D. W. OGILVIE & COMPANY..... (PLAINTIFFS)..... } APPELLANTS;

1920 Nov. 15, 17.
1921 Feb. 1.

AND

A. C. DAVIE AND OTHERS..... (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Contract—Illegality—Public order—Questions raised only at argument—New trial—Arts. 989, 990 *C.C.—Sect.* 158 (*f.*) *Cr. C.*

Per Duff, Anglin, Brodeur and Mignault JJ.—Where a contract sued upon has been held void for illegality on a ground not pleaded and not referred to at the trial until after the close of the evidence, and the circumstances relied upon to establish such illegality may be susceptible of explanation, a new trial should be directed to afford the plaintiff an opportunity to adduce evidence to meet the defence of illegality. *Connolly* v. *Consumers Cordage Co.* (89 L.T.R. 347) followed.

Per Anglin and Mignault JJ.—In the case of a sale to the Government a contract by the vendor to pay an agent, engaged by him to procure the highest possible price, all that such agent could obtain over a figure fixed by the vendor as the minimum net price he would accept is not *per se* illegal as contrary to public order.

Per Idington J. (dissenting).—Upon the evidence, the option agreement alleged by the appellants had expired and had never been renewed.

Judgment of the Court of King's Bench reversed, Idington J. dissenting.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec, affirming the judgment of the trial court and dismissing the appellant's action.

PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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The appellants claim from the respondents the sum of $12,567.85 being for commission and profits due to them by virtue of a certain agreement, this sum being the difference between the amount for which the appellants had the right to purchase the respondent's property and the amount paid by the government under expropriation proceedings. The respondents fyled pleas that the action was premature, that the commission and profits had already been paid to appellants' agent, and others in relation to the respective items of the claim. At the close of the trial, the respondents' counsel, in argument, alleged that, upon the evidence, when they agreed to pay the appellants for was an exercise of improper influence with the government of Canada or some ministers of the Crown or some of its officials in order to effect the sale of their property. The trial judge and the Court of King's Bench dismissed the appellant's action, resting their judgment solely on that ground of illegality.

Eug. Lafleur K.C. and *J. W. Cook K.C.* for the appellants.

Louis St. Laurent K.C. and *Gravel K.C.* for the respondents.

IDINGTON J. (dissenting).—The respondents, as owners in part and as executors or trustees in part, were entitled to compensation for land in Levis expropriated by the Crown for purposes of the Intercolonial Railway on the 12th August, 1912. It is by no means clear whether it was as the result of ignorance of the fact that the land had been so expropriated or as a

means of determining the compensation due the respondents, that they retained appellants on the 1st October, 1912, for some purpose and to effectuate same gave, on said date, the following option:—

D. W. Ogilvie, Esq.,
11 St. Sacrament St., Montreal, P.Q.

Dear Sir:

We hereby give you an option to purchase the following described property, such option to be good for four (4) months from present date.

That certain property known as the G. T. Davie & Sons property, situated in the town of Levis, P.Q., the said property being bounded on the north-west by the river St. Lawrence; on the south-east by the public road known as the Commercial Road; the whole as per plan prepared by A. E. Bourget, P.L.S., of date March 28th, 1912. The whole as it now exists with wharves, buildings, etc., erected thereon.

The property to be accepted subject to existing leases and servitudes.

Rents, taxes, insurance, etc., to be adjusted to date of passing of deeds.

The property to be free and clear of any and all encumbrances.

Purchase price to be as per our letter of this date, payable on passing of deeds, which must be passed within thirty (30) days from the date of acceptance of option.

In the event of this option being taken up and the purchase price paid, we agree to pay D. W. Ogilvie & Company, incorporated, a commission of five per cent (5%) on the purchase price.

Yours very truly,
George T. Davie & Son.

The appellant responded thereto by the following:—

11 St. Sacrament St.
Montreal, Oct. 1, 1912.

Messrs. G. T. Davie & Sons,
Levis, P.Q.

Dear Sirs:

In reference to the option given me this day to purchase that certain property owned by you situated in the town of Levis, P.Q., the whole as per plan prepared by A. E. Bourget, P.L.S. of date March 28th, 1912.

It is hereby understood that this option is given for the purpose of my acting as your agent for the sale of the property at the best obtainable figure and on completion of the sale I am to receive a commission of five per cent on the purchase price.

Yours very truly,
(Sgd.) Douglas W. Ogilvie.

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The letter of respondents of 1st October, 1912, enclosing the option, had referred to the part the Government required as worth, at least, $2.00 per foot, evidently thereby including injurious affection of so taking, and referred to some other land as possibly required for same purpose as worth $1.00 a foot.

That option evidently expired by effluxion of time without any results, or extension, or renewal, and all therein, and connected therewith, seems only useful as illuminating to a certain, or rather uncertain, extent, what follows.

The next stage in the relations between the parties hereto appears, by the following letter of appellant of 7th May, 1913, and reply of respondent of 14th May, 1913, which read as follows:—

Montreal, May 7, 1913.

Messrs. George T. Davie & Sons,
Levis, P.Q.

Dear Sirs:—

The Intercolonial Railway of Canada have sent us a blue print of your property situated in Lauzon Ward, Levis, shewing the land they purpose to expropriate lying between the present Intercolonial Railway and the King's highway; the strip of land having a superficial area, according to the plan as prepared by A. E. Bourget, of 36,900 sq. ft. E.M.

In order to take up this matter with the Intercolonial Railway, will you kindly write us giving us the best cash price you will accept for the 36,900 sq. ft. of land. On receipt of your letter we will communicate with the proper officials and endeavour to make a sale of the property direct to the Intercolonial Railway without expropriation proceedings.

Trusting you will give this matter your early attention, as it is advisable to settle with the railway before expropriation proceedings are started.

Yours very truly,

(Sgd.) D. W. Ogilvie & Co., Inc.
Per D. W. Ogilvie.

(REPLY).

Levis, May 14th, 1913.

Messrs. D. W. Ogilvie & Co.,
11 St. Sacrament St., Montreal, Que.

Dear Sirs:—

In answer to your letter of May 7th, we beg to say that we are asking one dollar and twenty-five cents ($1.25) per foot of our property which has been expropriated by the Intercolonial Railway.

Yours very truly,
Geo. T. Davie & Son.
Per J. O. A. V.

That seems to have resulted in some little movement on the part of the appellant, for it is able, on the 13th Oct., 1913, to write as follows:—

Montreal, October 13th, 1913.

F. P. Gutelius, Esq.,
General Manager,
Intercolonial Rly. of Canada,
Moncton, N.B.
Re Geo. T. Davie & Son's property, Levis, P.Q.

Dear Sir:—

We beg to acknowledge receipt of your favour of the 9th instant and note contents.

As per our letter of May 16th, 1913, addressed to Mr. F. T. Brady, we are prepared to sell the G. T. Davie & Sons' property in Lauzon Ward, Levis, P.Q., containing 36,900 sq. ft., for the sum of $64,575.00, or $1.75 per sq. ft. This price will cover all damages.

We would point out that the question of "Damage" is a serious one, as Mrs. Davie has to vacate the Davie residence, lying to the south of the land in question; and the office of G. T. Davie & Sons, and the Quebec Salvage Company, has to be vacated owing to the noise, inconvenience, etc., caused by the Intercolonial Railway taking over the strip of land in question.

In addition to this, the question of carriage between the Davie property situated to the south and to the north of the strip of land in question has become a difficult one owing to the several tracks they have to cross, and to the fact that the ground on this strip has been excavated and it makes it difficult to take a heavy load from one property to the other.

Mr. Geo. D. Davie is in Montreal to-day and the contents of this communication has been put before him, and he has expressed his opinion of being anxious to come to an early amicable settlement with the Railway Company.

Yours very truly,
(S.) D.W. Ogilvie & Co. Inc.
(S.) D.W. Ogilvie.

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Something, not clear what, revived the energy of appellant, for we have respondent's letter:

Montreal, Jan. 30th, 1914.

Messrs. D. W. Ogilvie & Co. Inc.

Dear Sirs:—

Re Levis property.

I hereby confirm the verbal extension given you some time ago of your option for the purchase of the property of the undersigned at Levis, at the modified price of a dollar and seventy-five cents per foot for the portion required by the Government, viz., the portion lying between the highway and the Intercolonial Railway, and containing approximately thirty-six thousand nine hundred square feet, or one dollar and twenty-five cents per foot, if you take the whole of the property; the above option being hereby extended until, say, the first of April, next.

Yours truly,

(S.) George T. Davie & Sons.
Per G. D. D.

Montreal, March 31st, 1914.

The above option is hereby renewed on the same terms and condition for sixty (60) days from the present date.

(S.) George T. Davie & Sons.
(S.) per G.D.D.

and reply from appellant's manager, as follows:—

March, 26th, 1914.

George D. Davie, Esq.,
Levis, P.Q.

Dear Mr. Davie:

In reference to the strip of land containing about 36,900 sq. ft. which the Intercolonial Railway desire to purchase.

Following your verbal instructions, I have again got directly in touch with the officials of the Intercolonial Railway regarding the sale of this property, and have to-day been informed that as Mr. Gutelius is likely to be kept at Ottawa for some days on important business nothing at present can be done.

The official in question, however, informed me that the railway were anxious to come to an amicable settlement for the purchase of this property.

Under the circumstances, in order that there be no misunderstanding, will you be good enough to renew the option of date January 30th, 1914, which expires on April 1st, 1914, for say, sixty (60) days.

This will give an opportunity to meet Mr. Gutelius in Montreal or Moncton during the next couple of weeks and get this property sold at private sale without any of our Quebec friends interfering in same.

With kindest regards,
Yours very truly,
Douglas W. Ogilvie.

Nothing having been accomplished meantime, and the sixty days' extension if given (as may be inferred from the letters of 22nd April and 28th April, 1914) having expired, I again remark that all the foregoing must pass for nothing as contractual basis to be relied upon by appellant, save as illuminating the relations between the parties.

The letters I refer to of April, 1914, are as follows:—

Geo. D. Davie, Esq.,
Levis, Que.

Montreal, April 22nd, 1914.

Dear Sir:—

I understand Mr. Barnard spoke to you in reference to the property of George T. Davie & Sons which I.C.R. wish to acquire.

I can get you one dollar and seventy-five cents ($1.75) per sq. ft. for this piece of land from the railway, but I am also of the opinion that if we hold out, this sum can be increased.

As our option on this property is good until June 1st, I would be obliged if you would give the matter consideration.

I might suggest that the property be sold to myself or some other responsible individual on a small cash payment at $1.75 per sq. ft.; and that any profit over and above $1.75 per sq. ft. secured from the I.C.R. be divided amongst those interested. This matter we would have to adjust when we next meet.

Trusting you will take the matter up with your brothers and see what can be done.

Yours very truly,

(Sgd.) Douglas W. Ogilvie.

Levis, Que., 28th April, 1914

D. W. Ogilvie, Esq.,
11 St. Sacrament St., Montreal.

Dear Sir:—

Your favour of the 22nd instant re the property expropriated at Levis by the I.C.R. was duly read and as requested I have talked the matter over with my brother.

He is agreeable that we dispose of this property either to yourself or some other responsible party that you would name at $1.75 per sq. ft. on consideration of a cash payment to be made on same, leaving you to dispose of it to the Government and any difference over the $1.75 to be divided as you see fit.

Yours truly,

George D. Davie.

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On the 2nd of June, 1914, when that last option extension ended, respondents, apparently tired of the needless and vexatious delay, promptly began to act on their own behalf and wrote directly to the manager of the Intercolonial as follows:—

Montreal, June 2nd, 1914.

F. P. Gutelius, Esq.,
Manager, Intercolonial Rly., Moncton, N.B.

Dear Sir:—

Since Sept., 1912, we have been corresponding with various officials of the Intercolonial Railway in reference to a strip of land at Levis, P.Q., which the railway company has taken possession of and which belonged to Geo. T. Davie & Sons, Levis, P.Q.

The property in question has been acquired by the Davie Shipbuilding and Repairing Co., Limited, and at a meeting of the directors held at Montreal, this morning, we were instructed, without prejudice to the proprietors' rights and subject to immediate acceptance, and that the deed of sale be signed not later than July 1st, 1914, to make the following proposition:

We will sell you the property containing a superficies of 36,900 sq. ft. E.M. as per survey prepared by A. E. Bourget, P.L.S., for the sum of sixty-nine thousand, five hundred and seventy-five dollars ($69,575.00) cash, on passing of deed. The purchase price to include damages to the adjoining property as belonging to the Davie Company.

The Davie Shipbuilding and Repairing Co., Limited, is anxious to come to an amicable settlement regarding the purchase of this land, and we trust you will give the matter your immediate consideration.

His reply is not in the case.

Surely that must have cut away all hope on the part of appellant ever reaping anything by fair means of any profit beyond the basis of $1.75 per foot for whatever land taken by the Crown for the purposes in question.

In response to letters meantime the appellant's manager wrote as follows:—

11 St. Sacrament St.,
Montreal, Sept. 15th, 1914.

Messrs. George T. Davie & Sons,
Levis, P.Q.

With reference to your letter of the 8th instant, asking what the position is of your claim against the Government for land taken for the I.C.R. cattle sheds at Levis.

I beg to say that the settlement of this matter is progressing, I consider on the whole, very satisfactorily.

We have arranged with the Government to apply for a petition of right to sue the Government for the value of the land, but have been asked not to press this matter, as they expect to make a settlement.

In Ottawa last week we were asked to write Mr. Gutelius telling him that if the matter was not settled before the 20th instant, we would apply for the Petition of Right and that the same would be granted.

Of course you know it is very difficult to get the Government to move in any matter outside of war matters just at present; but they are well disposed, and I really think we will be able to settle this matter without suit within a very short time.

Of course when the settlement is effected, it will bear interest from the date of the taking of possession by the railway company of the Davie property.

Trusting this explanation is satisfactory, and assuring you that we are doing everything possible in order to obtain a quick settlement in this matter.

Yours very truly,

Douglas W. Ogilvie.
Levis, Que., 17th Mar., 1915.

Nothing more appears in the case bearing directly on the measure of appellant's retainer until March 17th, 1915, when respondents write as follows:—

Messrs. D. W. Ogilvie & Co., Inc.,
11 St. Sacrament St., Montreal.

Dear Sirs:—

In connection with our property at Levis, which the Intercolonial Railway Co. has taken possession of for a siding and which property has been in your hands for sale to the Government, Mr. Barnard states that the Government will be willing to settle for the property on terms that would give us one dollar and seventy-five cents ($1.75)

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per foot for the property, with interest at 4% from date of sale to be passed as soon as the deeds are got in shape. The purchase price to be payable as soon as the Government is in funds and not later than two years from date.

This would be satisfactory to us and we hereby authorize you to close the matter on such terms.

Yours faithfully,

Geo. T. Davie & Sons.

It is to be observed that this did not expressly renew or pretend to extend the terms of previous letters giving an option and it is to me incredible that in face of the respective letters of appellant of 13th October, 1913, and of respondents of 2nd of June, 1914, to Mr. Gutelius, plainly declaring their terms, that there should exist any hope of profit to be got by fair means.

I, therefore, see no basis upon which appellant can rest any claim for compensation on such a basis, or any other basis than the 5% on price of $1.75 per foot.

Hence if there was in fact any discovery that a larger area than the original 36,900 square feet within that spoken of and defined by the plan of expropriation, that larger area was respondents' property and the price they named of $1.75 per sq. foot over and over again, sometimes expressed as 36,900 square feet, and at others as that more or less, was theirs within the literal terms declared in the foregoing letters.

The only thing quite apparent is that for years the respondents having allowed the appellants the opportunities I have outlined above, then ceased to do so and claimed payment on basis of $1.75 a foot upon which appellant would be entitled to its commission. That had been paid before the appellant sued herein on the basis of 36,900 sq. feet being the correct measurement as assumed throughout till execution of deed;

unless in regard to an incident connected with the work of one Addie, a surveyor, who was not called, and whose computation of the area in question may have been the foundation for claims alleged to have been made by the Government that it contained only 34,312 square feet.

The deed to the Crown which resulted, after a year or more of delay, and is dated 2nd June, 1915, professes to convey 38,723 feet.

I am unable to identify the two descriptions, that is the one given in expropriation and that given in the deed, as being identical, though I see nothing to demonstrate that the area in the original description had been for any reason increased and yet why a new description was resorted to is neither explained nor explicable on the evidence before us. Either they are the same or the contract under which appellant worked has been departed from in a way that would not help it herein.

If they are, as is quite possible, within the same boundaries, only differently expressed, then the appellant has nothing to complain of herein unless by reason of an error of computation of area that he has not got his commission upon the price of $1.75 per square foot.

The apparent difference in area would be 1,823 feet, which, at $1.75 per foot, would be $3,190.25, and appellant's commission thereon would be, as I make it, $159.51 due him, if this later computation of area correct.

On my construction of the appellant's contract with respondents, as evidenced by the above quoted letters and the attendant circumstances interpreting same, this would be the ultimate result for appellant.

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I can see no ground for the extension of the implications of profit after the time limit therefor had expired and the respondents had declared by their letter of 2nd June, 1914, to Mr. Gutelius, the terms upon which they were willing to accept as compensation for their land expropriated, whether it be 36,900 feet or 38,723 feet.

It would have been highly improper for those serving the Crown to have given more; if more given, it must be attributed to mistake, or something worse, which I hope did not exist, and, in any event, could not benefit appellant.

In this view of the contract between the parties hereto there never was any foundation for the pretension of appellant to any share in the interest to be paid by the Crown for the detention of payment.

The claim set up by appellant of about twenty to twenty-five per cent profit, under all the circumstances, is most repulsive and suggestive of much suspicion of its having been founded upon hopes and expectations offensive against the provisions of the public policy enunciated in section 158 of the Criminal Code.

Unless we are to assume, what is inherently improbable, that the respondents were so ignorant and incapable as to be quite unfitted for taking care of their own affairs, and much less of discharging their duties as trustees, the result seems inexplicable upon any other theory than that the Crown was made to pay twenty-five per cent more than respondents were willing to accept.

Which alternative should be adopted: That the Crown was not well advised, or that it was imposed upon? And again, that such imposition was designedly brought about, or merely that the feeble folk serving the Crown were overcome by those serving the respondents?

And again, was it the result of a clear recognition on the part of the respondents that it was only by engaging an equipment adequate to surmount the lethargic resistance of such feeble folk, that the respondents could get a just consideration of their rights which led them to offer such a price for the service?

In the evidence there is a good deal that is very suggestive of some willingness to do some manoeuvering.

In justice to the Minister of the Department there is not the slightest ground of suspicion attaching to him or to others directly serving the Crown.

We must, however, I submit, aid them in removing the tendency of suspicion on the part of those believing otherwise that such things can be done, by always scrutinizing closely the conduct of those dealing with their subordinates.

There is much to arouse suspicion in some features of the actions of the parties hereto and their respective agents, and if the suspicious discovery of increase in area is unfounded the Crown may recover from the respondents, but that would not or should not help appellant.

There is, in my view of the facts, no need to consider the ground taken in the courts below.

If the result had been to increase the price to the extent claimed by appellant of twenty or perhaps twenty-five per cent beyond the price which the respondents had offered, then, I suspect, there would be much in the case to suggest an examination of the law and facts which the said courts have proceeded upon.

I would dismiss this appeal with costs, but without prejudice to the appellant's right to recover in another action the small item of $159.00 it may be entitled to if in fact there was actually an increase of area beyond that originally contemplated, conveyed to the Crown.

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Whether or not there was an error or computation in the area upon the basis of which the price per foot desired by respondents was such as to entitle appellant to the item I have named as possible based thereon, has not been the foundation of this appellant's action or tried out.

It is quite possible that the respondents have been paid too much, and that such overpayment is recoverable by the Crown, and hence I do not deal with the payments made by respondents to the subordinate agent of the appellant.

DUFF J.—I regret to say that I have been unable to concur in Mr. Lafleur's contention that the decision of the trial judge affirmed by the Court of King's Bench to the effect that the plaintiff's claim arises out of transactions juridically sterile because partaking of the nature of trafficking with influence is entirely without foundation in the evidence.

On the other hand it is quite clear to me that the odious accusation which by the conclusion of the courts below is held to be established was never really put to the witnesses principally concerned in such a way as to give them a fair opportunity of meeting it and clearing themselves; and the point to which I have given my attention is whether, there being some evidence pointing in the direction of the conclusion at which the courts below have arrived, it is of sufficient weight to support the judgments or of so little weight as to require a reversal of those judgments on this point. On the whole I think the more satisfactory course is to order a new trial reserving all the costs including all the costs of the appeal to this Court to abide the result of that trial. This being my conclusion, it would be improper to discuss the evidence in detail.

I am satisfied that as regards the other issues raised by the pleadings the appellants have fully established their right to recover the amount claimed; and the retrial should therefore be limited strictly to the issue whether or not the contract upon which the claim is based is a contract the enforcement of which the law regards as incompatible with those paramount interests of the community which are compendiously indicated by the phrases "public policy" and "public order."

ANGLIN J.—Appealing from a judgment of the Court of King's Bench, affirming the dismissal of their action by the Superior Court, the plaintiffs seek judgment for the amount of their claim, or, alternatively, a new trial on the ground that they were not given an opportunity of meeting a charge of illegality, not pleaded and first preferred in the course of the argument before the trial judge, on which the judgments against them solely rest.

The claim as formulated in the declaration consists of three items:

(a) Balance of commission at five per cent on the price which the defendants agreed to accept for their land.....$	159.51
(b) Price paid in excess of what the vendors agreed to take, exclusive of interest.....	1,809.75
(c) Interest on the price paid between the date of taking possession and the date of closing the transaction ("date of sale")..	10,598.59
	$ 12,567.85

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Besides particular defences peculiar to each item, two general defences are pleaded—that the action is premature and that the plaintiffs' claim has been satisfied by payments made by the defendants to Mr. C. A. Barnard. Consideration of these pleas may be advantageously deferred. The discussion of the several items will, therefore, proceed subject to them and to the defence of illegality.

(a) and (b). A contract to pay a commission of five per cent on a price of $1.75 per square foot, which the defendants had agreed to accept, is admitted. A supplementary contract that any sum in excess of this figure which the plaintiffs could induce the Government to pay would belong to them as additional remuneration is contested. But in view of the admissions in the examination of Allison C. Davie, the correspondence in evidence, and the acknowledgment of this supplementary contract by the payment of $5,000 on account of it by the defendants to Mr. C. A. Barnard, there seems to be no reason to doubt that it is established. Whether the plaintiffs are entitled to the balance of the commission asked and only to the $1,809.75 claimed as excess price, or whether the demand for a balance of commission is unfounded and the whole $5,000 and interest thereon should have been claimed as "extra price" depends on the true area of the property conveyed to the Crown.

If the area conveyed was in fact that named in the deeds, 38,723 square feet, the claim as formulated is correct as to both items. If it was 36,900 square feet, which was the basis of the negotiations and of the actual settlement with the Government of the price paid ($64,575 for 36,900 square feet at $1.75, plus $5,000, a lump sum agreed to as a compromise), the claim for a balance of commission is ill founded and,

if not debarred by the principle limiting the adjudication to the sum demanded (Art. 113 C.C.P.) the plaintiffs would be clearly entitled to the sum of $5,000 and interest thereon instead of $1,809.75, in respect of item (b) of their claim. In their factum, however, while apparently recognizing that a mistake was made in this respect to their detriment they adhere to their claim as formulated in the declaration.

The notice of expropriation gave the area of the property to be taken as .79 acres, or 34,412 square feet. According to a survey made by Mr. Bourget, P.L.S., the actual area of the land expropriated was 36,900 square feet and the defendants appear to have based their claim throughout on that being the correct quantity. They still adhere to that position. Another survey made for them by Mr. Addie is stated in a letter from the Deputy Minister of Railways to Mr. Barnard to have shown an area of 38,671.3 square feet. The Deputy Minister points out that Mr. Addie probably included land which was already the property of the Crown. The defendants asked that the Government should send a qualified surveyor to check over Mr. Addie's survey on the ground and arrive at a definite result with him. If that was done, the record does not show the result. Whether anything was done or not, and whatever its result if anything was done, it is abundantly clear that the transaction was closed between Mr. Barnard and the Department on the basis of the actual area being 36,900 square feet, which it was agreed should be conveyed at a price of $1.75 per foot ($64,575) plus $5,000 additional. This latter sum was agreed upon, Mr. Barnard tells us, by way of compromise between the figure of $1.75 per square foot stated by the plaintiffs in their letter of 13th October, 1913, to the general manager of the

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I.C.R., and confirmed by the defendants' letter of the 30th of January, 1914, as what they were willing to accept on a basis of 36,900 square feet, and $2.00 per square foot, the price finally demanded from the Department by Mr. Barnard, who represented the plaintiffs. Mr. Barnard's evidence and his letters put that beyond doubt.

The deeds transferring the land to the Crown, in which the area is stated to be 38,723 square feet, were not seen either by the plaintiffs or by Mr. Barnard before execution, although they had asked to be notified of the closing of the matter and had stated (letter of the 14th of March, 1916) that they wished to be present. Mr. Barnard tells us that on the date of closing (2nd of June, 1916) Mr. Dupré, who acted for the Government in investigating the title and in giving instructions for the preparation of the deeds and had arranged to notify Mr. Barnard so that he and Mr. Ogilvie might attend on the closing, telephoned him from Quebec that

> the matter was all ready and that the Davies insisted on its being closed that afternoon.

Of course Mr. Ogilvie and Mr. Barnard were unable to be present.

Mr. Banard says that there were three different surveyor's reports and that that meant quite a few interviews between himself and Mr. Dupré. On the 2nd of February, 1916, the plaintiffs wrote to the defendants:—

> The situation is simply this: The Government have several plans showing different areas of the property, and it is necessary that Mr. Addie prepare a plan of the property as per the expropriation notice
>
> If the area as shown on this plan appears satisfactory to the Government the matter will be closed at once.
>
> The Department of Railways and Canals informs us that their engineer at Moncton has instructions to go into the matter with Mr. Addie. And we are to-day again taking up the matter with the Department, inquiring as to the delay.

To this the defendants replied on the following day:—

Plans have already been prepared by Mr. Addie of the property and are now in possession ot the Government.

What is required is that an engineer be appointed to go over the ground with Mr. Addie (as Mr. Brown, chief engineer at Moncton, wrote Mr. Addie he had no orders to that effect) and which Mr. Barnard promised he would attend to at Ottawa.

It is urgent that this be done and that a Government engineer go over the ground with Mr. Addie so that we can get the matter closed up and a settlement effected without further delay.

On the 13th of March the papers were sent by the Department of Justice to MM. Dupré & Gagnon with instructions to get the matter closed without delay. It must have been after this date that Mr. Barnard had the frequent interviews with Mr. Dupré of which he speaks. Some delay was occasioned by difficulties of title and in having the order in council for payment put through. There is no further reference in the record, however, to the question of area. Neither Mr. Dupré nor the notary Couillard, who prepared the deed, nor any of the surveyors or railway officials concerned, is called to explain how the area came to be fixed at the figure named in the deeds. Mr. Barnard in a letter of the 22nd of May, 1917, to the late Mr. Stuart K.C., who was then acting for the defendants, refers to the change of area as a "manoeuvre * * with a view to covering up the $5,000." Thomas O'Neill, the defendants' accountant and confidential clerk and a witness on their behalf, also suggests that 38,723 square feet was inserted in the deed "because there was something to cover" in "the making of the $5,000." But if that had been the purpose the area would almost certainly have been increased by 2,857.14 square feet (which at $1.75 per square foot would amount to $5,000) and made 39,757.14 square feet.

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While Allison C. Davie could not explain the statement in the deeds that the area was 38,723 square feet and refused to characterize it as "false," he swore positively that he knew the area of the property to be 36,900 square feet.

Whether there is anything due in respect to item (a) and what should have been the plaintiffs' claim on item (b) depend entirely upon the true area of the property conveyed. In my opinion that cannot be ascertained on the evidence now before us. This question should therefore form one of the issues for determination on the new trial, which must be had for other reasons presently to be stated. The plaintiff's rights in respect to items (a) and (b) should be determined as above indicated when such area is ascertained. To permit of complete justice being done if the true area proves to be less than 38,723 square feet leave should be reserved to the plaintiffs to present an incidental demand under Art. 215 (1) C.C.P. for the whole or any part of the balance of the sum of $5,000 (and interest thereon) not covered by the conclusions of their present declaration. Should such a demand be held not to lie the right to bring action for any such balance not recoverable in this action, should, if the defence of illegality is not successful, be reserved to them.

(c) The claim for interest, $10,598.59, between the date of taking possession (12th of August, 1912) and the date of conveyance (2nd of June, 1916) is preferred on two grounds—as profit secured from the Government over and above $1.75 per foot, and as covered by a contractual stipulation. The sum claimed includes $762.40, interest paid on the $5,000 and recoverable, if at all, under item (b).

If the plaintiff's claim to the interest on the $64,575 rested solely on a stipulation that they should receive so much of the purchase price as exceeded $1.75 per square foot, the view suggested by the learned Chief Justice of Quebec that as an accessory of the principal it would belong to the defendants (*res accessoria sequitur rem principalem*) might occasion difficulty. The principle of the law of mandate adverted to by my brother Mignault might also prove an obstacle to recovery by the plaintiffs. But the special contract invoked by them, if established, overcomes these difficulties.

While the matter was still in the stage of negotiation the plaintiffs informed the defendants by letter (15th of September, 1914), that

> of course when the settlement is effected it will bear interest *from the date of the taking possession* by the railway company of the Davie property.

Allison Davie admits that from this letter the defendants learned that the Government would pay interest from the date of expropriation. When negotiations between Mr. Barnard and the Department had so far progressed that he was able to state the terms of settlement, we find this passage in a letter from the defendants to D. W. Ogilvie of the 17th of March, 1915:

> Mr. Barnard states that the Government will be willing to settle for the property on terms that would give us one dollar and seventy-five cents ($1.75) per square foot for the property with interest at four per cent *from the date of sale* to be passed as soon as the deeds are got in shape. The purchase price to be payable as soon as the Government is in funds and not later than two years from date. This would be satisfactory to us and we hereby authorize you to close the matter on such terms.

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The important words in this letter are "from the date of sale." Although the witness O'Neill says he understood them to mean "from date of expropriation" (testimony probably inadmissible), Allison C. Davie offers no such explanation and George D. Davie, with whom all the negotiations were carried on by Ogilvie, is not called as a witness. Mr. Barnard says that it was distinctly understood that the interest up to the date of actual conveyance was to be given the plaintiffs and himself as additional remuneration. He certainly made a claim on that basis at an interview with Allison C. Davie and O'Neill in January, 1916, when he met them in Quebec to make certain, he says, that they understood the terms of the settlement and precisely what disposition was to be made of the moneys to be paid by the Government. Davie and O'Neill both admit that interview. Barnard says he understood the claim he then made was assented to: Davie and O'Neill that it was to be referred to George D. Davie. The failure to call the latter as a witness is, therefore, most significant. Barnard himself was a witness for the defendants and their counsel had him verify and then put in evidence a letter of the 22nd of May, 1917, from himself to the late Mr. G. C. Stuart, who was then acting for the Davies. In that letter Mr. Barnard says:

> Ogilvie's agreement provided that he would get anything over and above $1.75 a foot. We tried first to get $2.50 a foot and then $2.00, and finally got the Government to offer $1.75. The matter was at a deadlock for some time when, after numerous interviews with the Minister, I arranged that instead of getting $2.00 a foot we should get $1.75 plus $5,000.00 and interest on the whole amount at 4% from the date of taking of possession, the $5,000.00 and interest from taking of possession being a compromise between our demand at $2.00 and the Government's price of $1.75.
>
> I considered that Ogilvie, under his agreement, would be clearly entitled to the $5,000.00 and the interest from the date of taking of possession, but in order to avoid all possible misunderstanding, pre-

pared a special letter which I sent to Ogilvie with instructions to have same signed by the Davies, in which I mentioned that I had arranged with the Government for the sale of the property on terms that would give them $1.75 per foot, "with interest at 4% from date of the sale to be passed as soon as deeds are got in shape," and I thought by reciting "from date of sale to be passed as soon as deeds are got in shape" that I had made it quite clear that they would only get interest from the date of the deed of sale.

I further explained the matter in a letter to Mr. George Davie and also verbally to Mr. O'Neill, and when I found that the cash payment would not be sufficient to pay off Ogilvie took the trouble to go to Quebec and meet Mr. Allison Davie and Mr. O'Neill at Chinic's Hardware Store where we went into the figures and worked out exactly how much the Davie Estate would have to add to the cash payment in order to settle with Ogilvie, and how Mr. Allison Davie and Mr. O'Neill can now pretend that the estate is entitled to the interest from date of taking possession is frankly beyond me.

P.S. In figuring the amount of interest that Ogilvie is entitled to I have in the above letter calculated interest up to the 2nd of June, the date of the passing of the deed of sale. To give you the whole story I should mention that when I met Mr. Allison Davie and Mr. O'Neill in Quebec at Chinic's and we figured the amount of interest coming to Ogilvie they raised the point that if interest until the execution of the deed of sale was to be paid to Ogilvie the settlement might drag on for a long time to the prejudice of the Davie estate. I agreed that this would not be fair as the expectation was, when the Davies agreed to take $1.75 a foot, that they would get payment within a reasonable time, and after some discussion it was agreed that Ogilvie's right to the interest would stop on the 1st of March.

Mr. Barnard's statement as to the objection raised by Messrs. Davie and O'Neill is corroborated by their testimony. The defendants also called Mr. D. W. Ogilvie as a witness on their behalf and had him pledge his oath to the truth of all the facts within his knowledge stated in Mr. Barnard's letter to Mr. Stuart.

Finally, the defendants paid Mr. Barnard $10,763 on the 5th of June, 1916. Allison C. Davie says on examination for discovery by counsel for the plaintiffs that this payment was made in fulfilment of a legal obligation—he is quite sure of it. On examination by counsel for the defendants he at first repeats this

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statement, but under adroit questioning he eventually says that, while the first $5,000 was so paid, the second $5,000 was paid "out of goodwill," after a conference of the family. Once again George D. Davie is not called to verify this statement. The witness O'Neill was not asked as to it. To me it is simply incredible. Five thousand dollars (with $763 interest on it) was admittedly paid to Barnard as principal secured in excess of $1.75 a foot. Barnard had in January also demanded the interest from August, 1912, to the date of closing on the $64,575 to be received by the Davies for themselves. The Davies held Barnard's note for $10,000 principal and $1,500 interest in connection with another transaction. They seem to have assumed that because of the relations between Barnard and Ogilvie's company any payment which they might make to the former would operate *pro tanto* as a discharge of their obligations to the latter. They probably conceived that it would be a good stroke of business to obtain payment of Barnard's note by setting it off against what they apparently believed might safely be credited to him in discharge of their obligation to the plaintiffs. Perhaps to avoid any admission that might prove embarrassing in the event of Ogilvie insisting on his claim for the interest, while they described the first $5,000 of the $10,000 of principal paid to Barnard as "difference on sale of Davie property to I.C.R.," they designated the second $5,000 as "allowance for services rendered" in the statement sent to Barnard and as "bonus for trouble" in a statement certified by O'Neill and filed at the trial. Comment on all this seems unnecessary. I would merely add that the testimony of Allison C. Davie is most unsatisfactory, It gives an impression of shiftiness and unreliability.

Taking into account all the evidence before us bearing upon it, if obliged now to determine the question, I should incline to the view that the Davies did agree with Ogilvie that his firm should have as part of their remuneration the interest on the $64,575 between the date of taking possession and the date of sale, by which I am disposed to think was meant the date of execution of the deeds. But as a new trial must be had on other grounds, it will probably be more satisfactory that this item should be dealt with by a judge who will have the advantage of seeing the witnesses and possibly also of evidence not now before us, such as the testimony of George Davie and the explanatory letter to him mentioned in Barnard's letter to Stuart. We have not the benefit of the views either of the trial judge or of a majority of the learned judges of the Court of King's Bench on the merits of the plaintiffs' claim apart from the defence of illegality. The learned Chief Justice would treat the interest as an accessory and holds the claim for $159.51 unfounded. Mr. Justice Martin would disallow the plea of compensation based on the payments to Barnard and the defence that the action was premature. He finds the claim for interest unfounded and also that for a balance of commission. Mr .Justice Pelletier proceeds solely on the ground of illegality. Mr. Justice Greenshields dissents and there is no opinion delivered by Mr. Justice Carroll. The formal judgment merely dismisses the appeal "considering that there is no error in the judgment appealed from."

The general defences still remain to be considered.

I know of no legal ground on which the defendants can set up payment to Barnard as an answer to the plaintiffs' claim. Neither as a partner nor otherwise

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was he entitled to receive moneys payable to them. He was merely their employee or sub-agent and had apprised the defendants of that fact by sending them a copy of his letter of the 24th of March, 1916, written to D. W. Ogilvie. Nevertheless they chose to pay Barnard instead of the plaintiffs, moneys due, if at all, to the latter.

The defence that the action is premature has occasioned me some difficulty. The answer to it suggested by Mr. Justice Martin, the only judge below who alludes to it, seems open to the objection that the delay in payment was negotiated by Barnard himself and assented to by Ogilvie. The defendants, however, would seem to have recognized by their payments to Ogilvie of commission on $64,575 and to Barnard of $10,763 in June, 1916, that they were then under obligation to pay whatever remuneration had been earned in respect of the entire sale, notwithstanding that they had not yet received $60,000 of the purchase money and the interest thereon. With some doubt I accept the view of my brother Mignault that this defence should not prevail.

I do so the more readily because it does not afford an answer to a part of the claim proportionate to the part of the purchase money paid before action and does not preclude a declaratory judgment as to the balance. Moreover by an incidental demand under Art. 215 (2) C.C.P., all the purchase money having since been paid, the plaintiffs could have put themselves in a position to recover such balance, if not otherwise disentitled to it. The fact that the defence was not given effect to in the courts below affords a strong indication that in their opinion it should not be maintained.

The illegality charged by the defendants at the close of the trial was a violation of Article 158 (*f*) of the Criminal Code. They in effect then alleged that what they agreed to pay the plaintiffs for was an exercise of improper influence with the Government or some Minister or official thereof. They refer to the following features of the evidence as warranting an inference that that was, in part at least, the nature of the consideration which they were to receive for the remuneration to be paid.

Ogilvie says that the Davies "appreciated" that he was "in a better position to negotiate than they were;" that was also his own impression:

> the Davies felt that (he) could get a better price * * * from the Government than they could,

and that

> Mr. Barnard was probably in a more favourable position than (himself) to negotiate with the Government and its officials.

Any price in excess of $1.75 per square foot which they could obtain from the Government was to be divided between the plaintiffs and Barnard.

Although the Davies were always willing to accept $1.75 per square foot for their property and on the 22nd of April, 1914, Ogilvie had written them

> I can get you one dollar and seventy-five cents ($1.75) per square foot for this piece of land from the railway, but I am of the opinion that if we hold out this sum can be increased,

the completion of the transaction was delayed until June, 1916, so far as appears solely to enable Ogilvie and Barnard to secure additional moneys for themselves from the Government. The Government actually paid $5,000 more than the Davies had asked and were willing to take. In addition they paid $10,598.59 of interest which the plaintiffs assert the Davies had agreed to hand over to them.

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For two years the plaintiffs tried unsuccessfully to induce Mr. Gutelius, the general manager of the I.C.R., to agree to pay the defendants' price of $1.75 per foot. Then Mr. Barnard was brought in to break the *impasse* by negotiating with the Minister over Mr. Gutelius' head. The price demanded for the land was immediately raised. Mr. Gutelius was over-ruled and $5,000 additional in principal and $10,598.59 interest—the latter apparently not expected by the Davies for themselves—was eventually paid by the Government.

Mr. Barnard says he was brought into the transaction when it was found that nothing could be done with Mr. Gutelius—and that after he was brought in the negotiations were left entirely in his hands, adding, however,

> I had Mr. Ogilvie to help me. I had Mr. Ogilvie use his influence up at Ottawa and with the railway people

and that he (Barnard)

> was to use his influence * * * to try and persuade Ottawa that the price was reasonable.

In a letter of the 11th of June, 1915, written to George D. Davie, when matters were dragging, Barnard says

> I expect to go to Ottawa this week and take the matter up with my friends.

Thomas O'Neill, the defendants' accountant, says Ogilvie told him

> I have handed the whole thing over to Barnard. I do not want to mix with the politicians in Ottawa and he has friends up there.

Then there is the suggestion thrown out in the examination for discovery of D. W. Ogilvie that Mr. Barnard was closely connected by marriage with a member of the Government, and finally the increase

of the area from the 36,900 square feet, claimed by the Davies to be the true area, to the 38,723 square feet mentioned in the deeds, coupled with Barnard's and O'Neill's surmise that it was made to cover up the additional $5,000.

In addition to all this, apparently before Mr. Barnard's services were enlisted, there was a reference to Government valuators, with whom the plaintiffs advised the defendants to "keep in touch"—a mysterious intervention of a Mr. Lockwell, whose status and connection with the matter are not explained—an interview between Lockwell and Ogilvie at the latter's residence in Montreal and eventually a valuation by these valuators at the absurdly high figure of $3.00 a square foot, on which the Department refused to act.

The cumulative effect of all these things is relied upon to warrant the inference that the plaintiffs demanded compensation or reward, by reason of, or under the pretence of, possessing influence with the Government, or with some minister or official thereof (directly or through Barnard as their sub-agent), for procuring from the Government payment of the defendants' claim for compensation for their expropriated property. The learned trial judge considered this inference warranted and that the contract sued upon was therefore illegal as a barter of improper influence. His judgment was pronounced on appeal to be free from error. Two of the learned appellate judges (Lamothe C.J., and Martin J.), added, however, that in the case of a sale to the Government a contract by the vendor to pay an agent, engaged by him to procure the highest possible price, all that such agent could obtain over a figure fixed by the vendor as the minimum net price that he would

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accept, is in itself illegal as contrary to public policy and involving deception of the Department interested and a fraud upon the Government. Mr. Justice Martin speaking of the subject of the present action says

> it was a demand for compensation under a pretence of possessing influence with the Government: it was an agreement intended to mislead and had the effect of misleading the Government as to the price the respondents were willing to take for their property. The manner in which it was made afforded an opportunity for appellant to exploit the Government.

This aspect of the case has been dealt with by my brother Mignault. I agree with his views upon it and cannot usefully add to them. I am unable to appreciate the ground of the distinction drawn by the two learned appellate judges betweeen the Government and a corporation, firm or individual as a purchaser as affecting the legality of a contract for the remuneration of the vendor's agent based on the *quantum* of his interest in an increased price.

But the ground of the judgment of the Superior Court requires further consideration. The first observation I would make upon it is that if the four principal facts relied upon—the over-ruling of Mr. Gutelius, the long delay after the letter of the 22nd of April, 1914, the payment of a large sum over and above the price the vendors were prepared to accept and the increase in the area from 36,900 square feet to 38,723 square feet—have any probative force in support of the defendants' case they tend to establish rather an actual and successful use of improper influence with the Government, or some minister or official thereof, than a mere demand for compensation based on the existence of such influence real or pretended. Yet Mr. Justice Martin says

> there is no evidence or suggestion that any official of the Government was corrupted in any manner,

and the learned Chief Justice of Quebec makes the same statement and adds

> Il n'est pas allégué et il n'est pas prouvé qu'on ait exercé aucune influence indue sur la décision des autorités. Il n'est pas non plus allégué et il n'est pas prouvé que le terrain exproprié avait une valeur inférieure à celle payée par l'Intercolonial. Entre le gouvernement d'une part et Davie & Co. d'autre part, le contrat n'est pas attaqué et ne paraît pas attaquable.

But for the four facts which I have specified, the other matters relied upon in support of this branch of this case—equivocal expressions in evidence and correspondence and sinister suggestions of advantages taken of friendships and family connection carried no further—would not be deserving of notice. Their significance depends wholly upon their connection with the salient facts above stated. Taken with those facts they no doubt give rise to a situation "fraught with suspicion." But, with respect, if the matter were to rest where it now is the inevitable result in my opinion would be a verdict of "not proven"

The appellants quite reasonably do not desire such a Pyrrhic victory. They wish to remove the stigma necessarily left by an accusation such as that under consideration if it be not completely refuted. Unfortunately they did not ask for a postponement of the trial to afford them an opportunity to meet that charge when it was preferred in argument before the trial judge. Had they done so and been refused, even if the evidence were vastly stronger than it is—if it clearly established a *prima facie* case against them—having regard to the manner in which the charge was sprung, they would, in my opinion, have been entitled to a new trial to afford them the opportunity denied—not as a matter of grace, but as of right. Not having taken that course, however, they are now obliged to ask indulgence. Yet, as the

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Lord Chancellor (Halsbury), delivering the judgment of the Judicial Committee, said, in *Connolly et al.* v. *Consumers Cordage Co.* (1), where similar illegality, not suggested in the Courts below, had been found by this Court

> it is impossible to resist the cogency of the argument of counsel that he has not had an opportunity of meeting the allegations that are suggested against his client. As already stated, the circumstances are fraught with suspicion. but suspicious as they are, they may, nevertheless, be susceptible of explanation, and, if so, the opportunity for explanation and defence ought to have been given. That has not been done; and whatever may be the suspicions that their Lordships, in common with the learned Judges below, may entertain upon the subject, mere suspicion without judicial proof is not sufficient for a court of justice to act upon.

My only doubt has been whether the proper course in the present case would not be entirely to reject the defence of illegality as unsupported by proof. I defer, however, to what is probably the better judgment of my learned colleagues that there is sufficient of suspicion in the circumstances already before us to warrant sending the case back for a new trial in order that this defence may be fairly and fully investigated and the appellants' guilt established, if they be guilty, or if not their character cleared of what any right-thinking man must regard as an imputation under which they should not remain if it can be removed.

On the new trial the issues to be contested should be restricted to the question of the area of the property conveyed by the defendants to the Crown, the existence of a contract with regard to the payment of the interest to the plaintiffs and the defence of illegality. The question on this defence should be whether the plaintiffs by reason of or under the pretence that they or their agent Barnard possessed influence with the Government or with any Minister or official thereof

(1) [1903] 89 L. T., 347, at p. 349.

demanded or exacted from the defendants or induced the latter to pay, offer or promise any compensation fee or reward for procuring from the Government the payment of the defendants' claim or any portion thereof for the taking by the Government of the defendants' property at Levis.

Under all the circumstances there should be no costs of this appeal to either party.

BRODEUR J.—La demanderesse-appelante réclame le paiement d'une commission au sujet d'un terrain qui appartenait aux défendeurs et qui a été exproprié par la Couronne.

Sur la contestation telle que liée, la demanderesse aurait probablement réussi pour une partie importante de sa réclamation, mais la Cour Supérieure, confirmée en cela par la Cour d'Appel, a trouvé que l'option et les conventions invoquées par la demanderesse n'avaient pour but que de couvrir son intervention auprès des autorités fédérales pour obtenir par son influence des conditions plus avantageuses et un prix plus élevé pour le terrain exproprié, et que ces conventions, étant contraires à l'ordre public, étaient illégales.

Cette question d'illégalité n'avait pas été soulevée par la défense; et la demanderesse dit qu'elle en souffre préjudice parce que certaines circonstances louches qui sont au dossier démontreraient, si elles étaient expliquées par une preuve additionnelle qu'elle se déclare en position de faire, qu'elle a agi d'une manière absolument légale et honnête.

En effet, il serait important d'expliquer cette nomination d'évaluateurs, la présence autour d'eux ou au milieu d'eux de personnages à réputation douteuse, cette lettre des défendeurs où ils disent qu'ils connaissent bien ces évaluateurs,

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we think our Mr. George can keep in touch with them (Letter, 19th Dec., 1913),

et le rapport de ces évaluateurs donnant pour le terrain exproprié une valeur plus considérable que celle que les défendeurs étaient prêts à accepter.

Il serait bon de connaître les raisons pour lesquelles les défendeurs ont choisi comme mandataires des personnes d'une ville éloignée qui ne connaissaient rien ou presque rien des terrains expropriés. Cette circonstance devient d'autant plus mystérieuse que Ogilvie dit, dans sa lettre du 26 mars 1914, qu'il espérait pouvoir compléter la transaction par vente privée

without any of our Quebec friends interfering in same,

et que Barnard, dans une lettre du 15 janvier 1915, dit qu'il irait à Ottawa dans quelques jours

take the matter up with my friends when I am there.

Il est évident que Gutelius, le gérant général de l'Intercolonial, pour l'usage duquel ce terrain était exproprié, ne voulait pas payer le prix demandé par Davie et Ogilvie, et alors on a utilisé les services de Barnard pour négocier avec le ministre et passer pardessus la tête de Gutelius. Ogilvie aurait dit à ce sujet à une personne entendue comme témoin dans la cause:

I have handed the whole thing over to Barnard. I do not want to mix with the politicians in Ottawa, and he has friends up there.

Il serait également important de savoir pourquoi on a inséré dans l'acte de vente une quantité plus considérable de terrain que celle que les défendeurs disent avoir cédée. Barnard ne peut pas s'expliquer ce changement et il suggère

the area was changed with a view to covering up the $5,000,00, for which manoeuvre there was no reason whatever.

Il y a encore d'autres circonstances dans la cause qui rendent probable l'illégalité de cette transaction: mais comme la demanderesse se croit en position d'expliquer toutes ces circonstances et qu'elle n'en a pas eu l'occasion, je crois que nous devrions, dans ces circonstances, non pas confirmer le jugement des cours inférieures, mais appliquer la décision du Conseil Privé dans la cause de *Connolly* v. *Consumers Cordage Co.* (1), et renvoyer la cause en Cour Supérieure pour faire une enquête complète, et les tribunaux seront ensuite en meilleure position de se prononcer sur cette question de la légalité du contrat intervenu entre les parties.

L'un des items les plus importants de la réclamation de la demanderesse porte sur le question d'intérêt. Il s'agirait de savoir si l'intérêt depuis l'expropriation jusqu'à la passation du contrat appartiendrait aux défendeurs ou à la demanderesse.

Il y a peut-être un peu d'ambiguité dans la lettre que les défendeurs ont signée à ce sujet, mais après les explications de Barnard, qui a préparé cette lettre, j'aurais été enclin à accepter son témoignage; mais comme il est formellement contredit sur un point par d'autres témoins et comme nous n'avons pas l'avantage de l'opinion du juge qui présidait au procès et qui a entendu ces témoins sur leur crédibilité, il vaut mieux ne pas préjuger la question.

Les defendeurs, dans leur défense, ont plaidé que l'action était prématurée et que Barnard avait autorité de recevoir de l'argent d'eux pour et au nom de la demanderesse.

Ces deux moyens de défense sont mal fondés.

(1) 89 L.T. 347

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Il n'y a rien dans les conventions entre la demanderesse et les défendeurs qui démontre que le paiement de la commission ou de la partie du prix de vente qui excèderait $1.75 du pied ne serait payé que lorsque les défendeurs recevraient eux-mêmes leur argent du gouvernement. Leur conduite prouve amplement qu'il n'y a pas eu de délai d'accordé. Ils n'avaient reçu, lors de la passation de l'acte fixant l'indemnité, qu'une somme de $11,034.58: et cependant ils ont de suite payé une somme d'au delà de $13,000.00 à la demanderesse et à Barnard.

Quant au paiement fait à Barnard, il ne peut pas être prétendu qu'il doit être invoqué contre la demanderesse. Barnard avait bien été employé par la demanderesse pour aider au règlement par le gouvernement de la réclamation des défendeurs, mais il n'avait pas l'autorisation et le pouvoir de la demanderesse de percevoir des deniers pour elle.

Pour ces raisons, l'appel devrait être maintenu, mais sans frais, vu que l'appelante est en faute de ne pas avoir demandé en cour supérieure à faire l'enquête qu'elle désire maintenant mettre au dossier.

Le contre-appel, vu la disposition du présent appel, devient inutile et devrait être renvoyé sans frais.

Le dossier devrait être renvoyé en cour supérieure pour s'enquérir de la légalité du contrat.

A cette fin les parties devront avoir le droit d'amender leurs plaidoiries. La demanderesse pourra présenter, dans le cas où le contrat ne serait pas illégal, une demande incidente, si la cour supérieure le permet, ou bien le droit lui sera réservé de réclamer par une nouvelle action une somme additionnelle si la quantité de terrain vendu n'est pas de 38,723 pieds mais est d'une quantité moindre.

MIGNAULT J.—The appellant, a body corporate, which is owned and controlled by Mr. Douglas W. Ogilvie of Montreal, claims from the respondents $12,567.85 made up, as stated in its factum, of the following items:

1. For balance of commission on the sale by the respondents to the Canadian Government for the Intercolonial Railway of a parcel of land at Levis, Que.....		$ 159.51
2. For difference between purchase price of 38,723 square feet at $1.75 per foot, being.....	$67,765.25	
and the price actually obtained for the property.....	69,575.00	1,809.75
Interest on $9,575.00 for three years and 295 days at 4%		1,459.59
Interest on $60,000.00 for three years and 295 days.....		9,139.00
		$12,567.85

To explain this claim, I must say that on the 2nd of June, 1916, the respondents sold the property in question to the Government for a block price of $69,575.00, with interest from "the date of taking" (which the parties admit was the 12th of August, 1912, date of the registration by the Government of the expropriation notice). The deed described the property as containing 38,723 square feet, and the appellant alleges that this was its area, and the Government, on the date of sale, paid to the respondent on account of the price, $9,575.00, with interest at 4% from the date of taking, said interest amounting to $1,459.59, so that the total cash payment was $11,-034.59, The balance of the purchase price, $60,000.00, the Government was to pay in two years from the date of sale, June 2nd, 1916, with interest at 4% from the date of taking The final payment, amounting with interest to $69,575.00, was made to the respondent on or about October 20th, 1918, a year and a half after the bringing of the appellant's action.

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As briefly as can be stated, the appellant's claim is that it is entitled to a commission of 5% on a price giving to the respondent $1.75 per square foot, and it calculates this commission on a price of $67,765.25, representing $1.75 per square foot on a total area of 38,723 feet. The appellant was paid $3,228.75 as 5% commission on $64,575.00, which, at the price of $1.75 per foot, represents an area of 36,900 feet, and it demands an additional amount of $159.51 being 5% on $3,190.25, the difference between $64,575.00 and $67,765.25.

Then the appellant claims that it is entitled, over and above this commission, to anything received by the respondents in excess of $1.75 per foot, and the sale price being $69,575.00, this excess amounts to $1,809.75.

Finally, treating the interest payable to the respondents as being something to which it, the appellant, is entitled as being over and above the price of $1.75 per foot, it demands, as representing this interest, the sum of $10,598.59, the greater part of which was paid to the respondents long after the action was brought.

Among other matters, the respondents plead that the action, in so far as it is based on any amount paid to them after June 2nd, 1916, is premature. They also object that the real area of the property was 36,900 feet and not 38,723 feet as alleged by the appellant and stated in the deed of sale to the Government. They also claim the benefit of payments exceeding $10,000.00 made by them to Mr. Charles A. Barnard K.C., who was associated with the appellant in the negotiations concerning the sale of the property. I will dispose at once of this last defence by saying that, in my opinion, the respondents cannot, as against the appellant, offset any payments made by them to Mr. Barnard.

Before taking up the different items of the appellant's claim, I must refer to the question of the area of the property which was discussed at considerable length at the hearing. No evidence of this area was given at the trial. The appellant alleges that it was 38,723 feet, and the deed of sale, and a subsequent deed between the Government and the respondents correcting it, expressly give this figure as the area sold. On the other hand, both Mr. Ogilvie, who owns the appellant company, and the respondents acted throughout on the assumption that the expropriated property contained 36,900 square feet, which was stated to be shewn by a plan prepared by Mr. Bourget, land surveyor, which plan however is not in the record. The respondents had measurements made by Mr. Addie, land surveyor, and it is mentioned in a letter written to Mr. Barnard by the Deputy Minister of Railways and Canals that Addie reported an area of 38,671.3 feet. The expropriation notice gives the area as being 79/100 of an acre, or 34,412 feet. Mr. Barnard, in one of his letters, qualifies as a "manoeuvre" the statement in the deeds of an area of 38,723 feet, and some of the learned judges of the Court of King's Bench looked on it as being a very suspicious circumstance. The position, however, is this: The appellant founds its action on a sale of 38,723 feet, and no evidence, outside of the deeds, was made of the real area. This seems clearly to be the basis of the appellant's action as it was conceived by the appellant itself.

First item. Claim of $159.51, additional commission. This claim is based on the agreement, which is not disputed by the respondents, to pay 5% on the sale of the property at $1.75 per square foot, and the

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question whether the respondents have paid all the commission owed by them or not depends on the area of the land sold. This, I have said, the appellant alleges was 38,723 feet. The respondents deny this allegation, and aver that the total area was 36,900 feet. The appellant had therefore the onus of establishing its averment, but, as regards the respondents, the statement in the deed of sale from the respondents to the Government as well as in the subsequent deed of correction, in both of which the area is declared to be 38,723 feet, might probably be considered conclusive evidence, as being at least an extra-judicial admission by the respondents of this area; and moreover while Mr. Allison Davie swore, when examined on discovery, that the area was 36,900 feet, he added however the qualification

> that is the plan we followed then

and he did not undertake to say that the statement in the deeds was false. The matter could have been cleared up by producing a copy of the plan annexed to the deed of sale, and possibly by a survey on the ground of the area shown on this plan, but as that was not done, I would have been disposed to hold the respondents bound by their admission in the deeds, However, out of deference to the desire expressed by my brothers Anglin and Brodeur, I am willing, inasmuch as the case must be sent back for retrial on the question of the legality of the contract, that new evidence be taken to establish the real area of the property taken by the Crown. When this evidence is made, it will be possible to determine whether the appellant's claim for $159.51 is justified, assuming that its action remains in the form in which it was brought.

Third item. Claim of the appellant for $10,598.59, interest on the purchase price of $69,575.00. In my study of this case I dealt with this item before considering the second item of $1,809.75, which is the one in connection with which the greatest difficulty arises in view of the judgments of the courts below. I had formed an opinion on the merits of this claim for interest, but inasmuch as I now defer to the desire of my brothers Anglin and Brodeur that this question be among those directed to be retried, with the view that some evidence which was not given be made, I deem it my duty, so as not to embarass the new trial, to express no opinion as to this item of the appellant's claim.

Second item. Claim of the appellant for $1,809.75, being the difference in price between $67,765.25. representing 38,723 feet at $1.75 per foot, and $69,-575.00, the total purchase price paid by the Government.

This sum of $1,809.75 is clearly something paid by the Government over and above the purchase price of $1.75 per foot, and the appellant is entitled thereto if the ground on which its action was dismissed in the courts below cannot be sustained.

The learned trial judge dismissed the action of the appellant without costs for the following reason:

> Considérant que la dite option et les conventions subséquentes, prouvées et alléguées comme s'y rattachant, n'avaient pour but que de couvrir l'intervention des demandeurs comme intermédiaires entre le Gouvernement du Canada et les autorités du chemin de fer Intercolonial, d'une part, et les défendeurs, d'autre part, pour procurer, par leur position et leur influence, aux dits défendeurs, des conditions plus avantageuses et un prix plus élevé pour le terrain alors ainsi exproprié, et que la considération stipulée était le prix de telle intervention;

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Considérant que toute convention de cette nature est contraire à l'ordre public, et que toute considération stipulée pour y donner effet est illégale et nulle et ne peut faire l'objet d'une réclamation en justice.

The Court of King's Bench affirmed this judgment, Greenshields J. dissenting, but in their reasons for judgment some of the learned judges considered that an agreement the object of which was to obtain from the Government for this land something in excess of the price for which the respondents were willing to sell it, was an illegal contract, contrary to public order, and that the appellant could not recover any compensation for its services under this agreement. In the words of Chief Justice Lamothe,

Davie & Co. et la compagnie appelante se sont entendus ensemble pour tâcher d'obtenir de l'Intercolonial une somme additionnelle d'environ $5,000, somme que Davie ne réclamait pas. En d'autres mots, ils se sont entendus pour soutirer du trésor public, une somme additionnelle non réclamée et non due. Le motif des contractants et leur but avoué sont clairement illicites. Il s'agissait de tromper le département des chemins de fer sur les intentions de Davie & Co.; il s'agissait de cacher ou de mettre en oubli le prix réel demandé; le département a été induit à croire que Davie & Co. réclamaient réellement $5,000 de plus, et tout cela pour le bénéfice de la compagnie appelante. Il s'agissait de fonds publics. Le gouvernement n'est pas dans la position d'un particulier; il ne peut faire aucune libéralité sans le consentement du parlement.

Je partage les vues du juge de première instance; le contrat entre Ogilvie & Co. et Davie & Co. avait pour base et motif une considération illégale, illicite et contraire à l'ordre public. Les tribunaux ne peuvent en forcer l'exécution.

In consequence, the Court of King's Bench dismissed without costs the appeal from the judgment of the Superior Court.

It should be observed that the grounds on which both judgments below dismissed the appellant's action, were not taken in the respondent's plea, but the contention was raised at the hearing in the first court, and I would, with deference, think that the

parties and particularly the appellant should have been afforded the opportunity of bringing fresh evidence on the issue thus raised. In saying that I do not for a moment dispute that the Court can *proprio motu* dismiss an action when it comes to the conclusion that it is founded on an unlawful and illicit contract; but even then I think it is better to reopen the case so that the parties may, if they can, clear themselves of the imputation of having made an unlawful or illicit agreement.

The words of the learned Chief Justice of the Province of Quebec which I have quoted, may I say so with respect, somewhat overstate the facts of this case as I conceive them. What happened was that the respondents were willing to accept $1.75 per foot for their property and to pay a commission of 5% on this price to the appellant who was their agent, and who was in no wise connected with the Government or under fiduciary relations with it. The respondents agreed also to abandon to the appellant anything in excess of the stated price which the appellant might obtain. There was no suggestion whatever of deceiving the Government, and there was surely no duty incumbent on the appellant to disclose to the Government the price which the respondents would accept. It was the case of an agent bargaining with a third party for the best obtainable price, even a price in excess of that which his principal would accept, and the fact that the agent had stipulated with his principal that the excess price would belong to him does not make the contract illegal. The learned judges of the Court of King's Bench recognize that such a contract can be made when the purchaser is a private individual (see also Guillouard, *Société*,

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no. 16, who discusses the nature, thereby admitting the legality, of such a contract), but why can it not be made when the purchaser is the Government, provided no misrepresentations, no corruption of public officials nor improper methods are resorted to, and provided that the vendor and his agent are under no fiduciary relations with the Government imposing on them the duty of disclosure? Here the learned Chief Justice says:

> Il n'est pas allégué et il n'est pas prouvé qu'aucun officier public ait été corrompu. Il n'est pas allégué et il n'est pas prouvé qu'on ait exercé aucune influence indue sur la décision des autorités. Il n'est pas non plus allégué et il n'est pas prouvé que le terrain exproprié avait une valeur inférieure à celle payée par l'Intercolonial.
>
> Entre le gouvernement d'une part et Davie & Co. d'autre part, le contrat n'est pas attaqué et ne paraît pas attaquable.

That being the case, even though this property was to be paid with public monies, how can it be said that the agreement between the parties was illegal and contrary to public order? The words "public order" may be words to conjure with, but their meaning is very vague, and although undoubtedly a contract contrary to public order is void (arts. 989 and 990 Civil Code), still where a contract is not prohibited by law it should be very obvious that it is contrary to good morals or public order before it be set aside. With respect, I cannot agree with the learned Chief Justice when he comes to the conclusion that this contract, which would not be contrary to public order if the purchaser were a private citizen, is against public order because the lands were bought by the Government, it being remembered that the agents who dealt with the Government were under no fiduciary relation towards it, and resorted to no corruption, misrepresentation or undue influence.

The learned trial judge puts the case on somewhat different grounds when he finds that there was a contract whereby Ogilvie and Barnard undertook, through their position and influence with the Government, to obtain a higher price for the property than that which the respondents were willing to accept, the additional sum so obtained to be divided between them. This, in my opinion, is a very much stronger ground.

It is useless to deny that the facts in evidence lend some support to the theory on which the Superior Court's judgment is based. The respondents contracted with Ogilvie and I have said that, in my opinion, their contract was not *per se* an illegal one. But Ogilvie found Mr. Gutelius, the superintendent or general manager of the Intercolonial Railway, obdurate. He refused to pay even $1.75 per foot for the property, and then Ogilvie secured the co-operation of Mr. Barnard, presumably and even admittedly, because he possessed, or was supposed to possess, influence with the Government. Mr. Barnard asked $2.25 per foot from Mr. Gutelius who had declined to pay even $1.75, and this was naturally refused. (See Barnard's letter to Mr. Geo. D. Davie of April 1st, 1915). Mr. Barnard then negotiated with the Minister of Railways and Canals, the head of the Department, and finally Mr. Gutelius was overruled and the sale was agreed to at a price of $64,575.00, representing $1.75 a foot for an area of 36,900 feet, which the parties then understood was the area of the land, plus $5,000 which the Government agreed to pay over and above this price. Mr. Barnard says, in his letter of May 22nd, 1917, to Mr. Stuart K.C., that this was a compromise between his demand first of $2.50, then $2.00, and the Government's price

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of $1.75. There is no doubt that in all he did, Mr. Barnard acted with the approval of Mr. Ogilvie and also, I think, of the respondents, and but for his intervention and influence it is possible the opposition of Mr. Gutelius would not have been overcome. It is needless to add that the $5,000.00 so obtained was to be divided between Ogilvie and Barnard.

Under these circumstances the two courts have found that the contract giving to Mr. Ogilvie and "those interested" the surplus or profit which he might obtain over and above the selling price of $1.75 per foot, was a contract made with them by reason of their real or supposed influence with the Government, in other words was a purchase of their influence with the Government, and consequently null and void.

The appellant complained before us that it had not been afforded an opportunity to meet, and disprove if it could, the contention that it had bartered its influence with the Government, which contention was raised only at the argument in the first Court. I have already said that I think that it should have been afforded that opportunity and as a matter of justice, and because were I to dispose of the contention on the evidence in the record, I would have great difficulty in determining whether there has been really here a barter of influence with the Government, or an ordinary contract with an experienced broker looking towards the securing from the Government of the best obtainable terms, I have come to the conclusion that the record should be sent back to the Superior Court with directions to reopen the case on this question whether there was, as found by the Superior Court, an agreement by Ogilvie or Barnard, through the influence which they possessed or pre-

tended to possess with the Government or with any Minister or Official thereof, to obtain for the respondents the price of $1.75 per foot for the expropriated property, any sum obtained in addition to the said price to be divided between Ogilvie and Barnard.

I have not referred to the defence that this action is premature. The reason for which this defence was disregarded, to wit that Ogilvie's right to claim commission could not be affected by a delay granted by the respondents for the payment of the purchase price, is in my opinion unsound inasmuch as the respondents sold on terms made for them by Ogilvie or by his agent, Barnard. But, in view of the conduct of the respondents themselves, I do not think that this defence should be maintained. They paid to the appellant, immediately after the signing of the deeds, and although they had received only $9,575.00 on account of capital, the full commission on the purchase price of $64,575.00, the $5,000.00 added thereto being treated by them as something due to Barnard, thereby recognizing that the appellant did not have to wait until the payment of the balance of the purchase price to claim its commission on the balance. They thus put their own construction on their contract with the appellant, and I do not think they should now be allowed to contend that the right of the appellant, whatever it was, was postponed until the monies were actually paid over to the respondents.

I therefore agree that there should be a retrial as stated in the memorandum which will be included in the formal judgment of the Court.

It may well be, if the area of the expropriated property be shewn to be 36,900 square feet, that the appellant has misconceived what are its rights against the respondents, assuming that the contract sued on is a

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lawful one. For the surplus price paid to the respondents over and above the price of $1.75 per foot would then be $5,000.00, and not $1,809.75 as alleged in the declaration. Whether the appellant, in view of the retrial, would be entitled to amend its declaration, or to take an incidental demand, is a question on which I do not deem expedient to express in advance any opinion, but I am willing that any opportunity to amend or to take an incidental demand be afforded the appellant on the new trial ordered. It seems to me that if the appellant is entitled to any portion of the price paid the respondents as being over and above the sum of $1.75 per foot, it should get a proportionate part of the interest paid to the respondents on the purchase price of the property.

I would grant no costs to either party of this appeal nor of the cross-appeal which, in my opinion, should be dismissed.

JUDGMENT.

The appeal is allowed without costs and a new trial on certain points is directed as indicated in memorandum. Idington J. dissenting.

MEMORANDUM FOR FORMAL JUDGMENT.

1° The appeal is allowed without costs.

2° The Court declares that the defendants' contentions that the action was prematurely instituted and that Barnard was the plaintiff's partner and that Barnard had authority and power to receive money for the plaintiff company are unfounded.

3° The record will be sent back to the Superior Court to further inquire into and determine

(a) whether the plaintiffs by reason of or under the pretence that they or their agent Barnard possessed influence with the Government or with any Minister or official thereof demanded or exacted from the defendants or induced the latter to pay, offer or promise any compensation, fee or reward for procuring from the Government the payment of the defendants' claim or any portion thereof for the taking by the Government of the defendants' property at Levis;

(b) the area of the property conveyed by the defendants to the Crown; and

(c) whether the defendants contracted to pay the plaintiffs as part of their remuneration the interest paid by the Crown on the purchase money between the date of its taking possession of the property and the date of the execution of the deeds conveying it.

4° The Court orders that both parties shall have liberty to amend relevantly to the new enquête above directed so far as Quebec procedure permits and that, without in any way determining that it would be maintainable, leave shall be reserved to the plaintiffs, should the area of the property be found to be less than the 38,723 square feet mentioned in the deeds, to prefer, if so advised, an incidental demand for an increased allowance in respect of excess price over $1.75 a square foot for the number of square feet by which the property shall be found to fall short of 38,723.

The Court declares that if the illegality of the contract is not established the plaintiff company is entitled to a commission at the rate of 5% on so much of the purchase money paid as represents the price of the land actually conveyed at $1.75 a square foot less the sum of $3,228.75 already paid to it and also

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the sum of $1,809.75 claimed in the declaration in respect of excess price with interest thereon and in addition thereto to any sum for which they may successfully maintain the incidental demand above mentioned.

Should such incidental demand not be preferred or be held not to lie and the defence of illegality fail leave will be reserved to the plaintiffs to bring such action as they may be advised for any balance (over $1,809.75) of the sum of $5,000 paid as excess price which they may see fit to claim.

If it is not established that the contract alleged by the plaintiffs is illegal, adjudication on the defendants' liability in respect of the sum of $10,598.59 claimed for interest is reserved to be disposed of by the Superior Court.

Appeal allowed without costs.

Solicitors for the appellants: *Cook & Magee.*

Solicitors for the respondents: *Pentland, Gravel & Thomson.*