any intoxicating liquor . . . without being duly licensed"—is not easy to reconcile with the rule established by the other cases dealt with. The principal, however, was a Committee of the House of Commons, which could not be licensed. But, even there, it was held that, upon the true construction of the statute, the sale struck at was a sale by the master or principal, and not that by a servant.

It cannot be doubted that the intention of the section of the

ONT.
S. C.
1913
REX
v.
RUSSILL.
Hodgins, J.A.

Inland Revenue Act cited was to prohibit absolutely the sale of wood alcohol, a poison, except in labelled bottles. It would fritter away the statute to hold that the sale of the article proved in this case, if made by a servant, absolved the employer, because he did not actually conduct the sale. The prohibition is explicit; the sale was in law the sale of the master; and there is no saving clause, such as is found in *Coppen* v. *Moore*, enabling the employer to free himself. It seems to fall fairly within the exceptions quoted. And, as stated by Hagarty, C.J., in *Regina* v. *King*, 20 C.P. 246: "If it be contrary to law to sell liquor or any other article in a shop, the keeper of that shop is, we think, responsible for any sale made by any clerk or assistant in his shop; *primâ facie* it would be his act."

There was a clear delegation of authority or of the master's power to prevent a sale contrary to the statute, by putting the servant in charge of the store and of the vessel of wood alcohol from which the quantity sold was taken. Moreover, the statute in question is one of a class to which the construction given in this case is most readily applied, as recognised even by Brett, J., in his dissenting judgment in *Regina* v. *Prince* (*ante*).

Section 111 of the Inland Revenue Act, relied on by counsel for the defendant, as indicating a contrary intention, does not, when examined, bear out the interpretation sought to be put upon it; nor does its position in the statute lead to the conclusion that it has any relation to the clause in question here. It deals with a different offence, and imposes a penalty upon the person carrying on the business, (1) for neglecting to keep books, or (2) for allowing any person in his employ to neglect so to do. This deals, not with the employee, but wholly with the employer, for his personal neglect to do a certain act, or for his neglect in allowing others to fail in performing the same duty. This is not equivalent to a provision such as was decisive in *Paul* v. *Hargreaves*, [1908] 2 K.B. 289.

The question submitted should be answered in the negative, and the case remitted to the Police Magistrate.

Case remitted with directions.

SASK.
S. C.
1913

BECK v. ANDERSON.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 15, 1913.

1. APPEAL (§ VII I 3—356)—DISCRETIONARY MATTERS—AS TO PLEADINGS —AMENDMENTS—ADDING STATUTE OF LIMITATIONS.

The discretion of a trial judge in permitting an amendment at the trial, by setting up the Statute of Limitations, will not ordinarily be disturbed on appeal.

[*Patterson* v. *Central Canada, etc., Co.*, 17 P.R. (Ont.) 470, referred to.]

SASK.

S.C.
1913

BECK
v.
ANDERSON.

2. LIMITATION OF ACTIONS (§ II A—35)—WHEN STATUTE RUNS—ACCOUNTS—CHARGES ON ONE SIDE ONLY.

That the last item of an account for goods sold is within six years will not draw after it those of longer standing, where the account is not mutual but all charges are on one side only.

[*Cotes* v. *Harris*, Buller's N.P. 149; and *Beck* v. *Pierce*, 23 Q.B.D. 316, applied.]

Statement

APPEAL by defendant from the judgment at trial in favour of the plaintiff in an action for goods sold and delivered.

The appeal was allowed and the action dismissed.

F. W. Turnbull, for defendant.

H. Y. MacDonald, for plaintiff.

Haultain, C.J.
Newlands, J.

HAULTAIN, C.J., and NEWLANDS, J., agreed that the appeal should be allowed.

Lamont, J.

LAMONT, J.:—I concur in the conclusion reached by my brother Elwood. I merely wish to say that, had I been trying the case, I doubt if I should have allowed the application to amend at the trial by setting up the Statute of Limitations. The rule, as I understand it, is that technical defences, such as the setting up of the Statute of Limitations or the Statute of Frauds, should be pleaded at the earliest opportunity, and, failing that, should not be allowed at the trial unless under exceptional circumstances. It is, however, a matter within the discretion of the trial Judge, and he having exercised his discretion in allowing the amendment, that discretion should not be interfered with.

Elwood, J.

ELWOOD, J.:—This is an action for goods sold and delivered. The defendant in his defence denies the sale to him of any goods, and alleges that any goods delivered to him were so delivered at the request and by the order of one Ericson, who made himself solely responsible to the plaintiff for the payment of the same.

At the trial, subject to the plaintiff's objection, the learned trial Judge gave the defendant leave to amend his defence by pleading the Statute of Limitations. At the conclusion of the trial, judgment was given for the plaintiff for the full claim and costs. On behalf of the plaintiff it is objected that the trial Judge erred in allowing the above amendment, and that, as some of the items in the account sued for were sold within six years of the commencement of the action, the statute is no bar.

From a perusal of the cases mentioned in the Annual Practice, 1913, p. 438, the practice appears to be to allow an amendment where it can be done without injustice to the other side, so as to determine the real question at issue.

In *Patterson* v. *Central Canada Savings and Loan Co.*, 17 P.R. (Ont.) 470, it was held that, the Statute of Limitations

SASK.

S. C.
1913

BECK
v.
ANDERSON.

Elwood, J.

being a defence permitted by law, the very right and justice of the case demanded that the plaintiffs should not recover in that action if the statute afforded a bar to their right to do so.

I am, therefore, of the opinion that the discretion of the trial Judge in allowing the amendment should not be interfered with. I may say that there was no cross-appeal by the plaintiff, and for that reason the Court should not, in any event, on this appeal, disallow the amendment. The statement of claim is dated December 4, 1912, and I assume that the writ was issued on that date. With the exception of items totalling $12.75, all of the goods sued for were apparently got more than six years prior to the commencement of the action.

In *Catling* v. *Spoulding*, 6 T.R. 189, 101 Eng. R. 504, Lord Kenyon, at p. 506, says:—

> In *Cotes* v. *Harris*, Buller's N.P. 149, all the items were on one side; and Dennison, J., who well knew what was the proper replication in such cases, and was well acquainted with the import of the Statute of Limitations, said, where all the items were on one side, the last item which happens to be within six years shall not draw after it those that are of longer standing; but it was not doubted there but that if there had been mutual demands the plaintiff might have recovered.

In that case there were mutual demands, and it was held that the plaintiff should recover.

In *Beck* v. *Pierce*, 23 Q.B.D. 316, it was held that the statute barred the items in a solicitor's account more than six years old at the time of the commencement of the action, but did not bar subsequent items. It appeared that the whole account was not for continuous work such as bringing and prosecuting an action.

It is not suggested in this action that there were mutual demands, and I am of opinion that the statute is a bar to the whole claim except the above sum of $12.75. At the trial, the only evidence of the $12.75 account was a duplicate copy of a monthly statement dated December 31, 1906, which was tendered by the plaintiff and allowed in evidence. I take it from the trial Judge's notes that the defendant objected to the reception of this evidence, and I am of the opinion that this evidence was improperly received.

This statement, however, contained a credit as follows: "Dec. 30: By 57 bus. oats at 25c., $14.25;" which would more than balance the above sum of $12.75, and leave nothing owing from the defendant to the plaintiff with respect to transactions in the month of December, 1906. The defendant, who was called as a witness on the plaintiff's behalf, denied that he bought anything in November and December, 1906, and denies that he sold the plaintiff any oats. I am, therefore, of the opinion that the appeal should be allowed. There will be judgment dismissing the action with costs.

Appeal allowed.

VICTOR MFG. CO. v. REGINA TRADING CO.

SASK.

S. C.
1913

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 15, 1913.

1. APPEAL (§ VII M 8—655)—FINDING OF JURY AGAINST UNCONTROVERTED EVIDENCE—NEW TRIAL.

If the appellate court is of opinion that the jury were not justified in refusing to believe the uncontradicted evidence of witnesses in support of a claim for damages in respect of defects in and inferior quality of goods supplied, it may order a new trial in respect of the disallowance of such claim.

2. SALE (§ III C—73)—RESCISSION—FAILURE TO SUPPLY ENTIRE ORDER.

Rescission of an entire contract of sale for the seller's omission to supply all of the several articles included in the order is a right which must be exercised as to all or none, and retention of part of the goods is a waiver of the right as it disaffirms that the contract was an entire one. (Dictum *per* Elwood, J.)

[*Tarling* v. *O'Riordan*, 2 L.R. Ir. 87; and *Champion* v. *Short*, 1 Camp. 50, considered.]

Statement

APPEAL by defendants in an action for goods sold and delivered.

The appeal was dismissed as to the plaintiff's principal claim but allowed as to defendant's counterclaim.

J. F. Frame, for defendants.

J. N. Fish, for plaintiffs.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—In this case there were a number of objections raised by the appellants. So far as the amendment which was allowed at the trial is concerned, it was properly allowed, no injustice was done to the defendants, and the discretion of the learned trial Judge should not be interfered with.

The order which was given in evidence on behalf of the plaintiffs originally, *inter alia*, was as follows: "No. 772, 4 misses' dresses 14, 16, 18, ½ each shade, white, pink, sky, tan; $33.00, $132.00." When the plaintiffs came to put this order in evidence the figure "4" before "misses" had been crossed out with two marks and above it written "2," and the figures "132" had been crossed out and above them written "66." All this was done in lead pencil. At the foot of the order was a reduction of $66, leaving the total order at $1,756.85. No evidence was given of the circumstances under which, or when, these changes were made, except that it was after the order was signed. It was shewn by the evidence that the figures "14, 16, 18," meant the sizes of the dresses, and "½ each" meant one-half dozen of each of the colours named.

The order also, *inter alia*, contained the following: "No. 771, 4 misses' dresses, ½ each shade, white, pink, sky, tan; $27.00, $108.00." The order was given on September 29, 1910;

SASK.

S. C.
1913

VICTOR MFG. CO. v. REGINA TRADING CO.

Elwood, J.

the goods to be shipped in January, 1911. On January 12, 1911, goods to the amount of $413.35 were shipped to the defendants, and on January 20, 1911, the remainder of the goods, to the amount of $1,343.50, were shipped to the defendants, and contained the goods No. 772 and No. 771.

The first shipment arrived on January 24; the second on February 2; and both shipments were opened and checked off by the defendants on or about February 3. It was then found that there were only two dozen of No. 772.

On January 10, the defendants found that they had ordered more goods than they required, and so wrote the plaintiffs, and stated that they wished to cancel the order to the extent of $927.20, giving a list of goods to be cancelled, among other things No. 772, two dozen dresses, and No. 771, two dozen dresses.

Before receipt of this letter, the plaintiffs had made the first shipment, and on January 17, replied, stating that they could not accede to the request for cancellation. Several other letters passed between the plaintiffs and defendants, the defendants asking for cancellation and the plaintiffs always refusing to allow the cancellation. On February 25, 1911, the defendants shipped back to the plaintiffs goods to the amount of $490.30, among which were No. 772, one dozen misses' dresses, and No. 771, two dozen misses' dresses, and on the same date wrote a letter to the plaintiffs, giving a list of the goods so returned, and stating that they were accepting every line they could possibly handle. The plaintiffs have refused to accept from the railway company the goods so returned.

On behalf of the defendants it is objected that the order having the above unexplained alteration is void; and, therefore, the plaintiffs cannot recover. There was, however, a duplicate of the order given in evidence, which did not shew any alteration. I am of opinion that the order is merely evidence of the transaction; that the action is not on the order in the sense of an action on a promissory note; but is for goods sold and delivered; and that this objection is not well taken. It was further objected that the order was an entire one for goods to the amount of $1,822.85, and not for $1,756.85, the total amount shipped by the plaintiffs. It was suggested on behalf of the plaintiffs that the correct interpretation of the order with respect to No. 772 is, two dozen dresses, and not four dozen, and that the subsequent details in the order shew this to be the true meaning. I think that there is considerable force in this argument, but I do not feel called upon to decide that.

In *Champion* v. *Short*, 1 Camp. 50, the defendant ordered half a chest of French plums, two hogsheads of raw sugar, and 100 lumps of white sugar. The plums and the raw sugar

arrived, but, the white sugar not coming to hand, the defendant countermanded it, and gave notice to the plaintiff that, as he wished to have the two sorts of sugar together or not at all, he would not accept the raw. The plums he used. Lord Ellenborough, at p. 54, says:—

> Where several articles are ordered at the same time, it does not follow, although there be a separate price fixed for each, that they do not form one gross contract. I may wish to have articles A, B, C, and D, all of different sorts and of different value; but, without having every one of them as I direct, the rest may be useless to me. I, therefore, bargain for them jointly. Here, has the defendant given notice that he would accept neither the plums nor the raw sugar, as without the white sugar they did not form a proper assortment of goods for his shop, he might not have been liable in the present action; but he has completely rebutted the presumption of a joint contract including all the articles ordered, by accepting the plums, and tendering payment for them. Therefore, if the raw sugar was of the quality agreed on, and was delivered in reasonable time, he is liable to the plaintiff for the price of it.

In *Tarling* v. *O'Riordan*, 2 L.R. (Ireland) 87, the Lord Chancellor, approving of what is laid down above in *Champion* v. *Short*, says:—

> The ground of rescission existed as to all or none, and acceptance of any one article was a waiver of the right to act upon that particular ground.

At p. 89, Morris, C.J., says:—

> Now, the principle of that decision appears to me to be that the purchaser had, by his act of keeping one article, disaffirmed that the contract was an entire one, because, after the seller had not complied with the order, in neglecting to send the third article, the purchaser, with that knowledge, instead of returning the two articles (as he might), kept one.

The above seem all very much in point, and I am of the opinion that in the case at bar, even if the contract were originally entire, which I am of the opinion it was not, the defendants disaffirmed that the contract was an entire one. On February 3, they had knowledge of what they now claim is a shortage; they made no objection to the shortage; they accepted and retained the remainder of the goods comprised in the order until February 25, then they returned part of the goods, including one dozen of the dresses which they now complained they were short of; and the only ground they gave for returning the goods was, that they could not handle them, as they were overstocked. I would, therefore, dismiss the appeal, in so far as it affects the plaintiffs' judgment on the claim. There was no cross-appeal of the plaintiffs on the question of interest; and, in any event, I do not think that the plaintiffs are entitled to interest.

SASK.

S. C. 1913

VICTOR MFG. CO. v. REGINA TRADING CO.

Elwood, J.

So far as the counterclaim is concerned, the whole evidence shewed that the defendants had suffered damage. The only suggestion of contradiction was, that, as the defendants had not complained of the poor quality of the goods, the jury disbelieved the defendants' witnesses. Some of the goods, however, were shewn to the jury, and the defects were apparent. I am of the opinion that the jury were not justified in refusing to believe the uncontradicted evidence of the defendants' witnesses. In his charge to the jury, the learned trial Judge suggested that $443 might be the amount of damage sustained by the defendants. I would allow the defendants $443 damages. If both parties accept this amount, there should be judgment for the defendants on the counterclaim for $443 and costs of the counterclaim; otherwise there should be a new trial on the counterclaim.

Judgment accordingly.

SASK.

S. C. 1913

REX v. HAMMOND.

Saskatchewan Supreme Court, Haultain, C.J., Johnstone, Lamont, and Elwood, JJ. November 15, 1913.

1. HOMICIDE (§ I—12)—WHAT CONSTITUTES—WILFUL EXPOSURE OF CHILD—EVIDENCE AS TO CAUSE OF DEATH—SUFFICIENCY.

That the accused took his new-born illegitimate child out of doors on a cool day and left it exposed with no covering other than a little straw on the day of its birth and that it died shortly afterwards, is sufficient to shew that death resulted from or was hastened by his failure to properly care for the child so as to make him guilty of culpable homicide.

[See Criminal Code, R.S.C. 1906, secs. 256, 259, 262.]

Statement

CROWN case reserved by Newlands, J., on a trial for murder.

T. A. Colclough, for the Crown.

No one for the accused.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—The accused Hammond was tried for the murder of an infant child before my brother Newlands and a jury at Saskatoon, and was convicted. The learned trial Judge submits a case for the opinion of the Court, in which the following questions are asked:—

1. Is there sufficient evidence of the cause of the death of the said infant child?

2. Is it by the evidence satisfactorily established that the death of the said infant child was caused by the omission and neglect of which the accused is shewn to have been guilty?

3. If either of the above questions is answered in the negative, was there sufficient evidence for the jury to convict the accused of murder?

On the first question. The evidence at the trial discloses the

following facts. As a result of illicit connection with the accused, one Louie Chandler, the sister-in-law of the accused, became pregnant. A child was born prematurely on the morning of the 22nd August, 1912, and was born alive. As soon as the child was born, the accused took it out of the house and placed it on a pile of straw outside and left it there, with no other covering but a little straw. The child was alive when it was left by the accused in this condition. (These facts are all stated by the accused in his confession.) Shortly afterwards, the body of the child was buried by the accused (evidence of Dr. Ross). At seven o'clock on the morning of the 22nd August, 1912, the thermometer shewed a temperature of 45° (Fahr.) (evidence of J. W. Ebby). The medical evidence, given by Drs. Ross, Walker, and Croll, shews that the infant in this case was not cared for properly by the accused after it was born, and that its negligent treatment by the accused probably caused death, but in any event hastened death.

In view of the foregoing, the first and second questions must be answered in the affirmative.

Conviction affirmed.

CHISHOLM v. WODLENGER.

Manitoba King's Bench, Metcalfe, J. December 5, 1913.

1. PARTIES (§ IV—125)—SUBSTITUTION—STATUTE OF LIMITATIONS.

A plaintiff's right of action is not barred by the Statute of Limitations, where he brings his action within the statutory period, though since the cause of action arose he has taken his son into partnership and mistakenly brought his action in the names of himself and his son as partners, the style of cause and record being subsequently amended to name him personally as plaintiff though such amendment was allowed after the statutory period.

[*Ferguson* v. *Bryans*, 15 Man. L.R. 170, distinguished; see also *Luciani* v. *Toronto Construction Co.*, 10 D.L.R. 551.]

Statement

ACTION to recover architect's fees involving the effect of an amendment of the style of cause as regards the Statute of Limitations.

Judgment was given for the plaintiff.

J. B. Hugg, for plaintiff.

E. A. Cohen, for defendant.

Metcalfe, J.

METCALFE, J.:—The plaintiff is an architect. In 1906, the plaintiff was architect for a building near the residence of the defendant Wodlenger, and, on attending to inspect this work one day he met Wodlenger on the street. He had already done some work for Wodlenger. It appears that the defendants owned a lot suitable for the erection of a large building and were then considering the advisability of building on the property.

MAN.

K. B.
1913

CHISHOLM
v.
WODLENGER.

Metcalfe, J

On the street, Wodlenger spoke to the plaintiff about this, and, while there is some difference as to exactly what occurred, there is no doubt that Wodlenger instructed the plaintiff to do something towards an estimate for a proposed building, and there is no doubt that the defendant Balcovski subsequently, by ratification, became equally liable with the defendant Wodlenger.

The plaintiff did proceed with the preparation of plans and the preparing of an estimate of the cost of the building. No amount had been agreed upon as his fee. It was no doubt intended that, in the event of building the work occasioned thereby should become a part of a bill to be subsequently rendered by the plaintiff as architect for the whole contract.

The plaintiff delivered, in August, 1906, at the residence of the defendant Wodlenger, the plans and drawings and an estimate of the cost of building. Not having heard further from the defendants, he rendered, in the following January, an account, charging $843.06 for his services. Afterwards he saw the defendants, who protested that they had no idea, when they discussed the matter so informally with the plaintiff, that he was going to take so much trouble. I have no doubt they were genuinely surprised at the amount of the bill. They told him that they did not then intend building, but if they did build they would be glad to employ him as architect, whereby the work thus incurred would become a part of the whole bill. At that interview the plaintiff does not appear to have objected strenuously to the position taken by the defendants, but he did say that he had incurred $150 of outlay in the matter. The interview seemed to have been more or less good-natured on both sides. Later, the plaintiff happened to meet the defendant Balcovski on the railway platform at Moose Jaw, and a somewhat similar conversation took place.

On April 3, 1912, "James Chisholm and C. C. Chisholm, carrying on business as Chisholm & Son," commenced the action. It subsequently transpired that C. C. Chisholm did not become a partner with his father until after this cause of action arose, and, by an amendment, made in October, 1912, the style of cause was amended so that "James Chisholm" alone brings the action.

The plaintiff applying for leave to amend at the trial, I granted such leave. The defendant was allowed to set up the Statute of Limitations, and the record was thereupon amended.

Although the action as originally constituted was commenced within the six years, the defendant says that by reason of the amendment of October, I must hold, in effect, that the action was commenced as of that date, in which event the claim would be barred by the Statute of Limitations, and he cites in

support of that contention *Ferguson* v. *Bryans*, 15 Man. L.R. 170. In that case, the plaintiff, not a judgment creditor, had brought an action, not for the benefit of creditors generally, to set aside a fraudulent conveyance. Afterwards he amended so as to bring the action on behalf of himself and all the other creditors. Such amendment was made after the expiration of sixty days from the date of the conveyance. It was there held that the plaintiff was not entitled to the benefit of the sixty-day provision of the Assignments Act. I do not think that case applies. There the plaintiff had no legal right to bring the action. Here the plaintiff was the sole owner of the cause of action. His son subsequently became his partner. In view of the facts here, surely I must consider that the action, in so far as the Statute of Limitations is concerned, was commenced when the statement of claim was issued.

I have no doubt that, in this case the plaintiff honestly proceeded with the work and there is no doubt that he did perform work of considerable value. On the other hand, I have no doubt that the defendants had not absolutely made up their minds to build, but owning the lot, and as prudent men they desired to know pretty well where they would stand as to the cost of a building before they finally concluded to build. While I have no doubt of his employment, and while I have no doubt that work and services were performed at the request of the defendants, still I think, under the circumstances, knowing that these men were cattlemen and not particularly well versed in other matters, it would have been better had the architect, before incurring such a large bill, told the defendants the approximate cost. On the other hand, I think that when the defendants got the plaintiff's bill they did wrong in not saying to the plaintiff something to this effect: "We admit the employment. We know that you have done work; but you should have pointed out to us the great trouble it would entail to prepare the information necessary and you should have told us something about the cost, and in view of the circumstances, can we not get together and settle the matter?" Considering all the circumstances, and considering the friendly relations that still seem to exist between these parties, surely had they both approached the matter in a conciliatory spirit, litigation would not have been necessary.

At the conclusion of the case both counsel asked me to deal with the matter from such a standpoint, and from that point of view to "deal fairly with the parties." I think it is a case in which justice may very well be done in that way. I therefore allow the plaintiff $400 and the costs of a County Court suit, without any right to the defendants to set off.

Judgment for plaintiff.

ALTA.

S. C.

1913

BOIVIN v. LESSARD.

Alberta Supreme Court, Beck, J. December 8, 1913.

1. CONTRACTS (§ II D—145)—PARTICULAR WORDS—REALTY SALE—GUARANTEED PROFITS ON "THE PURCHASE."

On a sale by the vendor real estate company where the first deferred payment and interest did not become due for six months, a guarantee given to the purchaser by a large shareholder in the vendor company, as an inducement for the purchase, that such shareholder would, within six months, effect for the purchaser a re-sale to realize a profit of 25 per cent. "on the purchase" is not necessarily a guarantee of 25 per cent. on the entire price, but may, having regard to the customary method of speculative real estate dealings in the locality, be construed to guarantee only that profit on the actual expenditure which the purchaser would require to make, up to the end of the six months' period fixed for the prospective resale.

2. GUARANTY (§ I—2*a*)—WHAT CONSTITUTES—REALTY SALE—PROMISE "TO REALIZE" SPECIFIED PROFIT.

Where, on a realty sale the vendor promises his purchaser "to realize" for such purchaser, before the date of the next instalment of the original purchase price matures, a specified profit adding a hope to even double such specified profit, the promise as distinct from the hope goes beyond mere opinion and imports a legal obligation by way of guaranty enforceable by the original purchaser against his vendor.

3. EQUITY (§ I A—1)—JURISDICTION—FUSING EQUITY AND LAW—SUBSTANTIVE AND ADJECTIVE LAW—FORM OF REMEDIES.

A court with a single system of judicature combining both law and equity jurisdiction, may devise new forms of remdies to suit new and peculiar contract rights.

[Pomeroy, Eq. Jur. 2nd ed., secs. 1159 *et seq.*, referred to.]

Statement

ACTION by the plaintiff on a contract under which he purchased realty from the defendant with an alleged stipulated guaranty of a certain "percentage profit" on the investment.

Judgment was given for the plaintiff.

E. B. Edwards, K.C., for plaintiff.

C. C. McCaul, K.C., for defendant.

Beck, J.

BECK, J.:—This action was recently tried before me without a jury. The defendant with one other person owned practically all the shares in the Imperial Agencies, Limited. This company owned the land in question. The plaintiff and the defendant met. The plaintiff wished to make an investment, and as a result of conversations between them the plaintiff agreed to buy the land in question for the price of $11,600, payable $5,000 in cash; $3,300 on April 19, 1913; $3,300 on October 19, 1913, with interest at the rate of eight per cent. per annum.

An agreement in writing dated October 19, 1912, expressing this agreement was drawn up and executed by the company and the plaintiff. It was not, however, executed until October 23. At the time of the negotiations there had been talk of the defendant giving the plaintiff a guarantee of making a profit

on his investment concurrently with the execution of the agreement for sale and purchase and as part of the same transaction the defendant gave the plaintiff a letter dated October 23. (Original letter in French).

(*Translation.*)

I am glad that you have accepted my proposals concerning the purchase of the following lots in Norwood—for the total sum of $11,600.00. This proposal for sale which I submitted to you some days ago was made to you after mature and well-weighed reflection, and in order to prove to you that I am positive with regard to my statements I promise to realize for you between now and six months hence at least 25 per cent. on the said purchase, and I hope in fact to be able to double the profit which I have just mentioned.

I think, on the evidence, the promise contained in this letter was part of the inducement to the plaintiff to make the purchase and that therefore it is not without consideration. What does it mean? Does it mean nothing more than a very strong expression of opinion or the imposition of an obligation upon the writer—the defendant? I can read it only in the latter sense. Then what is the obligation? The first deferred payment matured six months from the date of the agreement. The promise was to realize the stated profit within six months. Although there is a difference of a few days between the date of the agreement for sale and purchase and the letter, I think the expression "d'ici" [translation—"hence"] referred to the date given to the transaction by the date of the agreement for sale and purchase. What were the respective rights of the parties at the end of the fixed period of six months? The plaintiff had then invested $5,000 only. He was to get "25 per cent. profit." The profit was to be on the "purchase." It does not say on the purchase price. Though binding undertakings that within a certain period a certain profit will be made are not very common in times and places where buying and selling real estate is active, yet representations, expectations and calculations of profit are very commonly made and generally, in my experience as the amount of profit made on the amount invested in the purchase.

Such transactions have been so common in these Western Provinces for so many years that I think I should not ignore my general knowledge of such affairs in dealing with such a case. Having regard to this general experience of my own, I think the words "25 per cent. de profit sur le dit achat" should be interpreted as meaning 25 per cent. profit on the amount invested in the purchase at the time fixed for the performance of this promise, rather than 25 per cent. profit on the total purchase price. That is to say, the meaning of the promise was:—

ALTA.

S. C.
1913

BOIVIN
v.
LESSARD.

Beck, J.

By the time the first deferred payment falls due I will have resold the property so as to return you your $5,000 with 25 per cent profit (*i.e.*, $1,250), and relieved you of the necessity—though, perhaps, not of the direct legal liability on your covenant—to pay the deferred payments.

It should be specially observed that the promise is not to pay but to realize; that is, the method whereby the profit is to be obtained is clearly from a sale of the land which, therefore, is not to remain the property of the plaintiff. I think, on the evidence, the plaintiff placed the defendant in a position to carry out his promise because the property was "listed" with the defendant, and he was verbally authorized to sell it, and was in a position without any reason to expect serious delay to obtain the plaintiff's signature to any necessary documents.

The defendant not having implemented his promise within the period of six months from the date of the agreement, what were the respective rights and liabilities of the parties? I suppose that one remedy which the plaintiff may ask is, that he now have a personal order for payment of a sum being the total of (*a*) the difference between the purchase price of $11,600, and the present value of the land (on which considerable evidence was given and which I fix at $1,000; (*b*) 25 per cent. profit on the down payment of $5,000, *i.e.*, $1,250; (*c*) the amount paid for taxes by the plaintiff, *i.e.*, $206.08; (*d*) interest on these several sums at such rate as the Court thinks just. I think this should be 8 per cent.—the rate fixed by the agreement of sale and purchase. I do not think the plaintiff is entitled to have added to this the conveyancing and registration charges $21.60.

I think however, this Court exercising as it does all the jurisdiction of the former Superior Courts of law and equity and, therefore, administering one body of substantive and adjective law, ought, while ever preserving the principles of jurisprudence now well settled and adopted by the Court, when applying those principles to the many new and peculiar combinations of fact and circumstance which are continually arising, to use a very free hand in moulding the forms of the remedies so as to do as far as reasonably convenient complete justice to all parties to the litigation: see Pomeroy, Eq. Jur., 2nd ed., secs. 1159 *et seq.*

I think on this principle, that in view of the tenor of the agreement, the defendant has a right to ask that instead of having a personal order against him for the amount calculated on the basis I have stated, the plaintiff retaining the land, the plaintiff should transfer the land to him upon payment of that amount, substituting for the difference in value ($1,000) the purchase price $11,600 with interest on the several portions of it from the dates of payment. In either case I think the plaintiff

is entitled to the costs of the action. The defendant will have one month (or such further time as by order of the Court or a Judge may be allowed him) to elect to which of these two remedies he will submit.

If he fails to elect within the time limited, the plaintiff will have a personal order for payment by the defendant of the amount calculated on the basis first stated, together with his costs of action—the plaintiff retaining the land. If the defendant elects to submit to the other remedy, he will have two months further time to pay the amount calculated on the basis secondly stated, with the costs of action and with subsequent interest at the same rate, the plaintiff, concurrently with the payment, transferring the land free and clear of all incumbrances to the defendant. In case of default, the plaintiff may within one week elect either to take a personal order for the amount calculated on the basis first stated, with costs, and with subsequent interest and subsequent costs, or to take a personal order for the amount calculated on the basis secondly stated, with costs, and with subsequent interest and subsequent costs, the land to be sold subject to the approval of a Judge, and the net proceeds to be applied in satisfaction so far as they will extend of the plaintiff's judgment.

Judgment for plaintiff.

ALLAN v. RIOPEL.

Alberta Supreme Court, Beck, J. December 1, 1913.

1. CONTRACTS (§ I D 4—60)—OFFER AND ACCEPTANCE—REAL PROPERTY—OPTIONS—WHEN TURNED INTO CONTRACT OF SALE.

An option for the sale of land is turned into a contract of purchase, where the buyer is permitted to go into possession and the seller gives him further time and accepts money on account of deferred payments.

2. VENDOR AND PURCHASER (§ I A—1)—RIGHTS AND LIABILITIES OF PARTIES—WRONGFUL SALE BY VENDOR TO THIRD PERSON—LIABILITY OF VENDOR—TO VENDEE'S ASSIGNEE FOR CREDITORS.

If, during the currency of a contract for the sale of land, the vendor wrongfully sells it to a third person in derogation of the rights of the original purchaser, the vendor is answerable to him or his assignee for creditors for the price received on such sale over and above what the original purchaser had agreed to pay, if the latter elects to seek his remedy in damages rather than in specific performance.

3. IMPROVEMENTS (§ I—3)—ALLOWANCE TO PURCHASER FOR IMPROVEMENTS—LIEN FOR ON SETTING ASIDE SALE IN FAVOUR OF PRIOR PURCHASER.

Where a vendor, who had contracted to sell land to a vendee who went into possession, subsequently on such vendee absconding sold it to another person who was aware of, or who had notice sufficient to put him on inquiry as to, the original vendee's rights, although they were not disclosed by the records in the land titles office, the sale may be set aside at the instance of the original vendee's assignee, but the purchaser is entitled to a return of his purchase money, and if charged with occupation rent he is also entitled to interest on his purchase money; he will also be allowed for the value of improvements made by him and for taxes paid; and, if a balance is found in his favour, he is entitled to a lien on the land therefor.

ALTA.

S. C.

1913

ALLAN v. RIOPEL.

ACTION by an assignee for the benefit of creditors against assignor's vendor to set aside a sale of land by the vendor in derogation of the contract with the assignor.

Judgment was given for the plaintiff.

G. G. Dunlop, for plaintiff.

H. A. Mackie, for defendants.

Beck, J.

BECK, J.:—This action was lately tried before me without a jury. The plaintiff is the assignee for the benefit of the creditors of J. A. Bruyere and (his son) Edmond Bruyere under an assignment made on January 27, 1913, pursuant to the Assignments Act (ch. 6 of 1907).

The defendant Riopel owned the land in question. On April 15, 1912, a written agreement was made for the sale by him to J. A. Bruyere of this land—six lots in the village of Legal—for $500 of which $100 was paid in cash and for the balance of which $400 J. A. Bruyere gave his promissory note at three months.

The agreement was lost; some very indefinite evidence of its contents were given at the trial.

Bruyere immediately went into possession of the land and erected buildings on some of them—one comprising a store, place of residence and a warehouse; another a stable or barn. Riopel discounted the note with the Royal Bank of Canada. $60 was paid by Bruyere on account. A new note was taken on July 20, 1912, for $340 with interest both before and after maturity at the rate of eight per cent. per annum payable three months after date. This note was also discounted in the same bank. About the date of the maturity of the note $90.45 was paid on account of it. The interest on the note being $6.70 this payment left the balance owing on the note on October 23, 1912, $256.25

On January 28, 1913—the day following the assignment to the plaintiff—Riopel sold the land to the defendants Prevost and Baert for $600 cash; and gave a transfer which was registered and on which a certificate of title issued to the purchasers on the 30th January. Out of this $600 there was paid to the Royal Bank of Canada $262.75 the balance, with interest, then owing on Bruyere's note; Riopel retaining the balance of $337.25 for his own benefit. Riopel claims that the sale which he made to J. A. Bruyere was only an option. I find the contrary. Assuming it was originally an option it certainly ceased to be a mere option and became a mutually binding contract under the circumstances of the vendor accepting a payment on account of the deferred payment; giving time by renewal of the note and accepting a further payment on account; the purchaser having taken possession and remaining in possession throughout.

The sense in which Riopel claims the agreement was a mere option, is I think that while the agreement really did amount to an agreement for sale, any default at any time gave him a right to

sell without notice with the result of forfeiting all payments on account of purchase money and entitling him to retain any surplus and this, notwithstanding the erection of improvements upon the land. I do not believe there was any such agreement between Riopel and Bruyere. Even if there was, the provision was in my opinion void: *Great West Lumber Co.* v. *Wilkins*, 1 A.L.R. 155; but in any case was waived by the dealings between the parties which I have related and by this additional fact. Bruyere had left Legal; some people, including I think Riopel, thought he had gone for good. His wife was in possession of the premises continuing the business in a small way at least. She therefore had an interest—probably a legal one—in the property. Riopel went to her on January 28, the day before he sold to Prevost and Baert, and got her to sign a promissory note in his favour for what he claimed to be the balance owing to him in respect of the property payable two weeks after date. He took it away with him but almost immediately, thinking it useless to him, tore it up; without getting her consent or giving her any notice of his intention to ignore it. This note was therefore current at the time Riopel sold to Prevost and Baert.

For the reasons I have indicated it is quite clear in my opinion that the defendant Riopel had no right to sell the property in question when he sold to the defendants Prevost and Baert and that therefore he would be liable to the plaintiff not merely for the surplus of purchase money of $337.25 on that sale but for any further surplus of real value at that date provided the plaintiff had contented himself with asking a judgment on this basis against the defendant Riopel alone without persisting in his claim that the title of the defendants Prevost and Baert is, notwithstanding their having obtained a certificate of title, invalid as against him, and that it should be set aside.

Prevost and Baert both lived at Legal, a small country place, where it may well be presumed that everybody knew nearly everything about everybody else. They both in fact knew that Riopel had formerly owned the lots. He knew or at least supposed that Riopel had sold them to Bruyere; they knew that the buildings upon them had been put up by Bruyere and that Mrs. Bruyere was living on the property, on which also was a small stock-in-trade with which she was continuing to carry on the business.

Baert did not give evidence. He had been asked by Prevost to join him in the purchase and whatever his acknowledge of the facts and circumstances surrounding the transaction I think he must be bound by Prevost's knowledge and acts. It appears that on January 29, Riopel having made up his mind that Mrs. Bruyere's note was of no use to him—he says he thought so because he found it had no date—went to Prevost and offered him the property for $600 cash. By the time the stage in the case was reached at which Riopel gave his evidence, evidence had been

ALTA.
S. C.
1913
ALLAN
v.
RIOPEL.
Beck, J.

given on the part of the plaintiff that the buildings on the land had cost between $3,000 and $4,000 and that they were worth from $1,500 to $2,000. Riopel when subsequently giving his evidence said the buildings were worth only $300 or $400; that there was no question of the buildings in the sale; that he sold the land only, not the buildings.

Prevost admitted the buildings were worth I think about $400 and must have cost much more. The lots presumably—and I think there is evidence to this effect—were worth about $400 or $500. I think the buildings were worth about $1,000. Prevost says he bought the buildings as well as the lots.

Prevost made enquiries of Riopel as to his right to sell—not as a matter of course as an ordinary purchaser might naturally enquire of his vendor, but because of his knowledge of the facts and circumstances which I have related indicating that Riopel had not a right to sell because he had already sold to Bruyere who had built on the property and whose wife was still in occupation. He also made enquiries of the manager of the bank at which Bruyere's note to Riopel was under discount. He also searched the title in the land titles office. He says he became satisfied that Riopel had a right to sell because he satisfied himself that there was no written agreement between Riopel and Bruyere. He did not speak to Mrs. Bruyere. He gave a reason for this which did not satisfy me. Though I have no doubt that in the ordinary way of things he is honest, I cannot avoid the conclusion that he thought that he had a very good bargain; that Riopel could give him a good title any way; that it was no business of his to make any further enquiries of Mrs. Bruyere or anybody else as to whether or not if he bought from Riopel he would be wronging Bruyere; who in any case was not likely ever to return and whose creditors he need not consider. In this I think he did not come up to the standard of honesty and fair dealing still required of proposing purchasers notwithstanding sec. 135 of the Land Titles Act: *Sydie* v. *Sask. & Bat. R.L. & D. Co.*, 14 D.L.R. 51; *Stephens* v. *Bannan & Gray*, 14 D.L.R. 333 at 342, *per* Beck, J.

I propose to set aside the sale.

In 20 Cyc. tit., "Fraudulent Conveyances," pp. 638 *et seq.*, it is said:—

> But where the conveyance is founded in actual fraud, the grantee, as a general rule, is regarded as *particeps criminis*, and is not entitled to reimbursement, or to have the conveyance stand for any purpose of reimbursement or indemnity, either for consideration or advances paid or liabilities incurred. In such case the conveyance will not, as a general rule be allowed to stand as security either for a *bona fide* indebtedness of the grantor to the grantee; or for claims existing against the grantor and purchased or paid by the grantee; or for claims created subsequent to notice of the equity of a creditor seeking to subject the property; or for expenditures made by the grantee to protect his title.

I interject here a subsequent paragraph at p. 641:—

A fraudulent grantee in possession is not entitled as against creditors to reimbursement for permanent improvements made by him on the property, unless he was in *bona fide* possession without any intention of participating in the fraud and made the improvements in good faith.

The original paragraph continues:—

This rule however is not an inflexible one.

The general rule I have no doubt is correctly stated, but I think its application to any particular case must be made to depend upon the particular circumstances of the case, *e.g.*, the character and degree and extent of the fraud; the relationship of the parties to the transactions; the position of the parties to be benefited and hurt by the setting aside of the conveyance; and generally what under all the circumstances is just and equitable.

In the present case the defendants Prevost and Baert have considerably improved the buildings and I think an allowance should be made to them in that respect, but I have not sufficient evidence of a satisfactory kind to fix the amount of the allowance. They should also be allowed any payment made on account of taxes and any other just allowance. On the other hand they should be charged an occupation rent. They are entitled to their purchase money and—being charged an occupation rent—to interest. They must pay the costs of the action. There will no doubt be a balance in their favour. For this balance they will have a lien on the property in question.

There will be judgment against Riopel for $337.25 with interest at 8 per cent, per annum from January 29, 1913, also with costs of the action. As between Riopel on the one hand and Prevost and Baert on the other the costs will be payable one half by each. If the parties cannot agree there will be a reference to ascertain the amount for which the defendants Prevost and Baert are entitled to a lien. The plaintiff will have a month from the ascertainment of the amount of the lien within which to pay the amount. In default either party may apply for sale or further directions.

Judgment accordingly.

MORRISON v. WILSON.

Manitoba Court of King's Bench, Metcalfe, J. December 5, 1913.

1. TRIAL (§ II E—196)—PRELIMINARY QUESTIONS TO JURY—BASIS FOR DETERMINING POINT OF LAW—MALICIOUS PROSECUTION.

Preliminary questions may properly be left to the jury in an action for malicious prosecution for the purpose of enabling the trial judge to determine as a matter of law whether there is a want of reasonable and probable cause.

[*Cowes* v. *Kirkaldie*, 18 N.Z.L.R. 626, followed; and see Annotation at end of this case.]

MAN.

K. B.
1913

MORRISON
v.
WILSON.

2. MALICIOUS PROSECUTION (§ II—5)—WANT OF PROBABLE CAUSE—MALICE—"ACTUAL MALICE" DISTINCT FROM "IMPROPER MOTIVE."

Where in an action for malicious prosecution, preliminary questions were first submitted to the jury on whose answers the trial judge found want of reasonable and probable cause, and then submitted the general question, whereupon the jury brought in a verdict for plaintiff, but added that there was "no attempt at malice on the part of the defendant," the jury should be asked to reconsider the verdict so as to clear up the inconsistency, and for this purpose a further question may be submitted as to whether the defendant was actuated by any "improper motive" in laying the charge; and upon answering the latter question in the affirmative the plaintiff is entitled to judgment for the amount of the verdict.

Statement

ACTION for malicious prosecution, involving a finding by the jury on "improper motive" as distinct from "actual malice."

Judgment was given for the plaintiff for $1,000 damages and costs.

W. M. Crichton and *E. A. Cohen*, for plaintiff.

H. J. Symington, for defendant.

Metcalfe, J.

METCALFE, J.:—The action is for malicious prosecution.

The plaintiff was an electrician who was carrying on business in a small way and was indebted to the defendant for goods supplied and, contemplating further purchases, made an assignment in writing of his book accounts to the defendant. Although the assignment contained a clause by which he agreed not to collect any of the moneys, there was evidence which, if the jury believed it, would justify them in finding that there was an understanding whereby the plaintiff might collect and apply such moneys on wages. The plaintiff did collect some of these moneys and there was evidence upon which the jury could find that the money so collected was paid on wages. The defendant caused the plaintiff to be arrested and the proceedings terminated in favour of the plaintiff.

At the conclusion of the trial I thought that it was a case in which I might, without leaving the whole question, very conveniently, as was done in the case of *Couves* v. *Kirkaldie*, 18 N.Z. L.R. 626, leave questions to the jury upon which I might determine the question of reasonable and probable cause. I, therefore, left for the consideration of the jury two questions, and after these had been argued by counsel and the jury instructed by me as to these questions, they retired for the purpose of considering same, and in a short time returned with the questions answered. These questions and answers are as follows:—

1. Did Wilson agree that notwithstanding the clause in the agreement the plaintiff might still collect the money? A. Yes.

2. If so, did Wilson agree that Morrison might disburse it without further authority from Wilson? A. We believe he agreed to allow Morrison for wages and expenses.

Upon such findings, I found that the plaintiff had shewn an

absence of reasonable and probable cause, and the case having been argued by counsel, I charged the jury leaving to them the general question. The jury retired and subsequently returned and rendered their verdict in these words:—

Verdict for plaintiff, $1,000. No attempt at malice on the part of defendant.

I then told the jury that I did not understand their verdict. I again charged them as to malice, explaining the difference between what is commonly known as "actual or express malice" and "improper motive." I told them to retire and again consider their verdict and gave them a further question which they returned answered as follows:—

Was the defendant actuated by any improper motive in laying the charge. A. Yes.

The defendant's counsel moved for judgment for the defendant notwithstanding the verdict, and argued that the jury had in its first finding negatived malice.

The plaintiff owed the defendant a large sum of money. It might well be that he was not actuated by any hatred or spleen, but that he instituted the proceedings for the purpose of recovering his money. If he did so, it was an improper motive. There was evidence upon which the jury might find that he was acting from an improper motive, although there was no personal hatred or spleen. It may be that the jury desired to so express it.

I think under the circumstances the plaintiff must succeed.

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

Judgment for plaintiff.

Annotation—Trial (§ II E—196)—Preliminary questions—Action for malicious prosecution.

Annotation

Malicious prosecution —Questions of law and fact

In *Coures* v. *Kirkaldie*, 18 N.Z.L.R. 626, the principle is explained on which are left to the jury preliminary questions upon which the Court may determine the question of reasonableness and probable cause in the following terms, page 632.

"There are two courses that may be followed in actions for malicious prosecution. A Judge may put certain issues to the jury, and, on the answer to these, rule whether it has been proved to his satisfaction that there was an absence of reasonable and probable cause. Or a Judge may leave all issues raised in the action—viz., malice, absence of reasonable and probable cause and damages—to the jury; giving his direction or ruling in the second of such issues hypothetically on certain facts being proved. In some cases that may be the better course to follow. The judge is not bound, however, to put the issue of malice or of damage to the jury till this preliminary question of reasonable cause has been settled. It is an issue that a Judge has to find based, no doubt, when the facts were in dispute, on the findings of the jury. But if the facts had not been in dispute the jury

MAN.

Annotation

Annotation (*continued*)—Trial (§ II E—196)—Preliminary questions — Action for malicious prosecution.

Malicious prosecution —Questions of law and fact

had no function to perform till the issue had been settled by the Judge." *Couves* v. *Kirkaldie*, 18 N.Z.L.R. 626; and see *Almond* v. *Muirhead*, 8 Q.B. D. 167, 173; *Brown* v. *Hawkes*, L.R. 4 H.L. 521.

Whether there was reasonable and probable cause for the arrest of the plaintiff must be decided, in an action for malicious prosecution, by the trial Judge, while the question of malice is to be determined by the jury: *Wood* v. *Newby*, 5 D.L.R. 486, 21 W.L.R. 438.

In a Manitoba case, the trial Judge asked the jury whether the defendant honestly believed the case he laid before the magistrate, to which the jury answered "no;" and whether the defendant was actuated by some motive other than an honest desire to bring a man he believed to have offended against the criminal law to justice, to which the jury answered "yes;" and assessed the plaintiff's damages at $500. The trial Judge directed a verdict to be entered for the plaintiff for $500 with costs. Afterwards, the jury stated that they intended the $500 to include costs. The trial Judge then changed his direction, and made the verdict $500 without costs:—Held, that, upon the answers to the questions submitted, the trial Judge properly found for the plaintiff on the issue of reasonable and probable cause, and it could not be said that there was no evidence upon which these answers might be given. Held, however, that the jury had nothing to do with costs; and, as their statement that the $500 was to cover damages and costs, did not shew how much they gave for damages, there must be a new trial: *Davis* v. *Wright*, 19 W.L.R. 762 (Man.).

In an action for malicious prosecution the Court must decide whether, upon the facts, the defendant had reasonable and probable cause for his proceeding, and it will be held that he had, if he took reasonable care to inform himself of the facts and honestly, though erroneously, believed such a state of facts to be true as would, if actually true, have constituted a *primâ facie* case for the prosecution complained of: *Wainwright* v. *Villetard*, 6 Terr. L.R. 189.

The jury is to find the facts on which the question of reasonable and probable cause depends, but the Judge must determine whether the facts found do constitute reasonable and probable cause: *Still* v. *Hastings*, 13 O.L.R. 322, affirmed 14 O.L.R. 638; *Ford* v. *Can. Express*, 21 O.L.R. 585, affirmed 24 O.L.R. 462; *Meaney* v. *Reid-Newfoundland Co.*, 39 N.S.R. 407.

Malice may be implied in an action for malicious prosecution, where there was not reasonable and probable cause for the arrest of the plaintiff: *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q.B.D. 674; *Wood* v. *Newby*, 5 D.L.R. 486, 21 W.L.R. 438; *Canadian Pacific Railway Co.* v. *Waller*, 1 D.L.R. 47, 19 Can. Crim. Cas. 190.

Where there is no evidence upon which a jury could fairly pronounce that the defendant had a guilty knowledge of the fraud charged, or that there was a lack of *bonâ fides* in what he did in laying the matter before his solicitor, the trial Judge was right in determining that there was reasonable and probable cause for the prosecution, and in withdrawing the case from the jury and dismissing the action: *Longdon* v. *Bilsky*, 22 O.L.R. 4.

In an action for malicious prosecution, the belief of the defendant in

Annotation (*continued*)—Trial (§ II E—196)—Preliminary questions — Action for malicious prosecution.

MAN.

Annotation

Malicious prosecution —Questions of law and fact

the truth of the charge which he laid is a fact material to be considered in determining whether there was reasonable and probable cause for the prosecution; the state of the defendant's mind is a fact; and where the evidence, whether of one or more witnesses (including the defendant himself or otherwise), may lead to different conclusions as to his belief, it is not for the Judge but for the jury to say what the fact is. And, in this action, the question whether the defendant honestly believed in the truth of the charge which he laid against the plaintiff was, in the circumstances, which suggested want of such belief by the defendant, for the jury. (*Ford* v. *Canadian Express Co.* (1910-1911), 21 O.L.R. 585, 24 O.L.R. 462, and *Longdon* v. *Bilsky* (1910), 22 O.L.R. 4, explained) *Connors* v. *Reid*, 25 O.L.R. 44, 20 O.W.R. 291 (but see *Connors* v. *Reid*, 3 O.W.N. 337, as to quantum of damage on further appeal).

Mr. C. B. Labatt in an exhaustive article in 35 C.L.J. 545, deals with the whole question of reasonable and probable cause, and by permission, we extract portions thereof dealing with the respective provinces of the trial Judge and the jury in determining the existence of probable cause. He says:—

The doctrine established by the authorities is that the existence of probable cause is a question exclusively for the Court only when there is no controversy either as to the facts upon which the solution of the various subordinate issues which it involves is dependent. "The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to shew it probable or not probable are true and existed is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law:" *Johnstone* v. *Sutton* (1786), 1 T.R. 493, *per* Lords Mansfield and Loughborough (p. 543). "It is for the jury to say whether the facts pleaded were proved, and for the Judge to determine whether or not they amounted to reasonable and probable cause." Maule, J., in *West* v. *Baxendale* (1850), 9 C.B. 141. "The prevailing law of reasonable and probable cause is that the jury are to ascertain certain facts, and the Judge is to decide whether those facts amount to such cause:" *Turner* v. *Ambler* (1847), 10 Q.B. 252, *per* Lord Denman. Similar language is used in *Broad* v. *Ham* (1839), 5 Bing. N.C. 722; *Davis* v. *Russell* (1829), 5 Bing. 354; *Haddrick* v. *Heslop*, 12 Q.B. 267, affirmed (in Exch. Ch.), 12 Q.B. 928, 23 L.J.Q.B. 49; *Weston* v. *Beeman* (1857), 27 L.J. Exch. 57; *Hailes* v. *Marks* (1861), 7 H. & N. 56; *Busset* v. *Gibbons* (1861), 30 L.J. Exch. 75; *Ayres* v. *Elborough* (nisi pr. 1870), 22 L.T.N.S. 106, *per* Blackburn, J.; *Kelly* v. *Midland, etc., R. Co.* (1872), Ir. Rep. 7 C.L. 8; *Lucy* v. *Smith* (1852), 8 U.C.Q.B. 518; *Joint* v. *Thompson* (1867), 26 U.C.Q.B. 519; *Hawkins* v. *Snow* (1895), 27 Nov. Sc. 408; *Candell* v. *Loudon* (1785), cited in *Johnstone* v. *Sutton*, 1 T.R. 493 (p. 520); *Huntley* v. *Simson* (1857), 2 H. & N. 600; *Donnelly* v. *Bawden* (1877), 40 U.C.Q.B. 611; *Archibald* v. *McLaren* (1892), 21 Can. S.C.R. 588.

In some cases we find it laid down that the question of probable cause must be left to the jury where the decision depends on disputed questions of fact: *Wilson* v. *Winnipeg* (1887), 4 Man. L.R. 193. Compare *Vincent* v. *West* (1868), 1 Hannay (N.B.) 290. This is correct only in the sense

MAN.

Annotation

Annotation (*continued*)—Trial (§ II E—196)—Preliminary questions — Action for malicious prosecution.

Malicious prosecution —Questions of law and fact

that the Judge must take the opinion of the jury on such facts as a step in the process of determining the defendant's liability. The final decision must always rest with him whether it is arrived at by means of special findings or by means of instructions couched in a hypothetical form. In *Martin* v. *Lincoln* (1668), cited in Buller, N.P. 13, it was held to be in the discretion of the Court to direct the jury, if there were manifest proof that there was no cause of action. In the earliest reported cases, the question was treated as a matter of pleading. Thus in an action for conspiracy and procuring the plaintiff to be maliciously indicted for robbery, a plea setting forth the fact of the robbery and circumstances of suspicion was held good on demurrer, as it confessed procuring the indictment and avoided by matter of law: *Pain* v. *Rochester*, Croke, Eliz. 871; *Chambers* v. *Taylor*, Croke, Eliz. 900. In *Rochester* v. *Whitfield* (1595), Croke, Eliz. 871, the Court held, on demurrer, that a plea setting out the circumstances whereby the defendants came to indict the plaintiff was good, "for their causes of suspicion are sufficient . . . and the imprisonment need not be answered when the indictment is grounded upon good cause." The full scope and significance of this doctrine was definitely settled by the Exchequer Chambers in the leading case of *Panton* v. *Williams* (1841), 2 Q.B. 169, which, although it was not accepted without some expressions of dissatisfaction on the part of individual Judges (see especially the remarks of Denman, C.J., in *Rowlands* v. *Samuel* (1847), 11 Q.B. 39 (note), 17 L.J.Q.B. 65) is now regarded as the fountain of law upon this subject. "There can be no doubt, since the case of *Panton* v. *Williams*, 2 Q.B. 169, that reasonable and probable cause in an action for malicious prosecution or for false imprisonment is to be determined by the Judge." Lord Chelmsford, in *Lister* v. *Perryman* (1879), L.R. 4 H.L. 521 (p. 535). The principle there formulated was this: Whether the question of reasonable or probable cause depends upon a few simple facts, or upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the Judge to inform the jury that, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable and probable cause, the result being that the question of fact is left to the jury, and the abstract question of law to the Judge. Commenting on the cases, which might be thought to have somewhat relaxed the application of the rule, by seeming to leave more than the mere question of the facts proved to the jury, Chief Justice Tindal said:—

"It will be found . . . that, although there has been an apparent, there has been no real, departure from the rule. Thus, in some cases the reasonableness and probability of the ground for prosecution has depended, not merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. In *James* v. *Phelps* (1840), 11 Ad. & E. 483, Lord Denman had said, in the course of his opinion, that the question whether there be or not reasonable or probable cause may be for the jury or not, according to the particular circumstances of the case." But this was a case where the evidence suggested that the defendant knew that an essential ingredient of the offence charged was lacking.

Annotation (*continued*)—Trial (§ II E—196)—Preliminary questions — Action for malicious prosecution.

MAN.

Annotation

Malicious prosecution —Questions of law and fact

Again, in other cases, the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In *Wedge* v. *Berkeley* (1837), 6 Ad. & E. 663, the Court held that both the bona fides of the defendant, a magistrate, and also the question whether there was reasonable cause for a magistrate's detaining goods on a suspicion that they were stolen was for the jury. But this ruling is deprived of much of its significance by the fact that it was made in the course of a judgment which upheld the action of a Judge in leaving the case to the jury upon instructions that they were to find whether there were "reasonable grounds of suspicion." It may be reconciled with the general current of the authorities by assuming that the real question which the trial Judge intended to leave to the jury was merely whether the defendant believed in the guilt of the plaintiff. In other cases the inquiry has been, whether from the conduct of the defendant himself the jury will infer that he was conscious he had no reasonable or probable cause. But in these and many other cases which might be suggested, it is obvious that the knowledge, the belief and the conduct of the defendant are really so many additional facts for the consideration of the jury; so that, in effect, nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury, whilst at the same time, they have received the law from the Judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable cause for the prosecution, or the reverse. ". . . Such being the rule of law, where the facts are few and the case simple, we cannot hold it otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts are made out to their satisfaction. But it is equally certain that the task is not impracticable; and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them."

It should be noted that the Judge's inference as to the existence or non-existence of probable cause is really an inference of fact, and not of law: *Hicks* v. *Faulkner* (1881), 8 Q.B.D. 167, per Hawkins, J.; in *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521 (p. 535). In the same case Lord Colonsay suggested (p. 539) that the rule which makes the existence of probable cause a question for the Court is accounted for by the "anxiety to protect parties from being oppressed or harrassed in consequence of having caused arrests or prosecutions in the fair pursuit of their legitimate interests, or as a matter of duty, in a country where parties injured have not the aid of a public prosecutor to do these things for them." Lord Chelmsford, after remarking that this question was one for the Court, said: "In what other sense it is properly called a question of law, I am at a loss to understand. No definite rule can be laid down for the exercise of the Judge's judgment.

MAN.

Annotation

Malicious prosecution — Questions of law and fact

Annotation (*continued*)—Trial (§ II E—196)—Preliminary questions — Action for malicious prosecution.

Each case must depend upon its own circumstances, and the result is a conclusion drawn by each Judge for himself, whether the facts found by the jury, in his opinion, constitute a defence." In Scotland, the existence of probable cause is a question for the jury: *Lister* v. *Perryman* (1870), 4 L. R.H.L. 521, *per* Lord Colonsay (p. 539). In Quebec, the question appears to be still an open one. See *Drolet* v. *Garneau* (1884), 10 Que. L.R. (Q.B.) 139. In his treatise on Malicious Prosecution (ch. vii.), Mr. Stephen has undertaken to prove that, "by successive judicial decisions, the practical burden of deciding whether or not the plaintiff has shewn a want of reasonable cause, has been in effect transferred to the jury." The gist of his argument is that the logical consequence of the decisions of the Court of Appeal and the House of Lords in *Abrath* v. *North-Eastern R. Co.* (1883), 11 Q.B.D. 440, 11 A.C. 247, is that any Judge is "entitled" to put to the jury the questions, whether the defendant took reasonable care to inform himself of the true state of the case, and whether he honestly believed the case which he laid before the magistrate, and that, as these questions cover the whole ground of reasonable cause, the Judge is virtually bound to render judgment for or against the plaintiff, according as a negative or affirmative answer is returned. The vice in Mr. Stephen's reasoning lies in the assumption that this case can be construed in such a sense as to warrant a Judge in taking this course under all circumstances. Clearly, he can be justified in doing this only when the evidence presented is such as to make the correct answer to these questions a disputable point. That this most frequently, or, possibly, in most instances, be the situation created by the submission of the testimony, may be readily conceded, but to assert that these issues are then properly left to the jury is simply equivalent to laying down for a special case the rule explicitly formulated in many of the older decisions, that the assistance of the jury must be called in when any of the facts upon which the existence of probable cause depends are in dispute. There is, in fact, nothing in the *Abrath* case to shew there was any intention to modify the established doctrine that the final determination of the main issue—whether there was probable cause—rests with the Court whether the jury is or is not asked to settle any of the subordinate issues.

Mr. Labatt, continuing, considers that it is inconceivable that if the Court of Appeal and the House of Lords had had such an intention, they should not have made some reference to the explicit re-affirmations of the old rule a few years previously in *Lister* v. *Perryman*. It is wholly impossible, moreover, to reconcile Mr. Stephen's theory with the rulings and dicta in *Brown* v. *Hawks*, [1891] 2 Q.B. 718, a case more recent than that on which his main reliance is placed. If the facts on which the existence of probable cause depends are not in dispute, there is nothing for him to ask the jury, and he should decide the matter for himself: *Brown* v. *Hawks*, [1891] 2 Q.B. 718, *per* Lord Esher; *Broad* v. *Ham* (1839), 5 Bing. N.C. 722, *per* Bosanquet, J. Where the plaintiff gives no proof of facts indicating a want of probable cause, the Judge's decision may be rendered on motion for a nonsuit: *Torrance* v. *Jarvis* (1856), 13 U.C.Q.B. 120. The fact that the defendant fails to prove certain of the circumstances which he alleged in his plea as shewing the existence of probable

Annotation (*continued*)—Trial (§ II E—196)—Preliminary questions — Action for malicious prosecution.

MAN.

Annotation

Malicious prosecution —Questions of law and fact

cause does not preclude the operation of the usual rule that it is for the Court to determine whether the matters proved constitute probable cause, nor prevent him for amending the plea so as to correspond with the proof by striking out some allegations and qualifying another: *Hailes* v. *Marks* (1861), 7 H. & N. 56. Bramwell, B., said: "It is not the question upon what he acted, but whether he had reasonable and probable cause for acting; and, if he had, he is justified, though he had, or said he had, some further cause."

A new trial should be ordered where the Judge left it to the jury to say whether there was reasonable and probable cause for arresting the plaintiff: *Hill* v. *Yates* (1818), 8 Taunt. 182; *Panton* v. *Williams*, Exch. Ch. (1841), 2 Q.B. 169, or, as it has been expressed in another case, where it was left to the jury to say whether the facts which were proved and which were known to the defendant at the time he caused the plaintiff to be apprehended, were sufficient to cause a reasonable and cautious man, acting bona fide and without prejudice, to suspect the plaintiff of the offence charged: *West* v. *Baxendale*, (1850), 9 C.B. 141.

When evidence has been given which, as matter of law, constitutes want of probable cause, and the Judge first expresses the opinion that the plaintiff has failed to make out a want of probable cause, but subsequently, at the request of counsel, puts the case to the jury, telling them that, to entitle the plaintiff to a verdict, they must be satisfied that there was a total absence of reasonable and probable cause, and that the defendant acted with malice, a verdict for the defendant should be set aside on the ground of misdirection, as it is possible that the jury may have come to a conclusion on the question of malice different from that at which they would have arrived had the question been properly presented to them: *Gibbons* v. *Alison* (1846), 3 C.B. 181. Where no special grounds are suggested why the defendant should have disbelieved his informant, it is error to leave it to the jury to decide whether he did believe what he was told: *Smith* v. *McKay* (1853), 10 U.C.Q.B. 412, second app. p. 613, so also, if the trial Judge is of opinion that want of probable cause has not been established by the evidence, it is error necessitating a new trial, if he does not nonsuit the plaintiff, or does not direct a verdict for the defendant, if the plaintiff insists on going to the jury: *Tyler* v. *Babington* (1848), 4 U.C.Q.B. 202. And if he has ruled that there was probable cause, verdict for the plaintiff will be set aside by Court of review: *Golwin* v. *Crowle* (1751), Sayer's Rep. 1. *A fortiori* must it be the proper cause for a Judge to decide as to existence of probable cause where the only question to be determined is, in the strict sense of the term, one of law, *e.g.*, whether a letter written by the plaintiff should be construed in such a sense as to bring the writer within the purview of the statute, 7 & 8 Geo. IV. ch. 29, sec. 8, as to extorting money by threatening a criminal prosecution: *Blachford* v. *Dod* (1831), 2 B. & Ad. 179. But the task of further delimitation between the provinces of Court and jury is beset with the difficulties which are inseparable from a system which puts in the hands of a Judge the decision of a question, which, according to all analogy, should be left to the jury. The difficulty of drawing the line between the questions which are appropriately submitted to the jury and

MAN.

Annotation

Malicious prosecution —Questions of law and fact

Annotation (*continued*)—Trial (§ II E—196)—Preliminary questions — Action for malicious prosecution.

those which are appropriately settled by the Judge without the intervention of the jury has not infrequently been commented upon: see, for example, *Davis* v. *Russell* (1829), 5 Bing. 354; *Rice* v. *Sanders* (1876), 26 U.C.C.P. 27. As long as we are restricted to general language, the boundary of the power of the Court to determine, unaided, whether there was probable cause seems to admit of no more precise description than that contained in the following passage of the opinion of Baron Alderson in *Mitchell* v. *Williams* (1843), 11 M. & W. 205, p. 217, quoted with approval in *Riddell* v. *Brown* (1864), 24 U.C.Q.B. 90: "The Judge has a right to act upon all the uncontradicted facts of the case, and it is not necessary specifically to leave every fact to the jury—to ask them, for instance, 'Do you believe this? Do you believe that? Do you think that was so-and-so?' It is only where some doubt is attempted to be thrown upon the credulity of the witnesses or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that the Judge is called upon to submit any question to the jury."

The converse situation which demands the interposition of a jury has been thus described by one of the most eminent of modern English Judges: "If there be facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, those facts must be left specifically to the jury; and when they have been determined in that way, the Judge must decide as to the absence of reasonable and probable cause:" *Brown* v. *Hawks*, [1891] 2 Q.B. 718, *per* Lord Esher, p. 726. Compare the statement that the opinion of the jury must be taken if the facts are contradicted, or not of that distinct character that there can be no question as to the correct inference to be drawn from them: *Erickson* v. *Brand* (1888), 14 Ont. App. 614, *per* Osler, J.A., p. 654. It is obvious that the rule by which, so long as the facts are not in dispute, a Judge has a right to decide, without the intervention of a jury, whether there was probable cause, involves, as a legitimate corollary, the doctrine that this question must remain one for the Judge, although the undisputed facts adduced by each party separately point to different conclusions.

In other words, although the Judge is not entitled to pronounce upon the effect of evidence which is conflicting in a sense that more than one inference may be drawn from it, he is warranted in determining the effect of evidence which is conflicting in the sense that the materials furnished for the decision consist of distinct groups of specific facts, of which one establishes and the other negatives the existence of probable cause. Hence, where a witness who has given testimony which justifies the inference that the defendant had probable cause for preferring a charge is unimpeached in his general character, and uncontradicted by testimony on the other side and there is no want of probability in the facts which he related, a Judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly, even though, up to the time when the witness had so testified, the evidence put in shewed *primâ facie* want of probable cause: *Davis* v. *Hardy* (1827), 6 B. & C. 225. The effect of this decision has been said in a Canadian case

Annotation (*continued*)—Trial (§ II E—196)—Preliminary questions — Action for malicious prosecution.

MAN.

Annotation

Malicious prosecution —Questions of law and fact

to be that, although the evidence offered by the plaintiff shews, in the opinion of the presiding Judge, a want of reasonable and probable cause, yet, if the defendant subsequently adduces facts which satisfy him that there was reasonable and probable cause, a nonsuit may properly be granted: *Riddell* v. *Brown* (1864), 24 U.C.Q.B. 90, where it was held that, as unimpeached witnesses had established facts sufficient to justify the inference that the plaintiff was about to leave the country, his arrest was warrantable, though he offered testimony shewing, *primâ facie*, that he had no such intention.

The effect of the decision of the Supreme Court of Canada in *Archibald* v. *McLaren* (1892), 21 Can. S.C.R. 588, upon the question of reasonable and probable cause in an action for malicious prosecution, is to overrule the decision of the majority of the Court of Appeal in *Hamilton* v. *Cousineau* (1892), 19 A.R. 203, and to affirm the Ontario law in accordance with the views expressed by Armour, C.J., and Street, J., in the Divisional Court, and the dissenting judgment of Burton, J.A., in the Court of Appeal in *Hamilton* v. *Cousineau*. The question in that case was as to whether the defendant had exercised reasonable care to inform himself of the facts before he laid the information, and the question which it was unsuccessfully argued in *Archibald* v. *McLaren* should have been submitted to the jury was as to the honest belief by the defendant of the truth of the information upon which he acted in instituting criminal proceedings; but the same rule as to when it is proper to submit these questions must apply to both of them: (*Still* v. *Hastings* (1907), 13 O.L.R. 322, 324, followed; *Abrath* v. *North-Eastern R. Co.* (1883-6), 11 Q.B.D. 79, 440, 11 App. Cas. 247, explained as in accord with *Archibald* v. *McLaren*); *Ford* v. *Can. Express*, 21 O.L.R. 585, affirmed 24 O.L.R. 462.

The Ontario law has undergone a radical change by a new clause introduced into the revised Judicature Act of 1913, 3-4 Geo. V. (Ont.) ch. 19.

Sec. 62 of the latter statute enacts that, "In actions for malicious prosecution, the Judge shall decide all questions both *of law and fact*, necessary for determining whether or not there was reasonable and probable cause for the prosecution.

REX v. ALLEN.

N. B.

S. C. 1913

New Brunswick Supreme Court, Landry, McLeod, White, Barry, and McKeown, JJ. September 10, 1913.

1. APPEAL (§ VI B—288)—GROUNDS FOR DISMISSAL—CRIMINAL CASE—DELAY IN MOVING FOR LEAVE TO APPEAL.

A delay of two years after the conviction in applying for leave to appeal therefrom under sec. 1019 of the Criminal Code, 1906, would not be a ground for refusing to entertain an appeal based upon the wrongful admission of the prisoner's wife as a witness against him, even if the Crown had not by consenting to an order granting leave to appeal waived such objection.

2. APPEAL (§ VII M 3—542)—CRIMINAL TRIAL—INADMISSIBLE TESTIMONY.

In a criminal case not of the class in which a wife may testify by virtue of the Canada Evidence Act or of the common law against

N. B.
S. C.
1913
REX
v.
ALLEN.

her husband, the wrongful taking of the wife's testimony against her husband is a ground for a new trial under sec. 1019 as a "substantial wrong," if the evidence of the wife is material and of such a character that it may have had an influence with the jury in leading them to find a verdict of guilty.

[*Makin* v. *Attorney-General of N.S.W.*, [1894] A.C. 57; and *Allen* v. *The King*, 44 Can. S.C.R. 331, applied.]

3. WITNESSES (§ I B—15)—HUSBAND OR WIFE—CRIMINAL TRIAL.

In criminal cases of the class in which the wife is not competent as a witness against her husband, if she is called by the Crown and gives evidence although stating that she came to Court voluntarily and was willing to testify, the conviction cannot stand unless it clearly appears that the evidence she gave did not affect, and could not have affected, the result.

[*Makin* v. *Attorney-General of N.S.W.*, [1894] A.C. 57; and *Allen* v. *The King*, 44 Can. S.C.R. 331, applied.]

Statement

APPEAL from a conviction for obtaining money upon false pretences upon a case stated by leave of the Court under sec. 1016 of the Criminal Code, tried before Barry, J., and a jury at the Saint John Circuit, November, 1910.

Defendant was indicted on seven counts and was convicted on the first, third, fifth and sixth. The first count was as follows:—

John W. Allen at the city of Saint John in the city and county of Saint John and province of New Brunswick, on the twenty-second day of October, 1910, did unlawfully and with intent to defraud obtain by false pretences from Albert M. Belding a railway ticket entitling a person to pass on a Canadian Pacific Railway train from the city of Saint John to Fredericton in the province of New Brunswick aforesaid, by representing that his, the said John W. Allen's family were in Fredericton, where also he expected to resume work, whereas in truth and in fact the family of the said John W. Allen were not in Fredericton, nor had he the said John W. Allen been working there as he the said John W. Allen well knew at the time when he did so falsely pretend as aforesaid, nor did he the said John W. Allen go to Fredericton.

The third and fifth counts were similar and the sixth count was as follows:—

The said John W. Allen at the city of Saint John aforesaid on or about the twenty-seventh day of October last did unlawfully and with intent to defraud obtain by false pretences from Joseph H. Prichard a railway ticket entitling a person to pass on a Canadian Pacific Railway train from the city of Saint John to Fredericton aforesaid by representing that he had a job in Fredericton and it was necessary to go that night, whereas in truth and in fact the said John W. Allen had no job or employment in Fredericton and did not intend to go to Fredericton that night and did not go, as he the said John W. Allen well knew at the time when he did so falsely pretend as aforesaid.

After conviction in December, 1910, defendant was allowed his liberty on recognizance of himself and his sister to reappear at any subsequent Circuit Court to receive sentence, and on November 27, 1912, on motion of the Attorney-General, de-

fendant was brought into the Circuit Court at Saint John and sentenced on all four counts to a term of two years in the penitentiary. Before sentence was passed, application was made on behalf of the defendant to reserve a case for the Supreme Court *en banc* on the following grounds:—

Statement

Improper admission of evidence:—

(*a*) of Alberta Allen, being wife of the accused John W. Allen, and having been subpœnaed and produced by the prosecution at the trial of her husband upon a charge of obtaining money by false pretences, who was thereby compelled to give evidence against her husband;

(*b*) of Alberta Allen, being wife of the accused John W. Allen and therefore not a competent witness for the prosecution upon the trial of her husband upon a charge of obtaining money by false pretences.

This application was refused by the trial Judge as it was thought to be a case in which application might better be made to the full Court.

Leave to appeal was granted by this Court on February 11, 1913, with the consent of the Attorney-General and a case stated upon the grounds above set out.

It appeared that the defendant's wife had been subpœnaed by the Crown and gave evidence for the prosecution at the trial. Counsel for the defendant objected that she was not a competent or compellable witness. Witness stated that she came to Court voluntarily and that her evidence was purely voluntary and that no inducement or threat had been offered to her. Her evidence was to the effect that neither she nor her children had ever livel in Fredericton and that the defendant had not supported his wife or family for some years.

E. C. Weyman, for the defendant, moved to set aside the verdict.

Argument

Grimmer, A.-G., for the Crown:—No appeal should be allowed because the verdict was given two years ago, and no appeal was taken until the sentence was given. There is no time limit for taking an appeal but it should be taken promptly. Under sec. 1019 of the Criminal Code no conviction shall be set aside for improper admission of evidence unless some substantial wrong or miscarriage was thereby occasioned, and under sec. 1020, where some counts only are affected the Court may give separate directions as to each count.

[WHITE, J.:—The wife's evidence does not seem to bear on the sixth count.]

Grimmer, A.-G.:—The verdict upon the sixth count at least should stand.

[BARRY, J.:—There was no other evidence that the wife and family did not live in Fredericton.]

N. B.

S. C.
1913

REX
v.
ALLEN.

Argument

WHITE, J.:—In *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, it is held that the verdict must be set aside unless the evidence is such that it could not have a material bearing.

McKEOWN, J.:—The wrong admission constitutes a substantial wrong. He referred to *Allen* v. *The King* (1911), 44 Can. S.C.R. 331.]

Weyman, in reply:—The false pretence as to facts depends on the wife's evidence. The false representation in the sixth count was that defendant had a job in Fredericton. The wife's evidence is the only evidence that bears on the point. Section 1020 of the Code applies when only one count is affected. Here four counts were heard collectively. A separate direction could not be given as the sentence here was not apportioned. It is in law a substantial wrong to put a man's wife on the witness stand: *Reg.* v. *Gibson*, 18 Q.B.D. 537.

Landry, J.

LANDRY, J.:—I not only agree with the conclusion arrived at and expressed by my brother White, that if the evidence of the wife in itself has been looked to by the jury, or if they have been influenced by it at all in arriving at the conclusion they did, there should be a new trial; but I go a little further in my opinion: I think the inception of the evidence, the swearing of the witness—that is, having the wife of the prisoner there against his objection, and not at his request—is not what may be technically called an improper reception of evidence in that sense of the term, but that it is an illegal proceeding, being contrary to the statute. It is more the improper admission of an incompetent witness, than the improper admission of evidence. Therefore, on that ground, I think there ought to be a new trial in this case.

McLeod, J.

McLEOD, J.:—I agree that this appeal must be allowed. At common law the wife was an absolutely incompetent witness against her husband—except in a few cases of which this is not one. The statute is an enabling one and allows the wife to be called by her husband on his own behalf but does not authorize the Crown to call her.

It was improper for the Crown to call the wife as a witness against the defendant in this case. The evidence the wife did give was in fact important and was a part of the evidence on which he was convicted and therefore as she was not a proper witness there must be a new trial. I however base my judgment on the broader ground that the wife was an illegal witness called by the Crown to give evidence against her husband and did give evidence against him and this of itself renders the trial bad.

It was contended that she said she was a voluntary witness, but that makes no difference because she was incompetent to give evidence against her husband in this case. As a matter of fact, however, she was subpœnaed by the Crown and attended under the subpœna. There should be a new trial.

WHITE, J.:—This case was tried at the Saint John Circuit, before Mr. Justice Barry, in the month of November, 1910. The prisoner was indicted upon an indictment containing seven counts, and was convicted upon the first, third, fifth and sixth counts,—the second and fourth being withdrawn, and a *nolle prosequi* having been entered upon the seventh one. All the counts under which the prisoner was convicted charged him with the offence or crime of having obtained money under false pretences. At the trial the Crown called and examined as a witness the wife of the accused and it appears from the record before us that this witness, the wife of the prisoner, was present under a subpœna issued by the Crown. It would appear from her statement that she gave her evidence in a sense voluntarily; but it is also clear that she gave it without the consent, and I think I might say gave it against the expressed will of the prisoner, declared through his counsel. It is clear, at all events, from what is before us, that the witness cannot be regarded as in a sense a witness on behalf of the prisoner. After conviction the prisoner was allowed to go on suspended sentence, on his own recognizance, to appear when called upon for sentence; and in November, 1912, he was sentenced before Mr. Justice Barry to a term of imprisonment on all of the counts, without apportioning his sentence in respect of the several counts. At the time of the sentence application was made to the learned Judge to reserve a case, but leave was refused; not because the learned Judge thought the question was one in respect to which a case might not properly be reserved; but because in his opinion it was the simpler and better way, under the circumstances, that the prisoner should apply to the Court. Application was made to the Court, and the case is now before us as a case reserved.

The main question we have to determine is whether or not the conviction can stand, in view of the fact that the prisoner's wife was called and gave evidence as a witness, as I have stated. There is one other point raised by the Honourable the Attorney-General, and that is, that having waited for two years before applying to reserve a case, the Court cannot, or at least ought not, to entertain a reserved case.

Dealing with the second point first I think that, the Crown having consented to a case being reserved, it is too late now to raise that point. Moreover, under the circumstances of this

N. B.
S. C.
1913
REX
v.
ALLEN.
White, J.

case, having in mind the care which Courts properly exercise to see that prisoners upon trial can only be convicted and suffer punishment when they have been convicted by evidence that is legal and proper evidence. I think we ought not to give effect, even if the point were not raised too late, to that second objection.

The only point remaining, therefore, to consider is the question as to the effect of the evidence given by the wife. It is quite clear that at common law the wife was an incompetent witness either for or against her husband. Under our statute—that is, the law as it now stands—she is made a competent witness on behalf of her husband; but the statute does not make her either a competent or a compellable witness against her husband. It only alters the common law in so far as is expressly stated in the statute; and therefore we are all of opinion that this evidence was improperly received.

It was urged by the Attorney-General that under sec. 1019 of the Code we might, and indeed should, sustain the conviction because the evidence of the wife was not the only evidence to establish the charges laid against the prisoner in the indictment, as there was abundant evidence to sustain the conviction, without the evidence of the wife.

The case of *Makin* v. *Attorney-General for New South Wales*, 63 L.J.P.C. 41, [1894] A.C. 57, and the case of *Allen* v. *The King* (1911), 44 Can. S.C.R. 331, both shew that if the evidence of the wife is material and of such a character that it may have had an influence with the jury in leading them to pronounce a verdict of guilty, the verdict cannot stand, even though there be ample evidence to have warranted the jury in arriving at the same conclusion, apart altogether from the testimony of the wife. Before we could hold, that despite the improper reception of the evidence of the wife we would sustain the verdict, it must appear clearly, and beyond question, that the evidence she gave did not affect, and could not have affected, the result. If the wife had only given evidence as to some immaterial point, or testimony directed to establish merely some formal question not bearing directly upon the question of the guilt or innocence of the accused, then, possibly, we might hold that the conviction could stand; but that is not the character of the evidence given here. Therefore, the conviction and sentence thereon will be set aside and a new trial will be granted upon the counts on which the prisoner now stands convicted.

Barry, J.

BARRY, J.:—I wish to say that while I agree entirely with what has been said by my brother White, I think that the evidence of the accused's wife was improperly admitted, and that such admission operated prejudicially to the accused upon

a material issue, although the evidence which was properly admitted at the trial, without the wife's evidence, may have warranted the conviction of the accused upon the sixth count of the indictment. The appeal, in my opinion, should be allowed, the conviction quashed, and a new trial granted.

N. B.
S. C.
1913
REX v. ALLEN.

McKEOWN, J., agreed with the judgment delivered by WHITE, J.

Conviction set aside and new trial ordered.

Ex parte WILLIAMS.

B. C.
S. C.
1913

British Columbia Supreme Court, Morrison, J. July 3, 1913.

1. LAND TITLES (§ VI—60)—PLANS—SUBDIVISION—DOCUMENT AFFECTING ONLY PART OF LOT.

A mortgage covering only a part of a lot designated in a registered subdivision plan may be registered under sec. 100 of the Land Registry Act, 1911, ch. 127, where accompanied by a map or sketch shewing the portion affected, without filing a plan of re-subdivision under sec. 90 making such part a separate parcel thereunder.

Statement

PETITION for a direction to the district registrar of titles to register a mortgage of a portion of certain lots designated upon a registered subdivision plan.

W. J. Whiteside, K.C., for petitioner.

H. C. Hanington, for the registrar, contra.

Morrison, J.

MORRISON, J.:—The petitioner, who is owner in fee simple of certain lots in the city of New Westminster, has executed a mortgage of a portion of them, particularly described in the mortgage. The district registrar of titles declines to register this mortgage, assigning as his reason that registration of a portion of a lot shewn on a deposited subdivision plan cannot be effected; that a re-subdivision plan must be first deposited under sec. 90 of the Land Registry Act. Mr. Whiteside, for the petitioner, contends that the plan attached to the mortgage is not a statutory re-subdivision of the character dealt with in sec. 90; that the section which governs his application is sec. 100. I am inclined to agree with him. Surely an owner may encumber any designated portion of his property without necessitating a statutory re-subdivision, or any division such as is contemplated by sec. 90. The plan attached to the mortgage is of no further use after the mortgage is paid, nor is the contingency of foreclosure an answer at this juncture. The plan in question is not a substitute for previously deposited plans, or any portion of them. The prayer of the petitioner is granted.

Petition granted.

ONT.

S.C.

1913

PORTERFIELDS v. HODGINS.

Ontario Supreme Court, Lennox, J. October 24, 1913.

1. ASSIGNMENTS FOR CREDITORS (§ VIII A—74a)—PRIORITY OF CLAIMS—WAGES—RIGHTS OF ASSIGNEE OF CLAIM FOR.

A preferential claim for wages earned within three months of a debtor's assignment for the benefit of his creditors, carries with it its priority on a transfer being made thereof, and the transferee, although he acquired the claim before the debtor made the assignment for creditors, is entitled under the Wages Act, 10 Edw. VII. ch. 72, R.S.O. 1914, ch. 143, to priority over the debtor's ordinary creditors.

["*The Wasp*," L.R. 1 Ad. & Ecc. 367, applied.]

Statement

ACTION by the assignee of the wages-claims of a number of employees of the Goderich Wheel Rigs Limited, an incorporated company, against the assignee for the general benefit of creditors of that company, for a declaration that, under the provisions of the Wages Act, 10 Edw. VII. ch. 72, the plaintiff was entitled to be paid the amount of the wages-claims assigned to him, in priority to the ordinary or general creditors of the company.

Judgment was given for the plaintiff.

M. K. Cowan, K.C., and *Charles Garrow*, for the plaintiff.

W. Proudfoot, K.C., for the defendant.

Lennox, J.

October 24. LENNOX, J.:—The defendant is assignee for the general benefit of the creditors of the Goderich Wheel Rigs Limited, an incorporated company. The assignment was executed on the 17th May, 1913. On the 21st April, 1913, nearly one hundred of the employees of this company, having various sums owing them for wages payable that day, sold and assigned their respective claims to the plaintiff for valuable consideration.

The defendant, as assignee of the company, admits the plaintiff's right to rank as as ordinary creditor upon the assets of the company; but the plaintiff claims that under the provisions of the Wages Act, 1910, 10 Edw. VII. ch. 72, he is entitled to be paid in priority to the ordinary or general creditors of the company.* No direct authority has been referred to, and it is said that the question is a new one.

The objections urged by the defence are: that, the wages

*Section 3 of the Act: "Where an assignment is made, for the general benefit of creditors, of any real or personal property, the assignee shall pay, in priority to the claims of the ordinary or general creditors of the assignor, the wages of all persons in the employment of the assignor at the time of the making of the assignment, or within one month before the making thereof, not exceeding three months' wages, and such persons shall rank as ordinary or general creditors for the residue, if any, of their claims."

having been purchased and the assignment thereof obtained before the date of the assignment for the general benefit of creditors, the right to preferential treatment did not then exist, and cannot be taken to be vested in the plaintiff; and that this right is not assignable.

It is admitted that the wages in question were earned within three months, and the assignors of the plaintiff were all in the employment of the company within one month next before the assignment for creditors. It is also stated and admitted that, after the sale to the plaintiff, some of these wage-earners were again in the employment of the company, and that they also claim in priority to general creditors for these subsequent earnings. In no case, however, do the claim of the plaintiff and the subsequent claim of the employee together amount to as much as three months' wages.

I am unable to see why the plaintiff should not enjoy all the rights and advantages which his assignor would have enjoyed had he retained his wages-claim.

It is not a new right arising after the assignment for creditors, but a statutory security, always existing during the service, which may or may not have to be enforced, and is always available in case of need; it is a statutory lien upon the assets of the employer, as a mortgage is a lien upon land of the mortgagor, a lien though the land may never have to be resorted to for payment. There is nothing personal about it. It is not that the wage-earner may rank upon the estate or collect from the assignee, but that (10 Edw. VII. ch. 72, sec. 3) "the assignee shall pay, in priority . . . the wages of all persons in the employment of the assignor," etc.; and sec. 45 of the Conveyancing and Law of Property Act, 1 Geo. V. ch. 25, embodying a policy which we adopted in Ontario in 1872 (35 Vict. ch. 12), expressly provides that an assignment shall "pass and transfer the legal right to such debt or chose in action . . . and all legal and other remedies for the same."

In the American and English Encyclopædia of Law, 2nd ed., vol. 2, p. 1084, it is said: "By a complete assignment of a chose in action the whole interest of the assignor in the thing assigned passes to the assignee, and also the security for the debt, for it is a familiar and well-settled rule of law that the assignment of a debt carries with it every remedy and security for such debt available by the assignor as incident thereto, although they are not specially named in the instrument of assignment;" and, after citing a number of authorities, principally American, it is added, at p. 1087: "If a mortgagee assigns a debt, to secure the payment for which a mortgage is given, whether the same be done before or after forfeiture, the equitable interest of the mortgagee passes to the assignee."

ONT.
S. C.
1913
PORTER-FIELDS v. HODGINS.
LENNOX, J.

The case of "*The Wasp*" (1867), L.R. 1 Ad. & Ecc. 367, clearly illustrates this principle. The statute 24 Viet. ch. 10 gives the Court of Admiralty jurisdiction to entertain a claim for the building or repair of a vessel, if at the time the suit is instituted the vessel is under arrest. This claim was for building, and the vessel was under arrest; but before the arrest the plaintiffs assigned this claim to bankers, on behalf of whom they now sued as bare trustees; and after this assignment they became bankrupt. It was argued, as here, that at the time of the assignment to the bank the plaintiffs had no claim against the vessel, as it was not then under arrest; that no such right therefore passed to the bank, and that therefore it subsequently passed to the trustees for creditors. Dr. Lushington said: "The objection . . . is, that at the time of the assignment to the bank the plaintiffs had no claim against *the vessel* to assign, as they had not commenced proceedings against her . . . and could not commence proceedings by reason of the vessel not being under arrest; that the claim against the vessel did not accrue until after the plaintiffs had executed the deed in favour of their creditors, and consequently that the claim passed to the trustees for the creditors. It seems to me, however, that the assignment by the plaintiffs to the bank of the causes of action would carry with it all right of action to recover the debt, including any right for that purpose to proceed against the vessel which might then be, as it were, inchoate, but which might subsequently be complete."

The statute is for the benefit and security of the workman. Why should he not be allowed to obtain full value of his earnings? Why should he be compelled, in case of stress, to sell out for tithe of what is coming to him?

McLarty v. *Todd* (1912), 7 D.L.R. 344, 4 O.W.N. 172; *Heyd* v. *Millar* (1898), 29 O.R. 735; *Beifeld* v. *International Cement Co.* (1898), 79 Ill. App. 318, at p. 323; *In re Westlund* (1900), 99 Fed. Repr. 399, at p. 400; *Wilson* v. *Doble* (1910), 13 W.L.R. 290; *Arbuthnot Co.* v. *Winnipeg Manufacturing Co.* (1906), 16 Man. L.R. 401; *National Supply Co.* v. *Horrobin* (1906), 16 Man. L.R. 472; and *In re Brown* (1870), 4 Benedict (Dist. Ct. N.Y.) 142, may be referred to. The *Beifeld* and other American cases generally turn upon provisions in their statutes which are not in ours.

There will be judgment for the plaintiff with costs, declaring that he is entitled to rank as a preferred creditor. I think that the defendant acted in good faith, and was quite justified in awaiting the judgment of the Court before adopting this construction.

Judgment for plaintiff.

DRINKLE v. STEEDMAN.

SASK.

S. C.
1913

Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Brown, JJ. November 15, 1913.

1. SPECIFIC PERFORMANCE (§ I E 1—30)—CONTRACT FOR REAL PROPERTY—TIME OF ESSENCE—RELIEF FROM FORFEITURE.

In an action for specific performance of an agreement for the sale of land containing a forfeiture clause in the event of non-payment of instalments of the purchase money as they fall due, the provision is a penal one against which the court has jurisdiction to relieve the purchaser, not only from the forfeiture of the land itself but from the forfeiture of purchase money paid.

[*Kilmer* v. *B.C. Orchard Lands Co.*, [1913] A.C. 319, 10 D.L.R. 172; *Boyd* v. *Richards*, 13 D.L.R. 865; *Re Dagenham (Thames) Dock Co.*, L.R. 8 Ch. 1022, followed; *Hall* v. *Turnbull*, 2 S.L.R. 89; *Enkema* v. *Cherry*, 5 S.L.R. 61, distinguished; *Steele* v. *McCarthy*, 1 S.L.R. 317, overruled.]

2. FORFEITURE (§ I—4)—REMISSION OF—ABSENCE OF LACHES—REALTY SALE.

Where the payment of the purchase money outstanding and interest will compensate the vendor for default in a stipulated payment under an agreement for the sale of land and the purchaser has made out a proper case for the intervention of the court and has not disentitled himself to relief by laches or delay, the court may, on payment of the amount ascertained to be due under the contract relieve him from the forfeiture occasioned by his default.

[*Kilmer* v. *B.C. Orchard Lands Co.*, [1913] A.C. 319, 10 D.L.R. 172; *Boyd* v. *Richards*, 13 D.L.R. 865; *Re Dagenham (Thames) Dock Co.*, L.R. 8 Ch. 1022, followed; *Steele* v. *McCarthy*, 1 S.L.R. 317, overruled.]

Statement

APPEAL by the plaintiff from the judgment of Newlands, J., refusing relief against a forfeiture. The original action was for specific performance of an agreement for the sale of land.

The appeal was allowed.

J. F. Frame, for appellants.

O. M. Biggar, K.C., for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—This is an action for specific performance of an agreement for the sale of land. By an agreement in writing James Campbell White (since deceased) agreed to sell to one Tom Loveridge the south-west quarter of sec. 5, township 37, range 5, west of the 3rd, for the sum of $16,000, payable $1,000 cash; $1,000 on December 1, 1910, and the balance in five equal annual instalments of $2,800 each. The agreement contained the following provision:—

> And it is further agreed that in case the purchaser shall at any time make default in any of the payments by himself herein agreed to be paid or in any part thereof or in the performance of any of the covenants herein contained, the vendor shall be at liberty at any time after such default, without notice to the purchaser, either to cancel this contract and declare the same void and to retain any payments that may have been made on account thereof as and by way of liquidated damages and retain

SASK.

S. C.
1913

DRINKLE
v.
STEEDMAN.

Lamont, J.

all improvements, or proceed to another sale of the land either by public auction, tender, or private contract, and the deficiency, if any, caused by such resale, with all costs, charges and expenses attending the same or caused by such default, shall be made good by the purchaser.

The agreement also provided that

if the vendor shall see fit to declare this contract null and void by reason of the purchaser's default, such declaration may be made by notice from the vendor addressed to the purchaser directed to the post office hereinbefore mentioned.

The cash payment was made. On January 24, Loveridge assigned all his interest in the above described lands and in his agreement with White to the plaintiffs. On January 20, 1910, James Campbell White died, and on April 8, letters of administration for his estate were granted out of the Surrogate Court of the county of Wentworth, in the Province of Ontario, to the defendant, who as administrator, on July 22, approved of the assignment from Loveridge to the plaintiffs. These letters of administration, however, were not re-sealed in this province until May 25, 1911. On December 1 following, the next payment under the agreement fell due. The plaintiffs did not make it. On December 15, the defendant, through his solicitors, wrote to the plaintiffs declaring the agreement null and void. This notification was received by the plaintiff W. R. Drinkle on December 21. On the same day Drinkle remitted to the defendant by bank draft the sum of $1,954.26, being the payment due December 1, and interest to December 31. This the defendants refused to accept. On January 30, 1912, the plaintiffs again tendered the amount due, which was again refused. Subsequently they brought this action claiming specific performance, or, in the alternative, damages.

The action was tried before my brother Newlands, who held, following the decision of this Court in *Steele* v. *McCarthy*, 1 Sask. L.R. 317, that he could not relieve the plaintiffs from the forfeiture of their interest in the land. From that judgment the plaintiffs now appeal.

On the argument in appeal, the two main contentions advanced on behalf of the plaintiffs were, (1) that since the judgment appealed from herein was given, the Privy Council, by its decision in *Kilmer* v. *B.C. Orchard Lands Co.*, [1913] A.C. 319, 10 D.L.R. 172, had overruled the principle laid down in *Steele* v. *McCarthy*, 1 S.L.R. 317, and (2) that in any case the notice of cancellation given by the defendant was insufficient, because he had not at the time the notice was given been granted letters of administration in this province, and was therefore not in a position to deal with the lands.

In *Steele* v. *McCarthy*, 1 S.L.R. 317, this Court decided that where an agreement contains what is commonly called a can-

cellation clause, and the vendor puts an end to the agreement in accordance with the terms of that clause, the Court cannot relieve the purchaser from the forfeiture of his interest in the land. In a number of subsequent cases it was held that the Court could relieve against the forfeiture of the sums of purchase-money paid. See *Hall* v. *Turnbull*, 2 S.L.R. 89, and *Enkema* v. *Cherry*, 5 S.L.R. 61.

In *Kilmer* v. *British Columbia Orchard Lands Co.*, [1913] A.C. 319, 10 D.L.R. 172, the agreement provided that, unless the instalments of purchase money were punctually paid, the agreement should be null and void, and all payments made should be forfeited to the vendor. Default was made, and the vendor declared the agreement at an end and brought an action for a declaration that it no longer was binding. Kilmer counterclaimed, and asked for specific performance, and brought the payment in respect of which default had been made into Court. Their Lordships held, following *Re Dagenham (Thames) Dock Co.*, L.R. 8 Ch. 1022, that the provision was in the nature of a penalty against which the Court could, and under the circumstances of that case, should, relieve the purchaser; and they directed the agreement to be specifically performed. The principle adopted by the Court was that laid down by Mellish, L.J., in the *Dagenham* case, L.R. 8 Ch. 1022, at 1025, where he said:—

> I have always understood that where there is a stipulation that if on a certain day an agreement remains either wholly or in part unperformed, in which case the real damage may be either very large or very trifling, there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty.

In his Laws of England, vol. 13, pp. 151 and 152, Lord Halsbury says:—

> Any clause forfeiting an interest in property on non-payment of money is treated in equity as penal, and relief will be given on payment of the money with interest and compensation for the delay.

In his argument before us, counsel for the defendant Steedman contended that the notice to the plaintiffs, declaring the agreement at an end, was nothing more than a rescission by him of the contract in accordance with a power to rescind reserved in the agreement, and that therefore it should be upheld. He endeavoured to account for the decision in the *Kilmer* case by saying that this point had not been raised before their Lordships. If the argument that it was simply a case of rescission had been maintainable, I do not think it would have escaped the notice of the learned counsel who argued the *Kilmer* case, much less that of their Lordships. It is also suggested that the *Kilmer* case is distinguishable from the present one on the ground that in that case the action was brought by the vendor,

SASK.

S. C.
1913

DRINKLE
v.
STEEDMAN.

Lamont, J.

and that the purchaser claimed relief by way of counterclaim, while in the present case the action has been brought for specific performance by the purchaser. I cannot see that the form of action can have any bearing on the matter. If the purchaser has a right to have the clause declared penal in its character, his right must be the same, irrespective of whether he claims relief in the first instance or by way of counterclaim. If the vendor was seeking the indulgence of the Court, the Court, while granting his request, might impose terms upon him. But where he seeks a declaration that the agreement is at an end, the Court cannot grant that request and impose as a term thereof that the agreement shall be specifically performed. The result, therefore, in my opinion, is, that the Court has jurisdiction to relieve a purchaser from the forfeiture of his interest in the land itself as well as from the forfeiture of the purchase-money paid, and that *Steele* v. *McCarthy*, 1 S.L.R. 317, upon that point must be considered as having been overruled. See also *Boyd* v. *Richards*, 13 D.L.R. 865.

The Court having jurisdiction to grant relief and direct specific performance of the agreement, the only question to be determined is, have the plaintiffs made out a proper case for the intervention of the Court? The plaintiffs promptly remedied their default by tendering the instalment of purchase-money due. They have also under the circumstances been reasonably prompt in applying to the Court for relief. I cannot, therefore, find that they have been guilty of laches in any respect; and accordingly they are entitled to succeed.

The appeal should therefore, in my opinion, be allowed. A reference should be had to the local registrar to ascertain the amount due to the defendant under the agreement, and upon payment of that amount by the plaintiffs they will be relieved from the forfeiture occasioned by their default and the defendant's notice.

Appeal allowed.

SASK.

S. C.
1913

SWIFT CANADIAN CO. v. EASTERBROOK.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont and Elwood, JJ. November 15, 1913.

1. PLEADING (§ IIIB—309)—ESTOPPEL—SETTING UP CONSTITUENT FACTS.

A plea of estoppel must allege all facts upon which the party relies as constituting the estoppel, and consequently if a defendant, sued for the price of goods sold and delivered, desires to set up that the defendant had, on receiving a statement of account rendered by the plaintiff after the date of the charges in question paid the amount of same and had destroyed vouchers in faith of its being the entire account, such facts must be specifically pleaded in order to form an answer to the demand for items which were not in fact included in the account so rendered.

SASK.

S. C.
1913

SWIFT CANADIAN CO. v. EASTERBROOK.

Newlands, J.

APPEAL by plaintiffs from the dismissal at the trial of their action, brought for goods sold and delivered.

The appeal was allowed, and judgment entered for plaintiffs.

P. H. Gordon, for plaintiffs.

W. M. Martin, for defendants.

The judgment of the Court was delivered by NEWLANDS, J.:—This is an action for goods sold and delivered of which an account was rendered. There is no denial of the plaintiffs' claim in the defence; and, therefore, the claim is admitted: rule 153. The defence is an account stated on July 31, 1912, and payment in full; an admission of a subsequent account and a tender of the amount due on that account, which amount is brought into Court; and a plea of estoppel by reason of the above-mentioned facts. The trial Judge held the burden of proof to be on the defendants, and, after the trial, held that the plaintiffs were estopped from claiming that the account settled was an old account due on December 11, 1911; and he gave judgment for the defendants.

Upon the facts as pleaded, there was, in my opinion, no estoppel, these facts amounting only to a statement of account, and a payment of the amount as stated, which would not prevent the plaintiffs from proving that such account was so rendered by mistake. The defendants gave evidence that, upon receiving a receipt for this account, which, they claimed was the whole amount due, they destroyed all prior accounts, and that they had no records of prior transactions.

If these facts had been pleaded, the plea of estoppel would have been a good one, as they would have thereby shewn that, on account of the plaintiffs' action, they had altered their position to their detriment, having destroyed the evidence by which they could prove the settlement of account. As this was not done, and as a plea of estoppel, to be a good one, must allege all facts upon which the defendants rely to prevent the plaintiffs from recovering (Bullen & Leake, p. 646), the plaintiffs are not estopped; and, their account being admitted by the pleadings, the defendants have to rely upon their defence of payment, which they have not proved; and, therefore, the plaintiffs are entitled to recover. I do not think that the finding of the trial Judge that the letter of August 19, was false to the plaintiffs' knowledge, and that, "to induce the defendants to pay a debt which they denied, the plaintiffs represented it as a balance of an open account which would close the business to July 31, and, in order to cover their duplicity, invited the defendants to be foolish enough to return the letter which was the only evidence of it," was supported by the evidence. Upon the strength

SASK.
S.C.
1913
SWIFT CANADIAN CO. v. EASTERBROOK.
Newlands, J.

of this finding, he held that "a representation knowingly false casts upon the plaintiffs the onus of proving that the defendants did not act on it to their detriment," and that the plaintiffs had not removed that onus.

The letter in question was a circular in the following words:—

We are now making yearly audit of our books, and are desirous of having verified all open accounts as at the close of business, July 31.

The balance in your account on that date was debit $12.26.

Kindly compare with your records and return this letter in the enclosed stamped envelope, giving full particulars, should there be any discrepancies.

Yours respectfully,
SWIFT CANADIAN CO. LTD.
J. H. Northcott,
Travelling auditor.

I can see no evidence of duplicity in this circular; and, therefore, can see no grounds for putting the burden upon the plaintiffs of proving that the defendants did not act upon it to their detriment; and, as they proved that this circular was for an old account which was overdue, and had no reference to the current account upon which the action is brought, the burden of proving payment would still be on the defendants; and, as they did not prove the same, the appeal should be allowed and judgment given for plaintiffs with costs.

Appeal allowed.

CAN.
S.C.
1913

CANADIAN PACIFIC R. CO., appellant, defendant v. KERR, respondent, plaintiff.

(Decision No. 2.)

Supreme Court of Canada, Idington, Duff, Anglin, and Brodeur, JJ. November 10, 1913.

1. RAILWAYS (§ II D—75)—FIRES—ORIGIN FROM LOCOMOTIVE—INFERENCE.

The fact that no fire was seen at or near a railway track until a few minutes after the passing of a railway locomotive which had not been recently inspected, justifies an inference, where no other cause seemed probable, that the fire originated from sparks from such engine, so as to fix the railway with liability under sec. 298 of the Railway Act, R.S.C. 1906, ch. 37.

[*Kerr* v. *Canadian Pacific R. Co.*, 12 D.L.R. 425, affirmed; *National Trust* v. *Miller*, 3 D.L.R. 69, referred to.]

2. APPEAL (§ VII J 3—400)—QUESTION NOT RAISED BELOW—CAUSE OF ACTION.

A question not raised in the court appealed from will not be considered by the Supreme Court of Canada when not mentioned in the factum, and when all evidence pertaining to such question had, by consent of the parties, been omitted from the appeal book.

Statement

APPEAL by the defendant from the judgment of the Court of Appeal of British Columbia, *Kerr* v. *Canadian Pacific R. Co.*,

12 D.L.R. 425, against it for a fire said to have been started by sparks from a locomotive, and resulting in the destruction of standing timber.

The appeal was dismissed.

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

Travers Lewis, K.C., and *A. B. Macdonald*, for respondent, plaintiff.

CAN.
S. C.
1913
CANADIAN PACIFIC R. CO. v. KERR.
Idington, J.

IDINGTON, J.:—When a plaintiff complaining of the destruction of property, by fire started by a railway locomotive, proves that the fire in question was not apparent to anyone there present, until after the locomotive charged with being the cause thereof, had passed the place of the fire's origin, and immediately, or within half an hour thereafter, the fire is discovered to have been but recently started, within a hundred feet or so of the railway track so run over, and no other cause thereof is visible, a *primâ facie* case has been established which must be met by something more than idle suggestions or guesses about the effect of the ordinary current of the wind in collision or conflict with the currents created by the speed of the train and that radiating from the smoke stack; or the possibilities from the pipe ashes of a possible hunter, where no one hunted; or of the cigarettes or matches of a possible fisherman where there were no fish, or other imaginary causes of the fire. Nor is such a cause of action so proven to be defeated by the adoption by the railway company of "modern and efficient appliances." In such latter case, and in the absence of being guilty of any negligence, the company complained of is absolved from any greater liability than five thousand dollars. I think the learned trial Judge and the Court of Appeal appreciated the evidence and applied the law correctly in this regard.

We are asked now, though no such ground was taken in the appeal below, and it is not even mentioned in the appellant's factum herein, to entertain an appeal in regard to respondent Kerr's damages because he is only a resident pre-emptor. He sued as such and claimed damages accordingly. The learned trial Judge, as well as the parties, proceeded throughout upon the basis of the party entitled to recover having his damages assessed according to the value of the timber destroyed on his land. Kerr, being in occupation of his land and in good standing as pre-emptor, clearly was entitled to most substantial damages for the destruction of the timber. Whether the mere speculative chance that he might fail to complete his purchase or not, should affect or lessen the claim for full value of the timber, never entered the minds of any of those concerned at the trial. Such a view or possibility should not be entertained now after all that has transpired.

CAN.

S. C. 1913

CANADIAN PACIFIC R. CO. v. KERR.

Idington, J.

The alleged reversal of this Court in the recent case of *National Trust Co.* v. *Miller, Schmidt* v. *Miller*, 3 D.L.R. 69, apparently relied upon by the learned trial Judge, does not affect the matter of such a claim as I assume the plaintiff here sets up by his pleading. For my part, in that case I happened to dissent from the majority, yet pointed out the possibility of a claim being so founded even by the owner of a licensing location.

I agree with the learned trial Judge, the pre-emptor in good standing and in possession stands on much higher ground, and I think his claim in such case can fall little below that of an absolute owner, at all events so near to that as to render it necessary to have raised the distinction at the trial. I may point out that he is given by sec. 132 of the Crown Lands Act, an action for any trespass as if absolutely seised of the land indicating how extensive the rights are which he holds in relation to the timber on his land. In my view it is not necessary to pursue the inquiry further and determine exactly how far his contract, read in the light of this action, might carry the respondent, though this is not an action of trespass.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—I think there is sufficient evidence to support the inference drawn by the learned trial Judge as to the origin of the fire.

As to the point raised by Mr. Hellmuth respecting the damages awarded to Kerr, I think that point is not open. The learned trial Judge may have incorrectly interpreted the decision of this Court in *National Trust* v. *Miller, Schmidt* v. *Miller*, 3 D.L.R. 69, as involving the proposition that where standing timber is destroyed, or taken away, through or by a wrongful act, the person who is in possession of the land upon which the timber stands, is entitled to recover the full value of it from the wrongdoer, notwithstanding the fact that he has only a limited interest in the timber, such, for example, as a non-exclusive right to make use of it for a limited purpose. I do not think that proposition can now be maintained; but, on the other hand, there can be no manner of doubt that a pre-emptor would be entitled to recover from a wrongdoer, destroying timber growing on his pre-emption, the value of his interest in the timber, whatever that might be. I think the appellants, in excluding from the appeal book all the evidence bearing upon the matter of such damages (it being remembered that no such question was raised in the Court of Appeal for British Columbia), have precluded themselves from raising the question in this Court.

I think the appeal should be dismissed with costs.

ANGLIN, J.:—There was ample evidence of facts upon which, without conjecture, but by what was not an unreasonable inference, a jury could properly find that the fire in question in this action was caused by the defendants' locomotive.

Under the authority of *Hamelin* v. *Bannerman*, 31 Can. S.C. R. 534, I would be disposed to preclude the appellant from raising here the question as to the quantum of the interest of the respondent Kerr, that question not having been presented by him in the Court of Appeal or in his factum. Apparently because no issue of this kind was to be presented, the evidence bearing on it was omitted from the record in the Court of Appeal and is not now before us. The question at the trial appears to have been not whether, because of his limited interest as a pre-emptor in the timber which was destroyed, the quantum of this plaintiff's recovery should be restricted, but whether he had any right of action or recovery at all.

Under sec. 132 of R.S.B.C. 1911, ch. 129, the plaintiff Kerr as a pre-emptor had a right of action against the defendants. It may be that the quantum of the damages to which he was entitled would be substantially less than if he had full ownership of the land which was burned, or of the timber upon it; but, without the evidence which has been omitted from the record, we are not in a position to determine the proper quantum, or to say that the amount allowed is clearly excessive.

I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—This is an action by different persons who claim damages from a railway company under sec. 298 of the Railway Act.

Under the provisions of that section, if damages are caused to lands by a fire started by a railway locomotive, the company shall be liable for such damages, whether there is negligence or not.

The plaintiffs had to prove that the fire had been set by a locomotive of the company defendant. It is a question of fact about which the trial Judge and the Judges of the Court of Appeal are unanimous. It would not do for us to reach a different conclusion than the one reached unanimously by the Courts below. The jurisprudence of this Court is to the effect that the finding of a trial Judge confirmed by the Court of Appeal should not be disturbed.

Now as to one of the plaintiffs, it was argued that he was not the owner of the property destroyed by the fire, but simply a licensee under the provisions of the Crown Lands Act of British Columbia. That question does not seem to have been discussed before the Court of Appeal. We have been informed by counsel at bar that, by consent of the parties, all the evid-

CAN.

S. C.
1913

Brodeur, J.

ence in relation to that feature of the case was not printed. The only inference to be drawn from that is that the parties were satisfied with the judgment of the Supreme Court of the province in that regard. It would not be fair to the parties to pass judgment on that issue that seems to have been abandoned.

In those circumstances, the appeal should be dismissed.

Appeal dismissed.

ONT.

S. C.
1913

Re FULFORD.

Ontario Supreme Court, Middleton, J. October 16, 1913.

1. EXECUTORS AND ADMINISTRATORS (§ II A 1—21)—POWERS AND LIABILITIES—ASSETS—AS TO INVESTMENTS.

Power to invest in non-trustee securities of similar nature to those held by a testator at his death is not conferred on executors by a testamentary direction to keep any investments held by the former at his decease, and to invest the money of his estate as it came in in government bonds and securities and municipal debentures, and also to hold any increased stock received as stock dividends or similar additions to the testator's holdings.

2. CORPORATIONS AND COMPANIES (§ V E 4—230) — DIVIDENDS — STOCK DIVIDENDS—WHAT ARE.

A stock dividend is a distribution to those already holding shares of a company by way of a dividend upon their holdings; it does not amount to a new investment, but is merely a mode of distributing accumulated profits in the shape of new stock, and which has the effect of reducing *pro tanto* the value of the shares already held.

3. EXECUTORS AND ADMINISTRATORS (§ II A 1—21)—POWERS AND LIABILITIES—AS TO INVESTMENTS—POWER TO RETAIN—SIMILAR NEW INVESTMENT.

Power vested in executors to retain investments made by a testator does not amount to an implied authority to make similar investments on behalf of the estate.

[*Re Nicholls, Hall* v. *Wildman*, 14 D.L.R. 244, 29 O.L.R. 206, distinguished.]

4. EXECUTORS AND ADMINISTRATORS (§ II A 1—21)—POWERS AND LIABILITIES—ASSETS—AS TO INVESTMENTS—RETENTION OF—SHARES ACQUIRED UNDER OPTION HELD BY TESTATOR.

Shares of a non-trustee stock acquired by executors under an option held by a testator to subscribe for additional shares at less than the market value, become assets of the estate to be converted by the executors, and cannot be retained by them as a permanent investment under power to keep any investment held by the testator at his death, and to invest the money of his estate as it came in in government bonds and securities and municipal debentures, and also to hold any increased stock received by way of stock dividends, or similar additions to his holdings.

5. EXECUTORS AND ADMINISTRATORS (§ II A 1—21)—POWERS AND LIABILITIES—ASSETS—AS TO INVESTMENTS—RETENTION OF SHARES OF SUBSIDIARY COMPANY RECEIVED ON DISSOLUTION OF ILLEGAL TRUST.

Shares of non-trustee stock in various subsidiary companies received by executors, on the dissolution of a company as a so-called trust, in exchange for shares of the latter company held by a testator,

cannot be retained by them under power to keep any investment held by the former at his death, and to invest the money of his estate as it came in in government bonds and securities and municipal debentures, and also to hold any increase of stock received as stock dividends, or similar additions to the testator's holdings; there is in such case no such similarity or identity between the shares of the parent company and the subsidiary companies composing it, sufficient to permit the executors to retain the substituted shares.

[*Re Smith*, [1902] 2 Ch. 667; and *Re Anson's Settlement*, [1907] 2 Ch. 424, considered and applied.]

6. EXECUTORS AND ADMINISTRATORS (§ II A 1—21)—POWERS AND LIABILITIES—ASSETS—AS TO INVESTMENTS—SHARES HELD BY TESTATOR BUT NOT FULLY PAID FOR.

That shares held by a testator at his death were not fully paid up, so that his executors were compelled to pay the balance due on his subscription, does not prevent them holding the shares as an investment made by the testator, under a testamentary power to keep any investment held by the testator at his death.

7. EXECUTORS AND ADMINISTRATORS (§ II A 1—15)—POWERS AND LIABILITIES—ASSETS—DISPOSAL OF—DUTY TO PREVENT SACRIFICE.

It is the duty of executors when obliged to realize on shares, to exercise a sound discretion and not to hastily and improvidently throw them on the market.

8. EXECUTORS AND ADMINISTRATORS (§ III A–69)—APPLICATION OF EXECUTOR TO COURT FOR ADVICE—WHAT MAY BE CONSIDERED—MATTERS IN DISCRETION OF EXECUTOR.

It is only upon legal matters or difficulties arising in the discharge of the duties of an executor, that the court is authorized to give advice in an application upon originating notice, and not such as involve the exercise of judgment and discretion on the part of the executor, such as the advisability of, and the proper time to realize on, the assets of an estate.

9. WILLS (§ III G 7—150)—INCOME—WHAT IS—ACCRETIONS TO SHARES ACQUIRED BY EXECUTORS UNDER OPTION HELD BY TESTATOR.

Accretions to shares of stock received by executors on the exercise of an option incident to such shares, are not to be treated as income but as belonging to capital.

[*Re Anson's Settlement*, [1907] 2 Ch. 424, referred to.]

10. WILLS (§ III G 7—150)—INCOME—WHAT IS—PROCEEDS OF UNAUTHORIZED INVESTMENT BY EXECUTORS — SECURITIES RETAINED FOR REALIZATION.

The entire income received by executors, who are empowered to hold certain investments upon a non-trustee security, or those retained for profitable realization, does not go to the life tenant; since everything beyond the legal rate of interest will be regarded as an accretion to the corpus to compensate for the risk incident to the particular investment.

Statement

MOTION by the executors of the will of George Taylor Fulford, deceased, upon originating notice, for an order determining certain questions arising upon the will and in the administration of the estate.

E. T. Malone, K.C., for the executors.

H. S. Osler, K.C., for the Official Guardian, representing the infant son and grandsons of the testator, and appointed upon the hearing to represent grandchildren who may hereafter be born.

M. C. Cameron, for Mrs. Hardy, the life-tenant.

ONT.
S. C.
1913
RE FULFORD.
Middleton, J.

MIDDLETON, J.:—During his lifetime, the late Mr. Fulford had been largely interested in various industrial undertakings, and held a large amount of stock and other securities of a more or less speculative and uncertain value.

By paragraph 4 of his will he provided: "I authorise my executors to keep any of the investments which I may have at my decease, and I direct them to invest the moneys of my estate, as they come in, in Government bonds and securities and in municipal debentures of the Dominion of Canada and the Provinces and municipalities therein, and of the United States of America and the States and municipalities thereof, and I also authorise them to hold any increased stock received by way of stock dividends or similar additions to my holdings."

The question that is now raised arises with reference to the duty of the executors under this clause. The executors have retained the stock and other securities held by the deceased; but in the course of time the nature of these holdings has been changed in many respects—as will have to be discussed in greater detail—and the main question is, whether the executors are now entitled to hold securities which have become substituted for the original investments.

Everything depends upon the meaning to be attributed to the clause in question. In the earlier part of the clause, the authority to retain is confined to "the investments which I may have at my decease." Outside of these investments the testator has made it clear that he desires his estate to be invested in securities of the highest possible character: Government bonds and municipal debentures. Then follows the clause which was much discussed on the argument: "And I also authorise them to hold any increased stock received by way of stock dividends or similar additions to my holdings."

It is argued on behalf of the trustees and the life-tenant that this authorises the executors now to invest in securities of a similar nature to those in which the testator had invested, and held at the time of his death. I cannot accept this as being the correct interpretation of the clause in question; which seems to me plain and free from all ambiguity.

As a rider to the first direction, permitting retention of the testator's own investments, he permits the retention of (*a*) "any increased stock received by way of stock dividends" or (*b*) "similar additions to my holdings."

It is said that there can be no addition to the testator's holdings similar to stock dividends. This may be so, though I am by no means prepared to admit it; but that would not alter the construction or meaning of the clause. All that this clause authorises to be retained is any stock dividend received, or something akin to it. A stock dividend is stock distributed to

those already holding stock, by way of dividend upon their then holdings. It is not a new investment in any sense; it is a mode of distributing accumulated profits in the shape of new stock, which, *pro tanto*, reduces the value of the stock held.

To illustrate—if the testator held ten shares of stock in "A" company, worth twice par by reason of accumulated profits, the company might declare a stock dividend of ten shares, which would transmute the holding from ten shares worth $200 each to twenty shares of $100 each. The testator desires to make it plain that if this were done there was no obligation to sell the ten new shares.

In my view, the operation of the clause is strictly limited to the retention of shares received as stock dividends, or other securities which may fall within the designation of "similar additions."

In *In re Smith*, [1902] 2 Ch. 667, Buckley, J., had before him a will by which the testator had authorised his executors to retain any part of his estate "in its present form of investment." The testator held a number of shares in a limited company, which were of great value. A reconstruction took place, the old company being wound-up. A new company was formed, and all the assets were transferred to the new company. The members of the old company received shares in the new company. The trustees accepted these shares, and surrendered the shares of the old company. Some of the shares received were preference shares, some were ordinary shares. There was in the will a clause permitting investment, and the preference shares fell within that clause. The question was raised as to whether the trustees had the right to retain the ordinary shares or whether it was their duty to convert them. It was held that they had that right: "The new shares came to the trustees because the testator held the old shares, and for no other reason. The shares in the new company resulted from the shares in the old company without any act on the part of the trustees, simply because they held the testator's shares. . . . The trustees, therefore, have not made the investment in the new shares. The altered thing that they have is the same investment in an altered form resulting from qualities inherent in the investment which their testator had. . . . The new company is simply a reproduction, a transformation, of the old company. . . . There is no difference in the form of business, no change from fully paid to partly paid shares, so as to cause additional liability."

This case was considered in *In re Anson's Settlement*, [1907] 2 Ch. 424. A settlement contained a similar power of retention. One of the investments was shares in the Northern Securities Company, a holding company which held shares in and controlled the policy of certain railway companies. The stock of

ONT.
S. C.
1913
RE FULFORD.
Middleton, J.

the holding company was cancelled to the extent of ninety-nine per cent., and, in lieu of the cancelled stock, the stockholders received certain paid-up shares of the subsidiary companies. A year or more afterwards, the trustees received three options, entitling them to take up new stock in respect of the shares held by them in the subsidiary companies. This required payment to the companies of the price at which this stock was being issued. The company took up the stock, and in one instance sold the right of option. The sum was received, and the value of the new stock, over and above the amount paid, was claimed as income. Kekewich, J., held that the shares of the subsidiary company held as the result of the dissolution of the holding company were not investments of the settlor which the trustees could retain. *In re Smith, supra,* was relied upon as determining the case adversely to this view. The learned Judge finds himself unable to accept the reasoning of Buckley, J., stating his own view thus (p. 434): "There, no doubt, you have large elements, I will not say myself of sameness, but of similarity; and it may be that it is right to come to the conclusion that the reconstructed company is really in substance the same company as the old, so that trustees who are authorised to retain shares in the old company might now be considered to retain shares in the new."

He then deals with the case before him: pointing out that, no matter what opinion is taken of the reasoning in *In re Smith,* it cannot apply to the case in hand, as there is no sameness, and the holdings are holdings in entirely different concerns.

I think it is a question of fact in each case: is what has taken place merely a change in the investment made by the testator, inherent in the investment itself, or is the change, although a change effected by a *vis major,* quite apart from the volition of the holders, a substitution of something different from that which the testator invested in?

The earlier case is based upon the finding of fact that the shares in the reconstructed company were in substance the same investment. The finding in the latter case was that the distributed assets, reaching the executors on the dissolution of the holding company, were not an investment made by the testator.

With much deference, I agree with the finding in both cases; and the question here is, with reference to each item, under which head does it fall?

Proceeding now to the concrete matters submitted, the testator held certain stock. The right or option to subscribe for additional stock, at a price less than the market value, was given to the executors by reason of the testator's holding. The executors took up the new stock, thus converting into the stock of the company in question certain assets of the estate held as cash or

ONT.
S. C.
1913
RE FULFORD.
Middleton, J.

invested in Government and municipal securities. In taking up this stock, the executors were discharging their duty; a duty which might just as well have been discharged by selling the "rights;" but they have no right to retain the stock so taken up. It became an asset of the estate which it was their duty to convert.

With reference to the stock taken on re-organisation of several companies named, sufficient does not appear before me from the present material to enable me to pronounce upon the question of substantial identity. No doubt, in accepting the stock in the new company upon a re-organisation, the executors have exercised their best judgment, and no attack is made or suggested upon the wisdom of what has been done. But, as already said, before the stock so received could be retained as a permanent investment, there must in each case be a finding of fact as to the substantial identity of the two corporations. The testator may well have been content to invest a certain sum of money in a company carrying on a small business, and if he made such an investment he authorised his executors to continue it; and, if all that has been done is to re-organise that same company, even though the re-organisation involves the substitution of stock in a new concern, the case relied upon shews that this is really the same investment. But, if the re-organisation means the swallowing up of that small company by some merger and the substitution of an equivalent holding in some widely different concern, then the investment is not, either in substance or in form, that made by the testator; and, although the transmutation takes place without the consent or against the will of the executors, their right to retention is at an end. From the memorandum handed in, I am at present inclined to think that the bulk of the stocks of this estate, where there has been a reconstruction or change, can be no longer retained. The material is inadequate to allow the individual stocks to be finally dealt with.

In re Anson's Settlement is conclusive against the right of the executors to retain the distributed assets received as the result of the dissolution of what are commonly known as "The Trusts," in consequence of the legislation and action of the United States and its Courts, decreeing their dissolution. This covers all the stocks received in lieu of the holding in the American Tobacco Company.

A further question is raised as to the holdings that had been subscribed for, but not fully paid-up by the testator at the time of his death. I think that these are investments made by the testator, and that the fact of the executors being called upon to implement his obligation to pay the balance remaining upon his subscriptions, makes these none the less his investments.

It may be that the parties will be able to agree as to the

ONT.
S. C.
1913
RE FULFORD.
Middleton, J.

effect of these findings upon the different stocks held. If not, supplemental material may be put in.

The question is then raised as to the duty of the executors to realise. I do not for one moment suggest that these stocks should be hastily and improvidently thrown upon the market. The executors are intrusted by the testator with a discretion as to realisation, and they must exercise that discretion, realising as best they can upon the stocks which they are not authorised to hold.

It is suggested that some scheme should be devised by which the Court should approve of realisation in each particular case, taking the opinion of some advisory committee, if necessary, upon each particular transaction. I do not think that any such scheme can be authorised. The executors are protected from all liability if they honestly and with due care exercise the discretion vested in them. But the responsibility is theirs, and cannot be shifted upon the Court. The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.

Another matter was suggested, with reference to which no formal question is asked. The executors must keep in mind the principles governing the apportionment between capital and income; and, as indicated in *In re Anson's Settlement*, the accretions to the shares by the exercise of the options belonging to the capital are not income. The entire income received upon an unauthorised security, or upon a security retained for profitable realisation, does not go to the life-tenant; but everything beyond the legal rate of interest is regarded as an accretion to the corpus to compensate for the risk incident to the particular investment.

The executors argue that a power to retain implies a power to invest in similar securities. No authority is cited for that proposition. The holding of Mr. Justice Hodgins in *Re Nicholls, Hall* v. *Wildman* (1913), 14 D.L.R. 244, 29 O.L.R. 206, that a power to invest in particular securities implies a power to retain where the testator has already invested, is quite beside the mark.

The costs of all parties may be allowed out of the estate.

Order accordingly.

ROMANISKY v. WOLANCHUK.

MAN.

C. A.

1913

(Decision No. 3.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 24, 1913.

1. JUDGMENT (§ VI A—259)—ENFORCEMENT—SEQUESTRATION — ORDER TO PAY MONEY IN A LIMITED TIME.

Rule 710 of the King's Bench Act, R.S.M. 1902, ch. 40, providing for application for a writ of sequestration where a person by a judgment or order is ordered to pay money within a limited time and neglects to obey the judgment or order, cannot be applied to a judgment which without limitation merely provides "that the plaintiff shall recover against the defendant the costs of the action to be taxed," there being no jurisdiction to fix a time within which the plaintiff shall recover and the judgment not being an "order to pay money."

[*Romanisky* v. *Wolanchuk*, 13 D.L.R. 798, affirmed; *Hulbert* v. *Catheart*, [1894] 1 Q.B. 244; and *Re Oddy*, [1906] 1 Ch. 93, specially referred to; and see Annotation on Sequestration at end of this case.]

2. APPEAL (§ VII I 1—345)—HEARING AND DETERMINATION—WHAT REVIEWABLE—DISCRETIONARY MATTERS—REFUSAL TO GRANT WRIT OF SEQUESTRATION.

Whether a writ of sequestration shall issue under rule 710 of the King's Bench Act, R.S.M. 1902, ch. 40, lies in the discretion of the court, and, when soundly exercised, its decision is final, a denial of an application for the writ not being open to review on appeal.

[*Hulbert* v. *Catheart*, [1896] A.C. 470, followed.]

Statement

APPEAL from the judgment of Galt, J., *Romanisky* v. *Wolanchuk* (No. 2), 13 D.L.R. 798, dismissing an appeal from an order of a Deputy Referee refusing a motion for a writ of sequestration.

The appeal was dismissed.

N. F. Hagel, K.C., for plaintiff.

R. B. Graham, for the defendant.

The judgment of the Court was delivered by

Howell, C.J.M.

HOWELL, C.J.M.:—The plaintiff recovered a judgment against the defendant for costs in the sum of $182.69. It was an ordinary judgment that "the plaintiff shall recover against the defendant."

An ordinary writ of *fi. fa.* goods was issued and the sheriff being unable to recover thereon, states that he must return it *nulla bona*.

An affidavit was filed proving the above facts and that judgment has not been paid, and further, "I have heard the defendant admit that he is the owner of real estate situate in the said eastern judicial district, and that some portion of the same at least is rental-bearing property." There is nothing to shew whether this property is exempt from liability for the payment of his debts or not.

Upon this material an application was made by the plaintiff to the Deputy Referee in Chambers for an order under rule

MAN.

C. A.

1913

ROMANISKY v. WOLANCHUK.

Howell, C.J.M.

710, King's Bench Act, R.S.M. 1902, ch. 40, for the issue of a writ of sequestration. The Deputy Referee refused the order, and, on appeal to Mr. Justice Galt in Chambers, the Deputy Referee's decision was supported, and the plaintiff appeals to this Court.

It is apparent that if in matters of this kind there is a discretion, it has been exercised in this case by the Deputy Referee and by a Judge in Chambers against the plaintiff.

The writ of sequestration is a process handed down to us from the Court of Chancery by rule 710. In that Court a decree operated *in personam*, and the only method of enforcing it was by process of contempt against the party disobeying it, and amongst the methods were sequestration, attachment and the appointment of receivers. Originally the object of sequestration was to oust the defendant from his property, real and personal, and thus compel him to perform what was ordered. While the sequestrators were in possession they often received moneys, and a practice of the Court grew up to apply these moneys by way of payment to the plaintiff to the extent of any moneys which the defendant had by the decree or order been directed to pay to the plaintiff.

The English Judicature Act transferred a large part of this practice to the present Court. Order 42, rule 2, generally transfers the old Chancery methods of enforcing payments without naming them, and rule 4 distinctly provides that sequestration may issue to enforce an order to pay money into Court while rule 6 provides for sequestration to enforce the delivery of property. Order 43, rule 6, provides that where any person is ordered to pay money into Court "or to do any other act in a limited time," neglects to obey the order or judgment, the person prosecuting such order or judgment may, without order, be entitled "to issue a writ of sequestration against the estate and effects of such disobedient person." This rule further provides that such writ shall have the same effect as the writ in Chancery formerly had, and the proceeds are to be dealt with as formerly in Chancery. Rule 7, under this order, provides that, to enforce the payment of costs there must be an order for the writ.

Under our rules, attachments for contempt and sequestration are considered under one heading of, "Attachment and sequestration." Rules 707 and 708 provide that if attachment is issued because of contempt, and the party is in custody, sequestration may issue "against the estate and effects of the disobedient party." Rule 710 is the only one under which an order for sequestration where the defendant is not in custody and where the default is merely the non-payment of money, can be granted, for rules 707 and 708 do not apply where the default is the non-payment of money. The rule 710 provides that, "if a person

who is ordered to pay money neglects to obey the judgment or order," then, on default, the party prosecuting the order "may, at the expiration of the time limited for the performance thereof," apply for a writ, and upon proof of what is required by a Judge, an order may be granted. There is no provision in this rule stating the force or effect of such writ as is provided by the English rule, and, perhaps, it was considered not necessary because of secs. 23, 24 and 25 of the King's Bench Act. I shall assume that a writ of sequestration, when issued, will be acted upon in the same manner as, and will have the power and effect of, such a writ issued in Chancery in England on July 15, 1870.

I think the true construction to put upon rule 710 is, that it applies only to cases where the party is ordered to pay money to some person or into Court on or before a specified time, and that it does not apply to an ordinary judgment where the plaintiff is entitled to "recover" from the defendant; in other words, it is an extraordinary remedy given where the party has so disobeyed the order or judgment as practically to be in contempt. I cannot think that the Legislature intended to allow such a writ to issue against an ordinary judgment debtor, merely because the sheriff cannot realize upon a *fi. fa.* I do not think that, under such circumstances, the Legislature ever intended that a writ should issue against the impecunious debtor authorizing the sheriff to enter into possession of and sequester all the debtor's real and personal estate and collect, receive and sequester all rents and profits, "and detain and keep the same under sequestration in your hands" until the unfortunate debtor shall pay "and clear his contempt," and apparently all without any regard to exemptions.

The quotations last set out are taken from Form No. 147, which, by sec. 96 of the King's Bench Act, is made part of the Act.

If an order is granted under rule 710, the writ must issue in this form, and I assume that the sheriff, the sequestrator, would have all the cruel and drastic powers set forth in the writ.

The case of *Hulbert* v. *Cathcart*, [1894] 1 Q.B. 244, was relied upon by Mr. Justice Galt as an authority to support the order made by him; but Mr. Hagel, on the argument, met this by simply stating that this case was reversed in appeal by a case apparently in the same cause, reported in [1896] A.C. 470. A glance at these two cases shews that the learned counsel was mistaken. The first-mentioned case was an application for a writ in a case like this, to enforce payment of a judgment, and was refused, and this case was cited with approval, as quoted by Mr. Justice Galt, as late as 1906.

The case of *Hulbert* v. *Cathcart*, [1896] A.C. 470, was an

MAN.

C. A.
1913

ROMANISKY
v.
WOLANCHUK.

Howell, C.J.M.

application for a writ of sequestration to compel the defendant to pay certain costs which the Court had ordered the defendant to pay to the plaintiff. In giving judgment, Lord Herschell uses the following language, at 473:—

> It is to be observed that the respondent was ordered by a Court of justice to pay these costs and that those orders of the Court have been treated with contempt,

and again at 474:—

> *Primâ facie* the person who has obtained an order of the Court which has been treated with contempt has a right to the process of the Court to secure that its orders shall not be so treated.

The two independent judgments above referred to hold, first, that the writ should not issue to enforce an ordinary judgment, and that it should issue in punishment of contempt.

I take it that in *Slade* v. *Hulme*, 18 Ch.D. 653, the motion was not to set aside the writ, but to order payment to the sequestrators, and I assume the writ was issued because of contempt.

The Court of Appeal in the case of *Re Oddy, Major* v. *Harness*, [1906] 1 Ch. 93, referred to in the judgment of Mr. Justice Galt, practically decides that to enforce an ordinary judgment to recover money, a writ of sequestration will not be issued.

In the case of *Knill* v. *Dumergue*, [1911] 2 Ch. 199, for some reason a writ of sequestration had been issued, and the case turns upon the question whether the sequestration can attach a pension. I assume the writ had been issued because of some default in the nature of contempt.

The language used by Mr. Justice Meredith, in *Re Asselin*, 6 O.L.R. 170, as to the modesty of the plaintiff's application is eminently applicable to this case.

I would construe rule 710, explained as it is by the form of the writ, as a process for the punishment of a party who has been ordered to pay money on or before a particular time, the non-performance of which would be a contempt of Court; I would not construe it as another process which a creditor has to enforce the payment of his claim.

It seems to me there is another ground upon which the appeal should be refused. The case of *Hulbert* v. *Cathcart*, [1896] A.C. 470, shews clearly that the order for the writ is one in the discretion of the Judge, and if he exercised that discretion soundly it is final. I think the learned Judge decided the case on proper principles.

The appeal is dismissed with costs. The costs to be set-off against the judgment entered for the plaintiff in this cause.

Appeal dismissed.

[See Annotation on Sequestration, page 855.]

Annotation—Judgment (§ VI A—259)—Enforcement—Sequestration.

MAN.

Annotation

Judgment—Enforcement by sequestration

The writ of sequestration was originally a process of contempt *in rem*, not *in personam* (*Tatham* v. *Parker* (1853), 1 Sm. & G. 506, 65 E.R. 221; and see *Pratt* v. *Inman* (1889), 43 Ch.D. 179), and was used where the defendant either could not be arrested, or having been arrested, remained in prison without paying obedience to the Court. Originally this process was merely used as a means of coercing the defendant, by keeping him out of possession of his property; and the practice of applying the money received by the sequestrators, in satisfaction of the sum decreed to be paid, is of comparatively modern origin. This, however, became the usual course of proceeding and the Court of Chancery would, where a sequestration had been issued to enforce a decree for the payment of money, order the sequestrators to apply what they had received by virtue of the sequestration, in satisfaction of the duty to be performed: 5 Encyc. Laws of England 495.

Sequestration is an extraordinary and a drastic remedy, and the right to it is *stricti juris* if not *strictissimi juris*: *per* Riddell, J., in *Dalton* v. *Toronto General Trusts Co.* (1908), 11 O.W.R. 667.

Rule 710 of the Manitoba K.B. Rules, R.S.M. 1902, ch. 40, provides as follows:—

"If a person who is ordered to pay money neglects to obey the judgment or order according to the exigency thereof, the party prosecuting the same may, at the expiration of the time limited for the performance thereof, apply in chambers for a writ of sequestration against the defaulting party, and upon proof of due service of a notice of the motion, unless the Court thinks proper to dispense with such service, and upon proof by affidavit of such other matters, if any, as the Court requires, the Court may order a writ of sequestration to issue."

And Manitoba rule 711 enacts that "commissions of sequestration are to be directed to the sheriff, unless otherwise ordered."

The British Columbia rules as to sequestration are more explicit. Rule 618 of the B.C. rules, 1906, is in almost identical words with the English rule bearing the same marginal number and is as follows:—

"Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration has heretofore had before the passing of the Judicature Act, 1879, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with in equity."

Rule 619 also taken from the English rules is that "no subpœna for the payment of costs, and, unless by leave of the Court or a Judge, no sequestration to enforce such payment, shall be issued."

B.C. Rule 619A, taken from the Ontario rules, is as follows:—

"Unless otherwise ordered, commissions of sequestration are to be directed to the sheriff."

MAN.

Annotation

Judgment—Enforcement by sequestration

Annotation (*continued*)—**Judgment** (§ VI A—259)—**Enforcement—Sequestration.**

The English rule abolishing the subpœna for payment of costs (see also B.C. rule 619) makes it necessary that a sequestration for the payment of costs which may be had "by leave of the Court or a Judge" should be applied for on notice which supplies the place of the notice formerly given by the service of the subpœna: Annual Prac. 1914, p. 751. The English practice is to move in Chambers: *Snow* v. *Bolton*, 17 Ch.D. 433. It is discretionary whether sequestration will be ordered or not: *Hulbert* v. *Catheart*, [1896] A.C. 470.

Under the British Columbia rules (B.C. rules of 1906, marginal numbers 582 and 584), a judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment. And a judgment for the recovery of any property other than land or money may be enforced:—

(*a*) By writ for delivery of the property;

(*b*) By writ of attachment;

(*c*) By writ of sequestration.

The new Ontario Rules of 1913, C.R. 549 and 550 (taken from former rules 859 and 860) are as follows:—

"549. If a person who is ordered to pay money, neglects to obey the judgment, the Court may, upon the application of the party prosecuting the same, at the expiration of the time limited for performance, make an order for a writ of sequestration.

"550. A writ of sequestration shall be directed to the sheriff, unless otherwise ordered."

The Saskatchewan Rules of 1911 would appear to preserve the remedy of a writ of sequestration by the proviso contained in order 33, rule 475 that "nothing in this order [No. 33] shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever." A form of writ of sequestration is given in the schedule of forms appended to the Saskatchewan Rules, see form No. 67.

The New Brunswick Rules of 1909 follow closely the English Rules of Practice as to sequestration. Rule 530 of the N.B. Judicature Act, 1909, is as follows:—

"Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had in England before the commencement of the English Supreme Court of Judicature Act, 1873, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the said Court of Chancery."

The next following rule (N.B. 531) is that "no subpœna for the pay-

Annotation (*continued*)—Judgment (§ VI A—259)—Enforcement—Sequestration.

MAN.

Annotation

Judgment—Enforcement by sequestration

ment of costs, and, unless by leave of the Court or a Judge, no sequestration to enforce such payment, shall be issued.

A writ of sequestration was formerly addressed to four persons named in it, chosen by the person presenting the judgment or order, commanding them or any three or two of them at certain proper and convenient days and hours, to go and enter upon all the messuages, lands, tenements and real estates of the persons in default, and to collect, take, and get into their hands, not only the rents and profits of the real estate, but also all goods, chattels and personal estate, and detain and keep the same under sequestration in their hands, until the person in default has cleared his contempt and the Court has made other order to the contrary: Anderson, p. 511. The sequestrators need not be professional persons and are not required to give security for what they may receive: Anderson, p. 515. Rules of Court now usually require that the writ should be directed to the sheriff. The writ may be issued against an infant: Anderson, p. 515. Its form need not be modified when it is directed against the estate of a married woman, where she is restrained from anticipation (*Hyde* v. *Hyde* (1888), 13 P.D. 166).

Under the English practice, sequestration has been allowed upon the following:—

(1) Judgment or order for payment of money into Court;

(2) Judgment or order to do any act within a limited time;

(3) Judgment or order for the delivery of property, other than money or land;

(4) Judgment or order for the payment of costs;

(5) Judgment or order against a corporation.

The writ may also be employed for carrying into effect decrees or orders made in divorce or matrimonial causes (*Hyde* v. *Hyde* (1888), 13 P.D. 166; *Sansom* v. *Sansom* (1879), 4 P.D. 69; *In re Slade* (1881), 18 Ch. D. 653; and see *Craig* v. *Craig*, [1896] P., at p. 174).

It may be issued against a married woman, though the judgment is against her in respect of her separate estate only (*Worrall* v. *Worrall* (1895), 11 T.L.R. 573). It may also be issued against the estate and effects of a person of unsound mind not so found by inquisition for non-compliance with an order for payment of moneys made before such person became of unsound mind: *Robinson* v. *Galland*, W.N. (1889), 108.

A writ of sequestration will not be issued on an ordinary judgment for the recovery of a sum of money (*Hulbert and Crowe* v. *Cathcart*, [1894] 1 Q.B. 244). But it may apply to an order for the payment of a sum of money in which a time is limited for its payment (*In re Lumley, ex parte Cathcart*, [1894] 2 Ch., at 273, *per* Lindley, L.J. Nor will it be issued to enforce a negative injunction, except against a corporation: *Selous* v. *Croydon Rural Sanitary Authority* (1888), 53 L.T. 209.

Seizure in sequestration of the property of the debtor does not convert it into the property of the creditor, nor does it give the creditor a charge upon it until he has obtained an order giving him a special right to or charge upon a specific part of the property: *Re Pollard*, [1903] 2 K.B., *per* Romer, L.J., at pp. 47, 48). Still, the judgment creditor's title prevails over that of a mortgagee under a mortgage for value made to

MAN.

Annotation

Judgment—Enforcement by sequestration

Annotation (*continued*)—Judgment (§ VI A—259)—Enforcement—Sequestration.

avoid the effect of the writ and with full knowledge on the mortgagee's part of all the circumstances: *Ward* v. *Booth* (1872), L.R. 14 Eq. 195; and over that of volunteers under a conveyance before the issue of the writ: *Re Lush* (1870), L.R. 10 Eq. 442. Mere notice of the issue of the writ will not bind a chose in action in the hands of a third party: *Re Pollard* (1903), 87 L.T., at 62; [1903] 2 K.B., at 48, [1902] W.N. 144.

Where the payment of an annuity to which the person in default is entitled is subject to the condition that it is to cease upon his assigning or incumbering it, or upon his doing anything by which it becomes vested in some other person, it terminates upon the issue of the sequestration and the sequestrators are not entitled to anything in respect of it: *Dixon* v. *Rowe*, [1876] W.N. 266.

The writ, generally speaking, remains operative until either the person in default has purged his contempt or the Court has ordered it to be discharged. The application for its discharge should be by motion. An order will not be made for its dissolution until a return has been made by the sequestrators: Anderson, p. 535. An order appointing a receiver impliedly discharges the writ.

Where leave is required for the issue of the writ, the Court must be satisfied that the application is reasonable, but it is not necessary to point to any particular property which may be made available for the payment of the costs. It is a matter for the discretion of the Judge whether the writ shall issue or not, and where the Court or Judge to whom the application is made has exercised a discretion and made an order, it should not be interfered with by a superior Court unless it is shewn that there has been an improper exercise of the discretion or some miscarriage of justice: *Hulbert and Crowe* v. *Cathcart*, [1896] A.C. 470.

In the case of a corporation, which has disobeyed an order of the Court, the remedy is by writ of sequestration against its property and effects: see *R.* v. *Windham* (1776), 1 Cowp. 377.

A sequestration will not be ordered unless there has been such wilful disobedience as to constitute a contempt of Court: *Fairclough* v. *Manchester Ship Canal Co.*, [1897] W.N. 7, C.A.; compare *A.-G.* v. *Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48, at p. 62, C.A. It had been held in an earlier case that "wilful" disobedience to an injunction to remedy a nuisance meant a refusal to do what was ordered, but did not imply obstinacy or any imputation of an obnoxious kind: *A.-G.* v. *Walthamstow Urban District Council* (1895), 11 T.L.R. 533; compare *Spokes* v. *Banbury Board of Health* (1865), L.R. 1 Eq. 42, and *Stancomb* v. *Trowbridge Urban District Council*, [1910] 2 Ch. 190. But in many cases of disobedience the writ will be ordered to lie in the office for a fixed time, to enable the corporation to comply with the order: *A.-G.* v. *Walthamstow Urban District Council, supra; Lee* v. *Aylesbury Urban District Council* (1902), 19 T.L.R. 106; *Stancomb* v. *Trowbridge Urban District Council, supra;* see also *Meters, Ltd.* v. *Metropolitan Gas Meters, Ltd* (1907), 51 Sol. Jo. 499. The issue of the writ is a matter of discretion, which will not be interfered with on appeal, unless it has been exercised on a wrong principle or so as to cause injustice: *Cocks* v.

Annotation (*continued*)—Judgment (§ VI A—259)—Enforcement—Sequestration.

MAN.

Annotation

Judgment—Enforcement by sequestration

Great Western Railway Co. (1886), 3 T.L.R. 92, at p. 93, C.A.; Oswald on Contempt, 3rd ed., 223.

Directors, managers, or other officers of a corporation privy to, or aiding, or abetting a contempt by such corporation may be made responsible therefor: *Ex parte Green, In re Robbins* (1893), 7 T.L.R. 411; *Lewis* v. *Pontypridd, Caerphilly & Newport Railway Co.* (1895), 11 T.L.R. 203, C.A., but a director will not be attached unless the order which has been disobeyed has been personally served on him: *McKeown* v. *Joint Stock Institute*, [1899] 1 Ch. 671.

A writ of sequestration can be issued, it seems, to enforce an undertaking: *Milburn* v. *Newton Colliery, Ltd.* (1908), 52 Sol. Jo. & W.R. 317, following *dicta* in *London and Birmingham Railway Co.* v. *Grand Junction Canal Co.* (1835), 1 Rail. Cas. 224, at p. 241, and not following *A.-G.* v. *Wheatley & Co. Ltd.* (1903), 48 Sol Jo. 116.

Attachment and sequestration may issue concurrently: *Crone* v. *O'Dell* (1821), 2 Moll. 344. "Sequestration unquestionably was and is a process of contempt. Sequestration was issue to compel a man formerly to put in an answer and the like, and sequestration also went to compel (in the words of Lord Hardwicke) a defendant to perform a duty such as the payment of money, and such, of course, as the payment of money into Court": *Pratt* v. *Inman* (1889), 43 Ch.D. 175, at p. 179; but it is not applicable to criminal contempt: Oswald on Contempt, 3rd ed., 225.

The death of a person does not discharge a sequestration issued against him where it has issued to compel the performance of a duty by such person, and in that case the proceedings under the writ of sequestration may be continued against the legal personal representative of such person; but where it had issued merely to compel an answer, death was held to discharge the writ: *Hyde* v. *Greenhill* (1746), 1 Dick. 106; *Pratt* v. *Inman, supra.*

A writ of sequestration may be issued against a married woman, though the judgment is against her in respect of her separate estate only: *Worrall* v. *Worrall* (1895), 11 T.L.R. 573; Oswald on Contempt, 3rd ed. 225.

Sequestration is not strictly an execution; it is founded on default of performance of the decree of the Court, and does not give any right in the funds levied to the person at whose instance it is sued out: *Burne* v. *Robinson, Matthews* v. *Robinson* (1844), 7 Ir. Eq. R. 188.

The writ operates *in rem* and not *in personam*: *Tatham* v. *Parker* (1853), 1 Sm. & G. 506.

Sequestration dates from the date of the issue of the writ: *Burdett* v. *Rockley* (1682), 1 Vern. 58; *Dixon* v. *Rowe*, [1876] W.N. 266; but a person entitled to the benefit of the order, to enforce which it has been issued and served, is not a secured creditor: *Ex parte Nelson, In re Hoare* (1880), 14 Ch.D. 41, C.A.; *In re Hastings, Ex parte Brown* (1892), 61 L.J.Q.B. 654; *In re H. E. Pollard, Ex parte S. R. Pollard*, [1903] 2 K.B. 41, C.A.; though his title may prevail over that of a mortgagee: *Ward* v. *Booth* (1872), L.R. 14 Eq. 195; or a volunteer under a conveyance: *In re Rush* (1870), L.R. 10 Eq. 442, in special circumstances.

The following classes of property have been held liable to sequestration:

MAN.

Annotation

Annotation (*continued*)—Judgment (§ VI A—259)—Enforcement—Sequestration.

Judgment—Enforcement by sequestration

freehold and leasehold land: *Burdett* v. *Rockley*, 1 Vern. 58; rents and profits of real estate: *Hyde* v. *Greenhill* (1746), 1 Dick. 106; personal estate (*ib.*); a rent-charge: *Wilson* v. *Metcalfe* (1839), 1 Beav. 263; choses in action: *London and Can. Loan and Agency Co.* v. *Merritt*, 32 U.C.C.P. 375; for instance a balance at a banker's: *Miller* v. *Huddlestone* (1883), 22 Ch.D. 233; but mere notice of the writ is not sufficient to bind such a balance (*In re Pollard, Pollard* v. *Pollard*, [1902] W.N. 144; income under a will: *In re Slade, Slade* v. *Hulme* (1881), 18 Ch.D. 653; money and stock in Court: *Cowper* v. *Taylor* (1848), 16 Sim. 314; *Conn* v. *Garland* (1872), L.R. 9 Ch. 101; dividends and rents accrued due at the date of the judgment, to which a married woman restrained from anticipation is entitled: *Claydon* v. *Finch* (1873), L.R. 15 Eq. 266; *Bryant* v. *Bull, Bull* v. *Bryant* (1878), 10 Ch.D. 153; *In re Lumley, Ex parte Hood Barrs*, [1894] 3 Ch. 135, C.A.; *Hood Barrs* v. *Cathcart*, [1894] 2 Q.B. 559; *Hood Barrs* v. *Heriot*, [1896] A.C. 174; but not future dividends or rents: *Hyde* v. *Hyde* (1888), 13 P.D. 166; *In re Lumley, Ex parte Hood Barrs, supra;* pensions for past services, unless they are made inalienable by statute: *Dent* v. *Dent* (1867), L.R. 1 P. & M. 366; *Willcock* v. *Terrell* (1878), 3 Ex.D. 323; a sum received in commutation of a pension, even where the pension itself could not be sequestrated: *Crowe* v. *Price* (1889), 22 Q.B.D. 429, C.A.; but not the pay, half-pay, or pension of an officer or other public servant, where alienation is prohibited by statute: *Birch* v. *Birch* (1883), 8 P.D. 163; *Apthorpe* v. *Apthorpe* (1887), 12 P.D. 192; *Lucas* v. *Harris* (1886), 18 Q.B.D. 127, C.A.; *Crowe* v. *Price, supra;* and compare *In re Saunders*, [1895] 2 Q.B. 424, C.A.; and *In re Ward, Ex parte Ward*, [1897] 1 Q.B. 266.

Sequestrators may break open doors in discharge of their office: *Lowten* v. *Colchester Corporation* (1817), 2 Mer. 395; and if keys are denied them, may be allowed to open boxes that are locked: *Lord Pelham* v. *Duchess of Newcastle* (1713), 3 Swan. 290n. It has been doubted whether the books and papers of a corporation could be seized by sequestrators: *Lowten* v. *Colchester Corporation*, 2 Mer. 395.

Application for leave to sell should be made to the Court upon notice: *Mitchell* v. *Draper* (1803), 9 Ves. 208. If service is impossible, *e.g.*, if the party has gone out of the jurisdiction, the application may be made *ex parte*: *In re Rush (a Solicitor)* (1870), 18 W.R. 417.

Where lands have been taken, authority to let the property may be given on a motion with notice: *Neale* v. *Bealing* (1744), 3 Swan. 304n; but the sequestrators will not be ordered to make leases: *Ray* v. *Anon.* (1784), 3 Swan. 306n.

A writ of sequestration to enforce against the defendant company an injunction restraining further infringement of a patent was refused by the Exchequer Court of Canada in *Sharples* v. *National Mfg. Co.*, 9 Can. Ex. C.R. 460.

At the trial of an action brought to restrain the defendants' company from carrying on blasting operations so as to cause nuisance and danger to the plaintiff, judgment was entered by consent, the defendants agreeing not to carry on blasting operations so as to discharge fragments of rock on

Annotation (*continued*)—**Judgment** (§ VI A—259)—**Enforcement—Sequestration.**

MAN.

Annotation

Judgment—Enforcement by sequestration

the plaintiff's land. Thereafter the plaintiff alleged that the defendants had on several occasions broken their undertaking, and therefore applied by motion for a writ of sequestration under English Ord. 42, r. 31. It was held that there had been a breach of the undertaking, although unintentional; that if there were any recurrence of the offence a writ of sequestration would issue, and that the company must pay the costs of the motion as between solicitor and client: *Davis* v. *Rhayader Granite Quarries, Ltd.*, 131 L.T. Jo. 79.

The plaintiffs, having recovered a judgment against the defendants for a large sum obtained an order from a Judge in Chambers ordering defendants to pay the amount due upon such judgment to the sheriff, to whom executions had issued against defendants' goods, or to the plaintiffs, by a day certain, and in default that a writ of sequestration should issue. Default having been made, a writ of sequestration issued accordingly. It was held by Wilson, C.J., that, though the writ could not have issued to enforce the judgment, which was for the payment of money, without limiting a time certain, yet that the Judge's order was a judgment for disobedience of which the writ might issue, and that the writ was regularly issued: *London and Canadian Loan and Agency Co.* v. *Morphy*, 10 O.R. 86. The Chief Justice cited with approval the remarks of Lindley, J., in *McCarthy* v. *Goold*, 1 B. & B. 387, that it is competent for the Court, irrespectively of the Debtors' Act, as well as under it, to make an order upon the judgment debtor under an ordinary judgment, to pay the whole or any part of the debt, and upon an order so obtained the judgment creditor might have a writ of sequestration although he could not have it under the judgment alone: *London and Can. Loan and Agency Co.* v. *Morphy*, 10 O.R. 86, at 91. The latter proposition is not in accordance with the later decisions under the English rules, and it must now be considered as at least doubtful whether a writ of sequestration can be had in Ontario by the expedient of getting an order against the debtor to pay by a fixed future date after the recovery of a mere common law judgment for a money demand. It was expressly held in *Hulbert* v. *Cathcart*, [1894] 1 Q.B. 244, that the proper form of a common law judgment is for the "recovery" not for the "payment" of money, and that there is no jurisdiction to add to a judgment for recovery of money, a limitation of the time within which such recovery is to be executed, so as to found a right to issue a writ of sequestration in default of payment within the time limited.

The two defendants in the case of *London and Can. Loan and Agency Co.* v. *Morphy*, cited above, were partners in the stock-broking business, and were members of the Toronto stock exchange (a corporation), and had seats at the stock board thereof, shewn to be of considerable value, and to be saleable by the defendants on compliance by them with certain by-laws of the corporation, which, among other things, provided for a written application to the exchange by any member, wishing to sell his seat, for leave to sell, submitting at the same time the name of the proposed purchaser, and if the purchaser was in such a case acceptable, or had theretofore been accepted, the leave would be granted. A party desiring to become a member of the stock exchange could not, under the by-laws, be admitted a member unless he had been previously a stock broker, resident,

MAN.

Annotation

Judgment—Enforcement by sequestration

Annotation (*continued*)—Judgment (§ VI A—259)—Enforcement—Sequestration.

doing business publicly as such, in Toronto, for at least six months previously to his application, and had upon his own application been accepted by the exchange as a member, the vote for his acceptance to be by ballot, and one black ball in five, or a portion of five to exclude. After being accepted he might purchase a seat from some one already a member, or pay an entrance fee of $4,000 to the exchange, and by such payment create a seat for himself. The total number of seats on the board was limited to forty, whereof thirty-three were taken up by the thirty-three members of the exchange. The sequestrator applied for an order under the writ of sequestration to sell the defendants' seats at the exchange. Wilson, C.J., held, that although such seats were the property of the debtors and should be saleable under process, and the Court could implement its execution by ordering the defendants to do any act necessary to effect, or to refrain from any act to obstruct, the sale of the seats; yet that, inasmuch as the Court could not control the exercise of the ballot by the members of the exchange, the seats had not been and could not be sequestered under the writ, and no order for sale could be made. An appeal was taken to the Court of Appeal, and it was then shewn that one of the two judgment debtors had paid off the judgment of the plaintiffs, and was carrying on the appeal for the purpose of obtaining the seat owned by the other. The Court of Appeal thought this circumstance quite apart from the fact that the ultimate completion of title to a purchaser could only be effected by the contingent co-operation and assent of the stock exchange as provided by its by-laws, a ground for affirming the judgment appealed from but directed that its order should be without prejudice to any right the judgment debtor so paying off might have to procure himself to be substituted for the plaintiffs in proceedings against his former partner, the co-defendant: *London and Can. Loan and Agency Co.* v. *Morphy*, 14 A.R. (Ont.) 577.

Where a motion for sequestration against a railway company for breach of injunction restraining a nuisance had been ordered to stand over for a short period to enable the company to remove the nuisance, the C.A. refused to interfere: *Cocks* v. *G.W.R.*, 3 Times L.R. 92; and see same case, 3 Times L.R. 505.

Upon an application for sequestration the question for the Court is, whether a contempt has been committed. The Court has no jurisdiction otherwise to declare the rights of the parties, *inter se*, as regards any of the facts alleged in support of the application: *Meters Limited* v. *Metropolitan Gas Meters, Limited* (1907), 51 Sol. Jo. 499.

Re GIMLI PROVINCIAL ELECTION.

REJESKI v. TAYLOR.

(Decision No. 3.)

MAN.

C. A.

1913

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 20, 1913.

1. ELECTIONS (§ IV—92)—CONTESTS—CONTROVERTED ELECTIONS ACT—OBJECTIONS TO PETITION—SECOND EXTENSION OF TIME FOR MAKING.

Under sec. 37 of the Controverted Elections Act, R.S.M. 1902, ch. 34, providing that preliminary objections may be filed to a petition by the respondent within five days after service thereof, or within such further time as any judge shall grant for the purpose, after one extension of time has been made such further time may be granted as the judge may deem necessary, his power not being exhausted by the making of the first extension.

[*Power* v. *Griffin*, 33 Can. S.C.R. 39, distinguished.]

2. ELECTIONS (§ IV 93)—CONTESTS—CONTROVERTED ELECTIONS ACT— OBJECTIONS TO PETITION—WAIVER.

That a preliminary objection to a petition made under the Controverted Elections Act, R.S.M. 1902, ch. 144, might have been raised on a previous objection to the sufficiency of the service of the petition will not bar a subsequent application based on the former objection, especially where the objection, if made on the first application, might have been considered a waiver of the irregularity in the service of the petition. (*Per* Cameron and Haggart, JJ.)

3. ELECTIONS (§ IV —92)—CONTESTS—CONTROVERTED ELECTIONS ACT—OBJECTION TO PETITION—SECOND EXTENSION OF TIME FOR MAKING—ABANDONMENT—LACHES.

Delay in taking out an order for a second extension of time under sec. 37 of the Controverted Elections Act, R.S.M. 1902, ch. 144, for making preliminary objections to the sufficiency of a petition filed under the Act, cannot be considered an abandonment of the original order, where the delay was due to a difference of opinion between the solicitors for the respective parties as to the terms of the order. (*Per* Cameron and Haggart, JJ.)

Statement

APPEAL by the petitioners in an election petition brought under the Manitoba Controverted Elections Act, R.S.M. 1902, ch. 34, from an order made by Galt, J., on November 6, 1913, extending the time for the filing of preliminary objections to the petition.

The appeal was dismissed, HOWELL, C.J.M., and RICHARDS, J.A., dissenting.

A. B. Hudson, for the petitioners.

A. J. Andrews, K.C., and *F. M. Burbidge*, for the respondent.

Howell, C.J.M. (dissenting)

HOWELL, C.J.M. (dissenting):—In a carefully considered judgment made in this matter, and reported in 13 D.L.R. 121, 25 W.L.R. 205, the Chief Justice of the King's Bench held that the power given to a Judge to extend the time provided for by sec. 33 of the Controverted Elections Act was only elaborated by sec. 34, and it gave power to extend only once.

MAN.

C. A.
1913

RE GIMLI PROVINCIAL ELECTION (No. 3).

Howell, C.J.M. (dissenting)

On appeal to this Court, my brothers Richards and Haggart agreed with him, and my brothers Perdue and Cameron and I held that, because of sec. 34, there was power under the two sections to enlarge the time more than once (14 D.L.R. 414).

The real point in controversy in this appeal is, whether a Judge, under sec. 37, has power to extend the time more than once.

In the early part of the 19th century, by three cases in the Common Pleas—*Payne* v. *Deakle*, 1 Taunt. 509; *Barrett* v. *Parry*, 4 Taunt. 658, and *Leggett* v. *Finlay*, 6 Bing. 255—and by a case in the King's Bench, Anon. 2 Chit. 45, it seems to be laid down as law that an arbitrator having power to enlarge the time for making his award may exercise that power from time to time; and Russell on Arbitration, p. 147, on the strength of the above cases, states this to be the law. In not one of the cases is the clause giving the power enlargement set forth, but merely the substance of it is stated. Perhaps there were other clauses or language which led Lord Mansfield to give the broader meaning to the clause in the first case on the subject. It was argued in some of these cases that after one enlargement the arbitrator was *functus officio*.

It was deemed necessary in England by the Interpretation Act of 1889, sec. 32, sub-sec. 1, to provide that, in construing such power to enlarge the time as is provided by sec. 37, it shall be deemed power to enlarge "from time to time as occasion requires;" and Craies, in his Statute Law, p. 243, states: "The substantial effect of the provision is to rebut the presumption that the power is exhausted by a single exercise."

By the Act of Union with Ireland, the Crown was empowered to assume such Royal style and title as by proclamation His Majesty should be pleased to appoint; and, this having been done, it was deemed necessary to pass legislation to permit another proclamation: see Craies' Statute Law, p. 251.

It is significant that the English Order 64, rule 7, the Ontario rule 353, and our rule 385, all provide for extending the time even if an order has already been made on the subject.

With this law before me, I must now consider the case of *Power* v. *Griffin*, 33 Can. S.C.R. 39. In that case the Commissioner "may at any time . . . grant to the patentee an extension of the term of two years." The Court unanimously, after full consideration, held that once an extension of time was granted, the Commissioner was *functus officio*. The Chief Justice, at p. 43, says:—

> There is no possible room under the wording of the statute for the contention that the Commissioner could extend this delay from time to time, and a jurisdiction of this nature cannot be extended by construction.

Mr. Justice Armour, at p. 49, says:—

The words used in granting the power authorise only one extension and by the grant of the extension of June 8, 1901, the power was exhausted.

In the matter before us the power given is "within such further time as any Judge shall grant for that purpose." Of course, our rule 385 cannot be invoked, and the power to extend the time fixed by statute can only be derived from these words. The "further time" above referred to, to be granted by "any Judge," is certainly as single in its meaning as "an extension" mentioned in the last-cited case. To hold the order appealed from good is to hold that these words mean "within such further time as any Judge shall grant for that purpose and within any still further time that any other Judge shall grant."

Howell, C.J.M. (dissenting)

Orders had been made under this section granting further time, and then the order appealed from was granted. I think there was no power to make the order.

RICHARDS, J.A. (dissenting):—Sec. 37 of the Manitoba Controverted Elections Act allows the respondent to file preliminary objections "within five days after the service of the petition . . . or within such further time as any Judge shall grant for that purpose."

Richards, J.A. (dissenting)

The question is, whether, after one extension of time has been so granted by a Judge, further such extensions can be granted by the same or another Judge.

The wording of sec. 13 of the Act does not seem to me to sustain the argument advanced by counsel for the respondent, that it brings into the Act the provisions of sec. 87 of the Dominion Act. I think the last-named section—87—deals with more than "principles and practice." It confers distinct and important powers on the Court and its Judges, by enabling them "to extend from time to time the period limited" by the Act "for taking any steps or proceedings."

I am still of the opinion, stated in effect in my judgment of October 27 last in this case, on the appeal from an order of Mr. Chief Justice Mathers, that Acts delegating powers of legislatures should be strictly construed, and should not be held to confer powers which are not given on the face of such Acts or by necessary implication.

I think that only one power to extend time by a Judge is given by sec. 37, and that that power is exhausted by being once exercised.

If a contrary view had been taken by the majority of this Court on the above appeal from the order of the Chief Justice of the King's Bench, I should now be bound by that decision. But, as I understand their judgments, they merely held that each of the two sections 33 and 34 gave a separate power to

MAN.
C. A.
1913
RE GIMLI PROVINCIAL ELECTION (No. 3).

grant further time for service of the petition, thereby empowering the learned Chief Justice to make each of the two orders for extension which were in question, the second of which he subsequently held had been unauthorised by those sections. There was no holding by a majority of the Judges that the Act enabled any power for extension of time given to a Judge to be exercised from time to time or oftener than is distinctly stated on the face of the Act. I would allow the appeal.

Perdue, J.A.

PERDUE, J.A.:—The petition in this case was served on July 25, 1913. On July 28, Mathers, C.J., made an order extending the time for filing preliminary objections until the expiration of two days after the application to set aside certain orders relating to the service of the petition should be disposed of. That application was finally disposed of by the Court of Appeal on October 27. On October 29, a second order was made extending the time for filing the preliminary objections up to and including October 31. On the last-mentioned date, an *ex parte* order was made by Galt, J., further extending the time for filing preliminary objections up to and including November 3, or until the application by the respondent to remove the petition from the files of the Court should be disposed of. On November 6, Galt, J., made a further order extending the time for filing preliminary objections up to and including the day upon which judgment on the appeals from that order itself and from the order of November 3, should be pronounced by the Court of Appeal.

The present appeal is brought from the above order of November 6. The ground of the appeal is, that a Judge had no power, under the Manitoba Controverted Elections Act, to make a second order to extend the time for filing preliminary objections.

This appeal turns upon the construction of sec. 37 of the Act. That section is as follows:—

> 37. Within five days after the service of the petition as hereinbefore described, or within such further time as any Judge shall grant for that purpose, the respondent may produce in writing any preliminary objections or grounds of insufficiency, which he may have to urge against the petitioner or against the petition, or against the security, or against any further proceedings thereon; he shall in such case at the same time file a copy of such objections or grounds for the petitioner.

It is argued that, under a proper construction of the above section, a Judge has power to grant only one extension of time and that after the first order had been made by Mathers, C.J., extending the time for filing preliminary objections, a Judge of the Court had no power to grant a further extension. If effect has to be given to this contention, the result may be that,

the time having passed for the filing of preliminary objections, no preliminary objections filed after that time can properly be considered by the Court. Such a result might seriously affect the respondent's position. He might be debarred from raising questions of status or insufficiency or security, which should properly be raised by preliminary objections, and which might be vital in their character. That such questions are properly the subject of preliminary objections, and can only be raised by preliminary objections, is, I think, settled by the judgments of the Supreme Court of Canada in the *Stanstead* case, 20 Can. S.C.R. 12, and the *Prescott* case, 20 Can. S.C.R. 196. See also *Brassard* v. *Langevin*, 2 Can. S.C.R. 319, at p. 327.

In an application under the present petition to set aside a second order to extend the time for service of the petition, Mathers, C.J., held that a Judge had, under sec. 33 of the Act, power to make only one order, and that he was then *functus officio*. On appeal to this Court, the majority of the Court, in allowing the appeal, did not find it necessary expressly to decide that point. The only authority cited in support of the petitioners' contention was *Power* v. *Griffin*, 33 Can. S.C.R. 39, an authority which was relied upon by Mathers, C.J., in giving his decision. But, upon a careful examination of it, I think the facts and circumstances of that case were essentially different from those involved in the application now under consideration. In *Power* v. *Griffin*, 33 Can. S.C.R. 39, the statute enabled an official, at any time not more than three months before the expiration of the term for the commencement of a certain operation, to grant an extension of such term. The official granted one extension, and then, long after the lapse of the three months, granted a further extension. It was held that the statute gave him no authority to grant the second extension. It is obvious that the power there conferred was quite different from one enabling a Judge of the Court to grant further time for taking a proceeding in a cause pending in his Court. In the one a restricted authority was given, which could only be exercised within a definite period, in the other the authority to extend the time is conferred in general terms.

In construing a statute, it is the duty of the Court, in so far as it can, to ascertain and give effect to the intention of the legislature in passing it. The words "or within such further time as any Judge shall grant for that purpose" shew that the intention of the legislature was to confer upon a Judge of the Court of King's Bench power to extend the time for filing preliminary objections. The main object of this provision, contained in the words above-cited, was the granting of power to extend the time for filing preliminary objections. Whether that extension should be granted by one order or by more than one,

MAN.
C. A.
1913
RE GIMLI PROVINCIAL ELECTION (No. 3).
Perdue, J.A.

was a matter of quite subordinate interests. If circumstances arose which rendered the first extension of time insufficient to meet the requirements of the case, I do not think that it was the intention of the Act that the Judge should be powerless to grant a further extension.

In *Payne* v. *Deakle*, 1 Taunt. 509, an order had been made at *nisi prius* referring the cause to arbitration, so that the arbitrator should make his award on or before a certain date, "or on or before any other day to which he should enlarge the time for making his award." The arbitrator enlarged the time to a certain date, and again enlarged it to a still later date. Lord Mansfield, in giving the judgment of the Court, said:—

> The sense of the condition is, that the arbitrator shall have sufficient time to make his award, and that if he cannot make it by the day named, he is to make it any time that he pleases; and whether he names the ultimate day at once, or at a subsequent time, is immaterial.

I regard the above as an authority in point. I do not think that there is any fundamental distinction to be observed in construing the judicial order above referred to and the statutory provision now under consideration.

I think the appeal should be dismissed. The costs should be costs in the cause to the respondent.

Cameron, J.A.

CAMERON, J.A.:—If, in sec. 37 of the Controverted Elections Act, the words "or within such further time as any Judge shall grant for that purpose" are to receive the construction which, it is contended by the appellants' counsel, they must, then it is, in my opinion, clear that they cannot be affected by the provisions of sec. 13, and it is immaterial whether sec. 87 of the Dominion Controverted Elections Act, or the relative English Rules (if any) are to be considered as part of our Act or necessarily supplemental or incidental thereto. If sec. 87 or the English Rules are at variance or inconsistent with sec. 37, they are irrelevant and need not be considered on this appeal. The whole question, therefore, before us, on this branch of this appeal, is, whether the words quoted must be given the rigid construction above indicated.

That an extension of time can be granted under the section, though the time prescribed has elapsed, is well settled. The cases are collected and discussed by Mr. Justice Richards in *Re Morris Election*, 22 Man. L.R. 6. I refer more particularly to the *Burrard Case*, 32 C.L.J. 638; *Alexander* v. *McAllister*, 34 N.B.R. 163; *Re Bothwell*, 9 P.R. 485; *Wheeler* v. *Gibbs*, 3 Can. S.C.R. 374; *Stratton* v. *Burnham*, 41 Can. S.C.R. 410; and *Eaton* v. *Storer*, 22 Ch.D. 91.

The argument against the above construction was plainly that there is no express provision for an extension after the

expiration of the statutory time; and, in the absence of such a provision, the application must be made before the original time has elapsed, because, the time having elapsed, there was nothing remaining to extend. This was the argument advanced by eminent counsel in *Banner* v. *Johnston*, L.R. 5 H.L. 157. The section of the Companies Act, 1862 (sec. 124), in question, is given at p. 162. The construction of that section is discussed by Lord Hatherley at p. 170 and Lord Cairns at p. 172. The House of Lords, in view of the circumstances that might arise in connection with an appeal, and which must have been in contemplation of the legislature, refused to give the section in question the narrow construction for which counsel argued.

The circumstances which may make it necessary to apply for an extension of time under sec. 37 may not be known until it is impossible to obtain an order giving further time within the five days prescribed, or some unforeseen occurrence may have prevented the filing of the objections within the proper time. Such considerations as these are amongst those that have influenced the Courts in deciding to allow appeals to be lodged, even if the times originally prescribed for entering the appeals have elapsed, and there be no express provision made for an application after the time has passed. This reasoning seems to me applicable here. A Judge in fixing an extension of time, having in view the policy of the Act that petitions must be disposed of with all convenient despatch, may have fixed a short further period within which the objections must be filed. Then, unforeseen circumstances may arise making the filing within that time impossible. Can it be that there would then be no further power to grant an extension, even for twenty-four hours? To exclude such a meaning from the words above-quoted, would it not be necessary to read them as if they were "or within one such further period of time as any Judge shall grant for that purpose?" I must say that I find it impossible to avoid that conclusion. And yet that would be, in my opinion, to read into the section something that is not now there.

The power given to the Judge is discretionary, and it must be assumed that no extension will be granted except for good cause. It cannot be well argued, therefore, that a liberal construction of the words quoted would lead to confusion or undue delay.

The word "time" in the words quoted is obviously not used in its wide, general sense: but in its meaning of "a part of time considered as distinct from other parts." To my mind, it connotes the further meaning of "times." It means precisely what is conveyed by the phrase "period of time." And, if that phrase were inserted, instead of the word "time," it would seem to me necessarily to convey the further meaning of

MAN.

C. A.

1913

RE GIMLI PROVINCIAL ELECTION (No. 3).

Cameron, J.A.

"periods of time." The use of the singular naturally conveys the plural meaning. Moreover, this is in accordance with the rule of construction prescribed by sub-sec. (*m*) of sec. 8 of the Interpretation Act. If I am correct in this view, then the words in question are to be read as if they stood "within such further time (or times)" or "within such further period (or periods) of time." This is the construction that appeals to me as consonant with the language used, with the intention of the legislature, so far as I can gather it, and with a regard to the varying circumstances that may arise in connection with the procedure, and which it is fair to consider that the legislation had in view.

In reference to *Power* v. *Griffin*, 33 Can. S.C.R. 39, I feel that the Supreme Court was influenced in its decision by the wording of the section there in question as set out at p. 42. The authority of the Commissioner to extend must, under the wording of the section, be exercised at a time "not more than three months before the expiration" of the two years. This seems to me such an express limitation of the authority of the Commissioner requiring him to grant his extension within the three months, if he makes it at all, that it is easy to see how the Court arrived at the conclusion that the last extension, granted during the currency of the first extension properly made, was "absolutely unauthorised by the statute." The explicit declaration of the time within which the power was to be exercised necessarily excluded any other time wherein an extension could be granted.

The arbitration cases which were referred to on the previous argument by Mr. Hudson, and on this appeal by Mr. Andrews, seem to me to have some bearing on the case, and tend to reinforce the view which I have formed. I refer to *Payne* v. *Deakle*, 1 Taunt. 509, where an arbitrator, in an arbitration under an order of reference, enlarged the time for making his award after having once enlarged it as empowered by the order. It was held by Lord Mansfield that the sense of the condition was that the arbitrator should have sufficient time to make his award, and that, if he could not make it by the day named, he could make it at any time he fixed. I refer also to *Barrett* v. *Parry*, 4 Taunt. 658. There was at the time of these decisions no statute giving arbitrators the power thus given them by the Courts.

On the whole, I am of opinion that Mr. Justice Galt had power to make this order appealed from, though I am sensible that the question raised is one of difficulty.

The point is taken that the order should not have been granted, as it is in contravention of the policy of the Act that proceedings in these election matters should be expedited. The

objection could have been taken by way of preliminary objection and not by way of substantive application. Authority was cited to shew that the point as to service could have been raised by preliminary objection: *The West Peterborough* case, 41 Can. S.C.R. 410. On the other hand, it is contended that the proceeding actually taken was in accordance with precedent, and that under the wording of sec. 39 the taking of the objection as a preliminary objection might have been open to the construction of a waiver of irregularity. As the respondent's proceeding to set aside service was regularly taken, I think that this objection cannot be sustained.

It is also objected that the order before us was, by the delay in taking it out, abandoned. The question of abandonment must be one of intention; and, if there be here any *primâ facie* evidence of abandonment, it is shewn by the lapse of time from November 3, to November 6. But that delay is fairly accounted for by the difference of opinion between the solicitors for the parties as to the terms of the order, to which reference is made in the learned Judge's reasons for judgment.

In the circumstances, I am not prepared to hold that there was an abandonment of the order by the respondent. The order, on its face, recites that on November 3, a verbal order was made extending the time for filing preliminary objections, as therein set forth, and that the parties had on November 6 attended before the learned Judge, and had then spoken to the minutes of the order to be made. This would take the order out of the rule debarring the Court from going behind the date appearing on the face of the order, as stated in *Young* v. *Hopkins*, 9 Man. L.R. 312. Moreover, if the time for filing had elapsed after November 3, and before November 6, that, of itself, would not have deprived the Judge of jurisdiction to make the order.

In my opinion, the appeal must be dismissed.

HAGGART, J.A., concurred with PERDUE and CAMERON, JJ.A. Haggart, J.A.

Appeal dismissed, HOWELL, C.J.M., *and* RICHARDS, J.A., *dissenting.*

MAN.

C. A.

1913

Re GIMLI PROVINCIAL ELECTION.

REJESKI v. TAYLOR.

(Decision No. 4.)

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. November 20, 1913.

1. APPEAL (§ XI—720)—TRANSFER OF CAUSES—LEAVE TO APPEAL TO PRIVY COUNCIL—PROCEEDING UNDER CONTROVERTED ELECTIONS ACT.

Leave to appeal to the Privy Council from an order of a court made in a proceeding on a petition under the Controverted Elections Act, R.S.M. 1902, ch. 34, will be refused, since the proceeding is one to which the Royal prerogative to hear appeals does not extend.

[*Théberge* v. *Laudry*, 2 App. Cas. 102, 107; *Valin* v. *Langlois*, 5 App. Cas. 115; *Cushing* v. *Dupuy*, 5 App. Cas. 409; *Kennedy* v. *Purcell*, 4 Times L.R. 664; *Moses* v. *Parker*, [1896] A.C. 245; and *Re Wi Matua*, [1908] A.C. 448, followed.]

Statement

MOTIONS for leave to appeal to the Privy Council from two orders of the Court of Appeal, see *Re Gimli Election* (No. 2), 14 D.L.R. 414 and *Re Gimli Election* (No. 3), 14 D.L.R. 863.

The motions were dismissed.

A. J. Andrews, K.C., and *F. M. Burbidge*, for the applicant.

A. B. Hudson, for the petitioners.

Richards, J.A.

RICHARDS, J.A.:—The King was the original fountain of justice, and at first, he personally administered justice. In the course of time he appointed, first certain of the great lords, and afterwards Courts, composed of Judges, to exercise for him this duty. But he has never parted with his prerogative right finally to deal with such cases, though he has in fact delegated the actual hearing of the final appeals to certain of his Privy Councillors, who are called the Judicial Committee of the Privy Council, and who advise him what disposal to make of such appeals. In this way his prerogative has been retained in all cases of ordinary law which his Courts, as such, had the power to decide.

Until the passing of Controverted Elections Acts, the matter of dealing with disputes as to the validity of elections of members of legislatures, was wholly exercised by such legislatures. Their right to do so was jealously guarded by them, and the King possessed no prerogative right to interfere with their decisions thereon.

In very recent times legislatures have, for purposes of convenience, delegated certain of their powers to Courts specifically named by them, to deal with Controverted Elections. The Act R.S.M. 1902, ch. 34, under which the election for the electoral division of Gimli is now being contested, was enacted by the Legislative Assembly of Manitoba for that purpose.

In passing that Act, the legislature have not divested themselves of the power to repeal the Act and reassume the exercise of their functions, which they have thereby delegated.

The question of the right to appeal to their Lordships of the Judicial Committee in such cases has been discussed by the members of that Court in several cases.

In *Théberge* v. *Laudry*, 2 A.C. 102 at 107, Lord Cairns, in delivering the judgment of their Lordships on an application for leave to appeal, says:—

> Now, the subject-matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. . . . Their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown.

And at p. 109, referring to the provisions of the provincial Act disqualifying for corrupt practices, he further says:—

> Mr. Benjamin contended that the Act of Parliament, so far as it engrafted on the decision of the Judge this declaration of incapacity, was *ultra vires* of the power of the Legislature of the Province. Upon that point their Lordships do not think it necessary to express any opinion whatever. If the Act of Parliament was, in this respect, as contended, *ultra vires* the provincial Legislature, the only result will be that the consequence declared by this section of the Act of Parliament will not enure against and will not affect the petitioner; but it is not a subject which should lead to any different determination with regard to that part of the case.

Counsel for the petitioner for leave to appeal (the respondent in the matter of the election petition) argued that in *Valin* v. *Langlois*, 5 A.C. 115, their Lordships had indicated that the prerogative of the Crown to grant an appeal could be exercised in proceedings under Controverted Election Acts.

As I understand that case, the sole question raised before their Lordships, on the application for leave, was, whether the Parliament of Canada had power to authorise provincial Courts to deal with controverted elections of Members of that Parliament. The Supreme Court of Canada, from which the appeal was sought, had held that Parliament had that power. Their Lordships upheld that decision in refusing leave to appeal. Lord Selborne, in giving the judgment of the Board, says at p. 122:—

> If, indeed, the able arguments which have been offered had produced in the minds of any of their Lordships any doubt of the soundness of the decision of the Court of Appeal, their Lordships would have felt their duty to advise Her Majesty to grant the leave which is now asked for.

In the above the Court referred to as "the Court of Appeal" is apparently the Supreme Court of Canada; and, in mentioning

MAN.

C. A.
1913

RE GIMLI PROVINCIAL ELECTION (No. 4).

Richards, J.A.

the decision of that Court, I understand the language above quoted to refer only to its holding that Parliament had the power to authorise provincial Courts to deal with controverted elections. So that it was only with regard to the question whether the Act was, or was not, *ultra vires* of that Parliament, that their Lordships implied a power, on their part, to grant leave to appeal.

In *Cushing* v. *Dupuy*, 5 A.C. 409, the judgment of the Judicial Committee says, at p. 419, in discussing *Théberge* v. *Laudry*, 2 A.C. 102:—

> It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the Superior Court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject-matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed; and, consequently, it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determination in the last resort should belong to the Queen-in-council.

The next case for consideration is *Kennedy* v. *Purcell*, 4 Times L. R. 664, an application in 1888 for leave to appeal from a judgment of the Supreme Court of Canada in a matter arising out of a trial under the Controverted Elections Act of the Dominion. There Lord Hobhouse, who gave the judgment, says, in reference to *Théberge* v. *Laudry*, 2 A.C. 102:—

> The decision of the Judicial Committee was, not that the prerogative of the Crown was taken away by the general prohibition of appeal, but that the whole scheme of handing over to Courts of law disputes which the Legislative Assembly had previously decided for itself, shewed no intention of creating tribunals with the ordinary incident of an appeal to the Crown.

Then, after referring to *Valin* v. *Langlois*, and the argument advanced that in that case it had been held that there was power to grant an appeal, he says:—

> But such variance as there was between the two cited causes was only to this extent—that the Committee in the latter case must have thought that the question of the existence of the prerogative was still susceptible of argument, when the dispute went to the very root of the validity of a law passed by Parliament to take effect in a province. Their opinion on an *ex parte* hearing, and on the sole question whether or not there should be any further argument on the matter at all, could not be put higher than that.

The cases he refers to as the "two cited causes" are *Théberge* v. *Laudry*, 2 A.C. 102, and *Valin* v. *Langlois*, and it is *Valin* v. *Langlois*, 5 A.C. 115, that he refers to as "the latter case."

Then, again, on p. 666 after referring to the need for quickly disposing finally of such cases, he says:—

And it seemed to their Lordships that there were strong reasons why such matters should be decided within the colony, and why the prerogative of the Crown should not, even if it legally could, be extended to matters over which it had no power, and with which it had no concern, until the legislative bodies chose to hand over to judicial functionaries that which was formerly settled by themselves. Before advising such an exertion of the prerogative, their Lordships would require to find indications of an intention that the new proceedings should so follow the course of ordinary law as to attract the prerogative. But the indications they found were of the contrary tendency.

In the report of the case in 59 L.T.R. the word "extension" is used instead of "exertion" in the part of the judgment quoted last above.

In *Moses* v. *Parker*, [1896] A.C. 245, Lord Hobhouse, at p. 248, says:—

In the case of *Théberge* v. *Laudry* this Board had to consider the effect of a Quebec statute which transferred the decision of controverted elections to the Legislative Assembly from the Assembly itself to a Court of justice. The statute provided that the judgment of the Court should not be susceptible of appeal. Though that provision would destroy the right of a suitor to an appeal, it did not, taken by itself, destroy the prerogative of the Crown to allow one. But this Board held that they must have regard to the special nature of the subject; to the circumstance that election disputes were not mere ordinary civil rights, and that the statute was creating a new and unknown jurisdiction for the purpose of vesting in a particular Court the very peculiar jurisdiction which, up to that time, had existed in the Assembly. And they came to the conclusion that the intention of the Legislature was to create a tribunal in a manner which should make its decision final to all purposes, and should not annex to it the incident of being reviewed by the Crown under its prerogative.

Further on he says, on p. 249:—

In *Théberge* v. *Laudry*, the Board pointed out that the case between the parties was one in which they would not think of admitting an appeal if the power existed.

In *Re Wi Matua*, [1908] A.C. 448, the judgment of the Judicial Committee at p. 450, in referring to *Théberge* v. *Laudry* and *Cushing* v. *Dupuy*, says:—

The difference between those cases and the present is of the broadest and most essential kind. In them the subject-matter of the protected jurisdiction connoted functions conferred on the Court by statute which would not otherwise have belonged to it as the general distributor of justice. In the one case—*Théberge* v. *Laudry*—the subject-matter was actually a part of the privilege of Parliament and therefore entirely alien to the region of prerogative.

Though I cannot see that, for the purposes of this application, it would make any difference if not enacted, it may be pointed out that sec. 101 of our Manitoba Act, after providing for an appeal to the Court of King's Bench *en banc* (whose functions are now vested in this Court) from the decision of the Judges at

MAN.

C. A.

1913

RE GIMLI PROVINCIAL ELECTION (No. 4).

Richards, J.A.

the trial, sec. 104, says: "And the said judgment shall be final to all intents and purposes."

Their Lordships, I think, plainly lay down two rulings in the foregoing decisions:—

Firstly, that, except possibly on the question whether the Act is *ultra vires* of the legislature, the Royal prerogative to hear an appeal does not extend to cases under Controverted Elections Acts.

Secondly, that, even if it did so extend, they would not advise its exercise except perhaps in the case of an appeal on that question of *ultra vires*.

In the present case the power of the legislature to pass the Act has not been questioned.

In view of the way in which the matter has been dealt with in the cases above referred to, I cannot doubt but that this appeal would be dismissed if we were to give the leave asked for. So viewing it, I think it would be improper for us to grant leave to appeal, which would compel their Lordships again to deal with matters already so fully decided by them.

I would dismiss the petition for leave to appeal.

This decision will not interfere with the petitioner's right to apply directly to the Judicial Committee for such leave.

Costs of this petition are to be costs in the cause to the petitioners who filed the original election petition.

Perdue, J.A.

PERDUE, J.A.:—The respondent has applied for leave to appeal to the Judicial Committee of the Privy Council from two orders of this Court disposing of appeals from the Court of King's Bench. These orders were pronounced on motions made in respect of proceedings under an election petition filed in pursuance of the Manitoba Controverted Elections Act. It has, I think, been conclusively settled, by several decisions of the Judicial Committee itself, that no appeal lies in such matters to the Privy Council. I need only refer to the following cases: *Théberge* v. *Laudry*, 5 A.C. 102; *Kennedy* v. *Purcell*, 59 L.T.R. 279; *Moses* v. *Parker*, [1896] A.C. 245; *Re Wi Matua*, [1908] A.C. 448.

These decisions shew that in cases of ordinary legal rights suitors may, as a general rule, appeal to his Majesty-in-council, and if prevented from appealing as of right, any suitor may ask for special leave to appeal by virtue of his Majesty's prerogative. But the rights involved under an election petition stand upon a different footing. Until the passing of the Controverted Elections Act, the jurisdiction of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly, had existed in the Assembly itself. As Lord Robertson very tersely pointed out in *Re Wi Matua*, the

MAN.

C. A.
1913

RE GIMLI PROVINCIAL ELECTION (No. 4).

subject-matter of an election petition was in former times actually a part of the privilege of Parliament, "and therefore entirely alien to the region of prerogative."

I think the petition for leave to appeal in each case should be dismissed.

HOWELL, C.J.M., and CAMERON and HAGGART, JJ.A., concurred.

Motions dismissed.

HILL v. SIMMONDS.

N. S.

S. C.
1913

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Meagher, Russell, and Longley, JJ. November 29, 1913.

1. ARBITRATION (§ I—3)—REVOCATION OF SUBMISSION—SUBSEQUENT AWARD —VALIDITY.

An award rendered after the revocation by one party of the authority of the arbitrators under a parol submission is void in the absence of a reauthorization of the arbitrators.

2. ARBITRATION (§ I—1)—SUBMISSION TO—WHAT AMOUNTS TO—AGREEMENT FOR ASSESSMENT OR VALUATION.

Where it is necessary for those to whom a question is submitted to hear evidence or argument, in order to determine the damages to which a person is entitled, the submission is not merely for an assessment or valuation but for an arbitration, and is therefore revocable, if by parol only.

Statement

APPEAL by the defendant from the judgment of Ritchie, J., in favour of plaintiff for the sum of $5,000 and costs in an action claiming damages for assault.

The main defence to the original action was that after the assault the parties left the question of damages to be determined by Mr. T. Notting, barrister, and Mr. James Simmonds, the father of the defendant, who made an award of $750, which must be the limit of damages. The learned trial Judge found that the submission, which was a verbal one, was revoked before it was acted upon; that there never was any fresh submission; that the award relied upon was made after the authority of the arbitrators had been revoked and at a time when the arbitrators had no authority or jurisdiction to make it. He found further that the assault was a most violent and serious one, and wholly without justification or excuse of any kind, and, in consideration of the injuries sustained by plaintiff and the fact that they were likely to be of a permanent character, fixed the damages at the sum of $5,000.

The appeal was dismissed.

H. Mellish, K.C., for appellant.

C. J. Burchell, K.C., and *J. L. Ralston*, for respondent.

N. S.
S. C.
1913
HILL
v.
SIMMONDS.
Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The principal if not the only question which it is necessary to deal with on this appeal is the findings of the learned trial Judge. If these findings cannot be successfully attacked, then the judgment must stand. There can be no doubt as to the first that the verbal submission to Mr. Notting and Mr. James Simmonds was revoked by the plaintiff before it was acted on. The second and third findings are complained of as against the evidence, that is to say, (2) that there never was any fresh submission and (3) the award of $750 was made after the authority of the arbitrators was revoked and at the time the arbitrators had no authority or jurisdiction to make it.

The evidence on this subject is entirely confined to what took place on the 4th September between plaintiff, Mr. James Simmonds and Mr. Notting. They materially and flatly disagree, Mr. Simmonds and Mr. Notting as against the plaintiff, the plaintiff contending and swearing that the object of his visit with Mr. Simmonds to Mr. Notting's office was not to submit the amount of damages he claimed again to Messrs. Simmonds and Notting, but to settle who was responsible for the long delay in adjusting them under the agreement of submission which he had already cancelled. Mr. Simmonds, supported to a large extent by Mr. Notting, swears that it was for the purpose of getting them at once to proceed to fix the damages, and that in accordance therewith he and Mr. Notting, on that afternoon, made their award. It then becomes a pure question of fact who is to be believed. The learned Judge, of course, believed the plaintiff; otherwise he could not have made the two findings in question. It is for us, then, to examine the evidence and see whether there are grounds sufficiently strong to justify us in setting aside his findings. I confess that after a careful study of all the evidence there is much to fill my mind with serious doubts as to the real object of plaintiff's visit to Mr. Notting's office. I cannot, however, divest myself of the great weight which should be given to the views of the Judge at the trial. It is evident that to these questions, the most material in the case, he must necessarily have given, in an important case of this kind, very serious consideration, and there must have been circumstances at the trial, not apparent to us, which have influenced him to give greater weight to the plaintiff's testimony as against the two other witnesses. Under ordinary conditions one would have expected the testimony of two reputable witnesses to have prevailed over the testimony of one. This leads me to the conclusion the learned Judge gave effect to other considerations in weighing the evidence, and there was room for applying them in this case.

I may briefly deal with another question raised by Mr.

N. S.
S. C.
1913
HILL
v.
SIMMONDS.
Sir Charles Townshend, C.J.

Mellish that there having been a submission to arbitration it could not be revoked by either party, and he further contended that the submission here was in writing as shewn in the correspondence. It may be that one party to the agreement, especially if in writing, could not revoke it, but it seems quite clear either party could revoke the authority of the arbitrators to proceed, in which case an award made thereafter would be void: *Fraser* v. *Ehrensperger*, 12 Q.B.D. 310; Russell on Arbitration 121; 1 Halsbury 950.

The revocation of the arbitrators' authority in this case is clear beyond dispute.

The only remaining question, whether the plaintiff renewed the authority of the arbitrators September 4th, I have already discussed.

Mr. Mellish further contended that Mr. Notting and Mr. Simmonds were not really arbitrators, but assessors or valuators of the damages, appointed by the parties whose authority could not be revoked.

In Lord Halsbury's Laws of England at p. 440, vol. 1, he says:—

> In order to constitute a submission to arbitration there must be some difference or dispute either existing or prospective between the parties, and they must intend that it should be determined in a quasi-judicial manner. Therein lies the distinction between an agreement for a valuation and a submission to arbitration, for in the case of a valuation there is not as a rule any difference or dispute between the parties, and they intend that the valuer shall without taking evidence or hearing argument make his valuation according to his own skill, knowledge and experience.

I think the citation effectually disposes of any such argument. This was clearly a case of arbitration in which there was an existing dispute which the arbitrators were appointed to settle.

I am, for these reasons, of opinion that this appeal should be dismissed.

Meagher, J. (dissenting)

MEAGHER, J., read an opinion in favour of allowing the appeal and dismissing the cross-appeal with costs. He was unable to explain why plaintiff went with defendant's father to Mr. Notting's office on the 4th September on any other theory than that it was to have the matter taken up and settled on that day. The evidence shewed that plaintiff assented to this. He said he must have it settled that day, and when told subsequently that it had been settled he expressed no surprise, but asked whether he would get a letter, in reply to which he was told he would, that Mr. Notting had written one. This was not consistent with his objection that it was the solicitors and not the arbitrators who were to settle the damages. There

N. S.

S. C.
1913

HILL
v.
SIMMONDS.

Russell, J.

was evidence to shew a continuance of the submission or assent to its continuance, and under these circumstances there should be clear evidence to justify the finding that the arbitration was not resumed and carried into effect.

RUSSELL, J.:—This action was brought against the defendant for having assaulted and beaten the plaintiff, inflicting serious and permanent injuries upon him. The learned trial Judge has found that the assault "was a most violent and serious one and was wholly without justification or excuse of any kind." He has fixed the damages at $5,000 and the only doubt he had on this point was whether that amount so fixed was sufficient to compensate the plaintiff for the injuries inflicted upon him. The defendant's counsel on the appeal does not justify the assault and did not seriously complain, or complain in more than a perfunctory manner, if at all, of the amount of the damages assessed. But the contention is made that the agreement to refer, which in the first instance was oral, had been reduced to writing in the course of the correspondence that followed. He contends that it thus became an agreement in writing within the meaning of the Arbitration Act which makes the appointment of the arbitrator irrevocable, the submission being, as defendant contends, irrevocable even at common law. Defendant further contends that if the authority of the arbitrators was revoked as claimed by the plaintiff a new submission was made on September 4 and that under this fresh submission an award was made on the same day, which is an answer to the plaintiff's claim for damages. The learned trial Judge has found that the verbal submission was revoked before it was acted upon, that there never was any fresh submission and that the award of $750 was made after the authority of the arbitrators had been revoked and that at the time it was made the arbitrators had no authority or jurisdiction to make it.

As to the first point raised with reference to the submission it was no doubt oral in the first instance. The plaintiff suggested that it should be put in writing, but this was not done. The plaintiff was not, so far as I can gather, objecting to its being put in writing, but the solicitor who the plaintiff desired should act for him in fixing the damages thought that a writing was not necessary. This, however, is of no consequence one way or the other. The correspondence clearly admits the fact of the submission, but I do not think that such an admission satisfies the terms of the Arbitration Act so as to render the agreement an agreement in writing with the legal consequences that would follow under the Act. Probably if the question related to an agreement under the 4th or 17th sections of the Statute of Frauds the correspondence would be a sufficient

note or memorandum of the agreement to satisfy the statute. Perhaps it would not. If the time within which the award was to be made was part of the oral agreement or one of the conditions under which the plaintiff was willing to have the matter amicably settled, the correspondence is not a complete memorandum, because it mentions no time as having been agreed upon or stipulated for. It is not clear, however, that any definite time was agreed upon or made by either of the parties a condition. But I think it is hardly to be doubted that if a written agreement had been drawn up there would have been some condition as to time, and that is one of my reasons for the opinion that when the Arbitration Act refers to an agreement in writing it means something more precise and formal than the memorandum that will suffice to meet the requirements of the Statute of Frauds. Granting that the submission was oral I have no doubt that the authority of the arbitrators could be revoked and that it was distinctly revoked by the plaintiff. It matters not whether the submission could be revoked or not. It could be and was rendered abortive by the action of the plaintiff in revoking the authority of the arbitrators. Perhaps an action lies for having rendered it abortive. It is not necessary to answer the question whether it does or does not so lie.

A more difficult question presents itself on the contention of the defendant that there was a fresh submission, or if the original submission was irrevocable a re-appointment of the arbitrators, or a fresh authorization to them to proceed under the submission. It really is of no consequence how the matter is phrased. The learned trial Judge has found that there was no fresh submission. If he had found the other way I do not think his finding could have been disturbed. Neither do I think the finding that he has made can be disturbed. It turns entirely upon the credit to be accorded to the witnesses. The evidence of the defendant's father is diametrically opposed to that of the plaintiff. The plaintiff had definitively broken with Mr. Notting whom he had looked upon as his arbitrator if not as his solicitor in the matter and on August 3rd, had notified the defendant's father that he was about to proceed to collect his just dues through the Courts. The latter and the defendant consulted counsel, no doubt for the purpose of learning whether they could not hold the plaintiff to the original arrangement for an arbitration, which promised better results than a settlement by the Courts. Not knowing that the defendant had consulted Mr. McInnes, the plaintiff a few days later consulted Mr. Fulton, a partner in the same firm, who was also unaware of the consultation with Mr. McInnes. Discovering this fact shortly afterwards plaintiff retained Mr. McLean and left the matter of settlement in his hands. Even at this late date I have

N. S.
S. C.
1913
HILL
v.
SIMMONDS.
Russell, J.

no doubt, under the evidence, that the plaintiff was willing that the matter should be settled without a lawsuit, but it does not follow that, after retaining counsel and placing his interests in their hands, he was willing that the matter should be settled behind their backs and without consulting them. He says that what he understood throughout was that the solicitors on both sides should get together and arrange a settlement of the case. Mr. Simmonds, defendant's father, says that the plaintiff was willing that the damages should be adjusted by himself and Mr. Notting. There was clearly a misunderstanding and it no doubt has been due in part to the fact of the plaintiff's deafness. The fresh authorization, if there was any, took place in Mr. Notting's office on the morning of September 4th. All that the plaintiff heard on that morning was the statement of Mr. Notting to the effect that he could not at that time attend to the matter, having other engagements, and that he could not see them till the afternoon. This was communicated to the plaintiff by Mr. Simmonds. Plaintiff did not return in the afternoon because he gathered from the manner of the solicitor that he was not a welcome visitor. He is very emphatic in his repudiation of the idea that he was taking the matter out of the hands of his new solicitors, or giving any authority to Mr. Simmonds and Mr. Notting to make an assessment of the damages without consulting them. But for the fact of the plaintiff's deafness I should be inclined to accept Mr. Notting's evidence as supporting Mr. Simmonds in the conflict between himself and the plaintiff, but even so, I should have hardly felt warranted in reversing the judgment of the trial Judge on a matter so peculiarly within his province. As the case stands I have no doubt that the decision on the question of a fresh submission was right. I have the same doubts as the trial Judge regarding the sufficiency of the damages awarded, but I deem it best in this respect to let well enough alone. I think it is to be very greatly regretted that the defendant did not, the moment he recovered his mental equilibrium, frankly acknowledge his fault instead of refusing an apology for the wrong he had done to the plaintiff. It stands out all through the case that if such a course had been adopted this unfortunate litigation would never have occurred.

The appeal should in my opinion be dismissed with costs.

Longley, J.

LONGLEY, J.:—I concur in the opinion of the Chief Justice. The appeal should be dismissed.

Appeal dismissed, MEAGHER, J., *dissenting.*

ATTORNEY-GENERAL AND TOWN OF TRURO v. CHAMBERS ELECTRIC LIGHT AND POWER CO. Ltd.

N. S.

S. C.
1913

Nova Scotia Supreme Court, Ritchie, J. November 21, 1913.

1. INJUNCTION (§ I L—104)—AS TO HIGHWAYS—TELEPHONE AND ELECTRIC POLES—LOWERING WIRE TO INTERFERE WITH THOSE OF COMPETITOR.

An electric company will be restrained from arbitrarily and unreasonably lowering its wires for the sole purpose of compelling a competitor which otherwise could string its wires below the first company's wires and still leave a clear space of three feet as required by sec. 6 of ch. 130 of N.S. Acts of 1889, and had begun operations accordingly, to re-arrange its entire plan and go above the first company's wires.

2. MUNICIPAL CORPORATIONS (§ II F 1—171)—AS TO LIGHTS—POWER TO CONSTRUCT ELECTRIC LIGHT SYSTEM.

A town that is expressly empowered by law to light its streets may construct an electric lighting system for that purpose when not prevented by any exclusive charter vested in some other person or company.

3. HIGHWAYS (§ II B—47)—USES—BY ELECTRIC COMPANY—POLES—POWER OF MUNICIPALITY OVER.

The right to erect poles and wires in the streets of a town conferred on an electric company by sec. 6 of ch. 130 of the N.S. Acts of 1889, can be exercised, under sec. 7 of the Act, only under the direction and supervision of such person as the town may appoint, who, however, must exercise his power in a fair and reasonable manner.

4. HIGHWAYS (§ II B—47)—USES—BY ELECTRIC COMPANY—POLES—CONSENT OF MUNICIPALITY TO ERECTION.

The fact that an electric company had previously acquired statutory power to erect poles and wires in the streets of a town does not prevent it coming within the provisions of a subsequent Act, ch. 21 of N.S. Acts of 1911, declaring that poles shall not be erected except with the written permission of the street committee of the town under such terms as public safety may require.

5. ELECTRICITY (§ III A—17)—WIRES—STATUTORY REQUIREMENT THAT WIRES CARRIED ABOVE GROUND BE "WHOLLY INSULATED"—WIRES CARRIED ON POLES.

Having regard to other portions of the same statute, the requirement of sec. 7 of ch. 130 of the N.S. Acts of 1889, that in all cases where any electric wire or any portion thereof, is carried "above ground," that it shall be "wholly insulated," relates only to wires where carried from pipes of conductors laid underground, and does not extend to wires carried from pole to pole above the minimum height fixed by statutory authority.

6. MUNICIPAL CORPORATIONS (§ II B 1—42)—DELEGATION OF POWER—BY MUNICIPALITY—POWER TO FIX HEIGHT OF WIRES.

The power of a town council to determine the height which electric wires shall be suspended above its streets cannot be delegated to a city official.

Statement

ACTION by the Attorney-General on the relation of the town of Truro and of G. Clarence McDowell and by the town of Truro joined as a plaintiff in its own right, against the Chambers Electric Light and Power Co. Ltd.

The plaintiff town claimed declarations as to the exercise by defendant company of rights claimed under its Act of in-

N. S.

S. C.

1913

ATTORNEY-GENERAL AND TOWN OF TRURO v. CHAMBERS ELECTRIC LIGHT AND POWER CO., LTD.

Statement

corporation, in relation to the erection of poles and the placing of electric light wires on the streets of the town; also to restrain the alleged arbitrary and unreasonable exercise of its powers by the defendant company.

Judgment was given for the plaintiffs.

The plaintiff town was proceeding to install an electric lighting system, for the purpose of lighting the streets and public buildings of the town, and it was claimed, on behalf of the defendant, that the work of erecting poles and placing wires, for the purposes of the town, was being carried on in such a way as to interfere with the legitimate rights of the company, in connection with the running of additional wires for the purpose of providing for additional business and the changes that would become necessary when the supplying of electric light to the town was discontinued.

F. H. Bell, K.C., and *J. L. Ralston*, for plaintiffs.

T. S. Rogers, K.C., and *S. D. McLellan*, K.C., for defendant.

Ritchie, J.

RITCHIE, J.:—In this action the plaintiffs claim the following relief:—

(*a*) A declaration that the defendant company is not entitled to unreasonably or unnecessarily obstruct the streets of the town of Truro by the position of its plant, or be dangerous to life or property, and for an injunction to restrain the defendant company from so doing, etc.

(*b*) A declaration that the defendant company is not entitled to place its plant in such a position on the streets as to interfere with the placing or erection of poles, etc., by the town, and for an injunction.

(*c*) A declaration that the defendant company is not entitled to carry its wires above the ground, unless wholly insulated, and for an injunction.

(*d*) A declaration that the defendant company is not entitled to erect poles, etc., on the streets, without the supervision or direction of the relator McDowell or other person appointed by the town, and for an injunction.

(*e*) A declaration that the defendant company is not entitled to break up the streets or place poles, etc., thereon, without the permission in writing of the street committee, and for an injunction.

(*f*) A declaration that the defendant company is not entitled to change the height of its wires, without the approval in writing of the town engineer, and for an injunction.

(*g*) A declaration that the defendant company is not entitled to place its wires at a less height than 22 feet from the ground, and for an injunction.

(*h*) Damages.

(*i*) Such other relief as may be granted.

The defendant company contend that the plaintiff is not entitled to any of the relief asked for, and by way of counterclaim sets up:—

That the plaintiff town is illegally and unlawfully undertaking the construction and operation of an electric lighting plant, and a declaration to this effect is sought.

Further declarations are asked for as follows:—

1. That the by-law set forth in par. 23 of the statement, and the determination made thereunder, are illegal.

2. That the defendant company has the right to retain its poles and wires as heretofore constructed, and the right to raise and lower the wires, in a reasonable manner in accordance with the usual practice in like works.

3. That the town is not entitled in the carrying out of its proposed project to interfere with the prior rights (reasonably exercised) of defendant company, which rights are sought to be defined.

4. That the town is bound in carrying out its undertaking by the provisions of the by-law approved on September 16, 1913, and that therefore it is not competent for the town to construct electric wires of a less height from the ground than 22 feet.

5. That the defendant company is entitled to continue its operations under its charter in a reasonable manner and without the supervision, etc., alleged in the statement of claim to be requisite.

An order is also claimed restraining the town from interfering with the rights of defendant company in the premises.

I have stated the contentions of the parties at some length, thinking that possibly such statement may be found a convenience when the case is heard on appeal.

The defendant company was incorporated by letters patent dated February 9, 1889, with certain limited powers. The Truro Electric Company was incorporated by ch. 108 of the Acts of the Province of Nova Scotia for the year 1887. All the rights and franchises of the Truro Electric Light Co. have been purchased by the defendant company. This was proved in a general way, which proof would not have been sufficient if objection had then been taken, but no objection was then taken, though Mr. Ralston referred to it in closing.

I hold that the evidence being received without objection, it has become cogent proof.

Chapter 130 of the Acts of the Province of Nova Scotia for the year 1889, refers to the proposed purchase by the defendant company, and extends the objects of the company, and these two Acts, to which I have referred, give the defendant company the rights which it has in the streets of the town of Truro. Sec. 6 of ch. 130, Acts of 1889, as amended, reads as follows:—

The company is hereby empowered to erect and place upon and along the streets, ways and other necessary places and highways in the town of Truro, and also in the county of Colchester, poles or other necessary supports with wires thereon for the transmission of electric currents for the purposes of the company's business, but not to interfere with the Nova Scotia Telephone or Western Union Telegraph companies' wires now erected in Truro, and no person or corporation shall erect or place any electric light or other wires within three feet of the wires of the company.

N. S.

S. C.
1913

ATTORNEY-GENERAL AND TOWN OF TRURO
v.
CHAMBERS ELECTRIC LIGHT AND POWER CO., LTD.

Ritchie, J.

The defendant company have the right to erect and maintain their poles and wires in the streets of the town of Truro but not the exclusive right. The town has the right under the Towns Incorporation Act to light the streets, and this is what the town of Truro proposes to do. Poles have been erected by the town for their wires, for the most part on the side of the street opposite to the side on which the defendant company's poles are erected, but at certain places the wires must cross.

The town poles are lower than those of the defendant company, but its wires, as proposed, will not at any place come within three feet of the defendant company's wires.

On September 10, 1913, the defendant company, noticing the action of the town to which I have referred, wrote a letter to the mayor and town council in which the following appears:—

> We notify you that we claim the right to go as low as any wire is permitted to go, and will at once shift our wires to as low a position as we see your wires going.

The defendant company followed this up by lowering their wires at the crossings to within three feet of the town's proposed wires. The result would be to force the town to go above the defendant company's wires. I find that the action of the defendant company in this regard was taken solely for the purpose of obstructing the town in the construction of its plant.

I construe the passage of the letter which I have quoted as a threat, and the action of the defendant company shews that it was not an idle one. The president of the defendant company said to Mr. Harvey Doane, the gentleman employed by the town to put in its plant:—

> What is the use of you trying to put up your system? I can put my wires down and you will have to go above and that is expensive work.

This is suggestive as to the intent of the defendant company in lowering its wires. I do not think it was done for the better prosecution of its business, but solely to obstruct the town, and, if possible, kill the town project, and I find this to be an arbitrary and unreasonable exercise by the defendant company of its corporate powers.

This state of facts raises the question of law, can the defendant company exercise its powers in an arbitrary and unreasonable way, or must the powers of the defendant company be exercised in a reasonable way?

I am of opinion that the defendant company cannot exercise its powers in an arbitrary and unreasonable way, and I therefore grant the relief asked for by the plaintiff in respect of the lowering of the defendant company's wires, at the places mentioned in the evidence.

The defendant company, of course, has the right to maintain

its poles and wires as they were before the town project was undertaken. All I am holding on this point is that it has not the right to unreasonably and unnecessarily alter them, for the sole purpose of defeating the town undertaking.

It was contended for the defendant company that the proposed project of an electric light plant, being constructed by the town, was illegal for reasons set out in paragraph 14 of the defence.

I decide against this contention. The town has express power under the Towns Incorporation Act to light the streets, and I do not know why it should not do so by electricity, there being no exclusive charter in the way.

As to the other grounds of illegality, all that it is necessary for me to say is, that in my opinion the defendant company cannot urge them as a defence to this action.

By sec. 7 of ch. 130 of the Acts of 1889 the powers of the defendant company are made:—

> Subject to the supervision and direction of such person as the said town or county (as the case may be) may appoint to supervise the same, whose duty it shall be to see that the said powers hereby confirmed or granted are carried out, and that any obstructions on the street calculated to interfere with the efficient working of the company's lines, or to cause any danger to life or property, directly or indirectly, are removed by the company with as little detriment and inconvenience as possible to the citizens of Truro or county or their property.

I hold that this proviso applies to sec. 6 as well as to sec. 7, and the plaintiffs are entitled to a declaration accordingly. Of course the supervision and direction must be fair and reasonable, and any attempt to unduly interfere with the rights which the defendant company have under their charter would be restrained.

The defendant company have the right under secs. 6 and 7 to erect poles on and break the soil of the streets subject to the supervision and direction which I have referred to.

By ch. 21 of the Acts of 1911, which is an Act amending the Towns Incorporation Act it is provided that:—

> No person shall break up the soil of any street or erect or place in any street, sidewalk, road, lane, park or square within the town any telegraph, telephone, electric light or other pole or poles without first making application to the street committee in writing specifying the purpose for which such breaking up is required and obtaining their permission therefor in writing; and the committee may impose such terms upon the persons applying as the security of the public appears to them to require.

The plaintiffs contend that the rights of the defendant company under its charter are subject to this amendment. The question is one of construction with a view to getting at the intention of the Legislature. I think it was the intention of

N. S.
S. C.
1913
ATTORNEY-GENERAL AND TOWN OF TRURO v. CHAMBERS ELECTRIC LIGHT AND POWER CO., LTD.
Ritchie, J.

the Legislature to make a general uniform law applicable to every town in the province, and that it was intended that persons or corporations, who had acquired rights on the streets, should hold those rights subject to the regulations imposed by this general law. I must, therefore, on this point make a declaration in accordance with the plaintiffs' contention.

The plaintiffs contend that under sec. 7 of ch. 130 of the Acts of 1889, the defendant company is bound to have all its wires "wholly insulated," that is, entirely covered, and seek a declaration to this effect. I do not agree with this contention, and decline to make the declaration sought in this regard. In my opinion, the proviso contained in the concluding part of sec. 7 only applies to electric light wire carried above ground from pipes of conductors laid underground. The fact that the word "insulated," in sec. 6, is struck out by a subsequent Act, is entitled to consideration on this point.

On September 12, 1913, the following by-law was passed by the town council:—

> The town engineer, under the authority and direction of the council, shall determine in writing the height from the ground at which electric light wires on, over or along the streets shall be placed by any person, firm or corporation, and the height from the ground of any existing electric light wires shall not be changed without the approval in writing of the town engineer, under the direction and authority of the town council.

The plaintiffs ask for a declaration that under this by-law the defendant company cannot change the height of existing wires without the approval in writing of the town engineer.

I refuse to make the declaration asked for. I think the by-law is bad on its face. Assuming that the town council has power to make the determination mentioned, it is a jurisdiction which cannot be delegated. The defendant company ask for a declaration that the determination of Mr. McDowell, made under this by-law that electric wires shall not be less than 22 feet from the ground, is binding upon the town, as well as upon any other person or corporation. I do not see how I can make this declaration, because I have held that this by-law is invalid. If it was binding, I may add that I doubt if the town authorities could, under the circumstances of this case, reasonably say it was not binding upon the town, and the town council cannot make unreasonable by-laws.

I think I have disposed of all the contentions made on this trial, but if I have overlooked anything, my attention can be drawn to it when the order is moved.

This case is an important, and I think, in some respects a close, case. It was tried and argued with marked ability on both sides. I have given careful consideration to the arguments addressed to me, and, but for the fact that it was represented

at the bar that time was of the essence in the delivery of my judgment, I would have referred to the authorities, and given the reasons for my conclusions, as to the law, with greater particularity. Other engagements in Court have prevented me from giving as much time as I would have liked to the consideration of the case. No doubt there will be an appeal, and it is satisfactory to me to know that my conclusions, both as to the law and the facts, are subject to review. I will hear counsel as to the costs. Further directions will be reserved.

Judgment for plaintiffs.

N. S.
S. C.
1913
ATTORNEY-GENERAL AND TOWN OF TRURO v. CHAMBERS ELECTRIC LIGHT AND POWER CO., LTD.

GILBERT v. GILBERT.

N. B.
S. C.
1913

New Brunswick Supreme Court, McLeod, J. October 2, 1913.

1. TRUSTS (§ II B—48)—POWER OF TRUSTEES UNDER WILL TO SELL LANDS.

Where by his will the testator directs that his undivided interest in property of which he was a tenant in common with others should not be sold as such, but that the property should be partitioned and thereupon the share apportioned to him or to his estate, should be held on the same trusts as he provided with respect to property of which he was the sole owner, the share apportioned in a partition action brought by the testator in his lifetime and continued by his executors and trustees after his decease will be subject to the like powers of sale and conditions as to the widow's consent as the will provides in the trust as to the land held in severalty.

Statement

SUIT brought by the executors to construe the will of Thomas Gilbert.

M. G. Teed, K.C., for plaintiff.
Chas. F. Sanford, for defendant.

McLeod, J.

MCLEOD, J.:—The bill in this case is filed to obtain a construction of the will of Thomas Gilbert, late of the city of Saint John, under which will the plaintiffs are executors and trustees. The facts may be shortly stated as follows:—

Thomas Gilbert, late of the city of Saint John, departed this life on March 11, 1913, having first duly made and executed his last will and testament. The will was executed on February 16, 1906. At the time of making this will and also at the time of his death, the testator owned considerable real estate situate in the city of Saint John, some of which he owned in severalty, and some of which he was a tenant in common with his brothers, Henry Gilbert and James S. Gilbert, and his sister, Elizabeth Wilson, as trustee under the will of Henry Gilbert and Bradford Gilbert. In and by his will, he, after providing for the payment of his debts and funeral expenses, and the erection of a monument, gave to his wife, Marion Jean Gilbert, one of the plaintiffs, all of his plate, linen, etc., and other articles of personal use or

N. B.

S. C.

1913

GILBERT v. GILBERT.

McLeod, J.

ornament and also the sum of four hundred dollars ($400) in money. The will then proceeds as follows:—

I give, devise and bequeath all the rest, residue and remainder of my estate and property both real and personal whatsoever and wheresoever unto my said trustees, their heirs, executors, administrators and assigns, but subject nevertheless to and upon the trusts following, that is to say:—

And then follows the provision as to the management of the property by the trustees, the investments to be made, the costs and expenses to be paid, and it is then provided that the net income of the estate is to be paid to his wife, the said Marion Jean Gilbert, during the term of her natural life and after her death the said trustees are to stand seized and possessed of the real estate and securities upon the trusts, which are stated as follows:—

In trust for my said nephew Henry Gilbert, his heirs, executors, administrators and assigns absolutely, but should the said Henry Gilbert die in the lifetime of my said wife before or after my decease then in trust for such person or persons as he shall by his last will and testament appoint and in default of such appointment in trust for his eldest son him surviving absolutely subject, nevertheless, to the payment of all succession and other duties payable to the Crown in respect of my estate including the interests therein of my said wife.

Provision is then made for the payment of the succession duties. And then the following provision relating to the sale of the real estate is made:—

I hereby authorize and empower my said trustees if they shall deem it expedient for the interests of my estate by and with the consent of my said wife Marion Jean Gilbert to sell and dispose of all or any part or portions of my real estate held by me in severalty for such price or prices as they may think fit either for part cash and part on credit secured by mortgage on the property sold and to invest the proceeds of such sale or sales in the same manner and on the like securities as are hereinbefore mentioned for the investments of my personal estate and such investments shall form part of my personal estate and shall be held by my said trustees under the same trusts as hereinbefore mentioned of my personal estate.

Then follows the following provision relating to the property of which he is tenant in common with his brothers and sister:—

And whereas I am part owner of certain real estate situate in the city and county of Saint John as tenant in common with my brothers Henry Gilbert and James Gilbert and my sister Elizabeth Wilson as trustee under the wills of my late brothers Bradford S. Gilbert and Henry Gilbert and it may be expedient hereafter that partition and division of the said lands and tenements should be made I hereby in such case authorize and empower my said trustees and the survivor or survivors of them and the trustees for the time being of this my will to enter into negotiation and agreements with my said brother and sister for the partition and division of the said lands and tenements so held by us as tenants in common and

for the purpose of effectuating and carrying out said agreements for partition to make execute deliver and acknowledge all deeds transfers and conveyances which may be necessary and expedient for the transfer of my interest in any portion of said lands as may be allotted to the other parties co-tenants in common in severalty. And to accept and receive from the other parties co-tenants in common deeds transfers and conveyances of such parties to my trustees and to all and every act and deed necessary and proper for the full carrying out of such partitions as fully and effectually as I could or might have done if living; and I hereby will and direct that such portions of said real estate now held by me as tenant in common as may be allotted and conveyed under such partition to my said trustees shall be held by them under the same trusts as are herein mentioned concerning my estate.

Under and by will the plaintiff Marion Jean Gilbert, Allen O. Earle and Henry Gilbert were appointed executors and trustees; but Allen O. Earle departed this life before the death of the testator and by a codicil dated March 8, 1913, he revoked the appointment of the said Henry Gilbert and appointed the plaintiffs, William A. Ewing and J. Roy Campbell, trustees together with his said wife of and under his will with the same powers as if they had been named executors and trustees in the said will, and in all other respects confirmed his will.

The plaintiffs by the bill filed asked a declaration of this Court that the plaintiffs have the right and power to sell and convey in fee simple the land held by the testator as tenant in common at the time of his death and which may be allotted to the plaintiffs as executors and trustees in severalty. The testator after making his will and before the codicil was made commenced an action in Chancery for the partition of the lands held by him as tenant in common and that suit was pending at the time of his death and was continued by the plaintiffs.

The question I have to determine is whether the plaintiffs can when the partition of the lands so held in common is made, sell the portion that may be allotted to them and which could be then held by them in severalty. It is difficult to find any particular rule of construction as to a will save and except the general one that the intention of the testator must be collected from all parts of the will and in some instances the Court may look at the circumstances as they existed when the testator made his will if it becomes necessary to do so in order to ascertain the correct meaning of the will. Of course, the will itself speaks at the death of the testator. At the time the testator, in this case, made his will he owned two classes of real estate, one of which he owned in severalty and the other which he owned as a tenant in common with his sister and brothers. In his will he provides that all or any part of the real estate held by him in severalty might be sold subject, however, to the condition that the consent of his wife to the sale must first be given. As to the property he owned as tenant in common he makes a provision

N. B.

S. C.
1913

GILBERT
v.
GILBERT.

McLeod, J.

for the trustees to make a partition and provides that they may give and take the necessary deeds in order to make such partition. When that partition is made, they hold it in severalty and he provides that the property so held in severalty should be held on the same trusts as are mentioned in his will concerning his estate. After he made the will this suit for a partition was begun by him and continued until his death. He at no time made any change in his will and if the suit had been concluded before his death and the partition made, he then at the time of his death would have held that also in severalty and there would be no doubt that under the provisions of the will it could be sold subject to the obtaining of his wife's consent. The suit, however, was not concluded before his death and the plaintiffs as they had a right to do carried on the suit, and when the partition is made they will then hold that in severalty. It seems to me that so holding it they are entitled to treat it the same way as the other property that he in his lifetime held in severalty. The provisions in the will with reference to the partition of the land held by him as tenant in common looked entirely towards giving his executors and trustees a power to partition it and take and give necessary deeds for that purpose. He did not give them power to sell an undivided interest in the property, in other words, before the sale of the property his desire was that it should be partitioned and he himself in his lifetime took the necessary steps for that purpose. By the provision by which he gives his executors and trustees authority to partition the property he directs that they should hold it on the same trusts as are mentioned concerning his estate. There is nothing in the will to shew that the testator meant that the trustees should hold this property after the partition was made in any different way than they held the other real estate he had. Looking at the whole of the will, the fair meaning of it is that the trustees were to make a partition of the real estate in which he was interested as a tenant in common, and after the partition was made they were to hold the portion allotted to them in the same way that his other real estate was held by them. The testator appears to have provided for two things with reference to his real estate, first, that none of his real estate should be sold without the consent of his wife, and second, that the trustees should not sell an undivided portion of the property that he held as tenant in common, but that it should be partitioned by them before selling.

I, therefore, conclude that the plaintiffs have a right to sell the land allotted to them in the partition and give a good title thereto.

The costs of all parties will be paid out of the estate. The plaintiffs' costs to be taxed as between solicitor and client.

Leave reserved to the parties to make a further application.

Direction accordingly.

REX v. WALDON.

B. C.

S. C.

1913

British Columbia Supreme Court, Hunter, C.J. November 26, 1913.

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

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

[*Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502, 20 Can. Cr. Cas. 458, distinguished.]

Statement

APPLICATION to quash a conviction under a municipal by-law as to Sunday observance.

The conviction was set aside.

Woodworth, for prisoner.

H. C. Clarke, for South Vancouver.

Hunter, C.J.

HUNTER, C.J.:—The *Ouimet* case [*Ouimet* v. *Bazin*, 3 D.L.R. 593, 46 Can. S.C.R. 502, 20 Can. Cr. Cas. 458] is not exactly in point. That was a case where the Act impugned undertook to deal generally with the subject of Sunday observance; this is a case where it is sought to uphold a by-law as being within the power reserved to the province by the proviso in sec. 5 of the Dominion Act. The by-law goes further than the province itself could go; for example, its prohibition would cover the supply of gas for cooking which is allowed by sec. 12 of the Dominion Act. The proviso enables the province to reduce the scope or mitigate the severity of the general prohibition in respect of the topics mentioned in the section, but it does not clothe the province with power either itself to deal generally with the matter of Sunday observance, or to devolve such powers on municipalities as purports to be done by the Municipal Act. The conviction must be set aside.

Conviction quashed.

QUE.

C. R. 1913

BANK OF MONTREAL v. LOW LUMBER CO. Ltd.

Quebec Court of Review, Tellier, DeLorimier and Greenshields, JJ. February 28, 1913.

1. BANKS (§ VIII C—181)—STATUTORY RECEIPT AS COLLATERAL SECURITY —ACTION FOR DEBT PRIOR TO ACCOUNTING.

A bank which has made advances to a lumber company upon assignments and statutory receipts under the Bank Act (Can.), whereby the company thereafter held the logs and lumber as bailees of the bank, may maintain an action against the company for the balance due them in respect of such advances without having rendered prior to the action an account of the proceeds realized under the security so held as collateral; it is sufficient that the details of such accounting should be furnished under oath in the action, and that the defendant has had an opportunity of contesting its accuracy.

APPEAL by way of review from the judgment of the Superior Court, McDougall, J., in an action by the bank for balance of account.

The judgment below was confirmed.

T. P. Foran, K.C., for the plaintiff.

Aylen & Duclos, for the defendants.

The opinion of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—This is an action to recover from the defendants the balance of advances made by the plaintiff on notes of the defendant, Martin, to the order of the other defendant the Low Lumber Co. The latter sets up the plea that certain wood goods were pledged to the bank as collateral security for the advances, with power to sell and dispose of them, that this was done, and that no account thereof having been rendered by the bank, its action is premature and unfounded. The facts may be briefly stated as follows:—

Previous to June 9, 1908, the plaintiff, at the request of the defendant, the Low Lumber Co., agreed to make certain advances to it on promissory notes signed by the other defendant, Martin, to its order. As security for the payment of these notes, and any renewals thereof, the defendant agreed to give the plaintiff assignments and pledges, under the authority of secs. 74-75 of the Bank Act. Upon the advances being made, the notes were given, and the security, in the form of pledges and assignments, made. Subsequently, a further advance of $1,000 was made, and security was taken, under another section of the Bank Act, viz., sec. 88. From and after the execution of the assignments or pledges, the logs and timber and other wood goods were held by the defendant, the Low Lumber Co. as bailees of the bank. A proposal was made on May 16, 1908, by the East Templeton Lumber Co. to saw, manufacture and sell, for the Low Lumber Co., all logs, timber and other wood goods which might be delivered by the Low Lumber Co

at the mill of the East Templeton Lumber Co.—subject always to the approval of the Bank of Montreal. This proposal was accepted by the Low Lumber Co. on the 20th of May following. Subsequently an agreement was entered into between the Low Lumber Co. of the first part, the East Templeton Lumber Co. of the second part, and the Bank of Montreal, of the third part, by which, after reciting the fact that the bank had made advances to the Low Lumber Co. and setting forth that the pledged property could not be sawn at the mills of the Low Lumber Co., and setting forth that the Low Lumber Co. had made an agreement with the East Templeton Lumber Co. to saw the said timber, as set forth in the letters of the 16th of May and the 20th of May, 1908, it was agreed, that the Low Lumber Co., acknowledging to hold the pledged property, as the agents or bailees of the plaintiff, would undertake, at their own expense to float, convey and deliver the same to the East Templeton Lumber Co. to be sawn by the latter, and to be held by the latter as bailees of the bank. The sale of the property, it was agreed, should be made by and through one Vallilee, manager of the East Templeton Lumber Co. with the concurrence of one Martin, the manager of the Low Lumber Co., and with the concurrence of the Bank of Montreal, at Ottawa, the price to be applied towards the payment of the charges of the East Templeton Lumber Co. for sawing and handling the timber, and the balance to be paid over to the Bank of Montreal, to be applied by it towards the payment of the advances made to the Low Lumber Co.

In virtue of this agreement, a certain quantity of timber of different kinds was delivered by the defendant, the Low Lumber Co., at the mill of the East Templeton Co., and a great part of it was sold by the East Templeton Co. and the proceeds after deducting the cost of sawing and other charges of handling, as provided for in the agreement, was paid over to the Bank of Montreal; but the part representing the charges for sawing, etc., was credited to the East Templeton Lumber Co. by the bank, this company being also debtors to the bank in a large amount. A part of the lumber, after being sawn was burned, and the insurance on the same was paid to the Bank of Montreal, and, after crediting, out of the amount received, the amount due to the East Templeton Lumber Co., the balance was credited by the bank to the advances made to the defendants. The total amount received by the bank from all sources, under the agreement, is stated to be $4,011.70, as fully set forth in a statement filed of record. This is sworn to as correct, and, according to the proof made, must be accepted by this Court as being a correct statement.

Now, it is pretended by the defendants that the bank is ac-

QUE.
C. R.
1913
BANK OF MONTREAL v. LOW LUMBER CO., LTD.
Greenshields, J.

countable towards them for all the logs and timber received by the East Templeton Lumber Company from the defendant, the Low Lumber Co. If the defendants mean that the Bank of Montreal must give credit to the defendants for every dollar received by it from the lumber delivered to the East Templeton Lumber Co. under the agreement of June 9, 1908, I should find no fault with the statement, but the defendants, apparently, go much farther and strenuously urge, that before any action can be maintained by the bank upon the notes, an account according to the provisions of law must be previously rendered, and possibly previously debated between the bank and the defendants. I cannot, for one moment, assent to such a proposition. The bank was in the position of a creditor holding collateral security under agreement, with power to realize upon that collateral security. As such creditor, the bank sues for what it claims to be the unpaid balance of the debt, after crediting what it has realized from the sale of the collateral security, and it furnishes to the defendant sued, a statement in detail of these amounts. If the defendant so sued and so furnished with such details, is dissatisfied, or is convinced that the statement is incorrect, it is for them to attack the statement, and plead in defence its incorrectness, but, unfortunately, in the opinion of this Court, they have failed in their proof. If this Court were to lay down a proposition that a bank having discounted the notes of a customer, and having received payments on account of past due notes from time to time, was bound, before suing for the recovery of the unpaid balance, to render an account according to law, with all its formalities, it would seriously hamper commercial transactions between banks and their customers, and there is no law to justify such a statement, and that plea of the defendant was properly dismissed.

The second plea is practically a plea of payment. Say the defendants: "You did receive from us logs, timber, etc., etc., and did realize from the sale of such logs, timber, etc., etc., amounts more than sufficient to pay your claim against us." This affirmative plea must be proved by the defendants, and, in the opinion of the learned trial Judge, they have failed to do so, and with this opinion this Court fully agrees, and the judgment will be confirmed, with costs.

Appeal dismissed.

Re VAN HORNE and WINNIPEG & NORTHERN R. CO.

MAN.

K. B.

1913

Manitoba King's Bench, Galt, J. November 29, 1913.

1. EMINENT DOMAIN (§ II D—103)—APPEAL—REMITTING AWARD TO ARBITRATORS—FAILURE TO ITEMISE AWARD.

On an appeal from the award of arbitrators in an expropriation proceeding the court has power, under sec. 46 of the Expropriation Act, R.S.M. 1902, ch. 61, to refer back the award for reconsideration and re-determination where it is impossible to deal intelligently with the appeal by reason of a lump sum being awarded, without any indication by the arbitrators, who refused to give their reasons for their award, as to the nature of the items of damages comprising it.

2. EMINENT DOMAIN (§ II D—101)—APPEAL—AWARD—LUMP SUM—WHEN TREATED AS EQUIVALENT TO VERDICT OF JURY.

An award of a lump sum as damages for land expropriated will not be treated on appeal as equivalent to the verdict of a jury, where it is apparent from the evidence that some items entering into the award should have been eliminated as a matter of law.

[*Vezina* v. *The Queen*, 17 Can. S.C.R. 1 at 16, considered.]

Statement

APPEAL from an award of a lump sum by arbitrators for land taken by expropriation.

The award was referred back to the arbitrators for re-determination.

C. P. Fullerton, K.C., for Van Horne.

P. A. Macdonald, for Winnipeg & Northern R. Co.

Galt, J.

GALT, J.:—This is an appeal from an award, dated August 1, 1913, made by a majority of the three arbitrators appointed to fix the compensation payable by the railway company to Sir William Van Horne for the taking of a portion of the claimant's lands for the purposes of the railway.

The arbitrators appointed by the parties respectively were William Harvey and David H. Cooper, and these two arbitrators appointed George Patterson as the third.

The appeal was argued before me on November 20 and 21.

The Winnipeg & Northern R. Co. were incorporated by a private Act, ch. 122 of the Manitoba statutes of 1906. Clause 13 of the Act provides that the several clauses of the Manitoba Railway Act and of the Manitoba Expropriation Act should be incorporated with and shall be deemed to be a part of the Act, etc. And 13 (*a*) provides:—

> The said company shall make fair and full compensation to all owners of property which may be taken, used, flooded or injuriously affected by any of its works, and shall have the right to use and acquire all such properties on payment therefor. The amount or amounts to be paid to be ascertained and determined under the provisions of the said Railway Act and the said Expropriation Act, so far as they can be made to apply, in the event of a disagreement as to price.

The Manitoba Railway Act, section 7, provides that for the value of lands taken and for all damages to lands injuriously

MAN.
K. B.
1913
RE VAN HORNE AND WINNIPEG & NORTHERN R. CO.
Galt, J.

affected by the construction of the railway in the exercise of the powers by this or the special Act or any Act incorporated therewith vested in the company, compensation shall be made to the owners and occupiers of and to all other persons interested in any lands so taken or injuriously affected.

The following sections of the Expropriation Act are pertinent, 33, 34 and 40. Sections 42 to 47 provide for an appeal from any award made under the Act.

Under sec. 42, either party may appeal upon any question of law or fact to a Judge in Chambers and upon the hearing of such appeal, such Judge shall, if the same is a question of fact, decide the same upon the evidence as in a case of original jurisdiction.

Sec. 43 provides that such appeal shall be by way of a rehearing.

Under sec. 45, the Judge on such appeal shall have all the powers of the said Court as to amendment and otherwise, etc.

Under sec. 46

> the said Judge shall have power to draw inferences of fact, and to set aside the award, and to make any award that ought to have been made, or to refer back the award to the arbitrators for their reconsideration and re-determination as to such matters, and with such directions as he shall deem fit, and on such terms as to costs and otherwise as shall seem just, and to make such further and other judgment or order as the case may require.

Sec. 47 provides for a further appeal from the decision of the single Judge.

The award states that—

> We, the said William Harvey, and George Patterson, two of the above-named arbitrators, the other arbitrator David H. Cooper dissenting and not joining in this award, but being present at the time of the consideration and determination thereof, do hereby make and publish this award of and concerning the said matters, and we hereby find, award and adjudge that the compensation to be paid to the said Sir William Van Horne for the lands so taken and expropriated by the said railway company and for the damage to the residue of his said lands caused by severance and otherwise as provided for by the said statutes is the sum of twenty thousand dollars ($20,000) which we do hereby award to the said claimant Sir William Van Horne by way of compensation for the taking of the said lands by the said railway company and for all damages to the residue of his said lands occasioned by the taking thereof over and above all benefit and advantage to said residue of said lands arising from the construction of the said railway.

The heads of damage mainly dealt with in the evidence and arguments of counsel were as follows:—

1. Value of land taken;
2. Greater expense in ploughing, etc.;
3. Necessity of keeping up fences;
4. Interference with drainage;
5. Liability to fire;
6. Extra expense of taking care of stock;
7. Interest on amount awarded.

The arbitrators who signed the award have given the lump sum of $20,000 by way of compensation for all damages sustained by the claimant, both in respect of the lands taken, amounting to about 10 acres, and lands rendered useless by being cut off from the rest of the property, amounting to about 5 acres, and all the other items above mentioned. No distribution of amounts awarded by the two arbitrators in respect of each or any of the above items of damage are given in the award or appended thereto, and no reasons are given by said arbitrators in connection with their award.

Counsel for the appellant stated that one of these arbitrators was willing privately to communicate his reasons for the award; but the other concurring arbitrator objected to any reasons being given; consequently none were given.

The evidence is voluminous and the witnesses differ widely in their opinions both as to the value of the land taken and as to the resulting damages. The arbitrators do not appear to have accepted the evidence of any particular witness or witnesses, or to have discredited any, so that the task of re-hearing such a case as this is extremely onerous and difficult.

The cases referred to by counsel on both sides arose out of claims made under the Railway Act of Canada, the provisions of which differ in some respects from the provisions of the Manitoba Railway Act and the Manitoba Expropriation Act.

In *Re Armstrong and The James Bay Railway Co.*, 12 O.L.R. 137, Meredith, C.J., expresses a regret for the enormous expense which in that case had been incurred in settling the comparatively simple question involved in the inquiry, and expressed the hope that it might be possible to devise some simpler and much less expensive means of ascertaining the compensation which a railway company should pay to a land-owner whose property was taken or injured in the exercise of the railway's statutory powers.

That case was appealed to the Privy Council, *James Bay R. Co. and Armstrong*, [1909] A.C. 624, when their Lordships concurred with the Chief Justice in regretting the enormous expense incurred in settling a very simple question and shared the hope that it might be found possible to devise some better way of ascertaining the compensation payable to a land-owner. At page 631, Lord Macnaghten uses the following language, which I think very appropriate to the present appeal:—

> The award of the arbitrators in the majority does not give any indication of the way in which these several heads were dealt with or any clue to the reasons on which the award was based. The very guarded answer which the two arbitrators gave to the statement of the dissentient arbitrator, the fact that, when the learned Chief Justice expressed his willingness to receive an explanation from them, they abstained from giving him any

MAN.

K. B.
1913

RE VAN HORNE AND WINNIPEG & NORTHERN R. CO.

Galt, J.

assistance, and the line of argument adopted on behalf of the railway company, all lead to the inference that these arbitrators were under the impression that they could prevent or nullify an appeal by giving merely a general verdict. It was argued at the Bar that the Judge on appeal ought not to have disturbed the finding of the arbitrators unless it was demonstrable that the award was founded on some error in principle. But how is an error in principle to be detected when there is nothing to shew what the principles were by which the tribunal was guided? The statute gives a right to an appeal. That right was surely intended to be effective. It is impossible to suppose that the arbitrators from whom the appeal lies can defeat that right by judicious silence. Such conduct rather tends to provoke an appeal. After all it only makes the task of the Judge on appeal a little more troublesome. It throws upon him the duty of going through all the evidence and examining into the justice of the award, paying, of course, due regard to the finding of the arbitrators.

In *Re Davies* v. *James Bay R. Co.*, 20 O.L.R. 534, the Court of Appeal for Ontario found themselves confronted with a somewhat similar award. Moss, C.J.O., at p. 541, expresses his surprise at the length and expense of the proceedings, and adopts the same view as that previously expressed by Meredith, C.J., and Lord Macnaghten. At page 542, he says:—

> Save one passage in the award, to be presently referred to, we have nothing which we can accept as indicating the principles by which they were guided in coming to their conclusions. While we may look at so much of the statement of the non-assenting arbitrator as appears to indicate his own views, we are not at liberty to pay regard to it as setting forth the opinions of his colleagues. In this state of the case, the only course to be adopted was that commended by the Judicial Committee in *Armstrong's Case*, viz., to go through all the evidence, and—having, of course, due regard to the findings of the arbitrators, so far as they can be ascertained—examine into the justice of the award.

This is the task I am invited to undertake on the present appeal.

The arbitrators are three gentlemen of undoubted integrity, and it does seem strange to me that men of their ability and knowledge should be averse to stating exactly how they arrived at their award in respect of each of the items of damage allowed for. One of them is a trained lawyer, and the other two must have had considerable experience in legal procedure. They ought to have realized the difficulty in which they would place any appellate tribunal before which the case might come by maintaining what Lord Macnaghten describes as "a judicious silence" in respect to the items of their award.

Take the very first item, namely, the value of the lands taken. The highest estimate given by any of the witnesses was, I think, $650 an acre. Now, suppose that the two arbitrators who joined in the award chose to adopt a fanciful value of say $1,000 an acre for this land, the item would be well within the total amount awarded, and yet would be wholly unjustifiable on the evidence. Then, take the last item of "interest." Counsel for the claimant argued that interest was allowable and that he had claimed it

before the arbitrators, while counsel for the railway company opposed the allowance of any interest. No one can tell whether interest was or was not allowed, nor at what rate. The other intermediate five items all present the same difficulty. The witnesses varied greatly in their evidence, and there is nothing to shew whether the testimony of one or more was accepted rather than of others who differed from them.

It was argued by counsel for the claimant that the award of arbitrators or a majority of them was equivalent to the verdict of a jury, and reference was made to the judgment of Patterson, J., in *Vezina* v. *The Queen*, 17 Can. S.C.R. 1, at p. 16, where the learned Judge said:—

> It must be an exceptional case in which, on a mere estimate of damage depending on appreciation of the evidence and the exercise of judgment, this Court can be expected to interfere with the amount settled by the tribunal primarily charged with the inquiry, and which has facilities for arriving at a correct conclusion that are not possessed by the appellate Court. Where the tribunal of first instance has proceeded on correct principles and does not appear to have overlooked or misapprehended any material fact, an appeal against the amount awarded will in most cases resemble an appeal against an assessment of damages in an action, which would be a hopeless proceeding unless some very special reason for the interference of the appellate Court can be shewn.

In that very case the learned Judge varied the award by adding two sums of $500 each to the amount awarded, which could not very well have been done in the case of the verdict of a jury. But, apart from that, I think where the items of damage are such as I have indicated, and one or more of them may be eliminated as a matter of law, this is an exceptional case within the meaning of that phrase as used by the learned Judge. I fully realize that the opinions of the above arbitrators on each item of claim are entitled to the highest respect. But they have not indicated what their opinions are.

Under the Railway Act of Canada, there is no power to refer an award back to the arbitrators: see *Re McAlpine and Lake Erie R. Co.*, 3 O.L.R. 230. But under the Manitoba Expropriation Act, sec. 46, the appellate Judge is expressly given power to refer back the award to the arbitrators for their re-consideration and re-determination. I am of opinion that this is the proper order to make in the present appeal, and when the arbitrators shall have stated the amount awarded by them under each of the several heads of claim, an appellate tribunal will be in a position to deal intelligently with the award and the separate heads of damage.

I, therefore, direct that the award be referred back to the arbitrators for this purpose.

I think the appellants are entitled to their costs of this appeal.

Order accordingly.

ONT.

S. C.
1913

PALO v. CANADIAN NORTHERN R. CO.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. October 27, 1913.

1. RAILWAYS (§ II D 6—70)—INJURY TO ANIMALS BY TRAINS—LACK OF PROPER FENCE—ANIMALS AT LARGE THROUGH OWNER'S NEGLIGENCE.

The fact that the owner of an animal turns it out to pasture on his own land beside a railway track which a company had not fenced as required by law, does not shew that the animal was at large through the negligence or wilful act of the owner so as to relieve the company from liability under sec. 294 (4) of the Railway Act, R.S.C. 1906, ch. 37, for injuries inflicted on it while on the right of way; the company's omission to construct a fence did not deprive the adjoining owner of the right to turn his animals out to pasture on his own land.

[*McLeod* v. *Canadian Northern R. Co.*, 18 O.L.R. 616, 9 Can. Ry. Cas. 39, followed.]

Statement

APPEAL by the plaintiff from the judgment of the Judge of the District Court of the District of Thunder Bay, dismissing the action, which was brought to recover damages for the loss of a horse of the plaintiff's, which got upon the defendants' track, owing, as the plaintiff alleged, to their omission to fence, and was so injured, as the plaintiff alleged, by a train of the defendants that it had to be destroyed.

The plaintiff was a farmer, residing on his farm; the defendants' line of railway ran westerly along its south side. His house was in a clearing, fenced on all sides. At the west side of this clearing was the stable, the west door of which opened into another portion of the plaintiff's land, which portion was unfenced and extended down to the defendants' line of railway. The plaintiff permitted the horse to pasture on this unfenced portion of his land.

At about five o'clock in the afternoon of the 27th September, 1912, the horse was pasturing near the stable on the plaintiff's land. A passenger train went westerly past the farm at about 7.30 p.m.—it being then quite dark. Shortly thereafter, the horse was found at the south side of the track, so severely injured that it had to be destroyed. There were hair and blood on and along the south rail near where the horse was found.

The County Court Judge found that there was no evidence that the injury was caused by the defendants' train; and, therefore, dismissed the action.

The appeal was allowed and judgment given for the plaintiff.

Argument

H. E. Rose, K.C., for the plaintiff, argued that the learned trial Judge erred in the inferences drawn by him from the evidence, and should have held that the horse was struck by the defendants' train, and so received the injuries which resulted

ONT.
S.C.
1913
PALO
v.
CANADIAN NORTHERN R. CO.
Argument

in its death. That being so, the liability of the defendants is clearly established: *McLeod* v. *Canadian Northern R.W. Co.* (1908), 18 O.L.R. 616; *McMillan* v. *Manitoba and North-Western R.W. Co.* (1887), 4 Man. L.R. 220.

A. J. Reid, K.C., for the defendants, argued that the horse was "at large" through the plaintiff's negligence, and that the *McLeod* case did not apply. The learned trial Judge's finding of fact as to the cause of the accident was correct and should not be disturbed. He referred to the Railway Act, R.S.C. 1906, ch. 37, sec. 294, sub-sec. 4; *Lodge Holes Colliery Co.* v. *Mayor, etc., of Wednesbury*, [1908] A.C. 323, 326; *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Bishop* v. *Bishop* (1907), 10 O.W.R. 177; *Clayton* v. *Canadian Northern R.W. Co.* (1908), 7 Can. Ry. Cas. 355; *Murray* v. *Canadian Pacific R.W. Co.* (1907), 7 Can. Ry. Cas. 351; *Becker* v. *Canadian Pacific R.W. Co.* (1906), 7 Can. Ry. Cas. 29; *Bourassa* v. *Canadian Pacific R.W. Co.* (1906), 7 Can. Ry. Cas. 41; *McDaniel* v. *Canadian Pacific R.W. Co.* (1907), 7 Can. Ry. Cas. 34; *Higgins* v. *Canadian Pacific R.W. Co.* (1908), 18 O.L.R. 12, 9 Can. Ry. Cas. 34, 38; *McLeod* v. *Canadian Northern R.W. Co.*, 18 O.L.R. 616, 9 Can. Ry. Cas. 39; *Kreuzenbeck* v. *Canadian Northern R.W. Co.* (1910), 13 W.L.R. 414.

Rose, in reply.

Mulock, C.J.

October 27. MULOCK, C.J.:—This is an appeal from the judgment of His Honour the Judge of the District Court of Thunder Bay, who dismissed the plaintiff's action with costs.

The plaintiff's claim is for damages because of injury to his horse by a train of the defendant company on the 27th September, 1912, which got upon the defendant company's track because of their omission to fence. The learned trial Judge held that there was no evidence that the injury was caused by the defendant company's train; and, therefore, dismissed the action. From that finding the plaintiff appeals.

The plaintiff is a farmer, residing on his farm; and the company's line of railway runs westerly along its south side. His house is in a clearing, which is fenced on all sides. At the west side of this clearing is his stable, the west door of which opens into another portion of the plaintiff's land, which portion is unfenced and extends down to the defendants' line of railway. The plaintiff permitted the horse to pasture on this unfenced portion of this land.

At about five o'clock in the afternoon of the day when it was killed, the horse was pasturing near this stable on the plaintiff's land. A passenger train went westerly past the farm at about 7.30 p.m. It was then quite dark. Shortly thereafter, the horse was found at the south side of the track with one front leg

ONT.
S.C.
1913
PALO
v.
CANADIAN NORTHERN R. CO.
Mulock, C.J.

broken and with serious injuries to his right jaw and right hind leg, and had to be destroyed. There was hair and blood on and along the south rail near which the horse was found.

Shortly before the arrival of the train, Isaac Karila, one of the plaintiff's witnesses, saw the horse uninjured on the north side of the track, grazing almost up to the rails. About an hour after the train had passed, going westerly, he again saw the horse, but at this time it was injured and was at the south side of the track, within about twenty feet of where he had previously seen it. The plaintiff swears that the horse could not have been injured except by the train, as the ground was all even and level where it was.

The evidence shews that there were two other horses grazing along the track in addition to the plaintiff's horse.

The defendants' engineer in charge of the train swore that he was on the right side of the cab, and, when approaching the siding where the horse was injured, was looking out, and that the fireman called to him to look out for a horse, and that at that moment the horse crossed the track from the south or left side to the north, passing about twenty feet in front of the engine, when it disappeared. He said that he saw but one horse. From his position in the cab, his view of the south side of the track was obscured by the engine. He said that there might have been other horses on the left side of the track, but "hardly thought" he could have struck a horse on the left side of the track without seeing it. He admits, however, that he did not see the horse that crossed the track until it was actually upon the track; and, if, therefore, he did not actually see it before it got upon the track, he may also have failed to see other horses close enough to the south rail to be injured.

John Varden, the fireman, was on the left side of the cab, and "thinks if he had struck a horse he would have seen it;" but, on being further questioned by the defendants' counsel, he said that if the engine had struck a horse he would have seen it.

The facts established on behalf of the plaintiff are not controverted, and an appellate Court is in as good a position as the trial Judge to draw the correct inferences from an admitted or proved set of facts, and is free to do so.

From the plaintiff's evidence the inference is, I think, irresistible that the horse was struck by the passenger train in question, and this inference has not been rebutted by the evidence for the defence. The learned trial Judge, however, seems to have misapprehended the evidence of the engineer and fireman, for he says that "no one saw the train strike the horse, and the engineer and fireman both testify that this did not happen."

A careful perusal of the evidence of these two witnesses fails to satisfy me that they so testified. It is clear from a perusal

of the engineer's evidence that he saw nothing of any occurrences at the left side of the track; and, as the plaintiff's evidence leads to the conclusion that the horse was struck by the left side of the train, the engineer's evidence is irrelevant and valueless; nor can any weight be attached to the fireman's evidence. He was, it is true, on the left side of the cab; but, when asked by the defendants' counsel if he could have seen a horse if he had struck it, he said that he "thought so," and explained, evidently in justification of his doubt, that it was quite dark, but that he could see the front of the engine. When further pressed by the defendants' counsel, he said that he would certainly have seen it if the engine had struck a horse; and finally he said that he was positive. Both of these witnesses, however, only testify to the engine not having struck the horse; but the accident might have been occasioned by another part of the train; as at times happens where an animal standing alongside of a passing train turns away and in turning comes in contact with the train. Such an occurrence here is reconcilable with the whole evidence; and, with all respect to the finding of the trial Judge, I think that the proper inference to draw from the evidence is, that the horse was injured by some part of the defendants' train, not necessarily the engine; and this seems to have been the view of the trial Judge, who says in his judgment: "It might be possible to have the train hit a horse without their (the engineer and fireman) knowing it."

But it is argued that the plaintiff was guilty of negligence, and, therefore, is not entitled to recover.

By sec. 8 of 9 & 10 Edw. VII. ch. 50 (D.), being an Act to amend the Railway Act, sub-sec. 4 of sec. 294 of the Railway Act is repealed and the following is substituted therefor: "When any horses . . . 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 . . . 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," etc.

This section, like sec. 237 of the Railway Act and the repealed sec. 294, shifts the onus and renders the company liable unless it establishes that the animal got at large through the negligence or wilful act or omission, etc., of the owner, etc. Thus the company, in order to succeed, must establish two things: (a) that the animal got at large; (b) that it got at large through the owner's negligence or wilful act or omission, etc. Failing to establish both of these conditions, the company's defence fails.

ONT.
S. C.
1913
PALO
v.
CANADIAN NORTHERN R. CO.
Mulock, C.J.

Of what negligence or wilful act or omission has the plaintiff been guilty? This is a question of fact. The horse is not shewn to have been elsewhere than on the plaintiff's land, and on the defendant company's right of way. It was the duty of the defendant company, not of the plaintiff, to maintain a fence between the plaintiff's land and the company's right of way. This the defendants omitted to do, but such omission could not deprive the plaintiff of the right to use his land; and, as such owner, he was within his legal rights in allowing the horse to pasture there, and, therefore, was guilty of no negligence. The company having thus failed to establish any defence to the *primâ facie* cause of action conferred upon the plaintiff by the statute, he is entitled to maintain this action, and this appeal should be allowed.

The plaintiff in his statement of claim stated the value of the horse to be $275. At the trial he said that he would not have sold it for less than $300. This is not saying that it was worth $300. Another witness for the plaintiff spoke of the horse as worth about $300. In the face of this rather indefinite evidence, I think that the amount of the judgment should be limited to that claimed in the statement of claim, viz., $275; and judgment should be entered for that amount, and costs below and here.

Riddell, J.

RIDDELL, J.:—The plaintiff is a settler along the line of the Port Arthur Duluth and Western Railway, owned and operated by the defendant railway company, and this railway runs through his property. The railway company did not fence their right of way, but left it wholly open. The plaintiff formerly had a fence surrounding his land, but about two years ago it was destroyed by fire, and he has been too poor to rebuild it. About 600 yards from the west side of his lot, runs through his land a forced winter road, used for drawing out wood, ties, etc. In September, 1912, the plaintiff had some horses outside of his stable not far from this road; they apparently went upon the road down to the railway and wandered along the railway property, grazing as they went. One of them was injured so seriously that it had to be killed. The plaintiff sued the railway company, and at the trial in the District Court of the District of Thunder Bay, before His Honour Judge O'Leary, without a jury, that learned Judge dismissed the action. The plaintiff now appeals.

The learned Judge finds it not proved that the horse was struck by a train of the defendants.

There is no more salutary rule than that laid down by Lord Loreburn, L.C., in *Lodge Holes Colliery Co.* v. *Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 328: "When a finding of fact rests upon the result of oral evidence it is in its weight

hardly distinguishable from the verdict of a jury except that a jury gives no reasons." But an appellate Court "does not and cannot abdicate its right and its duty to consider the evidence. . . . And if it appear from the reasons given by the trial Judge that he has misapprehended the effect of the evidence or failed to consider a material part of the evidence, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate Court to a clear conclusion that the findings of the trial Judge are erroneous, it becomes the plain duty of the Court to reverse these findings:" *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, at p. 506 (Divisional Court).

In this case, shortly before the passing of a train, the horse had been seen "all right" on the plaintiff's side of the track. Shortly thereafter, it was seen with its leg broken, but on the other side; there was blood and hair on the rail on this side and near where the horse was found, and the horse had other injuries, some on the head, some on the neck, etc. The learned Judge found against the plaintiff because of the evidence of the engineer and fireman.

"The engineer and fireman on the defendants' train had done everything required of them. They were not in any way at fault. The train was running slowly. The whistle had been blown. The headlight was on, and they were on the look-out, so that they are not excusing themselves from negligence, and I believe they are telling the truth as far as they know. It might be possible to have the train hit the horse without their knowing it. From the fact that their attention was called to the horse crossing the track immediately in front of their train, they would naturally be on the look-out, and, I think, if the train had struck the horse they would know it." As the trial Judge points out, it is possible that their train struck the horse without either fireman or driver knowing it; although the fireman, at least, says it is not possible. But the error of the Judge is in the assumption that the railway-men were speaking of this particular horse, which is not the fact—it was "a horse."

I think that we are entitled to hold, and should hold, that the plaintiff has proved that his horse was injured by the defendants' train.

The defendants, however, raise before us the point that the claim of the plaintiff cannot succeed by reason of the provisions of sec. 294 (4) of the Railway Act. If effect were to be given to this contention, the result would be startling. It is argued that the act of the plaintiff in putting his horse out of the stable, although on his own land, was a putting "at large" by his wilful act, within the meaning of sec. 294 (4) of R.S.C. 1906, ch. 37. The result would be that all a railway company

ONT.

S. C. 1913

PALO v. CANADIAN NORTHERN R. CO.

Riddell, J.

need do would be to neglect their statutory duty to fence (sec. 254), and the unfortunate farmer along the line must not allow his animals out in the farm, but must keep them in stable or closed field. This would, no doubt, be a happy result for the law-breaking railway company; but, before such an extraordinary effect be given to the section, it must be clear that such is its necessary meaning.

I do not think that the section applies at all to the present case. It is sec. 295 which refers to the duties of adjoining owners *quoad* their own land, and sec. 254 to their rights. "At large" in sec. 294 refers to animals elsewhere than upon the land of their owner. This, I think, is apparent from a reading of the statute; and authority is not wanting.

In a very full and exhaustive judgment in *McLeod* v. *Canadian Northern R.W. Co.*, 9 Can. Ry. Cas. 39, 18 O.L.R. 616, on p. 622 of the report in 18 O.L.R. it is said: "The negligence of the owner referred to in the 4th clause of sec. 294 is really applicable to cases where the animal is 'at large' and not 'at home.'" And at p. 624: "Cattle on the lands of the owner are not 'at large' but 'at home.'"

A few weeks before this decision, the case of *Higgins* v. *Canadian Pacific R.W. Co.* (1908), 9 Can. Ry. Cas. 34, 18 O.L.R. 12, was decided in the King's Bench Divisional Court; and, while there was no express decision that "at large" meant "not at home," this was taken for granted throughout.

The cases previous to these are cited by the Chancellor in the *McLeod* case, and it is unnecessary to refer further to them.

The learned District Court Judge has found against negligence on the part of the plaintiff, and rightly so on the facts—even if negligence by the plaintiff could avail in an action based upon neglect by the railway company of a statutory duty; as to which see *Davis* v. *Canadian Pacific R.W. Co.* (1886), 12 A.R. 724.

The appeal should be allowed. The trial Judge did not find the value, as he might have done, and, no doubt, would have done, had the evidence been conflicting. The only evidence of value is that of the plaintiff and his witness Isaac Karila, who both place the value at $300.

Judgment should, in my view, be entered for the plaintiff for $300, with costs here and below; but, as my learned brethren think the amount should be $275, I do not dissent.

Sutherland, J.
Leitch, J.

SUTHERLAND and LEITCH, JJ., agreed with MULOCK, C.J.

Appeal allowed.

AGNEW v. McKENZIE ELLIS WOOD CO.

SASK.

S. C.
1913

(Decision No. 2.)

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and Elwood, JJ. November 15, 1913.

1. PLEDGE (§ II A—13)—DEPOSIT OF MONEY—FORFEITURE ON DEFAULT—FORFEITURE OF DEPOSIT.

Money paid in respect of a contract of sale of a business as a guarantee that the intending purchaser would not back down after the seller imparted information of a confidential character to the buyer, cannot be recovered back by the purchaser on his repudiation of the contract, where the transaction fails of completion through no fault of the seller, if the amount so put up as a guarantee is not unreasonable.

[*Agnew v. McKenzie, etc., Co.*, 10 D.L.R. 176, affirmed on appeal.]

Statement

APPEAL by plaintiffs from the dismissal of the action at the trial before Brown, J., *Agnew v. McKenzie Ellis Wood Co.*, 10 D.L.R. 176, 23 W.L.R. 302.

The appeal was dismissed.

J. F. Frame, and *A. E. Doak*, for plaintiffs.

J. McKay, K.C., and *P. Mackenzie*, for defendants.

Haultain, C.J.

HAULTAIN, C.J., concurred with NEWLANDS, J.

Newlands, J.

NEWLANDS, J.:—The plaintiffs in their statement of claim in this action, after setting out certain representations which, they allege, were made to them by the defendants, and which, they afterwards allege, were untrue, but which the trial Judge finds were substantially true, against which finding the plaintiffs have not appealed, say:—

6. The plaintiffs, relying upon the said representations, agreed by parol with the defendant company, through its agents, the defendants Romeril and Fowlie, to purchase, for the sum of $70,000 the said business, property, plant and equipment, subject to the preparation and execution of a written agreement embodying the representations in the third and fourth paragraphs hereof set out, and subject to certain adjustments to be arranged between the plaintiffs and defendants.

7. In pursuance of the said parol agreement, and subject to the preparation and execution of the said written agreement and the adjustments aforesaid, and as a guaranty of the good faith of the plaintiffs, the plaintiffs on or about the 26th day of January, 1910, paid to the defendants Romeril and Fowlie the sum of $500.

8. In further pursuance of the said parol agreement and subject as aforesaid, the plaintiffs, on or about the 28th day of January, 1910, paid to the defendants Romeril and Fowlie the further sum of $3,000.

[The learned Judge here quoted from the decision below.]

The plaintiffs appeal from the finding as to the $3,000, but not as to the $500. They claim that the $3,000 which was paid to the defendants Romeril and Fowlie was not to be turned over to

SASK.

S. C.
1913

AGNEW
v.
MCKENZIE
ELLIS
WOOD CO.

Newlands, J.

the other defendants the McKenzie Ellis Wood Co. Ltd. until the completion of a written agreement containing terms or adjustments satisfactory to all the plaintiffs, and, as such an agreement never was concluded, the $3,000 should have been returned to the plaintiffs.

There was a formal contract entered into on January 28, 1910, but the learned trial Judge has held that

> this formal contract of January 28 is not binding on the plaintiffs, simply because it was not executed by them. It purports to be executed by the Saskatchewan Cordwood Company, but that company was not as yet formed or organized; and T. D. Agnew, who signed the same, had no authority to sign as manager of that company, and thereby bind the plaintiffs.

I think that the plaintiffs' right to recover in this case depends entirely upon the question whether the defendants Romeril and Fowlie were authorized to hand the sum of $3,000 over to the defendants the McKenzie Ellis Wood Co. Ltd., which would again depend upon the fact whether the adjustments had been made satisfactory to the purchasers, *i.e.*, the plaintiffs.

At the time this money was paid to Romeril and Fowlie, the following receipt was given by them:—

> Prince Albert, Sask., Jan. 28, 1910.
>
> Received from T. D. Agnew, accepted cheque for three thousand dollars ($3,000) as part payment on the purchase-price of the E. McKenzie Ellis Wood Co. Ltd., including timber limits Nos. 873, 859, 877, 941, camps, equipments, cordwood cut and piled, supplies, sleighs and boats, etc., subject to an adjustment satisfactory to the purchaser.
>
> ROMERIL, FOWLIE & CO.
> A. Romeril.

Mr. McKay, K.C., of counsel for the defendants, argued that this adjustment applied only to the cordwood, and this is, I think, the proper interpretation to be given to it. The receipt which was given for the $500 deposit was subject to an adjustment of the wood cut. This receipt is as follows:—

> Prince Albert, Jan. 26, 1910.
>
> Received from Messrs. Romeril, Fowlie & Co. the sum of five hundred dollars, being deposit on account of purchase-price of all timber limits belonging to the McKenzie Ellis Wood Co. Ltd., and camp tools, sawing outfits and engines, and all implements and conveyances owned by said company, including all wood cut on the berths, subject to adjustments, the purchase-price to be seventy thousand dollars ($70,000) in cash.
>
> THE MCKENZIE ELLIS WOOD CO. LTD.
> E. McKenzie Ellis,
> *Managing director.*

This receipt was given to the plaintiff Hilary Agnew. It was shewn by the evidence that some 150 men were cutting wood for the McKenzie Ellis Co., for which they were paying

them $1 per cord, so that the supply of cut wood would be increasing every day, as well as the liability of the company to the men working for them; this, being to a certain extent an unknown quantity, would certainly require adjustment. It is also contended on the part of the defendants that this adjustment was made before the cheque for $3,000 was handed over to the McKenzie Ellis Wood Co. Ltd.

In the agreement, which was signed on Saturday night, January 26, there are these clauses:—

1. The vendor shall sell and the purchaser shall purchase all the aforesaid timber berths and all its interest in any other timber berths in said district, cordwood, camps, gasoline engine, steamboat, and all the cordwood now cut and piled on said timber berths, excepting what is loaded on the cars, and all the cordwood and fuel business now carried on by the vendor, at and for the price or sum of $70,000, to be paid as follows:—

2. Three thousand five hundred dollars is to be paid in cash on the execution of this agreement (the receipt whereof is hereby acknowledged) and the balance or sum of sixty-six thousand five hundred dollars on the 5th day of February, A.D. 1910.

3. The vendor agrees to pay all the wages due the men working in the cordwood camps on its timber berths up to the date hereof, and to pay all liabilities due by the vendor in connection with the premises.

This is certainly an adjustment of the cordwood, the plaintiffs getting all the cordwood cut and piled on the berths up to the date of this agreement, and the defendants retaining what was loaded on the cars, and paying all wages and expenses to that date. The cheque for $3,000 was handed to Romeril and Fowlie by the plaintiff T. D. Agnew, and it was signed "Saskatchewan Cordwood Company, T. D. Agnew, acting manager;" and the agreement which contained the above-mentioned adjustment was signed in the same way, thus shewing that he was satisfied with the adjustment made, with the provision that $3,500 was paid in cash, of which the receipt was acknowledged; and that was, in my opinion, a sufficient authorization to Romeril and Fowlie to hand the same over to the vendors, the McKenzie Ellis Wood Co. Ltd. Now, as the plaintiffs' statement of claim admits that the plaintiff had agreed to purchase the business of the defendants the McKenzie Ellis Wood Co. Ltd., and as it further admitted that the sums of $500 and $3,000 were paid by the plaintiffs subject to the adjustments, which, as I have stated, were finally arranged to the satisfaction of T. D. Agnew, who conducted all the negotiations with the defendants on behalf of the plaintiffs, it does not matter whether the formal agreements were properly executed or not, nor whether these payments should be described as deposits or payments on account, because in either event they were paid by the plaintiffs on account of the purchase-money; and, the defendants having performed their part of the agreement, the plaintiffs cannot

SASK.

S. C.
1913

AGNEW
v.
MCKENZIE
ELLIS
WOOD CO.

Lamont, J.

recover them back, the conditions upon which the payments were made having been fulfilled.

The plaintiffs not having made out a case entitling them to recover the amounts paid, the judgment should be for the defendants; and the appeal should, therefore, be dismissed with costs.

LAMONT, J.:—The first question which, to my mind it is necessary to determine is, was the $3,000 in question in this appeal the property of the Saskatchewan Cordwood Co.? The plaintiffs mutually agreed that they would join together for the purpose of purchasing and carrying on the business of the defendants the McKenzie Ellis Wood Co. To do this they required a large amount of money. To obtain that money they applied to the manager of the Canadian Bank of Commerce for a line of credit. How much does not appear; but, as the purchase-price was $70,000, it must have been a substantial sum. The bank gave a line of credit to the plaintiff in the name of the Saskatchewan Cordwood Co. When this credit was obtained, the plaintiffs had already made a deposit of $500 on account of the purchase, and had received a demand for a further sum of $3,000.

On obtaining the line of credit, one of the plaintiffs, T. D. Agnew, issued to the defendants Romeril and Fowlie, agents of the defendant company, a cheque for $3,000 on the Canadian Bank of Commerce, signing the cheque "The Saskatchewan Cordwood Co., T. D. Agnew, acting manager."

For this cheque Romeril and Fowlie gave a full receipt. It is admitted on behalf of the plaintiffs that T. D. Agnew had authority to sign the cheque in the name of the Saskatchewan Cordwood Co. and to pay out the cheque to their agents and to stipulate as to the terms on which it was to be paid over to the defendants the McKenzie Ellis Wood Co., although no express authority was given to him nor was there any express restrictions placed upon the authority he admittedly had.

The day after this cheque was paid over, the defendants and T. D. Agnew met, and, after a conference of some five hours, an arrangement was concluded between them, which arrangement was reduced to writing. The agreement was made between the McKenzie Ellis Wood Co. Ltd., as vendors, and the Saskatchewan Cordwood Co., as purchasers. It provided that the vendors should sell and the purchaser should buy the timber berths and the cordwood and fuel business of the vendors, for $70,000, payable $3,500 on the execution of the agreement and the balance on February 5. It also provided that all cordwood cut except what was then on the cars should go to the purchasers, and that the vendor would pay the wages of all

men employed in the camps to the date of the agreement. The agreement was signed by Agnew, "Saskatchewan Cordwood Co., T. D. Agnew, acting manager."

On the signing of the agreement, Romeril and Fowlie handed over the $3,000 cheque to the defendant company. The plaintiffs refused to pay the balance of the purchase-money, although the defendants were willing to complete.

The plaintiffs now seek to get back this $3,000, on the ground that T. D. Agnew had no authority to execute the agreement in the name of the Saskatchewan Cordwood Co., or to bind them by it. Are they entitled to get it back? I am of opinion that they are not. The cheque which paid this $3,000 was the cheque of the Saskatchewan Cordwood Co., and the money represented by it was the money of that company. It is only as members of that company that the plaintiffs can have any claim to it. In the light of their admission that T. D. Agnew had authority to sign the company's name to the cheque and hand it over to the vendors' agents and to stipulate as to the terms upon which it should be handed over to the vendors, the plaintiffs cannot now be heard to deny that he (Agnew) had authority to say whether or not the conditions upon which he handed it over have been performed. He is the person who imposed the stipulations, and by his signing of the agreement he admits that these stipulations were duly performed. I am, therefore, of opinion that the cheque was properly paid over.

Were it necessary so to do, I should be prepared to hold, on the facts appearing in evidence in this case, that the plaintiffs formed themselves into a partnership under the name of the Saskatchewan Cordwood Co., which would give T. D. Agnew a right to bind all the other partners. Where two or more persons agree to embark in a joint venture for the purchase and sale of goods, all participating in any profit or loss that may arise, there is a partnership as regards all goods bought pursuant to the agreement: *Lowe* v. *Dixon*, 16 Q.B.D. 455; Halsbury's Laws of England, vol. 22, pp. 6 and 7. And where two or more persons contribute of their capital to a joint fund for the purpose of purchasing a business as a joint concern, in the profits or loss of which each is to participate, there is formed, in my opinion, a partnership in which one partner is bound by the acts of the other in the carrying out the purposes for which the partnership is formed.

ELWOOD, J., concurred with NEWLANDS, J. Elwood, J.

Appeal dismissed.

ONT.

S. C. 1913

CROFT v. MITCHELL.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. December 15, 1913.

1. BROKERS (§ I—2)—STOCK BROKERS—SALE OF STOCK ON MARGIN.

On an ordinary purchase of stock on margin through a broker, if the broker fails to deliver the shares upon a demand being made with a tender of the balance due on them, the purchaser is entitled to the value of the shares at the time of such tender and demand, less any balance owing upon them and less commission and interest.

[*Croft* v. *Mitchell*, 10 D.L.R. 695, affirmed.]

2. BROKERS (§ I—2)—TRANSACTIONS ON MARGIN—BOUGHT NOTES.

In a stock margin deal, the "bought notes" are not in themselves conclusive in establishing the terms of the actual purchase.

[*Aston* v. *Kelsey*, [1913] 3 K.B. 314; *Johnson* v. *Kearley*, [1908] 1 K.B. 514, considered.]

3. BROKERS (§ I—2)—STOCK BROKERS—TRANSACTIONS ON MARGIN—SAVING CLAUSE AS TO CORRESPONDENTS' NEGLECT.

In a transaction between a stock broker and his customer for stocks on margin, a stipulation saving the broker from liability for "any kind of failure or default on the part of (such broker's) correspondents" is to be construed as referring to the correspondents' possible neglect in executing the order, and not as covering the contingency of the correspondents' bankruptcy or its effect on the customer's order.

4. BROKERS (§ I—2)—STOCK BROKERS—"BOUGHT NOTE"—PRINTED CONDITIONS.

A condition printed upon a stock broker's "bought note" sent to the customer after the order is executed will not bind the purchaser unless he has assented thereto or has failed to express immediate dissent under circumstances which cast upon him the duty of notifying the broker forthwith that he does not agree to the conditions expressed.

[*Price* v. *Union Lighterage Co.*, [1903] 1 K.B. 750, 20 Times L.R. 177, applied; *Ewing* v. *Dominion Bank*, 35 Can. S.C.R. 133, referred to.]

5. BROKERS (§ I—2)—STOCK BROKERS—ORDER EXECUTED THROUGH FOREIGN BROKER.

In a stock margin deal where the buyer's broker in the usual course of the transaction would select and employ a foreign broker to complete the transaction, the fact that the customer was charged with the entire cost of the shares at the foreign price plus the foreign broker's commission, without distinction being made as to the commission or notice to the customer that the commission was included, and the customer is also charged a commission by his own broker, is evidence to shew that the foreign broker was the agent only of the local broker, and that the local broker was himself responsible to the customer for putting through the transaction and not merely an agent to transmit the order to the foreign broker.

Statement

APPEAL by the defendants from the judgment of Lennox, J., 10 D.L.R. 695, 4 O.W.N. 1086.

The appeal was dismissed.

R. S. Cassels, K.C., for the defendants.

G. H. Watson, K.C., for the plaintiff.

ONT.

S. C.
1913

CROFT
v.
MITCHELL.

Hodgins, J.A.

The judgment of the Court was delivered by HODGINS, J.A.: —A perusal of the evidence satisfies me that the learned trial Judge is correct in his finding as to the effect of the agreement made between the appellants and respondent on the first occasion. It was argued, however, that, after the apparent execution of the order to purchase, the appellants had, by virtue of the conditions upon their bought note, in some way altered the relative positions and had become intermediate agents.

The measure of damage fixed by the learned trial Judge is correct, for there is nothing to indicate that actual delivery was not contemplated. The appellants' bought note begins with a statement to that effect, and the appellants' evidence at the trial establishes that as the legal result of their contract.

I do not read the bought note as indicating any change of position from that stated by Lamont: "Q. You got an order to purchase the shares? A. Yes, sir. Q. You accepted that? A. Yes."

From the bought note of Lyman & Co., put in at the trial, it would appear that they bought at one-quarter per cent. less than the amount represented to the respondent by the appellants in the bought notes of the latter.

I do not think it can be said that the bought notes are in themselves conclusive: *Aston* v. *Kelsey* [1913] 3 K.B. 314. Yet they illustrate how the various parties treated the actual purchase, and from them it is clear that Lyman & Co. bought for and on account of the appellants, and that the appellants bought for and on account of the respondent. Mitchell says that Lyman charged them one-sixteenth per cent. on the purchase; so that the statement in the original bought note of 57¼, on a purchase by Lyman at 57, shews that the appellants included Lyman's commission as part of their own, and did not disclose it to the respondent, and included also one-eighth for prospective sale. This does not effect a change in relationship, as was the case in *Johnson* v. *Kearley*, [1908] 1 K.B. 514, because there was no concealed and arbitrary addition, but only the usual broker's commission, which in *Aston* v. *Kelsey* (ante) is treated as proper. But the non-disclosure, or rather the want of statement, that a commission charge was being made by Lyman & Co., is of importance as shewing that the latter were treated by the appellants as their agents, and not as the brokers of the respondent.

If this be correct, the importance of the notice said to be given by the printed matter on the bought note disappears. But there is really nothing on the bought note to indicate that Lyman & Co. were other than the agents of the appellants. Their case is based upon the fact that Lyman & Co. bought these shares; and a condition printed upon the note of that purchase after the order is executed, and not assented to by the principal, ought

ONT.

S.C.
1913

CROFT
v.
MITCHELL.

Hodgins, J.A.

not to be binding unless it is beyond question clear, and couched in such terms as to cast upon the principal the duty of immediate dissent: *Price* v. *Union Lighterage Co.*, [1903] 1 K.B. 750, 20 Times L.R. 177. There is not between a broker who knows all the facts and does not disclose them, and a customer, any duty similar to that stated in *Ewing* v. *Dominion Bank* (1904), 35 S.C.R. 133; nor, after a contract is made and executed or partly executed, can its effect be impaired by any such notice as is expressed on these bought notes.

The words "any kind of failure or default on the part of our correspondents" can hardly be said to include insolvency and its consequences; but rather point to neglect in executing the order.

I think the appeal should be dismissed with costs.

Appeal dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

THE KING v. FALARDEAU.

Exchequer Court of Canada, Audette, J. March 10, 1913.

EMINENT DOMAIN (§ I D 2—55)—*For railroad—Public work—Wharf fronting on area taken.*]—Hearing of an information filed by the Attorney-General of Canada for the expropriation of lands for the National Transcontinental Railway, a public work of Canada.

E. J. Flynn, K.C., and *J. E. Chaplean*, for plaintiff.
E. Baillargeon, for defendants.

AUDETTE, J., held that the Exchequer Court has no jurisdiction to entertain a claim for the value of property outside of the area expropriated as shewn in the plan and description in the registry office. Where, therefore, the plan shewed a certain lot as to be expropriated, the Court dealing with the value to be paid for the expropriated property only, could not in the same proceeding award damages claimed in respect of two piers built in deep water opposite the property in question. A direction was given for the amendment on the registry to embody corrections made upon the plan of expropriation to correctly state the superficial area of the land expropriated.

AUTOSALES GUM AND CHOCOLATE CO. v. FAULTLESS CHEMICAL CO.

Exchequer Court of Canada, Cassels, J. March 4, 1913.

TRADE-MARK (§ VI—32)—*Expunging from registry—Disuse.*]—Petition to expunge two trade-marks from the registry.

M. H. Ludwig, K.C., for petitioners.
R. S. Smart, for respondents.

CASSELS, J., held that the Exchequer Court has jurisdiction, on the application of any party aggrieved, to order the rectification of the trade-marks registry by expunging a mark that, through non-use or abandonment, remains improperly thereon to the embarrassment of trade.

B. C.

1913

FRIPP v. CLARK.

Vancouver County Court, Judge McInnes. June 2, 1913.

MECHANICS' LIENS (§ IV—17)—*For what work—Architect's services.*]—Trial of action to enforce a mechanics' lien.

W. C. Brown, for plaintiff.

Saunders, Hannington, and *Creagh*, for the several defendants.

JUDGE MCINNES held that section 6 of the British Columbia Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, which confers a mechanics' lien upon a person who "does work or service or causes work or service to be done upon, or places or furnishes any material to be used in the making, constructing," etc., of any building, does not confer upon the architect a right to a lien on the building for the cost of preparing the plans. Furthermore where five per cent. was to be paid for preparing the plans and for superintendence, the contract is an indivisible one, and the architect, not being entitled to a lien as regards the preparation of the plans cannot maintain a lien for any sum in respect of the superintendence.

Action dismissed.

CUNNINGHAM v. NEW WESTMINSTER.

British Columbia Supreme Court. Motion before Murphy, J.

MUNICIPAL CORPORATIONS (§ II C 1—54)—*Ordinances and by-laws—Franchise—Repeal.*]—Motion to quash a municipal by-law purporting to repeal a by-law empowering the predecessors in title of the plaintiff to construct, operate and maintain gas works in the city of New Westminster.

The original by-law had been passed many years previous to the repealing by-law and it had expressly authorized the laying of gas pipes through the streets, but, under the superintendence of the city board of works, the plaintiff had proceeded to lay pipes on the streets without first notifying the city officials, and the municipality then voted to repeal the original by-law.

MURPHY, J., held, referring to *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, that an equity had arisen in the plaintiff's favour similar to an estoppel, because of the expenditures made by plaintiff; and that the delegation of power by the Legislature to make, amend and repeal by-laws in connection with gas companies did not apply to authorize the repeal of the by-law in question where it would be manifestly unfair and unjust to the plaintiff, as the successor of the original company which had been specially authorized by the municipality to carry on the gas works. The repealing by-law was, therefore, quashed.

UNITED NICKEL COPPER CO. v. DOMINION NICKEL COPPER CO.

ONT.
1913

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. November 18, 1913.

[*United Nickel Copper Co. v. Dominion Nickel Copper Co.*, 11 D.L.R. 88, affirmed.]

CONTRACTS (§ I D 1—47)—*Joint obligation—In complete execution—Pleading—Counterclaim—Damages through interim injunction.*]—Appeal by the plaintiff from the judgment of Kelly, J., in *United Nickel Copper Co. v. Dominion Nickel Copper Co.*, 11 D.L.R. 88, 4 O.W.N. 1132.

J. T. White, for the plaintiffs.

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

THE COURT dismissed the appeal with costs.

ST. CLAIR v. STAIR.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. November 13, 1913.

[*St. Clair v. Stair*, 12 D.L.R. 840, affirmed.]

DISCOVERY AND INSPECTION (§I—1)—*Affidavit on production—Claim of privilege for reports—Identification—Sufficiency—Documents obtained for information of solicitor—"Solely."*]—Appeal by the plaintiff from the order of Falconbridge, C.J.K.B. in Chambers, *St. Clair v. Stair*, 12 D.L.R. 840, 4 O.W.N. 1580, reversing the order of the Master in Chambers, *St. Clair v. Stair*, 11 D.L.R. 862, 4 O.W.N. 1437, directing the defendants to file a better affidavit on production.

S. H. Bradford, K.C., for the plaintiff.

R. McKay, K.C., and *A. R. Hassard*, for the defendants.

THE COURT dismissed the appeal with costs.

INDEX

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

CASES—*continued.*

CAVEATS—

CERTIORARI—

CHAMPERTY AND MAINTENANCE—

CHATTEL MORTGAGE—

COLLISION—

COMPANIES—

COMPROMISE AND SETTLEMENT—

CONDITIONS—

CONFLICT OF LAWS—