REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

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1912.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir Charles Fitzpatrick C.J., G.C.M.G.

" Désiré Girouard J.

" Sir Louis Henry Davies J., K.C.M.G.

" John Idington J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Joseph Doherty, K.C.

ADDENDA ET CORRIGENDA.

Errors and omissions in cases cited have been corrected in the TABLE OF CASES CITED.

Page 127, line, 21—For "*then*," read "*there.*"
" 296, line 11—After "*other*," add "*lands.*"
" 389, line 23—For "*east*," read "*west.*"
" 389, line 26—For "*west*," read "*east.*"
" 513, line 10—After "*transactions*," add "*in.*"
" 569, line 32—After "*is*," add "*not.*"

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 44 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Canadian Northern Rway. Co. v. *Anderson* (45 Can. S.C.R. 35). Leave to appeal to the Privy Council was refused, 20th March, 1912.

Canadian Pacific Rway. Co. v. *Wood* (decided 15th May, 1911, reversing judgment appealed from, 20 Man. R. 92; not reported). Leave to appeal to the Privy Council was refused, 20th March, 1912.

Clarke v. *Baillie* (45 Can. S.C.R. 50). Leave to appeal to the Privy Council was refused, 13th December, 1911.

Grand Trunk Pacific Rway. Co. v. *City of Fort William et al.* (43 Can. S.C.R. 412). Appeal to the Privy Council allowed with costs, 2nd Nov., 1911; ((1912) A.C. 224).

Jones v. *Burgess* (decided 8th May, 1911, affirming the judgment of the Supreme Court of New Brunswick). Leave to appeal to the Privy Council was refused, 23rd Jan., 1912.

Montreal Street Railway Co. v. *City of Montreal* (43 Can. S.C.R. 197). Appeal to the Privy Council dismissed with costs, 16th Jan., 1912 (58 Can. Gaz. 656, 691).

Montreal Park and Island Rway. Co. v. *City of Montreal* (43 Can. S.C.R. 256). See case last noted above.

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OF THE

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TABLE OF CASES CITED.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

LE CLUB DE CHASSE ET DE PECHE STE. ANNE (PLAINTIFFS) } APPELLANT;

AND

THE RIVIERE-OUELLE PULP AND LUMBER COMPANY (DEFENDANTS) ..... } RESPONDENT.

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*Nov. 8, 9.
1911
*Feb. 21.

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

Construction of statute—Fishery and game leases—Personal servitude—Possession—Use and occupation—Right of action—Action en complainte—Renewed leases—Priority—Watercourses—Works to facilitate lumbering operations—Driving logs—Storage dams—Penning back waters out of track of transmission—Damages—Rights of lessees—Injury to preserves—Injunction—Demolition of works.

The lumber company are holders of timber limits in the Townships of Ixworth, Chapais and Lafontaine, in the counties of L'Islet and Kamouraska, and, assuming to act under the authority of certain statutes of the Province of Quebec, (now consolidated in

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, Duff, and Anglin JJ.

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articles 7295 to 7300, R.S.Q. (1909)) erected dams at the outlet of the Lakes Ste. Anne into the River Ouelle to form a reservoir, by penning back the waters of these lakes, for the purpose of augmenting the natural flow of the River Ouelle during seasons when its waters had abated to facilitate the transmission of timber cut on their limits below that point and delivering it at their saw-mill further down stream. They were owners of the lands on both sides of the stream at the place where the dams were erected. The fish and game club were lessees of fishery and hunting privileges under a lease issued in virtue of the "Quebec Fisheries Act," and the "Quebec Game Laws" which had been in force for a number of years prior to the erection of the dams but which was surrendered subsequent to their construction and a new lease granted to the club in its stead by the Crown. The leases cover the territory included in the above mentioned townships and the timber limits therein held by the lumber company. The action was brought by the club to recover damages for injuries occasioned to their rights as lessees of the fishery and hunting rights in consequence of the manner in which the dams were used and lumbering operations carried on in the river by the lumber company.

Held (Fitzpatrick C.J. dissenting).—That the plaintiffs have a status to maintain an action for injuries to their rights as fishing and hunting licensees and that the judgment at the trial (Q.R. 36 S.C. 486) for such damages should be restored.

Per Fitzpatrick C.J. and Girouard and Anglin JJ.—The respondents had the right to construct and maintain the dam in question and to use it to facilitate the flotation of logs etc. in the lower reaches of the River Ouelle.

Per Idington J. (Davies J. *dubitante*).—This right exists only in respect of the streams or portions of them down which logs, etc., are actually driven by the timber licensees and does not extend to storage dams upon upper reaches and tributary waters not themselves used for the flotation of timber.

Per Duff J.—The powers conferred by the statute must be exercised reasonably. In this case, the impounding of the stream's sources, miles beyond any part of it on which any timber could be expected to pass, is not within the contemplation of the statute and would not be a reasonable exercise of the powers intended to be conferred.

Per Fitzpatrick C.J. and Girouard and Duff JJ. (agreeing with the court below (Q.R. 19 K.B. 178)).—The right to aid the user of floatable streams by artificial means authorized by article 7299 of the Revised Statutes of Quebec (1909) may be exercised at all seasons of the year.

Per Davies, Idington and Anglin JJ.—Articles 7298 and 7299 of the Revised Statutes of Quebec (1909) must be read together and,

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while the right to use floatable streams in their natural state for the flotation of timber exists at all times and in all seasons, the right to aid such user by the artificial means authorized by article 7299 may be exercised only during the periods mentioned in article 7298, viz., during the Spring, Summer and Autumn freshets.

Per Curiam, Fitzpatrick C.J. *contra*.—This right, whatever its extent or duration, is exercisable only subject to the condition that the person enjoying it shall make compensation to others holding rights such as the appellants enjoy; and, having regard to the circumstances of this case and the legislation governing it, the question of priority in the acquisition of the respective rights of the parties is of no consequence.

Leave to appeal to the Privy Council was refused, 15th May, 1911.

APPEAL from the judgment of the Court of King's Bench(1), reversing the judgment of the Superior Court, District of Kamouraska(2), and dismissing the appellants' action with costs.

The circumstances of the case are stated in the judgments now reported.

The *dispositif* of the judgment of Cimon J., in the trial court were as follows:—

"Arbitrant à quatre cent piastres les dommages que la défenderesse a causés au demandeur dans les deux années précédant l'action,

"Ordonne à la défenderesse de ne plus user de la dite écluse de manière à inonder les terrains concédés au club demandeur pour les fins de pêche et de chasse, et en ce qui concerne la dite écluse, 'd'agir en tous points de manière à donner aux eaux des dits lacs dans la dite décharge leur cours naturel' et ce tant et aussi longtemps que les baux de pêche et de chasse du demandeur seront en vigueur; et

"Condamne la défenderesse à payer au demandeur,

(1) Q.R. 19 K.B. 178.

(2) Q.R. 36 S.C. 486.

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pour dommages causés au cours des deux années qui ont précédé l'action, la somme de quatre cent piastres, avec intérêt du 11 mai, mil neuf cent huit, et les dépens de l'action."

The *considérants* of the formal judgment of the Court of King's Bench are as follows:—

"Considering that the appellant had, at all times herein referred to, a right to maintain and use as it did the dam in question in this cause and that respondent, by and in virtue of its fishing and hunting leases, acquired the right of fishing and of hunting only as they existed in the year 1905 and subject to the prior right of the appellant to maintain and use said dam as it did for and in connection with lumbering operations.

"Considering that respondent suffered no damage by the action of appellant and that it has no right to recover from it or to have appellant condemned to cease using said dam as it has done.

"Considering that there is error in the judgment appealed from.

"This court doth maintain the present appeal and reverse the judgment appealed from, * * * and, proceeding to render the judgment the said Superior Court ought to have rendered, doth maintain appellant's pleas and dismiss respondent's action with costs against respondent in favour of appellant in this court and in the Superior Court.

"Mr. Justice Carroll concurs in reversing so much of the judgment *a quo* as condemns appellant to cease using its dam as it has done, but dissents from so much of the judgment now rendered as reverses that part of the judgment *a quo* which condemns appellant in damages."

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L. P. Pelletier K.C. for the appellants.

G. G. Stuart K.C. and *C. E. Dorion K.C.* for the respondents.

THE CHIEF JUSTICE (dissenting).—This is a possessory action to which has been joined a claim for damages; and were it not that, on other grounds, I have come to the conclusion that the action should be dismissed, I would have felt obliged to very seriously consider the question of the plaintiffs' right to ask, in this proceeding, for any order with respect to the construction or operation of the dam. It is undoubted law that a mere lessee cannot bring a possessory action "en complainte" although he may sue for damages.

Le preneur n'ayant qu'un droit personnel et mobilier n'a pas l'action possessoire. Guillouard, Louage, vol. 1, no. 29.

See also Pigeau, vol. 2, p. 9; S.V. 41, 1, 852 and S.V. 93, 1,237. Guillouard, ibidem, no. 174.

The right to hunt is generally considered in English law to be a grant of an interest in land. *Webber* v. *Lee* (1). In French law there is a distinction to be made which is well expressed in Fuzier Herman, Rép., *vo.* "Chasse," no. 111:—

La cession à titre onéreux du droit de chasse ne doit pas être confondue avec la location de ce même droit. La cession est consentie moyennant l'acquittement d'un prix une fois payé, tandis que la location suppose, en général, le paiement de fermages périodiques. Le cessionnaire a un droit réel, qui lui permet d'intenter directement toutes actions contre les tiers pour faire reconnaître et respecter son droit. Le locataire, au contraire, n'est qu'un créancier de jouissance; en cas de trouble occasionné par un acte juridique, il ne peut que mettre son bailleur en cause. Si le propriétaire du fonds grevé de la servitude personnelle de chasse vient y chasser indûment, il peut être poursuivi correctionnellement par le cessionnaire; le locataire, en pareil cas, à notre avis du

(1) 9 Q.B.D. 315.

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moins, n'a contre le bailleur qu'une action civile en dommages—intérêts.

See also Bélime no. 267; Garnier, "Actions Possessaires," pp. 168, 169.

I am disposed to think that the possession given by the leases relied on here must be construed to mean use and occupation and not civil possession as defined by article 2922 of the Civil Code, and that they do not confer on the licensee any higher right than the tenant would have at common law. Aubry & Rau, vol. 2, par. 177, p. 106, defines possession:—

L'état de fait qui donne à une personne la possibilité physique, actuelle et exclusive d'exercer sur une chose des actes matériels d'usage, de puissance et de transformation.

Because of the form in which the claim is made, and of the nature of the evidence adduced to support it, another question would require to be considered arising out of the distinction between the rights of the owner and those of the lessee which I find stated in these words in a note to Dalloz; 1905, 2, 10: Il ne faut pas

confondre la possession du droit de chasse au cours des manœuvres, avec le droit de chasse lui-même, celui-ci, considéré dans son ensemble, constitue un élément souvent fort important du droit de propriété. On peut bien faire ressortir la confusion ainsi commise en opposant la privation de jouissance, qui est une servitude grevant le droit de propriété, à l'atteinte résultant du dépeuplement total ou partiel, lequel abolit en totalité ou en partie le droit de propriété lui-même.

In this case the claim is chiefly, if not entirely, for damages caused not to the fishing and hunting but to the fishery and to the hunting preserve; such damages constitute a permanent injury to the property which might well give the owner a claim, but not the lessee. If the dam is maintained and operated as at present the fish will, according to the allegations of the de-

claration, be destroyed and the other game driven from the preserve. How much of the damages allowed is to be apportioned to the permanent injury done the property and how much to the interference with the appellants' rights of enjoyment? If the respondents pay the present claim, can they set that payment up in answer to a claim from the owner for permanent damages to the property? I feel it to be my duty to mention these difficulties which must strike everyone at all familiar with the principles applicable to possessory actions as fundamental; and, although in the conclusion I have reached, it is not necessary for me to do more than to draw attention to them, they must be disposed of and decided by those who are in favour of allowing this appeal. The effect of article 1065 C.P.C. was not raised here or below.

The facts are very fully stated by my brother Anglin. The respondents are owners of timber limits, covering about 300 miles, of which they and their *auteurs* have been in possession for a great number of years under government licenses renewable annually. Those licenses convey for the period of their duration the ownership of all the timber within the area granted. Sections 1599-1600, R.S.Q.; *Watson* v. *Perkins*(1) *per* Sanborn J. at page 270; *Dupuy* v. *Ducondu*(2) *per* Fournier J. at page 463. For the purpose of manufacturing into timber the logs cut on their limits the respondents have built a saw-mill on the River Ouelle at the place called St. Pacôme. The logs are floated from the limits where they are cut to the mill, a distance of about 20 miles, on the waters of the River Ouelle and its numerous branches and tri-

(1) 18 L.C. Jur. 261. (2) 6 Can. S.C.R. 425.

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butaries. For the purpose of facilitating the conveyance of their logs from the limits where they are cut to the mill, where they are sawn, the respondents erected a dam on a stream that serves to discharge the waters of two lakes into one of the branches of the River Ouelle. The two lakes are connected together by a small stream called by the witnesses "La Passe" and are within the area covered by the timber licenses. The dam, built entirely on the respondents' own property, raises the level of the water in the lakes and floods their shores to the injury of the fishing and hunting privileges held by the appellants over a large area which includes these two lakes; hence this action.

Both parties practically agree that the dam was built by the respondents, and is used by them, to facilitate the floating of their logs down the river, from the limits to the mills at all seasons, but more particularly when the freshets of the Spring, Summer and Autumn having ceased to affect the flow of the water the river in its natural state cannot float logs. Two questions, therefore, fall to be decided on the merits of this appeal. The first is: Have the respondents the right to erect and maintain the dam complained of, subject to the obligation to pay damages, if any are occasioned? And, if to this question an affirmative answer is given, the next question to be considered is: Can the dam be utilized during all seasons? Girouard J. and I agree, for the reasons given by Mr. Justice Anglin, with the unanimous judgment of the provincial court of appeal that the respondents have the right to erect and maintain the dam to facilitate the floating of their logs; but there is a difference of opinion between us as to the periods of the year during which the dam may be used for that purpose. My brother Anglin holds that the use of the dam must be limi-

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ted to the periods of the Spring, Summer and Autumn freshets. My brother Girouard, with whom I agree, holds that the respondents may utilize the waters of the dam to aid the flotation of their logs at all times, as occasion to do so arises. I would add just one word with respect to the right to erect this dam for the purpose of storing water to aid in floating logs when the rivers are low. We are called upon to construe a statute passed for the purpose of aiding a most important industry by a legislature which presumably is familiar with the local conditions to which the provisions of that statute are made applicable. The words used, giving to them their ordinary and natural meaning, authorize the erection and maintenance of dams anywhere for the purpose of facilitating the floating of timber down all rivers, etc., the condition being payment of damages. Should we with at best a very limited knowledge of the conditions which the legislation was intended to remedy assume to say that, because of some inconveniences that may result if we give to the language used its plain and obvious meaning, the legislature did not mean what it said ?

The dam was built in the Autumn of 1903 on a lot of land acquired by the respondents in fee simple from the Crown and was first put into operation during the lumbering season of 1904. At that time the appellants held fishing and hunting leases over a small portion of the territory covered by the timber licenses; but, in March, 1905, those leases were cancelled and new leases issued which are produced as appellants' documents of title. Let me observe here that the leases of March, 1905, *are not renewals but new leases issued in lieu of the old leases which were cancelled;* and the ground of action is an alleged interference with the rights granted by these new leases within the

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two years preceding the date of the action, (1908). The rights of the lessees as to fishing and hunting are defined in sections 2256 and 2350 of the Revised Statutes of Quebec (1909) in substantially the same words in so far as they affect the issues here, and I will quote only one section :—

2256. The lease shall confer upon the lessee, for the time therein specified, the right to take and retain exclusive possession of the lands therein described, subject to the regulations, fees and restrictions which may be established, and shall give him the exclusive right to fish in the waters fronting on such lands subject to the provincial and federal laws, fees and regulations then in force, and also to prosecute in his own name any illegal possessor or offender against this section and to recover damages, if any, *but not against any person who may pass over such lands or the adjacent waters, or who engage in any occupation* not inconsistent with this section, nor against the holder of a license *to cut timber, who has, at all times, in accordance with his license, the right to cut and remove trees, lumber* and saw-logs, and other timber, within the limits of his license, and during the term thereof, to make use of any floatable river or watercourse, or of any lake, pond or other body of water and the banks thereof for the conveyance of all kinds of lumber and for the passage of all boats, ferries and canoes required therefor, subject to the charge of repairing all damages resulting from the exercise of such right.

No such lease can be issued by the Minister for more than nine years (R.S.Q. art. 2249) and the rent is payable annually in advance as a condition of renewal (art. 2255). The right to cut and remove all timber from the territory covered by their license, which includes the area covered by the hunting and fishing leases, is especially reserved to the respondents together with the right to utilize for that purpose all floatable rivers, water-courses, lakes, ponds or other bodies of water, whether they are within or without the area covered by these leases. So that if, to drive timber cut on their limits within or without the territory covered by the appellants' fishing and hunting leases, it is necessary to utilize waters situate within that territory, the respondents have authority to do it

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and the appellants cannot complain. The difficulty in this case, it is said, arises out of the fact that the timber was cut on the river below the place at which the dam is built, and it is argued that the statute does not contemplate the contingency of a dam being required above to gather water to facilitate the driving of logs cut on the river below the dam. With all deference, it appears to me obvious that the object of the statute is to increase the floatability of rivers and streams by artificial means for the driving of lumber. The statute does not limit the places at which the works designed to effect that purpose may be built provided they aid in the result which the legislature had in view; and there is no more effective way to reach that result than by creating a reservoir at the source to increase the flow of water in the river during the dry seasons. I will not press this point further, as I am of opinion, for the reasons given by Mr. Justice Anglin, that the right to build the dam must be maintained.

I now come to the point of difference between my brother Anglin and myself which I have already explained. Because of the enormous importance of the issue involved to the respondents who, by the use of the dam, have been able to increase their output of logs from about eighty thousand per annum to over three hundred thousand and generally to the lumber industry, which is by far the most important in the Province of Quebec and which will be seriously affected by this judgment, I will endeavour to explain my view of the rights enjoyed by timber-limit holders in Quebec. It is and always has been (since the ordinance of 1669, "Ordonnance des eaux et forêts") the law in the Province of Quebec that the public have a legal servitude for floating down logs or rafts at all seasons of the

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year on all rivers, streams and water-courses of the province. See "Ordonnance des eaux et forêts, 1669"; *Oliva* v. *Boissonnault*(1); *McBean* v. *Carlisle*(2); *Tanguay* v. *Price*(3). The right to use the water-courses of the province for the conveyance of all kinds of lumber was extended to their banks by 20 Vict. ch. 40, sec, 2 (C.S.L.C. ch. 26, sec. 2, sub-sec. 2). This right is re-affirmed in article 891 of the Municipal Code and will be found in the Revised Statutes of Quebec (1886) section 5551, and in the new Revised Statutes of Quebec (1909) section 7349; and any interference with this somewhat exorbitant right renders the person interfering liable in damages, *Atkinson* v. *Couture*(4). Incidentally I may here observe that, the right to use the waters of all rivers, streams, and water-courses and their banks at all seasons being indisputably the law, the necessity for adding to the Revised Statutes (1886) section 2972 (*d*), which is also re-enacted as section 7298 of the new revision (1909) is not very apparent, purporting, as it does, to convey the more limited right to use the waters but not the banks for the purpose of driving logs during the Spring, Summer and Autumn freshets. However, it is not argued that the general right has been in any way limited by this amendment, and I must now consider the legislation passed to authorize the making of improvements to facilitate the floating of logs on those water-courses which are subject to this legal servitude in favour of the public.

It is common knowledge that as the forests in Quebec became depleted it was necessary for the lumbermen to go further up the rivers towards their sources

(1) Stu. K.B. 524.
(2) 19 L.C. Jur. 276.
(3) 37 Can. S.C.R. 657, at p. 665.
(4) Q.R. 2 S.C. 46.

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to procure a supply of logs for their mills, and, as a result, they had a longer distance to drive their timber and less water. To this difficulty was added the shortening of the period of high water through deforestation, as the water where the lumber is cut down runs off more freely. Then it became necessary to provide artificial means to improve the rivers and streams for lumbering purposes, and 16 Vict. ch. 191 was passed to authorize the incorporation of companies to facilitate the floating of timber down rivers and streams. The provisions of this statute were re-enacted in the Consolidated Statutes of Canada, ch. 68, and in the Revised Statutes of Quebec (1888), section 4921, new revision (1909), section 6266:—

6266. Any number of persons, not less than five, may form themselves into a company under the provisions of this section, for the purpose of acquiring or constructing and maintaining any dam, slide, pier, boom, or other work necessary to facilitate the transmission of timber or pulp-wood down any river or stream in this province, and for the purpose of blasting rocks, or dredging or removing shoals or other impediments, or otherwise of improving the navigation of such streams for the said purpose.

No such company shall construct any such work over or upon, or otherwise interfere with or injure any private property or the property of the Crown, without first having obtained the consent of the owner, or occupant thereof, or of the Crown, except as hereinafter provided.

By 54 Vict. ch. 25, a new section was added to the old Revised Statutes as 2972 (*e*), now in the new revision 7299, which I quote:—

It is and always has been lawful to erect and maintain dams, slides, aprons, booms, gate-locks or other necessary works to facilitate the floating or transmission of timber, rafts or craft down such (*i.e., all; v.* art. 7298 R.S.Q. 1909), rivers, streams, lakes, ponds or creeks, to blast rocks, dredge or remove sand-banks, remove trees, shrubs or other obstacles without, however, doing any damages to such rivers, lakes, ponds, streams or creeks.

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If it is absolutely necessary for the construction of such improvements to take and occupy any private property, expropriation proceedings shall be taken for the land strictly required for such purpose, by observing, for the valuation of the land and the damages resulting from the works, the provisions respecting expropriations for railways.

No work to which this sub-section applies shall be done in rivers to which salmon resort, unless previously authorised by the Lieutenant-Governor in Council, who shall determine how the work is to be done and the conditions to which it shall be subject.

In effect this section extends the powers theretofore vested in joint-stock companies with respect to improvements on all rivers, streams and water-courses in the province to individuals, and it is with respect to the construction of this new section 7299 that a difference of opinion exists between Anglin J. and myself. While we both agree that the right to erect and maintain dams to facilitate the floating of timber is absolute, my brother Anglin would restrict the use of these dams and the enjoyment of the benefits they confer to the period of freshets in Spring, Summer and Autumn. I contend, on the contrary, that the section is general in its terms and purports to be declaratory of the law. The terms used are:—

It is and has always been lawful to erect and maintain dams, etc.

For what purpose? "To facilitate the floating or transmission of timber" down all rivers, streams, etc.; there is no limitation as to the seasons during which they are to be operated, or with respect to the places at which they are to be built. It is lawful to erect dams anywhere provided the effect be to facilitate the floating or transmission of timber down the rivers and streams of the province. I do not find in the words used any intention to limit the places at which dams may be built or to exclude the right to build a dam at the source of the river or on one of the tributaries as was done in this case. The scope and object of the Act is to authorize improvements to facilitate the

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floating or transmission of timber down rivers or streams and there is no limitation either expressed or implied with respect to the periods of time during which these improvements are to be utilized. If the right to erect and maintain is absolute, I do not find in the statute any limitation of the resulting right to use. Construed literally and giving to the words of the statute their natural meaning there is no limitation of the exercise of the right conferred to any particular season. The right to float timber at all seasons and for that purpose to use the banks of all streams was part of the law of the province when this statute was passed declaring in express terms that it has always been permissible to facilitate the exercise of that right by making such improvements as are now in question. If the right to use the rivers to drive logs exists at all seasons, which is undoubted, and the statute gives the right to make improvements to facilitate that use, how can it be said that, although the right to use the river may be exercised at all times, the right to use the improvements is to be limited to those periods — the season of freshets — when these artificial aids are unnecessary? If the section we are now considering (7299) is to be read with the preceding one (7298), which latter purports to create a new right, how can it be said that it was the intention of the legislature to declare that it has always been legal to do something in aid of the exercise of a right created then for the first time? It is clearly not necessary to have recourse to artificial means to create a flow of water at those seasons of the year when nature makes ample provision for that purpose. To store water to aid the drive during the Spring, Summer or Autumn freshets would appear to be a very useless proceeding. But what more ef-

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fective means could be devised to aid the lumberman in his operations than to give him the right to store water during those seasons of abundance to be used in water famine times ? If there is any doubt as to the proper construction to be put upon this section, I would refer to article 12 C.C. and article 13 R.S.Q. What was the intention of the legislature? What was the object for which the Act was passed?—To authorize the making of improvements to facilitate the floating of logs not during the freshets, but in the lean period when the water had subsided. I can entertain no doubt as to this. The effect of this new section (7299) is to declare that a private individual may, for the purpose of his industry, do that which may be done by a company for the same purpose. A joint-stock company may use their dams and other improvements at all seasons of the year and there is no reason either in justice or on a fair construction of the statute to say that an individual may not in the like circumstances do the same.

Coming now to the damages. The right to make improvements is impliedly made subject to the condition that damages are to be paid; but these damages must be limited in this case to the injury done the appellants in the enjoyment of their rights to fish and hunt. "L'intérêt est la base et la mesure des actions." When they entered into possession in March, 1905, the dam existed and had been in operation for a year to the appellants' knowledge. There was no change in the local conditions and there is no evidence that the damages increased after 1905. I adopt this *considérant* of the court of appeal:—

Considering that the appellant had at all times herein referred to, a right to maintain and use as it did the dam in question in this cause and that respondent, by and in virtue of its fishing and hunting leases, acquired the right of fishing and hunt-

ing only as they existed in the year 1905, and subject to the prior right of the appellant to maintain and use said dam as it did for and in connection with lumbering operations.

See also *Chaudière Machine Co.* v. *Canada Atlantic Ry. Co.*(1).

I would dismiss this appeal with costs.

GIROUARD J.—I would allow this appeal in part. I agree with Carroll J. that only that part of the conclusion of the action claiming damages can be maintained and that no order can be issued by the court respecting the use of the dam. The construction and use of that dam is authorized by statute, subject to the payment of such damages as may be caused. I would, therefore, allow the appeal from that part of the judgment which refuses those damages. Furthermore, I would reserve to the appellants any right they may have to claim damages which have accrued since the institution of the action, the whole with costs against the respondents in all the courts.

Girouard, J.

DAVIES J.—The controversy in this case turns upon the right claimed by the respondents to build a dam across a small river or stream flowing from the Lakes Ste. Anne and by means of it to dam back and raise in height the waters of these lakes and overflow the lands surrounding them. The object in so damming back these waters was to create a huge reservoir to be utilized by the respondents during the dry seasons of the year to facilitate the floating of their timber down the Grande Rivière to their mills from the junction of the river flowing from the lakes with the Grande Rivière.

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The stream or overflow from the lakes did not join the Grande Rivière until it had flowed from the lakes 7 to 10 miles. No timber or lumber was floated from the lakes down the overflow stream. The object was not to facilitate transmission of logs or timber on the lakes or from the lakes down the overflow stream to the Grande Rivière, but to facilitate during the dry season of each year the transmission of logs from the junction of this lake overflow stream with the Grande Rivière down that river to the defendants', respondents' mills.

The plaintiffs had Crown leases giving them the exclusive right of fishing in these lakes, and the exclusive right of hunting in certain territory surrounding the lakes.

The defendants held certain timber limits under which they had a right to cut timber on a large part of this hunting area of plaintiffs.

No question appears to me to arise out of the priority of either of the fishing, hunting or timber leases.

The manner in which the defendants used the dam constructed by them caused damage to the plaintiffs as such fishing and hunting lessees, which were assessed by the trial judge at $400, and, so far as the amount of the damage is concerned, I see no reason to quarrel with it. The rights conferred on the plaintiffs as fishing and hunting lessees by the statutory provisions now consolidated in articles 2256 and 2350 R.S.Q. were seriously injured and partially destroyed by the manner in which the defendants used the dam complained of. I think it appeared clearly that the dam had been constructed upon lands of the respondents of which they had a grant from the Crown and so the only question remaining open was the right of

the defendants by means of this dam to raise the waters of the lakes as and when they did, even to the injury of the plaintiffs as hunting and fishing lessees as above stated, and without compensating them for such damage. The defendants attempted to justify the raising of these waters by means of this dam even to the injury of the plaintiffs under several statutory provisions of the Province of Quebec.

In my judgment, however, the only statutory provisions which could with any shew of reason be invoked to justify the claim of right of the defendants to do the plaintiffs the injuries they did, were the provisions now embodied in the R.S.Q. (1909), articles 7298 and 7299.

The questions which at once arise as to the permissive powers declared and allowed by these sections are:—Have they any and what limitations as to the places where and times and seasons during which they can be exercised? And do the rights to construct and maintain dams, etc., conceded to any person, firm, or company by the article, 7299, R.S.Q., carry with them the obligation to compensate riparian or other owners of property who may be damaged in their property rights by the exercise of the permissive privileges conferred?

It was strenuously contended at bar by Mr. Pelletier that this statutory right of constructing and maintaining dams, etc., to facilitate the floating or transmission of timber, etc., down the rivers and streams cannot receive such a broad construction as would justify the erection and maintenance of the dam in question on the stream or overflow from Lakes Ste. Anne, and the formation of a huge reservoir there, because no timber or logs were transmitted or floated

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down these lakes or on this stream or river flowing from these lakes, and that the avowed and admitted object of the construction of the dam and the use to which it was put were to create and make a reservoir of water which might be used during the dry seasons of each year and between the freshets to float and transmit timber and logs not on the river or stream whereon the dam was built, but on the Grande Rivière below the junction of the overflow stream from the lakes with such river, on which latter river alone the defendants floated down their logs or timber.

I confess there is very much in this argument which appeals to me as putting a fair and reasonable construction and limitation upon the article 7299, but, in the view I take of both these articles now under consideration, I do not find it necessary to decide the point.

In my opinion the two articles must be read together and, comparing them with several other articles of the statutes of Quebec relating to the same subject matter of the transmission of timber and logs down rivers and streams, such as articles 6266-6275, it seems to me that these articles are merely intended to affirm and declare such rights of transmission and to declare the times and seasons when, as well as the manner and extent to which, they might be exercised.

The articles so far as they relate to the points under discussion read as follows:—

7298. Subject to the provisions of this sub-section, any person, firm or company may, during the Spring, Summer and Autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams and creeks in this province.

7299. It is and always has been lawful to erect and maintain dams, slides, aprons, booms, gate-locks or other necessary works to facilitate the floating or transmission of timber, rafts, or craft down such rivers, streams, lakes, ponds or creeks, to blast rocks,

dredge or remove sand-banks, remove trees, shrubs or other obstacles without, however, doing any damage to such rivers, lakes, ponds, streams or creeks.

Now it will be observed that the article 7298 starts out with the statement "subject to the provisions of this sub-section any person," etc. So that it is clear the legislature intended all the articles comprised in the sub-section to be read and construed together, and that the general rights declared by articles 7298 should only be exercised subject to the provisions of the entire sub-section which included article 7299. Then the declared rights were expressly limited as to the times of their exercise to the periods of the freshets, "during the Spring, Summer and Autumn freshets"; and then article 7299 declared it to be and to always have been lawful to erect and maintain dams, etc., to facilitate the doing on *such* streams, etc. (that is on the streams mentioned in article 7298) of the very thing article 7298 had declared might be done. What was that?—It was that *during the Spring, Summer and Autumn freshets* it was lawful to float and transmit timber, etc., down the rivers and streams. One article asserted and declared the rights, the other article authorized the doing of certain things necessary for their proper exercise. As the article, 7298, conferring the rights limited their exercise to a special period of the year, namely, during the freshets, article 7299 regulating these rights and authorizing the doing of certain things to facilitate their exercise, might be read subject to the same controlling limitation.

But even if I was wrong in this construction of these articles; even if it could be held that article 7299 R.S.Q. should be construed without any limitation as to seasons, and that under it dams could be erected, main-

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tained and used in the seasons between the freshets, I should entertain no doubt that the party exercising the permissive powers conceded by the section would be liable for all damages caused by the maintenance of the dams, etc., to either the riparian proprietors above or below him, or to other proprietors abutting upon the lakes or streams whose property or rights were injured or destroyed by the manner in which the dams were maintained and used.

The permissive powers declared by article 7299 to exist in regard to the erection and maintenance of dams, etc., to facilitate the floating of timber down rivers and streams were not intended in my judgment to authorize the user of such dams in a way to injure riparian or other proprietors above or below the dams. The very great care taken by the legislature in articles 6266-6275 to guard and protect alike public and private interests from damage in the case of companies formed under those sections for the identical purposes expressed in article 7299 of facilitating the transmission of timber, etc., down rivers and streams, convinces me that the latter article could not be and was not intended to give permission to all persons and companies not formed under articles 6266-6275 to do with respect to riparian and other proprietors what is expressly forbidden and guarded against in these articles with respect to all companies formed under them.

In the absence of express language to the contrary, articles 7299 cannot be construed as conferring a legal right to damage, by overflow, or otherwise injure, the rights of the riparian proprietors on these rivers.

The principle laid down by the Judicial Committee in their judgment in *Canadian Pacific Ry. Co.* v. *Parke*

(1), at page 544, is the one which I think must apply and govern in the construction of this article 7299 R.S.Q. Their Lordships say:—

> Whenever, according to the sound construction of a statute, the legislature has authorised a proprietor to make a particular use of his land, and the authority given is, in the strict sense of the law, permissive merely, and not imperative, the legislature must be held to have intended that *the use sanctioned is not to be in prejudice of the common law right of others.*

In the case before us the use permitted is not confined to the proprietors' own land, but is the right to dam back the water of the rivers or streams of the province to facilitate the floating of timber down them, and the rights injured are statutory rights and not strictly common law rights. But the controlling distinction enunciated as it seems to me by the Judicial Committee is that which exists between a permissive act done under and by virtue of a statute, and an imperative one. In the former case it will not, in the absence of clear language to the contrary, be construed to sanction a use to the prejudice of the common law rights, and *a fortiori* statutory rights of others; in the latter it may be.

For these reasons I am of the opinion that the appeal should be allowed as to the damages awarded by the trial judge, and his judgment as to such damages restored with costs in all courts.

IDINGTON J.—Notwithstanding the wealth of legal lore bestowed on the argument of this case, I respectfully submit that the greater part of it is entirely irrelevant to the proper determination of the issues involved.

I agree that in giving effect to any legislation in-

(1) [1899] A.C. 535.

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vading the common law of any country we must have due regard to that law and restrict legislation of an invasive character to the clear and distinct expression thereof before allowing it to change the common law.

Here we have hardly any need for the application of so elementary a principle of law.

We have presented to us as the basis of all else to be considered a piece of Crown domain freed from the embarrassments of there being inherent therein relative to its tenure anything but what the legislature may have seen fit to stamp thereon in its administration thereof, or the lines it may have laid down by statute for such administration.

We have statutes enabling the Crown through its ministers to dispose thereof or of defined interests therein.

Pursuant to the powers thus conferred by legislation we have rights given each of these respective litigants. We must find these rights if we can, neither inconsistent nor incompatible. If we should unfortunately find them so then the priority of grant might become an important factor. But inasmuch as I think that the learned trial judge has rightly found them possible of conciliation, I am not at all troubled with such difficulties as might in the converse case have arisen.

The respondents became licensees of the Crown giving them the right to cut timber over certain limits. The appellants became exclusive licensees of the Crown to hunt or fish within certain defined limits.

Only at two points of small extent do these limits overlap each other.

Although each is called an exclusive right, and each party is spoken of as having an exclusive pos-

session, I think this latter word must be given, of its many possible uses or meanings, no more force than simply as to each party that exclusive right to possess to the extent necessarily implied by the legal limits of the rights to be respectively exercised within the terms of their respective grants.

I am not, when I find the exercise by each of its own rights quite compatible with the fullest exercise by the other of its rights, concerned with the fact that there is an overlapping in the territorial sense of their common ground for operating upon.

The respondents, so far as their operations in the way of cutting timber up to the present time are concerned, have not cut off or upon any of the territory over which the appellants' rights extend and thus the matter is further simplified.

The appellants' claim extends over two lakes of which the larger empties into the smaller, and from this smaller one there is a river, called Décharge, forming its outlet and running some seven or eight miles before it empties into the long River Ouelle.

It is said the Décharge carries in fact, though short, the larger quantity of water.

The respondents in carrying on their business as lumbermen have mills some miles below the confluence of these streams.

Their lumbering operations as to cutting logs and floating them to the market or their saw-mills have been confined solely to the River Ouelle.

They have never attempted and do not now claim it is part of their purpose to attempt to float logs over or through the lakes in question or the River Décharge.

What they do claim is that being owners of a lot

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granted to them by the Crown, and through which the Décharge runs, they can erect thereon at the point where it passes through said lot, a dam by means of which they can dam back the water in the lakes and river so as to form therein and upon the lands bordering same a large reservoir for storing water by means of which, and the flood-gates for the purpose, they can from time to time let off the water so stored and assist the floating of logs in the River Ouelle.

They erected such a dam and have had it in operation for some years and the appellants claim they have thereby impaired the utility of the lakes as a fish-pond of which appellants have been by their licenses put in exclusive possession for fishing purposes, and destroyed the utility of the Crown road by which the lake was reached, by submerging it.

The learned trial judge found the respondents had no right to do this and other such things, and assessed the damages at $400, and enjoined them from continuing it. I will refer to the terms of this injunction later.

The questions raised thus must to my mind be resolved by the interpretation and construction of two or three statutes now brought together in the recent revision of the statutes of Quebec, and numbered articles 7295 to 7300 inclusive.

Article No. 7295 is as follows:—

7295. Every proprietor of land may improve any watercourse bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, works and machinery of all kinds, and for this purpose may erect and construct in and about such watercourse, all the works necessary for its efficient working, such as flood-gates, flumes, embankments, dams, dykes and the like.

This was first enacted by 19 and 20 Vict. ch. 104,

sec. 1, of the Parliament of Old Canada but confined in its operation to Lower Canada, now Quebec.

I am unable to comprehend how a statute of which the purview seems so clearly related to the turning of power thus provided to the designated purposes can be made to directly subserve an entirely different purpose.

Where would such a method of construction end in extending the purposes thus expressed to something or everything merely incidental to and very remotely if at all, connected with the execution of the expressed purposes ?

If this contention for the extension of the operation of such a statute could be held tenable, I should expect next to hear of its use in enabling the creation of rice-fields, or farms of fur-bearing animals to supply men engaged in milling or manufacturing with such needful products.

This statute came under the notice of this court in the case of *Jones* v. *Fisher* (1), but such remote contingencies failed to be encouraged.

Somebody, however, would seem to have raised questions of its operating in a way to hinder the very industry it is now alleged to have some remote relation to.

In consequence thereof the legislature enacted what is now article 7297 R.S.Q., providing as therein appears and especially protecting joint stock companies in their business of floating timber.

It had so happened that a year or two before the first mentioned statute was passed, an Act was passed to facilitate the creation of such companies and regu-

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late their operations. Are these the companies referred to in article 7297? If, as I so suspect, then the public utility of said statute does not appear to have had much to do with floating logs, or to have led anyone to suppose it related thereto.

As if determined to put an end to the obstruction, such as an unrestricted exercise of power, which the first statute enabled might create, the legislature enacted also that which appears now in articles 7298 and 7299, R.S.Q., of which the following are the chief parts concerning us:—

> 7298. Subject to the provisions of this sub-section, any person, firm or company may, during the Spring, Summer and Autumn freshets, float and transmit timber rafts and craft down all rivers, lakes, ponds, streams, and creeks in this province.
>
> 7299. It is and always has been lawful to erect and maintain dams, slides, aprons, booms, gate-locks or other necessary works, to facilitate the floating or transmission of timber, rafts or craft down such rivers, streams, lakes, ponds, or creeks, to blast rocks, dredge or remove sand-banks, remove trees, shrubs or other obstacles without, however, doing any damage to such rivers, lakes, ponds, streams, or creeks.
>
> If it is absolutely necessary for the construction of such improvements to take and occupy any private property, expropriation proceedings shall be taken for the land strictly required for such purpose, by observing, for the valuation of the land and the damages resulting from the works, the provisions respecting expropriations for railways.

Article 7300 provided for the compensation of such persons as made such erections by fixing tolls to be paid for their use.

In default of being permitted to rest upon the first statute the respondents seek to rest their rights to do what they have done upon article 7299.

It seems to me there are two or three complete answers to this latter claim. In the first place it does not seem to me that these two articles which must be read together, cover this case at all or ever were in-

tended to sanction such a proceeding as that of the respondents.

Any one conversant with the history of litigation in the Province of Quebec relative to the rights thus definitely established need not have far to seek to find good reason for this legislation.

But I have failed to find or hear of any such attempt ingenious and praiseworthy as it is (if only legal) to impose upon others by process of law any such unexpected burdens as this must of necessity involve.

If some such thing had been tried it would likely have been made to appear in the litigation in and jurisprudence of the province.

It seems as if the respondents feel they can only succeed by using the article 7299, and discarding the preceding article.

I think we may well look to their origin and past relation, as well as the present, though amended by Acts incorporated in the revision, and in such case anything to be done seems to have been contemplated as relating to the seasons of freshets, whereas this expedient in question here is to aid chiefly in the dry seasons.

Indeed its use mostly objected to is that in such seasons.

Passing all that and reading these articles in their plain ordinary meaning do they, or either involve any such thing as the storage of water in a branch or feeder over which no timber is ever supposed to have passed? I confess I cannot so read them or either of them. And with that must fall the respondents' whole contention.

In the next place if we try to find herein a provi-

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sion for the storage of water supplemental to the river on which the floating of timber is to be operated, how can we suppose such a purpose was ever intended to have been expressed by such inapt language.

It is expressly declared that the dams, etc., provided for must not do "any damage to such rivers, lakes, ponds, streams or creeks."

How can you more effectually destroy or damage the utility of a stream of which every riparian proprietor is to be supposed to be entitled to use, as it passes, the waters thereof, than by shutting up its waters until a vast reservoir has been filled? It might take days or weeks to fill, and during all this time those down the stream are not to have their use of water for use of mills or herds or other domestic purposes.

It may be said this instance does not involve any such consequences. But it is not this case alone or its peculiar facts we must consider. It is the possible and probable operation of the construction (implying this enactment provided for auxiliary storage dams) which is contended for and has to be borne in mind.

Now let us look at the provision for compensation to those damnified by any such operation as implied in that construction and see how badly it fits.

It is clearly not applicable to any such case as that of those deprived of their use of water but those whose land has to be taken to enable the construction of any of the contemplated works.

It is not to be imagined that the legislature ever intended, when so careful of so small consequences as the expropriation of a bit of land, to deprive anyone of that of which the deprivation would do infinitely more harm, as in the case of such riparian proprietors.

If again the principle of the railway legislation taken as the measure of right between the parties is to be applied, how can it be applied here where the thing is first taken possession of and used?

The railway expropriations are preceded by an arbitration or by an order of the court and deposit presumed to meet the damages or compensation to be fixed by arbitration.

A railway company failing to observe such conditions is treated as a trespasser just as the learned trial judge treated the respondents.

Again we are told the Government having power to fix the tolls has fixed them, and hence it must be taken to have revoked the appellants' license *pro tanto.*

In the first place the order does not name any works on the Décharge River, but on the Ouelle River.

If that is not conclusive, how can the provision for tolls have any relation to such a work as this?

A dam or slide on a river over which timber is floated is for common use and hence the provision for tolls in legislation of this character is a most justifiable expedient.

But how can that have any relation to the case of a storage dam on a branch of such a river? Let us suppose the branch and lands on both sides or either side thereof entirely, as it might well be, the property of those erecting such a storage dam. What right could anyone else have to use the storage dam thereon? Or what right has been given to any power to fix tolls in such a case? We might as well say the Government had power to fix tolls for the use of any patent device and machinery one company had for overcoming such obstacles, and thereby impose the

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duty upon an enterprising party to lend its apparatus and skill to someone else. The legislature has not yet gone so far.

So far from finding any consolation for respondents in the fixing of tolls, I find in the provision therefor in the Act one of the most destructive arguments against their whole contentions.

It is the common path, the common highway over which this method of transportation is a matter of supreme importance for an important industry that the entire legislation relates to and nothing else.

I think the learned trial judge was right in his conclusions and almost entirely so in his reasoning.

I have had only one doubt of practical importance relative thereto, and that is this: The judgment enjoins the interference with the current and it may be that this is too wide.

It may well be the respondents have the right to raise the water within the range of their own premises in a way that the appellant has no right to complain of.

But this is a minor matter and so far as I could gather from answers to questions put, is of no consequence.

But if it is, then the judgment ought to be varied in that regard if the respondent so desires.

I think that, however, merely an incident or accident and not what the parties are here for.

I think it is not common to give rights of action to Crown locatees and licensees, and that the right of action given by the statute to the appellants as licensees is of that character and by virtue thereof as well as other rights of action, the appellants are entitled to protect their rights and subject to such vari-

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ation of the judgment, and whether judgment so varied or not, the appeal should be allowed with costs here and in the court below, and the judgment of the trial judge be restored so far as consistent with said variation.

DUFF J.—The respondents, the lumber company, professing to act under the authority of article 7299 R.S.Q., have erected a dam in a stream through which the waters of two lakes (known as the Lakes of Ste. Anne) in the county of Kamouraska, are discharged into the Grande Rivière. The dam is situated at the debouchement of this stream from the more northerly of the two lakes. The purpose which it is made to serve is this:—The respondents have a saw-mill on the Grande Rivière twenty miles below its point of confluence with the discharge. The timber (cut upon the banks of the Grande Rivière and its tributaries) is brought to that river at places below this point. The waters of the two lakes impounded by the dam are, at times when those of the Grande Rivière (unless artificially augmented) would be insufficient for that purpose, discharged into the river for conveying this timber to the respondents' mill.

The appellants, the game club, have licenses to fish in the Ste. Anne Lakes, and hunting privileges in the surrounding territory. It is hardly open to dispute that these rights of the club have been prejudicially affected by the operations of the lumber company, and the question is whether, in respect of this prejudice, they are entitled to reparation.

By the law of Quebec, streams (although not navigable in the strict sense) so far as they may be capable of conveying small craft and rafts of timber, have

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always, under the denomination of "floatable" streams, been subject to public use for such purposes. Some question which appears to have arisen touching the exercise of this right during seasons of high water in respect of streams not ordinarily floatable, is set at rest by article 7298 R.S.Q., one of the provisions of enactment under which the lumber company justifies the operations out of which the action arises.

This enactment authorizes the construction of works improving the floatability of streams already floatable, or making floatable such streams as do not already fall within that category. The scheme of the Act—expressed very summarily—appears to be to authorize persons having occasion to use as a public highway a stream already *publici juris,* to remove obstructions and to construct artificial works for the purpose of improving it as a highway, and in the case of streams not *publici juris,* to convert them into public highways by works of a similar character. The form of the leading provision of the enactment—though not necessarily incompatible with another view—appears to suggest the design on the part of the legislature that improvements executed under the authority of the Act should be situated on the stream which they are intended to affect; and this suggestion receives confirmation from article 7301 R.S.Q.

It seems to be necessary that some such limitation as to the situation of such works should be implied. If the legislature had intended that any person having occasion to use a stream for the conveyance of timber should be entitled to impound the sources of the stream miles beyond that part of it over which any timber could be expected to pass, one would have looked for some provisions aimed at protecting the

interests of other persons having occasion to use the stream for similar purposes; and affording some means of adjusting the rights of such persons in respect of the use of such improvements.

This view receives illustration from an enactment (now articles 6266 to 6340 R.S.Q.), providing for the incorporation of companies authorized to construct and maintain works of the same character and for the same purposes as those mentioned in article 7299 R.S.Q. The legislature in framing that enactment has been careful to provide that such works are to be permitted only after approval by a Minister of the Crown, and for the regulation of the use of such works in a "safe and orderly" way (R.S.Q. articles 6276, 6323, 4 and 7). The provisions of the statute, even with these precautions, pointedly suggest that the legislature had in contemplation only works situated on that part of a stream over which timber might be expected actually to pass. The point is not free from difficulty, but on the whole, balancing the relevant considerations, it seems improbable that the legislature had in view, in enacting article 7299 R.S.Q., such works as that in question here; and that the use of such works for the purposes to which the respondents have put them is not a reasonable exercise of the powers conferred by the Act.

I do not pursue the argument into its details, because, since on this point the court is equally divided, the appeal actually falls to be determined upon the hypothesis that such plans as those of the respondents are within the authority given by the statute.

On that hypothesis, the appellants do not appear to me to be entitled to a restraining order. I am not able to read article 7398 R.S.Q. as restricting the scope of the subsequent articles. That article, in my view, as

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already indicated, is to be explained as intended to remove some doubt which the legislature thought it worth while to allay. I do not think I can affirm that the doubt was groundless; if I should have been able to do so, still I should have preferred to act on the assumption that the legislature had enacted a wholly superfluous provision, rather than limit the beneficial operation of the subsequent articles in a manner which appears to be opposed to every consideration of practical convenience; and which it would be very difficult indeed to reconcile with the purpose the legislature obviously had in view. See *Hough* v. *Windus*(1), at page 229, *per* Lord Selborne.

The question of compensation remains. The right to use public rivers for the purpose of conveying timber, has always been subject (in Quebec) to the condition that the person so using them shall make compensation for injuries thereby caused (Mun. Code, sec. 891; and R.S.Q., art. 2256). There is, I think, the strongest presumption that the legislature, in declaring the existence of the auxiliary right to execute improvements of the kind mentioned in article 7299 R.S.Q., did not intend to deprive persons prejudicially affected by the use of such improvements, of this right of compensation — without providing a substitute for it. The right to use the improvements has for its basis the right to use the stream. The duty to compensate must, I think, be assumed to be co-extensive with the right to use; and consequently to be attached to the exercise of the right as well in the improved as in the unimproved state of the water-way.

(1) 12 Q.B.D. 224.

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ANGLIN J.—The facts of this case are fully stated in the judgments of the provincial courts.

Three questions present themselves for determination: the first, whether as holders of fishing and hunting leases from the Quebec Government the appellants have a status to maintain this action; the second, whether the acts of the respondents, which interfered with the natural levels of the waters of the two lakes Ste. Anne, and caused flooding of adjacent lands, thus injuriously affecting the appellants' rights of fishing and hunting, are or are not authorized by statute; and the third, whether, if such acts are so authorized, the respondents are or are not liable to make compensation for damages thereby occasioned.

The first question is, I think, concluded in favour of the appellants, at all events as to their right to maintain an action for damages, by the statute 62 Vict. (Que.) ch. 23, which re-enacts (as article 1383 R.S.Q.) with a slight alteration, article 1376(2) of the Revised Statutes of Quebec, 1888, declaratory of the effect of fishing leases, and the statute 1 Edw. VII. (Que.) ch. 12, sec. 6, similarly declaratory of the effect of hunting leases.

Article 1383 R.S.Q., as enacted by 62 Vict. ch. 23, reads as follows:—

1383. The lease confers upon the lessee, for the time therein determined, the right to take and retain exclusive possession of the lands therein described, subject to the regulations and restrictions which may be established, and gives him the exclusive right to fish in the waters fronting on such lands in conformity with the provincial and federal regulations, then in force, and also to prosecute in his own name any illegal possessor or offender against any provision of this Act, and to recover damages, if such exist, but not against any person who may pass over such lands or the adjacent waters, or who engages in any occupation not inconsistent with the provisions of this section, nor against the holder of a license to cut timber, who has, at all times, in accordance with his

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license, the right to cut and remove trees, lumber and saw-logs and other timber, within the limits of his license, and, during the term thereof, to make use of any floatable river or watercourse, or of any lake, pond or other body of water and the banks thereof for the conveyance of all kinds of lumber and for the passage of all boats, ferries and canoes required therefor, subject to the charge of repairing all damages resulting from the exercise of such right.

(See now R.S.Q., 1909, art. 2256.)

The language of 1 Edw. VII. ch. 12, sec. 6, is the same. (See now R.S.Q. 1909, art. 2350.) For convenience in discussing this legislation I shall refer to the numbers of the articles in the Revised Statutes of Quebec, 1909.

Though by no means free from ambiguity — indeed each at first blush appears to be self-contradictory — articles 2256 and 2350 R.S.Q., upon their proper construction, in my opinion, give to the holders of fishing and hunting leases the right to maintain an action against any holder of a license to cut timber who, in the exercise of his rights in making use of a floatable river, watercourse or lake, has done damage which he has failed to repair. The rights of timber licensees are "subject to such regulations and restrictions as may be established" (R.S.Q. 1888, art. 1311; now R.S.Q. 1909, art. 1599): *inter alia* they are subject to the obligation of the licensees to repair any damage occasioned by their exercise to fishing and hunting lessees of the Crown. If the right of damming asserted by the respondents is one of the rights of a holder of a license to cut timber referred to in articles 1156 and 2350 R.S.Q. (1909) — I think it is not — it is only exercisable subject to the charge of repairing all damages thereby occasioned. If it is not such a right, the defendants in interfering with the rights of the appellants, unless justified by other statutory authority, were "offenders" against the "sections" of which these

articles form parts, and as such are made liable to an action at the suit of these Crown lessees of fishing and hunting rights for damages sustained by them. To declare the rights of timber licensees to make use of rivers, lakes, etc., to be

> subject to the charge of repairing all damages resulting from the exercise of such rights

would indeed be futile, unless failure to make such reparation should give to the person injured a right to compel it by action. The only possible reparation for injury such as is complained of by the appellants is pecuniary compensation for their loss. I am, therefore, of the opinion that the acts of the defendants which caused damage to the plaintiffs for which reparation was not made — if such acts are authorized only by a statute which does not relieve from liability for consequential damages, or are unauthorized — gave to the appellants, as holders of fishing and hunting leases, a right of action for compensation.

It may be important to note at this point that the statutory provisions to which I have alluded were both enacted, or re-enacted, by the legislature subsequently to the enactment of those under which the respondents claim authority to do the acts of the effect of which the plaintiffs complain, viz.: R.S.Q. (1888) arts. 5535-6, and 54 Vict. ch. 25, sec. 1. Both sets of statutory provisions are now found consolidated in the Revised Statutes of Quebec, 1909.

In support of their allegation of statutory authorization, the respondents first invoke articles 5535-6 of the Revised Statutes of Quebec, 1888, which are re-enacted in the Revised Statutes of Quebec (1909), as follows:—

> 7295. Every proprietor of land may improve any watercourse bordering upon, running along or passing across his property, and

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may turn the same to account by the construction of mills, manufactories, works and machinery of all kinds, and for this purpose may erect and construct *in and about such watercourse*, all the works necessary *for its efficient working*, such as flood-gates, flumes, embankments, dams, dykes and the like.

7296. (1). The proprietors or lessees of any such works are liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise.

In my opinion these provisions have no application to the present case. It is true that the respondents have a mill on the Rivière Ouelle some miles below the point at which the discharge from the Ste. Anne Lakes flows into it. But the dam here in question is not erected "in and about the water-course" on which the defendants' mill is constructed and it certainly is not a work necessary or helpful for the "efficient working" of the machinery of such a mill. There is "no mill or machinery operated by this dam." *Jones* v. *Fisher*(1), at page 525. Improving a water-course in order to provide material for manufacture in a mill is not improving it or turning it to account for the efficient working of the machinery of the mill. It should be noted that, if article 7295 R.S.Q. did apply, under article 7296 the defendants would be liable in damages.

The respondents next invoke the statute 54 Vict. (Que.), ch. 25, sec. 1, as amended by 4 Edw. VII. ch. 14, sec. 2. These provisions are now found in the Revised Statutes of Quebec, 1909, as follows:—

7298. Subject to the provisions of this sub-section, any person, firm or company may, during the Spring, Summer and Autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams and creeks in this province.

7299. It is and *always has been* lawful to erect and maintain dams, slides, aprons, booms, gate-locks, or other necessary works to facilitate the floating or transmission of timber, rafts or craft

(1) 17 Can. S.C.R. 515.

down such rivers, streams, lakes, ponds or creeks, to blast rocks, dredge or remove sand-banks, remove trees, shrubs or other obstacles without, however, doing any damage to such rivers, lakes, ponds, streams or creeks.

It was provided by 54 Vict. ch. 25, that nothing therein should

affect the rights of joint-stock companies for the transmission of timber down rivers or streams.

This provision is found, slightly altered, in article 7297 R.S.Q., 1909, and, though now couched in general terms, it probably refers only to companies incorporated under the legislation consolidated in articles 6266 *et seq.* (R.S.Q., 1909), which have no application to the present case.

Although my first impression was that article 7299 R.S.Q., because of its intimate connection with article 7298, and because of the provisions of article 7301, confers the right to erect dams and other improvements only upon water-courses down which timber, etc., is actually floated or transmitted, after a study of the history of this legislation and careful consideration of its terms that interpretation appears to me to be too narrow. First introduced in Quebec in 1890, as 54 Vict., chapter 25, the prototype of this provision is to be found in the Ontario Statute 47 Vict. ch. 17, enacted after the decision of this court in *McLaren* v. *Caldwell*(1), and while that case was standing before the Privy Council for judgment(2). The Ontario statute is preceded by a preamble containing this recital:

Whereas grants have been made by the Crown of lands situated upon such streams; the said licensed and granted lands being above *as well as below* the places where such obstructions were or are, or where such works are or may be constructed.

(1) 8 Can. S.C.R. 435. (2) 9 App. Cas. 392.

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The Ontario provision corresponding to article 7298 R.S.Q. is much older (12 Vict. ch. 89, sec. 5).

It is obvious that "to facilitate the floating of timber" upon the lower reaches of a river the water from the several forks of its upper reaches, or from tributary streams may be equally serviceable. Article 7299 R.S.Q. does not require that the dams declared to be lawful shall be constructed on that part of the river in which the timber is actually floated; it does sanction the construction of improvements which will facilitate flotation and transmission. These improvements may be above or below the point at which such flotation or transmission begins; and if above, why on one fork rather than on another? Why on the main river, and not on the tributary? A dam on either, if above the part of the river on which flotation or transmission is carried on, may equally facilitate it. Although the Quebec statute lacks the preamble found in the original Ontario Act, its enacting or declaratory language is itself wider; it omits the words "therein or thereon" found in the Ontario statute. Not, I confess, without some lingering doubts, due chiefly to the terms of article 7301 R.S.Q., I have come to the conclusion that the situation of the dam in question, having regard to the flotation which it is used to facilitate, does not preclude the application to it of the provisions of article 7299 R.S.Q.

But article 7299 is, in my opinion, clearly auxiliary to article 7298 R.S.Q. The erection of dams, etc., which it authorizes, is for the purpose of facilitating the floating or transmission of timber declared to be lawful by article 7298 R.S.Q. "during the Spring, Summer and Autumn freshets." The rights conferred by the statute are limited to the periods of

these freshets (*Caldwell* v. *McLaren*(1); *Neely* v. *Peter*(2). The use of the dams and other improvements sanctioned is to enable lumbermen to take full advantage of them. It may be that under the powers recognized by article 7299 R.S.Q., as a result of the legitimate use of dams within its purview, the duration of these freshets may be slightly prolonged. But this article does not contemplate the construction of dams for the storage and retention of a supply of water to be used for floating and transmitting timber during the dry seasons. The evidence shews that, their mill-pond being too small to hold all the logs needed to supply their mill, the respondents after the freshets kept great quantities of logs along the bed and banks of the Rivière Ouelle, and from time to time during the dry season allowed the waters stored by the dam in question in the Lakes Ste. Anne to escape and by the artificial freshets thus created carried the logs lying in the river, or such numbers of them as they required, down to their mill. This use of the dam was, in my opinion, not sanctioned by article 7299 R.S.Q. and was the chief, if not the sole, cause of the injuries of which the appellants complain. A comparison of articles 7298 and 7299 R.S.Q. with 47 Vict. ch. 17, sec. 1 (Ont.), is instructive. I entertain no doubt that article 7299 R.S.Q. does not sanction the use of dams, etc., to facilitate or make possible the flotation or transmission of timber in the dry seasons.

My attention has been drawn to article 891 of the "Municipal Code," not cited at bar or referred to in the factums. Unlike article 7299 of the Revised Statutes of Quebec this article of the "Municipal

(1) 9 App. Cas. 392.

(2) 4 Ont. L.R. 293, at p. 296; 5 Ont. L.R. 381.

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Code" appears to declare the right of every person at all times (comp. articles 2256, 2350 and 7349(2) R.S.Q.) to use any municipal water-course for the conveyance of timber — subject to payment of all damages resulting from the exercise of the right.

Every river or natural watercourse, in the parts thereof which are neither navigable or floatable (except at certain periods of the year after rains) is a municipal watercourse. (Art. 868 Mun. C.)

Article 891 (Mun. Code) is declaratory of rights in water-courses only in their natural state. Article 7299 R.S.Q., in my opinion, has no application to or connection with it, or with article 7349 R.S.Q. Article 7299 R.S.Q. is historically and by its terms so intimately connected with article 7298 R.S.Q., that it must, as I have said, be regarded as accessory or ancillary to it, and the rights for which it provides are exercisable only for the purposes of the flotation or transmission declared by article 7298 R.S.Q. to be lawful.

The right of all persons to use water-courses in their natural state *at all times* for the flotation and conveyance of timber had, long before 54 Vict., been fully recognized and provided for by the legislation now consolidated in articles 2256, 2350 and 7349 R.S.Q., and article 891 Mun. Code, already referred to. Except that it expressly mentions "rafts," article 7298 R.S.Q. (54 Vict. sec. 1, 1972*d*), if read apart from and independently of article 7299 R.S.Q., would merely re-affirm the existence of this right during freshets. I cannot think that this article was passed simply to give to the transmission of "rafts" the same statutory sanction which had already been given to the conveyance of all kinds of timber. Unless it is to be deemed quite superfluous and to have been enacted *per incur-*

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iam — such a construction is to be admitted only if inevitable (*The Queen* v. *Bishop of Oxford* (1), at page 261) — this article must apply to the right to use water-courses, or parts thereof, with the aid of such artificial means as are provided for by article 7299 R.S.Q. Otherwise its enactment is simply unintelligible. Apart from the inapplicable provisions of article 7295 R.S.Q., the only statutory sanction for the construction of improvements which interfere with private rights in or along watercourses, except by companies formed for the purpose (article 2266 R.S.Q.), is that given by article 7299 R.S.Q. The conditions under which these companies may exercise such powers are onerous and special. See articles 6272-8 and 6305 R.S.Q. Why should the legislature, when expressing its sanction of the making and use of such improvements by persons or companies other than those incorporated under R.S.Q. articles 6266 *et seq.* without the safeguards and free from the conditions by those articles imposed, by the same statute declare a limited right of flotation — quite unnecessary, because already more fully provided for, if user of water-courses in their natural state were in its mind — unless it were for the purpose of defining the periods during which the right of flotation with the aid of such newly declared statutory privileges might be exercised ?

Again it is urged that during the freshets waters held in storage are not required and that to confine the use of such waters as are retained by the defendants' dam to those periods will, in fact, render the dam of no value and will give no effect to article 7299 R.S.Q. That article provides for other improvements, all of

(1) 4 Q.B.D. 245.

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which, including dams constructed on the parts of the river actually used for the flotation of timber, may be of great service during the freshets. Even dams situated, as is that here in question, above the part of the river in which it is sought to facilitate driving may be useful in regulating the flow of the water during these periods and thus be of material assistance in the transmission of the logs. The construction which I have put upon it by no means deprives article 7299 R.S.Q. of all effect. It is the only one, in my opinion, admissible, having regard to its collocation, its terms and its history. If this interpretation be narrower than the legislature intended, by a very simple amendment the article can be made to cover that for which the respondents contend.

I am further of opinion that, although the use made of their dam by the respondents should be deemed to be authorized by article 7299 R.S.Q., they nevertheless could enjoy that privilege only subject to the obligation of indemnifying persons injured by its exercise. Apart from statutory authorization there can be no right to interfere with the natural level or flow of waters to the prejudice of persons having riparian or other interests which would be affected. Article 7299 R.S.Q., though declaratory in form, in fact confers new rights and should, I think, be regarded as merely permissive — not imperative; and should the infliction of injury upon others follow the exercise of the rights thereby recognized or conferred, if there were no provision for compensation, it is possible that their exercise should be restrained. *Canadian Pacific Railway Co.* v. *Parke*(1), at pages 544-5. But, in the

(1) [1899] A.C. 535.

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absence of any declaration of a contrary intention, articles 2256 and 2350 R.S.Q. may, in the cases of fishing and hunting lessees of the Crown, be taken to supply the provision for compensation which in modern times is generally found in a statute authorizing interference with private rights. *Managers of Metropolitan Asylum District* v. *Hill*(1), at page 208.

The opening words of the article, "It is, and always has been lawful" are worthy of further notice. If owing to their presence it must be assumed that article 7299 R.S.Q. is merely declaratory of powers already existing, the inference of a right in persons injured by their exercise to compensation seems irresistible, because without statutory authority it cannot have been lawful by the use of dams to alter the flow and levels of streams and lakes to the injury of persons interested in such waters as riparian owners or otherwise — at all events without making compensation for such injury.

After comparing article 7299 R.S.Q. with section 1 of the "Ontario Act," 47 Vict. ch. 17, I entertain some doubt whether the concluding clause "without however doing any damage, etc.," is applicable to the whole section, or only to blasting rocks, dredging or removing sandbanks and removing trees, shrubs or other obstacles. The absence of the conjunction "and" at the end of the fourth line leads me to think that the former is probably the correct construction. I am, however, not satisfied that the raising and lowering of the waters of which the plaintiffs complain does any damage to the lakes themselves. Injury caused by flooding

(1) 6 App. Cas. 193.

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to fishing and hunting privileges merely does not necessarily involve damage to the rivers and lakes in and about which they are enjoyed. Neither is it injury caused by the erection and maintenance of the dam, but rather by the use made of it. I, therefore, rest the right of the appellants to recover damages not upon the concluding clause of the first paragraph of article 7299 R.S.Q., but upon the fact that the use by the respondents of their dam to provide water for the flotation of timber during the dry seasons was not authorized by that article, and upon the absence from it of a provision depriving the plaintiffs of the right to compensation for injury which the exercise by the defendants of any right conferred by it might entail, coupled with the rights conferred on fishing and hunting lessees by the statutory provisions now consolidated in articles 2256 and 2350 R.S.Q.

The rights of the timber licensees being, not absolute, but "subject to such regulations and restrictions as may be established" (article 1599 R.S.Q., 1909), the respondents acquired their rights subject to the reservations declared by articles 2256 and 2350 R.S.Q. in favour of the holders of any existing or future fishing and hunting leases which the Government had granted or might see fit to grant. It is, therefore, I think, immaterial that the appellants obtained renewals of their fishing and hunting leases after the construction of the respondents' dam. The respondents' rights always were and remained subject to the provisions of articles 2256 and 2350 R.S.Q.

The provision for expropriation in article 7299 R.S.Q. has no application, in my opinion, to the case of lands not "taken and occupied" in the erection and maintenance of the improvement, but merely injuri-

ously affected by flooding. Compare article 6305 R.S.Q.

The appellants are, I think, entitled to the damages awarded, which were confined by Cimon J. to the injury done to their fishing and hunting rights during the two years immediately preceding the action. That the amount allowed was excessive was not seriously argued.

Subject to the question whether as mere lessees, though given by the statute a right to exclusive possession, they have a status to maintain a possessory action (*Price* v. *Girard*(1); *Baptist* v. *La Cie. de Papier des Laurentides*(2), at page 479) (see Fuzier-Herman, Rep. *vo.* "Chasse" No. 111) the appellants would, in my opinion, be also entitled to an order requiring the defendants to refrain from so using their dam as to affect the levels of the waters of the two Lakes Ste. Anne *to the prejudice of the fishing and hunting rights of the appellants, except during the Spring, Summer and Autumn freshets.* The result of the opinions of the majority of my learned brothers renders it unnecessary to determine whether these plaintiffs can or cannot maintain an action for this relief.

Because the dam is on the defendants' property, and because its use at certain times is legitimate, the prayer for its demolition was, in any case, properly refused.

Appeal allowed in part with costs.

Solicitors for the appellants: *Pelletier, Baillargeon & Alleyn.*

Solicitors for the respondents: *Pentland, Stuart & Brodie.*

(1) Q.R. 28 S.C. 244. (2) Q.R. 16 K.B. 471, at p. 478.

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ROSE A. CLARKE (PLAINTIFF).....APPELLANT;

AND

FRANK W. BAILLIE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Broker—Stock carried on margin—Right to pledge.

A broker who carries stock on margin for a customer has a right to pledge it for his own purposes to the extent of the amount he has advanced.

If the broker pledges such stock as security for an amount greater than his advances, whereby he makes no profit and the client suffers no loss, he is not liable as for a conversion provided that on demand of his client he delivers to the latter the number of shares ordered and which he has been carrying for him. Anglin J. dissenting.

Per Duff J.—The broker is not liable under the above conditions if he pledges the stock believing that his arrangement with his client so authorized.

Per Duff J.—The dealings complained of were in accordance with the ordinary practice of brokers in Toronto in respect to stocks being carried "on margin," and the proper inference from all the evidence was that such dealings were authorized by the arrangement between the parties.

Per Anglin J.—The broker must at all times be in a position to hand over the stock to his client and if, as the result of his pledging it, he puts himself in a position where he may not be able to do so, he is guilty of conversion.

Judgment of the Court of Appeal (20 Ont. L.R. 611), affirming that of the Divisional Court (19 Ont. L.R. 545) affirmed. *Conmee* v. *The Securities Holding Co.* (38 Can. S.C.R. 601) distinguished.

(Leave to appeal to Privy Council was refused, 13th Dec., 1911.)

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a Divisional Court(2) by which the verdict at the trial in favour of the defendants was sustained.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 20 Ont. L.R. 611. (2) 19 Ont. L.R. 545.

The facts are stated in the judgment of the Divisional Court as follows:—

"The plaintiff brings this action to recover damages from the defendants because of their alleged dealings in respect of certain stocks known as the Sao Paulo, and Louisville and Nashville stocks, which the plaintiff engaged them to purchase for her on margin, as the term is. The learned trial judge disposed of the case adversely to the plaintiff, on the ground that she had failed to shew damage. Against this judgment she has appealed to this court.

"Her complaint as to the Sao Paulo stock is that the defendants, without her consent and in breach of their duty towards her, hypothecated it together with other stocks in which she had no interest, for a bulk sum exceeding many times the amount of her indebtedness to them, and that this conduct operated as a conversion. As to the Louisville and Nashville stock she charges that the defendants did not in fact purchase it for her, but, nevertheless, represented to her that they had done so. Ultimately, upon demand, they delivered to her agent for her the shares of the two stocks to the amount ordered by her; but, she says, did not inform her of the facts now complained of; that in ignorance of these facts she paid for and accepted the stocks and disposed of them; that on discovering the facts she considered herself entitled to damages, and accordingly brought this action.

"It is beyond question that the defendants purchased for the plaintiff the Sao Paulo shares in accordance with the terms of her instruction, she paying them a small portion of the purchase money therefor, and owing to them the balance, the defendants being entitled to hold these shares until the plaintiff

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paid them the amount owing in respect thereof. The defendants admit that they borrowed on the security of these shares, and of other stocks a sum of money greatly in excess of the amount owing by the plaintiff.

"As to the Louisville and Nashville stock, on the day of the plaintiff ordering its purchase, the defendants telegraphed instructions to a firm of brokers in New York to make the purchase, and in due course that firm sent to the defendants a bought note for the amount of shares thus ordered, whereupon the defendants represented to the plaintiff that her instructions had been complied with. It was, however, contended before us that if the New York brokers made the purchase of the Louisville and Nashville stock for the plaintiff, they the same day, sold it, and that thereafter no Louisville and Nashville stock was held for her by the defendants or their agents. On this point it may be observed that even if the New York brokers did sell the plaintiff's stock, still the defendants, so far as appears, were wholly unaware of the fact, and acted in perfect good faith in representing to her that the stock had been purchased and was being held for her. However, we think that the evidence shews that the New York brokers purchased for defendants in pursuance of the plaintiff's instructions to them the number of shares ordered for her, and that, although they sold the particular shares so purchased, still they always held either free from hypothecation or hypothecated, the number of shares which the defendants had ordered them to purchase, and on account of which she paid to them a sum of money by way of margin. In this transaction, the New York brokers seem to have known the defendants only, and were carrying for them many other stocks, all of which, including

the plaintiff's Louisville and Nashville shares, were being held by them as security for the whole indebtedness of the defendants to them, being an amount greatly in excess of the plaintiff's indebtedness to the defendants. After the lapse of some months the plaintiff applied to the defendants for both stocks, viz.: the Sao Paulo and the Louisville and Nashville, and at once, upon her paying the amount of the defendants' claim, they were transferred to her order."

Nesbitt K.C. and *Wood* for the appellants. The respondents were bound to purchase and then to carry the shares for the appellant. *Robinson* v. *Mollett*(1), at pages 815, 836, 838; *Johnson* v. *Kearley*(2), at pages 527 to 529; *Parsons* v. *Hart*(3).

Respondents were agents of appellant and when they converted the shares she could demand their value at the market price on that day. *Stubbs* v. *Slater*(4).

Hellmuth K.C. and *Long* for the respondents.

THE CHIEF JUSTICE.—I have no doubt that this appeal should be dismissed. The appellant brought an action to recover from the respondents damages for breach of an agreement to purchase for her certain shares of stock in these circumstances:—

The appellant is a spinster admittedly familiar with the usages and practice of the stock market and the respondents are brokers and members of the Toronto stock exchange. Instructions to purchase on

(1) L.R. 7 H.L. 802.
(2) [1908] 2 K.B. 514.
(3) 30 Can. S.C.R. 473, at p. 480.
(4) [1910] 1 Ch. 632.

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margin a certain number of shares of Sao Paulo and of Louisville and Nashville stock were given verbally by the appellant and when the orders were executed a notice called a bought note was sent to her in each case to inform her that her order was executed and setting forth the conditions subject to which the purchase was made.

The purchase of stock on margin through a broker necessarily involves an advance by the latter of a sum which added to the amount of the margin put up by the customer will be sufficient to enable the broker to pay for the stock. It is proved beyond doubt that to procure this money the broker is entitled, according to the well established usage of the stock exchange both in Toronto and New York, to re-pledge *en bloc* the stock bought by him on margin. To enable this re-pledging to be done in a way most advantageous for both parties and to avoid all misunderstanding as to the authority of the broker, this term was inserted in all the bought notes:—

> When carrying stocks for clients, we reserve the right of pledging the same or raising money upon them in any way most convenient to us.

It is admitted that the broker did in the case of each purchase make the necessary advances for his customer, the appellant; but the latter contends that while the broker had the stocks in his possession they were pledged by him to raise a sum of money in excess of what was then due to him by her with respect to each block of stock and that such a dealing constituted a conversion of the stocks to his own use and that he must account for their full value at that date notwithstanding that he acted in perfect good faith.

There can be no doubt, as both parties admit, that

the broker had the right to hypothecate the stock of his client so long as he did not pledge it for an amount in excess of what was due him by the client in connection with the purchase and the trial judge finds as a fact

that the stock which was for a good deal of the time unpledged was never at any time pledged by the respondents beyond the amount due them by the appellant for that portion of the purchase made which they had advanced.

If not sufficient to justify this finding which, of course, puts an end to the plaintiff's claim the evidence is very conclusive that the brokers had at all times control over the stock and could deliver it to the appellant, as they did on her first demand, on payment of the amount due on each purchase. When she did ask for delivery of the stocks the certificates were partly in respondents' vaults and partly in the possession of their agents in New York, subject to their order; and her directions with respect thereto were immediately complied with and the stocks were never at any time dealt with by the brokers to the damage of the appellant and to the profit of the respondents. On the contrary it is clear on every line of the evidence that the brokers acted with the utmost good faith, in strict accordance with the usages and customs known to the appellant and with reference to which she is properly presumed to have made her contract.

I would dismiss with costs.

DAVIES J.—I am of opinion that this appeal should be dismissed upon the ground that there was no evidence whatever that the plaintiff (appellant. had sustained any loss by reason of the alleged conversions of her stock of which she complains.

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The respondents were brokers and had purchased stock for the appellant on the margins advanced for the purpose by the appellant. They had pledged this stock so purchased together with other stock of other clients with one of the banks not only to raise the difference between the margins put up by the appellant and the purchase price of the stocks, but also to cover their general indebtedness to the banks which was, of course, much greater than the sum owing to them upon the appellant's stock. The appellant contends that the manner in which the pledge was made constituted in law a conversion of her stock and entitled her to recover the damages she claimed.

The facts proved shewed that the alleged conversion was in accordance with the ordinary practice of the respondent brokers in their dealings with the banks respecting the hypothecation by them of stocks of their customers, and that although they had hypothecated the appellant's stock or shares together with other stocks for a sum of money greatly in excess of the amount owing by the plaintiff on her stock, the moment she demanded her stock her demand had been complied with and her stock duly transferred to her, accepted by her and then sold by her. The alleged conversion by the improper manner of hypothecating the shares brought no profit to the brokers nor any loss to the appellant. It was not till long afterwards that plaintiff brought her action.

On the ground, therefore, that although the brokers were not under the terms of their contract with the appellant as I construe it justified in pledging her shares in the manner they did, yet as they delivered the shares to the appellant immediately she demanded

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them and that she did not suffer any damage whatever from the alleged impropriety I think this action cannot be sustained.

Owing to some observations made in the reasons for judgment of the Court of Appeal I think it desirable to say that further argument of the question of the legal meaning of the foot-note to the bought and sold notes of the brokers under which they claimed the right to hypothecate these shares for a larger sum than was due to them upon the shares by their owner has not tended to weaken or alter the opinion I expressed with regard to its meaning in the case of *Conmee* v. *Securities Holding Co.*(1), namely, that its language does not justify the broker in pledging the shares for a sum greater than that due from the customer to him.

I would dismiss the appeal with costs.

IDINGTON J.—The respondents contracted with the appellant to purchase and carry for her certain stocks. In the course of the business she claims they had pledged or hypothecated such stocks in such a way that she is entitled to charge against them the then market value of said stocks, though much depreciated in value when she received a transfer to her of said stocks or the like stocks and disposed of them, and hence suffered loss.

I am somewhat at a loss to know exactly on what legal grounds the claim is put.

If we are to treat the stocks in question as transferable in such a way that they can be looked upon as chattels susceptible of conversion for which an action

(1) 38 Can. S.C.R. 601.

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of trover would lie and this as if such an action, we are met with the legal difficulty that it has always been competent for the court in an action of trover to stay the proceedings for damages upon a delivery up of a chattel.

That is what has happened by the act of the parties, and how can damages rest on that ground ?

It has sometimes been competent for the owner of the chattel wrongfully converted, to waive the tort and sue for price or proceeds of goods and recover. This option could only be exercised upon the complete abandonment of any right to, or interest in, the chattel, which is impossible on the facts here.

In either of such alternatives as I present, the property in the thing in question is presumed in law to have become by the judgment of recovery, vested in the wrongdoer or party meddling with another's property. Hence no such ground of action is conceivable here.

Again, trusteeship is spoken of as a possible ground. How it can be invoked in such a case or made to operate is unexplained. Even if so a trustee having power of disposal pretending to exercise it by a circuitous method so that he ultimately becomes apparent owner as result of such transactions, has been held bound at the option of the *cestui qui trust* to account upon the footing of his alleged sale or whilst being tentatively held thereto to have the property put up for sale and the chances of a better bid being got given the *cestui que trust.* See *Ex parte Hughes* (1) (1802), and *Ex parte Lacey* (2) (1802).

Short of some such situation as that, I know of no legal principle upon which the courts have ever acted

(1) 6 Vesey 617. (2) 6 Vesey 625.

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to charge a trustee or agent improperly dealing with the trust estate with the value thereof; unless same or part thereof, debited has been lost as the result of such improper dealing.

The evidence in this case falls short of anything in any of these conceivable cases.

I am also unable to understand how our decision in the *Conmee Case*(1) has any bearing on the issues raised herein.

I would not for a moment say a word to weaken what we held in so plain a case as that was. Yet even if appellant had before accepting delivery to her of the stocks in question, made her alleged discovery of the facts herein relative to the pledging or hypothecation of the stocks in question and sought to make respondents responsible therefor, I would not be quite sure that she had brought herself within the said decision.

The hypothecation or pledging of the property of another beyond what that other authorizes, may have in many ways serious results that are not apparent in this case where no damages are shewn to have in fact resulted from the act complained of.

Again it is claimed as to the stock bought in New York that in fact there never was a purchase of that stock. The learned trial judge found that there was in fact such a purchase. The Divisional Court in appeal therefrom, also found there was such a purchase.

Though not expressly dealing with the point the Court of Appeal for Ontario must also be taken to have held the same way.

It is too late for us to reverse such findings of fact on such conflicting evidence as exists herein.

(1) 38 Can. S.C.R. 601.

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The utmost that can be said with a full assurance that we are not infringing upon the rule as to concurrent finding of fact by courts below is this, that the stock alleged to have been purchased in New York, passed by reason of some sort of understanding between the respondents and their New York agents, into a body of mingled securities pledged or hypothecated for a very large balance due from respondents to their New York agents in respect of similar transactions.

Now I am not at all prepared to hold that a broker in Toronto retained to buy stocks in New York, has completely executed the business entrusted to him, when he has by the same act of buying so called, so bound the alleged purchase as to subject it to the common charge (exceeding his advance in the purchase) covering it and many others.

It is idle to speak of the other securities being ample, or the personal credit of the broker in New York being ample, so long as the charge exceeds the value of the stock presumed to have been bought.

Nor am I disposed to stretch the implied authority, which may exist as suggested in the Court of Appeal, even if known and so recognized amongst brokers in Toronto, as to be binding upon each other or members of the Stock Exchange, to cover the duty arising towards a person ignorant thereof, when the broker is retained merely to purchase in New York, even when coupled with an agreement to advance part of the price.

I think this case must be disposed of by strict attention to the nature of the contract between the parties and the consequences of some breach thereof. In doing so I desire not to be misunderstood as accept-

ing without limitation either what has been held in the court below, or been contended for here and probably there, and hence my taking trouble to explain (by what I have said) in advance, what I am about to say.

The contract seems accurately stated in the following evidence of one of the respondents:—

249. Q.—The contract was that she was to pay 15% or 20% of the par value of the stock, and you were to pay the balance to purchase it, and the stock was to be pledged to you for the amount you put up, and she was to keep her margin up according to the fluctuations of the market,—was that the contract between you? A.—Yes, that is the contract; there was no written contract.

I do not think such a contract warrants the broker acting upon it either pledging or hypothecating the stock purchased pursuant thereto, for any greater sum than he has advanced together with the interest and commission due him.

Nor, to guard myself by repeating what I have said already relative to New York, do I think that if the purchase and this unwarranted pledging or hypothecating are, as they may be in a given case such as that of the dealing in Sao Paulo stock in question, part and parcel of the same transaction, that the broker has executed his contract to purchase.

It is not clear exactly how that was in this case. It is tolerably clear, however, that in the many changes involved here there must have been a time when the contract of purchase was executed by the terms of the pledge or hypothecation having been so expressed as to enable the shares in question to have been as of right withdrawn upon payment of the sum due from appellant to respondent.

It is, moreover, absolutely clear that the stocks were on demand of the appellant freed from any

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charge and immediately transferred to her upon her paying the amounts due.

The purchase the respondents were retained to make must then at all events have been fully executed, and I fail to see how thereafter she can, under the circumstances, now be heard to say the contrary, especially in the absence of any tender back of that which she got.

Now assume for argument's sake, that the respondents exceeded in any way by unauthorized pledging or hypothecating the limits of their legal rights, and even have thereby improperly jeopardized the appellant's property and her interests in question relative thereto, how can she on the facts claim she was damnified? No damage is shewn. No case is made shewing such damages. If her pleadings might cover nominal damages that is not what has been thrashed out in the long drawn out contest.

And if it ever was open to the appellant to rest upon such a case, the facts have been so held by the courts below, and the nature of the contest has been throughout so entirely distinct from such a consequence, that I do not think we can now reverse on such technical grounds, all that has passed in the courts below.

Although a case may be conceivable of transactions of such magnitude as to effect by such methods as in question the value of the stocks in the market, no evidence here shews such results to have taken place.

I may remark that though I have used purposely in order to cover briefly all points of view, the terms pledging or hypothecating as possibly conceivable relative to what was done, I by no means overlook the widely different legal meanings of the words, and in

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some cases, legal results, of improperly dealing with property subject thereto, or made the subject thereof.

In common parlance, and as used for convenience sake in argument the terms are loosely treated as interchangeable, though not so.

It so happens here I simply have to solve a legal problem arising in this case which must be solved in the same way, whether or not the thing known as stocks herein, or the evidence thereof, can be properly spoken of as subject matter of a pledge.

In the absence of fraud and having regard to the good faith of respondents, however mistaken in my view of their legal rights, I see no conceivable ground of action beyond breach of contract.

One question yet remains and that is the minor one of the one-half per cent. interest charged beyond the rate the brokers were paying. The contract is not clear, but the conduct of the parties makes it clear. She was told from time to time what interest was being charged. Unless the relation of principle and agent excludes the right to charge more than paid, the contract, or that and the conduct of the parties, forbids complaint.

The relation created by this contract is not one purely of principal and agent. It involves much more and thereby to my mind excludes in the absence of any countervailing facts and circumstances reducing it to that simple relation the application of the principles of law prohibiting an agent from making a profit unassented to by the principal.

I think the appeal must be dismissed with costs.

DUFF J.—I think the appeal should be dismissed. I should not have thought it necessary to add anything

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to the reasons given by the learned judges who have dealt fully with the questions involved in the court below were it not for the difference of opinion in this court and the circumstance that the decision of the Court of Appeal (it is argued) is in some way inconsistent with the decision of this court in *Conmee* v. *The Securities Holding Co.*(1).

There are several grounds upon which I think the plaintiff's action must fail.

The evidence shews very clearly, I think, that both in New York and Toronto there is a well understood and well defined usage among brokers who buy and carry stocks for customers "on margin" to repledge or hypothecate such stock *en bloc* for the purpose of raising the funds necessary to meet the obligations incurred by them in the transactions they have executed or undertaken to execute.

It was stated at the trial by Mr. E. B. Osler that this practice is advantageous to the customer because it enables the broker to borrow money at a lower rate. That it is a reasonable practice is shewn, first, by the fact of its general adoption in the two places mentioned, and secondly, by the circumstance that in the State of Massachusetts almost without exception and on the London Stock Exchange in the vast majority of cases such transactions are treated as executory agreements for the sale by the broker to the customer at the price at which the stocks are purchased plus a charge for interest and the broker so long as he carries the stocks is entitled to deal with them as owner. In *Bentinck* v. *London Joint Stock Bank*(2) the subject was dealt with by North J. who sums up the evidence given in that case at pp. 140 and 141 thus:—

(1) 38 Can. S.C.R. 601. (2) [1893] 2 Ch. 120.

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Now the evidence as to "contango" transactions is this—I am only giving a short *résumé* so far as it is now material—when a client directs a broker to buy stock for which the client is not himself finding the money to pay at the time, the money is provided by the broker, and he borrows the money for the purpose. This is done sometimes, no doubt, by a pure and simple loan; but in a very large majority of cases, amounting, according to the evidence of Mr. Grant, the official assignee of the Stock Exchange, to sixteen-twentieths of the whole business on the Stock Exchange, and, according to Mr. Powell's evidence, to nineteen-twentieths of the whole business, the thing is done by the broker finding the money on "contango," and then what happens is this: he is treated, not as the mortgagee or pledgee of the shares for the money which he advances, but he becomes by contract the purchaser of the shares out and out, and they become his own property. The shares are not yet transferred to him—he does not acquire any legal interest in them; but, as between the client on whose account he has bought them on the one hand, and himself on the other, when he finds the money on "contango" he becomes the absolute owner of the property, subject, however, to a contract made at the same time, or part of the same contract, that he is to re-sell to the client a like amount, not the same identical shares, but a like amount of similar shares, usually on the next account day, although a later day may be fixed by arrangement, at a price larger than that for which he gave his client credit on the first occasion; because the enhanced price is to cover interest upon the money in the meantime. Therefore, in fact, these "contango" transactions, although they are constantly treated as loans of money, even by persons who are thoroughly familiar with the business, although they are popularly spoken of, even on the Stock Exchange and by members of the Stock Exchange, when they come before the Court, as loans, yet, when the transaction is regarded from a legal point of view, it is not a loan on the client's security, but is a sale by which the broker becomes entitled to the security as his own, although he is subject to a contract to re-sell to the client, not the same, but an equal amount of similar shares or stocks at a future date. In all these transactions, therefore, when money is borrowed from a stockbroker on "contango" or "continuation," whether the money is obtained from the dealer or from other stockbrokers, or from bankers, the result is the same: the arrangement is one by which the broker becomes, as between himself and his client, the owner of the shares in question, although he is under a contract to provide an equal amount of similar shares at a future date. This being the nature of the business between the parties, the reason why these "contangos" or "continuations" are often called loans is quite clear; but this does not alter the legal position of the parties con-

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cerned in them, or prevent the shares held by the brokers under such circumstances from being their own and available by them.

According to the practice among brokers in Toronto and New York with reference to stocks so carried the powers of the broker over the stocks are much more restricted than those thus indicated. The evidence of Mr. Osler makes it plain that while the broker may pledge his securities *en bloc* he is, according to the practice in Toronto, bound to do so in such a way — that is to say, he is bound so to maintain the ratio between the loan and the value of the securities lodged — as to be able at any time on payment of the amount owing by a particular customer to procure delivery of any pledged shares which may be the property of that customer. His primary obligation, in a word, is to maintain such control over his hypothecated securities as to enable him at any time to carry out his contract with his customer; but subject to that he may pledge his customer's security with others *en bloc* for the purpose of getting the necessary funds to carry out his obligations. It appears to me to be a question of fact whether or not the agreement between the plaintiff and the defendants was entered into with reference to this practice. I do not think the law assigns such legal incidents to an arrangement by a broker to carry stocks "on margin" for a speculator as to exclude such a practice. I am quite willing to concede that in the absence of any such custom and in the absence of any express agreement to the contrary the relation between the customer and broker in such transactions would be in substance that of mortgagor and mortgagee subject to some modifications necessary to suit the peculiar necessities of the case. Here, however, we have such a cus-

tom, and I think the effect of the evidence is that in Toronto at all events it would be impracticable for brokers to carry out such transactions without resorting to the methods mentioned. There are some observations of Parke B. in *Foster* v. *Pearson*(1), at pages 858, 859 and 860, not without a bearing upon the point.

The judgment in the case of *Haynes* v. *Foster*(2) is treated in the argument for the defendant as establishing that it is a sort of *legal incident* to the character of a bill-broker that he is to pledge the bills of each customer separately; but we think that such is not the fair meaning of the judgment, but that it is to be taken in connection with the evidence, and that all that was intended was this, that, in the absence of evidence as to the nature of such an employment, a bill-broker must be taken to be an agent to procure the loan of money on each customer's bills separately, and that he had therefore no right to mix bills together and pledge the mass for one entire sum. In truth, *a bill-broker is not a character known to the law with certain prescribed duties; but his employment is one which depends entirely upon the course of dealing.* It may differ in different parts of the country, it may have powers more or less extensive in one place than in another; what is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place. A great body of evidence was adduced in the present case to prove that it was the course of dealing in the city of London for bill-brokers to raise money for their employers, by pledging the bills of different proprietors for one entire advance; and there is nothing unreasonable in such a practice.

* * * * *

It remains to consider whether there is any difference between the case of *Foster* v. *Pearson* and that of *Stevens* v. *Foster*.

The question was not left to the jury in the same way in the latter as in the former case. It was put on the ground that the jury might infer from the usage proved, and its general notoriety, that the customer employed the bill-brokers with reference to that usage, and therefore authorized them to deal with the bills as they in fact did; and the jury were satisfied with the evidence, and did draw the inference that Messrs. Wood & Poole had authority as between them and their employers to pledge the bills in the manner in which it appears that they did.

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(1) 1 C.M. & R. 849.
(2) 2 C. & M. 237.

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> So far as the usage tends to shew an authority to pledge bills in a mass, and not separately, its reasonableness is hardly disputed; and that question has also been already disposed of. It was proved to be the prevailing practice, and it is enough for us to say the jury were warranted in drawing the inference which they did, especially as the plaintiff was himself a bill-broker.

These observations were in effect adopted in *London Joint Stock Bank* v. *Simmons*(1), by Lord Macnaghten at page 225, and by Lord Field at page 228.

It is then, I repeat, a question of fact whether the contract was or was not entered into with reference to the usages referred to. I agree with the Court of Appeal that the proper inference is that it was. The appellant was, admittedly, familiar with transactions in the stock market. In each of the bought notes sent to her there is an intimation in these words:—

> When carrying stocks for customers, we reserve the right of pledging the same or raising money upon them in any way most convenient to us.

This, she says, was not brought to her attention, but, I think, a person who, having instructed a broker to buy stocks and carry them, receives a notice of this kind and does not read it, must be taken in respect of subsequent dealings to assent to any reasonable terms it may contain to the same extent as if he had read it and taken no exception to it. Now, in my view, this intimation is a plain warning that the arrangement with the broker involves the right to use the stocks purchased as security in accordance with the reasonable practice in such transactions among reputable brokers in Toronto and New York; and I do not see how after reading it and acquiescing in it the client could be heard to object to the use of them in the same way in which stocks carried "on

(1) [1892] A.C. 201.

margin" were being generally dealt with. I do not think ordinary people reading such a notice would take it to refer only to the broker's interest as mortgagee; that I think is too much of a lawyer's refinement. I think most people would assume that it meant something more than the mere statement of the fact that the broker would exercise his legal right to hypothecate his own interest in the securities referred to.

But assuming the plaintiff's rights to be regulated by the rules governing the relations between mortgagor and mortgagee, without reference to any special course of dealing, I cannot understand upon what ground she can recover in this action. The proposition upon which her case rests must be this: that a mortgagee of shares in an incorporated company making a sub-mortgage to secure a sum larger than the actual amount of his mortgage debt comes *ipso facto* under an obligation to pay the mortgagor the full market value of the shares at the time, and this although the mortgagor has acted in entire good faith and without profit to himself or loss to the mortgagor. I do not know upon what legal principle any such liability can be based. If the mortgagee makes a sale or as in *Ex parte Dennison*(1) hands over the stocks to somebody else to make a sale or does that which is equivalent to a sale he must, of course, account for what he receives or ought to have received; if he improperly uses the mortgaged property in such a way as to make a profit out of it he may be accountable for the profit. But if a mortgagee holding land under an absolute conveyance subject to a collateral agreement for redemption should submortgage or

(1) 3 Ves. 552.

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otherwise encumber the property (without disclosing the mortgagor's interest) for a larger amount than the mortgage debt, would anybody argue that the mortgagee must account for the full value of the land at the date of the sub-mortgage ? If so, upon what principle could the contention be based ? If one take the case of a pledge of chattels, that case is covered by distinct authority. It has long been settled that a repledge for more than the debt of the pledgor does not expose the pledgee to an action for conversion. Even a trustee using the property of his *cestui que trust* is accountable, generally speaking, only for the property or for the profits he has made or for the loss occasioned by his breach of trust. I do not think it has ever been suggested that a trustee in good faith leasing property he had no power to lease or mortgaging property he had no power to mortgage assumes *ipso facto* the obligation of a purchaser of the property at the option of his *cestui que trust.*

A very different question arose in *Commee* v. *Ames* (1), and I refer to it only because some language of mine has been cited as shewing that the memorandum on the bought note was not to be given effect to. In that case it appeared to me there was no evidence of any general practice which would affect the transaction under consideration. The point upon which it appeared to me, rightly or wrongly, that the decision must turn was that the plaintiffs, the brokers (who were suing the principal for a payment alleged to have been made on his account), had on the facts proved failed to establish that they had executed his mandate. I thought also that the

(1) 38 Can. S.C.R. 606.

memorandum in the bought note (on the same terms as that referred to above) not having been brought to the defendant's notice could not be held to govern the rights of the parties in respect of transactions completed before the bought note was despatched by the broker. That view has no possible bearing upon the questions arising in this case.

ANGLIN J.—The plaintiff sues to recover moneys paid by her to the defendants—her brokers—on account of the purchase price of certain shares of stock and interest thereon and for commissions; also for damages for breach of duty as her agents and for misrepresentation and deception and for the conversion of her shares.

The transactions were what is known as purchases on margin. The understanding, as deposed to by the defendant Wood, was that the brokers should take transfers of the stocks in such manner that, while the property of the plaintiff, they would be under the broker's control, *Caswell* v. *Putnam*(1); and that they should carry them for the plaintiff, having the right, however, at any time to call upon her to pay the balance due upon them and to take them over. As an incident to such a contract the brokers had the right to re-pledge the plaintiff's stock, always preserving, however, her legal right upon payment of the balance owing by her to obtain delivery of her securities. *Conmee* v. *Securities Holding Co.*(2), at pages 609, 613; *Rothschild* v. *Allen*(3). Shares were eventually delivered by the defendants to the plaintiff on her de-

(1) 120 N.Y. 153. (2) 38 Can. S.C.R. 601.
(3) 90 App. Div. N.Y. 233.

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mand which corresponded in number and demonination with her orders to them. When she demanded and received these shares, however, she was ignorant of the brokers' dealings with her property in the interval which form the basis of her present action.

She prefers her claim on allegations that the defendants never bought for her the shares for which she paid them; that, if they were bought for her, at least some of such shares were re-sold by the brokers' agents without authority; and, if this be so, that all of them were pledged by the defendants for their own general indebtedness, much greater in amount than what was owing to them by her, and without any provision for the release of her property on payment of the balance which she owed in respect of it; and that the amount charged her for interest was greater than the brokers themselves paid for the moneys which they borrowed and was a secret profit to which, as agents, they were not entitled.

I am not satisfied that the plaintiff has established her charge that the brokers did not buy for her all the shares she ordered them to purchase. The purchases of Sao Paulo stock are fully proven. There is some confusion in regard to the purchase of the Louisville & Nashville Railway stock. The evidence of it is decidedly halting, and, had the finding been that this stock had not been bought for the plaintiff, I would have thought it at least equally satisfactory; but I am unable to say that there is no evidence to support the holding of the provincial courts that 100 L. & N. shares were purchased for the plaintiff in New York by the defendants' agents, the Randolphs.

It is no doubt the case that the identical shares of L. & N. which were so bought were not kept on hand

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by the defendants or their agents. But they were not bound to keep these identical shares on hand. *Nourse* v. *Prime*(1). Subject to the question of hypothecation, with which I shall presently deal, their obligation would have been fulfilled if they kept on hand a sufficient number of L. & N. shares to answer the claims upon them of the plaintiff and of all other persons entitled to receive such stock from them. *Caswell* v. *Putnam*(2); *Conmee* v. *The Securities Holding Co.* (3). Upon the evidence in the record, however, the finding that this obligation was fulfilled in regard to the L. & N. stock cannot, in my opinion, be sustained.

It is admitted that, on the day on which they received the certificates for the 100 shares of L. & N. said to have been bought by them for the plaintiff, the Randolphs delivered it through the clearing house to Gates & Co. in part fulfilment of a contract previously made for a sale to them of 400 shares of L. & N. After this delivery the Randolphs held either 450 or 550 shares of L. & N. (it is not very clear which is the correct figure)—all of them under hypothecation to various lenders for large sums of money. The defendants failed to produce the Randolphs' "box-book" which alone would have shewn any other unpledged shares. There is no evidence that any of the pledged shares belonged to the Randolphs themselves or could have been appropriated by them to the defendants' account without disregarding prior rights of some of their other customers. When it appeared that the L. & N. shares alleged to have been so purchased for the plaintiff were not held for her but were immediately delivered to a purchaser from the Randolphs—if it were not so with-

(1) 4 Johns. Chy. 490; 7 Johns. Chy. 69.

(2) 120 N.Y. 153.

(3) 38 Can. S.C.R. 601.

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out that evidence—the burden was upon the defendants to shew, as something peculiarly within their knowledge, that they or their agents had on hand or under their control other L. & N. shares which they could rightly appropriate to the plaintiff's account. *Dickson* v. *Evans*(1), at pages 59, 60; *The King* v. *Turner*(2), at pages 210-211; *Elkin* v. *Janson*(3), at page 661; Taylor on Evidence, 10th ed., p. 292. There is no such evidence in the record. The witness Abrey, Randolphs' representative, very carefully refrained from committing himself to this statement. He, no doubt, indicated the position correctly when he said, not that the defendants actually had 100 L. & N. shares in the hands of the Randolphs, but that "they were *long* by the records." The transfer to Gates & Co. of the shares said to have been bought for the plaintiff was, upon the evidence before us, unjustifiable. It was a distinct appropriation of them which rendered the defendants liable to account to her for their value; and to that liability it is no answer that a like number of similar shares was subsequently acquired by the defendants and was accepted from them by the plaintiff in ignorance of what had taken place. *Langton* v. *Waite*(4). As to the 100 L. & N. shares the plaintiff's case is, in this aspect of it, if anything, stronger than was that of the defendant (appellant) in *Conmee* v. *The Securities Holding Co.*(5).

It is fully established—in fact it is admitted—that the defendants hypothecated all the plaintiff's shares for their own general indebtedness, much greater in amount than the balance due by the plaintiff in re-

(1) 6 T.R. 57.
(2) 5 M. & S. 206.
(3) 13 M. & W. 655.
(4) L.R. 6 Eq. 165, at p. 173.
(5) 38 Can. S.C.R. 601.

spect of such shares, and that at certain times they had not on hand shares available to answer her claim without resorting to those so hypothecated. They had no stipulation or agreement with their lenders under which they had a legal right to the release of the plaintiff's stock on payment of the amount she owed to them or of any smaller sum. They endeavoured to establish by evidence of brokers and others that it is the invariable custom of banks and trust and loan corporations from which such loans are procured by brokers to release the stock of a client pledged by his broker at any time upon payment of the amount of the balance due in respect of such stock by the client to the broker.

In the case of the pledges of the Sao Paulo shares the agreements between the lenders and the brokers were in writing. They contain no such term and in my opinion as to them this evidence of usage or custom was not admissible. It would vary written agreements or add to them a term inconsistent with the rights which they purport to give the lender.

In the case of the L. & N. shares, assuming that they were bought and carried for the plaintiff, the terms of the hypothecation of them are not in evidence. It does not appear whether the arrangement for it was verbal or in writing. But the pledge was for general indebtedness and there is no evidence that there was any stipulation which would give either to the defendants or to the plaintiff a legal right to the release of her shares on payment of the amount which she owed.

I am not satisfied that the evidence in the record establishes such an invariable custom or practice as the defendants contend for on the part of the lenders

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from whom they borrowed. But if such a usage were established it would fall short of a reservation in favour of the plaintiff of the legal right to redeem her stock on payment of the amount due by her in respect of it; and to that legal right and nothing short of it she was entitled. The brokers could not require her to rely upon any loose understanding or mere obligation of honour between themselves and their lenders. Neither could they require her to rely upon their own personal security. She was entitled to have her shares in such a position that they would be her security and would be at all times available to her on payment of the amount which she owed in respect of them. *Douglas* v. *Carpenter* (1), at pages 333-4. See also the remarks of Lord Wynford in *Rothschild* v. *Brookman* (2), at pages 195-6.

It is common knowledge that the business of stock-brokers in this country is conducted in a manner more closely resembling that which prevails in the United States, and particularly in the State of New York, than that which obtains in England. Many customs and usages of English brokers are unknown in Canada; and many practices prevalent in our markets, which have come to us from the United States, would not be recognized on the London Stock Exchange. For this reason, and also because of a dearth of English authority (see R. 70 of the London Stock Exchange, Stutfield, 3rd ed., p. 45), I have drawn for authorities, perhaps more freely than is usual in our courts, upon American sources.

The hypothecation of the plaintiff's stocks for the brokers' general indebtedness, in the absence of auth-

(1) 17 App. Div. N.Y. 329. (2) 5 Bli. N.S. 165.

ority for it from her, was in my opinion unjustifiable, and, so far as such intangible property can be the subject of conversion, should be deemed a conversion of it. It was an exercise of dominion over the shares—the assertion of an interest in them inconsistent with the right of the plaintiff, consistent only, in the absence of authorization from the plaintiff, with ownership of the shares by the defendants.

Either because the securities should be regarded as negotiable; *Baker* v. *The Nottingham and Nottinghamshire Banking Co.*(1); *Colonial Bank* v. *Cady* (2), at pages 277-8; *London Joint Stock Bank* v. *Simmons*(3); or because, as against the pledgees, whose good faith is not questioned, the plaintiff was estopped from denying the authority of the brokers to pledge the securities as their own; *Bentinck* v. *London Joint Stock Bank*(4); *McNeil* v. *Tenth National Bank*(5); the hypothecation gave to the pledgees an enforceable lien or a special property in the stock greater than that which the brokers had authority to confer. The evidence in the record and the position taken by the defendants sufficiently establish a custom of stock-brokers and bankers to deal with securities such as those in question as transferable by delivery when indorsed in blank. The elements necessary to establish an estoppel against the plaintiff appear to be present. It has not been even suggested on behalf of the defendants that their pledgees would not have been legally entitled to hold the plaintiff's securities as against her for the full amount

(1) 60 L.J.Q.B. 542.
(2) 15 App. Cas. 267.
(3) [1892] A.C. 201.
(4) [1893] 2 Ch. 120.
(5) 46 N.Y. 325.

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of the loan as collateral to which they were hypothecated, or for so much of it as they pleased, unless a right of redemption on payment of the balance due by her to the defendants was a provision of the loan implied by custom. On the contrary, they assert a right to so deal with the plaintiff's stocks, based either on a special contract with her evidenced by a memorandum at the foot of the "bought note" sent to her, or upon an alleged custom, which they sought to prove, and which they contend confers on brokers carrying stocks on margin this extraordinary privilege.

I adhere to the views which I expressed in *Ames & Co.* v. *Conmee*(1), at pages 168 *et seq.*, that the hypothecation of a client's stock by a broker for his general indebtedness without authority from the client is unjustifiable, and that the memorandum at the foot of the "bought note" given to the plaintiff—which is the same as that considered in *Conmee's* case—is not evidence of such authority. This note was in the following terms:—

> When carrying stock for clients, we reserve the right of pledging the same or raising money upon them in any way most convenient to us.

It is clear that nothing was said about any such provision when the brokers took the plaintiff's orders. Miss Clarke denies that this memorandum ever came to her notice. But assuming that it did and that the brokers might thus add a term to the contract, upon a proper construction of the memorandum having regard to the fact that it was prepared by the brokers themselves, while it might authorize them to pledge the plaintiff's stock for an amount not greater than that due by her in any way most convenient to them-

(1) 10 Ont. L.R. 159.

selves, there is nothing in it to confer on them a right to pledge it for a greater amount or to mingle it with other securities in a bulk pledge. *Conmee* v. *The Securities Holding Co.*(1). Neither is there anything in it to warrant the broker giving to his pledgee the right to dispose of the stock without notice either to himself or to his client. Yet we find that this was a stipulation in the pledge of the plaintiff's Sao Paulo shares to the National Trust Company; and there is a similar provision in the draft form of pledge used by the Dominion Bank with which the Sao Paulo shares were also hypothecated. It does not appear whether in the pledge of the L. & N. stock there was or was not a similar provision.

Failing to establish an express agreement by the plaintiff authorizing such pledges of her stocks as the defendants and their agents made and the attempted inference of such an authority from the memorandum on the "bought note" above alluded to being also unsuccessful, the defendants sought to establish that there is a universal custom of members of the Toronto Stock Exchange to so deal with their clients' stocks held on margin without express authority from the clients and that this custom was binding upon the plaintiff either because she was actually aware of it, or because, though not so aware, having employed members of the Toronto Stock Exchange, she should be deemed to have contracted subject to it. In the first place the evidence in my opinion falls short of what would be necessary to establish the custom. But, assuming that it was sufficiently proved, the attempt to bring home actual knowledge of it to the plaintiff absolutely failed.

(1) 38 Can. S.C.R. 601, at p. 609.

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Without such knowledge it is not a custom which would bind her. *Kirchner* v. *Venus*(1), at page 399. It "is so entirely in favour of (the brokers') side that it is fundamentally unjust to the other side," and, "if sought to be enforced against a person ignorant of it," would be held "unreasonable, contrary to law, and void"; its effect, if admitted, would be to change the intrinsic nature of the plaintiff's contract. *Robinson* v. *Mollett*(2), at pages 818, 836-8; *Johnson* v. *Kearley* (3), at page 530; *Lawrence* v. *Maxwell*(4). It follows that the hypothecation of the plaintiff's stocks by the defendants and their agents for their general indebtedness was a distinct breach of the defendants' contract with the plaintiff and also of their fiduciary duty to her. *Conmee* v. *The Securities Holding Co.*(5), at page 609-10. It was a "conversion" of her property; *Strickland* v. *Magoun*(6), at page 116.

It is well established that where a broker, who is under agreement to purchase and carry stock for a client, sells that stock without authority, leaving himself without other stock of the same kind available to satisfy his client's claim upon him, he becomes liable in equity, at the option of his client, to account to him for the proceeds of the sale, or the value of the shares as upon a conversion thereof to his own use, and he cannot escape that liability by purchasing and tendering to the client the same number of similar shares. *Langton* v. *Waite*(7), at page 173; *Taussig* v. *Hart* (8), at page 429.

Where a broker lends his client's stock to another

(1) 12 Moo. P.C. 361.
(2) L.R. 7 H.L. 802.
(3) [1908] 2 K.B. 514.
(4) 53 N.Y. 19.
(5) 38 Can. S.C.R. 601.
(6) 119 App. Div. N.Y. 113.
(7) L.R. 6 Eq. 165.
(8) 58 N.Y. 425.

broker he will in equity be held guilty of a similar conversion of it and the rights of the client are the same as if the stock had been sold, the broker being held accountable for its value at the time of the conversion. *Ex parte Dennison* (1).

The broker, who, without authority so to do, mingles his customer's securities with others and rehypothecates them for a greater amount than the customer's indebtedness to him, neither reserving the customer's right to obtain his securities on payment of that indebtedness nor retaining in his own possession a like amount of similar securities, available for delivery to his client, is in my opinion likewise guilty of a "conversion" of such securities. *Douglas* v. *Carpenter* (2); *Strickland* v. *Magoun* (3); *Rothschild* v. *Allen* (4).

The broker in such a transaction appropriates the client's stocks for his own purposes and pledges them as his own. I can see no difference in principle between such an appropriation and that which takes place upon the wrongful sale or loan of stocks similarly held.

It is urged, however, that the recovery of the client should be confined to the actual damage which he can shew that he has sustained as the result of the wrongful hypothecation of his stock, and that, where such stock, or a like amount of other stock of the same kind is delivered to him upon his demand, he has suffered no damage and can at best have but a nominal recovery. No doubt this would be the case if the sole right of the client were to maintain a common law ac-

(1) 3 Vesey 552.
(2) 17 App. Div. N.Y. 329.
(3) 119 App. Div. N.Y. 113.
(4) 90 App. Div. N.Y. 233.

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tion of trover and conversion. *Hiort* v. *London and North Western Ry. Co.*(1).

At common law, and if the relationship of the client to the broker should be regarded merely as that of pledgor and pledgee, re-hypothecation by the pledgee for a larger amount than that of his claim against the pledgor, though unlawful, is deemed not so repugnant to the contract as to be equivalent to a renunciation of it and an extinguishment of the pledgee's right of detainer; and the pledgor cannot maintain an action of detinue without having paid or tendered the amount of the pledgee's claim against him. *Donald* v. *Suckling*(2), at page 616. It is to be noted, however, that, in this case, as stated by Mellor and Blackburn, JJ. the re-pledging would be inoperative as against the original owner, and would confer upon the defendant no greater right than the original pledgee had: pp. 610, 611. If such an action were maintained at common law, it would be on the ground that the contract had been terminated and the pledgee would thus lose his security or its value, although not in a position to recover his advances.

A premature sale by a mere bailee or pledgee was also held at common law not to terminate the bailment nor to destroy the interest or special property of the bailee in the goods pledged, and, therefore, although a conversion, to be insufficient without tender to the bailee of the amount of his claim to support an action of detinue; and for the conversion only actual damages could be recovered, and, if there were not such damages, only nominal damages—if indeed the action would lie at all. *Halliday* v. *Holgate*(3); *Johnson* v. *Stear*(4).

(1) 4 Ex.D. 188.
(2) L.R. 1 Q.B. 585.
(3) L.R. 3 Ex. 299.
(4) 15 C.B.N.S. 330.

But even at common law, an action in assumpsit for money had and received would lie for the proceeds of securities wrongfully sold by the bailee or agent (not a pledgee), the owner electing to treat the wrongdoer as his agent in the transaction, and adopting the sale and claiming its proceeds as money had and received to his use. *Marsh* v. *Keating*(1), at page 600. In *Bonzi* v. *Stewart*(2), it was held that the principal of a factor, who had raised money on the security of his principal's goods without authority, might claim it as money had and received to his own use. Tindal C.J. said:—

> Messieurs Bonzi were at liberty, *at any time when they found their factors had wrongfully raised money on their goods,* in taking the account between themselves and their factors, to abandon their goods altogether, and to treat the money so wrongfully borrowed by the factors on the pledge of the goods, as money had and received to the use of themselves.

The Chief Justice adds that this is but an application of the principle laid down by the House of Lords in *Marsh* v. *Keating*(1).

A stock-broker buying on margin and carrying stock for a client is something more than a mere pledgee; he is also his client's broker or fiduciary agent. His position is not dissimilar to that of a factor who, in the ordinary course of business, is entrusted with the possession of his principal's goods or the documents of title thereto.

> Now as between principal and factor, there is no question whatever that that description of case * * * has always been held to be within the jurisdiction of a court of equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor—as the trustee for the particu-

(1) 1 Mont. & Ayr. 592.

(2) 4 Man. & Gr. 295 at pages 303-4, 325; 5 Scott, N.R. 1, 26.

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lar matter in which he is employed as factor—sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore in these cases the courts of equity have assumed jurisdiction. *Foley* v. *Hill*(1).

The stock-broker holding the stocks of a client, bought by him upon margin, as collateral security for moneys advanced by him to make the purchase, is neither merely a broker, nor merely a pledgee of the stock. He holds towards his client a fiduciary relation similar to that which exists between the factor and his principal; in his capacity as a pledgee he cannot divest himself of his character as an agent; having assumed the position of a quasi-trustee, the client is in equity entitled to hold him to it and to the consequent obligation to account on that footing. *Haight* v. *Haight & Freese Co.*(2); see also *Marvin* v. *Brooks*(3), at page 81. Indeed an accounting on this basis seems to be exigible in equity from a broker-pledgee although no fiduciary relationship existed in regard to the securities in question. *Ex parte Dennison*(4). Where there is a relation of quasi-trusteeship between the parties, the equitable jurisdiction to compel an accounting undoubtedly attaches.

It is familiar law that if a trustee's breach of trust consists in a sale of stock, the *cestui que trust* may in

(1) H.L. Cas. 28, at pp. 35-6.
(2) 112 App. Div. N.Y. 475; 190 N.Y. 540.
(3) 94 N.Y. 71.
(4) 3 Vesey 552.

bankruptcy proceedings at his option prove for the proceeds of the sale or for the value of the stock at the date of bankruptcy. *Ex parte Gurner*(1). So, in an action against a trustee who has wrongfully sold real property, the *cestui que trust* has the option of compelling the trustee to purchase other lands of equal value to be settled upon the like trusts, or of taking the proceeds of the sale with interest, or the present estimated value of the lands sold after deducting any increase of price by subsequent improvements. Lewin on Trusts, 11th ed., p. 1138.

In the case of a wrongful sale of his stock by his broker, if the client, who had intended to hold it, upon demand receives from the broker shares of the same kind and to an equal amount at par value, though he did so in ignorance of the broker's misconduct, he cannot shew that he is any worse off than he would have been had the shares been kept for him by the broker always ready for delivery. From that point of view he has sustained no damage, and were it not for the fiduciary position of the broker he might have no redress. But in equity his right, upon learning of the wrongful sale, to hold the broker accountable for its proceeds or for the value of the securities at the time of sale, as upon a conversion thereof to his own use, appears to admit of no doubt. Like results follow where the broker lends the client's stock. Why should the consequences not be the same where he appropriates the securities by hypothecating them for his own indebtedness to an amount greater than is due him from his client? Certainly not merely because, on demand by the client, ignorant of what has transpired, he has de-

(1) 1 Mont. D. & DeG. 497.

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livered to him shares of the same kind and of a like amount at par value. If that would suffice to discharge the broker guilty of wrongful hypothecation, it should also suffice where he has effected a wrongful loan or sale. Nor is the fact that the client has not shewn that the broker has made a profit by his misdeed a sufficient reason for his not being held so accountable.

Where a broker entrusted with his client's securities sells or lends them, the authorities establish that in equity he must account for their value at the date of the "conversion." Where he appropriates them by unauthorized hypothecation, the client should have the same remedy. In each case alike the personal responsibility of the broker has been unlawfully substituted as the client's security in lieu of the property with which the broker has wrongfully dealt. In each case, instead of fulfilling his mandate, which required him to hold the stock or shares for his client, or, if he parted with their possession, to do so only in such manner that upon payment of the amount due by him the client could obtain them as of legal right from the holder, the broker, using them for his own purposes, has put them out of his control. In the one case the client is asked to trust to the broker buying in shares to replace those with which he has parted; in the other, to his doing that, or redeeming the shares which he has pledged. In each case the client is subjected to the risk of the broker's insolvency.

The broker, who hypothecates his client's stock for his own purposes for a sum larger than that due by the client, substitutes as security to the latter, at least to the extent of the excess, his personal responsibility in lieu of the stock to which the client is en-

titled. If the broker, remaining solvent, by redeeming the stock and delivering it to the client on demand, could fully discharge himself, the temptation to commit the breach of duty involved in so dealing with stocks in his hands might, in many cases, be irresistible; can he but succeed in concealing his wrongdoing until the client applies for and takes over the stock or directs its sale, he escapes all liability for his misdeed. On the other hand, should he become bankrupt, and disaster to the client ensue, the broker will probably be little troubled by the claim of the latter for damages against what will in many cases be a practically worthless estate.

In wrongful sale — in wrongful loan — in wrongful hypothecation, there is involved an appropriation by the broker of his client's property for his own use.

While I appreciate the distinction which is drawn between a disposition of a pledge by a bailee effected wholly without authority, which suffices to terminate the contract of bailment and to disentitle the bailee to repayment of his advances, and a disposition merely in excess of the bailee's authority to do an act of the same class — such as a sale effected prematurely or without requisite notice, or a repledge for a greater amount than is due to the original pledgee — which is not so repugnant to the contract of bailment that it puts an end to it; *Halliday* v. *Holgate*(1); *Donald* v. *Suckling*(2); and is, therefore, held not to destroy the bailee's right to repayment of his advances or, in the case of the broker-pledgee, to indemnity; *Minor* v. *Beveridge*(3); the difference ends there. Its hypothe-

(1) L.R. 3 Ex. 299. (2) L.R. 1 Q.B. 585.
(3) 141 N.Y. 399.

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cation for a larger amount by a broker, holding with a right to repledge to cover his own advances, imperils the security of his client and involves an appropriation of it by the broker for his own use quite as much as would its pledge merely for the amount of the excess if the broker had no right to pledge at all; indeed, in the former case the title of the broker's pledgee, if dependent on estoppel, will probably be more readily established. The vital distinction, however, between the repledge by a broker holding a client's securities as the defendants held those of the plaintiff and the repledge by a mere common law pawnee is that in the former case the broker confers on his pledgee a good title for the whole amount of his advances as against the broker's client, whereas in the latter, the title of the sub-pledgee is limited to the interest of the original bailee.

In a case of sale the broker may directly take advantage of the rise and fall in the stock market to make illicit profit; indeed, he may use his client's stocks to help to bring about fluctuations in prices for his own benefit at his client's expense. In a case of hypothecation the opportunities for direct advantage may not be the same. But, although on a loan of the client's stock the broker has not this advantage, he is held accountable for the market value of the stock at the time he wrongfully lends it. *Ex parte Dennison*(1). Moreover, by pledging his client's stocks in bulk with securities of his own or of other clients, the broker may be enabled to raise a much larger sum of money than if all these stocks were pledged separately. With the additional moneys so obtained — moneys part, or it may be the whole, of

(1) 3 Ves. 552.

which rightfully belong to the client — the broker may be enabled to reap advantages and to make profits which it would be difficult to estimate and almost impossible to trace directly to their source. He may be enabled on his own account to deal, to an extent not otherwise possible, in marketable securities, profiting by their fluctuations in value, and perhaps affecting the market price of his client's securities to his detriment. Upon principle as well as for reasons of policy I think that, in the case of the stock-broker, the wholesome rule which entitles the client to hold him accountable for the market value of his securities at the time of their conversion should be held equally applicable to the cases of a wrongful hypothecation, a wrongful sale and a wrongful loan of such securities. I know of no situation in which a quasi-trustee has greater opportunities, if so inclined, to derive improper advantage from the possession and control of the property of his *cestui que trust*, than that in which the broker carrying stocks on margin for a client finds himself. In order, as far as possible, to protect their customers against the risks to which they would be exposed, were brokers at liberty with practical impunity to deal with their securities as those of the plaintiff were dealt with in this case — in order to protect brokers themselves against the temptation of making, it may be, large illicit gains by committing such a wrong with a minimized risk of personal loss, I think that the drastic but salutary rules which govern the relation of trustee and *cestui que trust* should be applied in all their rigour.

The very difficulty — amounting to a practical impossibility — of an accounting on the basis of the

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profits which the defendants may have made by the use of the money obtained by their illegal hypothecation of the plaintiff's securities affords another and a cogent reason for treating them as having become purchasers of those securities when they so dealt with them and for holding them accountable for their fair value at that time. "This seems to me to be a simple mode of effectually doing justice between the parties." Having used the plaintiff's securities as proprietors, the defendants' "proceedings, I think, entitled (her) to elect, and (she) has elected, to treat them as purchasers." *Marriott* v. *The Anchor Reversionary Co.* (1), at pages 186, 188.

Having regard to the fact that the financial result to the plaintiff would in all likelihood have been the same as it is had her stocks not been wrongfully pledged by the defendants, it may seem a hardship to hold them so accountable. But this observation is equally applicable where the broker sells and afterwards replaces his client's stock. "This is the risk to which such transactions are subject," *Ex parte Dennison* (2), at page 553; and the law applicable to them is "a law of jealousy," *Rothschild* v. *Brookman* (3). I cannot but think it deplorable that it should be held to be the law of Canada that if a broker, carrying stock on margin without authority, uses his client's shares as his own — pledges them for his general indebtedness — substitutes for them his personal responsibility as security to his client, the latter has not the right, upon discovering the facts, to elect to adopt his agent's appropriation of his property and to hold him chargeable with its value at the time of its con-

(1) 3 DeG. F. & J. 177. (2) 3 Ves. 552.
(3) 5 Bli. N.R. 165, at p. 190.

version. The effect of such a decision must be greatly to encourage breaches of duty by these quasi-trustees and to foster amongst an important body of fiduciary agents a disregard of the fundamental distinction between *meum* and *tuum* in dealing with the property of their principals.

In the case of a sale the proceeds usually represent the value of the securities; but, if not, the client's right is to an account of the actual market value. *Taussig* v. *Hart*(1). In the case of an hypothecation, as in that of a loan, the value must be determined by the market price at the time. If, as in the factor's case (*Bonzi* v. *Stewart*(2)), the right of the client adopting the broker's misappropriation should be restricted to claiming credit for the moneys raised upon his securities as against the broker who has so mingled these securities with others that it is not possible to determine how much of the moneys lent to him have been obtained on the pledge of them, it may fairly be held that a portion of the advances equal in amount to the full value of the client's securities was obtained by their hypothecation. In my opinion, therefore, the defendants and their agents by pledging the plaintiff's shares for their general indebtedness without providing for their release on payment of the balance owing by her, and without holding under their own control other shares of the same description available to answer her claim, made themselves accountable to her for the market value of such shares at that time.

That right the plaintiff did not lose by her subsequent acceptance of the shares tendered to her by the

(1) 58 N.Y. 425, at p. 429.

(2) 4 M. & Gr. 295, at pp. 303-4, 325; 5 Scott N.R. 1, at p. 26.

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brokers in satisfaction of her claim, or by her dealing with them as owner, in ignorance of what had transpired. Without knowledge there cannot be ratification or condonation. *Johnson* v. *Kearley*(1), at page 524. The defendants are, of course, entitled in an equitable accounting to credit for the value of the shares at the time they were so accepted. But they cannot insist on the plaintiff's returning, or tendering a return of such shares before suing for such accounting. If, in circumstances such as those of this case, a broker had this right, he might put a client, who had innocently parted with shares so taken over, in a position of serious difficulty; he might effectually deprive him of his right of action. The broker, whose misconduct has led to such a difficulty, cannot complain if his client elects to retain the securities giving him credit in the accounting for their market value when received.

This case may also be dealt with on the basis which commended itself to Magee J. in *Hutchinson* v. *Jaffray & Cassels*(2). Concealing the facts which entitled the plaintiff to take the position that her indebtedness was wiped out and that she was in fact their creditor, and falsely representing to her that they held and were carrying her stocks according to her mandate, the defendants obtained from her several payments of large sums of money and eventually of the entire residue of the purchase price of the stocks, with interest on the balance from time to time unpaid. Moneys so obtained by misrepresentation — paid in mistake of material facts concealed by the payee from the payer — are recoverable. The law will not permit persons holding a fiduciary position to retain them.

(1) [1908] 2 K.B. 514.

(2) 1 Ont. W.N. 481.

The brokers receive the full benefit to which they are entitled in respect of their claim for indemnity by having the balance of the original purchase price unpaid by the client offset in the accounting against the value of the converted property for which the client receives credit. To that they have an equitable right (*Minor* v. *Beveridge*(1)), but to nothing more.

The present action concerns 50 shares of Sao Paulo stock bought on the 26th of April, 1906 —(all the S.P. stock held by the defendants except 10 shares was hypothecated for their general indebtedness on the 30th of April); 50 shares of S.P. stock bought on the 26th September, 1906—(all the defendants' S.P. stock was hypothecated for their general indebtedness on the 29th September); and 100 shares of L. & N. railway stock said to have been bought on the 25th August, 1906, and hypothecated in like manner, if it was not wrongfully sold, as I think it was, on the very day of its purchase. As to the latter stock the defendants are accountable for the full price charged to the plaintiff for it. The market prices of the S.P. stock on the 30th April and 29th September are not in evidence, but there are general statements that, when the plaintiff's Sao Paulo shares were hypothecated, the market prices did not differ materially from the prices at which they were purchased for her. The defendants having failed to prove that at the respective dates of their conversion the market prices of these shares were lower than at the respective dates of purchase, they are accountable in the case of these stocks also for the full prices charged to the plaintiff. For these sums she should be given credit — in respect of the

(1) 141 N.Y. 399.

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first lot of S.P. shares on the 30th April, 1906, and in respect of the second lot, on the 29th September, 1906. She is chargeable with interest on the balance of the purchase price of the first lot unpaid between the 26th and the 30th April, and in respect of the second lot on a like balance from the 26th to the 29th September, at the rates shewn in the defendant's accounts in which she appears to have acquiesced. No interest is chargeable against her in connection with the L. & N. transaction. She is chargeable with the purchase price of these several stocks and is entitled to credit for all moneys paid by her to the defendants for principal, interest and commissions, including the original marginal payments and the final payment of the 3rd of June, 1907. Upon the sale of the first lot of Sao Paulo she was credited with the proceeds. That credit must stand. She took delivery from the brokers on the 3rd of June, 1907, of 50 shares of Sao Paulo and 100 shares of L. & N. The defendants are entitled to credit for the market value of these shares at that date. The plaintiff is entitled to interest at 5% on any balance from time to time standing to her credit on such accounting and upon the final balance, which would stand to her credit after the payment of the 3rd of June, 1907, from that date until this action was brought; and to interest on her claim thus ascertained until judgment.

Appeal dismissed with costs.

Solicitor for the appellant: *W. C. Mackay.*

Solicitors for the respondents: *Malone, Malone & Long.*

MORANG AND COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM DAWSON LESUEUR (PLAINTIFF) ..... } RESPONDENT.

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*March 20.
*Oct. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Literary work—Publisher and author—Obligation to publish.

In 1901, M & Co., publishers of Toronto, and L., an author in Ottawa, signed an agreement, by which L. undertook to write the life of the Count de Frontenac for a work entitled "Makers of Canada," in course of publication by M. & Co.; the latter agreed to publish the work and pay L. $500 on publication and a like sum when the second edition was issued. This contract was carried out and the publishers then proposed that L. should write on the same terms, the life of Sir John A. Macdonald, for which that of William Lyon Mackenzie was afterwards substituted. L. prepared the latter work and forwarded the manuscript to the publishers, who, although they had paid him in full for it in advance, refused to publish it, as being unsuitable to be included in "The Makers of Canada." L. then tendered to M. & Co. the amount paid him and demanded a return of the manuscript, which was refused, M. & Co. claiming it as their property. In an action by L. for possession of his manuscript,

Held, affirming the judgment of the Court of Appeal (20 Ont. L.R. 594), Idington and Anglin JJ. dissenting, that he was entitled to its return.

Held, per Fitzpatrick C.J., that the property in the manuscript (or what is termed literary property) has a special character, distinct from that of other articles of commerce; that the contract between the parties must be interpreted with regard to such special character of the subject-matter; that it implies an agreement to publish if accepted; and when rejected the author was entitled to treat the contract as rescinded and to a return of his property.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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Held, per Davies and Duff JJ., that there was an express contract for publication and an implied agreement that the manuscript was to be returned if publication should become impracticable for such reasons as those given by the publishers.

Held, per Duff J., that the publishers, until publication, could be treated as having possession of the manuscript for that purpose and, that purpose failing, there was a resulting trust in favour of the author.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment at the trial in favour of the plaintiff.

The only question raised for decision on this appeal was whether or not the plaintiff, LeSueur, who had written the life of William Lyon Mackenzie for the defendants, under the circumstances and in performance of the contract mentioned in the above headnote, was entitled to the return of his mss. which the defendants refused to publish. The trial Judge held that he was so entitled and his judgment was affirmed by the Court of Appeal, Moss C.J.O. dissenting. The defendants have appealed to the Supreme Court of Canada from the last mentioned judgment.

Hellmuth K.C. for the appellants. The plaintiff merely sold his mss. to the publishers and the property passed as in the case of any chattel. See *Parker* v. *Cunliffe* (2).

As to incorporating other terms in the written contract see *Lovell and Christmas* v. *Wall* (3).

The control by the publishers of the copyright given them by the contract vests in them the property in the mss. under the "Copyright Act." *Ward, Lock & Co.* v. *Long* (4).

Lafleur K.C. for the respondent.

(1) 20 Ont. L.R. 594.
(2) 15 Times L.R. 335.
(3) 27 Times L.R. 236.
(4) [1906] 2 Ch. 550.

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THE CHIEF JUSTICE.—Once it is admitted, as it is by both parties here, that the manuscript Life of Mackenzie which the respondent was commissioned to write was originally intended for publication in book form in the series then being published by the appellant and known as "Makers of Canada," such an intention based on the facts revealed by the evidence implies a tacit agreement to publish the manuscript, if accepted; and, the manuscript having been rejected as unsuitable for the purpose for which it was intended, no property in it passed and the respondent was entitled to ask that the contract be rescinded and the manuscript returned upon the repayment of the money consideration which he had received.

I cannot agree that the sale of the manuscript of a book is subject to the same rules as the sale of any other article of commerce, *e.g.*, paper, grain or lumber. The vendor of such things loses all dominion over them when once the contract is executed and the purchaser may deal with the thing which he has purchased as he chooses. It is his to keep, to alienate or to destroy. But it will not be contended that the publisher who bought the manuscript of "The Life of Gladstone," by Morley, or of Cromwell by the same author, might publish the manuscript, having paid the author his price, with such emendations or additions as might perchance suit his political or religious views and give them to the world as those of one of the foremost publicists of our day. Nor could the author be denied by the publisher the right to make corrections, in dates or otherwise, if such corrections were found to be necessary for historical accuracy; nor could the manuscript be published in the name of another. After the author has parted with his pecuni-

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ary interest in the manuscript, he retains a species of personal or moral right in the product of his brain. Lyon Cæn, note to Sirey, 1881.1.25.

What I have said is sufficient to shew that what is called literary property has a character and attributes of its own and that such a contract as we are now called upon to consider must be interpreted and the rights of the parties determined with regard to the special nature of the thing which is the subject of the contract. *Cox* v. *Cox*(1). An ancient manuscript or a papyrus might have by reason of its antiquity or the circumstances surrounding its discovery some intrinsic monetary value. But what may be the value to the writer or to the publisher of the manuscript in question here, so long as it is allowed to remain in the pigeonhole of the latter ? What was the consideration for the payment of $500 ? Not the paper on which the manuscript is written ; its value is destroyed for all commercial purposes. Not the paper with the writing on it; that can have no value without publication, except for the purposes suggested by Mr. Justice Meredith. The only way in which the appellant can legitimately recoup himself for his expenditure must be by the publication of the manuscript, and in this I find an additional reason for holding that publication was an implied term of the contract.

In the absence of English authorities on the subject, I referred to the French books which treat at great length of such contracts as we are now considering. The majority of French writers, and among them some of the most eminent, such as Pardessus, held that the obligation to publish is always to be considered as an implied term in every contract for

(1) 90 R.R. 601.

the purchase of the manuscript of a book; but admitting with the minority that a contract might be drawn which would transfer the whole property in the manuscript to the purchaser so that it would be in his power to retain it in his possession for his own personal use, all the French authorities admit that where, as in the present case, the parties have chosen to leave so much to intendment and implication, the court should give to the contract a construction wide enough to include the obligation to publish, that being, generally speaking, the more probable intention of the parties, as it was in this case their admitted intention at the inception of their negotiations.

See Pandectes Francaises, vbo. Propriété littéraire, Nos. 1912 and 1913. Pouillet, Propriété littéraire, 2nd ed., No. 308.

In conclusion, therefore, I hold that, as argued on behalf of the respondents and as found in both courts below, the conditions which together made up the consideration moving to the respondent were the payment of the stipulated price, $500, in instalments of $250 each, and the publication of the work in and as part of the series, "Makers of Canada." The respondent fully performed his contract when he wrote and delivered the manuscript and if, in the exercise of his undoubted right, the appellant properly rejected it as unsuitable for the purpose for which it was intended, viz., publication in the "Makers of Canada" series, then both parties were free to rescind the contract altogether and the respondent upon the return of so much of the consideration as he had received was entitled to have the manuscript returned to him. It cannot be denied that by the appellant's refusal the respondent was deprived of the chief consideration

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which moved him to write the manuscript, that is the benefit to his literary reputation resulting from publication. Tindal C.J. in *Planché* v. *Colburn*(1).

It is unnecessary for me to go over in detail the evidence of the contract and the correspondence, all of which must be taken into consideration, as well as the standard form of contract used by the publisher with all his contributors. In the judgment of the Court of Appeal and in the notes of my brother judges all that is useful is discussed with much ability.

For the short reasons which I have just given and for those more fully set out by Mr. Justice Meredith in the Court of Appeal, I would confirm the judgments below and dismiss this appeal with costs.

DAVIES J.—I think this appeal should be dismissed. From the fact that no regular contract was drawn up between the parties regulating their duties and rights, and these latter have to be determined from the rather loose correspondence between them, all the difficulties have sprung.

It is impossible in my judgment to put a proper construction upon this correspondence and fairly to deduce from it what the real intentions of the parties were without reference to their previous dealings.

The appellant company was engaged in publishing an historical series of books under the name "Makers of Canada," and in the year 1901 the respondent, LeSueur, had agreed to write for that series "The Life of Frontenac," and to complete it by a fixed date. The company on its part agreed to publish the book at its own expense in that series and to pay the re-

(1) 34 R.R. 613.

spondent certain royalties specified in the agreement as his compensation. Frontenac was written, accepted and published in the series, but by mutual agreement the method of payment was changed from the royalties previously agreed upon to two cash payments of $250 each, payable one on the publication of the book and the other on the publication of its second edition.

Some years afterwards the company suggested to Mr. LeSueur that he should write for "The Makers of Canada" the life of Sir John Macdonald "on the same terms as Frontenac," but afterwards feeling itself committed to another writer for Macdonald's life, suggested to the respondent that he should write the life of William Lyon Mackenzie instead, saying in one of their letters to respondent that "the Mackenzie book offers as good an opportunity for you as the Macdonald." Finally LeSueur agreed to write "Mackenzie." In its letter of 11th December, 1905, so often referred to in the argument, the company speaks of the agreement as a bargain with them by LeSueur "to do William Lyon Mackenzie for the sum of $500, payable in instalments of $250 as outlined."

The respondent LeSueur wrote the book and delivered the manuscript to the appellant company, but before its delivery he had been paid the whole consideration money of $500.

In the result the company declined to publish the manuscript on the ground that it was not suitable for the series for which it had been prepared and although respondent on learning their refusal to publish promptly tendered them back the $500 he had received and demanded the return of his manuscript, the company declined to accept the money tendered or

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return the manuscript, expressing their view that "according to the terms of the agreement under which you did the work and were paid for it the manuscript is the property of the company."

The issue between the parties was therefore whether under the contract between them the total consideration for the writing and delivery of the manuscript life of Mackenzie was the money payment of $500 as contended by the company, or whether its publication in the series of "The Makers of Canada" was an integral part of the consideration as contended by respondent LeSueur.

The respondent does not, of course, contend that the company had not the right to reject a manuscript unsuitable for the purpose for which it was intended, but that having rejected it and refused to publish, he, as the writer, had the right on returning the money consideration to a return of his manuscript.

I think the argument submitted by the respondent in support of the judgment of the Court of Appeal is sound, namely, that in effect the contract provided that LeSueur should write a manuscript life of Mackenzie substituted for Macdonald with the hope that it would be accepted and published by the company in their series of books "Makers of Canada"; that until acceptance the author was at all the risks of suitability or unsuitability of the manuscript; that if accepted the property passed and the company was bound to complete the money payments if incomplete and publish the manuscript as part of the series, while if rejected no property in the manuscript passed and no right to retain the rejected manuscript remained after the tender or return of the money consideration paid by them. It seems a constrained and unreason-

able construction of this contract to hold that under it the publisher should not only keep but be bound to keep and pay for an unsuitable manuscript. If the publisher was not so bound that, of course, would put an end to his claim as of right to retain the manuscript and still not publish it.

The whole question rests upon the construction of the contract and not upon any special rights of either authors or publishers apart from contract. In my opinion the terms of the Frontenac contract were agreed upon as those which should govern the writing of the life of Macdonald, and when Mackenzie was agreed to be substituted for Macdonald it was upon the same terms except where specifically changed. Publication in the series was undoubtedly one of the terms or consideration for the writing of Frontenac. It was incorporated in the Macdonald contract in clear language, and when Mackenzie was substituted for Macdonald and nothing said changing that specific term of the contract as part of the consideration which the author was entitled to claim, must be held to have remained part of the Mackenzie contract now in controversy.

The appeal should be dismissed.

IDINGTON J. (dissenting).—The appellant company of publishers were publishing a series of biographical works known as "The Makers of Canada." The respondent had, pursuant to a written contract with them, dated 26th August, 1901, written a life of Count Frontenac which seems to have been finished in the early summer of 1905. He was engaged also apparently as reader and critic of other works in the same series.

In December, 1905, he had in the course of this

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latter service, so reported upon the life of one Mackenzie, which had been contributed by another person for the same series, that its publication was suppressed.

In reference to this and other like works, appellant's manager wrote on the 6th of December, 1905, to respondent, and amongst other things, said:

> You have given the period considerable study, and have furnished us with copious notes, which ought to make it comparatively easy to do the Mackenzie book. I wish you would reconsider your position regarding this and undertake the book, for which we will give you $500.

On the 7th of December, 1905, the respondent replied as follows:

> Ottawa, 7th Dec., 1905.
>
> Dear Mr. Morang:—
>
> The life of W. L. Mackenzie is a ticklish bit of work for the simple reason that you cannot write it so as to please both parties, but as Wrong has decided not to take it up, I will take it in hand on the terms you mention, and have it ready by the 1st of July next, or at latest by 1st August.
>
> I see there is a movement on foot for raising a monument to Mackenzie in Toronto, and doubtless if the scheme is carried out there will be a good deal of glorification of him in connection therewith. I feel as if my book would not be quite in key with it all.
>
> However, I will try my best to do justice to him and to view such faults as he had with charity.
>
> Yours sincerely,
> (Sgd.) W. D. LESUEUR.

On the 11th of December, 1905, the appellant replied as follows:

> 11th Dec., 1905.
>
> Dear Dr. LeSueur:—
>
> In reference to your letter of the 7th, in which you accept our offer to do William Lyon Mackenzie for the sum of $500.00 payable in instalments of $250.00 as outlined. Your stipulation that you will have it done by the first of July, or the first of August, is satisfactory. We accept your offer.
>
> Yours very truly,
>
> Dr. W. D. LESUEUR,
> 88 Maclaren Street,
> Ottawa, Ont.

These letters seem to form a tolerably clear contract needing no interpretation except the surrounding facts and circumstances to indicate who and what the man Mackenzie was, and the nature and probable size of the book to be written.

The manuscript was produced by chapters from time to time and so delivered to appellant.

The $500 was paid by the monthly remittances on account of this and other literary services according to the wishes which respondent had later indicated would suit his purpose and convenience better than two instalments which originally may have been contemplated.

These payments had so progressed that by the 26th of July, 1907, the respondent felt it right to say he had got $650 for this and other work, in all amounting to $680, and yet he had not got Mackenzie off his hands, and asked further payments to be stopped until he was in credit again.

He says in the same letter, "When I hand you over Mackenzie and begin the index you can begin paying me again." The index, I gather, was not a necessary part of the contract to write the Mackenzie life.

He refers also in the same letter to facts relative to the progress of the Mackenzie book and his work, but nothing turns thereupon.

The work was finished and delivered and all paid for when appellant's readers seem to have condemned it as out of harmony with the rest of the series.

The respondent, feeling no doubt naturally hurt, and acting as a high-minded man might, tendered the repayment of the $500 and demanded the return of the manuscript.

The appellant company refused this. They say the property in the manuscript had become theirs.

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Respondent brought this action for recovery of the manuscript and for damages, but at the trial abandoned the latter and was awarded the former.

This judgment having been maintained by the Court of Appeal we are asked to reverse it.

I confess I have found considerable difficulty in understanding upon what ground the judgment proceeds. Divers reasons are given. Amongst others an implication is found that the contract had proceeded upon the understanding that the work, when produced, would be published in the said series.

In the evidence it appears that in the way of advertising this series the respondent is put down as the writer who was expected to deal with the life of Mackenzie.

How can this inducement to subscribers form part of this contract which had preceded the advertising?

The entire contract is in writing. The respondent frankly admits he had made no other or further terms orally.

It is said that an implication which entitles the plaintiff to rescission arises from the nature of the work or from that coupled with the earlier written contract relative to the life of Frontenac.

Two complete answers appear to me to meet this latter suggestion. In the first place there is not a word in this contract to import the other one or its terms into this. In the next place if it could be taken as a guide to find the intention of the parties, there is in the Frontenac contract an express provision for delivery of the manuscript to the appellant. And that is followed by an express assignment of all rights and property in the work; and an agreement that the company shall have the exclusive right to take out

copyright for it and get renewal thereof and to publish it during the terms thereof. Then in consideration of all that the company agree to publish at their own expense in such style as they deem advisable, and to pay the author a royalty named.

This provision for a royalty was abandoned by a later agreement, and a lump sum agreed upon in lieu thereof, before the contract we have to pass upon was thought of.

I cannot see how under such a contract the non-publication could have in law the effect of divesting the company of the property in the manuscript solemnly assigned and pursuant thereto delivered to the purchasers.

So far from the prior contract aiding respondent it is, if those terms of it that remained unchanged at the time this was entered into are to be imported into this one *pro tanto* as evidencing the relations of the parties thereto, an impassable barrier in the way of respondent asserting a title to the property in the manuscript, by reason of the terms and by force of the "Copyright Act."

If we consider this contract independently of aught else, then I can see no basis for such an implication of right to divest the owners of their property clearly vested in them by virtue of the terms of the contract and delivery of the goods so contracted for.

Can it be possible to hold that the appellant having accepted and paid for the work as agreed, could, merely because it did not when produced suit certain views, and its publication be a doubtful venture, return the manuscript and demand the $500 and recover it ?

It may suit respondent to have this done in this

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case, but how many writers could endure such a test of the like contract?

The right of rescission, if implied at all, must be mutual and reciprocal. I can find no warrant for holding such a thing as an implication of such a right based merely on disappointment.

Novel theories as to the consideration being of a two fold or combined character, that is money and fame, are no more workable as implications of law in contracts respecting products of the brain put into manuscript than into other things.

If the workmen desires, in addition to the cash consideration, something else springing from the use of the products of his labour, then he must stipulate for it.

There exists in law no implied condition precedent as suggested here, that the property in any product of a man's labour with either pen or pencil, or brush or chisel, does not pass until it reaches the point or place, and be put to the use, where he can admire, and ask others to admire it; no matter how reasonable his hopes or expectations of such ambition being gratified and that gratification becoming part of the fruits of his labour.

I agree in all that Chief Justice Moss has, in his judgment, said relative to this case, save the possible implication he sees that in this case there might have existed a right in appellant to reject the work.

It does not seem to me under the circumstances of this case that even that possibility of rescinding the contract existed, so long as the labour was honestly done to the best ability of the workman who was well known to the publisher and employer. It is the product of that particular man's brain he is buying and

the workman is selling. Its publication may be prevented by a fire destroying the manuscript, or a wave of public opinion destroying its value. No such thing as right of rescission can in either case be held possible in law for either party finding himself in such a plight.

Even publishers signing contracts to pay literary workmen of whose capacity they have had an opportunity to judge, must reserve such rights if they wish to enjoy same. If another view is conceivable then the right implied must surely be mutual. I can find no such implied right, and unless expressed it does not exist.

The appeal should be allowed with costs here and in the courts below.

DUFF J.—One of the terms of the agreement between the appellants and respondent was, I think, that the appellants should publish the respondent's book as part of the consideration for the stipulations that he should write the work mentioned and that it was to become the property of the appellants.

It is, in my judgment, impossible to escape this conclusion except by acting upon the invitation of the appellants to shut one's eyes to everything which preceded the last two or three letters of the correspondence in which the arrangement was finally concluded. That, of course, is contrary to all principle unless it is perfectly clear — what nobody suggests in this case — that in these few letters the parties were professing to state completely the terms of their agreement. "It is one of the first principles," said Lord Cairns, in *Hussey* v. *Horne-Payne*(1),

(1) 4 App. Cas. 311 at p. 316.

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that where you have to find your contract or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed.

The matter becomes perfectly simple when one looks at the transactions and communications between parties in the order in which they occurred. They came together in 1901. In that year the respondent was asked to write the biography of Count Frontenac for a series of biographies of men prominent in the history of Canada to be known as the "Makers of Canada." The respondent consented and a formal contract was executed in these terms:

W. D. LeSueur, of Ottawa, Ont., hereinafter called "The author," hereby enters into an agreement with George N. Morang & Company, Limited, publishers, of Toronto, to write "A life of the Count de Frontenac." The said work to contain not less than 65,000 words and not more than 70,000 words. And the author hereby agrees to deliver the manuscript of the same to George N. Morang & Company, Limited, complete, on or before 1st March, 1902.

The author hereby grants and assigns to George N. Morang & Company, Limited, all rights and property in the above-mentioned work, and agrees that they shall have the exclusive right to take out copyright, and to hold said copyrights and renewals, and to publish said work during the terms thereof.

In consideration of the rights granted, George N. Morang & Company, Limited, agree to publish the work at their own expense in such style or styles as they deem most advisable, and to pay the author, or his legal representatives, a royalty of ten (10) per cent. on the retail price of all copies sold in the Dominion of Canada, and a royalty of five (5) per cent. on all copies sold in England or foreign countries at special edition prices.

It is understood and agreed that no royalty shall be paid on any copies given away, or destroyed, or sold at a price below cost.

Statements of sale shall be rendered to the author by George N. Morang & Company, Limited, half-yearly, on June 30th and on December 31st of each year.

It is agreed that George N. Morang & Company, Limited, shall furnish to the author, free of charge, five copies of the volume as published, and should the author desire any more copies for his own use they shall be supplied at one-half the retail price.

Executed this 26th day of August, nineteen hundred and one.

Witness:

H. B. LeSueur.

George N. Morang & Company, Limited,
George N. Morang,
President.

W. D. LeSueur.

The arrangement contained in this document — the agent of the appellants, one of the editors of the series, so represented to the respondent when he signed it and the fact is not in dispute — was identical with that entered into between the publishers and each writer contributing to the series. The respondent completed the work which was the subject of this arrangement in 1902, and it was published in 1906. In the meantime the respondent came into communication with Mr. G. N. Morang, the President of the appellant company, and very friendly and confidential relations sprang up between them. The respondent became a member of the editorial staff engaged in editing the "Makers of Canada" and was asked to and did edit three works of the series. Among the manuscripts he was asked to read was that of a life of W. L. Mackenzie. Largely as a result apparently of the respondent's report on this manuscript it was decided by Morang that it was not suitable for publication. Then in December, 1905, the respondent was requested himself to undertake the book on Mackenzie; and this after some demur he finally agreed to do. The correspondence leading to this result seems conclusive on the point in hand. The first letter in evidence is one dated 4th October, 1905. This letter records the fact that the appellants have purchased the respondent's "rights in Frontenac," and that in consideration of the abandonment by the respondent of his right to

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royalties under his formal contract he was to receive $250 on publication of the first and the same sum on the publication of the second edition. Morang then, referring to a proposal that the respondent should undertake the life of Sir John Macdonald, said:

> If you undertake Macdonald, *I suppose the same terms as the Frontenac will be agreeable to you.*

It is impossible, I think, to suppose that (especially having regard to what had passed at the time of the execution of the contract of 1901) it could have occurred to anybody in the respondent's position that in proposing this arrangement the appellants were contemplating a departure from the Frontenac contract in one of its most essential terms. The suggestion here is that "terms" relates only to the money consideration. But what is there to justify such a limitation? The express agreement to publish was a vital part of the arrangement. Delete that and the whole consideration under the original contract and under the substituted arrangement mentioned in the letter disappeared. On this ground alone the suggested limitation of the natural meaning of the words is inadmissible. But apart altogether from the fact that under the arrangement the right to payment rested on publication—the publication as an object in itself was a substantial part of the consideration the writer was to receive without which (it does not require his testimony to shew) he would not have undertaken the work. It is equally impossible to suppose that the writer could understand this proposal in a sense different from that in which it was read by the respondent.

We start then with this as the proposed basis of any arrangement for a biography of Macdonald: that

if the respondent undertake it he shall do so upon the same understanding as to publication as that which applied to the book he had already written. The book on Macdonald was in the result not written by the respondent, but while the matter of the person who was finally to be entrusted with this book was in doubt, a suggestion was first made to the respondent respecting Mackenzie. On the 29th October Morang writes referring to the book on Macdonald, that he does not expect that book to be finished by the gentleman who was then engaged upon it, and adds:

> But if he should write on receipt of Edgar's letter agreeing to do what we require, I am sure you will do as you offered here, take another book. I think the "Mackenzie" book offers as good an opportunity for you as the Macdonald.

In December, however, Morang had become convinced that the biography of Macdonald would be satisfactorily completed by this person and definitely proposed that the respondent should assume the task of dealing with the career of Mackenzie. The passages in the correspondence relating to the subject are as follows:

> Dec. 6th, 1905.
>
> Prof. Edgar tells me that Wrong has decided that in his present position, it would not be wise for him to tackle Mackenzie. He practically decided to do it, but one of his cautious advisers warned him against it, and he has given us his decision. Hughes does not know, and never will know who advised us regarding his book. You have given the period considerable study, and have furnished us with copious notes, which ought to make it comparatively easy for you to do the Mackenzie book. I wish you would re-consider your position regarding this and *undertake the book, for which we will give you* $500.
>
> Dec. 7th, 1905.
>
> Dear Mr. Morang:—
>
> The life of W. L. Mackenzie is a ticklish bit of work, for the simple reason that you cannot write it so as to please both parties, but as Wrong has decided not to take it up, I will take it in hand

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on the terms you mention, and have it ready by the 1st of July next or at the latest by 1st August.

I see there is a movement on foot for raising a monument to Mackenzie in Toronto, and doubtless if the scheme is carried out there will be a good deal of glorification of him in connection therewith. I feel as if my book would not be quite in key with it all.

However, I will try my best to do justice to him and to view such faults as he had with charity.

Yours sincerely,

(Sgd.) W. D. LESUEUR.

11th Dec., 1905.

Dear Mr. LeSueur:—

In reference to your letter of the 7th, in which you accept our offer to do William Lyon Mackenzie for the sum of $500.00 payable in instalments of $250.00 as outlined. Your stipulation that you will have it done by the first of July or the first of August is satisfactory. We accept your offer.

Yours very truly.

This correspondence seems to leave little room for controversy. The book on Macdonald if undertaken was, as we have seen from the letter of the 4th of October, to be done on the same terms as that on Frontenac — which included an undertaking to publish on the part of the publishers. In default of the book on Macdonald one on Mackenzie was to be taken up. The offer is then made in concrete form to pay $500 for this last work — the exact sum the respondent was to receive for the first work; and finally — the respondent having agreed to this figure — Morang puts the matter beyond dispute by acknowledging the receipt of the respondent's acceptance of "our offer to do W. L. Mackenzie for the sum of $500 in instalments of $250 *as outlined.*" This last phrase can refer only to the passage already quoted from the letter of the 4th of October, stating the terms on which the respondent had agreed to the commutation of his royalties from the sale of the life of Frontenac;

and demonstrates that in the appellant's view the parties were proceeding on the conditions already established by that letter.

That point being reached the remaining questions do not appear to present any grave difficulty. The appellants having received the respondent's manuscript refused to publish it on the grounds stated by Morang in a letter of the 6th of May, 1908. In effect these grounds were that the book as a whole presented a view of Mackenzie's character and career and of the controversies in which he was engaged entirely at variance with views expressed upon the same points in other books of the series and with current historical opinion; that Mackenzie's character and career and public views had been discussed in a spirit of hostile criticism; and that as the subjects of other biographies in the series had been treated with sympathy Mackenzie and the movements he represented would appear to have been singled out for unfair partisan attack. The publication of such a work would (the publishers thought) gravely discredit the series as a whole and seriously interfere with the sale of the books.

In these circumstances the respondent did not insist upon the publication of his book. He did what might have been expected having regard to the character of this criticism — he tendered repayment of the money he had received on account of his work and asked for the return of his manuscript. The publishers after some delay took the position that the manuscript was their absolute property and refused his request.

It is not necessary to decide whether circumstances in fact existed which justified a refusal to publish.

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What appears to me to be perfectly clear is that on such grounds as those stated, the appellants could not rightly refuse to publish while retaining the manuscript; that the refusal to publish on such grounds constituted in effect a rejection of the manuscript.

It is not doubtful that the formal contract of 1901 left open many things to implication. The writer is to write a life of Frontenac containing a prescribed number of words; and the life of Frontenac so written is to become the property of the publishers and to be published by them. But it is not to be supposed that the writer merely undertook to put so many words together in the form of a book which might satisfy the description "Life of Frontenac." He had been selected as a person of competent skill to write a book for a certain series the general tone and character of which was well known to him and (while I think it is impossible to imply any absolute warranty of fitness for publication in that series) it is undeniable, I think, that he must be taken to have warranted to use honestly his best care and skill in the production of a work which should meet the reasonable expectations of the publishers in that regard, so far as he could fairly do so in justice to himself. Then there is a covenant to publish. That covenant in form is absolute; but if it had entered the mind of either party that the book when produced might be of such a character that the publishers in good faith should believe the publication of it likely to destroy or gravely depreciate the commercial success of the series as a whole and the writer should be unable from conscientious reasons to alter his work to meet the publishers' views — then I should think it may be presumed that all parties as reasonable people would have agreed

that in such circumstances the publishers should have the right to refuse to publish. So with the provision that the book was to be the property of the publishers; the right to refuse to publish would, in the event of such refusal, involve the correlative right on the part of the author to the return of his manuscript. If it had been suggested that in a given contingency the publishers should be relieved from the obligation to publish it is, I think, inconceivable that either party would have considered it possible in the event of such a contingency occurring and the publishers acting upon it that they should at the same time be entitled to retain the manuscript and suppress the author's work.

The case in this aspect of it is one of that class (referred to in *Dahl* v. *Nelson, Donkin & Co.*(1), at page 59, by Lord Watson) in which the parties to a contract have not expressed their intentions in the particular event which has happened (the production of a work which in the opinion of the publishers could not be published without gravely prejudicing the sale of the whole series), but have left them to implication. In such a case his Lordship says:

> A court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract * * * which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would

(1) 6 App. Cas. 38.

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presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

I should add that such having been the rights of the parties under the original contract those rights were, obviously, not affected by the fact of the money consideration having afterwards been advanced before the completion of the work.

But apart from any such implications the judgment must, I think, be supported. The appellants obtained this manuscript upon the faith of an agreement to publish it. In refusing to publish it they are guilty as Malins V.-C. said, in *Chattock* v. *Muller*(1), at page 181, of

> a flagrant breach of duty which in this court has always been considered as a fraud.

In such a case, the learned V.-C. adds,

> the court would be bound if possible to overcome all technical difficulties in order to defeat the unfair course of dealing.

One remedy, I am inclined to think with Meredith J. in the court below in view of this feature of the case open to the respondent was specific execution of the agreement to publish. The case appears to be analogous to those cases in which a railway company having obtained possession of land on a promise to construct buildings thereon and afterwards refusing to do so the court, notwithstanding the general rule that specific performance will not be granted of an agreement to build, decrees the execution of the promise upon the faith of which the company got the land, *e.g., Wolverhampton Corporation* v. *Emmons*(2); *Wolverhampton and Walsall Railway Co.* v. *London and North Western Railway Co.*(3). But I do not think the re-

(1) 8 Ch. D. 177. (2) [1901] 1 K.B. 515.
(3) L.R. 16 Eq. 433, at pp. 440, 441.

spondent is confined to that. The suppression of this manuscript would so manifestly defeat the intention of both parties — is indeed so monstrous a fraud upon the agreement under which the appellants obtained possession of it that the court will, if possible, as Malins V.-C., says, "overcome all technical difficulties" to make that impossible. The decision of this court in *Briggs* v. *Newswander* (1), is authority for the proposition that the appellants until publication had possession of the manuscript for that purpose; and, the purpose having failed, there is a resulting trust in favour of the respondent.

On these grounds I humbly think the appeal fails.

ANGLIN J. (dissenting).—Apart from any effect which should be given to section 18 of the "Copyright Act" (R.S.C. ch. 70), I am of the opinion that, on the proper construction of the letters of the 6th, 7th and 11th December, 1905, the entire and unqualified right of property in the manuscript in question is vested in the appellant company and the respondent is not entitled to its return upon recouping to the company the sum which had been paid him for it. These three letters contain the contract of the parties, except as to one term, viz.: the dates at which the two instalments of $250 each should be payable, as to which, because of the reference in the words, "as outlined," contained in the letter of the 11th December, parol evidence was probably admissible.

The contract between the parties was an employment of the plaintiff by the defendant company to "do" for it the life of William Lyon Mackenzie, for which it agreed to pay him $500.

(1) 32 Can. S.C.R. 405.

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Except the ordinary warranty that his work would be done with reasonable care and skill, there was no undertaking on the part of the author as to the character of his production — certainly none that he would produce a work in which only views agreeable to the publishers should be put forward. For a book written with the reasonable care and skill exigible from an author, the company bound itself to pay the stipulated price. It could not, I think, have justified a refusal to pay that price merely because conclusions reached by the author upon the acts and conduct of the subject of the biography were such that, as publishers, its directors deemed it inadvisable to place the book on the market.

On the other hand, the publishing company certainly did not undertake to publish any book written with reasonable care and skill which the author might tender to it, however unsatisfactory his conclusions, however unsuitable his production for the purpose for which it designed to use it. Neither is it possible, in my opinion, to imply upon its part an undertaking, in the event of its failure to publish the plaintiff's work, on being recouped the price which had been paid for it, to return him his manuscript with liberty to him to publish it or to have it published through another house, thus probably rendering available to some rival publisher a book which he might sell in competition with a volume of the appellant's own series. It is only by the implication of such a term or provision in the contract that the plaintiff can succeed, and the question for our consideration is whether such an implication should be made.

An author may make any agreement he pleases regarding the disposition of his manuscript. He may

assign it absolutely or subject to any condition or restriction upon its use. Such reservations or conditions as he makes and expresses the courts will protect and enforce. *Jefferys* v. *Boosey*(1), at pages 867-8. Certainly, too,

> there are some things which no one would think of expressing in terms, though undoubtedly they would form part of any contract made on such a subject.

Lawrence & Bullen v. *Aflalo*(2), at page 20. The question with which we are now confronted is whether any, and if so, what implication should be made in regard to a matter for which the contract does not expressly provide. This is not a question of law; it is a question of intention — a question of fact. While upon such questions "each case must stand on its own merits," we may discover in the authorities some analogies that may prove of assistance.

In regard to copyright it may be taken as settled law, since the explicit approval of *Sweet* v. *Benning* (3), by the House of Lords in *Lawrence & Bullen* v. *Aflalo*(2), that, in the absence of express agreement to the contrary or of special circumstances indicating a contrary intention, the proper inference from the employment of an author to write a book for the publisher of a periodical or of a serial publication, is that the copyright and the right to obtain copyright shall belong to the publisher. This inference does not depend on section 18 of the English "Copyright Act." It is drawn (to quote Lord Davey [*Lawrence & Bullen* v. *Aflalo*(2), at page 24], because

> in buying articles written by these gentlemen the inference is that both parties intended that the proprietor should have the right that

(1) 4 H.L. Cas. 815.
(2) [1904] A.C. 17.
(3) 16 C.B. 459.

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was necessary for him adequately to protect the articles which he had purchased and the enterprise for the purpose of which these articles were intended to be used.

Applying a similar test to the situation with which we are now dealing, it seems to me that it was necessary for the adequate protection of the publisher and of its enterprise that it should, on payment of the stipulated price, acquire the author's entire interest and property in the manuscript which he was employed to produce, with all rights which such proprietorship carries, including that of withholding the book from publication. *Ward, Lock & Co.* v. *Long* (1). Otherwise the publisher might find that it had brought about the production of a work which it could not make use of, but which might be used by the author very much to its detriment.

There can be no doubt that the parties, contemplating no event except publication, intended that for the $500 to be paid to the author the defendant company should acquire all his rights in the book he was employed to write — his common law literary property in it before publication, and his right to statutory copyright upon publication. Both parties expected that the plaintiff would succeed in producing a work of such character and merit that the defendant would publish it. Both took some risk on this point — the defendant the risk of investing its $500 in an unsuitable book — the plaintiff the risk of failing to secure the opportunity of enhancing his literary reputation which the publication of his work might be expected to afford. I appreciate the observation of Tindal C.J. in *Planché* v. *Colburn* (2), that an

(1) [1906] 2 Ch. 550, at p. 558.

(2) 8 Bing. 14.

author is actuated by the desire for literary reputation as well as for pecuniary profit. For his literary fame he depends on publication. But it is quite consistent with the contract now under discussion, viewed in the light of all the circumstances surrounding it, that the author refrained from stipulating for publication, or, in the alternative, for the return of his manuscript and the right to have it published otherwise, because he relied upon his ability to produce a book of which the defendant's own business interests would ensure the publication, and that he was prepared to take the risk of the defendant suppressing it. This seems to me more probable than the view for which the plaintiff contends. At all events it is, I think, impossible to say that

> on considering the terms of the contract in a reasonable and business manner an implication necessarily arises that the parties must have intended that the stipulation suggested (by the plaintiff) should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned;

per Lord Esher M.R., in *Hamlyn & Co.* v. *Wood & Co.*(1), at page 491. There is nothing expressed in the letters of the parties which would limit or qualify the absolute title of the defendant to the work which it employed the plaintiff to produce. I find nothing special — nothing unusual — in the circumstances surrounding this case to warrant the introduction of any qualification or restriction upon the rights which the written contract *primâ facie* confers.

For the plaintiff it is urged that the provision made for payment in two instalments — one on the

(1) [1891] 2 Q.B. 488.

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publication of the book, and the second on publication of a second edition — implies an undertaking by the defendant that it would publish the book. This was the provision for payment ultimately agreed upon in the case of the "Frontenac" contract, and it is to it that the words in the letter of the 11th December, "payable in instalments of $250 *as outlined,*" are said to be referable. Assuming that this term of the "Frontenac" contract was imported into the "Mackenzie" contract, it merely fixes the time at or the event upon which the defendant bound itself to pay. It does not import a covenant or undertaking on its part that the event will happen, but only that it will pay when it does happen, or, if it should fail to happen through its default, that it will, unless otherwise excused, pay as if it had happened. This provision of the contract therefore does not warrant the implication of an agreement by the defendant to publish the plaintiff's work — still less of an undertaking to return his manuscript and permit of its publication by the plaintiff or his nominees in default of publication by itself.

Apart entirely from the provisions of section 18 of the Canadian "Copyright Act" (R.S.C. ch. 70), I think it is reasonably clear that under the contract of the parties the defendant company became the proprietor of the manuscript which the plaintiff was employed to prepare and for which it paid him, and that as such proprietor it has the right to determine whether the plaintiff's book shall be published or suppressed. *Millar* v. *Taylor*(1).

But the provisions of that section of the "Copyright Act" appear to conclude this case in favour of

(1) 4 Burr. 2303, at p. 2379.

the appellant. Section 17 provides for the assignment of

> the right * * * to obtain a copyright and (of) the copyright when obtained.

It is, therefore, clear that the operation of the statute is not meant to be confined to the statutory copyright which exists only after publication. Although in section 18 "the proprietorship of such copyright" only is mentioned, having regard to the object of this provision, and to its collocation, that phrase should, I think, be taken to include not only the statutory copyright obtainable after publication, but also the right to obtain such copyright as an incident of the common law literary property which exists before publication. Indeed the section itself provides that the

> author shall not be entitled to *obtain* or to retain the proprietorship of such copyright, which is by the said transaction (the execution by the author of a literary work for another person) virtually transferred to the purchaser.

It is, therefore, reasonably clear that unless "a reserve" of copyright "is specially made by the author * * * in a deed duly executed," his employer — the other person for whom the literary work is executed — has by virtue of the statute the right to obtain the copyright. *Frowde* v. *Parrish*(1). This right is an incident of the common law literary property in the work which it is not unreasonable to assume is in such a case also vested in the person for whom the work has been executed.

In the absence of anything to indicate that the author in the present case in any manner specially reserved to himself any right of copyright or of control

(1) 27 O.R. 526; 23 Ont. App. R. 728.

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over the work which he undertook for the defendant, I am, for the foregoing reasons, of the opinion that he is not entitled to demand the return of his manuscript on repayment of the $500 received by him. I would allow the appeal with costs in this court and in the Ontario Court of Appeal and would dismiss this action with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Aylesworth, Wright, Moss & Thompson.*

Solicitors for the respondent: *Christie, Green & Hill.*

JOHN ROSS (PLAINTIFF).....APPELLANT;

AND

WALTER HOWARD CHANDLER, JOHN A. McRAE AND THE IMPERIAL BANK OF CANADA (DEFENDANTS).....RESPONDENTS.

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*March, 27, 28.
*Oct. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Partnership—Principal and agent—Partnership funds—Third party—Banks and banking—Negotiable instrument—Notice—Inquiry.

R. a member of the firm of R. M. & C. engaged on a contract for railway construction in Quebec, shortly before its completion went to Ontario, leaving his partners to finish the work, collect any balance due, pay the liabilities and divide the balance among them. M. and C. finished the work and received $56,000 and over, went to Toronto and formed a new partnership of which R. was not a member. Having undertaken another contract in North Ontario, they arranged with the head office of the Imperial Bank to open an account with its branch at New Liskeard and the cheque payable to R. M. & C. was cashed at the branch in Toronto and by instructions to the New Liskeard branch was placed the credit of the new firm then and the whole sum was eventually drawn out by the latter firm. R., later, brought an action against M. and C. for winding up the affairs of their co-partnership and, pending that action took another against M. and C. and the bank claiming that the latter should pay the amount of the cheque with interest into court subject to further order.

Held, per Fitzpatrick C.J. and Davies J., affirming the judgment of the Court of Appeal (19 Ont. L.R. 584), Idington and Anglin JJ. dissenting, that M. and C. had acted within their authority from R. by obtaining cash for the cheque; that there was nothing to shew that they had misapplied the proceeds or intended to do so by their dealing with the cheque; that in any case there

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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was no notice to the bank of any intention to misapply the funds and nothing to put them on inquiry; and that the action against the bank must fail.

Per Duff J.—The evidence establishes that M. and C. had authority to convert the cheque into an instrument transferrable by delivery only and that it was acquired by the bank in good faith in the ordinary course of business. The bank, therefore, obtained a good title to the cheque and its proceeds as against the appellant.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a Divisional Court by which the verdict for the defendants at the trial was sustained.

The facts of the case are not disputed. The action was brought by the plaintiff, Ross, to compel the Imperial Bank to pay into court the amount of a cheque made payable to Ross, McRae and Chandler, which had been placed to the credit of McRae, Chandler & McNeil at a branch of that bank. The plaintiff claimed that the bank on taking the cheque with his name on it as one of the payees was put on inquiry as to the right of the others to receive the amount. All the courts below have decided against this contention.

Lafleur K.C. and *A. W. Mason* for the appellant. The bank on taking the cheque payable to a firm from the two partners should see that it was indorsed with the concurrence of the third. *Creighton* v. *Halifax Banking Co.*(2). See also *London Joint Stock Bank* v. *Simmons*(3); *Earl of Sheffield* v. *London Joint Stock Bank*(4); *Federal Bank* v. *Northwood*(5).

(1) 19 Ont. L.R. 584.
(2) 18 Can. S.C.R. 140.
(3) [1892] A.C. 201, at p. 220.
(4) 13 App. Cas. 333.
(5) 7 O.R. 389.

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Bicknell K.C. for the respondent, The Imperial Bank.

Rose K.C. for the respondents, Chandler and McRae.

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Davies.

DAVIES J.—The facts of this case material to a determination of the controversy between the plaintiff, appellant, Ross, and the defendant, Imperial Bank, are as follows:—

Ross was a partner in a firm of contractors for the construction of a short piece of railway in Quebec, the firm name being Ross, McRae & Chandler.

Before the completion of the contract work Ross left Quebec and went to Ontario to look after some private work of his own leaving his two partners to finish up the contract, collect any balance due the firm under it, discharge with such balance the liabilities of the firm, and divide what moneys remained amongst the several partners according to their several rights.

McRae and Chandler accordingly finished the work and received a cheque for $56,251.57 in payment of the balance due on the contract upon the Bank of Montreal payable to their firm of Ross, McRae & Chandler.

They came to Toronto and having entered into a new partnership for some further work with one McNeil, under the style of McRae, Chandler & McNeil, they, McRae and Chandler, went to the Imperial Bank where McRae was known and had a conversation with the assistant general manager respecting the opening of an account in the bank at New Liskeard.

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Mr. Hay stated that Chandler said:

He and his partners, whoever they were, had completed a contract down east. I know he was speaking for McRae, and they were about to commence another contract up in the north, and as we had a branch of the Imperial Bank at New Liskeard, if it would be convenient, they would like to open an account with us.

It was acceptable to us and we opened the account. I took him downstairs I think and introduced him to the manager of the Toronto office, and approved of the opening of the account and his cheque was passed in and deposited to the credit of——

Here the witness was interrupted, but subsequently finished the sentence with the name "McRae, Chandler & McNeil." The witness was not able to say whether he specially observed that the cheque was payable to Ross, McRae & Chandler, and stated that he did not make any inquiries why Ross's name was not in the new account being opened, and that it did not occur to him as an important factor, though he knew "Ross was a contractor" and "probably identified him with the man on this cheque." He said "he had no suspicions and made no inquiries with regard to Mr. Ross."

As a fact the Toronto branch received and cashed the cheque and advised their New Liskeard branch to credit it to McRae, Chandler & McNeil. Mr. Hay stated there was no doubt that as the result of the negotiations the firm of McRae, Chandler & McNeil became entitled to credit at the New Liskeard branch for the "amount of the cheque."

Evidence of the state of that account was given shewing that the whole of this credit had been subsequently paid out on the cheques of McRae, Chandler & McNeil.

No evidence was given as to the nature of these payments, whether they were in liquidation of liabilities of the old firm of Ross, McRae & Chandler or

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of the new firm of McRae, Chandler & McNeil, or of the private debts of any or either of the partners of the old firm.

The plaintiff Ross subsequently brought an action against McRae and Chandler, and McRae, Chandler & McNeil, for the winding up of the affairs of the firm of Ross, McRae & Chandler, which action is now pending, and they further brought this present action against the bank and McRae and Chandler, claiming that the bank

> should be ordered to pay the said sum of $56,251.57, with interest into court to the credit of Ross McRae & Chandler, subject to further order herein.

The bank pleaded that it became a holder in due course of the said cheque and had no knowledge of the state of the accounts between the plaintiff Ross and the defendants Chandler and McRae, nor as to their respective rights to the proceeds of the cheque as between themselves.

It is obvious that the claim of the plaintiff as made could not be entertained. He had authorized his partners to complete the contract; collect the balance due on it; discharge its liabilities and divide what remained between the three partners, each being entitled to one third.

The utmost he could claim would be a declaration to the effect that the bank was liable for whatever share of that $56,000 would ultimately be found to belong to Ross on the adjustment of the accounts, and any such declaration could only be made as and when it was shewn that the bank was party and privy to some misappropriation of these funds and to the extent that such defrauded Ross.

As the matter now stands the adjustment of the

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accounts is proceeding under the direction of the court in another action, and it may be for aught the court knows that no part of the amount of the cheque will be shewn to be payable to Ross. He may be shewn to have received all he is entitled to under the partnership. It struck me, therefore, forcibly that we are now being asked to decide what may in the result be a purely academical question. However, that point does not seem to have been taken in the courts below, and was not taken here, so I say nothing more about it.

The substantial question is: Had the bank notice of an intended misapplication of the proceeds of the cheque received by them, and did they become parties or privies to such misapplication so as to make them responsible to Ross for any loss he may have sustained in consequence ?

The only notice at all they had was the name of Ross as one of the payees of the cheque to Ross, McRae & Chandler, and the absence of his name from the firm to which they credited the proceeds of the cheque. Did that fact throw upon them the duty of inquiring as to Ross's rights under the cheque, and the rights and liabilities of the several partners in the payee firm ? Was it a notice to them of an intended misapplication of the funds ?

Was the money received by the bank from the cheque or any part of it money which they *applied for their own benefit ?* The answer is no. Beyond the indirect benefit which they might derive from the new firm's business they had no benefit whatever and they made no charge for cashing the cheque. Had they any knowledge that it was to be applied by McRae & Chandler for purposes other than those of

the partnership ? The answer on the evidence must again be no, they had not, unless such knowledge is to be imputed to them arising out of the facts connected with the cashing of the cheque and the placing of the funds to the credit of McRae, Chandler & McNeil.

Was there anything to arouse suspicion on the part of the bank, anything to shew an intention on the part of the two partners to defraud Ross ? Again it must be answered, nothing beyond the fact that Ross's name could be seen as one of the names of the firm to which the cheque was payable, and was not one of the names of the firm to which the proceeds were credited. If that fact alone is sufficient notice to the bank, and if it threw the duty of inquiry upon them, then it may well be argued they took the cheque at their peril and would be liable for any misapplication of the moneys by the other partners.

The trial judge says he was unable to find any negligence and further, that

> no possible imputation of fraud or unfair dealing, wilful blindness or any impropriety can successfully be made against Hay whose good faith in this transaction is above suspicion.

All the cases where a member of a partnership has in fraud of the partnership indorsed and delivered to a third party or bank in satisfaction of a private debt of his own due to the third party, bills of exchange or other negotiable securities of the partnership, the third party or bank being under the circumstances cognizant of the fraud, or having had sufficient notice of the intended misapplication, have no application in my judgment to this case.

McRae and Chandler it is conceded had a perfect right to indorse the cheque as was done for the firm

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of Ross, McRae & Chandler, and to receive the money personally either from the payee or from a third bank such as the Imperial Bank. It was part of the express mandate given them by Ross that they should collect the balance due on the contract and discharge with such collections the firm's liabilities. If they had received the money from the discount of the cheque instead of taking the course they did and then deposited it to the new firm's credit and drawn it out again by cheques signed by the new firm, I cannot see what possible difference it could make.

We are asked to determine affirmatively that the mere placing of the proceeds of the cheque to the credit of the new firm was a badge of fraud or at any rate clear notice of an intended fraud on the partner Ross, and of an intended misapplication of the moneys.

I am quite unable so to conclude. The whole transaction appears to be one of an ordinary business character which, as a fact, gave rise to no suspicions and which should not have given rise to any. The placing of the moneys to the credit of McRae, Chandler & McNeil was not for the personal benefit of the bank "designed and stipulated for"; it was not done to pay a separate debt due to the bank by McRae and Chandler, or either of them, or what was known by the bank to be a separate debt due by one or two of the partnership. It was not in any sense fraudulent or necessarily inconsistent with the express purposes for which McRae and Chandler had been authorized to collect and disburse the moneys.

I have read all the authorities cited in support of plaintiff's contention that the bank either was a party to a misapplication of the partnership funds and was

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in consequence liable, or had such notice of an intended misapplication of such funds as put upon them the duty of inquiry before paying out the money and so made them liable for its proper application.

The cases chiefly relied upon by the appellant to support his contention were *Leverson* v. *Lane*(1); *Heilbut* v. *Nevill*(2); *Creighton* v. *Halifax Banking Co.*(3); *Frankland* v. *McGusty*(4); and *Ex parte Darlington District Joint-Stock Banking Co.; Re Riches and Marshall's Trust Deed*(5).

As regards the first four cases it is sufficient to say that in each of them the partnership credit or property had been given or delivered in payment or satisfaction *of a private debt* of one of the partners, and that in each case the party to whom it had been so delivered was under the circumstances of the case held cognizant of the misappropriation committed or attempted to be committed, or had under the special facts of the case the onus thrown upon him of shewing that the property or security had been given with the authority of the other partners. The controlling factors are, it seems to me, absent in the case before us, and these authorities cannot have any bearing upon the appeal unless it is held that the court is bound to infer from the evidence a knowledge on the respondent bank's part of an intended misapplication of the proceeds of the cheque to the private purposes of the two partners or to the purposes inconsistent with those of the partnership of Ross, McRae & Chandler, coupled with a subsequent actual misapplication.

The case of *Ex parte Darlington District Joint-Stock Banking Co.*(5) is a very peculiar one, and

(1) 13 C.B.,N.S. 278.
(2) L. R. 5 C.P. 478.
(3) 18 Can. S.C.R. 140.
(4) 1 Knapp P.C. 274.
(5) 4 De G.J. & S. 581.

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the observations of Lord Chancellor Westbury therein relied upon at bar must, of course, be read with reference to the facts with which he was dealing. That was a case of fraud where one partner had forged or manufactured bills of exchange to a large amount with the name of his firm appended as drawers and indorsers as also his own individual name as indorser, and had discounted these bills with the appellant's bank, which had credited the proceeds to his private account.

It was on these forged and fraudulent bills that after the death of the fraudulent partner the bank had claimed as creditors against the estate of the two surviving partners, Riches and Marshall, under the "Bankruptcy Act," and the holding of the Chancellor was that the transactions there shewed on their face a conversion by the customer of partnership property to his own purposes, and such great negligence on the banker's part in abstaining from inquiry as justified the rejection of their claim.

> All persons (he said, p. 585) may give credit to his (a partner's) acts and his authority, unless they have notice or reason to believe that the thing done in the partnership name is done for the private purposes, or on the separate account, of the partner doing it. In that case authority by virtue of the partnership contract ceases, and the person dealing with the individual partner is bound to inquire and ascertain the extent of his authority. If he do not so act, he must depend upon the right of the partner or on circumstances sufficient to repel the presumption of fraud.

This is nothing more than saying that persons giving credit to the acts and authority of a partner, but having "notice or reason to believe that what is done is for the private purposes or on the separate account of the partner doing it" gives such credit at his peril.

The question in every case is: Had the person giv-

ing credit to the individual partner such notice or must he be held under the facts proved to have had knowledge that the thing done in the partnership name was done for the private purposes of the individual partner ?

A very instructive case as to what amounts to notice and knowledge on the bank's part of the acts of individual partners being done for their own private and separate purposes is that of *Gray* v. *Johnston* (1), where it was held that:

In order to hold a banker justified in refusing to pay a cheque of his customer, the customer being an executor, and drawing a cheque as executor, there must be a misapplication of the money intended by the executor, so as to constitute a breach of trust, and the banker must be cognisant of that intention.

The existence of a personal benefit to the banker, designed or stipulated for, as a consequence of the payment, would be strong evidence that the banker was privy to the breach of trust.

The Lord Chancellor Cairns, at page 11, after reviewing the authorities, says:—

The result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, *intended by the executor*, and there must in the second place, as was said by Sir John Leach, in the well known case of *Keane* v. *Robarts* (2) be proof that the bankers are *privy to the intent* to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shewn that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed.

Now, as between a banker and his customer the Lord Chancellor laid down the proposition that to justify a bank in refusing to pay a demand of its customer, there must first be a misapplication of the

(1) L.R. 3 H.L. 1. (2) 4 Madd. Ch. 332, at p. 357.

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funds intended, and next, proof that the bankers were privy to such intent, and lastly, that proof of personal benefit being designed or stipulated for, would be the most cogent evidence of the banker's privity with the contemplated breach of trust. At page 14 Lord Westbury says:—

> Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer. But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit.

Having determined that the payment in that case was not intended to be for the benefit of the bankers, His Lordship goes on to say:—

> That being so, it was a payment in the ordinary way of trade in common discharge of the ordinary duty between a banker and his customer, and it is impossible for the parties interested in the estate to follow that transaction, to stamp it with the character of fraud, and to make out that the payment was any other than what it appears to have been, namely, a payment in the ordinary course of trade, and to pursue it as having a different character, the character, namely, of a payment made collusively and fraudulently by the executrix for the personal benefit of the bankers.

It appears to me that the facts of that case of *Gray* v. *Johnston* (1) were much stronger against the bank than those of this case. There the funds in question had been transferred from the credit of an estate on a cheque signed by the executor to the credit

(1) L.R. 3 H.L. 1.

of a partnership account in the same bank in which partnership the executor in its personal capacity was a partner, and the special benefit the bankers received was that the payment of the money, £850, went in diminuation of the liabilities of the firm to them of which firm the executor was a member.

In the case before us the bank derived no special benefit whatever. There was no debt due or owing to them which this cheque in dispute or any part of it went to diminish. There was not a scintilla of evidence of any personal benefit to the bank "designed and stipulated for" when the cheque was discounted.

The facts shew simply an ordinary every day business transaction. A person known to a bank as a reliable business man offers to the bank a cheque on another bank which is accepted and cashed. No charge is made because the person tendering the cheque intends opening an account with the bank and desires the money to be placed to his credit. The cheque is payable to a firm of which the person tendering it is a member. It is indorsed by the firm's name and also by the individual's name tendering it. There is not a suspicious circumstance surrounding the transaction. The bank had no knowledge of the state of the accounts between the partners or as to the respective rights of the partners to the proceeds of the cheque as between themselves. It derived no special benefit from the discount of the cheque or from the moneys arising therefrom. It had no knowledge or suspicion of any intended breach of trust or misapplication of the funds. It was an ordinary banking transaction and after discounting the cheque it placed the funds where its customer instructed it to place them to the credit of the new firm of McRae, Chandler

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& McNeil. The bank held the funds arising from the discount of the cheque to the order of McRae, Chandler & McNeil. If the latter had signed a cheque in their own favour and indorsed it to be put to their own credit, the transaction would in no sense have been different from that which actually took place when the money was placed by their verbal order and direction to the credit of the new firm. It was practically the case of a bank dealing with funds of its customer on the latter's order, and in such a case it is, "impossible," as Lord Westbury says in the case of *Gray* v. *Johnston* (1), at page 14 of the report,

> for the banker to set up a *jus tertii* against the order of the customer or to refuse to honour his draft on any other ground than some sufficient one resulting from the act of the customer himself.

McRae and Chandler were acting perfectly within their mandate when they indorsed and discounted the $56,000 cheque. The proceeds of the cheque when cashed were held by the bank at their credit. They could have taken the cash with them had they desired. They preferred putting it to the credit of the new firm of which they were partners. This indorsing and cashing of the $56,000 cheque was done in furtherance of the special mandate they held from Ross. They were to finish the contract which Ross, McRae & Chandler had, to collect what was due and payable thereon out of such contract. In cashing the cheque they were literally obeying Ross's mandate. They were further to pay and disburse out of the moneys they collected on the contract all outstanding liabilities and after that to divide the funds between the three partners as stipulated in their partnership articles.

(1) L.R. 3 H.L. 1.

To impose upon a bank discounting a cheque under such circumstances the duty of inquiring into the rights of third parties to the proceeds, to require the bank at its peril to make necessary inquiries from Ross who was in another part of the country as to his possible rights to a share of the cheque, to insist upon the proceeds being deposited only in the name of the old firm until Ross gave special authority otherwise, to impute to the bank under the circumstances a privity to a fraudulent attempt to defraud Ross in the application of the proceeds of the cheque, and simply on grounds of mere suspicion and curiosity would, in my humble judgment, be a most serious and unwarranted interference with ordinary banking business and throw great, if not insuperable, difficulties in it being carried on in this country. Most of the cases on the subject are reviewed at length by Bryne J. in *Coleman* v. *Bucks, and Oxon Union Bank*(1), where he shews the supreme importance of the factor so much relied upon by Lords Cairns and Westbury, of a personal benefit being to the bankers themselves designed and stipulated for as establishing privity with a contemplated breach of trust. At the close of his judgment Byrne J. says, page 254:—

> If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then, I think, the bankers would not be entitled to honour the cheque drawn upon the trust account without some further inquiry into the matter.

The case of the *Bank of New South Wales* v. *Goulburn Valley Butter Co.*(2) is also in point.

(1) [1897] 2 Ch. 243. (2) [1902] A.C. 543.

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The head-note of the report reads:—

In an action by a company to recover from its bankers moneys which, standing to the credit of its account, had been transferred by cheques of its managing director to the credit of his own overdrawn private account with the same bankers:—

Held, that the bank, acting in good faith and without notice of any irregularity, was not bound before honouring the cheques to inquire into the state of the account between the company and its managing director."

In delivering the judgment of the Judicial Committee Lord Davey says, page 550:—

The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque *Gray* v. *Johnston* (1); *Thomson* v. *Clydesdale Bank* (2), and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons: *Union Bank of Australia* v. *Murray-Aynsley* (3). On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows to be a trust account of his customer to the same customer's private account: *Ex parte Kingston; In re Gross* (4). Their Lordships are of opinion that Earle was not bound to inquire into the state of the account between the two parties. He had no materials to enable him to do so, and it is difficult to suggest any one of whom he could have made inquiry other than Ballantyne himself.

I do not think the evidence in this case warrants the inference of any agreement having been made between the bank and McRae and Chandler to discharge the latter's private debts out of the moneys arising from the discount of the cheque or that there was intended, or as a matter of fact had, any misapplication of these funds, or that the bank can under the circumstances be held liable for the disposition made of the proceeds of the cheque after discount.

I think the law is correctly stated in para. 473 of Halsbury's Laws of England, Vol. 1, page 226:—

(1) L.R. 3 H.L. 1.
(2) [1893] A.C. 282.
(3) [1898] A.C. 693.
(4) 6 Ch. App. 632.

Moreover, no agent who, being in possession of property which his principal holds in trust for another, makes on the instructions of his principal, any disposition thereof which is inconsistent with the trust, is guilty of a breach of trust, unless he had notice of the trust at the time, and was aware that the disposition made by him was in breach of trust.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The appellant and two others formed a contracting firm named Ross, McRae & Chandler, and, upon the completion of a work they had executed, Chandler got, at Montreal or thereabout, to the said firm or order, a cheque on the Bank of Montreal for $56,251.57, to satisfy the balance due on account of said work.

Without the knowledge of the appellant, or even asking his leave, Chandler took this cheque to the respondent bank at Toronto and explained to Mr. Hay, the assistant manager of that bank, that he desired to open an account for his firm of McRae, Chandler & McNeil, at a branch of said bank in New Liskeard, and shewed him this cheque which he wished to use as the basis of this new account.

The assistant general manager was only too glad to have a new account with so good a beginning, and assented to the proposal and passed Chandler on to the proper officers of the bank to carry out the details of this arrangement.

That involved an instruction to the agent at New Liskeard to open the account and give credit for the exact amount of the cheque free of charges, and a transmission of the cheque indorsed by Chandler in the name of the first-mentioned firm, and next in the name of his new firm, McRae, Chandler & McNeil, to the respondent.

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It is not denied and I think is the proper inference from the evidence, that these indorsements were made in the bank and not so made until it was known that the arrangement for opening this new account, collecting the cheque and placing the full amount to the credit at New Liskeard had been completed.

It was found by the learned trial judge that the assistant general manager acted in good faith, and that there was no negligence, and some stress is laid on this in the court below.

These are only his inferences from facts which are not in dispute. I assume that his finding from the appearance and manner of the assistant general manager, as a witness, that he was telling the truth so far as he could recollect it, must bind us here and be taken as the statement of fact so far as it goes.

But I cannot, even assuming that, draw all the inferences from this evidence, that the learned trial judge has drawn.

Let us bear in mind what Chandler and McRae were seeing the bank manager for, and the nature of the application made to him. It surely cannot be said that he was going to open an account with, and do business with and for a firm to whom the cheque belonged. On its face it plainly belonged to another firm. It was to become the basis of paying out to another firm which the bank trusted would circulate the bank bills.

It was not payable to the firm that was to be given credit.

What was proposed and done was clearly as could be the transferring of one firm's property to another firm, and the bank was to be used as a medium or part of the machinery for doing so. Its assent to the

proposal involved in its every essence the facilitating of this improper dealing with the cheque.

How could any one suppose this was not a using by Chandler of his firm's property for his own private purposes ? Or if McRae was there, taking part therein, as the manager supposes, how could it be possible for any one not to see that it was a using by them both, for their own private purposes, of that which did not on the very face of the transaction, belong to them, or them and McNeil ? And when Chandler and McRae referred to the fact that they had one contract and now were entering on another, surely there was nothing in that mode of expression to blot out Ross and substitute McNeil.

It is not an ordinary case. It is not one which might have happened by putting through an old account already established in the bank, a cheque sent in already indorsed over to be deposited in such old account, and in that way by, possibly, excusable inadvertence, procuring the execution of such an improper purpose as accomplished here.

I am not saying even that would be excusable, but assuming it might be, the cases are widely different.

Nor do I think the excuse offered of there having been cases known to Mr. Hay, where a firm of the same men have for purposes of business adopted different firm names at different times, furnishes any valid excuse. These firms ostensibly presented in their very firm names, two different sets of men and thus two entirely different business concerns.

In his evidence in his cross-examination, Mr. Hay is asked, and answers thus, in speaking of Chandler :—

Q. Had you heard anything whatever in regard to his means, or his position, until this time when McRae and he came there?

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A. I heard of the new firm having got that contract before they called on us at all.

Q. And you knew he was in that firm? A. Yes.

This shews he had present to his mind the creation of the new firm and the new contract, for he had stated just before this in his evidence, repeating from his examination for discovery, that the impression on his mind was that the three members of it had come together on the occasion in question. But speaking of this at the trial I infer he then doubted the correctness of his first impression.

I make no point of this lapse of memory, but merely wish to shew he never seems to have associated in his mind Ross as a member of the new firm.

It is found by the learned trial judge, and I think is abundantly clear that Mr. Hay never had any substantial reason for believing Ross was a member of the new firm, and without that I fail to see how his taking for the bank this cheque, on its face the property of Ross and his partners, can be upheld.

The facts seem to me to bring the case clearly within the principle acted upon in the *Darlington Case*(1) and the *Leverson* v. *Lane* case(2), referred to by the learned trial judge and cited in the various appeals and here; as well as in numerous cases referred to in the factum of the appellant.

It is not a question of mere suspicion, or something that might or ought to have put a man upon inquiry. It is the taking of that which on its face was partnership property from one of the parties for a purpose of his own, without any reason to believe or lead to the belief that the partners offering it had the authority of the other partner for so doing.

(1) 4 De G. J. & S. 581. (2) 13 C.B.N.S. 278.

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I do not overlook the suggestion that he had the authority to indorse and get the money, and that the further indorsing by him for the new firm must be assumed to have taken place after the cheque had thus become payable to bearer. That momentary condition of things in this case was not the basis of this transaction; and to permit this mere theory to be set up as a line of entrenchment to protect from the consequences of a breach of faith on the part of a partner, is something which ought not to be allowed any weight in face of the palpable facts of this case.

To do so seems to be an acceptance of the shadow for the substance.

It seems equally idle to suggest the fraud might have been so easily perpetrated in another way by drawing the money. The field for the operation of fraud is wide enough already, without adding even a small bit to it.

In speaking thus of fraud, and assuming it here to have existed in law, I do not wish to be supposed as going further than what the law implies on the part of one partner so dealing with partnership property as this man did.

For aught we know the partnership account when taken may disclose a state of things that may leave the transaction a mere piece of a high-handed way of getting one's own without waiting for recovery thereof by due course of law.

Of course that reprehensible method might not, in common parlance, be considered fraud whatever it might be in law.

Section 56 of the "Bills of Exchange Act" is relied upon by respondent bank. It seems to me to oper-

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ate entirely against it. But after all this only brings the argument back to the same point of this cheque having been negotiated without notice of defect in title or in breach of faith patent to any one who read or rather was capable of reading.

I think the appeal should be allowed with costs throughout, the judgment of the trial judge be set aside and such judgment be framed as will give appellant upon a taking of accounts the relief he is entitled to which is not so very obvious, nor will be until accounts are taken.

Of course all partnership debts will have to be paid so far as this cheque extends, and interest thereon may not have been applied thereto, but beyond that it is not possible to say what actual rights the appellant has as against the bank which must be subrogated to any of the claims of Chandler and McRae on the partnership funds.

DUFF J.—The evidence appears to me to shew that the respondents McRae and Chandler had authority to convert the cheque in question into a negotiable instrument in the strict sense of the term, that is to say, an instrument transferable by delivery alone; and that it was acquired by the respondent bank in good faith in the ordinary course of business. In such circumstances the bank, I think, obtained a good title to the cheque and its proceeds as against the appellant.

The appellant Ross with the respondents McRae and Chandler had been as partners carrying on the construction of railway works between Three Rivers and Shawinigan Falls, Quebec, under contract with the St. Maurice Construction Company. The appellant was for some time engaged in superintending the ex-

ecution of the contract on the ground, but before the completion of it he left to take charge of some works in progress in Parry Sound, Ontario, in which McRae and Chandler were also interested. The completion of the St. Maurice contract and the winding up of the business of the partnership in connection with that contract was left in the hands of McRae and Chandler. This involved, of course, the collection of the moneys payable under the contract and making the disbursements necessary to discharge the partnership obligations. It seems to be indisputable that McRae and Chandler were thereby invested with authority to convert the cheque received from the construction company into cash. Some suggestion was made, though hardly pressed, during the argument that since the firm had a banking account at Shawinigan Falls their authority was limited to depositing the cheque to the credit of that account and disbursing the proceeds by cheques drawn thereon. I do not think there is any foundation for that suggestion. McRae and Chandler evidently lived in Toronto; Ross was at Parry Sound; it might very well suit the convenience of all parties, the works being finished, that any further business should be transacted in Toronto; and Ross's evidence seems to leave no doubt that he was quite content to have McRae and Chandler realize the proceeds of the cheque in any manner they might think fit so long as those proceeds were properly applied. They might convert the cheque into bank bills by presenting it at one of the branches of the Bank of Montreal, on which it was drawn; or they might by indorsing it with the name of the payees and thus making it transferable by delivery alone convert it into the equivalent of bank bills. It is perfectly

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true that it would be an abuse of their authority and a fraud upon their partner if they did either of these things for the purpose of enabling them to appropriate the proceeds of the cheque to their own purposes in violation of their partner's rights. But it would none the less enable them, it appears to me, to give to a person dealing with them in good faith an unimpeachable title either to the bank bills or to the cheque so indorsed. Their authority as between themselves and Ross was, of course, an authority to apply the cheque or its proceeds to partnership purposes alone. But having for such purposes authority to convert the cheque into currency or the equivalent of currency the rights of such persons (dealing with them in good faith) could not, I think, be affected by the circumstance that the opportunity created by the existence and exercise of that authority was being improperly used for other purposes.

In relation to third parties the situation of McRae and Chandler (who for the purpose of dealing with this cheque clearly had the authority of managing partners) appears to have been much the same as that of an agent having possession of commercial paper belonging to his principal with general authority to indorse such instruments in the course of transacting the business of the principal and for his benefit. If the agent misuse such authority by applying the paper so indorsed to his own private purposes his dealing with it is from beginning to end a violation of his principal's rights; but third parties taking the paper from him with no knowledge or suspicion of his breach of duty and for value acquire nevertheless an indefeasible title even as against the principal. This was expressly decided, if not elsewhere, at least in *The*

Bank of Bengal v. *Macleod*(1), and *Bryant Powis & Bryant* v. *Quebec Bank*(2). A passage in Lord Brougham's judgment in the first-mentioned case which has often been cited appears to be applicable to the circumstances of this case.

> But it is further said, that even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power.

The cheque in question, therefore, although in the hands of McRae and Chandler for a limited purpose, was a negotiable instrument in the strict sense when it was presented to the bank for deposit to their credit by the firm of McRae, Chandler & McNeil; its character was such that any person in possession of it could, even though acting in fraud of the true owner, convey a good title to it provided value was received for it and the person acquiring it did so without knowledge or suspicion that it was being dealt with in violation of good faith.

That value was given is not disputed. The question of good faith remains. Had the bank any suspicion that this cheque was in the hands of McRae and Chandler for a limited purpose only, and that this dealing was in breach of the terms upon which they held it? This question has been passed upon by the trial judge and he has found that the bank had no such knowledge or suspicion. The Court of Appeal as well

(1) 7 Moo. P.C. 35. (2) [1893] A.C. 170.

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as the Divisional Court, moreover, unanimously accepted that finding.

It must be admitted that superficially there does appear to be some ground for supposing the judgment of Lord Westbury in *Re Riches and Marshall's Trust Deed*(1) to be in conflict with this view. The case is distinguishable however on the ground that the bills in question there being manufactured instruments — forgeries — the partners who negotiated them had no authority limited or otherwise to indorse such documents in the partnership name; and the Lord Chancellor does not deal with the case on the footing that they were negotiable instruments. While, moreover, it may be doubted whether the Lord Chancellor's conclusions in that case involve a finding that the bank had any actual knowledge or suspicion that the customer was acting fraudulently, I agree for the reasons given by my brother Davies that applying here the criterion which was applied in that case the respondent bank's responsibility is not established. In this connection it may be observed that the appellant's position really rests upon the contention that the fact of a cheque payable to the firm of Ross, McRae & Chandler being presented for deposit to the credit of the firm of McRae, Chandler & McNeil was in itself on its face notice that the cheque was being dealt with in violation of a trust. The contention seems to ignore the circumstance that this cheque was presented by two persons (one known to the banker personally as an honest business man, the other so known to him by repute) who were members of the firm to which the cheque was

(1) 4 De G. J. & S. 581.

payable. I do not know why a breach of trust should in such circumstances have been suspected. The difference in the firm names would, I should have thought, be of no significance whatever to persons accustomed to the dealings of railway contractors; and the fact that it made no impression on the mind of this experienced banker is not without bearing on the point whether it was a circumstance likely in the ordinary course of dealing to convey a suspicion of wrongdoing. The truth no doubt is expressed by Lord Herschell in *London Joint Stock Bank* v. *Simmons*(1), at page 223:—

> I apprehend that when a person whose honesty there is no reason to doubt, offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is whether the security is sufficient to justify the advance

or the credit required.

I do not think there is anything in Lord Westbury's judgment to justify the conclusion that in his view a banker being offered money or its equivalent by a person known by him to be a partner in a firm from or through which the money has been received, should be held accountable for a higher degree of vigilance and more active suspicion than when dealing with a broker or other agent who, to the banker's knowledge, offers securities which are the property of his principal and which he has authority to deal with in the course of transacting his principal's business.

ANGLIN J. (dissenting).—The plaintiff, who was the senior member of the contracting firm of Ross, McRae & Chandler, brings this action to compel the

(1) [1892] A.C. 201.

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Imperial Bank of Canada to account to him for his interest in the proceeds of a cheque for $56,251.57, drawn upon the Bank of Montreal by the St. Maurice Construction Co. in favour of the firm of Ross, McRae & Chandler. This cheque represented the balance due to that firm in connection with a contract carried out by it at Shawinigan, Que. The firm of Ross, McRae & Chandler had been formed for the purpose of this Shawinigan contract. About the time of its completion, Messrs. McRae and Chandler entered into a new partnership with one McNeil, under the firm name of McRae, Chandler & McNeil. This firm, in which the plaintiff had no interest, secured a construction contract on the Temiskaming Railway in Northern Ontario.

The cheque in question was received by Messrs. McRae and Chandler after Mr. Ross had left Shawinigan. By arrangement made by Messrs. McRae and Chandler with Mr. Hay, the assistant general manager of the Imperial Bank, it was taken by the Toronto branch of that bank, with the understanding that the amount thereof would be *immediately* placed to the credit of the firm of McRae, Chandler & McNeil at the New Liskeard branch of the same bank, for their convenience in connection with their Temiskaming contract.

The cheque bears indorsements in blank of the firm name, Ross, McRae & Chandler, and also of the firm name, McRae, Chandler & McNeil. There is no express evidence whether Chandler, who made the indorsements, put either or both of them on the cheque before, during or after his interview with Mr. Hay. Assuming that the course which prudent business usage would dictate was followed, the indorsements

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were put upon the cheque only after the arrangements for the opening of the account for the new firm had been completed. In this country, where the system of crossing cheques is little used, business men seldom take unnecessary risk of losing a cheque indorsed in blank and thus made payable to bearer. Had the indorsements been upon the cheque when it was shewn to Mr. Hay, I have little doubt that he would have said so when he was pressed by counsel for the plaintiff to state whether he had not seen the cheque and whether, if he had looked at it, he would not have seen that it was payable to the firm of Ross, McRae & Chandler. Mr. Hay is an experienced banker and as a witness was not loath to give any evidence which might put upon the case an aspect favourable to his bank. The fact that he does not say that there was any indorsement on the cheque when it was presented to him. coupled with the usual practice of prudent business men in such transactions, warrants the inference that Chandler put both indorsements on the cheque after he had arranged with Mr. Hay for the opening of the New Liskeard account and probably when he was about to hand it over to the clerk in the Toronto branch of the bank.

The plaintiff claims that the Imperial Bank is accountable to him because McRae and Chandler had not authority to deal with the cheque in question as they did, and the bank, as he alleges, took it with notice that they were diverting a partnership asset or security to an account in which their partner, the plaintiff, had no interest.

That McRae and Chandler were not authorized to use the cheque as they did is not seriously controverted. The defendants, the Imperial Bank, have been

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held not liable in the provincial courts — by the trial judge on the ground that there was no fraud or negligence on their part and that they had reason to believe that McRae and Chandler were acting within their authority; by the Divisional Court on the ground that the indorsement of the firm name of Ross, McRae & Chandler was within Chandler's authority, and that the case should be treated as if the proceeds of the cheque had been drawn from the Bank of Montreal and deposited by McRae and Chandler to the credit of the new firm; by the Court of Appeal on the ground that when Chandler indorsed the cheque for the firm of Ross, McRae & Chandler, it became payable to bearer, and when the amount of it was placed to the credit of the new firm, the bank became holders of it for value and without notice of any defect in the title; that negligence on the part of the bank would not suffice to render them liable, even if there had been negligence; that there was no evidence of fraud; and that there was nothing to suggest to Mr. Hay that he should have made inquiries. Mr. Justice Osler concurred in this judgment with doubt.

After most careful consideration I have come to the conclusion that the plaintiff's appeal should be allowed. He is, I think, entitled to succeed, not because of any fraud on the part of the bank officials, nor because of their negligence — although, with great respect for the learned trial judge and the provincial appellate courts, it seems to me reasonably clear that there was negligence on the part of Mr. Hay; *Bissell & Co.* v. *Fox Brothers* (1); *Hannan's Lake View Central* v. *Armstrong & Co.* (2); a word to Ross would have

(1) 51 L.T. 663, 53 L.T. 193. (2) 16 Times L.R. 236.

saved the situation — but on the well recognized principle of the law of agency, which is part of the law of partnership, that in the absence of actual authority or ratification, the principal is not bound by the act of his agent done out of the ordinary course of business, or outside the scope of his apparent or ostensible authority.

A partner has implied authority to deal with partnership property for partnership purposes; but it is beyond the scope of his ostensible authority to divert partnership securities to his private benefit, or to the benefit of a business in which he is interested, but which is not that of the partnership. A person acquiring an asset of a partnership from one of the partners with notice that he is diverting it to his own use, assumes the risk of establishing that such a disposition of the partnership property was sanctioned by all the other partners.

It is immaterial whether the partnership security is applied in discharge of an existing debt or whether it is used by the individual partner for the purpose of obtaining money from his own bankers to be applied for his own personal purposes. *Re Riches, and Marshall's Trust Deed* (1), at page 586.

By Mr. Hay's own evidence it is established that he was aware that it was a "new" firm which had got the Temiskaming Railway contract; he knew of the "old" firm and he probably identified the plaintiff, as a member of it, with the name "Ross" upon the cheque in question; he had no reason to believe that Ross had any interest in the "new" firm; its name indicated that Ross was not a member of it. He was informed that a contract had just been completed at Shawinigan. Although he does not in terms make the admission,

(1) 4 De G. J. & S. 581.

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the only proper inference from his evidence is that he knew that the cheque in question had been received in payment of a sum due to the contractors under the Shawinigan contract, and on the face of the cheque, which he saw, it was apparent that this payment was made to the old firm, Ross, McRae & Chandler.

Notice and knowledge means not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes. *Per* Parke B. in *May* v. *Chapman* (1), at page 361.

The cheque was indorsed in such a manner that the diversion of it from the old firm to the new firm was unmistakable. It was equally obvious that the indorsement by which this transfer was effected was made by, and was in the hand-writing of Chandler. He had placed his own signature beneath that of the old firm to indicate this fact. The design of placing the proceeds of this security of the old firm to the credit of the new firm, so that the latter would be in a position to disburse the money for its own ends, was therefore apparent. Indeed the intention of McRae and Chandler to use it in connection with their Temiskaming contract was avowed when they explained to Mr. Hay the reasons why they desired to have the proceeds of the cheque placed to their credit in the New Liskeard branch of the Imperial Bank. As put by Meredith C.J.:—

It seems equally clear that Mr. Hay, the assistant-general manager of the bank, with whom the transaction took place, had notice of the intended and of the actual application by McRae & Chandler of the proceeds of the cheque, so far as the depositing of them to the credit of the new firm was an application of them, for that they should be so deposited was the object of the transaction in which the parties were engaged.

(1) 16 M. & W. 355.

I would add that Mr. Hay knew that it was intended that the money should be used in connection with the Temiskaming contract of the new firm.

There is nothing in the evidence, as I read it, to support the statement of the learned trial judge that "Hay supposed that the old firm were going under a new name" — Hay certainly does not say so; nothing to warrant the learned judge's conclusion that "the bank have made out they had reason to believe that Chandler was acting within his authority" — if, indeed, short of a case of estoppel, that be material when it has been established affirmatively that he acted without authority. *Kendal* v. *Wood*(1), at pages 248, 254.

Chandler no doubt had authority as a member of the old firm to indorse the cheque for the purpose of depositing it to the credit of that firm, or of drawing from the Bank of Montreal the money for which it called. But the indorsement of the name of the old firm for the purpose of transferring the cheque to the new firm was beyond the scope of his ostensible authority as a partner in the old firm, quite as much as it was beyond the scope of his real authority.

Mr. Hay knew or must be taken to have known that Chandler and McRae were not acting within such authority as may be implied from partnership agency. He trusted to their having special authority and he took the risk of its turning out that such special authority did not exist: *McConnell* v. *Wilkins*(2), at page 443.

If the agent be held out as having only limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even

(1) L.R. 6 Ex. 243. (2) 13 Ont. App. R. 438.

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though it be an act of that particular class, because the authority being thus represented to be limited, the party prejudiced has notice and should ascertain whether or not the act is authorised. *Russo-Chinese Bank* v. *Li Yau Sam*(1), at page 184.

When the Imperial Bank accepted the cheque from McRae and Chandler and at once placed the amount of it to the credit of the new firm, it became not merely the agent of the new firm to collect the proceeds of the cheque for them, but the purchaser of the cheque. The materiality of this distinction is illustrated in the case of *Bevan* v. *National Bank*(2), at page 68 — a case concerning crossed cheques. Section 175 of our "Bank Act" corresponds with section 82 of the "English Bills of Exchange Act," 45-46 Vict. ch. 61.

I do not understand the view attributed to Meredith C.J. in the Divisional Court, that the bank was the agent of the old firm to receive payment of the cheque. As its purchaser the bank became a holder of the cheque for value ("Bank Act," sec. 56, sub-sec. 2); but, with great respect, I cannot accept the view that it had not notice of the defect in the title of the new firm which negotiated the cheque with it.

That knowledge of the fact that a partnership security is being diverted by one or more of the partners to the benefit of a business in which another of the partners is not interested puts the person taking it upon inquiry as to the actual authority of the partner or partners so dealing with it, "by which it is meant that he takes the paper at his peril," is established by many cases: *Creighton* v. *Halifax Banking Co.*(3); *Re Riches and Marshall's Trust Deed*(4); *Leverson* v. *Lane*(5); Halsbury's Laws of England, Vol. 1, p. 594.

(1) [1910] A.C. 174.
(2) 23 Times L.R. 65.
(3) 18 Can. S.C.R. 140.
(4) 3 De G. J. & S. 581.
(5) 13 C.B.N.S. 278.

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I fail to appreciate the distinction suggested between the case where, as here, the banker discounts or purchases for the benefit of an individual partner a cheque drawn in favour of his firm, and those cases where bankers, who, under similar circumstances, discounted promissory notes or bills of exchange, have been held accountable to the firm or the defrauded partner. A cheque is an inland bill of exchange drawn on a banker payable on demand. *Lynn* v. *Bell*(1).

We were pressed with the statement that, if the bank should be held accountable in the present case, banking business will be unduly hampered. I admit that weight which should be given to such a consideration. I question, however, the accuracy of the statement. But it is, in any case, of paramount importance that we should not disturb well-settled principles of the law of agency by disregarding them because in a particular instance their application may seem to result in a hardship, perhaps more apparent than real. The doctrine that a person, who deals with a partner in a matter or for a purpose beyond the scope of the ostensible authority which the partnership confers, does so at his peril, must not be jeopardized, impaired or weakened. I can discover no ground of distinction between the case of a bank which discounts a cheque drawn in favour of a partnership on another bank, and that of any other person who becomes the purchaser of such a security. Knowledge of facts indicating an excess of authority by the partner negotiating it puts both alike upon inquiry. The position of a banker who honours his customer's cheque is quite different. His primary duty to do so is a determining factor in cases

(1) (1876) 10 Ir. C.L. 487.

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such as *Backhouse* v. *Charlton*(1); *Gray* v. *Johnston* (2); *Coleman* v. *Bucks and Oxon Union Bank*(3). The distinction between the case of a person originally discounting a partnership bill and that of a subsequent *bonâ fide* holder of it for value is pointed out by Lord Kenyon in *Arden* v. *Sharpe*(4).

I accept the statement of the law, contained in the following paragraph of Mr. Justice Riddell's opinion:

> No one may with impunity take from one partner an asset of the firm "for the purpose of obtaining money to be applied for his own personal purposes," or with a knowledge that it is not to be applied for the purposes of the partnership.

That suffices to put the person taking the partnership asset on inquiry; and he ordinarily assumes the burden of shewing that the partner, from whom he received it, in so dealing with it, acted with the authority of his co-partner: Lindley on Partnership, 7th ed., p. 202.

The Master of the Rolls, delivering the judgment of the Privy Council in *Frankland* v. *McGusty*(5), at pages 301-2, says:—

> I take it to be clear, from all the cases upon the subject, that it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners. But there may be other circumstances attending the transaction which may afford the separate creditor a reasonable ground of belief, that the security so given in the partnership name is given with the consent of the other partners * * * Upon a consideration, therefore, of all the authorities, I am of opinion that the law is, that taken *simpliciter*, the separate creditor must shew the knowledge of the partnership; but if there are circumstances to shew a reasonable belief that it was given with the consent of the partnership, it lies upon the

(1) 8 Ch. D. 444.
(2) L.R. 3 H.L. 1, at p. 11.
(3) [1897] 2 Ch. 243.
(4) 2 Esp. 524.
(5) 1 Knapp P.C. 274.

partners to prove the fraud. I think that will reconcile all the cases.

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Except his idea that McRae and Chandler were reputable business men, and his gratuitous statement that "it is not an uncommon thing for contractors to take the different contracts under different names" — he does not venture to pledge his oath that he believed that Ross had any interest in the Temiskaming contract or in the "new" firm — the bank manager suggests no basis for any reasonable belief on his part that Chandler was acting within his authority in negotiating the firm cheque as he did. His belief in Chandler's authority, if it existed,—(again Mr. Hay is careful not to say that he did in fact entertain this belief; he apparently gave the matter no thought, had no suspicion, made no inquiries)—based on these grounds would not, in the circumstances, be such a reasonable belief as would even shift to the plaintiff the burden of proving lack of authority on the part of Chandler. This would rather appear to be a case in which the banker had no reason to believe that Chandler's actual authority was greater than his ostensible authority as a partner — a case of taking from an individual partner, for his own benefit, a partnership security *simpliciter*. Apart from conduct on the part of the plaintiff, upon which an estoppel might be founded, *Kendal* v. *Wood*(1), at pages 251, 253, but of which there is here no suggestion, good faith and belief in the authority of the partner negotiating the security, however reasonable, will not afford the banker a defence, at all events when absence of authority and fraudulent conduct on the part of the part-

(1) L.R. 6 Ex. 243.

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ner have been actually shewn. Lindley on Partnership, 7th ed., page 201, note (*s*); Smith's Mercantile Law, 11th ed., Vol. 1, p. 35; *Hannan's Lake View Central* v. *Armstrong Co.*(1).

I am, therefore, of the opinion that, in respect of the cheque itself and its proceeds, the right of the Imperial Bank is no higher or better than that of Messrs. McRae and Chandler.

As pointed out in *Heilbut* v. *Nevill*(2), because Chandler had authority to indorse the cheque in the name of the partnership, though for partnership purposes only, there might be some difficulty in holding the bank liable for a conversion of it; but there is no difficulty in holding them accountable for its proceeds as money had and received to the use of the firm of Ross, McRae & Chandler.

The relevancy of section 96 of the "Bank Act," relied upon by Mr. Bicknell, I cannot appreciate.

It has not yet been made clear what was the amount of the plaintiff's interest in the cheque. That will appear when the partnership accounts have been taken in the other action in which a reference for that purpose has been directed. The bank might, as a matter of strict right, be required to pay into court in this action the whole amount of the cheque in question. This would be placed to the credit of the old firm and the bank would then be entitled to claim as a creditor against the partnership for so much of the proceeds of the cheque as it could shew had been expended for the benefit of the old partnership; and as to the balance, it would be entitled to subrogation to the rights of McRae and Chandler as developed upon the part-

(1) 16 Times L.R. 236. (2) L.R. 5 C.P. 478.

nership accounting. But it will be simpler, and the net result will be the same, if the bank is held accountable to the plaintiff only for whatever sum, not exceeding $56,251.57, may be found to be the balance due to him upon the taking of the partnership accounts.

The defendant bank objects to the plaintiff recovering any judgment until it is shewn by the taking of the accounts of the partnership that there is a balance due to him. But the plaintiff, on the other hand, asserts that, unless the accountability of the bank is established, it may not be worth his while, because of their financial irresponsibility, to pursue his action of account against his late partners. The liability of the bank to account to the plaintiff depends chiefly, if not entirely, upon a question of law. But whether it involves solely a question of law or also questions of fact, under the circumstances it may well be disposed of before the accounts between the partners are taken up. Ontario Consolidated Rules 259 and 531. That the plaintiff's relief must be presently confined to a judgment declaratory of his rights against the bank is not an answer to his claim. "Ontario Judicature Act," sec. 57, sub-sec. 5. Such a judgment is all that can be now given him. With it, however, he will probably have no difficulty in realizing from the bank any amount found to be due him when the partnership accounts have been taken.

The appeal should be allowed with costs in this court and in all the provincial courts.

Although no relief is asked against the defendants Chandler and McRae, they were, I think, properly made respondents on this appeal. Their peculiar dealing with the partnership cheque in question has been

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the cause of this entire litigation; they are vitally and directly interested in the accountability of their co-defendants to the plaintiff, and it was right that they should be given an opportunity to appear, if so advised, when the case against the bank was being dealt with. But as no relief was asked against them their appearance was not necessary unless they desired to contest the plaintiff's right to hold the bank accountable. That they could do only at their own risk. They should bear their own costs in all the courts.

Appeal dismissed with costs.

Solicitors for the appellant: *Macdonald, Shepley, Middleton & Donald.*

Solicitors for the respondent, The Imperial Bank: *Bicknell, Bain & Strathy.*

Solicitors for the respondents, Chandler and McRae: *Beatty, Blackstock, Fasken & Chadwick.*

GEORGINA GIRVIN .....APPELLANT; 1911

AND *Oct. 19. *Oct. 24.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Criminal law—Evidence—Verdict.

Evidence making a *primâ facie* case for the Crown in a criminal prosecution, if unanswered and believed by the jury, is sufficient to support a conviction of the person accused.

APPEAL from the judgment of the Supreme Court of Alberta affirming the conviction of the appellant, at the trial, upon an indictment for arson, on an appeal by special leave upon questions of law in respect of which the trial judge, Stuart J., refused to reserve a case for the opinion of the court *in banco.*

The following statement was made by the learned trial judge in refusing the application for a reserved case by counsel for the appellant.

STUART J.—"I refuse to reserve the following questions for the opinion of the court, *en banc,* at the next sittings of the said court to be holden at Calgary, in Alberta.

"(I.) Does the evidence merely point to a suspicion of guilt instead of being the legal evidence necessary to support a conviction ?

"(II.) Was I right in refusing to dismiss the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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charge against the accused at the close of the case for the Crown upon application made by counsel for the accused ?

"(III.) Was the evidence of the witnesses McMinn and McIntosh as to the removal of certain horses alleged to be the property of Samuel Wilson pursuant to an alleged arrangement with the said Wilson, properly admitted by me, there being no evidence that the accused had any knowledge of any horses being on the premises, of their removal, or of any such arrangement, and objection being taken by counsel for the accused ?

"(IV.) Was that portion of my charge to the jury being 'a person who tells an untruth when not under oath is not a person who is likely to be believed even when they are under oath' improper ?

"(V.) Was that portion of my charge to the jury proper being, 'people do peculiar things and yet is it a probable thing that she would do — to leave a bundle of papers there in that store in a drawer which was apparently unlocked for so long containing incriminating evidence against her husband of his relations with another woman,' there being no evidence whatever of the said papers containing any incriminating evidence ?

"(VI.) Was I right in refusing to allow counsel for the accused to have the said papers handed in to the jury while deliberating upon their verdict unless so requested by the jury ?"

A. A. McGillivray for the appellant.

Wallace Nesbitt K.C. and *Christopher C. Robinson* for the respondent.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—I have always understood the rule to be that the Crown, in a criminal case, is not required to do more than produce evidence which, if unanswered, and believed, is sufficient to raise a *primâ facie* case upon which the jury might be justified in finding a verdict. A careful perusal of the evidence here satisfies me that there is evidence quite sufficient to prove that the house was destroyed by a fire under circumstances which clearly pointed to incendiarism, and that the accused might fairly be presumed to have set the fire. When the Crown's case was closed, of the three persons who had means of access to the building on the night of the fire two had given their evidence, frankly and fully testifying to all that occurred; the third, the accused, volunteered to go into the witness box and attempted to explain away those things which were calculated to throw suspicion upon her. To say the least, her explanation is not satisfactory. Her denials of facts that are proved beyond all doubt are very much to her discredit. In any event, the jury having had occasion to hear the story of the three persons who alone admittedly might have caused the fire, and the theory of accident being eliminated, came to the conclusion, on evidence which, in my opinion, was sufficient, that the appellant was guilty of the offence with which she was charged and no reason has been given here to justify us in setting that verdict aside. The facts are so fully and clearly discussed in the judgments below that I do not feel it necessary to say more.

Appeal dismissed.

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*May 18, 19.
*Oct. 3.

IN THE MATTER OF

"THE LOCAL IMPROVEMENT ACT" (Ch. 11, Statutes of The Province of Alberta, 7th Edw. VII.).

THE CALGARY AND EDMONTON LAND COMPANY (OWNERS) .... } APPELLANTS;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF ALBERTA (APPLICANT) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Appeal—Special leave—"Supreme Court Act," R.S.C. (1906) *c.* 139, *s.* 37(*c*)—*Interests involved—Construction of statute—"Alberta Local Improvement Act," 7 Edw. VII. c.* 11, *and amendments—"B.N.A. Act,* 1867," *s.* 125—*53 Vict. c.* 4 (*D.*)—*Assessment and taxation—Constitutional law—Railway aid—Land subsidy—Crown lands—Interests of private owner—"Free grant"—"Owner"—"Real property."*

Special leave to appeal from the judgment of the Supreme Court of Alberta (2 Alta. L.R. 446) was granted, under the provisions of section 37(*c*) of the "Supreme Court Act," R.S.C. 1906, ch. 139, because of the magnitude of the interests involved.

Provincial legislatures may authorize the taxation of beneficial or equitable interests acquired in lands wherein the Crown, in the right of the Dominion of Canada, holds some interest and the legal estate. The legislature of a province may provide for the levy and collection of taxes so imposed by the transfer of the interests affected by such taxes.

The Dominion statute, 53 Vict. ch. 4, authorized the granting of aid for the construction of a railway by a subsidy in Crown lands,

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*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

and, by section 2, it was declared that such grants should be "free grants" subject only to the payment, on the issue of patents therefor, of the costs of survey and incidental expenses, at the rate of ten cents per acre. The lands in question formed part of the land-subsidy, earned by the railway company and reserved and set apart for that purpose by order-in-council, which had been conveyed by deed poll to the appellants by the railway company prior to the issue of a Crown grant. While still unpatented, these lands had been rated for taxes and condemned for arrears of taxes under the statute of Alberta, 7 Edw. VII. ch. 11.

Held, that the interest of the appellants in the said lands was subject to taxation and liable to be dealt with under the provincial statute, although letters patent of grant thereof by the Crown had not issued.

Held, also, that allotment of these lands as "free grants," under the subsidy Act, related only to exemption from the usual charges made in respect of public lands by or on behalf of the Crown, except the cost of survey, etc., and did not exempt the appellants' interest therein from taxation under the provisions of the provincial statute, although neither the legal estate nor any interest therein remaining in the Crown could be liable to taxation.

Judgment appealed from (2 Alta. L.R. 446) affirmed. *Rural Municipality of North Cypress* v. *Canadian Pacific Railway Co.* (35 Can. S.C.R. 550) distinguished.

APPEAL from a judgment of the Supreme Court of Alberta (1), affirming the order of Sifton C.J., which confirmed the return of the tax commissioner, so far as it affected the lands in question.

On the 25th of February, 1910, an application, by motion to the Supreme Court of Canada,* was made for special leave to appeal from the judgment of the Supreme Court of Alberta, in view of the doubt whether or not the matter in controversy originated in an inferior tribunal, and it was urged that there should, if necessary, be special leave granted, under

(1) 2 Alta. L.R. 446.

*PRESENT: Sir Charles Fitzpatrick C.J. and Girouard, Davies, Duff and Anglin JJ.

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the provisions of the "Supreme Court Act" on account of constitutional questions and matters of great magnitude and public interest being involved in the dispute.

Chrysler K.C. supported the motion.

G. F. Henderson K.C. contra.

Judgment was reserved.

On the 3rd of March, 1910, the judgment of the court, on the motion, was delivered by

THE CHIEF JUSTICE.—This application was made before the registrar, as judge in chambers, under the provisions of section 37(*c*) of the "Supreme Court Act," for leave to appeal. The motion was enlarged by him into court.

The application arises in the following manner. The local statute of Alberta, chapter 11, of 1907, sections 90 *et seq.*, provides that the secretary of every district shall make a return of the assessable lands and also of arrears of taxes. Section 92 authorizes a judge of the Supreme Court of Alberta, in chambers, on the application of the Attorney-General of the province, to appoint a time for the holding of a court for the confirmation of the return; and section 95 provides that, any time after the expiration of a year, the Attorney-General may obtain an order from a judge, in chambers, directing that the title to the lands in arrears for taxes be vested in the Crown. In the statutes of 1908, chapter 7 (Alta.), it is provided that where jurisdiction is given to a judge, as *persona designata,* he should be deemed to have the jurisdiction

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of a judge of the court to which he belongs, and that his orders should be enforced as other orders of the court. By the same Act an appeal is given to the full court from his judgment, after leave has been obtained.

In the present case the lands of the Calgary and Edmonton Land Company were returned by the secretary of the district as in arrear for taxes, and this return was confirmed by the Chief Justice of Alberta, and, upon an appeal from his order of confirmation, the appeal was dismissed and his order was affirmed by the unanimous judgment of the full court. The land company now applies for leave to appeal under section 37(*c*) of the "Supreme Court Act," where an appeal is taken by leave of the Supreme Court of Canada or a judge thereof, although the case may not have originated in a court of superior jurisdiction.

Without expressing any opinion as to whether, in the circumstances, it was necessary to move for leave, we think it is a proper case in which to grant the motion, *quantum valeat,* because of the magnitude of the interests involved. The motion is granted without costs.

The questions at issue on the hearing of the appeal on the merits are stated in the judgments now reported.

Ewart K.C. and *Laird* for the appellants.

S. B. Woods K.C., Deputy Atorney-General for Alberta, for the respondent.

THE CHIEF JUSTICE.—I would dismiss for the reasons given by Mr. Justice Beck in the court below.

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Davies J.

DAVIES J.—This is an appeal from the judgment of the Supreme Court of Alberta dated 24th December, 1909, dismissing the appellant's appeal from the order of the Honourable Chief Justice Sifton, which latter is dated 2nd March, 1909.

The order of the Chief Justice was made by him under the powers vested in him by section 93 of "The Local Improvement Act" of the Province of Alberta, being chapter 11 of the Statutes of Alberta (1907), and the effect of it was to confirm the return of arrears of taxes for Local Improvement District No. 607 of the Province of Alberta in respect of the north-east quarter of section 3, township 16, range 2, West of the fifth meridian, for the year 1906, these arrears amounting to $2. This land belongs, it is claimed, to the appellant, having been acquired by it under the circumstances hereinafter set out. The effect of the confirmation of the return of the arrears of taxes on this land is to vest it or the appellant's interest in it in the Crown for the public use of the province, subject, however, to redemption by the owners, as in the statute set out.

As the case was admittedly a test one and involved important questions affecting the public interests depending upon the proper construction of the "Local Improvement Act" of Alberta (1907), and of Canada's "Constitutional Act" (B.N.A. Act, 1867), special leave to appeal to this court was granted to appellant.

The circumstances under which the appellant became possessed of the lands in question are as follows:

By statute of Canada, 53 Vict. (1890), ch. 4, it was provided that the Governor-General in Council might grant a subsidy in Dominion land to the Calgary and

Edmonton Railway Company (the predecessors in title of the appellant) towards the construction of the railway to an extent not exceeding six thousand four hundred (6,400) acres for each mile of the company's railway from Calgary to a point at or near Edmonton on the North Saskatchewan River, a distance of about one hundred and ninety (190) miles, and also to an extent of six thousand four hundred (6,400) acres for each mile of the company's railway from Calgary to a point on the international boundary between Canada and the United States, a distance of about one hundred and fifty (150) miles, such grant to be made in the proportion and upon the conditions fixed by order-in-council made in respect thereof and except as to such conditions to be free grants, subject only to the payment of the costs of survey and incidental expenses at the rate of ten (10) cents an acre in cash on the issue of patents therefor.

By order-in-council, 18th November, 1891, supplementing a previous order-in-council of the 27th June, 1890, the Government of Canada reserved and set apart (amongst others) the lands in question for the purpose of the land grant of the Calgary and Edmonton Railway Company, subject to its being found that it had not been disposed of or reserved prior to 27th June, 1890, this land (amongst others) having been applied for by the railway company on 20th October, 1891, and having been earned by the company at that time. These lands (amongst others) were transferred by deed of bargain and sale dated 13th December, 1902, by the railway company to the appellants and patent was issued to the appellants therefor on 19th June, 1907. The main issue, therefore, involved in this appeal is whether the appellants can be validly assessed

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for taxes in respect of this land in 1906, patent for it not being issued to them in respect of it until 1907.

Questions which were raised by the appellants arising out of the provisions of the order-in-council as to the lands reserved being fairly fit for settlement, and as to their not having been sold or disposed of prior to the 27th June, 1890, were withdrawn by Mr. Ewart during his argument at bar. He rested his appeal upon two points. First, that taxes could not validly be assessed upon the lands for the year 1906, because the patent from the Crown therefor did not issue till the year 1907, and next, because the second section of the "Dominion Act," 53 Vict. ch. 4, granting the subsidies in lands to the railway company in aid of the construction of the railway provided that

> such grants should be free grants subject only to the payment by the grantees respectively of the cost of the survey of the lands and incidental expenses at the rate of ten cents per acre in cash on the issue of the patents therefor.

The argument, as I understand it, on the second point was that, as the statute provided that the grants thereof were to be "free grants" subject only to the payment of ten cents per acre for cost of survey the lands granted could not be liable for provincial taxation before the patent issued; otherwise they would not be free grants.

I confess myself quite unable to appreciate this point. The term "free grants" mentioned in the statute meant free so far as the Crown granting the lands was concerned. It meant free from any of the customary charges made by the Government in selling its vacant lands to settlers or others, and from any charges of any kind by or on behalf of the Crown excepting those expressly mentioned for survey fees. It could not, in my opinion, be intended to exempt the

beneficial interest of the railway company in the lands from liability to local taxation which it otherwise would be subject to after it came into existence, and before the patent issued. The term "free grant" meant free as far as the Crown granting the lands was concerned, not free from liens or charges which might attach to the lands by law by virtue or in consequence of the acquisition by the railway company of a beneficial interest therein. Such a construction as that claimed involves, I think, an unwarrantable extension of the language of the statute, the meaning of which seems reasonably clear to me.

The main question, however, remains, which is substantially whether the Alberta "Local Improvement Act," chapter 11 of 1907, which was a revision of chapter 24 of 1903, as amended by chapter 8 of 1904, and chapter 11 of 1906, applied only to lands the title to which had passed by patent from the Crown or was applicable to the beneficial interest of an owner of lands the title to which had not so passed.

Reference was made during the argument to the decision of this court in *Rural Municipality of North Cypress* v. *Canadian Pacific Railway Co.*(1), on the construction of the tax-exemption section in the Canadian Pacific Railway contract expressly exempting the lands of that company from taxation for twenty years "from the grant thereof from the Crown." I cannot see how that case bears upon the case now before us. It was upon the express language of that exempting section that the decision of this court rested. No such language or any language analogous can be found in the statutes or orders-in-council which we have to construe in this case. The only language which can be

(1) 35 Can. S.C.R. 550.

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invoked to support the contention is that of the second section of the "Subsidy Act" before mentioned as to the grant to the railway company being a free grant. I have already dealt with that holding that it simply meant free so far as any imposition or charge by the Government of Canada, the granting party, is concerned, but is not in any way restrictive of the jurisdiction of the province over taxation for provincial purposes.

That being so the only questions remaining to be considered are the 125th section of the "British North America Act, 1867," which reads that

> no lands or property belonging to Canada or any province shall be liable to taxation,

and the meaning and scope of the "Local Improvement Act."

The lands in question were admittedly at one time Dominion lands within the meaning of that section. They were vested in the Crown subject to the control of Parliament.

By the "Subsidy Act," 53 Vict. ch. 4, Parliament had legislated declaring that the Governor in Council might grant the subsidies in land thereafter mentioned, (*inter alia*), to the Calgary and Edmonton Railway Company, 6,400 acres for each mile of the company's railway from Calgary to a point at or near Edmonton, and further declaring that such grant might be made

> in the proportion and upon the conditions fixed by orders-in-council, and that except as to such conditions the grants should be free grants,

subject only to the costs of survey, etc.

From the evidence before us it is clear that the lands in question were earned by the railway com-

pany, that they with others were selected by the company to answer the subsidy grant; that application was made to the Governor in Council for the necessary allotment of the lands to them; that the necessary order-in-council was passed "reserving and setting apart for the purposes of the land grant" to that railway company, (*inter alia*), the lands in question; that prior to the date when the taxes complained of were imposed the railway company had sold, assigned and transferred the lands in question with others to the appellants in this action, and that subsequently, on the 19th June, 1907, the patent for the lands in question issued to the appellants.

Can these lands be held, notwithstanding the dispositions of them so made by the Parliament of Canada, the Governor in Council acting under the authority of that Parliament and the railway company, still to be lands belonging to Canada and not liable to taxation until after the patent issued ?

The legal title, it is true, still remained in the Crown until the patent passed, but the equitable title had become vested in the appellants to whom it had been transferred by the railway company. The interest of the Crown whatever it might have been could not be taxed, but the beneficial interest of the appellants certainly was not exempted under or by virtue of the section of the "British North America Act, 1867," under review. Canada had no interest in the land after the consideration for which it was stipulated to be granted to the railway company had passed beyond the right to the cost of surveying the same which was to be collected when the patent issued. The whole beneficial interest having passed to the company and the bare legal estate remaining in the

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Crown the land no longer can be said to be land belonging to Canada within the meaning of the section. The exemptions provided for by that section are for the protection of the interest of the Crown only, not of those who have derived beneficial interests in lands from the Crown.

The only remaining question is whether or not the provisions of the "Local Improvement Act," under which the taxes were assessed, are comprehensive enough to cover that beneficial interest.

The Crown is not mentioned in that "Local Improvement Act," and it is not, of course, contended that any interest the Crown may have had could be legally assessed or affected by the assessment of the lands. What is contended is that all of the interest of the appellants was assessed and was condemned, and that, subject to the right of redemption reserved by the statute, the order of the Chief Justice operated to vest in The King, in right of His provincial government, the whole beneficial interest of the appellants in the land.

A reference to the Act in question shews that its scope and purpose was to embrace within the lands liable to be assessed and taxed every beneficial interest therein. Here we have only to deal with the legal estate which remained in the Crown and which the statute in no way affects or touches and the beneficial interest which had passed to the company and which I think clearly came within the interests assessable under the Act.

The interpretation section of the statute makes this abundantly clear. The conclusion I reach, therefore, is that the appellants had a beneficial interest in the lands in question which was subject to taxation

under the Act, and that the fact of the legal estate in the lands still remaining in the Crown made no difference and created no exemption in favour of the beneficial owner, the appellants, the Crown's interest being in no way affected.

The appeal should be dismissed with costs.

IDINGTON J.—This is an appeal from the Supreme Court of Alberta, *en banc,* in a matter which came before it for the interpretation of "The Local Improvement Ordinance of the North-West Territories" and amendments thereto, which seem to have been enacted by local legislative authority previous to the creation of the Province of Alberta, yet remain as the taxing statutes of that province, and have since been supplemented by additions to the legal machinery for enforcing the rates when fixed, and determining the legality of the proceedings.

The questions raised are relative to the liability of certain lands, now vested in the appellant, to taxation and to have payment of the taxes imposed by virtue of said statutes enforced in the mode provided therein.

I do not think it necessary to state in detail all the legislation that may be brought into action in this regard but, to illustrate, may briefly state sufficient thereof to understand how this case arises. The council for a district is given power to levy, in the manner and to the extent provided, upon every owner or occupant in the district "for all lands owned or occupied by him" and for that purpose to frame an assessment roll in which has to be set out each lot or parcel of land owned or occupied and the number of acres it contains, with the name and address of the

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person assessed, and the amount of assessment. And if the owner is not known the lot or parcel has to be set out, and the fact stated that the owner is unknown. Provision is made for an appeal therefrom by parties aggrieved and the final determination thereof by a justice of the peace. If the taxes are not paid within a stated time after notice, distress may be made of the goods of the person who ought to pay the taxes.

Section 57 is as follows:—

> 57. The taxes accruing upon or in respect of any land in the district shall be a special lien upon such land having priority over any claim, lien, privilege or encumbrance thereon.

The taxes might be recovered also by suit.

In the event of taxes not being paid a return is made by the secretary of the district shewing all lands in the district upon which taxes remain unpaid. And other returns are required at the same time and the returns so made then constitute a return which is the foundation for the proceedings taken herein, and it is declared *primâ facie* evidence of the validity of the assessment and imposition of the taxes as shewn therein, and that all steps and formalities prescribed by this ordinance had been taken and observed.

Thereupon the Attorney-General may apply in chambers to a judge of the Supreme Court of Alberta for confirmation of this return.

Machinery is provided for advertising, and notifying by mail, the parties concerned, of the proposed sitting of that court, and the time and place fixed by the judge, and at the time and place designated, the judge is required to hear the application, and all parties who appear thereon. Thereupon the judge is to determine whether the taxes in question respectively upon each parcel in the return, are due or

not, and such adjudication being made, the effect of finding any parcel in arrears for two years, is declared to vest in the Crown for the public use of the territories the said lands subject, however, to redemption by the owners respectively of the said lands at any time within one year from the date of the adjudication, etc.

These proceedings having been taken and the lands in question herein, having been so adjudged liable to forfeiture and forfeited accordingly subject to redemption in respect of taxes the appellants herein appealed to the court *en banc,* and that appeal was dismissed.

Thereupon the appellants asked leave to appeal to this court and it was granted by virtue of section 37, sub-section (*c*) of the "Supreme Court Act," yet the respondent claims there is no jurisdiction to hear an appeal of the kind.

Inasmuch as section 48 of the last named Act is specially designed for the purpose of dealing with cases of improper assessment I was at first doubtful if the sub-section (*c*) of section 37, wide as it is, could have been intended to apply to a class of cases of the kind in question. It may, however, well be held that this has not to do with assessment, but is a judicial proceeding for the purpose of ascertaining and determining relative to the regularity of the proceedings before executing the purpose of the legislation and may be looked at just as a quieting title proceeding might be.

I am, on consideration, inclined to think this the case.

Assuming jurisdiction exists, we must observe the nature of the question raised.

It is this. The lands in question form part of a land grant given to the Calgary and Edmonton Railway Company, by way of subsidy, out of the

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Crown lands, in what is now the Province of Alberta. The concession was made by virtue of a Dominion statute passed in 1890. The patent granting the lands in question, issued to appellants on 19th June, 1907, after the railway company had transferred such lands to the appellants by a deed dated 13th December, 1902.

The taxes in question consist of ratings made in 1906 and 1907. And it is contended that inasmuch as these lands remained in these years vested in the Crown on behalf of the Dominion, they remained non-assessable until after the issue of the patent and, hence, were non-forfeitable to the Crown on behalf of the province.

A good many subsidiary points were taken (but later abandoned), in argument to support the position that though in fact forming ultimately part of the subsidy to the railway company which actually passed to the company or its assignees they had not been so definitely designated until the issue of the patent, as to transfer any interest in them to the railway company, or their assignees, the appellants, until the patent issued.

The question raised is thus reduced to the construction of the taxing ordinance and amendments, and their operative effect when the appellants had acquired an interest of any kind in the lands so long as they remained vested in the Crown on behalf of the Dominion.

We must if we would understand the statute and this case observe at the outset that the taxing statute in question in no way presumes to bind the Crown or to tax Crown lands as such. Then the rule of law that when a statute does not expressly or within the pur-

view of the statute apply to the Crown or its lands it is to be taken as inoperative in relation to either must be borne in mind.

Bearing that in mind how can it be said that this ordinance which makes no such pretension can be said to have any reference to a taxing or forfeiture of the title, estate or interest of the Crown ?

Once that or any such pretension is deleted, as it were, from the appearances derivable from the use of such expressions as land or lands in any of the sections brought forward for consideration and the meaning thereof restricted to the estate or interest of others manifestly taxable for their lands, or their lands in fact so rendered liable thereto, it seems clear the whole difficulty is removed and the foundation for the present contention gone.

Not only is this so, but the interpretation of the word "owner," which is as follows:—

> 13. "Owner" includes any person who has any right, title or estate whatsoever or any interest other than that of a mere occupant in any land;

and, of the words "land," "lands" or "real property," as follows:—

> 18. "Land," "lands" or "real property" includes lands, tenements and hereditaments and any estate or interest therein;

make it quite clear that nothing done can go beyond or be effective beyond those specified meanings given in the Act to the language used.

Read as interpreted by the statute the estate or interest of the appellants is all that is touched and all that becomes forfeitable or forfeited if not redeemed. And assuredly the appellants never pretended, in the courts below, nor did any one suppose, that they had not a definite interest, but it was con-

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tended, that because the patent had not issued, even if appellants' estate or interest was, in 1906, as definitely fixed as it ever could be before the patent issued and forever beyond the power of the Crown to take that right and interest away, yet it was not, until 1907, taxable, and liable to be dealt with as it was by the officers of the district, confirmed by the Chief Justice who heard the application and was upheld by the court *en banc*.

I hold quite the contrary is the meaning of the taxing statute and that the assignees of the concessionaries were, in 1906, just as taxable as are purchasers from the Crown paying their purchase money by instalments, as I presume a great part of the country in question stands to-day. To decide this test case on any other issue than the neat one of the taxability of lands or interest in lands before the issue of the patent, would be to defeat the purpose of the parties in trying to make of it a test case.

I think the appeal should be dismissed with costs.

DUFF J.—I concur in dismissing the appeal.

ANGLIN J.—Counsel for the appellants having expressly abandoned all their other objections to the order in appeal, the only questions for our consideration are:—

(*a*) Whether the interest held by the appellants in the land in question would be taxable if it had been acquired from a private owner who retained an interest similar to that held in the present case by the Crown;

(*b*) whether provincial taxation of the interest of the appellants offends against section 125 of the "British North America Act;" and

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(*c*) whether, on a proper construction of the "Local Improvement Ordinance" of the North-West Territories (chapter 73 of the Con. Ord., 1905), the sole subject of taxation is the whole proprietary interest in land, or, whether any estate or interest less than the whole proprietary interest which may belong to an "owner" is also assessable.

The land in question forms part of the land subsidy authorized by the statute, 53 Vict. (D.) ch. 4, for the construction of the northern section (190 miles) of the Calgary and Edmonton Railway.

By a contract, which recites this statute and an order-in-council approving of the grant, the railway company undertook with the Dominion Government to fulfil the conditions upon which the grant of the subsidy was authorized by Parliament. Those conditions have been fully carried out. The railway company applied for, *inter alia,* the parcel of land in question (section 3, in township 16 of range 2, W. of Mer. 5), on account of the grant for the first 190 miles of railway. By order-in-council of the 18th November, 1891, which was passed on this application and stated that "the company are now entitled to have conveyed to them" lands to the extent of the area therein specified, the Government of Canada set apart, for the purpose of its subsidy, the lands for which the company asked.

Counsel were, in my opinion, well advised in withdrawing the objections which they abandoned. They were based on provisions of the order-in-council which made the allocation of the lands so set apart in some respects conditional, the point of the objections being the absence of evidence to shew that the land now in question fulfilled such conditions.

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The order in appeal confirms a "return," by the secretary of the district, of lands on which taxes remain unpaid. It has certain statutory effects. By sub-section 3 of section 83 of the taxation ordinance it is provided that

> the return for all purposes shall be *primâ facie* evidence of the validity of the assessment and imposition of taxes as shewn therein * * *

Having regard to this provision and to the facts that the objections withdrawn appear not to have been raised before the learned Chief Justice of Alberta, or, if raised, not to have been supported by evidence; that the notice of appeal to the court *en banc* contains no reference to any of them; that, in order to appeal to the full court, the land company required the leave of the Chief Justice, which was granted, no doubt, on submission to him of the notice of the proposed appeal and to enable the company to obtain a decision upon the grounds of appeal which were specified in that notice; and that leave to appeal to this court was secured on the representation that the appellants desired to present a test case to determine the liability to provincial assessment of lands comprised in the land subsidy which had been fully earned, but had not been actually patented — had the objections which were withdrawn been pressed they would probably have received scant attention.

By deed poll, of the 13th December, 1902, the Calgary and Edmonton Railway Company conveyed to the appellants all their estate, right, title, interest, claim and demand whatsoever, both at law and in equity, in and to the section of land now being dealt with. Giving due weight to the Dominion statute, to the contract between the Government and the railway company, to the company's application for specified

lands, to the order-in-council based upon such application and to the deed poll from the railway company to the appellants, I am satisfied that the section of land now in question must be deemed to have been finally and irrevocably allocated and appropriated to the land subsidy of the Calgary and Edmonton Railway Company. That company having fully earned its subsidy and being entitled *ex debito justitiæ,* upon demand and payment of the sum of ten cents per acre for cost of surveys, etc., to receive a patent of this land, I am of the opinion, that the appellants, as its grantees, acquired an interest in it, which, subject to any question arising under section 125 of the "British North America Act, 1867," might properly be subjected to provincial taxation.

By section 125 of the "British North America Act, 1867," it is enacted that

> no land or property belonging to Canada or any province shall be liable to taxation.

Assuming that beneficial interests held by subjects in lands, the legal title to, and also some beneficial interest in which is vested in the Crown in right of a province, should be deemed liable to such taxation as the ordinance of the North-West Territories authorizes, the fact that the Crown title and interest in such lands is held in right of the Dominion does not, in my opinion, render taxation of the interest of the subject-owner obnoxious to section 125 of the "British North America Act, 1867."

The existence of the legal title and a beneficial interest in the Crown, in right of the Dominion, as mortgagee for a balance of the purchase money of lands acquired by it under special legislation in connection with the winding up of the Bank of Upper Canada

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and subsequently sold in the liquidation proceedings, was held not to invalidate municipal taxation of the purchaser's beneficial interest, or equity of redemption, and its sale for arrears of such taxes, the title taken by the tax-sale purchaser, however, being declared to be subject to the mortgage held by Her Majesty, and the operation of the treasurer's deed being restricted to passing the estate subject to such mortgage. *Regina* v. *County of Wellington*(1). The trial judge had held the entire sale invalid. The Divisional Court modified his judgment as above stated. On appeal to the Court of Appeal for Ontario the judgment of the Divisional Court was affirmed(2). Section 125 of the "British North America Act" had been cited in argument (p. 426). A further appeal to this court was dismissed(3). The judgments in this court and in the Ontario Court of Appeal proceed upon the construction of a clause of the Ontario "Assessment Act" exempting property vested in the Crown. This sufficed for the disposition of the question directly in issue on the appeals, viz., the non-liability to taxation of the Crown interest in the lands. But it seems scarcely probable that, if the view of the Divisional Court, that

> the interest of the defendant John Anderson in the land was, however, subject to taxation and to be sold for arrears of taxes and the sale and treasurer's deed operated to pass that estate,

had not been approved, there would have been no observation upon it by any of the judges in either appellate court. In the Divisional Court, owing to the modification of the judgment at the trial, it was necessary to pass upon the validity of the tax on Ander-

(1) 17 O.R. 615. (2) 17 Ont. App. R. 421.
(3) *Sub nom. Quirt* v. *The Queen*, 19 Can. S.C.R. 510.

son's interest, which was challenged. We have, therefore, the direct authority of the opinion of that most careful and able judge, the late Mr. Justice Street, concurred in by the present learned Chief Justice of the King's Bench of Ontario, that it is within the power of a province to authorize the taxation of the beneficial or equitable interest of a subject in lands of which the Crown in right of the Dominion holds the legal title and in which it has some beneficial interest as well. I think that full effect is given to section 125 of the "British North America Act, 1867," by holding that it precludes the taxation of whatever interest the Crown holds in any land or property and that so long as such interest subsists, the taxation of any other interest in the land and any sale or other disposition made of it to satisfy unpaid taxes, while valid, is always subject to the rights of the Crown which remain unaffected thereby. *Attorney-General of Canada* v. *City of Montreal*(1).

Finally, I think it reasonably clear that the interest of the appellants in the lands in question is, as a subject of taxation, within the purview of the Consolidated Ordinance of the North-West Territories. By sections 49 and 72 the council is empowered to levy a tax "upon every owner or occupant in the district for all land owned or occupied by him." By sections 57 and 77 the taxes are declared to be

> a special lien upon such land having priority over any claim, lien, privilege or incumbrance thereon.

By section 85, land in arrear for such taxes, duly returned under section 83, is, upon judicial confirmation of the return, vested

(1) 13 Can S.C.R. 352.

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in the Crown for the public use of the Territories * * * subject, however, to redemption by the owners respectively of the said lands at any time within one year.

By section 2, sub-section 13

"owner" includes any person who has any right, title or estate whatsoever, or any interest other than that of a mere occupant in any land,

and by section 2, sub-section 18,

"land," "lands" or "real property" includes lands, tenements and hereditaments and any estate or interest therein.

See *Dilworth* v. *Commissioner of Stamps*(1).

The enacting language of section 49, read in the light of the interpretative clauses, is wide enough to embrace such an interest as that of the appellant. The fact that Crown interests are not expressly exempted, as they are in the Ontario Act, probably *ex majori cautelâ*, signifies nothing. The general rule that the Crown is not bound unless expressly named would apply: *Mersey Dock Trustees* v. *Cameron*(2); and the exemption under section 125 of the "British North America Act, 1867," must always be read into any Dominion or provincial taxing Act which does not expressly exclude it. Having regard to the apparent policy of the North-West ordinance to render all available lands and every interest therein subject to assessment (see section 2, sub-sections 13 and 18, and sections 52, 53, 74 and 76), and to the disinclination of the courts to give to exemptions any wider scope than a reasonably strict construction requires, Maxwell on Statutes (4 ed.), pp. 433, 439, I am of the opinion that the interest of the appellants in the land in question is within the purview of that ordinance.

(1) 11 H.L. Cas. 443. (2) [1899] A.C. 99, at pp. 105-6.

It is that interest which is made assessable; it is the same interest which is, by the judicial order confirming the "return," vested in the Crown for the public use of the Territories. I know of no sufficient reason why it should be necessary in a general assessment Act to make special mention of such a private interest in lands more than of any other. Neither can I accede to the view that under the North-West Territories ordinance nothing short of the entire proprietory interest in land was meant to be assessed. Such a construction would involve the exemption of lessees and private occupants under the Crown which, I think it quite clear, was not intended.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Lougheed, Bennett & Co.*
Solicitor for the respondent: *S. B. Woods.*

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*May 2.
*Nov. 6.

THE CITY OF VANCOUVER (DEFENDANT) ..... APPELLANT;

AND

WILLIAM A. McPHALEN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Municipal corporation—Highways—Nuisance—Repair of sidewalks—Statutory duty — Negligence — Nonfeasance—Personal injury—Civil liability—Right of action—Construction of statute—"Vancouver City Charter"—64 V. c. 54, s. 219 (B.C.).

Where a municipal corporation is guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect (*v.g.*, 64 Vict. ch. 54 [B.C.]), persons suffering injuries in consequence of such omission, may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly provided for by statute, unless something in the statute itself or in the circumstances in which it was enacted justifies the inference that no such right of action was to be conferred—*Coe* v. *Wise* (5 B. & S. 440; L.R. 1 Q.B. 711) and *Mersey Docks Trustees* v. *Gibbs* (L.R. 1 H.L. 93) applied. *Municipality of Pictou* v. *Geldert* ([1893] A.C. 524); *Municipal Council of Sydney* v. *Bourke* ([1895] A.C. 433); *Sanitary Commissioners of Gibraltar* v. *Orfila* (15 App. Cas. 400); *Cowley* v. *Newmarket Local Board* ([1892] A.C. 345); *Campbell* v. *City of Saint John* (26 Can. S.C.R. 1); and *City of Montreal* v. *Mulcair* (28 Can. S.C.R. 458) distinguished.

Judgment appealed from (15 B.C. Rep. 367) affirmed.

Per Fitzpatrick C.J. and Duff J.—The common law obligation under which the inhabitants of parishes, in England, through which highways passed were responsible for their repair has no application in the Province of British Columbia.

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*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), which, on an equal division of opinion among the judges, sustained the verdict entered at the trial in favour of the plaintiff.

The circumstances of the case and the questions in issue on this appeal are stated in the judgments now reported.

W. A. MacDonald K.C. and *Travers Lewis K.C.* for the appellant.

Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs for the reasons stated by Mr. Justice Duff.

DAVIES J.—The substantial question raised upon this appeal is as to the liability of the Municipality of Vancouver for nonfeasance in neglecting to repair a sidewalk in that city in consequence of which the appellant sustained injuries. The determination of that question must, of course, depend upon the construction of the charter of the city and the intention of the legislature as evidenced in that charter as a whole with regard to the duties and liabilities imposed upon the corporation. The statute or charter here in question, "Vancouver Incorporation Act," B.C. Statutes 1900, ch. 54, sec. 219, expressly imposes upon the city corporation the duty (*inter alia*) of keeping its highways in repair. It says

every such public street, road, square, land, bridge and highway shall be kept in repair by the corporation.

(1) 15 B.C. Rep. 367.

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It is not contended by the appellant that for a neglect of this statutory duty amounting to a nuisance an indictment would not lie, but that a civil action by an injured person for damages has not been given and will not lie. As I understand the argument it is that, in the absence of clear and express language in the charter making the corporation liable in civil actions for special damages sustained by individuals in consequence of the corporation's breach of duty in failing to keep the streets in repair, no action will lie.

I am not able to accept that argument. I have examined all the leading cases and authorities cited by the appellant and have reached the conclusion that express language creating civil liability for damages caused by the failure to perform a duty expressly imposed by statute upon a municipal corporation is not necessary. It is sufficient if a legislative intention to create such liability may fairly be inferred from the statute as a whole. If the duty imposed is one transferred from a body or authority on or with whom it previously rested and which body or authority was not itself liable in civil actions for nonfeasance, then very clear, if not express, language would be required to be shewn in the statute imposing this additional liability upon the transferee corporation.

In all cases it must, in the last resort, be a question of the intention of the legislature to be gathered from the whole statute. If the duties imposed are discretionary or permissible merely, and not absolute, or if absolute, adequate means are not given to carry them out, then very clear language must be used to found civil liability upon. But where the duty imposed upon a corporation with respect to its streets

and highways is absolute in its terms and is created and imposed in the charter calling the corporation into existence accompanied with provisions giving the corporation ample powers to fulfil the duties imposed and is not a duty merely transferred from a pre-existing authority or body in itself not liable for civil damages for neglect of such duty, then it does seem to me the courts may fairly infer a legislative intention to make the corporation liable civilly for neglect of such duty.

Now, in the statute in question I find everything, in my opinion, necessary to justify the drawing of such an inference. The absolute duty to keep the streets in repair is imposed upon the corporation, provisions are inserted giving adequate means to enable the corporation to discharge its duty. The duty is one created by the statute and not one transferred from any pre-existing body or authority not in itself civilly liable for its neglect. The nature of the duty itself affecting every inhabitant using the streets is one which I cannot imagine the legislature intended should be neglected, with civil immunity from damages, by the corporation and without remedy by one of the public specially damnified.

Unless, therefore, bound by the decided cases otherwise to determine I would hold the corporation in this case liable. My colleagues, Duff and Anglin JJ., have, in their reasons for judgment, collated and reviewed all the more important cases bearing upon the point at issue, including that of *Cowley* v. *Newmarket Local Board*(1), decided in the House of Lords, and those decided by the Privy Council of *Municipality of Pictou* v. *Geldert*(2); *Sanitary Commissioners of*

(1) [1892] A.C. 345. (2) [1893] A.C. 524.

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Gibraltar v. *Orfila*(1) (in 1890), and *Borough of Bathurst* v. *McPherson*(2) (in 1878), and have done it so fully and satisfactorily that I feel it quite unnecessary for me to go over the same ground.

Properly read, with reference to the facts with which the courts were then dealing, these decisions will not be found at variance with the law as I have endeavoured to state it, though no doubt there are dicta of many distinguished judges which apparently are so. Amongst these are observations of Chief Justice Strong in *Campbell* v. *City of St. John*(3), at page 4. These, however, must be held to have reference to the particular facts relating to the charter of the city with which he was there dealing. That charter does not appear to have imposed any absolute duty upon the Municipality of St. John to keep the streets of the city in repair and in the absence of any such provision or of any language from which a liability for civil damages for misfeasance could be implied, the decision in that case cannot be held to be a binding authority, in such a case as we have now before us, where the duty to keep the streets in repair is expressly imposed upon the Municipality of Vancouver.

If, however, the controlling distinctions I have mentioned between duties permissive or discretionary and duty absolute, on the one hand, and between newly created duties with powers and authorities annexed to them sufficient for their discharge and duties transferred from pre-existing bodies or authorities not civilly liable for their neglect on the other, are kept in mind, it will serve to explain much that otherwise would seem conflicting and perhaps justify the

(1) 15 App. Cas. 400, at p. 411. (2) 4 App. Cas. 256.
(3) 26 Can. S.C.R. 1.

caution so frequently repeated of late years in the highest courts that language used in delivering reasons for judgments, however broad, must be read and understood with reference only to the facts with which the court was then dealing.

I concur in dismissing the appeal.

IDINGTON J.—The appellant is a municipal corporation created by a charter which defines its powers and duties. Amongst such duties is enacted the following provision:—

Every public street, road, square, lane, bridge and highway shall be kept in repair by the corporation.

The question is raised whether or not an action will lie against the corporation upon this enactment at the suit of any one having suffered damages by reason of the non-observance of the duty thus imposed. It is well, therefore, in order to appreciate the scope of this legislation to observe some other provisions in the charter. Section 125, sub-section 52, gives the corporation wide powers for

opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up and putting down drains, sewers, watercourses, roads, streets, squares, alleys, lanes or other public communications within the jurisdiction of the council, and for entering upon, breaking up, taking or using, etc.

The corporation is empowered, by sub-section 48 of same section, to remove all nuisances, by sub-section 77, to compel removal of snow and remove it, by sub-sections 81 to 97, to regulate in every way the width, grade, mode of construction and use of streets, and by section 185, it is empowered to prevent and abate public nuisances. Section 133 empowers, in a very wide way, the opening, extending and widening of streets, etc. Section 134 empowers the construc-

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tion of local improvements, including streets, by means of levying a local or frontage rate, and enacts that, when done, the work

> shall thereafter be kept in a good and sufficient state of repair at the expense of the corporation.

The corporation is, by section 57, empowered to levy, for all the necessary expenses of the city, up to one-and-one-third cents in the dollar, besides all rates for schools, interest and sinking funds.

It is abundantly clear that possessed of such very extensive powers which enable the corporation to limit the extent of street to be constructed and nature of construction in such manner as to keep expenditure within its powers of taxation, there can be no excuse for non-repair.

It is evident that the limit of taxation is such as to empower any necessary levy for such purposes. It is equally evident that no other body than the corporation has any power in the premises and that no other power exists having authority to meddle with the subjects of construction or repair of the streets or highways.

There does not appear in the charter, so far as I can find, any penalty or special power given in any way to enforce this duty imposed in such absolute terms upon appellant.

By reason of defective construction or non-repair, the sidewalk in question, built by appellant two years previous to the accident, had become "wobbly," as one witness expressed it, for some time prior to the accident, though one of the street foremen or superintendents of appellant had occasion to travel over it daily.

Two years only having expired since construction, I should be inclined to infer, without much hesitation,

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that it never had been properly constructed, and the jury may well have so concluded.

It is contended, however, that it was the neglect of this duty to repair, that constituted the issue tried in fact, and that, being a mere nonfeasance, no action would lie.

The usual great array of authority displayed in cases like this, distinguishing between nonfeasance and misfeasance, has been presented.

I cannot say that I can reconcile all these cases or indeed that the mass of them deserve any attempt to do so. I do not propose to do so.

The first question raised is whether or not, inasmuch as this statute gives no special remedy for the neglect of the duty it imposes, the respondent is one of the persons for whose benefit it was enacted; and next, if so: Is he entitled to an action for damages resulting from the neglect of such duty ?

Common sense would say there ought not to be any difficulty in such questions as are thus presented. But the development of our English law has proceeded in such a way that these questions are by no means free from difficulty. One is not surprised, therefore, to find the division of opinion in the court below.

In *Couch* v. *Steel*(1), Lord Campbell, at page 411, said:—

> The general rule is that "where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages;" (Com. Dig., "Action on the Case," [A]). The Statute of Westminster, 2 (1 Stat. 13 Edw. 1), ch. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. See 2 Inst. 486. And in Com. Dig., "Action upon Statute"(F), it is laid down that "in every case where

(1) 3 E. & B. 402.

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a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

One cannot help wishing that this statement of the law had remained unchallenged. But it has not, and the only guide now left seems to be that laid down by Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.*(1), at page 448, adopted by the Court of Appeal in *Groves* v. *Wimborne*(2). We must look, we are told, at

the general scope of the Act and the nature of the statutory duty.

It may be said that this was merely spoken of the difficulties arising from there being in the statute a special remedy such as penalty or other like provision. I agree that is so. But I observe that is just the feature of the judgment in *Couch* v. *Steel*(3), that was challenged, and it has been said such has been the challenge that it no longer stands as an authority.

I am not prepared to assent to that in the sense that in every case or way the law was incorrectly laid down. I think no one can challenge the law as stated there, provided the statute to which it is applied is of the character that applying Lord Cairn's rule or suggestions to it one can found an action thereon.

But I go further and say that Lord Cairn's suggestions may well be applied to ascertain if we can found an action in a given case upon a given statute.

Now I, using such test, come back to the point of difficulty in the law as to this statute.

Can it be said that the persons it was to benefit are those who have to travel over the roads it binds appellant to repair ?

(1) 2 Ex. D. 441. (2) (1898) 2 Q.B. 402.
(3) 3 E. & B. 402.

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I have come to the conclusion they are, notwithstanding the innumerable dicta to which appeal may be made in a contrary sense. Although such a wealth of dicta exists, there is, I venture to say, no decided authority to the contrary construing such an imperative and direct statute as this freed from entanglement such as existed in those giving rise to said dicta.

We have, moreover, the principle that must govern applied to the decision of analogous cases in such a way that I see no difficulty in the existence of such weighty dicta.

Before passing to the consideration of these cases, I must notice the argument for appellant founded upon numerous English cases, decided upon a variety of English statutes, designed to secure due repair of highways.

I have referred to every one of the cases cited by counsel and numerous others, and, where analyzed and the grounds of the reasons given traced, we find the history to be this, or nearly this.

Beginning with *Russell* v. *The Men of Devon*(1) we find the law to be that no action would lie at common law against the inhabitants; not, as sometimes said, because unincorporated, but because the only remedy recognized by law was the indictment.

As surveyors of highways, or other like authority, were appointed, or corporations created in substitution for other parochial authority, they were one and all found not liable to be sued for damages, though they might have neglected the duty of repair more or less directly cast upon them by statute. But why so ? Simply because the statute which imposed the duty of repair sometimes limited the resources given to pay

(1) 2 T.R. 667.

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for repair, sometimes permitted a discretion or exercise of some judgment, as limit of duty, sometimes merely gave the power without imposing duty, sometimes expressly defined the limit of liability to be that of the inhabitants and when transferred to counties or other corporate bodies had been defined to be that of its predecessor in duty; and when traced out their respective duties were bounded thus by the common law liability of the inhabitants.

Sometimes, as in the case of *Maguire* v. *Corporation of Liverpool*(1), with that city's peculiar and diverse origins of corporate source of existence and responsibility; and the case of *Cowley* v. *Newmarket Local Board*(2), by reason of the "Public Health Act, 1875," having reached a state of development of municipal statute law that appeared to bear more directly on the corporate authority and responsibility, the courts were slightly troubled to reconcile the enactment of duties with this mode of construction.

But, I repeat, these and all such cases, however admittedly interesting and instructive as a study of the history of the law and its method of growth in England, are all beside the question raised here.

Of course, we find the adoption, as in the last named case, of the rule I have referred to as that given by Lord Cairns, to consider the scope and purview of the statute.

The English cases, so far as bearing directly upon highways, being thus disposed of, we have *Municipality of Pictou* v. *Geldert*(3), pressed upon us; as arising in this country. But it turns upon the same kind of history with a difference in names though

(1) 1905) 1 K.B. 767. (2) [1892] A.C. 345.
(3) [1893] A.C. 524.

identical in principle and result with these English cases. The *Orfila Case*(1) is only another variation of the application of the same principles. Nor can I read *Municipal Council of Sydney* v. *Bourke*(2) as at all helpful when I pay heed to the reasons given, founded upon a construction of a statute that leaves it very unlike this simple, yet comprehensive and imperative, statute before us, freed from what I, for want of a better expression, have called entanglements, so apparent in the other statutes (giving rise to like inquiries), and their history and expression.

Hartnall v. *Ryde Commissioners*(3) is a very notable case. It gave the courts a great deal of trouble to fritter it away. But that it seemed good law to Willes J. in the case of *Parsons* v. *Vestry of St. Matthew, Bethnal Green*(4), where it was by him merely distinguished from others, by reason of the slight difference in the statute on which it rested, entitles it to respectful consideration.

Our statute is still more advanced, if I may say so, and I will cherish the belief that if he had to interpret it he would have no difficulty in reaching the conclusion that it can, without disastrous results, be interpreted as it has been below.

I am the more encouraged to this by finding that it was Blackburn J., who with Crompton J. constituted the court that decided the *Hartnall Case*(3).

It is on great authority, that of Blackburn J., and the principle he laid down for the construction of such a statute in the case of *The Mersey Docks Trustees* v. *Gibbs*(5), at page 104, where he laid down the law to the effect

(1) 15 App. Cas. 400.
(2) [1895] A.C. 433.
(3) 4 B. & S. 361.
(4) L.R. 3 C.P. 56.
(5) L.R. 1 H.L. 93.

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that in every case the liability of a body created by a statute must be determined upon a true interpretation of the statutes under which it is created,

that the Chief Justice in the court below proceeded, and in which Mr. Justice Galliher concurred.

In this rule, Lord Watson, speaking for the Judicial Committee of the Privy Council, in the case of *Sanitary Commissioners of Gibraltar* v. *Orfila*(1), concurred. That was a case arising out of an accidental falling of an overhanging road, for which it was claimed those in charge were liable.

We have thus, I say, Blackburn J., whose rule of construction is thus adopted, holding with Crompton J. the corporate body liable for damages arising from non-repair, as a proper construction of a statute, much less directly leading to liability than this one now in question; for there was in the statute in question an entirely different remedy given by way of indictment, and no right of civil action expressly given. We find that countenanced, as set forth above, by so great a lawyer as Willes J.

In this case the statute itself is not cumbered with any such statutory remedy as there, to raise doubts of the statute's meaning in this regard. We find in the *Mersey Docks Case*(2), the House of Lords adopting and applying the rule laid down by Blackburn J. when applied under a statute no wider and no narrower than this now in question.

Surely under such authority and in the absence of express binding authority the interpretation put upon this Act was correct.

I desire, however, to call attention to a case that to my mind is an express decision of the Court of

(1) 15 App. Cas. 400. (2) L.R. 1 H.L. 93.

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Appeal in England, upon a similar statute relative to sewers involving also and only the question of omission instead of commission. I refer to the case of *Baron* v. *Portslade Urban Council*(1), upon section 19 of the "Public Health Act, 1875," which reads as follows:—

> 19. Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

The action was brought because by reason of this duty having been neglected, damages were suffered and they were assessed at £75.

The nonfeasance rule was invoked in argument, but ignored in the judgment which was delivered by Lord Halsbury, concurred in by A. L. Smith and Vaughan Williams L.JJ. and the appeal dismissed.

It was also urged there that section 299 of that Act had furnished a remedy and thus precluded the action from lying on the statute.

I submit the principle upon which the appellate court proceeded is applicable here, unless we can discover something in principle different in statutes dealing with highways from those dealing with sewers, or I may add, docks, in founding an action by those compelled to suffer from omission of duty relative to either one or the other on occasions where the public body, bound to a duty by statute, have neglected their duty.

The sooner the distinction between nonfeasance and misfeasance as applicable to actions on a statute of which the plain language indicates it can be as grossly violated by an omission to do something, as

(1) [1900] 2 Q.B. 588.

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by doing a wrongful act forbidden by it, is discarded, the better. And I would do it without resorting to metaphysical subleties the ordinary mind cannot follow easily.

The distinction can and does find a proper field of operation in some statutes, but not in this class, so far as I can see.

I have, out of respect to counsel, considered the St. John and Montreal cases decided by this court, but must say there is nothing decided there binding us here.

I think the appeal should be dismissed with costs.

DUFF J.—The plaintiff while walking on a sidewalk, constructed by the Corporation of the City of Vancouver on a public highway within the municipal boundaries, tripped over a loose plank and in consequence suffered serious personal injuries. It was left to the jury by the learned trial judge to say whether or not the state of the highway was due to the negligent failure of the municipality to keep the sidewalk in repair and whether the condition of the sidewalk was the cause of the injuries suffered by the plaintiff; and these questions they decided against the corporation.

The statute in which the corporate powers and duties of the municipality (1900 B.C., ch. 54), are declared, imposes upon the municipality the duty of keeping highways in repair; and the controversy on this appeal turns upon the question whether this enactment confers a right to reparation upon an individual suffering a personal injury in such circumstances as those giving rise to this action, or whether, on the other hand, the enactment is, as the

appellant municipality contends, declarative of a right which is only capable of being vindicated in proceedings instituted in the public behalf.

It is not denied, of course, in form, that this is a question which must ultimately turn upon the view one takes concerning the intention of the legislature as ascertained from the statute. The controversy is rather as to the effect of certain decisions (and certain dicta of very eminent judges) touching the responsibility of municipal corporations deriving their powers from other statutes passed by other legislatures in respect of negligent default in the matter of the repair of highways and as to the degree in which those decisions and dicta ought to be considered as regulating the construction of the special statute by which the appellant corporation is governed.

It is a general rule that where a duty rests upon an individual or a corporation of such a character that an indictment would lie for default in performing it, an action also will lie at the suit of a person who by reason of such default suffers some peculiar harm beyond the rest of His Majesty's subjects: *Mayor of Lyme Regis* v. *Henley*(1); *Sutton* v. *Johnstone*(2); *Ferguson* v. *The Earl of Kinnoull*(3); *McKinnon* v. *Penson*(4); *Hartnall* v. *Ryde Commissioners*(5); *Coe* v. *Wise*(6); *Maguire* v. *Liverpool Corporation*(7). Where, nevertheless, the duty arises out of statute the rule cannot be thus absolutely stated. The Statute of Westminster (1 Stat. W. 13 Edw. I.),

(1) 3 B. & Ad. 77, at p. 93; 2 C. & F. 331, at p. 354.
(2) 1 T.R. 493.
(3) 9 Cl. & F. 251, at pp. 279, 283, 310.
(4) 8 Ex. 319, at p. 327.
(5) 4 B. & S. 361, at p. 367.
(6) 5 B. & S. 440, at p. 464.
(7) (1905) 1 K.B. 767, at pp. 782 and 785.

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ch. 50, does indeed profess in terms to give a remedy by action on the case to all who are aggrieved by the neglect of any duty created by Act of Parliament. The effect of this statute, however, as stated in Comyn's Digest ("Action upon Statute" (F), is that

> in every case where a statute enacts or prohibits a thing for the *benefit of a person* he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law.

Obviously, this leaves it to be determined in each case whether the alleged duty has or has not been created "for the benefit" of the person aggrieved; which, of course (if the duty be a public duty), is only another way of stating the question whether the enactment does or does not evince an intention on part of the legislature that a private remedy by action shall be available to a person suffering a special injury from the wrongful omission to observe its provisions.

There was at one time a disposition on the part of some very eminent judges to hold that public bodies charged with duties to be performed by them as trustees on behalf of, or for the benefit of the public, were not, in their trust or corporate character, answerable for the negligent acts or defaults of their servants; on the principle — which has been broadly applied in the United States in such cases — that such bodies, in discharging their public duties, act as agents or instrumentalities of government, and as such are not answerable for the torts of their servants. See the speech of Lord Wensleydale in *The Mersey Docks Trustees* v. *Gibbs*(1), at pages 124, 125; and Lord Cottenham's judgment in *Duncan* v. *Findlater*(2). This view concerning the responsibility of municipal

(1) L.R. 1 H.L. 93. (2) 6 Cl. & F. 894.

and other bodies for negligence or default in the performance of the public duties imposed by statute was definitely rejected in a series of cases which culminated in the decision of the House of Lords in *The Mersey Docks Trustees* v. *Gibbs*(1). There Lord Blackburn (then Blackburn J.) delivering the unanimous opinion of the judges, while adopting (p. 118) Lord Campbell's observation in the *Southampton and Itchin Floating Bridge and Roads Co.* v. *Local Board of Health of Southampton*(2), that

> in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created,

stated the proper rule of construction to be this:—

> in the absence of something to shew a contrary intention, the legislature intends that the body, the creature of statute, shall have the same duties and its funds shall be rendered subject to the same liabilities as the general law would impose upon a private person doing the same things.

The canon of construction thus enunciated met with the approval of the House of Lords; and it is from the standpoint here indicated that, since the date of that decision, the courts have examined claims preferred against municipal bodies created by modern statutes and based upon an alleged violation of duties said to arise out of the provisions of such statutes. The question in each case is, of course, as already mentioned, in the last resort a question of the intention of the legislature to be collected from the enactment as a whole interpreted in the light of such circumstances as may properly be considered, and according to the canons of construction properly applicable. There are, however, I think, some well ascer-

(1) L.R. 1 H.L. 93. (2) 8 E. & B. 801.

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tained principles upon which the courts have acted in such cases. It might be stated broadly, I think, with the support of the great weight of authority, that the breach (by way of omission or nonfeasance) by a municipal body of a legal duty created by statute, gives rise to an action at the suit of an aggrieved individual where, (*a*) the default is of such a character as to be indictable, (*b*) the grievance suffered involves damages peculiar to the individual, (*c*) the damage suffered is within the mischief contemplated by the statute, and (*d*) where there is no specific provision excluding the remedy of action and the provisions of the statute as a whole, taken by themselves or read in the light of the history of the legislation, do not justify an inference that the legislature intended to exclude that remedy. In other words, I think the effect of the actual decisions is that where there is a legal duty having attached to it the sanction of indictment which has been created by statute and conditions (*b*) and (*c*) are present, then in general it rests with those who deny the remedy by action to point to something in the statute itself or in the circumstances in which it was passed indicating an intention to exclude the remedy. I think that is established by a series of decisions of high authority; but there are dicta of very eminent judges (I shall be obliged to refer to them more particularly) which appear to conflict with this proposition and it will be sufficient to take a narrower ground, which is quite broad enough for the purposes of this case, and is, I conceive, demonstrably conformable both to the authorities and to most of the dicta referred to. The ground upon which I think the liability of the corporation may be put consistently with every relevant

decision and with almost if not quite all the dicta I have seen, is this: where a municipal corporation acting under powers conferred by the statute creating it, constructs a work for use of the public, and invites the public to use it, the corporation having the ownership of and full authority to control the work, and to regulate the use of it by the public; and the statute creating the corporation in express terms imposes upon it the legal duty and at the same time gives it full authority to take all the necessary measures to prevent that work becoming a danger to the public making use of it in the exercise of their right, and owing to the unreasonable neglect of the corporation to perform this duty the work does become a public nuisance, then, in order to resist successfully a claim for reparation by one of the public who has suffered a personal injury in consequence of the existence of the nuisance, (while properly using the work in the exercise of the public right,) the corporation must shew something in the statute indicating an intention on the part of the legislature that the remedy by action shall not be available in such circumstances.

There is a large number of authorities in support of the proposition that as a general rule a municipal corporation is, apart from express enactment, under a legal obligation to make such arrangements as may be necessary to prevent the works which are under its care becoming a nuisance, and that, *primâ facie,* persons suffering a special injury from the failure of the corporation to fulfil this obligation, have a right of action against it: *Re Islington Market Bill*(1), at page 519; *White* v. *Hindley Local Board*(2);

(1) 3 Cl. & F. 513. (2) L.R. 10 Q.B. 219.

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Blakemore v. *Vestry of Mile End Old Town*(1); *Corporation Bathurst* v. *McPherson*(2). We are, however, dealing with a case where the duty is created by express statutory enactment and as that relieves us from some of the difficulties which, in point of interpretation, have sometimes presented themselves, it will, perhaps, tend to simplify matters if we limit our attention to cases of a similar nature. In *Coe* v. *Wise* (3), the Court of Queen's Bench and the Exchequer Chamber had to consider the responsibility of drainage commissioners who had Parliamentary authority to make a cut and sluice and were required expressly by the statute from which they derived that authority to maintain the works when made. In the Court of Queen's Bench, Blackburn J., after quoting the section in which this duty was declared, said, at pp. 464 and 465:—

> Nothing has been pointed out in the argument, and I have not myself discovered anything to qualify this enactment, which certainly seems to me to cast upon the Drainage Commissioners the duty to maintain this sluice. The common law gives a right of action against those neglecting a duty cast upon them to those who, in consequence sustain damage. I entirely assent to the position that if the Legislature have shewn an intention to prohibit this right of action in the present case that will effectually prevent it, and I agree that such an intention need not be shewn in express words if it can be collected from the whole Act, but I think that the onus lies on the defendants to shew that it was intended to prevent the right of action, and not on the plaintiff to shew that it was intended to give it.

The majority of the judges in the Court of Queen's Bench having taken the view that there was no right of action, their decision was reversed in the Exchequer Chamber where it was held, following *Mersey*

(1) 9 Q.B.D. 451. (2) 4 App. Cas. 256.
(3) 5 B. & S. 440; L.R. 1 Q.B. 711.

Docks Trustees v. *Gibbs*(1), that the action lay; and in delivering judgment the court (Erle C.J., Willes J. and Channell and Pigott BB.) after referring to that authority said, at page 720:—

> And we further hold that the action is maintained for the reasons stated by Blackburn J. in this case in the court below.

In *Meek* v. *The Whitechapel Board of Works*(2), Lord Penzance, then Wilde B., held the defendants answerable in an action for a nuisance arising from their neglect of their statutory duty (sections 68 and 69 "Metropolis Local Management Act") to cause the sewers within their district to be kept clean. In *Baron* v. *Portslade Urban Council*(3), the Court of Appeal had to consider section 19 of the "Public Health Act of 1875," which required the local authority in whom sewers should be vested to maintain them so that they should

> not be a nuisance and to see that they are properly cleaned and emptied (p. 591).

The council was held liable to an action at the suit of a person specially damnified by a nuisance arising from neglect of this duty. In none of these cases was there anything in the enactment pointing to the intention to give a right of action beyond the provision creating the duty; and in each case reparation was awarded to a member of the public suffering special injury from a mischief which was one of the character the legislature intended to prevent, and which, of course, was attributable to neglect of the duty prescribed. In *Maguire* v. *Liverpool Corporation*(4), at page 782, Vaughan Williams L.J. said:—

(1) L.R. 1 H.L. 97, at p. 110.
(2) 2 F. & F. 144.
(3) [1900] 2 Q.B. 588.
(4) [1905] 1 K.B. 767.

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Are we to treat the liability which is imposed upon the corporation as a liability coming within the rule, where statutory duties are laid upon public bodies by statute, that in the case of any one suffering damage by reason of the neglect of such public body to perform the duties which are thrown upon it by the statute, an action will lie by the individual member of the public who sustains particular injury by reason of that neglect of duty.

The appellant corporation does not dispute the authority of these decisions or controvert the reasoning of Lord Blackburn in *Coe* v. *Wise*(1), at all events in so far as that reasoning applies generally to the responsibility of a public body for a nonfeasance giving rise physically to such a state of things as constitutes an indictable nuisance. The contention upon which the appeal is founded, as I have already indicated, is this: that according to the settled law of England the duty of maintaining a highway in a state of repair, where it is cast upon a municipal body, is (as regards the legal sanctions attached to it,) *sui generis,* and the fact that such a duty is imposed expressly or impliedly by an Act of Parliament does not, *ipso jure,* give a remedy by action for failure to perform that duty and, moreover, is not, in itself, to be taken to indicate an intention on the part of the legislature that the remedy by action shall be available, and that such remedy is not available unless the legislature has in some other way clearly indicated an intention that it should be so. It is, of course, contended that no such intention can properly be implied from the provisions of the Act we have to consider. Before referring to the authorities upon which this contention rests it will be convenient to note broadly the character of the powers conferred upon the corporation of Vancouver touching the management and

(1) 5 B. & S. 440.

control of streets. The highways in the municipality are (section 217) vested in the corporation; and by the same section it is provided that these highways "shall not be interfered with" without the permission of the city engineer in writing. The council of the municipality, under section 125, has very full powers over highways and the public rights in respect of them. It may pass by-laws —, by sub-section 52, for

> opening, making, preserving, improving, repairing, widening, altering, diverting, stopping up * * * roads * * * and other public communications;

by sub-section 82,

> To regulate the width of new streets and roads, and for preventing the laying out or construction of streets and lanes unless in conformity with existing streets, etc., without the consent of the council first obtained;

for regulating plans level with surface inclination and material of the pavement, roadway, sidewalk of streets and roads (sub-section 83); for regulating roads, streets, bridges and driving and riding thereon (sub-section 84); for dealing with nuisances, including

> any structure or erection of any kind whatsoever * * * or any other matter or thing in or upon any * * * street or road.

And finally, by section 219:—

> Every * * * public street, road, square, land bridge and highway shall be kept in repair by the corporation.

The decisions on which the appellants mainly rely are *Municipality of Pictou* v. *Geldert*(1), and *Municipal Council of Sidney* v. *Bourke*(2); *Sanitary Commissioners of Gibraltar* v. *Orfila*(3), in the Privy Council, *Cowley* v. *Newmarket Local Board*(4), in

(1) [1893] A.C. 524.
(2) [1895] A.C. 433.
(3) 15 App. Cas. 400.
(4) [1892] A.C. 345.

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the House of Lords, and *Campbell* v. *City of St. John* (1), and *City of Montreal* v. *Mulcair* (2). Of these decisions the first in order of time is *Cowley* v. *The Newmarket Local Board* (3). That decision turned upon the effect of sections 144 and 149 of the "Public Health Act," which declared that the urban authority should have and be subject to all the powers, duties and liabilities of surveyors of highways, and should from time to time level, alter and repair the highways as occasion should require. It was held that an action could not be maintained by a person who in passing along a highway was injured by reason of its dangerous condition due to the negligent default of the Board to keep it in repair. The actual ground of the decision is thus stated by Lord Herschell (who took part in it) in delivering the judgment of the Privy Council in *Municipal Council of Sydney* v. *Bourke* (4), at pages 443 and 444:—

> In a series of cases ending with *Cowley* v. *Newmarket Local Board* (3), in which it has been held that an action would lie for non-repair of a highway the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not — even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body — was, that it had long been settled that though a duty to repair rested on the inhabitants subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to shew that the legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability.

In *Maguire* v. *The Corporation of Liverpool* (5), in applying the decision in *Cowley* v. *The Newmarket*

(1) 26 Can. S.C.R. 1.
(2) 28 Can. S.C.R. 458.
(3) [1892] A.C. 345.
(4) [1895] A.C. 433.
(5) [1905] 1 K.B. 767.

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Local Board(1), Vaughan Williams L.J. thus discusses it at pages 784 and 785:—

That statutory obligation having been created, how is it that by the decision in *Cowley* v. *Newmarket Local Board*(1), escape is made from the general proposition that where a statutory duty is created of such a nature that indictment would lie, or a remedy by criminal law be good for neglect to perform the statutory duty, an action will lie at the suit of a subject sustaining particular injury—I say, how is it that that undoubted general principle is escaped from in the decision in *Cowley* v. *Newmarket Local Board*(1)? According to my understanding of the judgments, both of Lord Halsbury and Lord Herschell, it is really escaped from by going back to what is the liability which is thrown upon the inhabitants of the parish in respect of liability to repair roads, and the limitation of procedure for neglect to perform that duty to procedure by the Crown. I arrive at the conclusion that this Act of 1846 was really mainly passed for purposes of convenience of remedy, and convenience of performing the duties in respect of a large aggregate of houses and streets such as one finds in the case of the Town of Liverpool. The object of the legislation merely being that sort of convenience, the object of the Act is that and that alone. It was not intended to alter the liability of those upon whom for convenience the carrying out of this work was thrown, but to leave it exactly as it was in cases where the obligation to repair was thrown upon the inhabitants of the parish.

At page 787, he states the principle to be deduced from this and other cases following it in these words:

I think that, having regard to the legislation that has taken place and to the various decisions which have been given, we ought, in construing this Act of Parliament, to start with a *primâ facie* presumption that in the transfer of the common law obligation to repair lying upon the inhabitants of the parish at large and on other bodies for the purpose of the public convenience, *primâ facie* it must be assumed that the legislature did not by such a transfer intend to impose any greater duty or any greater obligation upon the persons or bodies to whom the obligation was transferred than that which would have existed before the transfer.

To the same effect is the judgment of Romer L.J., at page 790:—

Furthermore, I think that certain other principles are now established with reference to the Acts of Parliament which create new

(1) [1892] A.C. 345.

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bodies, with duties and obligations cast upon them to do the repairs of highways in lieu of the inhabitants of the parish. Modern authorities shew that the question whether in such cases the liability to an action for damages for non-repair is thrown upon the new body created by the Act of Parliament such as I have mentioned, and such as those of 1830 and 1846 in the present case, is one to be gathered from the wording of the special Act. And it was pointed out in the case of *Municipality of Pictou* v. *Geldert*(1), at page 527, by Lord Hobhouse, who delivered the judgment of the Privy Council in that case, that "it must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed." I need not go through these modern authorities in detail. I think the result of them, and in particular of the case of *Cowley* v. *Newmarket Local Board*(2), is accurately summed up by Mathew J., as he then was, in the case of *Saunders* v. *Holborn District Board of Works*(3), at page 68, where he says: "The result of these decisions is plain — it is that in order to establish that a public body of this description is liable to an action for default in performing a duty imposed by statute it must be shewn that the legislature has used language indicating an intention that this liability shall be imposed, and unless such an intention on the part of the legislature is clearly disclosed, no action will lie." As I have said, those observations appear to me to accurately sum up the authorities, treating the observations of Mathew J. as being confined, as I think they were intended to be, to the question of the construction of such Acts of Parliament as those that I have been referring to.

It is obvious that the decisions in *Cowley* v. *The Newmarket Local Board*(2), and cognate cases, are regarded by these learned judges as creating an exception to the general rule and it is quite plain that the Corporation of Vancouver cannot claim exemption from the operation of that rule upon any such grounds as those upon which these decisions rest. Vancouver was incorporated by an Act of the legislature in 1886 (49 Vict. ch. 32 [B.C.]), and sections 217 and 218 of the present Act are reproductions of sections 213 and 214 of that Act. It is clear enough that, at the pass-

(1) [1893] A.C. 524. (2) [1892] A.C. 345.
(3) (1895) 1 Q.B. 64.

ing of the Act of 1886, the locality affected by it was not within the limits of an incorporated municipality, as the Chief Justice states in the court below. Mr. Lewis directed our attention to the preamble of the Act; but I do not understand it to be suggested that the Town of Granville there referred to was an incorporated municipality. The inference from the form of the preamble itself would be that it was not; and if there were any foundation for such a suggestion it would unquestionably have been put forward in the court below and we should have been furnished with positive information on the point.

There can, I think, be little doubt that the common law rule under which the inhabitants of parishes through which highways passed were responsible for their repair was never introduced into British Columbia. By proclamation of Governor Douglas, on the 19th November, 1858, issued under the authority of an order-in-council of 2nd February, 1858, passed pursuant to chapter 99 of 21 & 22 Vict., it was ordained that "the civil laws of England as the same existed" on the 19th November, 1858,

> and so far as the same are not from local circumstances inapplicable to the Colony of British Columbia are and will remain in full force in the colony till such time as they shall be altered

according to law. The local circumstances of the colony are pictured in the published correspondence between the Colonial Office and Governor Douglas in the years 1858 (the year in which the colony was established) to 1861, which correspondence has been a good deal considered in the last few years in the course of judicial proceedings in British Columbia. The colony owed its establishment to the influx of population due to the discovery of gold in the interior;

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and the correspondence makes it clear that one important duty of the detachment of engineers which was early sent out, under the command of Colonel Moody, was the construction of roads and trails. The Government — of necessity — assumed the maintenance of these highways. The same necessity, (arising partly out of the physical character of the country and partly out of the fact that great stretches of uninhabited territory had to be traversed in passing from one settlement or centre of population to another,) explains the fact that down to the present time the duty of constructing and maintaining roads and other highways outside the limits of municipalities has always been assumed and carried out by the Government of the colony or that of the province. The common law rule has never been acted upon and was, in 1858, and still is, "from local circumstances inapplicable." There is, therefore, no presumption arising from the state of affairs at the passing of the Act which can bring this case within the reasoning upon which the decision in *Cowley* v. *The Newmarket Local Board*(1) proceeded. Lord Herschell suggested, in his judgment in that case, that there was another ground upon which the decision might stand, and that suggestion it is hardly necessary to say requires the most careful consideration. I will return to it after discussing the other decisions upon which the counsel for the corporation more particularly rely. The next in order of date is *Municipality of Pictou* v. *Geldert*(2). The statute under consideration in that case was the "County Incorporation Act," a statute of the Province of Nova Scotia, passed in 1879. Lord Hobhouse in delivering the judgment of the Privy Council

(1) [1892] A.C. 345. (2) [1893] A.C. 524.

points out first that the common law of Nova Scotia was the same as that of England in imposing upon the inhabitants the legal duty of maintaining highways while not subjecting them to liability in an action for non-observance of that duty. Of the statute in question he observes (page 529) :—

> The first observation that occurs on these provisions of law is, that under the Act of 1761, the liability to maintain road and bridges lay upon the inhabitants, and that this liability is preserved by the "County Incorporation Act," which contemplates the enforcement of statute and highway labour.
>
> It is to be observed further that the statute does not in terms impose any obligation upon the municipality to repair the roads or bridges. It confers upon the council powers and authorities which extend to those objects; but the powers and authorities are conferred in precisely the same terms with reference to objects with regard to which the powers clearly must be discretionary and not matters of obligation.

These observations (which seem to give the gist of the decision) have no application to the statute before us. In *Municipal Council of Sydney* v. *Bourke*(1) the statute which the Privy Council had to examine contained no provision expressly imposing upon the municipal authority the duty to keep the highway in repair; and the effect of Lord Herschell's judgment is that that authority was charged with no duty in respect of such repair which the courts could take cognizance of. This is manifest from two paragraphs, on page 439 of the report, which I quote:—

> Attention has already been directed to the fact that the provisions of section 82 of the 43 Vict., relating to the maintenance of highways, are empowering only, and do not purport to impose a duty. The terms of the section make it manifest that this was the intention of the legislature. The council have conferred on them in a single sentence power to alter, widen, divert, and improve public ways, as well as to "maintain and order" them. It is obvious that the alteration, widening, diversion or improvement are matters left

(1) [1895] A.C. 433.

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absolutely to the discretion and judgment of the council, and that there is no binding obligation enforceable by law to do any of these things. It is impossible to hold that whilst as to these matters a power only is conferred and no obligation imposed, the case is different as regards the maintenance of the highways.

There is no doubt, in a certain sense, a duty incumbent on the council to see to the maintenance of the highways. It is for them to exercise the powers conferred upon them by law for the benefit of the community. In these matters they represent the citizens, and ought to have regard to their interests. For their discharge of these duties they are responsible to those whom they represent. The members of the council are the choice of the citizens, and if they do not use their powers well they can be displaced. But if they fail to maintain in good repair the highways of the city, it is not a matter of which the courts can take cognizance, or which can be the foundation of an action if any citizen should be thereby aggrieved.

Here again it is obvious that the reasoning of the Judicial Committee cannot be resorted to as governing the determination of the question before us.

Lastly, the ratio of the decision of the Privy Council in *Sanitary Commissioners of Gibraltar* v. *Orfila* (1), in so far as it affects the question under discussion is stated, at pages 412 and 413 of the report, in the following passage of Lord Watson's judgment:—

> The only duty laid upon them with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic. And, lastly, it is expressly provided that, in executing the order, they must conform to any rules and regulations which the Governor may think fit to make.
>
> Their Lordships are, in that state of the facts, unable to resist the conclusion that the Government, in so far as regards the maintenance of retaining walls belonging to it remains in reality the principal, the commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the Crown, in giving the sanitary body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle Road.

It is not argued that the Corporation of Vancouver can escape on the ground thus stated; and it is

(1) 15 App. Cas. 400.

plain that the actual decision cannot afford any support to the appellant's contention. Some stress is laid, however, upon Lord Watson's language at page 411 in the following sentence:—

> But in the case of mere nonfeasance no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act imposed upon the commissioners a duty toward himself which they negligently failed to perform.

It is impossible to contend that by this language Lord Watson meant to convey that "the duty towards himself" must be declared in express words; the remainder of the passage, in which he quotes Lord Blackburn's canon in *The Mersey Docks Trustees* v. *Gibbs* (1) as authoritative, shews that he intended to express no such idea. The passage means, I think, nothing more than this, that an intention to impute such a duty must be discoverable in the statute. I am not overlooking Mr. Macdonald's reference to the passage in the judgment of Matthew J., in *Saunders* v. *Holborn District Board of Works*(2), at page 68. The observations on which Mr. Macdonald relies must be taken, I think, to be confined as Romer L.J. points out in *Maguire* v. *Corporation of Liverpool*(3), at page 790, to Acts of Parliament such as those under discussion: viz., Acts which create new bodies with duties cast upon them to repair highways in lieu of the inhabitants of the parish.

It remains to consider the observations of Lord Herschell in *Cowley* v. *Newmarket Local Board*(4), at page 352, in which he suggests that the case falls within the scope of a remark of James L.J. in *Glossop* v. *Heston and Isleworth Local Board*(5). With

(1) L.R. 1 H.L. 93.
(2) [1895] 1 Q.B. 64.
(3) (1905) 1 K.B. 767.
(4) [1892] A.C. 345.
(5) 12 Ch. D. 102, at p. 109.

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the greatest possible respect for even a passing suggestion of Lord Herschell, I am constrained to think that there is no parallel between the statutory duty to provide a sufficient number of sewers for a given district, imposed by section 15 of the "Public Health Act" (which was the case to which the attention of James L.J. was directed), and a statutory duty to keep a highway, or if you like, an existing system of sewers, from becoming a nuisance. The first may to so great a degree rest in the discretion of the authority charged with it, that it would be difficult for a court of law to take cognizance of it at all; and in fact, since the decision in *Cowley* v. *Newmarket Board*(1), it has been held that the sole remedy for non-performance of the duty imposed by the enactment in question was provided by the enactment itself and was an appeal to the Local Government Board. The difference between the two classes of cases was pointed out by Kennedy L.J., in *Dawson* v. *Bingley Urban District Council*(2), at page 311; and earlier, by Lord Halsbury, in *Baron* v. *Portslade Urban District Council*(3), at page 590, in these words:—

> There seems to be a wide difference between the obligation or duty to construct a new system of drainage and the obligation on the local authority to use sewers that are vested in them in a proper and reasonable manner.

That observation appears to indicate the distinction between the case referred to by Lord Herschell and the present case.

The statute which this court had before it, in *Campbell* v. *City of St. John*(4), contained no pro-

(1) [1892] A.C. 345.
(2) 27 Times L.R. 308.
(3) [1900] 2 Q.B. 588.
(4) 26 Can. S.C.R. 1.

vision expressly imposing any duty upon the municipality in respect of repair of highways, and, having regard to the passages already quoted from Lord Herschell's judgment in *Sydney* v. *Bourke*(1), it is doubtful whether any duty, the breach of which could be the subject of an indictment, could be held to be implied. A decision that such a statute does not give a right of action for a special injury arising from non-repair, cannot, I think, properly be held to be conclusive of the interpretation to be placed upon a provision in another statute expressly imposing such a duty.

For these reasons I think the appeal should fail.

ANGLIN J.—The question which confronts us in this case is whether the corporation of the City of Vancouver, which is required by a mandatory provision of its statutory charter to keep in repair highways within its limits, is or is not liable to pay damages at the suit of a person injured while lawfully using one of such highways owing to its being in a state of disrepair.

Although there was some evidence upon which this case might have been presented as one of misfeasance — defective original construction — that aspect of it was not submitted to the jury by the learned trial judge. No exception was taken to his charge on this, or any other ground. In the provincial Court of Appeal the case was apparently treated by all the judges as purely one of nonfeasance, two of them expressing the opinion that the question of misfeasance was not open to the plaintiff. Under these circumstances the respondent should not be allowed

(1) [1895] A.C. 433.

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now to invoke the ground of misfeasance in support of his judgment.

If it were necessary in an action based on non-fulfilment of a statutory duty to make out a case of actual or imputed notice of the existence of conditions amounting to a breach sufficient to sustain a charge of negligence, the judgment for the plaintiff could not, I think, be successfully attacked on the ground that evidence of facts warranting an inference of such notice is lacking.

The real question, however, presented for our determination is whether the general rule that a person, for whose benefit as an individual, or as a member of a class, a statute is enacted, shall have a personal remedy for a breach of it which causes him injury (per Farwell and Kennedy L.JJ., in *Dawson* v. *Bingley Urban District Council*(1), has no application to statutes imposing duties on public bodies representing the public, or whether the application of this rule to these public bodies is excluded only where circumstances exist which shew that Parliament did not intend to impose upon them such a liability. The latter is, in my opinion, the correct view.

An analysis of the comparatively numerous English authorities of the class of which *Cowley* v. *The Newmarket Local Board*(2), is perhaps the leading example, makes it tolerably clear — notwithstanding some broader judicial statements, probably made inadvertently, which lend colour to the opposite view — that the real ground upon which many English municipal bodies charged by statutes with highway repair have been held not liable to travellers for injuries sus-

(1) 27 Times L.R. 308. (2) [1892] A.C. 345.

tained by them in consequence of failure to discharge that duty, was that, in enacting the various statutes imposing the obligation of repairing highways on these municipal corporations, Parliament intended merely to transfer to them an existing duty which rested on the inhabitants without changing the nature or the extent of the liability to be incurred upon failure to discharge it: *Municipal Council of Sydney* v. *Bourke*(1), at pages 443-444. A recent instance of exemption on this ground of an English municipal corporation from civil liability is furnished by the decision of the English Court of Appeal in *Maguire* v. *Corporation of Liverpool*(2). In many of the English cases the statutes dealt with will, upon examination, be found to be merely empowering or permissive; and several of them have for that reason been held not to impose a duty on the corporation. By other statutes the character and extent of the repairs required to be made is left to the discretion of the municipal body. In *Campbell* v. *City of Saint John*(3), there appears not to have been any such statutory duty to repair as we have in this case. In no case that I have found where the statute either in express terms or by necessary implication imposed on the municipal corporation an absolute duty to repair has it been held not civilly liable, unless the duty could be properly regarded as having been merely transferred to it, without change in its nature or incidents, from individuals or another body not subject to civil liability for its non-performance. Upon this ground the application of the general rule above stated has frequently been excluded. No doubt in certain statutes Parlia-

(1) [1895] A.C. 433. (2) [1905] 1 K.B. 767.
(3) 26 Can. S.C.R. 1.

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ment has otherwise indicated its intention that the imposition of a statutory duty shall not entail civil liability to a person injured in consequence of a breach of it. But in the absence of some sufficient ground enabling the Court to say that the legislature intended to exempt the body upon which a statutory duty is imposed from civil liability to a person, who is within the class for whose benefit such duty was created and who has been injured by its non-fulfilment, the general rule should, in my opinion, be applied and the injured person should be accorded his remedy in damages.

I find nothing in the statute now before us which suggests that the legislature did not intend that the present defendants should be civilly liable to any lawful traveller who may sustain injury on their highways owing to their having been negligently allowed to be in a state of disrepair. The duty to repair is created in mandatory and imperative language. There is nothing in the record to indicate that the duty thus imposed was transferred to the defendants from any other body — nothing to shew that there was any pre-existing common law obligation to repair lying upon the inhabitants of the territory incorporated as the City of Vancouver. The learned Chief Justice of the provincial Court of Appeal, speaking no doubt with full knowledge both of the local history of Vancouver and of the municipal legislation, public and private, in British Columbia, says:

> Before the incorporation of the defendant the locality now included within its limits was not organized, nor was it within the limits of any organized district. The Act, therefore, did not transfer common law powers and liabilities from the inhabitants of a district to an incorporated body, but the powers granted and liabilities imposed were original.

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In this statement Mr. Justice Galliher concurs. The dissenting judges do not question it. There being nothing in the record to cast the slightest doubt upon it, we would not be justified in assuming it to be inaccurate. The statutory duty of the defendants to repair highways should, therefore, be treated as "original and not transferred."

In the absence of something to shew a contrary intention, the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing. *Mersey Docks and Harbour* v. *Gibbs* (1); *Sanitary Commissioners of Gibraltar* v. *Orfila* (2).

For these reasons I am of the opinion that the defendants were rightly held liable and that their appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. H. Hay.*

Solicitors for the respondent: *Taylor, Hulme & Innes.*

(1) L.R. 1 H.L. 93, at pp. 97, 110. (2) 15 App. Cas. 400, 412.

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*May 17, 18.
*Nov. 6.

EWAN MACKENZIE (PLAINTIFF) ....APPELLANT;

AND

THE MONARCH LIFE ASSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Issue of shares—Authority to sign certificate—Estoppel —Evidence.

Held, per Fitzpatrick C.J. and Duff J., that where by statute and the by-laws of a joint-stock company certain of its officers are empowered to sign stock certificates, and they sign a certificate under seal in favour of a person who has agreed to change his position on receipt of the shares it represents and who is declared therein to be the holder of such shares the company is estopped from denying that it was issued by its authority, even if one of the officers signing it was acting fraudulently for his own purposes in doing so.

Held, per Anglin J., that the certificate is only *primâ facie* evidence of the statements therein and such evidence may be rebutted by shewing that it was issued without authority. In this case, however, Davies and Idington JJ. contra, the company failed to make such proof.

Judgment of the Court of Appeal (23 Ont. L.R. 342) reversed, Davies and Idington JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment at the trial in favour of the defendants.

In the year 1905 the appellant was part owner with one Ostrom of certain interim copyrights for six forms of insurance policies. The Monarch Life As-

PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 23 Ont. L.R. 342.

surance Company advertised that they were the exclusive owners of these forms. On the 7th September, 1905, the Assurance Company not having paid for the said copyrights, the appellant instituted proceedings against the said Ostrom and the Assurance Company claiming an injunction restraining the company from publishing the said advertisements, and the sum of $5,000 damages. This action came on for trial before the Hon. Mr. Justice Clute, and after the case had been partially tried was adjourned to enable the parties to effect a settlement. After considerable negotiations and correspondence it was agreed that Mackenzie should receive twenty-five fully paid up shares of the capital stock of the Monarch Life Assurance Company, and should transfer his interests in the copyrights to Ostrom, the manager of the company, and the action against both parties should be dismissed without costs. This settlement was arranged by Senator J. K. Kerr, apparently acting for the company, and by Mr. D. C. Ross, apparently acting for T. Marshall Ostrom, the managing director of the company. A certificate representing the stock issued under the corporate seal of the company and signed by its proper officers was handed over and the action was dismissed.

The company then repudiated the certificate and denied that the plaintiff was the owner of any shares and this action was brought to compel the company to register the plaintiff as owner of the twenty-five shares. The case came on for trial before the Honourable Mr. Justice Riddell at Toronto, who after the conclusion of the evidence, stated that the facts appeared to be as follows:—

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1. That Senator J. K. Kerr represented that he was acting for the company.

2. Every one acted in good faith.

3. Mr. Wilson, the company's solicitor, knew the terms of the proposed settlement.

4. The company received consideration for the shares.

5. That there was no resolution approving of the settlement of the action or the issue of these shares.

His Lordship subsequently dismissed the action upon the ground that the settlement was made with Ostrom acting on his own behalf and that the company were not bound by his actions in so doing. An appeal was taken from the said judgment to the Court of Appeal for Ontario and was dismissed with costs upon the same grounds, the Honourable Mr. Justice Magee dissenting. From this judgment the appellant appeals to the Supreme Court of Canada.

Bain K.C. and *Gordon* for the appellant. The authorized officers having signed the certificates bearing the company's seal the company is bound by their act. Halsbury's Laws of England, vol. 5, page 294. *Royal British Bank* v. *Turquand*(1); *In re Land Credit Co. of Ireland*(2).

In *Ruben* v. *Great Fingall Consolidated*(3) the certificate was not signed by the proper officers, but were forged, and the company were held not liable. The remarks of their Lordships, however, support the position of the appellant in this case. And see also *Bloomenthal* v. *Ford*(4); *Duck* v. *Tower Galvanizing*

(1) 5 E. & B. 248.
(2) 4 Ch. App. 460.
(3) [1904] 2 K.B. 712.
(4) [1897] A.C. 156.

Co.(1); *In re Coasters, Limited*(2); *McKain and Canadian Birkbeck Co., in re*(3).

The onus was on the company to prove facts sufficient to defeat plaintiff's claim; *D'Arcy* v. *Tamar, Kid Hill and Callington Railway Co.*(4); *County of Gloucester Bank* v. *Ruddy, Merthyr Steam, etc., Colliery Co.*(5); *In re Hampshire Land Co.*(6); and they have not done so.

Matthew Wilson K.C. for the respondents. Ostrom, the managing director, had no shares of his own to transfer to the plaintiff and no authority to issue the certificate. *George Whitechurch, Limited* v. *Cavanagh*(7); *Ruben* v. *Great Fingall Consolidated* (8).

The company never, by resolution, by-law or otherwise, authorized the issue of this certificate and cannot, even as a trading corporation, be estopped from denying its validity. *Longman* v. *Bath Electric Tramways*(9); *Mayor, etc., and Company of Merchants of the Staple of England* v. *Bank of England*(10).

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Duff.

DAVIES J. (dissenting).—For the reasons given by the Chief Justice of Ontario, in dismissing the appeal in this case to the Appeal Court of Ontario from the judgment of the trial judge, Riddell J., in which reasons Garrow and Maclaren JJ.A. concurred, and also

(1) [1901] 2 K.B. 314.
(2) [1911] 1 Ch. 86.
(3) 7 Ont. L.R. 247.
(4) L.R. 2 Ex. 158.
(5) [1895] 1 Ch. 629.
(6) [1896] 2 Ch. 743.
(7) [1902] A.C. 117.
(8) [1906] A.C. 439.
(9) [1905] 1 Ch. 646.
(10) 21 Q.B.D. 160.

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for the reasons stated by Meredith J.A., which substantially agree with those given by the Chief Justice, and to which I do not desire to add anything, I would dismiss this appeal with costs.

IDINGTON J. (dissenting).—The appellant sues for a declaration that he is the holder of twenty-five fully paid-up shares in respondent company and to have it ordered to register him as such.

On the facts set out by the learned trial judge and again more fully by the Chief Justice of Ontario in the Court of Appeal, which are not disputed, it is clear that in law there never was any subscription for such shares, or allotment or other issue thereof by the only authority competent to so direct.

It is admitted by the appellant he never paid the company anything nor had any contract with the company which would enable its board of directors to issue paid up stock even if we could assume it competent for the company to so contract.

He contends such a bargain is possible and that in course of executing it the managing director and the vice-president of the company would be the proper officers, by force of the Act of Incorporation and the parts of the "Companies' Clauses Act" included thereby in such Act, and of the by-laws made thereunder, to issue such certificate as this action is founded upon.

The certificate is as follows:—

> This certifies that Ewan Mackenzie is the owner of twenty-five fully paid-up shares of the capital stock of the Monarch Life Assurance Company (upon which shares $2,500 has been paid, together with $625 on premium), transferrable only on the books of the corporation by the holder thereof in person or by the attorney upon surrender of this certificate properly indorsed *and with the consent of the directors.*
>
> In witness whereof the said corporation has caused this certi-

ficate to be signed by its duly authorized officers and to be sealed with the seal of the corporation this 3rd day of May, A.D. 1906.

(Seal)

T. H. GRAHAM, *First Vice-President.*

T. MARSHALL OSTROM, *Managing Director.*

He says this was issued to him under such facts and circumstances as to induce him to rely thereupon and accept it in settlement of an action brought against the man Ostrom, who signed, and the company, and that he so induced, and so relying, consented to the dismissal of his action and therefore the company is estopped from denying the validity of the certificate.

I will assume that his present action is so constituted that even if there were no shares available either existent or within the power of the company to create to answer his demand, he, if entitled to recover at all, might recover alternatively damages for the failure to do so.

I desire his claim should be presented in the broadest possible way it can be put, in order to give effect to this alleged estoppel, if it can exist and then examine the facts on which it is alleged to rest. But presently therewith I must also examine the power of the company to issue such shares and consider the bearing thereof on said facts.

The action (of which the dismissal is the basis of any right appellant can have herein) was brought to enforce as against Ostrom a contract one Stevenson had made with him to sell some copyrights to him for a large consideration of which shares in the company formed a part, and to have the company restrained from using the copyrights. The one-fourth of the rights acquired by Stevenson, the vendor of said copyrights, had passed to appellant. The purpose of both was to have the company acquire said copyrights.

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In his statement of claim therein, appellant alleged that the company by virtue of the contract with Ostrom and the latter's dealings with his company, had used said copyrights but had not implemented the bargain.

This was answered by the company denying the allegations, and amongst other things pointing out that it had never become organized and hence such a bargain was in law impossible for provisional directors to make.

The company had in fact, up to the trial, never been organized, and its provisional directors clearly had no power to do aught but get shareholders to subscribe upon a basis that could not extend to include as part of the considerations moving to subscription a contract binding it to acquire and use such copyrights, or anything of that nature.

As against the company, save possibly the right to enjoin it from using or bargaining for use of such copyrights, the action seemed as hopeless a thing as ever was presented to any court.

And there is no evidence that at any time after said action was entered for trial the company ever did anything that would have touched appellant's rights in that regard, if he had any.

The trial was postponed from February, when first opened, to be taken up some later day if not settled.

The company got itself organized on the 21st of March, following this.

The appellant must have known from the company's pleadings and due consideration thereof, that the foundation in law for any bargain of which the fruits were to be shares in the company, did not exist. He must, therefore, when thus put upon inquiry, be held

bound to act cautiously and reasonably in relation to any proffered arrangement that implied carrying out what was illegal and improper for this man Ostrom to have attempted. He ought to have realized that before he could reckon upon shares in the company coming through such a channel, he must see that they were duly and regularly issued.

But it has been assumed by appellant that even conceding the power of the provisional board doubtful, once the company became organized, it could issue paid-up shares as result of a bargain such as in question. It seemed also to be assumed in appellant's argument that the directors could make such a bargain and validly issue such shares. It seems to me that is a fundamental error. And as the duty of appellant, and his correlative right to set up an estoppel on the facts, about to be adverted to, must to a certain extent depend upon, or be influenced by, a correct view of the legal position in this regard, of the powers of the company or its board, let us here consider that.

To appreciate the appellant's position and contentions, and especially that dependent upon his claim of estoppel, we must bear in mind that this is not a trading company, but an insurance company, incorporated by an Act of Parliament which embraces in the Act the provisions of the "Companies' Act" so far as not excepted in the incorporating Act, but only so far as not inconsistent with the incorporating Act or the "Insurance Act."

I think we must also bear in mind the nature of the business to be embarked in, and the policy of the then existent legislation relative to such insurance companies.

Let us turn to the provisions of the incorporating

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statute and its auxilliary, the "Companies' Act," and see if there is any warrant for assuming that anything but money can be received for payment of shares in such company.

The capital stock was fixed at two million dollars and, by section 4, it was enacted

> so soon as two hundred and fifty thousand dollars of the capital stock of the company have been subscribed and ten per cent. paid, etc.,

a meeting of those

> who have paid not less than ten per cent. on the account of shares *subscribed for by them*

shall elect a board, etc.; and, by section 6,

> the shares of the capital stock subscribed for shall be paid by instalments, etc.,

and

> the company shall not commence the business of insurance until sixty-two thousand five hundred dollars of the capital stock shall have been paid in cash into the funds of the company

and

> the amount so paid by any shareholder shall not be less than ten per cent. of the amount subscribed by such shareholder;

and, by section 7, the increase of capital is made dependent on the vote of

> at least two-thirds in value of the subscribed stock of the company, etc.

No one but those having subscribed, or those claiming under them, or the profit participating policyholders, seems contemplated by the Act as having any right to do with its affairs.

Let us turn to the "Companies' Clauses Act" and see if this enlarges that view.

The "Interpretation Act" defines the shareholder to mean "every subscriber to or holder of stock in the company" which does not help us much, for obviously

a transferee of stocks might not be "a subscriber" yet "a holder of stock" and the latter might be such without either being subscriber or transferee if otherwise power given to create stock without a subscription and without cash payment.

When we consider each and every section of that Act I think the utmost that can be said relative to the scope thereof, is that there is nothing expressly giving power to create stock otherwise than by subscription and payment in cash. We must bear in mind that the purpose of the Act is to supply a standard set of clauses which will subserve any legislation relative to all the joint stock companies Parliament can create, save as to railway, banking or insurance companies.

Yet when by section 17 of the company's incorporating Act the "Clauses Act" is adopted save as to specific sections, it guards that adoption by adding thereto the words,

in so far as the said Act is not inconsistent with any provisions of this Act or of the Insurance Act.

We are thus thrown back upon the sections I have quoted from the incorporating Act, the general purview thereof and of the "Insurance Act" and the clear principle which though daily repeated is sometimes lost sight of, that corporate bodies are only endowed with such powers as the creating legislature has given them. There may, however, be implications in the creations to give them activity.

Nor should we overlook the fact that having regard to such implied purpose there are numerous cases which at an early stage of the operation of the English Act of 1862, the courts held the power existed of accepting payment of moneys worth, instead of cash.

That Act was general and intended to be most

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comprehensive in its terms and operations, and unless such elasticity was given it would have largely failed of its purpose. At the outset the most useful thing it could be put to was to create corporate bodies to take charge of existent properties used for business or connected therewith or the goodwill thereof.

The situation which thus arose was of an entirely different character from that existent at and surrounding the creation of this company. The purpose to be executed was entirely different. And there the result was soon specifically guarded against in the Act of 1867.

On the whole I conclude that the Act of incorporation here in question, does not contemplate the issue of stock for anything but money, and at all events is not a thing that can be done by the directors exercising only the usual powers of management assigned them.

Whether possible to be directed upon due consideration by the shareholders or not, it is not necessary for me to determine beyond this, that I do not think such a case was presented to them as to entitle them to delegate both the right to act for them in the making of such a contract and the determination of all the details of such a bargain as the manager, Ostrom, induced a meeting in April to attempt, and the reference did not include any issue of such stock to appellant.

If no power exists, of course, there is an end of this case.

But there is another aspect of the matter and that is that the question of the power of the company to make a bargain at all, and of the board in that respect, and of the grave doubt that must exist to put it no

higher, are all matters lying open for the appellant to have considered and are not mere matters of the internal regulation of the company's mode of transacting business, and thus hidden from any one having dealings with the company. This appellant was not, therefore, in this case, of necessity restricted to the measurement of the authority of this company's officers, by what it was clearly apparent the company had held them out to the world as having power to do in the way of binding the company. He had the statutes for his guide and a warning in the pleadings.

I am also strongly impressed in this particular case with the facts that the appellant's whole claim rested upon his dealings with the manager, Ostrom, personally, and that in such a case it was his bounden duty to have ascertained not only that Ostrom had discharged his full duty by making to his employers the complete disclosure that for him in his situation, dealing for and with them, was necessary to found any contract between him and them, but also had given due consideration for that he must have professed to have acquired from them the right to transmit to appellant. Nothing can be clearer than that Ostrom neglected his duty in these regards, acted without any, or even the shadow of any, authority, and that upon the most casual sort of investigation, such as I have indicated was required of this appellant, he never could have been deceived or in any way misled.

Nor was this the less incumbent upon him because he saw the signature of one purporting to act as vice-president attached to this certificate he rests upon.

I cannot understand how any one dealing with such an issue as was presented for trial could assume without more information that the company had

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changed its front and policy so suddenly as to have matured any scheme that would have justified in law the issue of such stock as this certificate professes to evidence. And that he was alive to this is pretty evident from his counsel's letter three weeks after the alleged settlement, appearing in Mr. Kerr's letter of the 6th of March, 1906.

It is as follows:—

March 31st, 1906.

A. W. Holmestead, Esq.,
Barrister, etc.,
Toronto.

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Dear Sir,—There does not seem to be any prospects of the Monarch Life issuing shares in this matter, and I understand that the shareholders have refused to agree to the proposition which Mr. J. K. Kerr assured me would be satisfactory. Had we better not see about getting the case again placed on the list for trial?

Yours truly,
(Sgd.) JAS. BICKNELL.

But more than that the appellant must have known from the very nature of things he was doing and being a party to, that neither he nor any one else had given the company anything, and that they could not be compensated for such a transaction by a release to Ostrom such as appears unsigned, but dated May 4th, 1906, and seems the true consideration as proposed for the issue of such stock.

* * *

Having regard to all these things and everything implied therein, we are tempted to ask: What could the payment to Ostrom of the sum of fifty thousand dollars ($50,000) for such an illusory thing as the alleged copyrights be, but a plan for exploiting a company that seemed to have had for two years a desperate struggle to come up to the standard needed to get organized, and to justify the issue of a license to entitle it to enter on its proper business?

Such being the general features of the material circumstances presented to appellant's mind up to said date, let us see if we can, accurately, just what did happen out of which there could spring an estoppel of such grave import as we are presented with here.

The case was again entered on the trial list. Matters so far as we can see, unless some illegal resolutions, stood as they had done quite unchanged from the view presented to Mr. Bicknell's mind, on the 31st of March, 1906.

Then in some way, but how brought about is unexplained, Mr. Kerr sends the following telegram from Ottawa:—

May 2nd, 1906.

To James Bicknell, K.C.,
Bicknell & Bain, Barristers, Toronto.

Tried to see you when in Toronto; have arranged with Ostrom for transfer of shares as per agreement signed by me and will be approved of by directors at first meeting to be called for that purpose, as soon as possible. Kindly let case stand over, and oblige. J. K. KERR.

This may have been relied upon by appellant, but if so by its very terms he has to get the adoption of the board as basis for the issue of stock. Any undertaking to do so, even if broken, does not furnish ground of estoppel but action for a breach of the contract expressly made. We have, however, no evidence of any right in Mr. Kerr to act for respondent. And the minute book put in evidence and freely referred to by counsel on the argument, discloses no meeting from the 15th of April to the 19th of May, of either shareholders, directors or executive committee. In presence of such a record in evidence referred to by all parties, I fail to see how it can now be questioned as inadmissible.

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Nor can I understand, when such record shews no meetings were had, how, as is argued, the respondent was driven to call any or perhaps the whole of the twenty-five former directors of previous three years to attend; scattered as the record shews they were from Montreal to Winnipeg.

Moreover, the record shews the company had resolved to move its headquarters to Winnipeg, before this telegram from Mr. Kerr. The telegram from Mr. Kerr, so far from misleading, put appellant on his guard and imposed the duty on him of seeing before venturing to act on the alleged stock certificate that the directors had met and sanctioned it.

On the 14th of May the parties signed the following consent of dismissal of the action:—

Ewan Mackenzie,
Plaintiff;
and
The Monarch Life Assurance Company and T. Marshall Ostrom.
Defendants.

We hereby consent that this action be dismissed without costs.
Dated at Toronto, this 4th day of May, A.D. 1906.

JAMES BICKNELL,
For plaintiff.
D. C. ROSS,
For defendant Ostrom.
MATTHEW WILSON,
For defendant company.

This had to be substituted for another of a very different import, because the company's counsel very positively refused to sign the other or take part in such proposals of settlement as it indicated might be on foot. Such rejection must be held to have been known to the appellant. That rejected form of settlement, and its rejection being so known he cannot pretend fairly he was ignorant of the cause thereof, reads as follows:—

This action is settled as follows:—

1. The defendant, T. Marshall Ostrom, delivers to the plaintiff twenty-five fully paid-up shares of stock in the defendant company.

2. The defendant, T. Marshall Ostrom, in addition to the amount already paid, will pay $50 in full of any remaining costs of the plaintiff.

3. Except as above there shall be no costs to either party.

4. The plaintiff will release to the defendant Ostrom or to the company as his nominee any interest which he has under the assignment in question herein from one George Stevenson in the interim copyrights in question herein.

Dated this 4th day of May, 1906.

JAMES BICKNELL, Counsel for plaintiff.
Counsel for Monarch Life.
D. C. Ross, Counsel for T. Marshall Ostrom.

Now we have presented for redemption or adoption three years later, this certificate bearing date, let it be well noted, the 3rd of May, 1906, undoubtedly in existence and I think handed over to appellant's solicitor before the final consent to the dismissal was signed.

Mr. Kerr's telegram of the 2nd of May, could hardly have been supposed to have been implemented by the directors' meeting and with marvellous despatch producing this thing on the 3rd of May. The most casual inquiry would have disclosed the twenty-five directors were so widely scattered that such a thing was impossible. And careful inquiry would have disclosed the facts that the seat of business for such meetings had to be Winnipeg.

How can it be said this evidence proves what constitutes an estoppel in conformity with any legal definition thereof ?

How can it be said the company did anything that misled appellant ?

How can he plead reliance on its acts or alleged acts as consistent with this certificate, in face of the positive refusal to sanction such a settlement as might

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have implied the countenancing of the issue of said stock ?

How can he, who is told the stock will be transferred with the approval of the board of directors in the future, pretend he acted upon the fact of its issue having been already made as if approved ?

How can he pretend to ignorance of the prerequisite of approval of shareholders or board placed before him in such divers ways ?

How can he claim these officers had ever been held out as possessing the right to so issue certificates of this kind which on their face presuppose the cash had been paid ?

I think this appeal should be dismissed with costs.

DUFF J.—The questions arising on this appeal depend, it seems to me, upon considerations of very wide application; the weight to be attached to these considerations in the courts of law being, I should think, a matter of no little importance to the very large number of people who have dealings in the shares of joint-stock companies.

The facts are hardly in dispute. The appellant received through his solicitor a share certificate in the ordinary form stating that he was the owner of 25 shares of fully paid-up stock in the defendant company. This certificate had been received by his solicitor from the solicitor of one Ostrom, the managing director of the company, in settlement of an action then pending between the appellant as plaintiff and Ostrom and the company as defendants. The action had been brought to establish that the appellant was entitled to an interest in certain copyrights of insurance plans which Ostrom had professed to

assign to the company. The plaintiff alleged that the company was advertising and otherwise making use of these plans in violation of his rights as part owner of the copyrights and he claimed an injunction accordingly. The action having come on for trial was adjourned (according to the note of the presiding judge) to enable a settlement to be carried out. There was some delay, but eventually it was arranged that Ostrom was to transfer twenty-five fully paid-up shares to the appellant in satisfaction of his claim, and the certificate in question having been delivered by Ostrom's solicitor the action was by consent dismissed. In point of fact the appellant was not registered as the holder of any shares. Ostrom had transferred none to him, and had no fully paid-up shares to transfer; the issue of the certificate, moreover, had not in fact been authorized by the directors. The appellant contends that he, having acted upon the certificate by consenting to the dismissal of his action (thereby altering his position) the company is estopped from disputing the truth of the statement contained in it, viz., that he was at its date the registered holder of the shares mentioned.

It was not disputed on the argument, or at all events but faintly disputed, that this consequence follows if the statement in the certificate must in law be taken to be the statement of the company. The good faith of Mr. Bicknell, the plaintiff's solicitor, in accepting and acting on the certificate, is expressly found by the learned trial judge. "There is no charge of bad faith against any person except Ostrom," he says. The learned judge, as appears from his manner of dealing with the question raised, indubitably meant to relieve Mr. Bicknell from any suggestion that he

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had any suspicion touching the propriety of Ostrom's conduct in delivering the certificate. It was upon the same basis of fact that the case was considered in the Court of Appeal, and I cannot find that any imputation against the good faith of the appellant has been made by counsel for the respondent throughout the case. It seems clear, therefore, that it is on that basis that the appeal must be determined; but as some point is now made against the plaintiff in this connection, there is one observation which I think ought not to be omitted. It was Mr. Bicknell who on behalf of the appellant carried on the negotiations with Senator Kerr—whom he believed, as the learned trial judge has found, to be acting for the company. Senator Kerr foresaw no difficulty in carrying into completion the arrangement that Ostrom was to transfer twenty-five shares (fully-paid) to the appellant; Ostrom's solicitor, Mr. Ross, a reputable member of the profession, filled in the body of the certificate with his own hand, and obviously saw no difficulty. Mr. Wilson, the counsel for the company in the action (who, as the books in evidence shew, had been acting as the company's general solicitor,) was made fully acquainted with the terms of the settlement, and, (in view of his attitude I am bound to assume,) had no suspicion that Ostrom, in proposing to transfer fully paid-up shares to the appellant, was contemplating any juggling with the company's books, or any improper use of the company's name or seal; nor, it is perhaps needless to add, does any misgiving appear to have crossed the mind of Dr. Graham. In the minds of these four gentlemen, presumably much more fully acquainted with Ostrom's relations with the company than Mr. Bicknell, an outsider, could be, the settlement excited no suspicion or apprehension

of impropriety. In these circumstances if any point was to be made against the plaintiff's good faith, it ought to have been made, and distinctly made, at an earlier stage in the litigation. The question is then: Is the company bound by this statement as its own statement? I think it is bound by it.

The powers of the directors in respect of such certificates appear in section 13(*a*) of chapter 118, R.S.C. (1886):—

13. The directors of the company may, in all things, administer the affairs of the company, and may make or cause to be made for the company, any description of contract which the company may, by law, enter into; and may, from time to time, make by-laws not contrary to law or to the special Act or to this Act, for the following purposes:—

(a) The regulating of the allotment of stock, the making of calls thereon, the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock.

In the execution of these powers the directors passed by-law X.(*d*) in the following words:—

(d) Certificates shall be issued for stock after payment of at least ten per centum of the par value, and each certificate shall shew upon its face the number of shares and the amount paid upon the stock represented by such certificate at the date of such certificate, and all such certificates shall be signed by the president or a vice-president and the manager and be sealed with the seal of the company; but, *unless by special resolution of the directors*, no shareholder shall be entitled to receive a second or subsequent certificate until he shall have delivered up to the company all prior certificates received by him from the company for the same stock.

The persons thus appointed to sign and attest the attaching of the corporate seal to stock certificates are the persons who by another article of the by-laws are charged with the general duty of executing documents on behalf of the company. The certificate in question here was signed by one of the vice-presidents

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— Dr. Graham — and by the managing director. It was stated in argument and not denied that the book of stock certificates which by leave of the court was returned to the respondent company after the trial, shews the vice-president in question and the managing director to have been the officers who down to the time of the transaction in question usually performed the duty of issuing such certificates. The minute book in evidence, moreover, shews that Dr. Graham usually presided at the meetings of the directors and of a committee called the executive committee to which the directors had professed to delegate their powers of management.

There can be no doubt that under the by-law set out above the vice-president and the managing director would be acting within their powers in issuing certificates to persons holding shares upon which the minimum amounts had been paid. There can equally be no doubt that they would be acting beyond their powers in issuing such a certificate in the name of a person not a stockholder. But if in such circumstances, they issue a certificate, I do not think it is necessarily a nullity. Share certificates, as everybody knows, are acted upon as documents of title. Speaking broadly, they do not in themselves confer ownership — they are only evidence of ownership and perhaps apart from statutory enactment evidence only against the company itself; but in practice they are treated as documents of title and the courts have so far recognized their character as such as to hold that the deposit of a certificate may create an equitable mortgage of the shares to which they relate. As representing those shares they constitute a most important part of the movable commercial securities of the country.

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Now for such purposes a certificate (I am assuming it to be genuine in the sense that it is executed by the proper persons, the persons who, if the statements contained in it were true, would be the persons to execute it and give it forth to the world), would be perfectly valueless unless the statements certified to are to be taken to be the statements of the company itself. In commercial usage that is what a share certificate means — a statement not by an officer of the corporation, who may or may not be mistaken, but a statement by the corporation itself upon the faith of which the public are entitled to act. If before acting upon the statements you must first at your peril investigate them what purpose does the certificate serve ? Such a view of the effect of share certificates would, I think it is no exaggeration to say, quoting the language of Lord Cairns in *Burkinshaw* v. *Nicolls* (1), at page 1017,

> paralyze the whole of the dealings with shares in public companies.

The representations then, contained in such documents, as to the title to the shares and the amount paid upon them are representations which it is expected will be acted upon, and the object of the by-law authorizing certain named officers to execute such certificates is to place in the hands of shareholders documents upon the faith of which the public may act without further inquiry than to ascertain that they have been executed by those officers.

The statute left it optional with the directors whether they should or should not make provision for such certificates. But in making such provision, and providing that every shareholder on whose shares 10

(1) 3 App. Cas. 1004.

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per cent. had been paid should be entitled to such a document, they must be taken to have intended to arm the shareholder with a document which when executed by the proper officials should carry with it all the authority of a certificate given by the company.

It may be noted that the persons appointed for the purpose mentioned were not merely servants. The signatures of the manager and of the president or one of the vice-presidents were required. It is not easy to see how a stranger to the company could expect to verify a statement as to the contents of the company's books by obtaining any assurance which would be more conclusive than a statement so authenticated. In point of fact, (whatever may be said about a document executed by officers whose duties are well-known to be ministerial only,) no ordinary business man would think in ordinary affairs of business of refusing to accept and act upon — as the certificate of the company — a share certificate under the company's seal and signed as this was by such officers as a vice-president and a managing director when by the by-laws of the company those officers had been appointed to exercise, and regularly did exercise, the function of authenticating the execution of such instruments on behalf of the company.

The respondent's position rests upon two cases, *Ruben* v. *Great Fingall Consolidated*(1); and *George Whitechurch, Limited* v. *Cavanagh*(2). The distinction between this case and both those cases lies on the surface. In the first the certificate was not signed by the persons appointed to sign such documents. Their signatures were forged. The House of Lords held that

(1) [1906] A.C. 439. (2) [1902] A.C. 117.

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the secretary who had countersigned it was not authorized to warrant the validity of the certificate. It does not appear to have been doubted that if the signatures had been genuine the company would have been bound. At page 447 Lord James of Hereford expressly says that in such a case the certificate would be binding. It is surely one thing to say that the persons authorized to execute such a document are thereby authorized to warrant in the name of the company the truth of the statements contained in it, or in other words that the public is invited to act upon a document executed by them, and a very different thing to say that the public is invited to act upon the signature of one of them only. That is the difference between the appellant's contention here and the unsuccessful contention in *Ruben* v. *Great Fingall Consolidated* (1). In *George Whitechurch Limited* v. *Cavanagh* (2) it was held that the secretary had no authority to guarantee the truth of the representation contained in his certification. The distinction is pointed out in all the judgments between a certification such as was there in question, and a certificate under the seal of the company; pages 126, 134. That persons empowered to execute documents of the latter character have (as necessarily implied in the power to execute such documents) the authority to warrant on behalf of the company the truth of the statements made in them was assumed throughout. The authority to give a certification of transfer on the other hand, does not imply (for the reasons pointed out by Lord Macnaghten) any invitation to the public to act upon it.

If I am right in thinking that by placing in the

(1) [1906] A.C. 439. (2) [1902] A.C. 117.

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hands of the officers in question the authority to issue such certificates and permitting them to exercise such authority, the company invited the public to act upon the faith of certificates authenticated by them, then I think no difficulty arises from the fact that Ostrom was acting fraudulently for his own purposes. In *Mahony* v. *East Holyford Mining Co.*(1) the directors were acting fraudulently for their own purposes and so were the agents whose acts were in question in *Bryant, Powis and Bryant* v. *La Banque du Peuple* (2), and *Hambro* v. *Burnand*(3).

I should perhaps add this. It was not argued that the vice-president and managing director were not the proper persons to issue certificates, on the application of the holder of shares in proper cases, or that they had not full authority to execute them in such cases. Indeed, the authority is admitted in the respondent's factum. If it should be suggested that they could attach the corporate seal only under the authority of the directors the answer is: assuming that to be so — I think that is clearly not the true construction of the by-laws — it is plain that these are the persons who are to authenticate the affixing of the seal. The by-laws quoted make that plain, and having that authentication a stranger is entitled to act upon it: *Montreal and St. Lawrence Light, Heat and Power Co.* v. *Robert*(4), at pp. 202 and 203.

It is proper also to mention the suggestion that certificates of shares in this company differ in effect from certificates of shares affected by the "Companies Act 1862," inasmuch as there is no enactment (corresponding to the provision in that Act) making the certifi-

(1) L.R. 7 H.L. 869.
(2) [1893] A.C. 170.
(3) [1904] 2 K.B. 10.
(4) [1906] A.C. 196.

cates of the respondent company *primâ facie* evidence of title. That, I think, is not material. If the statement in the certificate in question is to be treated as the statement of the company, then the doctrine of estoppel comes into play. That the English decisions upon the subject do not depend on this provision of the Companies Acts is clear from this. In many of the cases it is not the title to the shares, but the liability to pay calls upon them that is in question. On this point there is no statutory provision; but the estoppel operates notwithstanding its absence.

ANGLIN J.—I agree with Meredith J.A. that, upon the evidence in the record, and especially in the absence of proof of the authority of Mr. J. K. Kerr to represent the Monarch Life Assurance Company, it must be held that:

> So far as the defendants are concerned the only settlement made, of the former action, was that it should be dismissed, as it afterwards was, as against them without costs; that they were in no way parties to the settlement made between the plaintiff and their co-defendant Ostrom, in that action.

I find myself, however, unable to concur in the view which prevailed in the Ontario Court of Appeal as to the value of the certificate produced by the plaintiff as evidence that he is a shareholder in the defendant company, or as to the proper conclusion upon this question from the evidence adduced at the trial.

I express no opinion upon the issue of estoppel, which was much discussed at bar. When and how far such a document as the certificate held by the plaintiff, regular in form, creates an estoppel against the company whose officers have signed it and whose seal it bears is, upon the authorities, a question of some difficulty, which, in the view I take of the pre-

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sent case, it is not necessary to determine. That this case does not fall within the line of decisions of which *County of Gloucester Bank* v. *Ruddy, Merthyr Steam, etc., Co.*(1) is an example, but should be held to be governed by the principles on which the judgment in *Ruben* v. *Great Fingall Consolidated*(2) proceeds, I am not wholly satisfied. There is at least one marked distinction between the facts in *Ruben* v. *Great Fingall Consolidated*(2) and those now before us.

It is quite true, as stated by the learned Chief Justice of Ontario, that

> there is nothing in the special Act incorporating the defendants, 4 Edw. VII. ch. 96, or in sections of the "Companies Clauses Act" (Dom.) R.S.C. (1886), ch. 118, which are declared applicable to the defendant company, similar to the provisions contained in the "Imperial Act," 8 & 9 Vict. ch. 6, amended by various other acts, requiring the defendants to deliver to a shareholder a certificate of proprietorship which is to be admitted in all courts as *primâ facie* evidence of the title of the person named in it.

We have no provision corresponding with section 23 of the "Imperial Companies Act of 1908," which declares that "a certificate under the common seal of the company specifying any shares or stock held by any member shall be *primâ facie* evidence of the title of the member to the shares or stock." But these statutory provisions would appear to be merely declaratory of what would without them be held to be the law. For, as pointed out by Magee J.A., such a document as the certificate produced by the plaintiff is, apart from any statutory enactment, "*primâ facie* evidence of its truth."

In *Hill* v. *Manchester and Salford Water Works* (3), Denman C.J. says, at p. 874:—

(1) [1895] 1 Ch. 629. (2) [1906] A.C. 439.
(3) 5 B. & Ad. 866.

The plaintiff proved that the common seal of the company was affixed to the bond by the officer who had legal custody of it, and so threw upon the defendants the burden of proving clearly that it was not set by their authority.

In *D'Arcy* v. *Tamar Kid Hill and Callington Railway Co.*(1), Bramwell B., at p. 162, says:—

It is not to be presumed that what has been done is *ultra vires* and therefore when the bond is produced under the seal of the company it is *primâ facie* to be taken that the seal was properly affixed.

And Channel B. adds:—

On production of the bond under the corporate seal it is *primâ facie* to be assumed that it is valid.

In *North-West Electric Co.* v. *Walsh*(2), Sedgewick J. delivering the judgment of the court, says at p. 50:

The fact that the respondent held a paper which upon its face stated that she held so much stock paid in full, *while evidence of the statement*, was not conclusive evidence of it.

See, too, *Montreal and St. Lawrence Light and Power Co.* v. *Robert*(3), at pages 202-3.

By the production of his stock certificate, therefore, the plaintiff established a *primâ facie* case entitling him to relief. How is that case met by the defendant, upon whom the burden was thus cast of proving that the plaintiff is not the holder of the shares mentioned in his certificate?

Its plea is that:—

1. If the plaintiff holds a stock certificate as alleged, the same was not issued by the defendant and the amount thereof was not paid up to the defendant, and the defendant did not consent thereto.

— The substance of this plea is that the issue of the stock which the plaintiff claims to own was not sanctioned by the board of directors of the defendant com-

(1) L.R. 2 Ex. 158. (2) 29 Can. S.C.R. 33.
(3) [1906] A.C. 196.

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pany, who alone had power to authorize it. In support of this allegation counsel for the defendant cross-examined Dr. Graham, the vice-president of the company, who was one of the signatories to the certificate. His evidence on this point is summed up in the following question and answer:—

Q. Then there has never been any authority from the board of directors at all for you to sign this certificate? A. I do not know about that.

He was not asked if he had attended all the directors' meetings; nor was he or any other competent witness asked whether the minutes produced by another officer of the company were a true record of all that had transpired at the directors' meetings. He had no recollection of how he came to sign the certificate.

Do you remember anything about it?

A. No.

His Lordship: You are not in the habit of signing things just because they are put in front of you?

A. When they are filled up and signed by the managing director, I would take it for granted they are right.

Q. You have no recollection?

A. No, sir.

No other director of the company gave evidence. The defendant called the present general manager of the company, Mr. Stewart, who took office in November, 1906. The transactions leading up to the plaintiff obtaining his stock certificate occurred in March and May, 1906, and the certificate bears date the 3rd May, 1906. Mr. Stewart was unable to give any evidence as to what had transpired before he became manager. He produced certain books of the company. Mr. Vansickle, a bookkeeper with the defendant, was also called. He had no part in the management and gave no evidence of any value. The defendant did not call any other witness.

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Mr. Stewart produced the stock ledger, the stock certificate book, the stock application book, and the minute book of the company. These books contained no record of anything which would indicate that the plaintiff had become a shareholder in the company.

Such of these books as the company is required, by R.S.C. ch. 79, sec. 144, to keep are, by section 175 of that Act (one of the companies clauses provisions made applicable to the defendant company by 4 Edw. VII. ch. 96, sec. 17), declared to be

primâ facie evidence of all facts purporting to be therein stated.

They are not, however, made negative evidence of the non-existence of the facts not therein stated. Moreover, books which the statute does not require the company to keep, *e.g.*, the minute book of directors' meetings, are not given any evidentiary value greater than they possess at common law. At common law such books are not admissible for the corporation as against a stranger. Neither, in my opinion, can the corporation without statutory authority put them in evidence when the question at issue is whether the opposing party is a member of it or a stranger to it; *Marriage* v. *Lawrence*(1); Taylor on Evidence (10 ed.), sec. 1781 — whatever might be the case were he by common consent a member.

The company might have called some of its directors of 1906 as witnesses and by them established, if such were the fact, that at no directors' meeting was there an allotment of the shares claimed by the plaintiff. It has not seen fit to do so. It is consistent with the evidence in the record that the board of directors may have sanctioned the issue of the shares in question

(1) 3 B. & Ald. 142.

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and that, by accident or design, a record of their action may not have been made. Counsel for the defendant contented themselves with cross-examining one director, called by the plaintiff, who was unable to negative the existence of the requisite authority for the issue of the shares claimed by the plaintiff and with tendering in evidence its own books — some of them probably inadmissible — none of them affording the evidence which it was bound to supply.

The *primâ facie* case made by the plaintiff, therefore, remains unanswered. The evidence of Dr. Graham sufficiently establishes that other certificates for shares were signed by him after that given to the plaintiff. It is thus made reasonably clear that when the plaintiff received his certificate the defendant held unissued shares to meet it; indeed, the defence of an over issue has not been suggested.

I am, with great respect, of the opinion that the plaintiff is entitled to the declaratory judgment for which he asks, and that his appeal should be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Bicknell, Bain, Strathy & Mackelcan.*

Solicitors for the respondents: *Wilson, Pike & Co.*

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BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS; *Oct. 5. *Nov. 6.

AND

ANNIE LOUISA WILKINSON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence — Carriers — Operation of railway — Defective system — Gratuitous passenger—Free pass—Limitation of liability—Employer and employee—Fellow-servant—Evidence—Onus of proof.

The plaintiff's husband was an employee engaged as a mechanic in the company's workshops and was travelling thither to his work on one of the company's passenger cars, as a passenger, without payment of fare. A freight car became detached from a train, some distance ahead of the passenger car and proceeding in the same direction; it ran backwards down a grade, collided with the passenger car and the plaintiff's husband was killed. The manner in which the freight car became detached was not shewn. On the body of deceased there was found a permit or "pass," which was not produced, and there was no evidence to shew any conditions in it, nor over what portion of the company's lines nor for what purposes it was to be honoured. On the close of the plaintiff's case the defendants adduced no evidence whatever, and the jury found that the company was at fault, owing to a defective system of operation of their trains, and assessed damages, at common law, for which judgment was entered for the plaintiff.

Held, that there was a presumption that deceased was lawfully on the passenger car and, in the exercise of their business as common carriers of passengers, the company were, therefore, obliged to use a high degree of care in order to avoid injury being caused to him through negligence; that there was nothing in the evidence to shew that deceased occupied the position of a

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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fellow-servant with the employees engaged in the operation of the trains which were in collision; and that, in the absence of evidence shewing any agreement, express or implied, or some relationship between the company and deceased which would exclude or limit liability, the plaintiff was entitled to recover damages at common law.

Judgment appealed from (16 B.C. Rep. 113) affirmed. *Nightingale* v. *Union Colliery Co.* (35 Can. S.C.R. 65) distinguished.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment at the trial by which the plaintiff's action was maintained with costs.

The action was brought by the plaintiff, the widow of Archer Samuel Wilkinson, deceased, on behalf of herself and of a minor child, for the recovery of $25,000 damages suffered through the death of her said husband caused, as alleged, by the negligence of the defendants. The circumstances in which deceased met his death are stated in the head-note. On the verdict of the jury judgment was entered for $8,000 damages awarded to the plaintiff, for herself, and $3,000 for her infant daughter. This judgment was affirmed by the judgment now appealed from, Mr. Justice Irving dissenting.

The principal grounds urged on behalf of the appellants were: (1) That no evidence was supplied by the plaintiff as to the circumstances under which the deceased was upon the car of the company. (2) That there was sufficient evidence that deceased was an employee of the company and was being carried to Westminster as such employee. (3) That there was some evidence that the deceased had a pass in his pocket when killed. (4) That the address of plaintiff's counsel to the jury proceeded upon the assump-

(1) 16 B.C. Rep. 113.

tion that the deceased was travelling upon a pass. (5) In his charge to the jury, the trial judge pointed out that there was no evidence that deceased "was in the position of an ordinary passenger under contract for carriage. There is no evidence of payment of fare and there is evidence of the fact that he had in his pocket-book a pass." (6) That there is no evidence whatever as to the cause of the accident. (7) That the onus was upon the plaintiff to prove all that was necessary to obtain a verdict and that onus was not discharged.

Ewart K.C. for the appellant.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE and DAVIES J. agreed with Duff J.

IDINGTON J.—The deceased husband of the respondent was a passenger on the appellants' railway car when, by reason of its servants' negligence, he met his death.

Primâ facie, his widow, who sues as his personal representative, on behalf of herself and her children, is entitled to recover as any other, in like circumstances, might recover.

If there were any specical circumstances to differentiate this case from that which the outstanding facts present, it devolved upon those claiming such exemption to have proven the facts to support it. Mr. Ewart's suggestion of there being a duty devolving on a plaintiff in such cases to negative or explain is clearly unfounded. Who ever heard of such negative proof being tendered in such a case? It would re-

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quire in each accident case that the passenger injured proved he never had a pass.

The bare statement that, after his death, the respondent found a pass in her deceased husband's clothes, without shewing for what or where, or that by the terms of the pass or conditions upon which it issued he assumed all risks, or even that he had presented it to the appellant's conductor on the occasion in question in answer to a demand for fare, goes for nothing.

Even a man travelling upon an unconditional pass cannot be killed with impunity by such gross negligence as apparent here on the part of those carrying deceased.

It is suggested that he was a fellow-servant of those guilty of the negligence and, hence, by reason of the doctrine of common employment, no recovery can be had at common law.

If so employed there is no evidence that he was where he met his death by reason of that employment.

He was, for all we know, entitled to get by any means he chose to the place where he had to work for the appellants.

Until he entered on that employment and was actually engaged therein, how can he be said to have fallen within the principle of the doctrine of common employment ?

That doctrine rests upon the implication that a person employed is presumed to have undertaken the risks incidental to such employment.

This case is not brought within this fundamental reason for the doctrine, and hence, it cannot apply.

There may arise questions of a nice character in this regard when, if ever, it is shewn in such a case

that the terms of the contractual relation between employer and employee establish that the employment began when the employee stepped into the employer's carriage.

I do not desire to express any opinion on such a case till it actually arises. I merely refer to a possibility which has not arisen here, but which the ingenuity of counsel suggested might be inferred by another jury.

I do not think when, as here, the proof of anything tending to raise a mere suspicion was made by appellant and then the further relative facts peculiarly in its own hands are withheld or avoided with care, that it can fairly ask any court to exercise its discretion to prolong such litigation.

The appeal should be dismissed with costs.

DUFF J.—The deceased, Archer Samuel Wilkinson, met his death in a collision while travelling in one of the appellant company's passenger cars from Vancouver to New Westminster. The inference that the collision was due to a want of ordinary care on part of the officers or servants of the company is indisputable. The company seeks to escape liability on the ground that the evidence fails to shew facts which enable us to say whether this absence of care involved any breach of duty for which the company is answerable to the respondent.

Wilkinson, who resided in Vancouver, was employed in the shops of the company at New Westminster, and was on his way thither on the morning when the accident occurred. It does not appear whether he did or did not pay his fare. It is suggested that he may have been carried gratuitously;

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and this suggested possibility is made the ground of the contention upon which the appeal was mainly based, viz.: that since we are ignorant of the character in which Wilkinson was on the appellant's car — whether, that is to say, as a passenger paying his fare, or as a passenger travelling free, or as a servant being carried to his work; and, since we are equally ignorant of the character of the negligence out of which the collision arose, the plaintiff must fail as we obviously cannot, in these circumstances, affirm either the existence of the gross negligence alleged to be necessary to attach liability to the company in the second case, nor the existence of negligence other than that of a fellow-servant which is necessary for success in the third.

This contention appears to me to be without substance.

I do not agree that in such an action as this it is necessary to prove that the traveller who has been killed had paid for his carriage or had entered into a contract to pay for it or that he was not being carried in the character of fellow-servant of those responsible for the accident. The appellants are a railway company carrying on the business of common carriers of passengers. The obligation to take reasonable care to carry safely arises out of the acceptance of the passengers. The law as settled is stated in the passage quoted by Mr. Chrysler from the treatise on carriers in the "Laws of England," art. 80:—

> The duty of a railway company (speaking, of course, of a railway company when in the exercise of its trade of common carriers of passengers), to use a high degree of care towards its passengers does not depend on any contract with the passenger; it is bound not to injure by negligence any person lawfully on its railway, whether such person has made a contract with it or not.

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The case of *Nightingale* v. *Union Colliery Co.* (1), cited by Mr. Ewart, is not a relevant decision. There the person injured was not being carried in a public conveyance by a railway company in the course of its business of common carrier of passengers. He was travelling on a locomotive attached to a freight train and was there in violation of an express rule of the company. In the case before us the presumption is that Wilkinson was lawfully on the car and the rule above stated applies unless something is shewn (some agreement, express or implied, or some relationship between the passenger and the company) which excludes or limits the application of it.

The doctrine of common employment or more accurately the doctrine of *Priestly* v. *Fowler* (2), was invoked; but there is nothing in the evidence to justify the application of that doctrine. Wilkinson's work was in the shops; at the time he met with the accident his day's work was not begun; and the risk of injury on the railway can not, therefore, be regarded as a risk incidental to his service, unless it be shewn that he was being carried by the appellants not in the character of common carriers, but in that of employers — in other words, under some arrangement which was part of or ancillary to his contract of service. (See *Coldrick* v. *Partridge, Jones & Co.* (3).) Of this there was not the slightest legal evidence and there was, consequently, on this head, no question which could properly be left to the jury. The sole point, therefore, upon which the jury had to pass was the amount of damages to be awarded; and, on that

(1) 35 Can. S.C.R. 65. (2) 3 M. & W. 1.
(3) [1910] A.C. 77; [1909] 1 K.B. 530.

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point, there is no adequate reason for disturbing their verdict.

ANGLIN and BRODEUR JJ. agreed with Duff J.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Wood.*

Solicitor for the respondent: *B. P. Wintemute.*

THE CITY OF WINNIPEG (PLAINTIFF) ..... } APPELLANT;

AND

FREDERICK F. BROCK AND CHARLES ROBERT MUTTLEBERRY (DEFENDANTS) ..... } RESPONDENT.

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*Oct. 17, 18.
*Nov. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Municipal corporation—Closing streets—"Passage of by-law"—Coming into force of by-law—Time for appealing—3 & 4 Edw. VII. c. 64 (Man.)—"Winnipeg City Charter"—Construction of statute.

A municipal by-law for the diversion and closing of certain highways and the transfer of the land to a railway company provided that it should "come into force and effect" on the execution of a supplementary agreement between the municipal corporation and a railway company "duly ratified by council"; it also determined the classes of persons and property entitled to compensation in consequence of being injuriously affected by the diversion and closing of the streets. The statute (3 & 4 Edw. VII. ch. 64, sec. 708, sub-sec. *c*(1)), conferring these powers, gave persons dissatisfied with the determination the right to appeal to a judge "within ten days after the passage of the by-law." Another by-law was subsequently enacted by which the first by-law was "ratified and confirmed and declared to be now in force." The defendants, who had been excluded from the class of persons to receive compensation, appealed to a judge, under the section of the statute above referred to within ten days after the enactment of the second by-law.

Held, that the terms "within ten days after the passage of the by-law" in the statute had reference to the date when the by-law affecting the streets and determining the classes entitled to compensation became effective; that the first by-law did not come into force and effect in such a manner as to injuriously affect

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the defendants until it was ratified and confirmed by the subsequent by-law, and, consequently, the defendants' appeal came within the time limited by the statute.

Judgment appealed from (20 Man. R. 669) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the decision of Mathers C.J., in the Court of King's Bench, by which an injunction had been granted restraining the defendants from proceeding to an arbitration, pursuant to the provisions of the "Winnipeg City Charter," to determine the amount of compensation in damages to which they might be entitled in consequence of the diversion and closing of certain highways by a municipal by-law.

The circumstances of the case are stated in the head-note and in the judgments now reported.

Wallace Nesbitt K.C., O. H. Clark K.C. and *Christopher C. Robinson* for the appellants.

Aikins K.C. and *C.P. Wilson K.C.* for the respondents.

THE CHIEF JUSTICE.—The question here is: Was by-law 4264 passed in September, 1907 ?

By "passed" I presume is meant that at that date the by-law was so complete in itself that it effected the purpose for which it was intended, although, possibly, it might not be brought into force until a later date.

The object in view was the closing of certain streets. Can it be said that within the four corners of the by-law, as it then stood, could be found the authority necessary to close the streets the result of which

(1) 20 Man. R. 669.

would be to injuriously affect the plaintiffs' property without any further step being taken except to bring the by-law into force? Distinguishing between that which is necessary to make a by-law complete and effective and that which is necessary to bring it into force, it seems to me clear that the first by-law was not completed and never became effective until the second by-law was passed confirming the supplemental agreement.

The argument for the appellant is that when the supplemental agreement was executed it had retroactive effect. If the by-law was not complete, inasmuch as it did not effectively accomplish the purpose for which originally it had been made until the second agreement was executed — within what delay would appeal lie? From the date of the by-law or the date of the supplementary agreement?

Until such a by-law effectively closing the street was passed the respondents had no interest upon which they could found a judicial proceeding. They could not be affected by something that was not done.

The second by-law purports to close the street. Otherwise what is the meaning of this expression in the agreement of the 24th of August, 1907? The words used are:—

> Now, therefore, in consideration of the premises and in consideration of the city passing a by-law closing up the streets and lanes referred to in its said agreement, dated the 20th day of October, 1906, the company hereby declares as follows; etc.

If the streets had been closed by the first by-law, why insert that provision in the supplemental agreement? On the whole, I agree with my brother Idington, and, for the reasons which he gives, I would dismiss this appeal.

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DAVIES J.—The substantial question to be determined in this appeal is whether a certain by-law of the City Council of Winnipeg, No. 4264, professing to ratify and confirm an agreement made between the city and the Canadian Northern Railway Company for (*inter alia*) the closing up of certain streets of the city and the construction by the company of a subway under one of the streets of the city was "duly passed" within the meaning of sub-section *c*(1), of section 708 of the Winnipeg Charter on the day the by-law bears date, the 30th day of September, A.D. 1907, when it formally passed the council, or on the 20th day of July, 1908, when a second by-law was passed, No. 5050, ratifying and confirming by-law 4264.

If by-law No. 4264 was so duly passed on the day of its date, 30th September, 1907, then, so far as the question is concerned, the defendants, respondents, were too late in appealing to Chief Justice Dubuc on the 28th July, 1908, and this appeal from the judgment of the Court of Appeal for Manitoba should be allowed.

If, on the contrary, the by-law No. 4264 was not duly passed within the meaning of sub-section *c*(1), until the 20th July, 1908, when by-law 5050 ratifying and confirming the supplemental agreement and the original agreement as amended by the supplemental one and also ratifying and confirming by-law 4264 and declaring it "to be now in force," then this appeal must be dismissed and this action brought to have it declared that the order of Chief Justice Dubuc of the 8th October, 1908, adding the names of the defendants to the names of those determined by the by-law 4264 to have been injuriously affected by the exercise of the powers contained therein was *ultra vires* must be dismissed.

The original agreement made between the city and the railway company was entered into the 20th October, A.D. 1906. The by-law 4264, as to the day of the legal passage of which the controversy turns, sets forth the agreement of 1906 in full and in its enacting part: (1) ratifies and confirms the agreement; (2) grants to the company the privileges of entering upon the streets and building a subway specified in section one of the agreement; (3) stops and closes up those portions of public streets bounded as therein specified; (4) provides for the conveyance of the closed-up streets to the company; and, (5) limits the persons who might be injuriously affected by the exercise of the powers contained in the by-law and in the said agreement and who were entitled to compensation for damages by reason thereof under the provisions of the Winnipeg Charter to those having an interest in any part of

real estate fronting on that part of Pembina street occupied or opposite the subway and its approaches.

The defendants (respondents) not being within this class of persons were, therefore, excluded from claiming damages for any injurious affection of their lands.

Then follows the clause on the construction of which the controversy centres.

6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the 24th day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

Done and passed in council assembled this 30th day of September, A.D. 1907.

To complete the chronological statement of the important facts I may here state that this supplemental agreement dated the 24th August, 1907, was, at the

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date of the passing of by-law 4264, under consideration of and awaiting the decision of the company and the city. Beyond the fact that it materially changed, in one respect at least, the obligations of the company to the city with respect to the construction of the viaduct it had no direct bearing upon the compensation to which the defendants, respondents, might be entitled.

The supplemental agreement having eventually been executed by the company and the city, the city council, on the 20th July, 1908, passed by-law 5050, (1) ratifying and confirming the supplemental agreement and also ratifying and confirming the first agreement of 20th October, 1906, as amended by this supplemental agreement, and further declaring—

(2) That the by-law No. 4264 is hereby ratified and confirmed and declared to be now in force.

In my judgment the by-law of 30th September, 1907, No. 4264, cannot be said to have been "passed," within the meaning of the statute in that regard, as to persons it excluded from those entitled to compensation for injurious affection of their lands, until the 20th July, 1908, when by-law 5050 ratified and confirmed both the supplementary agreement and by-law 4264 and declared the latter "to be now in force."

If by-law 4264 was clearly not in force until by-law 5050 so declared it, there would seem to me to be an end to the question. Formally and technically passed, it might have been, but, as so passed, it was without life or force and could not be said to authorize the injurious affection of any lands or the vested rights of any one.

Clause 6 of the by-law made it clear that before it ever could have any efficacy or operation, the supple-

mentary agreement of 20th August, 1907, modifying the original one set out at length in the by-law, should not only be executed, alike by the company and the city officials, but that such by-law 4264 and the execution of the agreement supplementary by the city officials should be duly ratified by council.

It does not seem to me that any application on the part of the defendants could have been successfully made to a judge to have their names added to the class of persons declared to be injuriously affected by the by-law No. 4264 within the ten days following this formal passing through council. Such applicants would be at once met by section 6, declaring that such by-law was not in force and might not ever come into force and that, as it stood, it did not and could not operate to affect any person injuriously. To do so required further action alike on the part of the company and the city — action which might never take place, but was essential to give life and vitality to the by-law.

The limit of time imposed upon parties who claimed that their properties were injuriously affected by the city by-law closing up streets, etc., and who desired to appeal from a determination excluding them from the class of persons entitled to compensation was short; — only ten days.

But, in my judgment, that limitation is applicable only to a by-law which was only really effective and which did or might in its operation injuriously affect other lands than those declared in it to have been affected. It could not have application to the case of a by-law such as this, which not only was not in operation or effective when formally passed, but was expressly stated on its face not to have any effect

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until certain named contingencies occurred which might, as a fact, never occur.

Without expressing any opinion, therefore, upon the question whether or not the Chief Justice in hearing the appeal of the defendants, respondents, was acting as judge of the court or as *persona designata*, I am of the opinion that the appeal should be dismissed.

IDINGTON J.—The appellant is a municipal corporation of which the powers that it enjoys are set forth in its amended charter, 3 & 4 Edw. VII. ch. 64.

One of the amendments therein relates to the power to close streets, and convey same, or part thereof, to a railway company, and is for our present purpose fairly abbreviated as follows:—

(*c*) For diverting or closing up any roads, streets * * * or lanes * * * or any part or parts thereof * * * and for conveying the same or any part thereof to a railway company * * * or to any person * * * and a conveyance to a railway company or to any person, made in pursuance of such by-law, shall absolutely vest in the company or person the fee simple in the land intended to be or purporting to be conveyed by the city to the company or person, and for determining what persons or classes of persons (if any) are injuriously affected by the exercise of the powers contained in this sub-section, and are entitled to compensation for damages by reason thereof, and no other persons or classes of persons shall be so entitled unless such determination shall be amended, on appeal to a judge of the Court of King's Bench as hereinafter provided, and any advantage which the real estate, trade or business of any person may derive from the exercise of such powers * * * shall be deducted from such compensation and the amount of any claim for compensation by any person, entitled, as above provided, which shall include any damage to trade or business, shall, if not mutually agreed upon, be determined by arbitration under this Act.

(*c*1) If any person be dissatisfied with the determination as to persons, or classes of persons, injuriously affected, as above mentioned, he may appeal therefrom to a judge of the Court of King's Bench, in which case he shall, within ten days after the passage of the by-law, apply to a judge sitting in chambers and produce to the judge a copy of the by-law and shew by affidavit that he is interested and such facts and circumstances as he claims entitle him to suc-

ceed upon such appeal. The judge, after service upon the city of a summons to shew cause in such behalf, may change, add to or diminish the persons or classes of persons so determined by the by-law, or may dismiss such appeal, and, according to the result of such an appeal, may award costs for or against the city. The decision of such judge shall be final and conclusive, and shall not be appealed from or moved against by any party.

The mayor, treasurer and comptroller of the appellant, professedly acting on its behalf, executed an agreement dated 20th October, 1906, which the vice-president and secretary of the Canadian Northern Railway Company also executed apparently on behalf of latter. This agreement recited that said company had asked the city to close certain streets and lanes which the company required to be closed in order that it might establish principal workshops there, and that the company had agreed to construct a subway and overhead bridge according to terms and stipulations thereinafter provided. Thereby the city, in consideration of the premises, granted permission to the company to enter upon Pembina Street (one of those to be closed) and thereon construct a subway sixty-six feet wide, and the company agreed to construct accordingly as specified, that the construction should be commenced in seven months from date thereof and completed within sixteen months from said date, but, if the company raised the grade of its road and yard, the city was to extend the term limited for completion for six months.

The agreement provided for a number of details, incidental to this project, which need not be referred to.

Then the company covenanted to establish upon the ground indicated and forever there maintain the principal buildings and workshops of its system between Lake Superior and the Rocky Mountains. The

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buildings were specified and the work of construction was to begin forthwith and be completed in two years from said date. The company agreed to indemnify the city

> from all actions, causes of actions, claims, damages and compensation to or in respect of any real estate (if any) injuriously affected by the construction of the subway and the overhead bridge, and the closing of said streets and lanes including damages (if any) to trade or business carried on thereon by reason of or resulting from anything done thereunder, which the city might be obliged to pay.

But it was thereby declared and determined, pursuant to sub-section (*c*) of section 708 (being that above abbreviated), that no person or class of persons were injuriously affected by the exercise of the powers contained in said sub-section, in respect of the closing of said streets and lanes, or entitled to compensation for damages by reason thereof.

It was graciously stated, in the closing part of the sentence setting this forth, that nothing therein

> contained should affect the rights conferred by said sub-section of appeal to a judge of the Court of King's Bench.

The irony of this gracious concession becomes more apparent when we observe that there is, in the sub-section named, no such right of appeal conferred, but only is by another sub-section not named in the entire agreement.

By what authority the appellant's mayor and other officers executed this, nowhere appears before us. And when questioned in argument here and it was pointed out from the Bench that the transaction of any such business by appellant must be authorized by a by-law, as required by section 472 of the charter, it was only faintly suggested in answer that there probably existed a by-law of appellant authorizing and directing the agreement.

Let us for the moment presume there was such a by-law, in conformity with said section 472, which is as follows:—

472. The jurisdiction of the council shall be confined to the city, except where authority beyond the same is expressly given; and the powers of the council shall be exercised by by-law when not otherwise authorized or provided for.

The declaration and determination set forth above, as in the agreement must, by the very nature of the contract and of the by-law power given, be presumed to have been duly and judicially reached and determined by such by-law.

The business was ended. The later steps and by-laws were useless. Are the questions now raised thereanent to be treated as academical? Why, when presumably determined by a by-law adopting the judgment set forth as above, did the city council not let it rest? How could they revise, as it will presently appear they did, the work so done? They, on the theory of a by-law authorizing and directing the agreement with this declaration, were *functi officio.*

The appellant has failed to take any such position heretofore and can hardly hope to take it now in such a proceeding as this. Yet it is the true position and answers any one choosing to refer to and rely upon the agreement and by-law No. 4264 (to be referred to presently) as anything but an offer. And hence the story I have related has a direct bearing on what has been argued before us as will presently appear.

The said agreement further provided

that the city in so far as it has authority, will duly stop and close up those streets and lanes, etc., etc.,

and convey them to the company. This, it is to be noted, is a something to be done in the future.

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Time was to be deemed to be the essence of the agreement.

Again the company binds itself thereby, as soon as it has commenced any of the works contemplated, to promptly and diligently carry on the work to completion.

By paragraph 12, near the close of the agreement, it was provided as follows:—

> Should the company fail or neglect to carry out the covenants or conditions or any of them in this agreement contained, then on such default on the part of the company the streets and lanes or parts of streets and lanes hereby contracted to be conveyed to the company shall revert to and be vested in the city, and the city is hereby authorized at the costs and expenses of the company to do all things necessary to restore said streets and lanes, or parts of streets and lanes to the original condition before the execution of these presents.

There does not seem to have been anything more done by any one until the 24th day of August, A.D. 1907, when we find another agreement of that date purporting to be made between the city and the company. This recites an alleged error in the above mentioned agreement, and that the company agreed to amend it and also to provide a permanent crossing to be used in case of necessity.

The suggested amendment was evidently important and the new proposition perhaps much more so. Both were to be carried out by putting in the two clauses now appearing in this new agreement. And, following them, it was provided that this agreement should be read and construed as and part of the said agreement of 20th October, 1906.

The attestation clause indicates a complete execution, but it is frankly admitted that, at least, the company did not execute until some time in the summer of the following year.

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Chief Justice Mathers, the trial judge, states it was not executed until the 20th of July, 1908, and he says, in the next sentence, that on that day another by-law, No. 5050, upon which respondents rest their claim, was passed. I infer the date may have been stated by counsel before him and that he has given the correct date.

On the 30th September, 1907, a by-law, No. 4264, had been read by the city council in which the agreement of the 20th October, 1906, to which I have so fully referred, was set out in full, and the council therein proceeds to enact, first, that the agreement thereinbefore set out is ratified and confirmed; secondly, that the city grants the right and privilege in the first paragraph of the agreement so set out, and thirdly,

there is hereby stopped and closed up those portions of public streets and lanes contained within the areas bounded as follows:—

and then describes the land. The fourth section of the by-law enacts that:—

The city by deed executed by its proper officers shall convey to the Canadian Northern Railway Company the respective parcels of land occupied by the portions of streets and lanes hereinbefore described and directed to be closed up, any of which the city by said agreement agreed to convey to the company under paragraph eight, and to and at the time agreed upon.

Sections 5 and 6 are as follows:—

5. It is hereby determined that persons who are, or may be injuriously affected by the exercise of the powers contained in this by-law and in the said agreement, and who are entitled to compensation for damages by reason thereof under provisions of the Winnipeg Charter, are all persons having any estate or interest to the extent of such estate or interest in real estate hereafter described, or any part thereof, that is to say, as follows:—

Real estate fronting upon that part of Pembina street occupied or opposite the subway and its approaches.

6. This by-law shall come into force and effect on the execution of

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the supplementary agreement dated the twenty-fourth day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

Let us observe that this section 5 is quite inconsistent with the adjudication set forth in the agreement presumably adopted by a missing by-law.

This by-law, it is now strongly contended, was passed on the day it bears date, within the meaning of the word "passage" in the amended charter, subsections (*c*) and (*c*1) relative to the by-laws thereunder, and must be held to mean in law that this inchoate and incongruous business was so ended then and there that the respondents were bound to have appealed to the judge within ten days from date of said by-law.

Before considering that fully I will continue the story. The deferred execution of the agreement having taken place on the 20th July, 1908, by-law No. 5050 was passed. Its enactments are as follows:—

1. The supplemental agreement dated the twenty-fourth day of August, A.D. 1907, between the City of Winnipeg and the Canadian Northern Railway Company respecting the amendment to the agreement between the said parties dated the twentieth day of October, A.D. 1906, is hereby ratified and confirmed, and said agreement dated the twentieth day of October, A.D. 1906, is hereby ratified and confirmed as amended.

2. By-law No. 4264 is hereby ratified and confirmed, and declared to be now in force.

Within ten days of the passage of this by-law the respondents appealed, under the amendment first quoted above, to the then Chief Justice of the Court of King's Bench for Manitoba, who then issued a summons which was served on appellant, and on its hearing the latter appeared as the order recites and the learned Chief Justice made an order putting respondents on the list of those entitled to have damages assessed.

It seems no objection was specifically taken to the jurisdiction of the learned Chief Justice, but an argument was made that the time must be computed from the date of by-law No. 4264, and not from that of No. 5050.

The order made curiously enough refers to the former by-law, but not to the latter.

Nothing more was done until the 10th of November, 1910, when notice was given by respondents to appellant, naming an arbitrator under the Act, to determine the damages owing the respondents.

No explanation is given for the delay, but I assume it probably was felt by the respondents that until the works had been proceeded with the injury might not be properly appreciated.

Thereupon the appellant moved for an injunction to restrain the respondents from proceeding.

The motion was, by consent, turned into one for judgment and Chief Justice Mathers ordered as applied for. From that order an appeal was taken to the Court of Appeal and the order reversed.

The appellant now seeks by this appeal to have the order restored. Is it not clear that the first agreement was in fact abandoned and the situation as if it had never existed ? Is it not also clear it had been broken and become impossible of execution ?

The question raised is whether the words "the passage of the by-law" are to be confined to the date of by-law No. 4264, or the date of by-law No. 5050, when the former first became effective, according to the conduct of the appellant and its very language in the latter by-law.

The appellant's claim is certainly remarkable and most unjust.

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The language of by-law No. 4264 seems to indicate that that by-law was not to be passed or considered so until ratified by the council, as it was by the later by-law No. 5050.

It is urged the language used in the former refers to a then ratification by the council of the amending agreement. It can only be reasonably claimed, at the most, that the language is so very ambiguous that the conduct of those using it may well be looked at as a guide to its meaning, and if so their appeal seems hopeless.

For nothing can be clearer than that the later by-law is that which the council of appellant rested upon to give vitality to the whole business about which they were concerned.

Test the issue raised by the obvious legal position that by-law No. 4264 left the matter in.

It would have been most hopeless for the respondents to have acted on the assumption that by-law No. 4264 had been passed.

How could they have ventured to nominate an arbitrator to settle their damages? How could they have approached any judge to ask him to name another, if the appellant's council had refrained from appointing, or a third, in case driven to resort to the provision in that behalf, to fill up the board of arbitrators? How could they appeal to any judge, as the very sections first above quoted require and entitle until they could present him a complete and valid by-law? It would have seemed as hopeless an attempt as ever was launched to have tried any of these things.

But if the court had taken such a view and constituted the board, how, it may be asked, could its

award be enforced ? What authority could the appellant's council have to levy and pay such damages ? Yet these might all have been the realities produced if the respondents had promptly proceeded in the Autumn of 1907, as it is now urged was their legal duty, and got put on the list, and had an arbitration. Nor does the absurdity end there if we look at the long history I have set forth. The appellant's mayor and, if legally authorized, its council, also had determined in October, 1906, no one entitled to claim for injury; and a year later tentatively reversed this finding whilst waiting for the railway company to decide whether to accept the new offer or not.

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The times named in the original agreement for the company to proceed had long since elapsed. Their contract, if such it was, had been broken, and the hypothetically closed streets had, as the agreement provided for, automatically reverted to the city by virtue of the terms I have quoted.

The power of the city had become exhausted by the terms of the first agreement if we assume a by-law had been properly passed, to direct and authorize it.

The adoption, in by-law No. 4264, by the city of this broken contract, was a most questionable proceeding. But until the matters involved in said contract had been rehabilitated by the mutual agreement thus alleged, by-law No. 4264 stood entirely as an offer.

The facts demonstrate of necessity that everybody concerned must concur in restoring the broken contract, or in re-creating it in an amended form. And if the old one was to be used, then, in doing so something had to be done by mutual consent to waive the breaches already apparent and accede to the amendments submitted and insisted on.

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I will not say such a thing was impossible; but I do say that in my opinion it was quite impossible for one party thereto to do that which not only needed waiver, but an entire abrogation of the terms of the agreement then become absolutely impossible when No. 4264 was read, and the farce gone through of calling it a by-law which was to adopt an impossible contract.

The clear truth is, nothing could be done, and everything attempted by by-law 4264 was a nullity, until the parties to the contract had mutually agreed. This stage, for reasons that do not appear on the surface, had never been reached.

No by-law could, under this statute, be held to be within the proper competence of the council until a railway company and the city had mutually so agreed that the council could pass such a by-law as required to close the streets. Indeed, I think the by-law for the latter purpose could only be properly passed after such an arrangement was come to as could justify closure of streets. In default of a by-law to direct the first agreement, it was null and, in my opinion, no such by-law can in law be presumed, though, for argument's sake, assumed above. Thence no proper foundation existed for by-law No. 4264 to rest on in the way of closing of streets.

It is entirely beside the question to point to cases where there may be a by-law properly passed dependent upon the happening of a named event or lapse of time.

The foundation for this appellant's council's power to pass a by-law closing streets as provided, had not been laid when this alleged by-law 4264 was read.

Its first effort, if ever carrying sparks of vitality,

had proved abortive. Its second had no justification in law unless and until there had been reached a mutual agreement. It is quite obvious that there was not only a hitch in arriving at such an agreement, but that it never was supposed by the council there was anything to be hoped for until the company had yielded and acceded to the much more onerous terms than those originally proposed to them.

Suppose all those whom the council finally declared, (contrary to their first declaration and determination), entitled to damages, had proceeded and had them assessed between September, 1907, and July, 1908, I suspect they and appellant's council would have realized the absurdity of the present contention.

However much the curative section 525, to which we are referred, may help over the vicious first step of adjudging as was done and of which I say nothing save to note the gross impropriety of such a proceeding, it cannot help to render competent that which was entirely incompetent.

I may remark we have no evidence of the proceedings having been taken to render said curative section operative.

I have the gravest doubt as to the propriety of this whole proceeding. The question of jurisdiction was not properly raised as it should have been, if doubted, and then been followed by an appeal or prompt application for prohibition, or default that the question raised before the judge when the time came for a judge to nominate an arbitrator. As an application for an injunction it raises a question of the discretion of the court, in cases of application for injunction, wherein the imperative requirements of settled practice have not precluded such discretion,

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and if discretion ever was to be exercised it certainly does not appear on these facts a proper case for exercising it to perpetrate an injustice. Moreover, the restraining an arbitration which has, on appellant's theory, no legal foundation and can determine nothing has been refused. See *North London Railway Co.* v. *Great Western Railway Co.*(1). As this feature of the case was not fully argued I do no more than express my doubts.

I think the appeal should be dismissed with costs.

DUFF J. agreed with Davies J.

ANGLIN J.—In my opinion the phrase "the passage of the by-law" in sub-section *c*(1), of section 708, of the Winnipeg Charter (3 & 4 Edw. VII. ch. 64, sec. 15 (Man.)), means a final enactment of the by-law by the municipal council such that no further action by it in the nature of confirmation or ratification is requisite in order to make the by-law operative or effective. Where a by-law provides that it shall come into force only upon its being subsequently ratified or confirmed by the council "the passage of the by-law" is consummated only when such ratification or confirmation is had. The concluding clause of by-law 4264 of the plaintiff corporation is as follows:—

> 6. This by-law shall come into force and effect on the execution of the supplementary agreement dated the twenty-fourth day of August, A.D. 1907, by the Canadian Northern Railway Company and the City of Winnipeg and duly ratified by council.

Although ungrammatical, however read, having regard to all the circumstances, including the subsequent action of the council in passing by-law 5050,

(1) 11 Q.B.D. 30.

this provision of by-law 4264 was, I think, intended to make the efficacy of that by-law for any purpose dependent entirely upon its subsequent ratification by the municipal council. This ratification was given by by-law 5050 and the time for the appeal provided for by clause $c(1)$, of section 708, ran only from the date of the enactment of that by-law.

In this view of the case it seems quite unnecessary to refer to the other matters presented in argument.

The appeal fails and should be dismissed with costs.

BRODEUR J.—I agree in the opinion stated by my brother Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *Theodore A. Hunt.*

Solicitors for the respondents: *Aikins, Fullerton, Coyne & Foley.*

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*Nov. 7.

THE BROMPTON PULP AND PAPER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

NARCISSE BUREAU (PLAINTIFF) ... RESPONDENT.

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

Appeal—Jurisdiction—Matter in controversy—Damming watercourse—Flooding of lands—Servitude—Damages—Objection to jurisdiction—Practice—Costs.

The plaintiff claimed $300 (the amount awarded by arbitrators) for damages in consequence of the defendants' dam penning back the water of a stream in such a manner as to flood his lands; he also asked for the demolition of the dam and an order restraining the defendants from thereby causing further injury to his lands. By the judgment appealed from the award was declared irregular, but damages, once for all, were assessed in favour of the plaintiff for $225, recourse being reserved to him in respect of any further right of action he might have for the demolition of the dam, etc. On an appeal being taken by the defendants the plaintiff did not move to quash, as provided by Supreme Court Rule No. 4, but took objection, in his factum, to the jurisdiction of the Supreme Court of Canada to entertain the appeal.

Held, that the only issue on the appeal was in respect of damages assessed at an amount below that limited for appeals from the Province of Quebec. The appeal was, consequently, quashed, but without costs, as objection to the jurisdiction of the court had not been taken by motion as provided by the Rules of Practice. *Price Brothers & Co.* v. *Tanguay* (42 Can. S.C.R. 133) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

Superior Court, sitting in review, at Quebec, by which the judgment of the Superior Court, District of Beauce (H. C. Pelletier J.), was reversed and the plaintiff's action was maintained in respect of damages with costs.

The conclusions of the plaintiff's *demande,* as amended, asked that an award of arbitrators, by which he was given $300 for damages suffered on account of his lands being flooded in consequence of the defendants increasing the height of their dam at the outlet of Lake Saint Francis, in the County of Beauce, should be ratified; that the defendants should be condemned to pay him the amount of damages so awarded for the period between the 31st of October, 1907, and the date of the action (8th May, 1908); that the dam complained of should be demolished, and that the defendants should be enjoined from troubling him in the enjoyment of said lands and should cease using the right of servitude they had, under the statute, in regard to the use of improvements made in the watercourse for industrial purposes. The action was dismissed at the trial, but, on an appeal by the plaintiff, the Court of Review reversed this judgment, declared the award irregular, assessed damages to the plaintiff in the amount of $225, once for all, and entered judgment in his favour for that amount, with costs, at the same time reserving to him any recourse he might have in respect of demolition of the dam, etc. This judgment was affirmed by the judgment now appealed from.

The respondent, in his factum, took objection to the jurisdiction of the Supreme Court of Canada to entertain the appeal, but made no motion to quash, as provided by Supreme Court Rule No. 4, and, on the

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appeal coming on for hearing, the same objection was made.

J. H. Kelly for the respondent. This is an action solely for the recovery of damages awarded at $300, and only $225 have been allowed; the *demande* for demolition and in respect of *troubles de possession* are merely subsidiary and alternative in the event of the defendants refusing to pay damages. Undoubtedly the defendants have the right to the use permitted by the statutes relating to the improvement of watercourses, but that right cannot be exercised except upon compensation for injuries thereby caused. We simply deny the right unless compensation for injury is made. The respondent has accepted the award made by the judgment of the Court of Review, which has been affirmed by the judgment appealed from. The only question in issue is whether or not the amount of that award should be reduced. We refer to section 46 of the "Supreme Court Act," and to that part of the judgment under appeal which refuses adjudication in respect of the claims for demolition and injunction; as to which recourse has merely been reserved in the event of further action being taken.

Stuart K.C., for the appellants, contended that the form of the action was *negatoria servitutis,* and that some interest in real estate and the use thereof was involved in the appeal.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—In the respondent's factum objection is taken to the jurisdiction of this court.

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The Chief Justice.

The question in issue between the parties is with respect to the right of the appellants to build on their property a dam which backs up the water of a stream and floods the lands of the respondent. In the court below it was decided that the defendants, now appellants, had the right to erect the dam upon payment of such damages as might result, but the right to renew the demand, if the conditions were altered, was reserved to the respondent. The only question in issue in this court is as to the amount of the damages which are not within the appealable limit.

We are all of opinion that the court is not competent to hear this appeal. As to costs, I think we must follow the rule laid down in *Price Brothers & Co.* v. *Tanguay*(1). The appeal should be quashed without costs as the objection was not taken by the respondent as provided by the Rules of Practice.

Appeal quashed without costs.

Solicitors for the appellants: *Pentland, Stuart & Brodie.*

Solicitors for the respondent: *Talbot & Guindon.*

(1) 42 Can. S.C.R. 133.

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*Oct. 10, 11.
*Nov. 6.

FRANK J. WEBSTER (DEFENDANT) . . APPELLANT;

AND

JAMES W. SNIDER (PLAINTIFF) . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Vendor and purchaser—Agreement to convey lands—Consideration—Price in money—Breach of contract—Recovery for "money had and received"—Sale or exchange—Damages.

S. sold his interest in certain lands to W. for a consideration, fixed at $19,000, of which $16,000 was to be satisfied by the conveyance of other lands, alleged to be owned by W. W. then executed a written agreement purporting to sell these other to S., for the sum of sixteen thousand dollars, acknowledged then and there to have been received by the vendor; bound himself to convey them to the purchaser, with a clear title, within one year from the date of the agreement, and time was stated to be of the essence of the contract. Upon default by the vendor to convey the lands, according to the agreement, the plaintiff sued to recover the $16,000, as money had and received for which no consideration had been given. In his defence, W. contended that the consideration mentioned in the agreement was not actually in cash but consisted merely of lands to be conveyed in exchange at a valuation fixed at that amount and, consequently, that the plaintiff could recover only damages to be assessed according to the value of the lands which he had failed to convey.

Held, that, in the absence of evidence of any special purpose as the basis of the agreement, the terms of the contract in writing governed the rights of the parties that the consideration mentioned in the agreement should be regarded as a price paid in money and consequently, the plaintiff was entitled to the relief sought. Judgment appealed from (20 Man. R. 562) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) affirming the judgment of Robson J.,

*PRESENT: Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 20 Man. R. 562.

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at the trial(1), by which the plaintiff's action was maintained with costs.

The circumstances of the case are stated in the head-note.

A. C. Galt K.C. for the appellant.
Hugh Phillipps for the respondent.

DAVIES J.—I agree in the opinion stated by my brother Idington.

IDINGTON J.—The appellant and the late T. R. Snider owned together a farm and equipment, and the latter sold his interest in their joint property to the former for considerations fixed by the bargain at nineteen thousand dollars. Part of this price was liquidated by notes and otherwise, but the details thereof do not concern this appeal. The balance of sixteen thousand dollars it was agreed might be satisfied by the conveyance of a section of land in Saskatchewan which the appellant was bound by contract in writing to convey to the deceased.

This part, of the transactions had between the said parties, took the shape of an agreement (dated 15th October, 1908), which, on its face, purports to witness the sale by the appellant to the deceased, as purchaser of the said Saskatchewan land.

at and for the sum of sixteen thousand dollars in gold or its equivalent to be paid to the vendor at Winnipeg.

That sum the appellant, the vendor, acknowledged thereby to have received.

He bound himself to have the said land con-

(1) 20 Man. R. 563.

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veyed to the deceased within one year from the date of the agreement so that he should have a clear title to the property within said one year from date.

It was expressly stipulated that time should in every respect be the essence of the agreement.

This latter provision, as well as the main purpose of the contract, was so far disregarded that the land was not conveyed as agreed when this suit was launched, on the 11th of May, 1910.

The deceased had, in his lifetime, transferred to the respondent all his interests in the purchase money for sale, of his interest, to appellant and securities therefor, and, amongst others, his rights under said appellant's contract of sale of said Saskatchewan land.

The respondent sued to recover from the appellant the said sum of sixteen thousand dollars and some other balance alleged to have become due on account of other dealings between deceased and the appellant.

The latter claims have been so disposed of that we are not now concerned therewith.

The respondent recovered judgment for said sum of sixteen thousand dollars and interest.

Thereupon appeal was taken by the present appellant to the Court of Appeal for Manitoba, and his appeal was dismissed with costs(1).

In appealing here he urges that in fact the entire dealings between him and deceased in truth constituted one bargain which was an exchange whereby deceased agreed to transfer his interests in the farm and equipment first mentioned to the appellant for the

(1) 20 Man. R. 562.

said Saskatchewan land and the notes, money and other considerations which were to make up the balance.

He claims that on such a bargain for exchange all the respondent can recover by way of damages is the value of this land in Saskatchewan which has not been conveyed and is all that the respondent has lost by the breach of contract now in question.

I do not think it is necessary to enter upon any inquiry here as to what the measure of damages might be in such a case of exchange, for I can find no sufficient evidence to support the appellant's contention. All that appears is a sort of halting statement in his discovery examination put in evidence against him wherein he describes, without shewing how, the transaction as an exchange.

I cannot set aside the written document which this contradicts. Its terms are clear and concise as I have recited. And if I were to draw an inference from those terms and such of the facts as are put before us I would be inclined to say this bargain was independent of the other, and was an afterthought, though possibly immediately after the first agreement.

At all events it may well have been so, and, if not, it rested on the appellant to shew clearly and explicitly what is alleged by him.

If the agreement was of the nature he contends for, then it should have been made to appear in this now in question.

I prefer to take the document as it is and the facts that are admitted as to what preceded its execution. Doing so I see nothing in the appellant's contention as to damages.

He owes sixteen thousand dollars and interest for

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the balance of the price he agreed to give to deceased for what he got from him.

I see no reason to trouble ourselves with nice questions suggested as arising on the agreement by which the appellant bound himself to convey to the deceased the Saskatchewan land. Suffice it to say deceased never executed that document, nor relinquished therefor what he was to get from the appellant; that the latter had a chance given to him to satisfy the balance thereof, but failed to do so, and has failed to shew any good reason why he should have further indulgence.

His conduct throughout seems inexplicable. His attempt to get a new trial has been met by the Court of Appeal in its discretion refusing him that indulgence. It is the settled jurisprudence of this court not to interfere with such exercise of mere discretion unless it involves some question of law or a clear denial of natural justice.

It is consoling to know that in this case, even if the appellant has at last left on his hands the clear title to the land it lies in a country exhibiting meantime such remarkable rises in land values that if his alleged dealing was a fair one he cannot suffer.

I think this appeal must be dismissed with costs.

DUFF J.—The transaction (it was agreed by the parties) was to be treated as a sale for cash. There is no evidence that this agreement was entered into for any special purpose which would prevent us treating it as governing all the rights of the parties or, at all events, such rights as are in controversy in this action. That being so, the executed consideration must be regarded as money paid for which the con-

sideration has wholly failed. The evidence discloses no equity which could properly be held to disentitle the plaintiff to relief.

ANGLIN J.—I agree in the opinion stated by my brother Idington.

BRODEUR J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tupper, Galt, Tupper, Minty & McTavish.*

Solicitor for the respondent: *T. R. Ferguson.*

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*Oct. 4.
*Dec. 6.

THE BRITISH COLUMBIA LAND AND INVESTMENT AGENCY (DEFENDANTS) ..... APPELLANTS;

AND

HARRY H. ISHITAKA (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Chattel mortgage—Sale under powers—Notice—Offer to redeem—Tender—Equitable relief—Evidence—Proceedings taken in good faith.

To impeach a sale under powers in a chattel mortgage on the ground that an offer to redeem was made prior to the time fixed by the notice of sale, the person entitled to redeem is obliged to shew that the amount due under the mortgage was actually tendered or that the mortgagee was distinctly informed that the mortgagor was then and there ready and willing to pay what was so due and, being thus informed of the intention to redeem, refused to accept payment.

In the exercise of his power of sale, a mortgagee of chattels is bound merely to act in good faith and avoid conducting the sale proceedings in a recklessly improvident manner calculated to result in sacrifice of the goods.

And *per* Duff J., he is not obliged (regardless of his own interests as mortgagee,) to take all the measures a prudent man might be expected to take in selling his own property.

Judgment appealed from reversed, the Chief Justice and Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia reversing the judgment of Morrison J., at the trial, and ordering a judgment to be entered in favour of the plaintiff for damages to be assessed.

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

The plaintiff claimed damages for the wrongful seizure and sale of his goods by the defendant assuming to act in virtue of powers contained in a chattel mortgage. The circumstances in which the sale was made are stated in the judgments now reported.

Ewart K.C. for the appellants. The judgment appealed from is erroneous in respect of the facts in controversy; there was no tender nor any waiver by the appellants of the necessity for tender. Even if the sale took place prior to the hour of sale mentioned in the notice, it was, nevertheless, valid inasmuch as the appellants were not bound to await the expiry of time given voluntarily and without consideration. If the judgment in appeal can be so construed as to hold that the sale was improvident or that the appellants wrongfully seized goods which are not included in the mortgage, then, such findings cannot be justified upon the evidence.

We refer to *Ex parte Danks*(1); *per* Cranworth L.J.; Halsbury, vol. 7, pp. 419, 420, note (*q*); *Hawkins* v. *Ramsbottom*(2); *Major* v. *Ward*(3); *Williams* v. *Stern*(4); *Blumberg* v. *Life Interests and Reversionary Securities Corporation*(5).

Travers Lewis K.C. and *Ladner* for the respondent. The trial judge erred in finding that the respondent did not offer to redeem in time, and in refusing him damages suffered by reason of the appellants preventing redemption, or in the alternative, damages by reason of improper exercise of the power

(1) 2 DeG. M. & G. 936.
(2) 1 Price 138.
(3) 5 Hare 598.
(4) 5 Q.B.D. 409.
(5) (1897) 1 Ch. 171.

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of sale; also in refusing damages for the sale of goods of respondent which were not included in the chattel mortgage. Reference is made to Bac. Ab. 7, 722; *Ex parte Danks*(1); Harris on Tender, pp. 69-70; *Major* v. *Ward*(2); *Kennedy* v. *De Trafford*(3); *Latch* v. *Furlong*(4); *Aldrich* v. *Canada Permanent Loan and Savings Co.*(5); and *Ex parte Moore*(6).

THE CHIEF JUSTICE (dissenting).—I have nothing to add to what my brother Idington says as to the legal rights of a mortgagee who sells the property mortgaged under his power of sale. His obligation to exercise that right in perfect good faith is fully established by the authorities to which he refers, if authority be required to support that proposition.

On the facts, I would add: The only question is whether or not we should reverse the provincial Court of Appeal on evidence from which we must, at least, admit, putting it at the very lowest, one may fairly infer that the respondent, on receipt of the notice of the appellant's intention to sell, by private sale, the goods and chattels covered by the chattel mortgage, placed himself in a position to redeem them, and, being in that position, did actually offer to redeem them within the stipulated time. Mr. Wallbridge swears very positively, and his memory is refreshed by entries in his day-book made at the time, that on the morning of the first of May he went to the office of the appellants' solicitors prepared to redeem and that he was then told by Garrett that it was too late. It is quite true he is not so positive that he asked for a

(1) 2 DeG. M. & G. 936.
(2) 5 Hare. 598.
(3) (1896) 1 Ch. 762.
(4) 12 Gr. 303.
(5) 24 Ont. App. R. 193.
(6) 2 Ch. D. 802.

statement of the amount due on the mortgage; but he swears that

> they were not in a position to give a statement at the time anyway.

In my opinion, the basic fact upon which all turns is that the respondent had at his disposal, or could procure the amount required to redeem before the delay to do so had expired. The value of the property covered by the chattel mortgage was worth at least double the amount at which it was offered by private sale, and it was, probably, worth more to the respondent in his logging business than to any one else. In these circumstances, it is not reasonable to suppose that he (the respondent) would allow the property to be sacrificed when it was possible for him to redeem it. I am much impressed by an incident which occurred at the trial when counsel for the respondent, on an objection made by the appellants, abstained from putting in some evidence which it was desired to introduce to shew that Ishitaka was actually in a position to redeem the mortgage. The trial judge then declared that there were negotiations to raise $1,500 on Kato's property and that he, Kato, was willing to let that go in as security for the loan and, on that ground apparently, he maintained the objection to the evidence. That this point, upon which so much depends, namely, the ability to redeem the mortgage, should have been and would have been, were it not for this objection, investigated further is obvious, and I am satisfied that the trial judge refused to admit the evidence because, with all the facts fresh in his mind, he was of opinion that the respondent's contention that he then had the money under his control was sufficiently established.

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The Chief Justice.

As to the sufficiency of the tender, it is not argued that what Mr. Wallbridge did constituted a legal tender; but, if a debtor tells his creditor that he comes to pay his debt and the creditor says that he is too late, or for any other reason refuses to accept the money, the actual production of the money is dispensed with.

Even if there was doubt as to which of the two views of the evidence should prevail, it seems to me that this court should not disturb the judgment of the provincial Court of Appeal which apparently adopted that view of the evidence which the trial judge entertained at the time of the trial and when the witnesses were all before him. The inherent probabilities are that, in view of the intrinsic value of the property, the respondent was able to raise the money he wanted, that the solicitor was instructed to redeem and that the solicitor did his duty in the circumstances.

In the Court of Appeal, Mr. Justice Martin says:—

> This is a case in which I feel I must bring myself to say, with all deference to the learned trial judge, that the weight of evidence is clearly against his finding, and the facts respecting the important interview between the solicitors, when the plaintiff was endeavouring to redeem the mortgage, must be found substantially as testified to by the plaintiff's solicitor.

Chief Justice Macdonald accepts Mr. Wallbridge's evidence as correct, and says:—

> The evidence of Mr. Garrett falls far short of contradicting that of Mr. Wallbridge, and that of Mr. King, his partner, does not touch upon this point because he was not present when this conversation took place.

I would dismiss with costs.

DAVIES J.—I agree with Mr. Justice Anglin.

IDINGTON J. (dissenting).—Want of good faith on the part of the mortgagee selling under a power of

sale is sufficient, if the vendee a party to it, to entitle the mortgagor to have the sale set aside. Short of setting the sale aside he has also a right to recover from the mortgagee damages suffered by reason of the existence of want of good faith.

Some indirect motive on the part of the mortgagee operating to the detriment of the mortgagor is sufficient foundation for such an action. As pointed out by Jessel M.R., in *Nash* v. *Eads*(1), mere indirect motives, such as anger, that lead only to a properly conducted exercise of the power, are not such as I refer to. In that case Jessel M.R. added, in speaking for the Court of Appeal, consisting of himself and Cotton and Lush L.JJ., as follows:—

> He, like a pledgee, must conduct the sale properly, and must sell at a fair value, and he could not sell to himself.

A sale at such a gross undervalue as to lead to the proper inference that a fraudulent purpose existed is also held by all the authorities quite sufficient ground of attack.

In *Kennedy* v. *De Trafford*(2), in appeal (1897), Lord Herschell sets forth the principle to be observed, as follows:—

> Lindley L.J., in the court below, says that "it is not right or proper or legal for him either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor." Well, I think that is all covered, really, by his exercising the power committed to him in good faith. It is very difficult to define exhaustively all that would be included in the words "good faith," but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that he had not been exercising his power of sale in good faith.

(1) 25 Sol. J. 95.

(2) 1896] 1 Ch. 762.

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It is quite clear that when a man has given another an absolute power to sell his goods, in a given event, he must be entitled to presume that it will be exercised honestly and with a proper regard to what honest conduct implies.

On the other hand, he given such a power clearly never was intended to subject himself to be hampered in the business or harrassed by reason merely of the goods having brought less than might under other and more favourable conditions have been realized.

In every case I have seen, and I have read all that have been referred to, the court has been (when the case turned on the question of sale at underprice) careful to observe whether or not there was anything but mere underprice; and, I think, in measuring the effect of a sale at less than the goods might have been sold for, regard must be had to all the circumstances in each case.

A man selling at public auction, after due advertisement and proper effort at the sale to realize the best possible price, might be able to justify to the full a sale to a single bidder at a price he could not be able to justify if, he being absolutely ignorant of the value of the goods over which he had such power, had rushed into the street and sold the same goods at the same price to the first man he met.

In this case, the goods mortgaged had, a year and a half before the sale, cost over twice as much as the mortgagee sold for; what, it was assumed, were the same goods.

The mortgage had been taken to secure eighteen hundred dollars, at six per centum per annum.

There was paid before the proceedings in question, a total of $719, according to respondent, and, accord-

ing to an officer of the appellants, only $674. I assume the latter correct and that, as he puts it, with interest there was $1,274 due.

The appellants allege in evidence the respondent had broken his promises of payment and then a distress warrant was given on 19th April, 1909, to seize.

Respondent having learned in some way not clear, of this, went on the 22nd or 23rd April, 1909, to appellants' office to get a statement of what was due in order to raise the money. When there he was served by appellants' agent with a notice that bears the date of 21st April, 1909, and says that they had entered into possession of all the goods covered by the chattel mortgage, and proposed to sell same by private sale on the first of May, 1909, at twelve o'clock noon, for the sum of $1,500, and that, unless all moneys due on the mortgage were paid on or before the first of May, 1909, the said sale would be consummated and possession transferred to the purchaser for the said sum of $1,500. I may observe that the notice was not addressed to the respondent, but to the original mortgagors.

One Allman, who was with the respondent, says it was after three o'clock in the afternoon, and too late to search the records that day, but next day he would have been ready to pay the amount and take the security offered, and asked for that delay, but was told there was no alternative but paying before eight o'clock that night.

The result seems to have been to discourage and delay respondent and negotiations with Allman fell through. Later he seems to have approached one Kato and arranged with him to raise the money; possibly, I infer, on more moderate terms than Allman was inclined to give.

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Kato was examined and, I infer, was quite willing to have raised the money, but, when asked the question, was met by an objection of the appellants' counsel to it as evidence. Without ruling on this, the court seemed to intimate such a reliance on previous evidence relative to such negotiations that the question remained unanswered.

I may remark here that, when the solicitor through whom that loan was to have been made was called to speak thereto, similar objections were raised and were met by a suggestion on the part of respondent's counsel that he supposed Mr. Wallbridge's statement was accepted.

The court replied the solicitor could not know about that. I merely note these tenderings of evidence on this head and will refer thereto and to the objections later when dealing with Wallbridge's alleged intention to tender.

The appellants had sold the outfit to one Bowes for $1,500 on the 18th or 19th of April, to become operative if title could be made on the 1st of May. Bowes paid $100 to bind the bargain. He had never seen the goods and so far as appears knew nothing of them except from the list. He had agreed with the appellants, as part of his agreement to purchase, to go up to where the goods were, with an officer, and take and keep possession till the time had elapsed for his purchase to become operative.

It cannot be said that such a conditional sale was *ipso facto* invalid unless we discard the authority of Wigram V.-C., in *Major* v. *Ward*(1). But certainly, in observing that case and its authority, we must not

(1) 5 Hare 598.

overlook what the learned judge there said, at page 604. He said:—

> I do not give any opinion how it would be, if an undervalue or any special circumstance were suggested, calculated to impeach the sale.

This purchaser pretends that what he paid was a fair price, but yet admits his purchase was "a highly desirable one."

The officer was instructed to put the goods, when seized, into the possession of the purchaser.

The whole proceeding tended much to damn respondent's chances of raising the money which a delay of a day, as it impresses me, would, in all probability, have enabled him to do without the expenses being multiplied.

It was a case of one man entirely ignorant of what he was selling, bargaining with another equally ignorant of what he was buying, but willing to gamble upon it.

And even though he does not seem to have got all the goods covered by the mortgage he does not complain.

We have no satisfactory explanation of why such haste was made to prosecute the seizure by sending out an expensive expedition in face of negotiations on the 22nd or 23rd to raise the money though the warrant was issued on the 19th and its execution delayed till these later dates, or why the transaction assumed the form it did when both parties were in the dark as to what they bargained about or its value.

And we have no evidence of any disinterested person to speak on behalf of the appellants as to value and none is given discrediting estimates adduced on behalf of respondent.

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The bargain was for the sale and purchase of the goods covered by the chattel mortgage. Strangely enough the bill of sale to Bowes to carry it out assigns goods in a list of which some never were covered by the chattel mortgage and a number of things covered by the description of the goods as given in the mortgage do not appear in this list of goods as assigned. And thus the respondent is left liable for a balance yet payable on the chattel mortgage though, evidently, Bowes would gladly have paid enough to relieve him.

In the absence of evidence of value of these omitted or those wrongfully included this feature of the case is only of some importance as shedding light on the recklessness with which the whole business was transacted.

Another significant thing is that the officer seizing says he was to give up the goods if paid $1,500 and his fees.

What is meant by this ? There was no such sum as $1,500 due on the mortgage apart from his fees and expenses.

Was the officer only concerned as to his fees ? And had Bowes, in fact, managed all the rest, including the vessel's hire and that of the men ?

A cheque was passed afterwards to the sheriff inconsistent with that but why if these instructions were in accord with, and suitable to the actual facts ?

The sale would have been hard to maintain in face of the reckless sacrifice made, and the arrogant conduct and contemptuous disregard of the appellants, in their conduct, and all the attendant circumstances here related, of all fair consideration for respondent's rights in the premises; but, when we find, as I think

we ought, that early in the forenoon of the first of May respondent's solicitor when calling upon the appellants' solicitors to pay them off was told he was too late, that the goods had been sold, I cannot see how such a transaction should be maintained.

It is as clear as anything can well be in this case that respondent, on the 22nd or 23rd of April, as I have taken to be the date of service of notice upon him (though the 23rd or 24th is more frequently given as the time) was negotiating to pay off the appellants, having learnt elsewhere or otherwise of some proceedings being on foot to enforce the mortgage, and that upon receiving this notice he relied thereon and became by virtue of its terms and the circumstances leading up to and surrounding it entitled to rely thereon as giving him the time named to redeem.

It is because of bad faith evinced in all I have shewn on the part of the appellants that the transaction sought to be impeached can be successfully attacked. And if we have to add to that mass of evidence the further finding of a breach of common honesty in violating good faith by withdrawing such a proposal knowing the party was given, both orally and thus in writing, the assurance it shews, can we think of the whole business but as a fraudulent device to defeat the just rights of the respondent ?

The case of *Williams* v. *Stern*(1), so much relied upon, seems beside the point raised here entirely. It was held there that there had been no such reliance put upon the defendant's promise as to furnish binding consideration. That cannot be said here. Indeed, I think respondent's misfortune was to have this notice thrust upon him when, in fact, he was negotiating

(1) 5 Q.B.D. 409.

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with a man who would have relieved him next day if that had been the term.

The fatal tendency of some people is to put off till to-morrow for any excuse what should be done to-day.

And respondent does not seem to have been an exception to that class and put off till the last day.

And then, by reason of his solicitor having been told he was too late, nothing more was done.

I think, from expressions of opinion of the learned trial judge he, evidently, at the trial, was impressed with the correctness of Mr. Wallbridge's evidence, though, later in his judgment charitably covering the incident as a misunderstanding.

It is quite likely this latter is correct finding, but it does not displace what Mr. Wallbridge states, or his client's rights. And the Court of Appeal has so found consistently with any theory of honest error on the part of the appellant's solicitor. I do not think the appellate judgment should be disturbed. It rests on ground which is distinctly taken in the pleadings and the notice of appeal and on the facts, apart from the doubt as to time of tender, ought to remain undisturbed.

I may say a word as to the question of Mr. Wallbridge being in a position to carry out his tender. If a man goes with a cheque or anything not legal tender to offer another he is entitled, if the other broadly refuses to accept anything, to act thereon. If the other refuses because of want of legal tender the opportunity to remedy that can be made use of if time permit, and here the time existed, I infer, before noon.

And, short of proof that the tender has been a sham, I see no answer that can let him, peremptorily declining in broad terms, escape the consequences of his refusal.

The case of *Jenkins* v. *Jones*(1), where tender of the debt without costs, which had not been ascertained, was held sufficient, may well be looked at in this connection and, especially, in light of what Mr. Wallbridge says he was prepared to do.

I think this appeal should be dismissed with costs.

DUFF J.—The grounds of action relied upon at the trial were: First, that goods not comprised in the bill of sale were sold by the appellant company: and, secondly, that the sale was made after the amount of the mortgage debt had, in effect, been tendered. As to the first of these grounds of action I think the weight of evidence supports the conclusion of the trial judge. As to the second I think the respondent, in order to make that ground the basis of a successful contention that the sale was in violation of his rights must shew either that he made a tender or that the mortgagees, being apprised of the fact that he (the mortgagor) was in a position and ready to pay the amount secured by the mortgage, refused to accept payment.

The learned trial judge obviously entertained no doubts as to the good faith of either Mr. Wallbridge or Mr. Garrett; and, I think the conclusion to which he ultimately came after considering all the circumstances, namely, that there had been a misunderstanding, is the most probable explanation of the conflict of testimony which unfortunately occurred. Mr. Wallbridge appears to have had in his mind and to have been only prepared to tender a sum considerably less than the amount which in fact was required to pay off the mortgage and, in such circumstance, one need

(1) 2 Giff. 99.

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not be surprised that he and Mr. Garrett should now prove to have been at cross-purposes.

The mortgage debt had been in arrears for something like six months. Various extensions of time had been granted and, finally, about ten days before the 1st of May, the respondent had been informed that payment must be made before noon on that day. Further requests for extensions continued, but it is not suggested that the respondent actually informed the mortgagees that he was ready to pay the debt until less than two hours before the hour fixed. The onus was on the respondent to shew that he tendered the amount due or that he distinctly and unmistakably made the mortgagees' agents aware that he was ready then and there to pay it and that, thus informed of his readiness to pay, they refused to receive it. In this, I think, he has failed.

A further ground of action was relied upon in the Court of Appeal — that the property was sold at an undervalue owing to the absence of such steps as the mortgagees were bound to take in order to protect the interest of the respondent in securing the best price. It is to be observed that the duty of a mortgagee in exercising a power of sale (as touching the measures to be taken to secure a good price for the property sold), has in recent years been stated by a very high authority, (*Kennedy* v. *De Trafford*(1)), Lord Herschell, at page 185; Lord Macnaghten at page 192; *Nutt* v. *Easton*(2), *per* Cozens-Hardy J., at pages 877 and 878. The sum of the matter appears to be this. He is bound to observe the limits of the power and he is bound to act in good faith, that is to say, he is bound

(1) [1897] A.C. 180. (2) [1899] 1 Ch. 873.

to exercise the power fairly for the purpose for which it was given. If the mortgagee proceeds in a manner which is calculated to injure the interests of the mortgagor and if his course of action is incapable of justification as one which in the circumstances an honest mortgagee might reasonably consider to be required for the protection of his own interests; if he sacrifice the mortgagor's interests "fraudulently, wilfully or recklessly," then, as Lord Herschell says, it would be difficult to understand how he could be held to be acting in good faith. But that is a vastly different thing from saying that he is under a duty to the mortgagor to take, (regardless of his own interests as mortgagee,) all the measures a prudent man might be expected to take in selling his own property. The obligation of a trustee, when acting within the limits of the power, would be no higher, *Learoyd* v. *Whiteley*(1), at page 733, and it is clear that in exercising his power the mortgagee does not act as trustee. The evidence quite fails to establish any violation of the respondent's rights according to these principles. There is not a word in the evidence as to the selling value of the property at the date of the sale. Apart, moreover, from the inadequacy of the evidence as it stands there is a fatal objection based upon the principle that, as a rule, a litigant who intends to rely upon a charge of bad faith must bring it forward distinctly at the trial. Such evidence as was relied upon in the Court of Appeal and in the respondent's factum was not put forward with the object of establishing any such cause of action and was not sifted in cross-examination with a view to its bearing on a claim of that character. Of

(1) 12 App. Cas. 727.

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bad faith or recklessness in the sale as constituting in itself a ground of action there was not, at the trial, from first to last, a single word.

ANGLIN J.—A careful perusal of the evidence of his solicitor has satisfied me that the plaintiff was not, at any time prior to noon on the first of May, 1908, in a position to redeem the defendants' mortgage. For this purpose $1,604.92 ($1,283.65 exclusive of costs) was required. Mr. Wallbridge was, not improbably, misinformed by his client as to the amount due. The latter appears to have assumed from some entries, which he says he saw in some book of the defendants, that about $1,100 was the sum needed for redemption. Negotiations by and on his behalf to raise money for this purpose proceeded on this basis for several days prior to the first of May. Mr. Wallbridge's evidence has convinced me that the money available to the plaintiff for redemption, on the first of May, was only about $1,100 — at the most $1,150. There never was an offer to pay to the defendants, or their solicitors, more than this amount. If Mr. Wallbridge was informed by Mr. Garrett before noon on the first of May, as he says he was, that the sale had been already concluded — a fact which I should certainly hesitate, upon the evidence before us, to find had been satisfactorily established — in the absence of proof that he was in a position to redeem, the plaintiff has not, in my opinion, made out a case entitling him to damages for a premature sale. Unless he was actually able to redeem he, in fact, sustained no such damage.

Without at all determining that it is so as a matter of law, I proceed on the assumption that the notice given by the defendants to the plaintiff operated as a

waiver of their right to sell without notice and entitled the plaintiff to redeem at any time prior to noon on the first of May, 1908.

I agree with Irving J. that the plaintiff failed to prove that his chattels were sacrificed by the mortgagees or that the sale was recklessly improvident. Neither did he shew that property not covered by the mortgage was seized.

With respect, I would allow this appeal with costs in this court and in the Court of Appeal and would restore the judgment of the trial judge.

BRODEUR J.—The respondent has instituted an action in damages against the appellants for an illegal sale of goods subject to a chattel mortgage.

He claims that he offered the amount due on the mortgage before the hour given in the notice, viz., before noon on the first of May.

The only question of fact involved is as to whether or not, on the morning of the first of May, a sufficient tender of the whole amount due was made.

The respondent's solicitor says, in his evidence, that he went on the morning of the first of May to the office of the appellants' solicitor; that he asked him for the amount that was proper to redeem the mortgage, and that he was willing to give him a cheque, and he was informed that the chattels had been sold.

The appellants' solicitor does not remember having seen the other solicitor, but that, after 12 o'clock, he was telephoned to by him about making a tender and he answered him it was too late.

If the circumstances are such as narrated by the respondent's solicitor, he should have made a quick rejoinder and taken the necessary steps to shew that he

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was still in time to make the offer. But he said nothing.

Besides he does not prove that he was ready to pay the whole amount due. The evidence shews that the amount due was over $1,500. However, the respondent's solicitor says that he was

> willing to give a cheque for $1,100, and if they said they could not make up an exact statement to $25, or $50, I would have given it,

and his own statements go to shew that he did not expect that an amount of $300 or $400 more could be claimed under the mortgage.

The tender, if made, was not sufficient, and the appellants were justified in making the sale.

It has been stated that the sale was improvident and that the price obtained was not high enough.

In the notice for sale served upon the respondent he was told that the chattels would be sold for $1,500 if the mortgage was not paid. It was, evidently, the best price that could be obtained. It did not even cover the whole amount due.

It was then for the respondent to find out some purchaser at a better price, and I cannot say that the sale was improvident.

I would allow the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *McPhillips & Wood.*

Solicitors for the respondent: *Bowser, Reid & Wallbridge.*

THE CANADIAN PACIFIC RAILWAY COMPANY AND THE CANADIAN NORTHERN RAILWAY COMPANY ..... APPELLANTS;

AND

THE BOARD OF TRADE OF THE CITY OF REGINA..... RESPONDENTS.

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*Oct. 6, 9.
*Dec. 6.

(REGINA RATES CASE.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Construction of statute—"The Railway Act," R.S.C. (1906), *c.* 37, *ss.* 77, 315, 318(2), 323—(*D.* 1 *Edw. VII. c.* 53)—(*Man.*) 52 *V. c.* 2; 53 *V. c.* 17; 1 *Edw. VII. c.* 39—*Board of Railway Commissioners—Complaints—Evidence—Agreement for special rates—Unjust discrimination—Practice—Form of order on reference.*

In virtue of an agreement with the Government of Manitoba, validated by statutes of that province and of the Parliament of Canada, the Canadian Northern Railway Company established special rates for the carriage of freight, etc., to points in Manitoba, and the Canadian Pacific Railway Company reduced its rates, which had been in force prior to the agreement, in order to meet the competition resulting therefrom. The complaint made to the Board of Railway Commissioners for Canada by the respondents was, in effect, that as similar proportionate rates were not provided in respect of freight, etc., to points west of the Province of Manitoba there was unjust discrimination operating to the prejudice of shippers, etc., to and from the western points. On questions submitted for the consideration of the Supreme Court of Canada,

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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Held, that the facts mentioned are circumstances and conditions, within the meaning of the "Railway Act" to be considered by the Board of Railway Commissioners in determining the question of unjust discrimination in regard to both railways; that such facts and circumstances are not, in law, conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion. (*Cf. The Montreal Park and Island Railway Co.* v. *The City of Montreal* (43 Can. S.C.R. 256).)

APPEAL, by leave of the board, under section 56(3) of "The Railway Act," from an order of the Board of Railway Commissioners for Canada, dated 10th December, 1910, by which the railway companies were directed to publish and file new tariffs removing the discrimination, declared to exist, in the tariffs then in force to points in the Provinces of Manitoba, Saskatchewan and Alberta from Fort William, Ont., Port Arthur, Ont., and points east thereof, in favour of Winnipeg, Man., and other points in the Province of Manitoba, by reducing the rates from Fort William, Port Arthur and points east thereof to Regina and Moose Jaw, in Saskatchewan, and other points west of the said favoured points.

The order of the Board of Railway Commissioners, granting leave for the appeal, was as follows:—

"It is ordered that the said railway companies be, and each of them is, hereby granted leave to appeal to the Supreme Court of Canada, from the said order, dated December 10th, 1910, upon the questions hereinafter stated, which, in the opinion of the board, are questions of law, subject to and upon the terms and conditions following:—

"1. That the applicant undertake to set the appeal down for and expedite the hearing thereof at the next sittings of the Supreme Court of Canada.

"2. That if the appeal be not argued at the said sit-

tings of the Supreme Court, for any reason for which the applicant may be to blame, then, the appeal shall not operate as a stay of the said order dated the 10th of December, 1910, unless this board shall otherwise order.

"3. That the questions for argument upon the said appeal arise out of the following facts:—

"1. (*a*) In the year 1888, an agreement was made between the Northern Pacific and Manitoba Railway Company and Her Majesty the Queen, represented by the Railway Commissioner for the Province of Manitoba, and was approved and ratified by the Legislature of Manitoba, by chapter 2 of the statutes passed during the second session of 1888. By that Act, the company was empowered to acquire and complete the Red River Valley Railway, located between the International Boundary and the City of Winnipeg, and certain other branches and extensions as therein set forth, and by the agreement, which is Schedule "A" to the Act, among other things, the Lieutenant-Governor in Council of the said province agreed to aid the construction of the railway, by guaranteeing the bonds of the company to the extent of $6,400 per mile of railway, and by giving to the company certain other benefits and advantages, as set forth in the said agreement, and in consideration of the benefits and advantages agreed to be granted to and conferred upon the company by the said agreement, it was agreed by the company that the Lieutenant-Governor in Council of the said province shall always have full power to fix, regulate and determine from time to time the freight rates and charges for transportation upon the said lines of railway, as by reference to the said Act and agreement will more fully appear.

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"(*b*) This agreement was modified by another agreement, made between the same parties in the following year, and approved by the Legislature of the Province of Manitoba, by chapter 17 of the statutes of 1899, as by reference to the said statute and agreement will more fully appear.

"By clause 8 of the amending agreement, it was provided:—

"That the power to regulate, fix and determine rates, conferred upon the Lieutenant-Governor in Council, by section 19 of said schedule, for railways of the Province of Manitoba, shall be limited so that the tolls, rates, and charges shall not be revised so long as the net earnings of the railway companies shall produce less than 10% per annum of the capital actually expended in the construction and equipment of the railway line, but no reduction shall be made unless the net income of the company shall be greater than 10% upon the capital so actually expended, exclusive of the aid given by the province.

"(*c*) At that time, the Canadian Northen Railway Company was not in existence, nor was there any line between Fort William and Winnipeg, except the line of the Canadian Pacific Railway Company. On the opening of the line of the Northern Pacific and Manitoba Railway, from Duluth to Winnipeg, by the direction of the Manitoba Government, rates were fixed by that company, which were lower than the rates of the Canadian Pacific Railway Company from Fort William to Winnipeg.

"(*d*) Between Port Arthur and Fort William and the undermentioned points, under Canadian Pacific Railway Company tariff No. 62, May 1st, 1887, the following rates had been in effect for some years:—

	1	2	3	4	5	6	7	8	9	10
Winnipeg, Emerson, Morris	133	112	92	69	63	49½	35	35½	39½	29
Portage la Prairie	141	118	84	71	64	54	38	27½	54	31½
Brandon	158	132	105	79	71	60½	42	41	60½	35½

"After the 'Northern Pacific and Manitoba Government' agreement was assented to, on the 4th of September, 1888, the following rates were printed by the Canadian Pacific Railway Company, in their tariff No. 118, October 25th, 1888:—

	1	2	3	4	5	6	7	8	9	10
Winnipeg, Emerson, Morris	116	98	80	66	57	47	35	35	35	27
Portage la Prairie	125	105	85	69	59	51½	38	37	39½	29½
Brandon	142	119	96	77	66	58	42	40½	46	33½

"But no reduction was made in the Regina rates by this tariff, which left those rates, as they had been for some years before, as follows:—

	1	2	3	4	5
Regina	197	164	131	99	89

"And the board has found, as a fact, that the above mentioned reductions in the Canadian Pacific Railway Company's rates in Manitoba, were caused by the action of the Northern Pacific and Manitoba Railway Company, in reducing its rates between Duluth and Winnipeg, which, in turn, was brought about by the said agreements with the Manitoba Government.

"(*e*) Afterwards, the Canadian Northern Railway Company was incorporated and acquired the lines of railway of the Northern Pacific and Manitoba Railway Company, in the Province of Manitoba, subject to the agreements with the Government of the Province of Manitoba above referred to.

"On the 11th of February, 1901, an agreement was made between the Government of the Province of Manitoba and the Canadian Northern Railway Com-

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pany, confirmed by the Legislature of that province, by chapter 39 of the statutes of 1901. By the terms of the last mentioned agreement, the Government of the Province of Manitoba agreed to guarantee the bonds of the Canadian Northern Railway Company, to the amount and upon the terms mentioned in the agreement, and to grant and confer upon the said company certain valuable franchises, benefits and advantages as in the agreement and statute is more fully set forth, and as the consideration therefor the Canadian Northern Railway Company agreed to make a reduction amounting to about fifteen per cent. of the tariff rates then in force, for the carriage of all freight (other than grain), from and to points in Manitoba, and from and to points in Manitoba from and to Fort William and Port Arthur. By the same agreement, the Canadian Northern Railway Company was empowered to lease from the Government of Manitoba and to acquire and operate the Northern Pacific and Manitoba Railway line.

"(*f*). The Canadian Northern Railway was completed in February, 1902, from Port Arthur to Winnipeg, and in the company's tariff, April 21st, 1902, the following rates to Manitoba points were established.

	1	2	3	4	5	6	7	8	9	10
Fort William to Winnipeg.....	89	75	60	45	40	34	25	25		20
Portage la Prairie	105	88	70	53	48	40	28	29		23
Brandon	120	100	80	60	54	46	32	32		27

"(*g*) These are the rates in effect at the present time, and owing to the competition existing between the two railway companies were adopted by the Canadian Pacific Railway Company, in its tariff, dated May 10th, 1902.

"(*h*) The Canadian Pacific Railway Company was

not a party to any of the agreements above mentioned, and was not legally bound to make the reductions it did, in the Province of Manitoba, but in order to hold its business, as a result of competition, it did, in fact, reduce its rates.

"(*i*) Subsequently, the Canadian Northern Railway Company, having obtained authority from the Parliament of Canada, extended its lines beyond the confines of the Province of Manitoba, and constructed lines of railway in the Province of Saskatchewan, which entered into competition there with the lines of the Canadian Pacific Railway Company in that province, at many points, the City of Regina being one of the points common to both lines.

"(*j*) In the present case, the City of Regina has complained that the rates to Regina, from Fort William, are higher in proportion than the rates from Fort William to Winnipeg and are, therefore, unjustly discriminatory as between localities.

"The said rates are, in fact, higher in proportion.

"The board has held that it was not the intention of Parliament, in passing section 315 of the 'Railway Act,' to permit railway companies to create different circumstances and conditions by entering into a contract with some one and so defeat the intention of the section, and that the circumstances and conditions which, if not substantially similar, may justify different treatment of different localities, must be traffic circumstances or traffic conditions, not circumstances and conditions which may be artificially created by contract.

"The board has also held that it has been proved that the Special Class Freight Tariffs of the Canadian Northern Railway Company and the Canadian

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Pacific Railway Company between Port Arthur and Fort William and points west thereof, unjustly discriminate in favour of Winnipeg and other points in the Province of Manitoba, to the prejudice and disadvantage of Regina and Moose Jaw, and other points west of that province, and that the companies should be required to reduce their rates so as to remove this discrimination by publishing and filing new tariffs.

"The questions for the consideration of the Supreme Court of Canada are: Were the facts set out above and more fully referred to in the record herein, circumstances and conditions within the meaning of the 'Railway Act,' which justify the existence of lower rates from Fort William to Winnipeg than to Regina: (*a*) With regard to the Canadian Northern Railway Company; (*b*) with regard to the Canadian Pacific Railway Company ?"

The issues raised on the appeal are stated in the judgments now reported.

Chrysler K.C. for the appellants, the Canadian Pacific Railway Co.

Ewart K.C. and *George F. Macdonnell* for the appellants, the Canadian Northern Railway Co.

Wallace Nesbitt K.C. and *Orde K.C.* for the respondents.

THE CHIEF JUSTICE.—The Board of Railway Commissioners has found as a fact, which is not open for argument, on this appeal, that the special class freight tariffs of the appellants in question unjustly discriminate in favour of Winnipeg and other points

in Manitoba to the prejudice and disadvantage of Regina, Moose Jaw and cities or towns, generally, west of Manitoba.

It was contended by the railway companies that this discrimination was justified by certain agreements between one of the railway companies and the Manitoba Government. The question submitted on this appeal is:—Are those agreements "circumstances and conditions" within the meaning of those words as used in section 315 of the "Railway Act" to be taken into consideration by the Railway Commissioners upon a complaint of unjust discrimination made by the Board of Trade of Regina, that city being a shipping point affected by those freight tariffs? That those agreements are "circumstances and conditions" to be taken into consideration by the Board of Railway Commissioners, in considering the question of unjust discrimination, cannot, it seems to me, be doubted; but it is for that board to decide what effect is to be given to them in the circumstances and I am entirely at a loss to understand what is the question of law involved. It is for the Board of Railway Commissioners to say, having taken the agreements into consideration as relevant facts, if they will give any and what weight to them.

The statute ((D.) 1 Edw. VII. ch. 53, sec. 3) confirming the agreement specially says that it shall not be construed so as to create discrimination:—

> Nothing in this Act or in the indentures contained in the schedules hereto, or done in pursuance of this Act or of the said indentures, shall
>
> (*c*) authorize the Canadian Northern Railway Company, contrary to the meaning of "*The Railway Act*," to charge or demand any discriminating rate for the carriage of freight or passengers, or to allow or make any secret or special tolls, rebate, drawbacks or concession, or any higher rates for the carriage of freight or passengers

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than those heretofore or hereafter fixed under the authority of existing or future legislation of the Parliament of Canada, by the Governor in Council, or by the Railway Committee of the Privy Council, or by any commission or other authority.

I would dismiss with costs.

DAVIES J.—I agree in the opinion stated by Duff J.

IDINGTON J.—In answer to the questions submitted herein I am of opinion that the facts set out in the case stated by the assistant commissioner of the Board of Railway Commissioners for Canada do not constitute and are not "circumstances and conditions within the meaning of the "Railway Act," which, of imperative legal necessity, justify the existence of lower rates from Fort William to Winnipeg than to Regina, either by (or "with regard to") the Canadian Northern Railway Co. or the Canadian Pacific Railway Co.

I cannot read the questions submitted as counsel for the railway companies contend they must be read; and, therefore, try to make my meaning clear by the interposition of the words "of imperative legal necessity." In any other sense than that I thus adopt I do not consider any question of law, such as can be submitted to this court is involved. In other words, notwithstanding the facts set out, the Board of Railway Commissioners is not as a matter of law (such as may be submitted in appeal to us as provided by the statute) required to permit the continuation of such discrimination.

The appeal should be dismissed with costs.

DUFF J.—The question whether in the circumstances presented in this case there has been unjust

discrimination is, in my opinion, committed to the Board of Railway Commissioners for decision as a question of fact by section 318 of the "Railway Act." That board, in deciding such a question, is, of course, to act judicially and, consequently, to have regard to all relevant facts. Since the decision of this court in *Montreal Park and Island Railway Co.* v. *City of Montreal*(1), it is, I think, not open to dispute here that the "circumstances and conditions" referred to in the question submitted are facts relevant to the point in issue. It is impossible, therefore, either to affirm or to deny as a proposition of law that those "circumstances and conditions * * * justify" (in the language of the question) "the existence of lower rates from Fort William to Winnipeg than to Regina." Whether that is so or not is a question of fact; and the Board of Railway Commissioners is the tribunal appointed by law to pass upon it.

ANGLIN J.—The Board of Railway Commissioners has, under sub-section 3 of section 56 of the "Railway Act," given to the Canadian Pacific Railway Company and the Canadian Northern Railway Company leave to appeal to this court from its decision requiring these two companies to remove

> the discrimination at present existing in the tariffs to points in the Provinces of Manitoba, Saskatchewan and Alberta, from Fort William, Port Arthur, and points east thereof, in favour of Winnipeg, and other points in the Province of Manitoba, and against points west thereof by reducing the rates from Fort William, Port Arthur, and points east thereof, to Regina, and Moose Jaw, and other points west of the said favoured points,

upon the following question, stated by the Board of

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Railway Commissioners as being, in its opinion, a question of law:—

Were the facts set out above, and more fully referred to in the record herein, circumstances and conditions within the meaning of the "Railway Act," which justify the existence of lower rates from Fort William to Winnipeg than to Regina: (*a*) With regard to the Canadian Northern Railway Company; (*b*) with regard to the Canadian Pacific Railway Company?

Section 315 of the "Railway Act" is, in part, as follows:—

315. All such tolls shall always, under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars, passing over the same portion of the line of railway, be charged equally to all persons and at the same rate, whether by weight, mileage or otherwise.

4. No toll shall be charged which unjustly discriminates between different localities.

5. The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line, is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the board is satisfied that owing to competition, it is expedient to allow such toll.

6. The Board may declare that any places are competitive points within the meaning of this Act.

Although Winnipeg is admittedly a competitive point, that feature of the situation, it is conceded, is not now material to the question with which we are asked to deal.

Unfortunately, as too frequently happens in these cases, counsel are unable to agree upon the scope and purview of the question submitted.

Are the words, "which justify," to be taken to mean, "which *may* justify," "which *do* justify," or "which *conclusively* justify"? The first or the third form would raise a question of law; the second would raise a question of fact, and on that ground must be rejected, if any other interpretation is admissible.

For the appellant railway companies it is contended that we are asked to determine whether the "facts" referred to in the question submitted are or are not "circumstances and conditions" which may justify a discrimination in rates and which the Board of Railway Commissioners should, therefore, receive in evidence and take into account in deciding, as a question of fact ("Railway Act," sec. 318), whether "the circumstances and conditions" under which traffic is carried to the several points mentioned in its order are or are not "substantially similar." Counsel for the company stated that the Board of Railway Commissioners treated the "facts" referred to as irrelevant and practically inadmissible.

A passage in the notes of the assistant chief commissioner certainly lends colour to the contention of the appellants as to the meaning of the question submitted. He said, at pages 183-4:—

> The board has held that it was not the intention of Parliament, in passing section 315 of the "Railway Act" to permit railway companies to create different circumstances and conditions by entering into a contract with some one and so defeat the intention of the section, and that the circumstances and conditions which, if not substantially similar, may justify different treatment of different localities, must be traffic circumstances or traffic conditions, not circumstances and conditions which may be artificially created by contract.

Apart from the statutory provision, to which I shall presently refer, and which, apparently, was not brought to the attention of the Board of Railway Commissioners, the question, as interpreted by counsel for the companies, is the same as that dealt with by this court in *Montreal Park and Island Railway Co.* v. *City of Montreal*(1). Because unwilling to assume

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that, with this very recent judgment before it, the Board of Railway Commissioners would again propound to us the very question there answered, I think the interpretation put upon the question by the appellants cannot be in accordance with the intention of the board. If, however, that be its meaning, clause (*c*) of section 3 of chapter 53, of the Dominion statutes, 1 Edw. VII., would probably prevent the companies from relying upon the agreements ratified by that Act in justification of any discrimination in rates. But, holding the view that the question submitted should not receive the interpretation put upon it by counsel for the appellants, I find it unnecessary now to decide the question as to the scope and effect of the statutory provision referred to.

For the respondent it was submitted that the Board of Railway Commissioners meant to ask this court whether the "facts" referred to (which counsel maintained had been received by the board in evidence and had been duly considered by it, but in determining the question of similarity of circumstances and conditions had been deemed by the board insufficient to warrant a finding of such dissimilarity as would justify a discrimination in rates) *necessarily justify* a discrimination and compel the board, as a matter of law, to hold that they establish a case of dissimilarity in "circumstances and conditions" which would justify some discrimination.

To the question so interpreted the answer should, in my opinion, be "no." The "facts" referred to do not *per se* and as a matter of law conclusively establish such a case of dissimilarity in circumstances and conditions as necessarily justifies the maintenance of some discrimination in rates.

It follows from the decision in the *Montreal Park and Island Railway Co.* v. *City of Montreal*(1), that, unless excluded by the statutory provision above adverted to, the "facts" referred to in the question submitted are relevant to the inquiry which the statute contemplates the Board of Railway Commissioners shall make, and that they are, therefore, admissible in evidence and should be duly taken into account. But the weight to which they would be entitled, if any, must be determined by the board itself and is, in my opinion, the very kind of thing which Parliament intended that body to decide finally as a question of fact.

Because satisfied that the interpretation put upon the question submitted by counsel for the respondent was that intended by the Board of Railway Commissioners, I would dismiss this appeal with costs.

BRODEUR J.—A contract by a railway company with a province cannot interfere with the duty of the Board of Railway Commissioners to prevent any discrimination in freight rates affecting a city in another province.

If a province or a locality chooses to give to the railway companies some bonuses or favours for the purpose of securing some reduction in their charges it should be done in conformity with the provisions of the "Railway Act," and these companies could certainly not rely on such contracts to justify a discrimination against some other localities.

In this case, where the railway company made the contract in question with the Province of Manitoba, it

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was then under the legislative authority of that province.

Later on it became a federal company under the control of the "Railway Act."

When application was made to Parliament for the purpose of confirming that contract concerning freight rates a special declaration was made in the statute of 1901 (1 Edw. VII. ch. 53, sec. 3), that the Canadian Northern Railway Company, which was assuming that contract, would not be authorized to charge any discriminatory rate.

An agreement between a railway company under federal charter and an individual or a group of individuals giving to any persons or to any locality a preferential rate constitutes discrimination under the "Railway Act."

The "circumstances and conditions" which, if not substantially similar, may justify different treatment to different points, and which are enunciated in section 315 of the "Railway Act," must be traffic circumstances or traffic conditions, not circumstances and conditions that may be created by contract.

The Board of Railway Commissioners has found that the rates from eastern points to Winnipeg and to Regina were discriminatory in favour of the former city. But it was urged that these rates had to be given to Winnipeg under the above contract and that the Board of Railway Commissioners was bound to give effect to such a covenant. Of course, the question was considered by the Board of Railway Commissioners; but it was not bound to sanction a discrimination which Parliament itself had declared would not be confirmed.

This appeal should be dismissed. There is no rea-

son for interfering with the discretion of the Board of Railway Commissioners.

Appeal dismissed with costs.

On the 22 December, 1911—

Chrysler K.C., on behalf of the Canadian Pacific Railway Co., moved for a direction as to the settlement of the minutes.

Geo. F. Macdonnell, for the Canadian Northern Railway Co., appeared in the same interest.

Orde K.C. contra.

The court, after consideration, pronounced judgment on the motion, as follows:—

"The registrar shall certify on behalf of the court to the Board of Railway Commissioners in answer to the question submitted that in the opinion of this court the facts therein set out are circumstances and conditions within the meaning of the "Railway Act" to be considered in determining the question of unjust discrimination with respect to both railways; such facts and circumstances are not in law conclusive of the question of unjust discrimination, but the effect, if any, to be given to them is a question of fact to be considered and decided by the Board in its discretion."

Solicitors for the appellants, The Canadian Pacific Railway Co.: *Chrysler, Bethune & Larmouth.*

Solicitor for the appellants, The Canadian Northern Railway Co.: *George F. Macdonnell.*

Solicitors for the respondent: *Gormully, Orde & Powell.*

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*Oct. 9.
*Dec. 6.

MARCH BROTHERS & WELLS (DEFENDANTS) ..... APPELLANTS;

AND

HARRY W. BANTON (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Vendor and purchaser—Condition of agreement—Sale of land—Payment on account of price — Cancellation — Notice — Return of money paid—Rescission—Form of action—Practice.

An agreement for the sale of lands acknowledged receipt of $600 on account of the price and provided, in the event of default in the payment of deferred instalments, that the vendor might, on giving a certain notice, declare the agreement null and void and retain the moneys paid by the purchaser. On default by the purchaser to make payments according to the terms of the agreement the vendor served him with a notice for cancellation which incorrectly recited that the contract contained a stipulation for its cancellation, in case of default, "without notice," and concluded by declaring the contract null and void "in accordance with the terms thereof as above recited." The vendor, subsequently, refused a tender of the unpaid balance of the price and re-entered into possession of the lands. In an action by the purchaser for specific performance or the return of the amount paid, rescission was not asked for.

Held, that, as the vendor had not given the notice required by the conditions of the agreement he could not retain the money as forfeited on account of the purchaser's default; that, as the payment had not been made as earnest, but on account of the price, the purchaser was entitled to recover it back on the cancellation of the contract, and that, as the relief sought by the action could not be granted while the contract subsisted, a demand for rescission must necessarily be implied from the plaintiff's claim for the return of the money so paid.

APPEAL from the judgment of the Supreme Court of Saskatchewan, affirming the judgment of John-

*PRESENT: Davies, Idington, Duff, Anglin and Brodeur JJ.

stone J., at the trial, by which the plaintiff's claim for specific performance of a contract for the sale of lands was refused and a direction was made for the repayment to him of the sum of $600 paid, on account of the price of the lands, at the time of the execution of the agreement for sale.

The circumstances of the case are stated in the above head-note.

J. B. Coyne for the appellants.

C. D. Livingstone for the respondent.

DAVIES J.—This was an action brought by respondent for specific performance of an agreement for the sale of certain lands to him by the appellants and, in the alternative, for the recovery of a part of the purchase money paid by him at the time the agreement was entered into.

The trial judge dismissed the claim for specific performance on the ground of delay on the plaintiff's part in carrying out his part of the agreement, namely, in making the payments it called for. No appeal was taken from his judgment on this point. The learned judge, however, gave judgment for the plaintiff for the $600, part of the price of the land, paid by him.

From that judgment the appellants appealed to the Supreme Court of Saskatchewan, which court unanimously dismissed the appeal, and the appellants now appeal to this court.

The simple and only point for our decision is whether, in the circumstances, the plaintiff was entitled under the pleadings and facts to a return of the instalment of the purchase moneys paid by him, or

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whether that payment had become forfeited to the vendors.

I take it as clear that in all cases the question of the right of the purchaser to the return of moneys paid by him — whether by way of deposit only, or "by way of deposit and as part payment of the purchase," or as part payment of the purchase money only — is a question of the conditions of the contract, and the intention of the parties as expressed in or to be implied from those conditions.

If the money has been paid as deposit simply or, as in the case of *Howe* v. *Smith*(1), "as a deposit and in part payment of the purchase money," unless the agreement contains something shewing a contrary intention, the payment is held to be a guarantee for the performance of the contract by the purchaser, who cannot recover the money back in case of his failure within a reasonable time to perform his contract. In order to enable the vendor, however, to retain, even moneys paid as a deposit, there

> must be acts proved on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract,

per Cotton L.J., at page 95.

The reason, however, for holding that moneys paid either as a deposit simply, or "as a deposit and in part payment of the purchase money," cannot be recovered back where the contract goes off by default of the purchaser, namely, that they are held as having been paid "as a guarantee for the performance of the contract" has no application to the case where moneys are paid simply on account of and as part of the

(1) 27 Ch. D. 89.

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purchase money. Moneys so paid have not the character of a guarantee and, upon rescission of the contract, the consideration for the payment being extinguished, in the absence of language in the agreement shewing a clear intention of the parties that the moneys should be forfeited, restitution must be made: *Cornwall* v. *Henson*(1), and on appeal(2); *Labelle* v. *O'Connor*(3).

In the case now under consideration in my opinion the agreement did not contain any language from which such an intention could be drawn.

On the contrary it provided in express terms the conditions under which the vendor was entitled to hold the moneys paid as forfeited.

The clause of the agreement reads as follows:—

> If the purchaser shall fail to make the payments of principal or interest aforesaid or any of them, or the taxes, strictly at the times above limited, or shall fail in the performance of any of the covenants or agreements herein contained then and in such case the vendor shall have the right at any time to declare the whole amount remaining unpaid upon this contract due and payable and to take action to collect the same and to deliver to the purchaser a deed to the said land when all of the said sums are collected or in the place of the foregoing, to declare this agreement null and void by giving thirty days' notice in writing to that effect, personally served upon the purchaser or mailed in a registered letter addressed to him at the post office named below, and all rights and interests hereby created or then existing in favour of the purchaser, or his approved assigns, or derived under this agreement shall, thereupon, cease and determine and the premises hereby agreed to be conveyed shall revert to and re-vest in the vendor without any further declaration of forfeiture or notice or act of re-entry, and without any other act by the vendor to be performed or any suit or legal proceeding to be brought or taken and without any right on the part of the said purchaser or his assigns to any reclamation or recompensation for moneys paid thereon.

This clause, I think, fairly expresses the intention of the parties to have been that there should not be

(1) [1899] 2 Ch. D. 710, at p. 714.

(2) [1900] 2 Ch. 298.

(3) 15 Ont. L.R. 519, at p. 550.

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forfeiture of any instalments of the purchase moneys paid on the contract unless and until the expiration of the thirty days' notice in writing therein provided to be given to the purchaser and failure during these thirty days by the purchaser to carry out his contractual obligation.

As a fact no such notice was ever given to the purchaser, but, on the contrary, a written notice was given him on the 6th April peremptorily declaring the contract to be "now null and void." This notice was evidently given under a complete misapprehension of the real contract which the parties made.

If the contract made had contained the stipulations which the notice of the 6th April recited it did contain, and if it had vested in the vendor power in case of default in payment of any instalment or of the interest or of the taxes, as the notice recited it did, summarily to "declare the contract null and void without notice to the purchaser" and had given the vendors the right in that case to "retain any payments that might have been made on account of such contract as and by way of liquidated damages," a very different condition would have been created. It is unnecessary, perhaps, to say that no stipulations of the kind recited in the notice did exist in the agreement, the only stipulations being those set out in the clause of the agreement which I have inserted above.

My conclusions agree, therefore, with what I understand to be those of the court below that, under this contract of sale and in the absence of any notice to the purchaser in default, such as that expressly provided for, the mere neglect and delay on the part of the purchaser, while sufficient to deprive him of his right to specific performance, did not operate as a for-

feiture of the instalments of the purchase moneys paid. These moneys not having been paid as a deposit and not having been forfeited under the agreement of sale, and the defendants being unwilling to accept the balance of the purchase moneys and convey the land on the ground claimed by them that the agreement was at an end and rescinded and the plaintiff having been refused by the trial judge specific performance of the agreement on account of his delay, I am of opinion that the judgment on his alternative claim awarding him a return of the $600 paid by him was correct.

It was suggested that the alternative claim made by the plaintiff for a return of the $600 did not expressly ask the court for a rescission of the contract, but I agree with Lamont J., that it is necessarily implied in the claim made for a return of the money for the court could not grant the relief asked for while the contract was still a subsisting one.

It appeared in evidence that, after the refusal of the appellants to accept the tender made to them of the unpaid purchase money, the respondent vacated possession of the land and the appellants entered into possession of it. They have declared the agreement null and void and have acted as if it was so. The respondent failing to obtain specific performance then makes his alternative claim that the agreement be rescinded by the court and his payments refunded to him.

Under all the circumstances I think the judgment appealed from is right and that this appeal should be dismissed with costs.

IDINGTON J.—The rule seems tolerably clear that a purchaser who has never in fact abandoned or re-

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ceded from his contract, but yet been by reason of laches or otherwise, from causes not falling within abandonment or recession, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance *primâ facie* entitled to a return of the deposit or part payment; unless some facts are shewn that would render this inequitable.

The respondent sought herein specific performance which the present appellants resisted and the court, thereupon, holding specific performance could not be decreed, and that there was no abandonment of the contract by respondent, ordered a return of the first payment of $600.

This was upheld by the appellate court.

It is now too late to raise nice questions of pleading or relative to the accuracy of view taken of the law by the learned trial judge or expressed by him.

He was substantially right in law if we look at the results he reached; and could have amended the pleadings if need be to carry out his judgment.

There was not such an abandonment or recession from the contract as contended for.

Nor can it properly be said there is anything inequitable in the result.

The appellants had the matter entirely in their own hands.

If they had submitted to specific performance they would have got the balance of their money and interest, which is all they ever were entitled to, or a properly framed judgment for specific performance which, when worked out, would have left them with the money already paid and the land, if later default made in the payment of the balance.

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They tried to grasp too much and have failed in getting all. And I have no doubt that the result will leave them, so far as the mere money to be got from the land (apart from costs of their fruitless litigation) is concerned, the gainers in the long run.

I think their appeal should be dismissed with costs.

DUFF, ANGLIN and BRODEUR JJ. concurred with Davies J.

Appeal dismissed with costs.

Solicitor for the appellants: *W. R. Parsons.*

Solicitors for the respondent: *Parker & Livingstone.*

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*Oct. 9, 10.
*Dec. 6.

THE CLOVER BAR COAL COMPANY ..... } APPELLANTS;

AND

WILLIAM HUMBERSTONE, THE GRAND TRUNK PACIFIC RAILWAY COMPANY AND THE CLOVER BAR SAND AND GRAVEL COMPANY ..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners — Jurisdiction — Private siding — Construction of statute—"Railway Act," R.S.C., 1906, c. 37, ss. 26a, 226—(D.) 8 & 9 Edw. VII. c. 32, s. 1.

Notwithstanding provisions in an agreement under which a private industrial spur or siding has been constructed entitling the railway company to make use of it for the purpose of affording shipping facilities for themselves and persons other than the owners of the land upon which it has been built, the Board of Railway Commissioners for Canada, except on expropriation and compensation, has not the power, on an application under section 226 of the "Railway Act," (R.S.C., 1906, ch. 37), to order the construction and operation of an extension of such spur or siding as a branch of the railway with which it is connected. *Blackwoods Limited* v. *The Canadian Northern Railway Co.* (44 Can. S.C.R. 92) applied, Duff J. dissenting.

APPEAL, by leave of a judge of the Supreme Court of Canada, upon the question of the jurisdiction of the Board of Railway Commissioners for Canada to order the construction and operation of an extension to the appellants' private industrial spur or siding across their lands.

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*PRESENT: Davies, Idington, Duff, Anglin and Brodeur JJ.

The circumstances of the case are stated in the judgments now reported.

J. H. Leech K.C. and *W. L. Scott* for the appellants.

Chrysler K.C. for the respondents.

DAVIES J. agreed with Anglin J.

IDINGTON J.—The appellants had the usual agreement with the Grand Trunk Pacific Railway Company for a siding which was built pursuant thereto on the appellants' land. The agreement was terminable on two months' notice by either party to it.

The respondent, Humberstone, desired siding accommodation at a point beyond this siding built for the appellants.

The Board of Railway Commissioners, on his application, ordered the said railway company to construct, maintain and operate the said proposed extension of the appellants' siding across their lands, taken up thereby, to and upon the Humberstone Coal Company's lands.

Incidentally to such order and to enable the said railway company to execute it, the order provided that the strip of land required for the said extension, so far as owned by the appellants, should be expropriated.

The appellants claim that this order is beyond the jurisdiction of the Board of Railway Commissioners and rely on our decision in the case of *Blackwoods Limited* v. *The Canadian Northern Railway Co.*(1), which was given after this order, now questioned.

(1) 44 Can. S.C.R. 92.

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Idington J.

I think the appellants are quite right.

The principle upon which that case was decided was that the Board of Railway Commissioners had no jurisdiction to enforce the construction of an isolated bit of railway which was entirely independent of and not connected with, or to be a branch of the main line or branch therefrom.

The principle is as clear as can be. The Board of Railway Commissioners, in this regard, can only act within the sections 221 to 226, inclusive, of the "Railway Act." These sections countenance nothing else than a piece of railway to be constructed in strict accordance with the terms of the said sections and what others are implied therein as applicable. It is idle to contend that this order can be maintained by virtue of a mere temporary private agreement such as invoked herein, even if the Grand Trunk Pacific Railway Company has a right thereby to use the temporary siding for its own purposes and to permit others to use it. Indeed, when closely examined, the order, whatever it may imply, says nothing as to operating that siding, then existent, and fails to declare this, with the extension, one complete branch line or siding.

It was because the Board of Railway Commissioners seemed confessedly to rely on analogous private or personal rights that I failed to find any jurisdiction for what they had ordered in the *Blackwoods, Limited* v. *Canadian Northern Railway Co.* (1).

And the majority of the court seemed to agree that the power to make such an order must be within the sections I refer to.

(1) 44 Can. S.C.R. 92.

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The private right of a railway company to the use of the private siding was the basis, in each case, upon which the order rested.

An alleged equitable right by way of estoppel to supplement this was set up in *Blackwoods Limited* v. *Canadian Northern Railway Co.*(1), and here the terms of the private bargain of the railway company to permit others to use its acquisition of right is relied upon.

Both are entirely apart from the powers given relative to branch lines which give jurisdiction to the board in such cases to direct or authorize branch lines, and need no supplementing of the kind in question in these cases.

It was not suggested in argument, but I have since considered the possible question of whether or not authority might be found by implication in the wide powers of the board respecting accommodations or facilities for shipping, to direct as it has done.

I, however, fail to see how they can be used in aid, save by and through the sections I refer to.

The appeal should be allowed with costs.

DUFF J. (dissenting).—I entertain no doubt that, under article 6 of the agreement between the appellants and the railway company, the company is entitled to use the existing spur for the purpose of affording such facilities for shipping and taking delivery of freight as it may be their duty to give to persons other than the appellants. That being so, I can see no reason why, under the authority of section 226 of the "Railway Act," the Board of Railway Com-

(1) 44 Can. S.C.R. 92.

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missioners may not order such facilities to be furnished by means of an extension of the spur. The case radically differs from the case of *Blackwoods Limited* v. *The Canadian Northern Railway Co.*(1). There (according to the state of facts presented to this court) the rights of the railway company in respect of the spur which it proposed to make part of its branch were limited to the use of it for the purpose of supplying facilities to the owners of the land on which it was constructed. The application was one by the railway company for approval of a branch line and the order of the Board of Railway Commissioners, consequently, if it was to be treated as an authority to construct a branch capable of being worked in connection with the railway had the effect of the imposing of an additional servitude upon the lands of the Blackwoods without compensation. That we thought the Act did not authorize. The order now before us leads to no such result; and I am unable, with great respect, to understand why it is not a valid exercise of the powers conferred by section 226 of the "Railway Act."

I ought, perhaps, to refer to the point made by Mr. Scott, that the use of the appellants' spur for the purpose of affording facilities to the respondent is necessarily incompatible with the observance by the company of the condition prescribed by article 6 of the agreement that the use of the siding by or for the benefit of other persons "shall not interfere with the proper use" of it "for the business" of the appellants.

It may be observed in this connection that, under

(1) 44 Can. S.C.R. 92.

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section 26 (*a*) (8 & 9 Edw. VII. ch. 32, sec. 1), the Board of Railway Commissioners is invested with the fullest powers respecting the enforcement of such contractual stipulations. Whether there is any incompatibility between the order under appeal and the provisions of article 6 of the agreement appears to me to be peculiarly a question of fact for the board.

I may say, further, with reference to the construction of article 6, that the construction now put forward was not relied upon at the hearing before the Board of Railway Commissioners, and, indeed, seems to be an afterthought suggested by the decision of this court in the case of *Blackwoods Limited* v. *The Canadian Northern Railway Co.*(1).

ANGLIN J.—Assuming the respondents' construction of the agreement between the appellants and the Grand Trunk Pacific Railway Company to be correct, I think this appeal should, nevertheless, be allowed upon two grounds — the first, that the spur, of which an extension has been ordered, is not part of the Grand Trunk Pacific Railway, but is a mere private siding or branch; the second, that the order of the Board of Railway Commissioners either purports unlawfully to deprive the appellants of the right of removing this spur or siding reserved to them by the agreement under which it was constructed, or, if this be not its effect, that the order directs the construction of a branch or siding not itself connected with the Grand Trunk Pacific Railway, and which can only be reached by using the appellants' spur, which, under their agreement with the railway company, the appel-

(1) 44 Can. S.C.R. 92.

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Anglin J.

lants may remove at any time upon giving two months' notice. Upon the former construction of the order there has been an unwarranted interference with the appellants' contractual rights; upon the latter, no permanent or sufficient provision is made for connecting the extension of the siding or branch line directed to be constructed and operated with the Grand Trunk Pacific Railway.

As I read the agreement under which the appellants' siding was built, it does not contemplate any extension of it. It contains several provisions inconsistent with the idea of an extension, notably that authorizing the removal of their spur by the appellants, and that reserving to them a paramount right to make any proper use of the siding at all times for their business. In view of these terms of the contract, the provision for the use of the siding by the railway company and that for its use by third parties on payment of compensation to the appellants must, I think, refer to such uses as may be made of it as constructed under the agreement and without extension. Several such uses were suggested in the course of the argument. It was practically conceded that, if this be the proper construction of the agreement, this appeal should succeed.

But, if the provisions for use of the appellants' siding by the Grand Trunk Pacific Railway Company and by third parties should be held, as Mr. Chrysler contended, to have been made in contemplation of an extension of the siding and, therefore, to preclude objection by the appellants to a proper order for such extension being made, they do not suffice to uphold the jurisdiction of the Board of Railway Commissioners to make the order now before us. As pointed out

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in the case of *Blackwoods Limited* v. *The Canadian Northern Railway Co.*(1) — more particularly in the judgment of my brother Duff, at pages 96 *et seq.* — the appellants' spur, constructed solely under the authority of their agreement with the Grand Trunk Pacific Railway Company, must be treated as a private siding or branch, not in any sense part of the Grand Trunk Pacific Railway. Its connection with the railway, because lawful without authorization by the Board of Railway Commissioners, raises no presumption that such authorization was obtained. As a private siding the board, in my opinion, had not jurisdiction to order its extension, unless it first provided in a proper and legal manner for its becoming part of the Grand Trunk Pacific Railway. This it might have done by directing the expropriation by the railway company of the land on which the siding is constructed. That would, of course, involve compensation to the appellants.

If the order of the board deprives the appellants of their contractual right upon notice to remove their siding, it in effect makes that siding part of the Grand Trunk Pacific Railway without any provision entitling the appellants to compensation for the land thus taken. If, notwithstanding the unqualified order for the construction and operation of the extension, the appellants still have the right to remove their spur and thus to destroy the connecting link with the Grand Trunk Pacific Railway, upon their exercising that right the extension would have no connection with the Grand Trunk Pacific Railway, and, without some further order or provision, its operation by the railway company would be practically impossible.

(1) 44 Can. S.C.R. 92.

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Anglin J.

For these reasons, I am of opinion that, in making the order in appeal the Board of Railway Commissioners exceeded its jurisdiction and that the appeal should be allowed with costs.

BRODEUR J.—I concur with the opinion expressed by Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellants: *Leech, Leech & Co.*

Solicitors for the respondents: *Emery, Newell, Ford, Bolton & Mount.*

THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

JOHN ANDERSON (PLAINTIFF) ..... RESPONDENT.

1911
*Oct. 18.
*Dec. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Employer and employee—Dangerous work—Dangerous materials—Risk of employment—Warnings and instructions—Employer's liability—Damages—Limitation of action—Construction of statute—"Railway Act," R.S.C. 1906, *c.* 37, *s.* 306—*"Construction and operation" of railway.*

Where instructions and warning are necessary to enable employees, in circumstances involving danger, to appreciate and protect themselves against the perils incident to the work in which they are engaged, it is the duty of the employer to take reasonable care to see that such instructions and warnings are given. The employer may delegate that duty to competent persons, but, where compensation is sought for injuries sustained by an employee owing to neglect to give such instructions and warning, the onus rests upon the employer to shew that the duty was delegated to a person qualified to discharge it or that other adequate provision was made to ensure protection against unnecessary risk to the employees. The failure of the employer to take reasonable care in the appointment of a properly qualified superintendent, to whom the duty of selecting persons to be employed is entrusted, amounts to negligence involving liability for damages sustained in consequence of the acts of incompetent servants. *Young* v. *Hoffman Manufacturing Co.* ((1907) 2 K.B. 646) applied; judgment appealed from (21 Man. R. 121) affirmed. In this case, as the risk incident to the employment of an incompetent foreman was not one of those which are assumed by an employee, the plaintiff was entitled to recover damages at common law. Judgment appealed from (21 Man. R. 121) reversed.

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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The limitation of one year, in respect of actions to recover compensation for injuries sustained "by reason of the construction or operation" of railways, provided by section 306 of the "Railway Act" (R.S.C. 1906, ch. 37) relates only to injuries sustained in the actual construction or operation of a railway; it does not apply to cases where injuries have been sustained by employees engaged in works undertaken by a railway company for procuring or preparing materials which may be necessary for the construction of their railway. *Canadian Northern Railway Co.* v. *Robinson* ([1911] A.C. 739) applied; judgment appealed from (21 Man. R. 121) affirmed.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), varying the judgment, at the trial, by which the plaintiff's action was maintained with costs.

At the trial, before Cameron J. with a jury, judgment was entered upon the findings of the jury in favour of the plaintiff for $7,000, assessed by the jury as damages at common law. By the judgment appealed from the judgment entered at the trial was sustained except in respect of the amount of the damages awarded which were reduced to the sum of $1,200, assessed under the "Workmen's Compensation for Injuries Act," R.S.M. 1902, ch. 178.

The circumstances of the case are stated in the judgments now reported.

Wallace Nesbitt K.C., O. H. Clark K.C. and *Christopher C. Robinson* for the appellants.

J. B. Coyne for the respondent.

THE CHIEF JUSTICE.—The facts of this case are fully explained by Mr. Justice Duff and I agree with him as to the general effect of the evidence. The fair

(1) 21 Man. R. 121.

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The Chief Justice.

inference from all that evidence is: By the exercise of reasonable care in the choice of their servants and appliances the appellants could have prevented, or greatly decreased the dangers incident to the work in which Anderson was engaged, the thawing of frozen dynamite. The trial judge, in his charge, clearly put the question of contributory negligence and of assumption of risk, the two main defences, to the jury; they found that there was no negligence on the part of the respondent and that he was ignorant of the danger to which he was exposed, and there is abundant evidence to support these findings. This verdict was subsequently, on appeal, set aside in part and judgment entered for $1,200 damages under the "Workmen's Compensation Act." Hence the appeal and cross-appeal. I will deal only with the cross-appeal and the verdict awarding the respondent $7,000 damages at common law. I would have dismissed the main appeal without a word.

May I say it with all respect: The judgment of the majority in appeal is wrong, in my opinion, in that it fails to distinguish between the liability which attaches to the master in the case of an accident to a servant caused by the negligent act of a competent fellow servant, and his liability for an accident which results from and is attributable to the employment of a fellow servant who is incompetent. It must be accepted as settled law, under the English system, as I understand it, that the master is not responsible to his servant for an accident resulting from an isolated act of negligence of an otherwise competent fellow servant. *Cribb* v. *Kynoch, Limited*(1), approved of in *Young* v. *Hoffman Manufacturing Co.*(2). But it is equally

(1) (1907) 2 K.B. 548. (2) (1907) 2 K.B. 646.

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well established by the authorities that the risk incident to the employment of an incompetent servant is not one of those which an employee assumes. If the injury could have been prevented by the exercise of reasonable care in the choice of his servants, and he fails in that respect, the master is liable. I can see no difference in principle between the liability, which attaches in the case of an accident to his servant, due to the employment of an incompetent foreman, as was undoubtedly the case here, and that to which a master is subject in case he provides a defective piece of machinery for the purpose of that servant's employment. Whether the accident is due to a defective system or to defective machinery the liability is the same. In *Johnson* v. *Lindsay & Co.*(1), Lord Herschell, at page 378, states the rule which, in my opinion, is applicable here:—

> It must be remembered that whilst a servant contracts with his master to be at the risk of the negligence of his fellow servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take care to select competent servants; and it would be most unreasonable to hold that he is exempt from liability for his serious negligence in any case when he is not under this obligation.

The neglect of the master to exercise proper care in the choice of servants competent to perform the duties assigned to them is, therefore, a source or cause of liability in the case of an accident properly assignable to that neglect. In other words, to make my meaning clear, I quite agree that no case of principle can be found in English law subjecting an individual to liability at common law for an act done without fault on his part; but it is equally certain that the master owes

(1) [1891] A.C. 371.

his servant the duty of reasonable care in the choice of his fellow servants, that the

duty differs in degree with the nature of the employment and with the experience of the servant,

and for a breach of that duty there is liability. The degree of care required from the employer by the common law of negligence adopted as the basis of treatment of accidents of industry when the mule and the spinning jenny were unknown, the canal boat and the stage coach the only means of communication and men dug and delved by the exclusive aid of pick and shovel, must be determined by a different standard in this age of flying machines, motor cars and dynamite.

Legal principles remain unchanged, but their application is to be changed with the changing circumstances of the times.

It occurs to me that there is another aspect in which the principle of legal liability involved in this case may be considered. The master must use all reasonable and proper precautions to safeguard his servant from dangerous conditions of his property, machinery and tools; and it is certainly well established by the authorities that the law takes notice that there are things which, in their nature, are so highly dangerous that, unless they are managed with great care, they are likely to injure people with whom they come into contact; and, while there is no disability on the master to utilize those dangerous substances for his profit and advantage in the prosecution of his work, there is a clear duty upon him to adopt every reasonable precaution which science and experience provide to reduce the risk of accident to the workmen who are obliged to handle them; and there can be no doubt that, on the evidence here, the respondents failed in that duty. *Citizens Light and Power Co.* v.

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Lepitre (1). No advantage results from the use of unnecessarily harsh language, but the evidence of the foreman has left with me a most disagreeable impression. I deem it my duty to say this much: One can hardly conceive it to be possible that, in our day and in this country, so little regard is had for human life on the works of construction that are being carried forward in so many places, not only in mines, railroads and factories, but in all the trades. The employment of such men as road-master Campbell in the general superintendence of work which involved at times the use of dynamite, a dangerous agency of which he was totally ignorant, gives us an explanation of the enormous toll of life and limb levied on their employees by railway companies. The risks of modern industry necessarily incidental to the complicated conditions under which reasonable regard for efficiency and economy oblige men and women to labour should not be increased by the employment of negligent or incompetent foremen. I trust this word of warning may serve to create a greater sense of responsibility on the part of corporations and other great employers of labour.

I was much troubled by the objection raised by the appellants as to the effect of section 306 of the "Railway Act" based on the Statute of Limitations; but, on the whole, I agree with the conclusion reached by Mr. Justice Duff. If this short statutory prescription is applicable to a case of common law liability, a point which I consider it quite unnecessary to decide now, at least it must be made abundantly clear that the facts bring the case clearly within the statute. On the evidence, it appears that the respondent was engaged

(1) 29 Can. S.C.R. 1.

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in a pit at a place called Bird's Hill, distant from the main line of railway, digging sand which was used for various purposes other than the construction of the railway. In this country where the activities of railway companies are multifarious, should we hold this section applicable, for instance, to a workman in a stone quarry from which stone is being extracted to build a hotel intended to be used for the purposes of the railway? That is an extreme case, but it is by such cases that the applicability of a principle may be most effectively tested.

I would dismiss the main appeal and allow the cross-appeal with costs.

DAVIES J.—This appeal raises several important questions of law upon which I confess I have had difficulty in reaching a satisfactory conclusion.

The plaintiff sued for damages sustained by him while blasting hard-pan with dynamite for the defendants in their quarry. He had been employed by one Campbell, a road-master in defendants' employ, and the jury found, in reply to questions put to them, that the injuries he sustained were caused by the negligence of the defendant company in

not employing competent men and not furnishing proper appliances and storage for explosives.

They further found against contributory negligence on plaintiff's part, and that plaintiff's injuries

were caused by his ignorance of the material he was using.

Now, the material was frozen dynamite which required to be thawed before being used to blast the hard-pan. The thawing of dynamite so as to use it for blasting purposes unless carried out in what seems to

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be recognized as the proper way is most dangerous work.

The trial judge directed judgment to be entered on the findings of the jury, for the damages found at common law. On appeal, the Court of Appeal, Chief Justice Howell dissenting, set aside that judgment and entered judgment for the smaller damages found under the "Workmen's Compensation Act." The defendant company appealed from that judgment on the ground that there was no evidence of negligence of the company or its employees which would justify the findings of the jury and for which the company was responsible, and that in any event the claim was barred by the 306th section of the "Railway Act."

The plaintiff cross-appealed to have the judgment of the trial judge for common law damages restored.

The substantive questions before us, therefore, are these two. Does the 306th section of the "Railway Act" apply to this case and bar plaintiff's claim, and, if not, is there evidence to sustain the findings of the jury, and if so is the plaintiff entitled to recover the common law damages found, or is he limited to those awarded under the "Workmen's Compensation Act"?

As to the proper meaning and application of this 306th section of the "Railway Act" I have entertained grave doubts. In the case of the *Canadian Northern Railway Co.* v. *Robinson* (1), I held the view that the acts there complained of, namely, the wrongful removal, in 1904, of the siding-track facilities which the complainant, Robinson, enjoyed and the continued operation of the railway without these facilities until September, 1906, when they were restored by the order of the Board of Railway Commissioners,

(1) 43 Can. S.C.R. 387.

were within this section and that damages resulting from the operation of the railway denying the complainant those rights were prescribed at the expiration of a year from the wrongful act of the railway company.

On appeal to the Privy Council, however, Their Lordships held(1), at page 745, that the "operation of the railway" referred to in the section seemed to signify the process of working the railway as constructed.

The refusal or discontinuance of facilities for making a siding outside the railway as constructed and connecting it with the line does not appear to be an act in the course of operating the railway itself.

It would appear, therefore, that, in Their Lordships' opinion, these special provisions limiting the time of bringing actions of certain classes to a period of a year from the origin of the cause of action do not apply to a case of refusing or discontinuing facilities on a siding such as were those in question and that the acts covered by the section were only such as were done in the course of operating the railway itself. Applying the principle underlying that decision it seems to me that operations carried on in a "borrowing pit" by the railway's servants in obtaining sand for the ballasting of a railway are not within the terms "construction of the railway" as used in the section. To come within that section the act or omission complained of must be directly connected with the actual construction of the road and not indirectly or incidentally so connected.

It is manifest that some limitation must be placed upon the words of the section. "The construction of the road" can hardly be held applicable to work carried on by the company such as the manufacture of

(1) [1911] A.C. 739.

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rails for the road or the procuring of ties for it from the woods nor can I extend the construction of the section to the case before us, namely, the operations of blasting hard-pan in a pit, some distance, it matters not what, from the actual railway for the purpose of obtaining sand for ballasting the road. I admit the difficulties surrounding the construction of the section, but following what I understand to be the view of Their Lordships of the Privy Council in the case of *The Canadian Northern Railway Co.* v. *Robinson*(1), I conclude that it must be confined to what would be deemed the actual construction of the road itself and not extended to incidental or indirect or outside work or operations of the company in the obtaining or manufacture or procuring of material or plant to be used in such construction.

Having reached this conclusion, I pass to the next question, whether there is evidence to sustain the findings of the jury, and especially that one which says that the plaintiff's injuries were caused by the negligence of the company

> by not employing competent men and by not furnishing proper appliances and storage for explosives.

I have carefully gone through the evidence, especially that of Campbell, the foreman, and the plaintiff, and am of the opinion that there was ample evidence to justify that finding. Campbell, according to his own evidence, knew little or nothing of the proper way to prepare frozen dynamite so that it might be used with safety as an explosive for the purposes required. He gave no instructions to the plaintiff apparently because he felt himself not competent to

(1) [1911] A.C. 739; 43 Can. S.C.R. 387.

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give them. He may have been fully competent as a road-master pure and simple, but the duties he had to discharge involved the use of dynamite, sometimes frozen, in blasting operations, and he frankly confesses his own ignorance in the matter of thawing frozen dynamite, and his consequent failure or inability to instruct the plaintiff as to what he should do and what he should avoid doing in thawing out the dynamite. The plaintiff himself was found by the jury on ample evidence to have been "ignorant of the material he was using," that is, frozen dynamite, and the crude and ineffective efforts made by him first to improvise or construct a method of thawing the dynamite, and on these efforts failing in placing the sticks of dynamite under or alongside of a hot stove, is evidence, I think, not of recklessness but simply of ignorance.

It was contended that, in any event, it was Campbell's negligence, in not applying to the company for proper materials to thaw the dynamite and in not fully instructing Anderson with regard to it, that caused the accident, and that, they being fellow-workmen, the doctrine of common employment covers the case and relieves the company of responsibility for damages caused by such negligence.

I agree that the parties stood towards each other in the position of fellow-workmen and that at common law the company would not be liable to any of the workmen standing in that relation for injuries caused to them by such negligence of Campbell, assuming his competency for the discharge of the dangerous duties intrusted to him to have carried out. But, as I find ample evidence to justify the finding by the jury of his incompetence to instruct those under him as to the

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proper way and method of thawing dynamite and as to the danger of attempting to thaw it in the fatal manner Anderson in his ignorance followed, I cannot accept the conclusion that the company are absolved from liability.

I find the evidence of Campbell's incompetence with respect to this special class of dangerous work which Anderson, uninstructed, was ordered to carry out, in Campbell's own confession of ignorance with regard to the handling and thawing of frozen dynamite.

The majority of the Court of Appeal for Manitoba based their judgment upon the absence of any such evidence.

The question then is, for me, reduced to one of the onus of proof as to the discharge by the company of its duty. That duty is, as laid down by the Court of Appeal in two late cases of *Cribb* v. *Kynock, Limited* (1), and *Young* v. *Hoffman Manufacturing Co.*(2), to give the necessary and proper instructions to young or inexperienced or ignorant workmen employed by them in dangerous work to guard against preventable dangers or accident, but such duty is one which the company or employer may delegate to a competent foreman and the negligence of the foreman is a risk which the fellow servant takes upon himself.

The foreman, however, or person to whom such duty is delegated must be a person competent to rightly discharge the duty. If that competency is proven then the employer's duty is discharged even where the delegate fails through neglect in the discharge of the delegated duty.

(1) [1907] 2 K.B. 548. (2) [1907] 2 K.B. 646.

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But, in the case of delegation to an incompetent foreman (by intermediate superior officers of the company who were, themselves, not shewn to be incompetent), as in the case now under consideration—does the onus lie upon the workman injured and suing for damages of disproving their competency also; or has he discharged all the law requires of him, *primâ facie,* when he proves incompetency on the part of the official whose negligence caused the injuries for which compensation is claimed? In my opinion, on every ground of reason and, I venture to think, of authority also, the latter is and should be the law. If it is not so, then mere appointment will imply competency and an onus will be cast upon injured workmen which in most cases it will be quite impossible for them to discharge. The law casts the duty upon the employer, whether a person or a company, of taking due and proper care in the appointment of his or its officers. That is all. The appointee may turn out to be quite incompetent, but that result throws no liability upon the company if it is shewn that due and proper care in his appointment was taken.

When the workman proves incompetency, on the part of a subordinate foreman, resulting in the injuries he complains of he makes, in my humble opinion, a *primâ facie* case and throws the onus on the company of proving affirmatively that it has discharged the duty the law casts upon it, but which it has elected to delegate. That duty, when delegated, is only discharged by delegation to competent persons, and it is not an absolute duty warranting competency on the part of the appointee, but is satisfied by shewing due and proper care in its exercise. The appointment, however, of an incompetent officer gives rise to

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the presumption that due and proper care was not exercised in his appointment. I gather that to be the opinion alike of the Master of the Rolls, at page 657, and of Kennedy L.J., at page 659, of the report of the case of *Young* v. *Hoffman Manufacturing Co.*(1). The same opinion is expressed with convincing reasoning by Palles C.B. in *Skerritt* v. *Scallan*(2), at page 401, and is called the "better opinion" by Mr. Beven in his book on Negligence (Can. ed., 1908), at page 648.

In the present case we have the necessary findings; incompetence of Campbell who employed the plaintiff, absence of proper instruction in the thawing of the dynamite, and absence of contributory negligence by plaintiff. These findings cast upon the defendant company the onus of proving the exercise of due and proper care in Campbell's appointment. That onus was not discharged simply by proof that Campbell was appointed by an intermediate officer. There still remained upon the company the duty of proving either that due and proper care had been exercised in the appointment of such officer, or that he was a man fully competent to discharge the duties delegated to him.

My opinion, therefore, is to dismiss the main appeal, allow the cross-appeal, vacate the judgment of the Court of Appeal, and restore that of the trial judge, with costs to the plaintiff in all the courts.

IDINGTON J.—The limitation of action contained in section 306 of the "Railway Act" certainly does not seem to have much to do with an action of neg-

(1) [1907] 2 K.B. 646. (2) (1877) Ir. R. 11 C.L. 389.

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ligence in operating, long after construction of the railway, works in a sand-pit. The only change made in amending the old "Railway Act" was to make the amended section conform to the usual interpretation the courts had put on that section.

I do not think the long struggle over that should now be given a new starting point to run it over again. I see no ground in this or any other point taken for allowing the appeal.

As to the cross-appeal I think it ought to be allowed.

The law, as laid down by Lord Cairns, in *Wilson* v. *Merry*(1), seems strangely forgotten in many places.

I have no doubt there exists a very wide if not an entire disregard of the terms upon which masters are there held to be absolved from a personal discharge of the duties they owe to their servants.

Lord Cairns, at page 332, of the report of that case stated as follows:—

> The master has not contracted or undertaken to execute in person the work in connection with his business. * * * But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do, and if the persons so selected are guilty of negligence this is not the negligence of the master.

The master's duty in the premises existent herein was to instruct, to warn, and to protect when setting his men at a dangerous employment.

The appellant company chose to substitute for itself, to discharge these duties, a man about as ignorant

(1) L.R. 1 H.L. Sc. 326.

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of dynamite, its dangers and the proper means for avoiding and averting them, as any man could be in these later times when the destruction it has wrought, largely through incompetent foremen, has awakened the dullest of men.

The company knew all these things so well that they properly paid an extra wage for the higher degree of skill needed at this work than the ordinary workman possesses.

The foreman selected does not seem to have so realized even what that meant as to be put on inquiry or get such men.

The jury has found herein and, to my mind, would have failed to discharge their duty if they had not found herein that the man in charge superintending and directing the work in question was incompetent.

He never should have been for an hour permitted to hold his position when the conditions of operating had become such that the work to be done involved a superintending for which he had never been fitted. He had by reason of changed conditions become, if ever fit, then unfit.

I think it unnecessary to pursue the subject further. The evidence quoted by Chief Justice Howell makes it clear that the jury had ample ground to find as they did and the reasons he assigned need not be repeated here. I agree therein.

I think the appeal should be dismissed with costs.

I think the cross-appeal should be allowed, with costs throughout, and that the judgment of the learned trial judge be restored.

DUFF J.—In this case I am to deliver the judgment of Mr. Justice Anglin and myself.

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The defendants appeal from the judgment of the Court of Appeal for Manitoba holding them liable to the plaintiff in the sum of $1,200, assessed by a jury as damages under the "Workmen's Compensation Act." At the trial the jury made findings which, in the opinion of the trial judge, entitled the plaintiff to recover at common law and he accordingly entered judgment for the sum of $7,000, the damages assessed by the jury on the basis of common law liability. This judgment the plaintiff by a cross-appeal seeks to have restored.

The findings of the jury, in so far as they establish liability of the defendants under the "Workmen's Compensation Act," on the ground that the plaintiff's injuries are properly attributable to the negligence of road-master Campbell, and not to his own blameworthy departure from such instructions as Campbell gave him, cannot be disturbed. They are supported by evidence upon which a jury might properly act.

The defendants also seek to escape liability under the limitation provision of section 306 of the "Railway Act," the action having been brought more than a year after the plaintiff was injured. Although, in one sense, the injury complained of was sustained by the plaintiff "by reason of the construction" of the defendants' railway, it was not so, in our opinion, within the meaning of those words as used in section 306 of the "Railway Act." The plaintiff was engaged in the work of procuring or preparing materials for the construction of the railway rather than in the work of construction itself. If the section of the "Railway Act" relied upon should be held applicable to such a case as this, it is difficult to perceive what limits should be placed upon its application when the rail-

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way company itself undertakes the procuring or manufacturing of materials of whatever kind requisite for the construction of its works. Having regard to the recent decision of the Judicial Committee, affirming the judgment of this Court in *Canadian Northern Railway Co.* v. *Robinson*(1), we think it is reasonably clear that an injury sustained under circumstances such as those of the present case is not within the purview of section 306.

We have not overlooked the argument of counsel for the plaintiff, although it was based on evidence somewhat meagre, that because gravel taken from the pit in question by the defendants was sold or given to contractors to be used for purposes not connected with the railway, or the works which it includes under the statute, the pit itself cannot be deemed to have been part of the railway, and that it is not established that the material, for the taking out of which the plaintiff was preparing when he was injured, was intended to be used upon or in connection with the railway. But, in the view we have taken of the purview of section 306, it is unnecessary to determine these questions and because of the unsatisfactory character of the evidence it seems undesirable to do so if it can be avoided.

It follows that the defendants' appeal should be dismissed with costs.

The cross-appeal raises quite another question.

The respondent was injured by an explosion of dynamite, at Bird's Hill, Manitoba, when in the employment of the appellant company. In the course of removing sand from a sand-pit with a steam shovel,

(1) [1911] A.C. 739; 43 Can. S.C.R. 387.

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in September, 1907, a party of the employees of the company encountered a bed of hard-pan, which proved intractable to ordinary methods and had to be broken up by means of dynamite. The party was subject to the orders of one Campbell, a road-master of the company, who, having procured some dynamite from some persons engaged in taking sand and gravel from an adjacent gravel pit, directed the respondent (according to his evidence) to take charge of the operation of blasting. To this the respondent (accepting his own account) objected, protesting his ignorance of dynamite and inexperience in the manipulation of it. The road-master (still following the respondent's story) then peremptorily ordered him to proceed with the blasting (telling him that he would be dismissed if he did not) and advising him, at the same time, to consult one of the workmen engaged in the neighbouring pit as to the proper method of handling it. The respondent says the person to whom he was thus referred was unable to give him any instructions except to shew him how to connect the fuse with the explosive; but that, being face-to-face with the alternative of obeying orders on the one hand and dismissal on the other, he chose the former and proceeded as well as he could with the work he had been directed to do. In mid-October the respondent left the employ of the company but, in the last few days of that month, was again engaged to work in the company's yard at Winnipeg by Campbell who, a day or two afterwards, directed him to proceed to Bird's Hill to resume the work of blasting, telling him at the same time that he must thaw the dynamite—which would be frozen. This the respondent (who according to his own story had no experience and no knowledge of the proper or

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usual method of thawing dynamite) first attempted by a process (it is unnecessary to describe it) which according to his evidence proved to be altogether too dilatory, and afterwards by placing the sticks of dynamite (on end) around a stove in a box car which the party was using. An explosion resulted killing one person and destroying the respondent's sight. The action was brought to recover damages on the ground that this explosion was due to negligence for which the company is responsible. The jury acquitted the respondent of the charge of contributory negligence and found negligence against the company in two respects.

By not employing competent men and by not furnishing proper appliances and storage for explosives;

they also found as follows:—

(5) If the injury was so caused by the negligence or improper conduct of any person having superintendence over the plaintiff, did the defendants use reasonable and proper care and caution in the selection of such person for the position he occupied ?

A. No.

The question on the cross-appeal is whether there is or is not evidence which, in law, is sufficient to support these findings.

"It does not appear to me to admit of dispute that at common law," said Lord Watson in *Smith* v. *Baker & Sons*(1), at page 353,

a master who employs a servant in a work of a dangerous character is bound to take all reasonable precautions for the workman's safety.

In the same case Lord Herschell said, at page 362:—

It is quite clear that the contract between the employer and the employed involves on the part of the former the duty * * * so to carry on his operations as not to subject those employed by him to unnecessary risk.

(1) [1891] A.C. 325.

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It is a corollary from these principles that where warning and instruction are necessary to enable persons employed in circumstances involving danger to appreciate and protect themselves against the perils incident to the duties in which they are engaged it is the duty of the employer to take reasonable care to see that such warning and such instruction are given.

On the evidence adduced in this case the jury were clearly entitled to find that the respondent was without experience or knowledge of the process of thawing dynamite and that, a workman thus ignorant and inexperienced having had the work of thawing dynamite assigned to him, it would be a precaution obviously necessary for the protection of the workman himself as well as of his fellow employees to see that, before undertaking the operation, he was properly informed as to the risks attending it and instructed as to the best methods of avoiding or diminishing those risks. The jury were, moreover, entitled to say that the obligation to take reasonable care to see that such information and instructions should be given involved the duty (if no other adequate steps to that end were taken) to see that the official who was charged with the responsibility of selecting persons to be entrusted with work such as that assigned to the respondent should be a person competent to discharge the obligation. There was ample evidence to shew that Campbell, the road-master, was not qualified in this respect and that no steps had been taken by the superintendent who appointed him or otherwise to ascertain whether he did or did not possess such qualification. In these circumstances the real question for determination appears to be this: On the evidence in this case, can the company properly be held responsible

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for the lack of instructions found by the jury to be due to the failure to take proper care in respect of the appointment of the official charged with selecting persons to be entrusted with the duty of thawing dynamite ?

We think the decision of the Court of Appeal in *Young* v. *Hoffman Manufacturing Co.*(1) is authority for the proposition that, once it is shewn that an employee has had assigned to him work of a character such that a duty arises on the part of the employer to take reasonable care before permitting him to undertake it, to see that he has the necessary knowledge and experience to protect himself from injury in the course of it, and it further appears that the employee (being incompetent in that respect) has been permitted to enter upon his duties without any steps having been taken, in fact, to ascertain his competency — those conditions being satisfied, it lies upon the employer to establish to the satisfaction of the jury that he has committed the duty referred to to some competent delegate or has made some other adequate provision for fulfilling it. In the case just mentioned the material facts are stated at page 646 of the report as follows:—

> The plaintiff, a boy of fifteen, was injured through his arm being caught by a circular saw while working in the defendants' engineering works. The jury found that there was negligence on the part of the defendants in not sufficiently instructing the plaintiff in the working of the machine. They found that the foreman, to whom the duty of instructing the plaintiff was delegated by the defendants, had not fully instructed or cautioned the plaintiff. The defendants at the trial desired to raise the defence that they were not liable to the plaintiff for the negligence of their foreman, which was not their negligence. Ridley J. declined to allow this point to be taken, on the ground that it was not pleaded, and gave judgment for the plaintiff. The defendants appealed.

(1) [1907] 2 K.B. 646.

The principles applied in that case are stated, at page 659, by Kennedy L.J., in these words:—

If it be the duty of the employer, in order that he may discharge his obligation to use reasonable care in order to prevent injury to his servant in handling the machinery upon which the servant is employed, to instruct him as to the safe and proper method of working, may that duty be discharged by delegating the business of instruction to a competent person — call him foreman or overlooker or what you will — so that, if an injury happens to the servant from the failure of the delegate to give any instruction, or adequate and proper instruction, the negligence causing the injury is, in point of law, the negligence, not of the master, but of the foreman or overlooker, who is a fellow servant with the injured person?

I agree with the Master of the Rolls that the contractual duty of the master to instruct may be discharged in this manner, and, further, that such delegation may be either an express delegation or implied as a part of the known and recognized duties of the delegate — whether styled foreman or overlooker or anything else — in the course of his service. Whether in the particular case such delegation, either express or implied, existed; whether the directions of the employer, if expressly given to the delegate were sufficiently precise and explicit; whether the delegate was or was not competent to understand and to fulfil the delegated duty — all these, just as in the case where the employer gives instruction personally or by written or printed notice the adequacy of such personal direction or of the notice, are matters proper for the consideration of the tribunal which, whether judge or jury, has to decide the issue of fact upon which depends the question of the fulfilment or non-fulfilment of the employer's duty to use reasonable care to avert danger to his servant employed about the machinery, and consequently the question of his liability or non-liability for the injury to the servant.

At the conclusion of his judgment at page 651, the Master of the Rolls says this:—

In my opinion the case must go down for a new trial. If it is established that a competent foreman was employed by the defendants whose duty it was, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instruction, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instruction. Unless this is established, the defendants will be liable, assuming that, as in the first trial, contributory negligence on the part of the boy is negatived.

In effect the decision of the court is that the duty referred to may be delegated; but, it having appeared

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that the thing which it was somebody's duty to do for the protection of the workman has not been done, then the employer, in order to discharge himself, must shew that the default is not his default.

Here the plaintiff has carried his case one step further forward and has proved (as the jury have found) that the lack of instructions to him was due to absence of care in respect of the appointment of his superior. On the principle above mentioned the burden of shewing that for this absence of care the company is not responsible is cast upon it. We have not overlooked the fact that, in the course of the plaintiff's case, Campbell was shewn to have been appointed by Wilcox, the Divisional Superintendent. The passage quoted from Kennedy L.J. makes it quite clear that in such circumstances the employer must satisfy the jury that he has done all that can reasonably be asked of him and that the neglect of duty leading to the injury complained of was that of an employee for whose negligence he is not responsible. It appeared, indeed, in *Young* v. *Hoffman Manufacturing Co.*(1), as the statement of facts above quoted shews, that the duty of giving instructions had been delegated and, nevertheless, it was held to be a necessary part of the employer's defence to shew that the delegate was competent.

The cross-appeal should be allowed with costs.

BRODEUR J.—I agree with the views expressed by the Chief Justice.

(1) [1907] 2 K.B. 646.

The main appeal should be dismissed and the cross-appeal maintained with costs.

Appeal dismissed with costs; cross-appeal allowed with costs.

Solicitors for the appellants: *Clark & Sweatman.*

Solicitor for the respondent: *George A. Elliott.*

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*Nov. 14, 15.
*Dec. 6.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... } APPELLANTS;

AND

MARY GRIFFITH AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway company—Death from contact with train—Absence of eye witness—No warning at crossing—Findings of jury—Reasonable inferences—Balance of probabilities.

About 5.30 on a December afternoon, G. left his place of employment to go home. An hour later his body was found some 350 yards east of a crossing of the Grand Trunk Railway, nearly opposite his house. There was no witness of the accident, but it was shewn on the trial of an action by his widow and children, that shortly after he was last seen an express train and a passenger train had passed each other a little east of the crossing, and there was evidence shewing that the latter train had not given the statutory signals when approaching the crossing. The jury found that G. was killed by the passenger train, and that his death was due to the negligence of the latter in failing to give such warnings. This finding was upheld by the Court of Appeal.

Held, that the jury were justified in considering the balance of probabilities and drawing the inference from the circumstances proved, that the death of G. was caused by such negligence.

APPEAL from a decision of the Court of Appeal for Ontario maintaining the verdict at the trial in favour of the plaintiffs.

The material facts are stated in the above headnote.

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*PRESENT: Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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D. L. McCarthy K.C. for the appellants.

McClemont for the respondents.

THE CHIEF JUSTICE.—Assuming that Griffith was run down, as found by the jury, at the level crossing on Kenilworth Avenue, he was there in the exercise of his right to cross the railway at a place made and provided by the company for that purpose. A train of cars comes to the same place with a right to cross that highway, subject, however, to the statutory duty of observing certain precautions with respect to the use of the bell and whistle. There was failure to perform that statutory duty. The bell was not rung and an accident resulting in the death of the deceased happened. There can be no doubt that, on these facts, a jury might say that negligence on the part of the company ought to be inferred. *Grand Trunk Railway Co.* v. *Hainer*(1); *North Eastern Railway Co.* v. *Wanless*(2).

The answer of the company is that the deceased was also guilty of negligence in that he failed to take the precautions which ordinary prudence suggested as he approached this admittedly dangerous place. For twenty-five yards before reaching the track, Griffith, whose duty it was in the circumstances to exercise reasonable care, was in full view of the track and could see and hear the train approaching, if he was alert as he should have been. It is quite true that the approaching train might have been seen by the deceased as he came to the track, if there was no obstruction, and the noise of the train might have given him warning if nothing interfered. But the

(1) 36 Can. S.C.R. 180. (2) L.R. 7 H.L. 12.

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train which caused the accident was, as I read the evidence, shut out from his view by a freight train going the opposite way — the track being double at this point — and the noise of the train approaching the crossing, and which admittedly caused the accident, might well be confounded with that made by the train going in the other direction and from which latter there was no danger to apprehend. Under these circumstances, the question is:—Ought the jury to infer, as they did, that the accident was caused by the absence of the statutory signal rather than by the failure, on the part of the deceased, to distinguish, in the confusion of noises caused by both trains, something to warn him of the approaching train and which warning he failed to observe? I think that in view of the opinions expressed in the *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(1) we would not be justified in interfering with the verdict. In a note referring to that case, Sir F. Pollock goes so far as to say "that Their Lordships did not conceal their opinion that the verdict was a perverse one." I do not think that such criticism might fairly be applied to the verdict in the present case.

I would dismiss the appeal with costs.

IDINGTON J.—There was such evidence of facts and circumstances tending to prove the respondents' case that they were entitled to have it submitted to the jury.

It is not necessary in any such case to have the evidence adduced demonstrate that a jury must find a verdict.

(1) 3 App. Cas. 1155.

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In the great majority of cases similar to this men may reasonably differ in regard to the conclusion to be reached.

We are asked to make a ruling in this case that would absolutely prevent recovery in any accident case unless it was supported by the evidence of eye witnesses.

I do not say that counsel presenting his case fairly as usual, in so many words asks us so to rule.

But I do say, that the logical result founded upon the various arguments put forward would be that.

No one who has heard or read many of these cases arising from some person having been killed at a railway crossing can fail to have often doubted whether or not under the given circumstances in which the deceased person was placed at the time of the accident, he or she would have heard the statutory warnings if given. It may in a small percentage of such cases be that the person killed was stone deaf or hopelessly drunk and from that or other like proof, courts and juries would be debarred from drawing the inferences they do draw in such cases.

Assuming the person killed possessed of the ordinary human faculties and of the reason and sense springing from the use of such faculties, courts and juries do infer the use thereof has been made, as a matter of self-preservation.

Given the proof that no statutory warning was given, they go a step further and infer that if such warnings had been given, the needed care would have been taken, and the accident have been averted. I may doubt in any such case if the absolute truth has been reached. However, I can see nothing wrong in law or sense in that mode of reasoning.

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In this case where the man killed was one who, as a matter of precaution, habitually took a longer road than he might, and thus spent daily twenty minutes more than his neighbouring fellow-workmen, in going to and returning from his work, this mode of reasoning seems peculiarly apt.

I was a member of this court when we dismissed the appeal in the *Grand Trunk Railway Co.* v. *Hainer* (1), and I certainly think this well within what was decided there.

No two cases will ever present exactly the same facts and circumstances.

The same confusion arising from coming and passing trains must have operated there as here. The unfortunates in either case might not in fact have been any better off had the law been observed.

Human insight is so limited that reaching absolute truth in regard to anything in everyday life relating to any accident is almost impossible. We must strive to reach as near as we can to the truth without being either too self-confident or bold and presuming too much or conjuring up as timid men do sometimes, more or less shadowy doubts to avoid responsibility.

This case seems to have been most fairly tried and I can see no reason to complain of the result reached.

I am glad to find from the learned trial judge's charge there was no appeal to passion or prejudice.

I agree in the mode of reasoning which the several learned judges supporting the verdict and judgment have applied to the case.

I should not indeed have added a word but for the strong argument made for appellant and for support

(1) 36 Can. S.C.R. 180

of which, I think, expressions here and there of high legal authorities can easily be found, but which are not maintained by the great general mass of authoritative decisions on the subject.

I think the appeal should be dismissed with costs.

DUFF J.—The body of the deceased James A. Griffith was found beside the railway track of the appellants, the Grand Trunk Railway Company, near Hamilton, about an hour after he left his place of work for his home on the evening of the 29th December, 1909. At the trial of the action (brought by the respondents, Griffith's widow and children) out of which the appeal arises, the jury found that he had been run down by an eastbound passenger train of the appellants at the Kenilworth Avenue crossing about 350 yards west of the place where his body was found and that the accident was due to the negligence of the appellants' servants in not giving the statutory signals as the train approached the crossing. It is not denied that Griffith's death was due to his being struck by the train in question, but the verdict is impeached in two respects: 1st, That there is no evidence properly leading to the conclusion that Griffith was at the crossing when he was struck down; and 2nd, there was none from which the jury could determine with any reasonable certainty that Griffith came into collision with the train as the result of this default on the part of the company's servants.

It will be convenient to deal first with the second ground of appeal and for the purpose of dealing with it I shall assume that the deceased was crossing the track at Kenilworth Avenue, when he met his death; and that as the east-bound train approached the high-

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way the bell of the locomotive was not ringing as the statute requires. The question arising on this topic is whether the plaintiff has shewn facts which justify the inference that Griffith's presence on the eastbound track at the moment he was struck by the train was due to the fact that the statutory signal referred to was not given?

Before examining the facts with a view to answering this question there are two general observations which I think ought to be made. The first of them is this. When a plaintiff in such a case as this proves facts justifying the conclusion that the default of the defendant has materially contributed to the accident in the sense that without that default the accident would not have happened he thereby establishes a *primâ facie* case — unless the facts disclosed fairly and reasonably viewed make it impossible in the absence of further evidence to escape the conclusion that the negligence of the injured person has also been a factor in producing the harm complained of.

I dwell upon this because I think the able and interesting argument of Mr. McCarthy did to some extent involve the fallacious assumption that the plaintiff must as a necessary element in his case exclude the hypothesis of the victim's contributory negligence. The plaintiff must fail if he cannot connect the injury complained of with the defendants' negligence without at the same time proving facts which no reasonable tribunal could hold to be consistent with the absence of contributory negligence on the part of the victim; but he is entitled to succeed if he convinces the jury on facts reasonably leading to that conclusion that the defendants' negligence has materially contributed to the mishap and if at the same time

the jury may reasonably find and do find that the defendants have failed to discharge the onus placed on them to shew that there has been such contributory negligence. This appears to me to be quite conclusively demonstrated by the judgment of Lord Watson in *Wakelin* v. *London and South Western Railway Co.*(1), in which Lord Blackburn concurred, and by the judgments in the *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(2) which Lord Watson mentions.

I will not put in my own words the second observation; but will quote the words of the Lord Chancellor in *Richard Evans & Co.* v. *Astley*(3) :—

> It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but courts, like individuals, habitually act upon a balance of probabilities.

It is quite unnecessary, doubtless, to say so — but if it should be supposed that the principle thus stated by the Lord Chancellor involves any new departure all doubts on that point may be allayed by referring of Lord Cairns's judgment in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(2), at pages 1166 and 1167, Lord Selborne's judgment in the same case, at pages 1190 and 1191, and Lord O'Hagan's judgment at page 1184; to the judgments of Lord Esher, and Lopes and Kay L.JJ., *Smith* v. *South Eastern Railway Co.*(4), at pages 183, 185 and 188, Lord Her-

(1) 12 App. Cas. 41, at p. 46.
(2) 3 App. Cas. 1155.
(3) [1911] A.C. 674, at p. 678.
(4) [1896] 1 Q.B. 178.

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schell, in *Peart* v. *Grand Trunk Railway Co.*(1), as well as to the judgments of the Judicial Committee of the Privy Council in *McArthur* v. *Dominion Cartridge Co.*(2) (Lord Macnaghten) at page 76, and in *Toronto Railway Co.* v. *King*(3) (Lord Atkinson) at pages 264 *et seq.*

In this case the relevant facts in evidence are — I am proceeding on the assumption above mentioned — that there were two tracks at the crossing in question; that at the time the accident occurred, about 5 o'clock of a December evening, two trains were approaching the crossing, one eastbound on the south track, and the other westbound on the north track and these trains met and passed each other almost immediately after the eastbound train had cleared the crossing; on the train approaching from the east the bell was ringing, on the other the bell was not ringing. It is important to add that as Griffith walking south came to the railway line his view towards the west would be cut off by a high fence until he reached a point twenty-five yards north of the line and that after reaching that point his vision towards both the right and the left was unobstructed. The first question we have to decide is whether from this state of facts the conclusion could fairly be deduced that the accident would not have happened if the bell had been rung.

I think the jury might properly consider that as Griffith approached the crossing he would see the west-bound freight train and hear its bell and that until he passed the fence on his right he could not see the eastbound passenger train; and that hearing no

(1) 10 Ont. L.R. 753. (2) [1905] A.C. 72.
(3) [1908] A.C. 260.

bell from the west he would be thrown off his guard in respect of trains approaching from that side and would naturally give his attention exclusively to the train he both saw and heard on his left.

It is clear that if after Griffith had passed the fence which was on his right he had glanced along the line westward from that side of the crossing he must have seen the eastbound train; and on the hypothesis that he did so, it is equally clear it would be impossible to justify the conclusion that the failure to ring the bell had anything to do with his death. If the deceased saw the passenger train and either rashly attempted to cross in front of it or was led to attempt to cross by his own error in miscalculating the position or speed of the train — in either case there could be no ground for connecting the failure to ring the bell with the accident; and the important question appears to be whether the jury could properly infer that the eastbound train was not observed by the deceased until at all events it was too late to enable him to save himself. I think they might do so. I think they might properly consider that in the circumstances hearing no bell from the east and having his vision in that direction obstructed by the fence on that side while the freight train at the same time was in full view west of the crossing, he not unnaturally might and probably did proceed without thought of possible danger from the opposite direction.

The other hypothesis — that seeing the eastbound train he was led into attempting to cross by an error of judgment as to the position or speed of the train might no doubt, considered in itself, be a possible explanation of what occurred. But I do not think the examination of these two rival hypotheses could

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properly be withdrawn from the jury. They presented a question for the jury in my opinion for this reason. The first proceeds upon the theory that that happened which in the ordinary course of events would be likely to happen as the result of the failure to ring the bell assuming Griffith to have acted in a way in which according to common experience the jury might reasonably consider it unlikely that an ordinary person having experience of the railway practice respecting signals for highway crossings would act. The other involves the assumption that Griffith acted in a way in which the jury might properly think only a very rash man would act. I think the plaintiff having thus connected the accident with the fault of the defendants by proving such negligence on their part as was calculated according to the common course of experience to result in just such an eventuality as that which happened in fact it was for the jury to consider the weight of any suggestion that the victim brought disaster upon himself by an attempt to do something in itself extraordinary or something which in the particular circumstances the jury would be entitled to think an ordinary person would be unlikely to do. The plaintiff's case appears to be in that position and that I think is sufficient to bring it within the principle stated by the Lord Chancellor and already quoted.

Each of the cases referred to above affords an illustration of this method of dealing with such questions. In Slattery's case the victim had been killed while attempting to pass in front of a train which he could not have failed to see if he had looked in the direction from which it was approaching. Nobody knew whether he saw the train or not. There was evidence from which the jury might have inferred

that he knew it was the practice of trains before passing the locality in question to give warning of their approach by whistling and there was evidence that at the moment of crossing he was in a preoccupied state of mind. The majority of the Law Lords held it to be a question for the jury whether he was put off his guard by the failure of the train to whistle or whether on the other hand he saw the train but rashly or through excusable error of judgment attempted to pass before it. In *Smith* v. *South Eastern Railway Co.*(1) nobody knew whether the victim had or had not seen the train which ran him down; but the practice was (as the man who was killed might be supposed to know) that when a train was approaching the crossing at which the accident occurred the gate-keeper stood there and informed the driver by signal whether or not the line was clear; and the train which caused the death of the victim passed the crossing immediately after he had left the gate-keeper sitting in his cottage. It was considered by the Court of Appeal that from these circumstances the jury might infer that the victim had been led into a sense of security by his knowledge that the gate-keeper was not at his accustomed post when a train was about to pass and that he had not seen the train until it was too late to escape. In *Toronto Railway Co.* v. *King*(2) there is another example of a similar mode of reasoning. In *Dominion Cartridge Co.* v. *McArthur*(3) the injury complained of arose from an explosion in a cartridge factory. One of the machines had defects which might have been expected to lead to such an explosion, notwithstanding the absence of any

(1) [1896] 1 Q.B. 178. (2) [1908] A.C. 260.
(3) [1905] A.C. 72.

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carelessness on the part of the victim who at the time of the explosion was engaged in working it. There was no suggestion of negligence on his part, and it was held to be a proper inference that the explosion arose from the defects proved. I may add that in *Crouch* v. *Père Marquette,* recently decided in this court, (where it was shewn that the signals given by a train approaching a highway were calculated to mislead and that the signpost had been removed from the crossing), it was held that the jury might infer that the death of the victim, a traveller on the highway, was due to his being misled by the signals or deceived as to the point at which the track crossed the highway; and that it was for them to say whether the rival suggestion that the victim's horse had taken fright when approaching the railway line was to be accepted or rejected.

If the jury considered the weight of probability to favour the conclusion that Griffith did not see the passenger train in time to escape it, then it seems clear that the question of contributory negligence could not be withdrawn from the jury. The considerations to which the majority of the Law Lords give effect in Slattery's case and which prevailed in *Smith* v. *South Eastern Railway Co.*(1), and in *Toronto Railway Co.* v. *King*(2), appear to be entirely applicable.

I quote *in extenso* two passages from the judgments in *Smith* v. *South Eastern Railway Co.*(1). At pages 185 and 186 Lopes L.J. says:—

> Then it was said that this case fell within the authority of *Wakelin* v. *London and South Western Railway Co.*(3), because the circum-

(1) [1896] 1 Q.B. 178. (2) [1908] A.C. 260.
(3) 12 App. Cas. 41.

stances under which the deceased came by his death were not known, and that the evidence given for the plaintiff was at the best equally consistent with the death of the plaintiff's husband having been caused by his own negligence as with its having been caused by the defendants' negligence. It was said that the train carried lights, that it could be seen more than 600 yards off, and that the driver sounded his whistle; and, therefore, that the deceased man must have been guilty of contributory negligence by reason of the reckless way in which he crossed the line. Of course, if that could be established, the argument which the defendants' counsel based upon *Wakelin* v. *London and South Western Railway Co.*(1) might be sustained. The question is whether on this point the case could have been withdrawn from the jury. Can it be said that the evidence was equally consistent with the view that the death of the plaintiff's husband was caused by his own negligence as with the view that it was caused by the defendants' negligence? I have felt some difficulty on this point; but on consideration the case strikes me in this way. The deceased appears to have known the crossing and the practice there with regard to the signalling of trains. Was it not a question for the jury whether the deceased, finding that the signalman remained sitting at his lodge and was making no attempt to signal any approaching train, might not reasonably have supposed that he could safely cross the rails without taking the precaution of looking up and down the line or listening for the whistle of a train? On consideration I have come to the conclusion that on this question there was evidence for the jury, and, if I had been trying the case, I do not think I could have withdrawn it from them.

The observations of Lord Esher at pages 183 and 184, are to the same effect:—

The deceased man lived in the neighbourhood, and had been at the crossing on previous occasions. I think there was evidence from which the jury might infer that he knew that Judges had to perform the services which I have mentioned for the company, whenever a train was passing over the crossing; and, that being so, they might on the evidence, take the view that, under the circumstances, it was not a want of reasonable care on the part of the deceased to presume that, as Judges remained in his house, no train was coming, and, therefore, he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might otherwise be necessary. If that be so, there was evidence for the jury upon the question whether there was any want of reasonable care on his part. In saying this, I think I am acting on the view expressed by Lord Cairns in the case of *Dublin, Wicklow*

(1) 12 App. Cas. 41.

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and Wexford Railway Co. v. *Slattery*(1). He seems in that case to have thought that, if a man had a right to suppose from his knowledge of the practice at the station that an approaching train would whistle, the jury might come to the conclusion that the absence of whistling had thrown him off his guard, and had produced in him a state of mind in which he might not unreasonably suppose that it was unnecessary for him to look out before crossing to see whether a train was coming. So here, I think, in the case of a man who knew the practice at the crossing, the jury might say that the fact that the signalman remained in his house produced in his mind a sense of security which would prevent its being a want of reasonable care not to look up and down the line to see whether a train was coming. Therefore, without entering into all the questions which have been discussed during the argument, I think the considerations which I have mentioned are sufficient to determine this case, and to entitle the judge at the trial to decline to withdraw the case from the jury.

The remaining question stands thus. There was evidence from which the jury might conclude that Griffith habitually avoided the railway. There is no reason for supposing that on the occasion in question he did not follow his usual practice except the fact that his body was found a considerable distance from the crossing. I think the question whether the situation of the body was so inconsistent with the supposition that he was on the crossing when he was struck as to lead to the inference that he was killed while walking on the track or to leave the whole matter too doubtful to justify any conclusion upon it was a question of fact which could not be withdrawn from the jury; and I think it is quite impossible to say that their verdict on this point was an unreasonable one.

ANGLIN J.—The defendants appeal from the judgment of the Court of Appeal for Ontario upholding a verdict against them for damages for the death of the

(1) 3 App. Cas. 1155.

plaintiff's husband. The plaintiff's case is that, while lawfully crossing the defendants' railway track on Kenilworth Avenue in the City of Hamilton in returning from his work to his home on the evening of the 29th December, 1909, her husband was struck and killed by a train of the defendant company which had failed to give the requisite statutory warning of its approach, and that this omission of duty was the cause of the accident.

At the trial and in the Court of Appeal the defendants contended that it was not established by the evidence whether the deceased had been killed by the train in question or by a train which had gone over the crossing shortly before, as to which no proof of breach of statutory duty had been given. The jury found against the appellants upon this point; the Court of Appeal confirmed the finding; and it was expressly accepted by counsel for the appellants at bar in this court.

In support of their appeal the defendants now take two grounds: first, that there was no evidence to sustain the finding that the deceased when struck by the train was on the highway crossing; and secondly, that, although the omission of the statutory signal had been proved, upon the evidence it was a mere surmise or conjecture and not a legitimate inference that this was the cause of the accident.

There was no eye witness of the accident. The train which must now be taken to have struck the deceased was travelling in an easterly direction. His body was found some 350 yards to the east of Kenilworth Avenue crossing; his dinner can and a mitten were picked up some fifty yards farther west than the body, and at the latter point there were also found

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traces of blood and hair upon the rails. There is no evidence of any indicia of the accident nearer to the crossing. Several of the plaintiff's fellow-workmen testified that it was his habit in returning to his home not to walk along the railway as other workmen did, but to cross it at Kenilworth Avenue. He was never known to have followed the railway track in going home. There was some evidence by two of his fellow-workmen, who, on the night in question, were walking home along the railway track, that, at a point about 110 yards to the west of Kenilworth Avenue, they were overtaken by the train which killed the deceased, and that looking up the track they did not see any person on the railway right of way either at the crossing or beyond it. The plaintiff also stated in evidence that she had warned her husband of the danger of walking upon the track and that he had assured her that he never did so. I, however, exclude this latter piece of evidence from consideration, as I think its admissibility very doubtful.

Having regard to the other evidence to which I have alluded and to the fact that it should not be assumed that an illegal act, such as trespassing upon the railway right of way would have been, was committed by the deceased, would a jury be justified in inferring that he was on the crossing when struck by the train; or does the mere fact of his body being found 350 yards east of the crossing preclude that inference? Had the body been found only a few yards from the crossing the jury's finding could not, I think, have been questioned. That the deceased was carried some distance by the engine is manifest from the fact that his can and mitten were found 50 yards nearer to the crossing than his body. That the bodies

of men and of animals struck by railway engines are sometimes carried by them for considerable distances is well known. There was no evidence given of anything in the condition of the body or in its position with regard to the railway tracks when found which would indicate whether it had or had not been carried any considerable distance. In these circumstances it was, I think, for the jury to determine what weight should be given to the fact that the body was found where it was. It was for them to say whether, it being clear that the body had been carried for some distance, it was reasonable in the circumstances to infer that it had been carried the whole 350 yards. It was within their province to decide whether the inference that the deceased had followed his usual course in returning home on the night in question and that he had, therefore, been struck on the crossing was rendered unsafe and improper because of the distance from it at which the body of the unfortunate man was found. The jury having drawn this inference, although the case is certainly a very close one, I am not prepared to say that their finding, affirmed by the provincial Court of Appeal, should now be set aside.

Upon the second question two considerations are pressed on behalf of the defendants; first, that a person coming towards the crossing, as the deceased did, could have a clear and unobstructed view of an approaching train for 25 yards before he reached the rails and that, had he looked when at that distance, or at any time thereafter before he crossed the tracks, Griffith could not have failed to see the train; it is, therefore, urged that his death should be ascribed rather to his failure to take ordinary care than to the defendants' omission of their statutory duty; in

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the second place, it is said that the train, when approaching the crossing, was ascending a grade, and that in doing so the engine made so much noise that, as the plaintiff herself says, it was audible to her standing in her doorway half a mile east of the crossing; and she adds that she also saw the light from the fire-box reflected on the escaping smoke and steam. The appellants maintain that it is, therefore, a pure conjecture that Griffith would have heard the omitted signal, had it been given.

In support of his contention that the case should have been withdrawn from the jury Mr. McCarthy urged that the fact that the accident might be attributed to failure of the deceased to look or listen before crossing the railway rendered it impossible for the jury to find, except as a mere guess or surmise, that breach of duty on the part of the defendants was the cause of the accident. The conduct of the deceased is primarily of importance upon the issue of contributory negligence. With that issue the jury must deal, the burden of proof being upon the defendants. It certainly cannot be laid down as an absolute rule that failure to look and listen before crossing a railway must in every instance and in all circumstances be held to be contributory negligence sufficient to debar relief. There may be circumstances which wholly excuse that omission. That the deceased might have been in a flurried state of mind owing to anxiety to procure a ticket for a friend was deemed a consideration which could not have been withdrawn from the jury in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(1). In the present

(1) 3 App. Cas. 1155, at p. 1167.

instance the evidence establishes that when Griffith reached the Kenilworth Avenue crossing, assuming him to have been struck on that crossing as found by the jury, there was a freight train approaching from the east. This train, it is proved, gave the statutory signals for the crossing, and it is quite possible that his attention may have been so absorbed by it that, for that reason, he failed to hear or observe the train coming in the opposite direction. It is for the jury to determine whether, in these circumstances, his failure to look to the west when about to cross the tracks amounted to contributory negligence.

Then it is urged that, having regard to the presence of the freight train and to the fact that the deceased presumably failed to hear the great noise made by the engine of the passenger train which struck him, it must be the veriest conjecture or surmise to say that if the latter train had given the statutory signals they would have attracted the attention of the deceased and prevented the accident. This method of presenting the defendants' case is certainly captivating. We have, however, the fact that Parliament has deemed it wise to enact that railway trains approaching highway crossings shall give certain signals not for the purpose of attracting the attention of those who are already on the alert and need no warning, but for the purpose of arousing those who are distracted or whose attention is absorbed owing to whatever cause and who, therefore, need warning. Parliament has specified the particular signals which in its judgment are best fitted to serve this purpose. Where it is clearly proved that those signals have been omitted and that an accident, which the giving of them *might* have prevented, has occurred, it must, I think,

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always be within the province of a jury to say whether or not, having regard to all these circumstances, the breach of statutory duty should be taken to be the determining cause of the accident. The moment the decision is reached that the statutory signals, if given, might have prevented the accident and there is evidence of their omission, it is not proper for the trial judge to withdraw the case from the jury, (unless, indeed, what is incontrovertibly contributory negligence is admitted or is so clearly proved in the plaintiff's own case that it would be proper to direct a jury to find it) and if, upon the case being submitted to them, the jury see fit to draw the inference that the omission of the signals was in fact the cause of the accident, it is not competent for an appellate court to disturb that conclusion. Had I been trying this case without a jury I am by no means satisfied that I should have reached the conclusion at which the jury arrived. But, as has been pointed out time and again an appellate judge should not, for that reason, interfere.

I would dismiss this appeal with costs.

BRODEUR J.—The appeal should be dismissed. I agree with the opinion given by the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondents: *W. M. McClemont.*

S. W. RAY AND C. W. JARVIS (PLAINTIFFS) ..... APPELLANTS;

AND

A. H. WILLSON (DEFENDANT) ..... RESPONDENT.

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*Nov. 16.
*Dec. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Signature to blank note—Authority to use—Condition—Bonâ fide holder—Bills of Exchange Act, ss. 31 and 32.

W., residing at Newmarket, owned property in Port Arthur and signed some promissory note forms which he sent to an agent at the latter place to be used under certain circumstances for making repairs to such property. The agent filled in one of the blank notes and used it for his own purposes. In an action by the holder W. swore, and the trial judge found as a fact, that the notes were not to be used until he had been notified and authorized their use. He also found that the circumstances attending the discount of the note by the agent were such as to put the holder on inquiry as to the latter's authority. The first finding was affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (24 Ont. L.R. 122), Fitzpatrick C.J. *dubitante*, that secs. 31 and 32 of the "Bills of Exchange Act" did not apply and the holder could not recover.

Held, per Davies and Anglin JJ.—The finding of the trial judge that the circumstances never arose upon which the agent had authority to use the note was not so clearly wrong as to justify a second appellate court in setting it aside.

Held, per Idington J.—The finding of the trial judge that the holder was put on inquiry as to the agent's authority was justified by the evidence and bars the right to recover.

Held, per Duff J.—The evidence establishes that the agent had no authority to use the note.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial in favour of the defendants.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 24 Ont. L.R. 122.

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The facts of the case are stated in the above head-note.

Bicknell K.C. for the appellants. *In Smith* v. *Prosser*(1) the note was negotiated before completion. That case, therefore, does not apply here.

The defendant is estopped from denying his agent's authority. See *Ewing* v. *Dominion Bank*(2); *Lloyd's Bank* v. *Cooke*(3).

Choppin for the respondent.

THE CHIEF JUSTICE.—I grant that a man in his dealings with those in whose honesty he has reason to repose confidence is not expected to take such precautions as make the commission of a crime, which he has no reason to anticipate, impossible; but, on the other hand, all men are under the obligation to exercise, in their relations with their fellow men, the care and caution of "an average prudent and intelligent man," which is equivalent to saying that we are all subject to "a duty to take care." In the special circumstances of this case, the nature and extent of that duty "to take care" must be considered with reference to the provisions of the "Bills of Exchange Act," to which I refer later, passed to protect the commercial public against the reckless carelessness of men in the management of their affairs and to facilitate business intercourse. The question to be decided here is whether, in view of that Act, the respondent should escape liability as the signer of the note which is the basis of this action on this, among other grounds, that, though his

(1) [1907] 2 K.B. 735. (2) 35 Can. S.C.R. 133.
(3) [1907] 1 K.B. 794.

carelessness may have caused the appellants harm, he was guilty of no breach of duty towards them.

The respondent, a man of some education and means and, if we may judge by his answers to the questions put on his examination as a witness, with considerable knowledge of the "Bills of Exchange Act," living at Newmarket near Toronto, purchased some built on property at Port Arthur, through one Thompson, who, after the purchase, continued to manage it for him. Anticipating the probability that some repairs would be necessary to his houses, the respondent signed several ordinary lithographed bill forms with blank spaces for names, amounts, etc., and delivered them to Thompson with instructions to fill up the blanks and issue them as completed notes if and when it became necessary to procure money to pay for the anticipated repairs. After some time, Thompson filled up one of the blank forms for the sum of $1,000, making of it a note payable on demand, and, in breach of his duty to the respondent, issued it in its completed form; the appellants are now holders in due course of that note. I believe the majority of the court are agreed that there is no evidence to support the finding of the trial judge that the appellants did suspect, or had any reason to suspect, fraud. The sections of the Act upon which the appellant relied at the argument are sections 31 and 32:—

31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit.

32. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior

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to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

On the whole evidence it is apparent that the authority to fill up and issue was given contemporaneously with the delivery of the signatures on the blank forms and there is no clear finding to the contrary. To bring this case within the decision in *Smith* v. *Prosser*(1) an evident attempt was made throughout the examination of the respondent to shew that the express authority to fill up and issue the bills was not to be exercised by Thompson until the respondent was communicated with for further instructions; but that the latter tacitly acquiesced in the fraud practised by his agent on the appellant, with full knowledge of all the facts, cannot be doubted. The respondent was also guilty of gross negligence when he placed Thompson in possession of the blank bills with the knowledge which he must be presumed to have had that possession carried with it *primâ facie* authority to fill up the blanks for any amount. In so doing the respondent was guilty of a clear breach of duty towards any one who might subsequently become a holder in due course, if the proviso to section 32 does not cover the case. The only material finding of fact is that the condition subject to which the express authority to issue was given never arose.

Does the fact that the express authority to fill up and issue, given contemporaneously with the delivery of the instrument, was conditional destroy the *primâ facie* authority vested by the statute in the person to

(1) [1907] 2 K.B. 735.

whom it was delivered to convert it into a bill enforceable in the hands of a holder in due course against the maker? I am strongly inclined to doubt that it does on the facts of this case. By the evidence of the respondent seeking to escape liability, in the absence of Thompson to whom the notes had been delivered, the presumption is rebutted to this extent only. The authority to fill up and issue is admitted to have been given contemporaneously with the delivery of the instrument; but the respondent says the note was not to be used until the necessity arose to make provision for the payment of such sums as might be required to make repairs to the houses in Port Arthur, which were in the discretion of the agent Thompson. I would have been disposed to hold that in issuing the note the agent did not act in accordance with the authority given to him, but that the instrument was originally delivered that it might in his hands form the basis of a negotiable instrument; that the statute gave him *primâ facie* authority to fill it up as a complete bill and, as a consequence, the proviso to section 32 would operate to protect the appellant. Otherwise what is the effect of that proviso? In every case hereafter the banker, instead of being able to rely upon the *primâ facie* presumption resulting from possession, will be put upon inquiry and, if it appears that the note offered for discount was signed or indorsed in blank, it will be his duty to ascertain whether in fact the maker or indorser authorized the filling in or the issuing of the note absolutely and without any secret restrictions at the time it was delivered to the person in possession. The *primâ facie* presumption created by the statute will be no longer of much, if of any value; because it may be destroyed

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by the evidence of the maker or indorser seeking to escape liability in the absence or death of the party to whom the instrument was originally delivered, on the ground that the authority to issue was conditional upon an event which never happened. The proviso will cease to be of any practical use because the note is not valid and effectual and cannot be enforced by the holder in due course, notwithstanding the statutory presumption, if the authority to issue was given subject to an unfulfilled secret condition. It may embarrass the ordinary commercial man to distinguish between limited authority, which would be covered by the proviso, and authority which is conditional upon the happening of a future event. I presume that the theory is that, failing the event, authority never existed. I would have adopted the judgment of Mr. Justice Meredith; but out of deference to the opinion of the majority of my colleagues who hold that this case is governed by the judgment in *Smith* v. *Prosser*(1), I do not enter a formal dissent.

DAVIES J.—If the findings of fact of the learned trial judge confirmed as they are by the Court of Appeal for Ontario, are not disturbed by this court, it is difficult to see how in the face of the judgment of the Court of Appeal in the recent case of *Smith* v. *Prosser* (1), this appeal could be allowed.

The trial judge found as a fact "that the defendant never intended nor authorized the paper sued on to be filled up as a promissory note; that the circumstances never arose upon which only the agent Thompson was authorized to fill the same up, and that what

(1) [1907] 2 K.B. 735.

was done by Thompson was without authority and in fraud of the defendant, and that the paper sued on never in fact by the defendant's authority became a promissory note."

These findings of fact were based upon the trial judge's acceptance of the evidence of the defendant. He was a very old man in feeble health and with a somewhat impaired memory and his evidence, owing to his inability to stand the fatigue of travelling to attend and give evidence at the trial had been taken by commission. While there were very many facts connected with his dealings with Thompson generally and especially with respect to the note sued on which he had signed in blank and given to Thompson upon which his memory failed him, the old man was singularly clear and emphatic upon the crucial point that he had delivered it to Thompson to retain in his custody until he had notified the witness, respondent, that monies were required by Thompson to pay for the repairs of some houses in Port Arthur belonging to the witness, for which Thompson was agent, in which case, if the witness had not the money to send Thompson then the latter could fill up and use the note, but not otherwise. The note was deposited with Thompson, so respondent gave evidence, for safe-keeping and was only to be filled up and used by him if and when he received information from respondent Willson that he could not provide and send the monies required by Thompson for the repairs of the houses. The note was one of several so deposited by Willson with Thompson, but the one sued on was the only one Thompson attempted to use.

This crucial finding of the trial judge has been confirmed by the Court of Appeal, Meredith J. dis-

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senting. I confess I have strong doubts whether I should have made the same finding on the somewhat unsatisfactory evidence produced. At the same time I have not such a clear conviction that it is erroneous as would justify me in reversing it. In a late case in the House of Lords of *Johnston* v. *O'Neil*(1), Lord Macnaghten, at page 578, stated the rule which governed that House with respect to two concurrent findings of fact as follows:—

> In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong.

In a Scotch case, *Gray* v. *Turnbull,* in 1870(2), where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither court saw the witnesses, Lord Westbury, after referring to the practice in courts of equity to allow appeals on matters of fact, makes this observation: "If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever." In an English case, *Owners of the P. Caland* v. *Clamorgan Steamship Co.*(3), Lord Watson expressed himself as follows:—

> In my opinion it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at — I will not say a certain because in such matters there can be no absolute certainty — but a tolerably clear conviction that these findings are erroneous, and the principle appears to me especially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability.

We have adopted and followed in this court of last

(1) [1911] A.C. 552. (2) L.R. 2 H.L. Sc. 53.
(3) [1893] A.C. 207.

resort in Canada the rule substantially as Lord Watson states it.

Accepting, therefore, the findings of fact on the question of the intention with which the blank note signed by respondent Willson was left with Thompson is the case concluded by *Smith* v. *Prosser*(1) above cited ? The facts with regard to the intention with which the signed blank notes were left in the hands of a third party as custodian were substantially the same in that case and this, and in each case the custodian had filled up and negotiated the blank note with a third party, who for the purposes of my argument may be held to have been a "holder in due course" without any instructions from the defendant authorizing him to do so.

Sections 31 and 32 of our "Bills of Exchange Act," R.S.C. 1906, ch. 119, are practically transcripts of the 20 and 21 sections of the English Act. The only difference is that the latter only applies to paper bearing a stamp which has been signed in blank.

The criticism of Mr. Bicknell upon the case of *Smith* v. *Prosser*(1) was that it was a decision upon a question of fact only and that the court there held the provisions of the "Bills of Exchange Act" inapplicable and decided the case upon the common law doctrine of estoppel. It is true that the court did hold the sections of the "Bills of Exchange Act" inapplicable because the note in that case was not stamped when negotiated, but they also held that the passing of that Act which codified the then existing law

did not alter in any respect material to that case the law as laid down in the prior authorities.

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Vaughan Williams L.J. says, at page 744:—

I do not desire to rest my judgment on that ground—(that is, that the holder of the note had notice that Telfer, the party who negotiated the note with him, was acting under a power of attorney, and that the plaintiff ought to have made inquiries)—nor do I rest it on the ground that there was no stamp, impressed or adhesive, on the note when Telfer assumed to negotiate it.

The learned Justice then goes on:—

I propose to deal with the case in this way. Here is a document which was in an incomplete state at the moment of its negotiation. If that note, being in that condition, had been handed to Telfer (and I leave out of consideration for this purpose the fact that Telfer and Wilson were joint attorneys) for the purpose of his making use of it, and for the purpose of its being issued as a negotiable instrument, I am of opinion that *primâ facie* the defendant would have been responsible to a *bonâ fide* holder for value who had purchased the note from Telfer as the plaintiff did. In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such.

Fletcher Moulton L.J., after first holding that under the special circumstances of that case the action must fail, said, p. 752:—

I am also of opinion that the same conclusion will follow if it be considered upon the broad grounds upon which Vaughan Williams L.J. has based his judgment, in which I entirely concur. The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument.

And at page 753:—

The essential fact which is necessary to enable the plaintiff to establish his case is, therefore, absent. The defendant never issued the documents with the intention that they should become negotiable instruments;

and—

In my opinion section 20 is based upon the doctrine of common law estoppel as it existed at the date of the Act, and, therefore, the

presence of the condition as to its operation shews that the legislature realized that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable.

Buckley L.J. bases his judgment on the same ground, namely, at page 755, that

the promissory notes never became negotiable instruments, the reason being that the defendant never issued them nor authorized any one else to issue them as negotiable instruments.

The true construction, therefore, of sections 31 and 32 of the "Bills of Exchange Act" so far as the protection of third parties holders in due course is concerned, limits that protection to cases where the signer intended the instrument signed by him to become a bill or note, and authorized its issue for that purpose. Where that intention is proved it matters not whether his instructions to the person he delivered it to were exceeded or not. He is liable upon it. If on the contrary that intention is disproved and it is shewn the instrument signed was not intended to be issued or became a bill or note, but was left for safe custody in some agent's hands to await further instructions as to its issue he is not liable if the bill or note is fraudulently issued by the agent or holder without such further instructions.

Our duty is to expound the law as we find it, and doing so, I am of opinion that on the findings of fact in this case which I am unable to conclude are clearly wrong, the appeal must fail and be dismissed with costs.

IDINGTON J.—I am not entirely free from doubt regarding respondent's version of the facts which led him to entrust his signatures to Thompson.

It is difficult to understand why such an expedi-

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ent should have been resorted to merely to anticipate repairs on his buildings.

My doubt, however, is not of such a nature as to entitle me to reverse the findings of fact by two courts below. I am clear the respondent was trying to tell the truth. And though possibly in error in assigning possible repairs as the subject-matter he had in view, it is extremely improbable that he is entirely mistaken in saying Thompson had no right to use the signature for his own purposes.

Taking the view of the facts that the courts below have done it seems impossible to hold otherwise than they have done without discarding the reasoning upon which the judgments in *Smith* v. *Prosser*(1) proceed.

It is to be observed, however, that the reasoning adopted was entirely unnecessary on the facts presented for the decision of that case and hence binds no one save so far as the reasoning adopted may. I do not think, however, this case requires us to adopt or discard the reasoning.

The exact shade of fraud involved in Thompson's misconduct is not to my mind so clearly and accurately determined as to apply or rather say we must apply the reasoning adopted in *Smith* v. *Prosser*(1).

All I am here, however, concerned with is, whether or not there is ground for finding a fraudulent use of the respondent's signature. I do so find. Whether the fraud is exactly of the kind dealt with in *Smith* v. *Prosser*(1), or more akin to the class of case needing the application of such reasoning as adopted in the case of *Lloyd's Bank* v. *Cooke*(2), matters little. The appellants are on such finding of fact bound to shew

(1) [1907] 2 K.B. 735. (2) [1907] 1 K.B. 794.

that they are holders in due course, which, I think, involves both good faith and valuable consideration.

And assuming that but for want thereof they would have on any ground been able to claim to recover on the note Thompson made out of his improper use of respondent's signature, I fail to see how they can succeed here or hope to succeed here in face of the finding of the learned trial judge.

He finds as fact that the plaintiffs "had reason to suspect and did gravely suspect the *bonâ fides* of Thompson as the holder of the note." At least two of the learned judges in the Court of Appeal accept this finding as well founded.

Care in taking a negotiable security is surely not too much to exact from those asking and in proper cases enjoying immunity as holders thereof. And I may add that bankers ought to preserve some record of such transactions where they in the course of such business can hardly be expected to remember every detail of their every day dealings.

The onus of proving they are holders in due course and in the sense I attribute thereto rests on them taking the security.

The appellants are not able to shew satisfactorily where they got this note or what they paid for it, or what it in fact was collateral to if taken as collateral at all.

The appellants were both on the witness stand. The only one who professes to know the details of the transaction professes it was got as incidental to the needs of Thompson to pay a hundred dollars to the Union Bank, which held it as security therefor and was pressing for its payment.

The court adjourned the case for some hours to en-

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able him to produce his books and papers and I infer if he had chosen he could have brought the officers of that bank as well as his own books and papers to establish the facts.

When the books were produced he could not put his finger on anything to clearly corroborate his story or fix the time or fact of payment which he alleged he had made.

There is no record indeed of his having the note except an entry made two months at least after the Thompson account seems to have been closed, and that is an entry in his register of bills for collection, of this and two notes of another party upon which he seems to have placed according to his evidence little, if any, value.

His story of how they came to be there recorded suggests rather he had found himself possessed of things he had forgotten.

He says he had continued to press Thompson for payment, but it never seems to have occurred to him to demand payment of this note (a stale security when got by him) from the maker for four months after getting it and for two months after it was placed among bills for collection. Why? What was he afraid of? It was a demand note, a class, he admits, they would not deal in usually.

He admits he knew the Union Bank might have demanded it and thus rendered it an overdue bill when he got it, yet he never inquired as to the fact.

Why did he so shut his eyes? He seeks to claim it as collateral. He tells three times over the story of how he got it.

The first time he says:—

I told him if he would go to the Union Bank and bring the note in

I would pay the Union Bank and hold it against everything he owed us.

Not a word in this as to future advances, yet he thinks it was on the 18th of May and, after more dealings meantime the account closed the end of June.

We have no explanation beyond the ledger debiting after the 18th of May of items amounting to a total of four to five hundred dollars and discounts crediting to amount of eight hundred dollars and yet a gradually rising debit balance.

What right could he have on such a statement of how he was to have held it to apply it to these dealings ?

Besides, it is rather curious he does not venture there to swear Thompson agreed to what he said. It is left in a case of this kind to mere inference or surmise which might be most misleading.

On the second version of the story in reply to the learned trial judge interrogating him as to what took place, he is still more vague and does not refer to holding it as collateral to anything.

If this version, as it stands, is the true statement, then he had no right to hold it for anything but the advance proposed to redeem it by the Union Bank.

It is quite consistent with the idea of a mere hope that something more than expressly stipulated for might come from its collection.

On a third attempt to explain the transaction in answer to the learned trial judge asking him to state what took place when Thompson delivered the note, he repeats the story of Thompson's having been pressed by the Union Bank and wanting money to pay it off and take the note, and then adds: "I asked him if he would give it to me as collateral for all he owed

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me and he said yes," and proceeded to speak of a lot of things to remember, etc.

I have compared this statement with the answer given to the identical question some time before.

They do not look much alike. The learned judge saw the witness, and was in an infinitely better position than I am to draw the proper conclusion to be drawn from variations of the story.

There was a statement also made by the witness between his first statement to his own counsel and the first statement to the learned trial judge in which he refers to a note of another party for which Thompson was responsible and he says. speaking of what he held this note for: "there was a note of a man named Williams whom I did not consider good and I told him so, and I told him I wanted collateral for that."

This is not introduced in any of the other three statements I have referred to.

I cannot help observing that in each of these three versions which I have specially referred to, the witness uniformly states the facts relative to the Union Bank holding the note for a hundred dollars and pressing for payment, and Thompson needing funds to pay it off, in substantially the same terms, but where, speaking of the question of holding the note for collateral purposes, the story varies most remarkably.

Again the whole business is in one place alleged to have taken place in one day. He did not know Willson. He says one place as follows:—

Q. Did you make any inquiries as to who Willson was, when you took this note ?

A. Yes.

Q. Did you know beforehand who he was ?

A. I don't know that I did; I don't remember whether the question ever came up.

Q. So you knew of no transaction with Willson until this came up ?

A. That's all.

The desperate financial condition in which Thompson was, he admits knowing all about, from Thompson's telling him in confidence.

It was hopeless to have expected anything from him and yet this stale demand note is not demanded until after Thompson had made an assignment for the benefit of his creditors to this witness, and as I infer, had left the country or at all events that part of the country.

The exact date of his leaving is not fixed, but the witness says:—

Q. Or whether it would become due upon demand ?

A. When I presented it at the Bank of Montreal at Port Arthur, I protested it.

Q. How long after Thompson went away was it you deposited it at the Bank of Montreal ?

A. I could not say; a short time afterward.

The estate realized about three cents on the dollar. The note was a demand note filled up by Thompson and was about a year old when appellants got it, then stamped on its face with the Union Bank, "B.C." stamp.

I cannot hold, under such circumstances as shewn throughout in the evidence I have referred to and other evidence in the case, that the learned trial judge erred in his finding, from which I have quoted above. I, therefore, think the appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed on the ground that the instrument sued upon was a simple forgery and that the appellants are not

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within the protection of sections 31 and 32 of the "Bills of Exchange Act."

I agree with the trial judge and the majority of the Court of Appeal that Thompson had possession of the paper entrusted to him by the respondent *as custodian only and that he had no kind of authority to convert it into a negotiable instrument for any purpose whatsoever*. I think sections 31 and 32 of the "Bills of Exchange Act" have no application to such a case; that their operation is confined to those cases in which there is a limited or conditional authority to convert a signature attached to a blank paper into a negotiable instrument or to convert an incomplete instrument into a complete instrument and that authority has been exceeded or abused.

The design and effect of the sections in question are, I think (if I may say so with respect), stated with accuracy by Fletcher Moulton L.J. in *Smith* v. *Prosser*(1), at pages 753 and 754, in these words:—

> In other words, both the common law and the statute realized the possibility of two rival dangers — on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being a maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and put it in circulation and thereby injure innocent persons. They, therefore, drew the line as regards the protection of third parties in the following very reasonable and intelligible way: If the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had signed it as an autograph. There would, in that case, be no *animus emittendi*, and he would, therefore, not be liable for the act of a bailee who turned the document into a negotiable instrument.

(1) [1907] 2 K.B. 735.

The present case sharply raises the question of the line of demarkation, and, as I think that the signed forms were in the possession of Telfer as custodian only, and not as the defendant's agent with an intention on the defendant's part that he should issue them as promissory notes, the defendant is not estopped from saying that he was not the maker of the notes sued upon.

Mr. Bicknell, in his able argument, naturally invoked the famous dictum of Ashurst J. in *Lickbarrow* v. *Mason*(1). But that dictum can be safely made the ground of decision in particular cases only in so far as it has taken shape in the form of a definite principle of law. *Farquharson Brothers & Co.* v. *King & Co.* (2), at pages 712 and 713, and in the House of Lords (3), at pages 336 and 337; *Rimmer* v. *Webster*(4), at page 169; *Scholfield* v. *Earl of Londesborough*(5), at pages 521 and 522; *Colonial Bank of Australasia* v. *Marshall*(6), at page 565; *Imperial Bank of Canada* v. *Bank of Hamilton*(7), at page 54.

"My Lords," said Lord Cairns, in *Cundy* v. *Lindsay*(8), at page 463,

> you have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty, your Lordships can do no more than apply rigorously the settled and well known rules of law.

Two further points require notice. First, as to estoppel, it is very clearly shewn in the judgment of Mr. Justice Maclaren that the appellants suffered no prejudice in consequence of the respondent's silence after becoming aware of the forgery, and the appellants, therefore, cannot succeed on that basis.

(1) 6 T.R. 131.
(2) [1901] 2 K.B. 697.
(3) [1902] A.C. 325.
(4) [1902] 2 Ch. 163.
(5) [1896] A.C. 514.
(6) [1906] A.C. 559.
(7) [1903] A.C. 49.
(8) 3 App. Cas. 459.

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Secondly, as Thompson was not, in committing the forgery or in negotiating the forged instrument, acting for the benefit of the respondent, nor professing nor intending to act in his behalf, the doctrine of ratification by acquiescence alone has no application. *Hébert* v. *La Banque Nationale*(1); *Keighley, Maxsted & Co.* v. *Durant*(2), pages 246 and 247.

ANGLIN J.—The material facts of this case and the substance of the evidence bearing upon them are fully and satisfactorily set out in the judgments of the learned Chief Justice of Ontario and Maclaren, J.A. (3). The evidence is most unsatisfactory on the two principal questions of fact involved—the one, whether the blank note form with his signature upon it was handed by the defendant to his agent Thompson merely as a depositary or custodian, with instructions not to fill it in or use it in any way until directed to do so by the defendant, or whether, without any further assent of the defendant, he had some authority to fill it in and to use it on the defendant's account; and the other, whether the plaintiffs took the note with serious suspicions of Thompson's good faith, which they made no effort to clear up, thus failing to discharge the burden cast upon them by section 58 of the "Bills of Exchange Act." It would perhaps be difficult to say upon which point the evidence is less convincing. The observations upon it of the learned judges of the Court of Appeal are fully justified.

But on the question of the nature of Thompson's mandate in respect of the paper signed in blank which

(1) 40 Can. S.C.R. 458. (2) [1901] A.C. 240.
(3) 24 Ont. L.R. 122.

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was entrusted to him, although as a trial judge I should probably have found against the defendant, for the reasons given by Moss, C.J.O., and Maclaren, J.A., I am of the opinion that the finding of Clute, J., that Thompson was a mere custodian of it with no authority to use it until directed to do so by the defendant was rightly affirmed in appeal. Moreover, where such a judgment has been affirmed by a provincial appellate court it is the settled practice of this court to decline to interfere unless the appellant clearly demonstrates that the conclusion reached is absolutely wrong. *Weller* v. *McDonald-McMillan Co.* (1); *Mayrand* v. *Dussault*(2); *George Matthews Co.* v. *Bouchard*(3). See, too, *Johnston* v. *O'Neil*(4), at p. 578, *per* Lord Macnaghten. In their attempt to perform that difficult task the present appellants have not succeeded.

As a mere custodian of the paper, Thompson, in fraudulently filling it in and using it, did not merely abuse or exceed his authority; he acted without any authority. In either case at common law the defendant could be made liable only by estoppel: *Nash* v. *De Freville*(1). But the estoppel against the principal which arises in a case of abuse or excess of authority by his agent — of which *Lloyd's Bank, Limited* v. *Cooke*(2), furnishes a recent instance — lacks its essential basis where the alleged agent, entirely without authority, disposes of a non-negotiable security or *fills in* and disposes of a document thus converted by his wrongful act into what is in form a negotiable instrument. In order to sustain the confidence of the

(1) 43 Can. S.C.R. 85.
(2) 38 Can. S.C.R. 460, 465.
(3) 28 Can. S.C.R. 580.
(4) [1911] A.C. 552.
(5) [1900] 2 Q.B. 72, at p. 89.
(6) [1907] 1 K.B. 794.

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commercial community in the title obtained by the *bonâ fide* holder of a negotiable instrument, it has been conclusively established that, if the maker or owner of it entrusts it in complete and negotiable form to a broker or agent, a person taking it from him for value and in good faith — although in parting with it he acts without any authority or in breach of express instructions — acquires an incontestable title and right of property. *London Joint Stock Bank* v. *Simmons*(1). But the person who merely deposits with a custodian a blank form of note bearing his signature does not issue it "intending it to be used." *Baxendale* v. *Bennett*(2). The deposit is in fact of a non-negotiable document and, therefore, does not "contain any invitation to any other member of the community to do any act from which a duty to him can be inferred." *Lloyd's* v. *Grace, Smith & Co.*(3), at pages 509-10.

It is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument and with the intention that it should be issued as such. *Smith* v. *Prosser*(4), at page 744, *per* Vaughan Williams L.J.

The promissory notes never became negotiable instruments, the reason being that the defendant never issued them nor authorized any one else to issue them as negotiable instruments.

Ibid. per Fletcher Moulton L.J., at page 753.

If we are to measure the estoppel by the physical possibility of deception, section 20 of the "Bills of Exchange Act" (our section 31), would contain something which would be absolutely irrelevant, and which yet is made a condition of the section being applicable. That section commences with the words: "Where a simple signature on a

(1) [1892] A.C. 201.
(2) 3 Q.B.D. 525, at pp. 531-2.
(3) [1911] 2 K.B. 489.
(4) [1907] 2 K.B. 735.

blank stamped paper is delivered by the signer in order that it may be converted into a bill"; in other words, the intention that it shall be converted into a bill is made a condition of the operation of the section. In my opinion section 20 is based upon the doctrine of common law estoppel as it existed at the date of the Act, and, therefore, the presence of the condition as to its operation shews that the legislature realized that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable. In other words, both the common law and the statute realized the possibility of two rival dangers — on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being the maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and put it in circulation and thereby injure innocent persons. They, therefore, drew the line as regards the protection of third parties in the following very reasonable and intelligible way: if the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had merely signed it as an autograph. There would in that case be no *animus emittendi* and he would, therefore, not be liable for the act of a bailee who turned the document into a negotiable instrument.

Although *Smith* v. *Prosser*(1) might undoubtedly have been disposed of on other grounds, we must accept it as an authority for the propositions of law on which the Lords Justices have seen fit to rest their opinions. *New South Wales Taxation Commissioners* v. *Palmer*(2).

Apart from the effect of the proviso to section 32, upon which great stress was laid in argument, the case against the defendant fails.

Assuming the plaintiffs to be "holders in due course," I agree with the construction put upon that proviso by Maclaren, J.A., who said:—

(1) [1907] 2 K.B. 735. (2) [1907] A.C. 179, at p. 184.

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It is argued that here the plaintiff can recover as a holder in due course under the proviso of section 32, which provides that "if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given." It will be observed that this applies only "to any such instrument," that is, to such instrument as is mentioned in section 31, and one which has been "delivered by the signer in order that it may be converted into a bill," and does not apply to an instrument like this, delivered to a bailee or custodian merely to be held until further instructions are received from the signer. It is not pretended that such instructions were ever given, so that the instrument never became a note for want of a proper delivery.

I concur in the opinion of the majority of the learned judges of the Court of Appeal that "there is nothing in the subsequent conduct of the defendant to create liability," either by ratification or by estoppel.

The appeal, in my opinion, fails.

BRODEUR J.—I concur in the views expressed above by Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellants: *J. E. Swinburne.*

Solicitor for the respondent: *T. H. Lennox.*

R. A. ANDERSON (PLAINTIFF) .....APPELLANT; 1911

*Oct. 20, 23.
*Dec. 22.

AND

THE MUNICIPALITY OF SOUTH VANCOUVER, SARAH RALSTON, AND MARY C. FLEMING (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Municipal corporation—Assessment and taxation—Meetings of council—Court of Revision—Transacting business outside limits of municipality—Place of meeting—Revision of assessment rolls—By-laws—Sale for arrears of taxes—Construction of statute—55 V. c. 33, s. 83 (a) (B.C.)—R.S.B.C., 1897, c. 144—Statutory relief—Estoppel—Acquiescence—Laches—Limitation of Action.

Per Fitzpatrick C.J. and Idington and Anglin JJ.—Prior to the amendment of the British Columbia "Municipal Act, 1892," by the "Municipal Amendment Act, 1894," 57 Vict. (B.C.) ch. 34, sec. 15, municipal councils subject to those statutes had no power to hold meetings for the transaction of any administrative, legislative or judicial business of the municipal corporation at a place outside of the territorial boundaries of the municipality.

Per Fitzpatrick C.J. and Idington, Duff and Anglin JJ.—Courts of revision organized under the British Columbia municipal statutes, have no power to exercise their functions as such except at meetings held within the territorial limits of the municipality where the property, described in the assessment rolls to be revised by them, is situate.

Section 15 of the "Municipal Amendment Act, 1894," inserted in the "Municipal Act, 1892" (B.C.), a new provision, section 83 (a), as follows: "All meetings of a municipal council shall take place within the limits of the municipality, except when the council have unanimously resolved that it would be more convenient to

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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hold such meetings, or some of them, outside of the limits of the municipality."

Held, Brodeur J. dissenting, that there was no proof of such a unanimous resolution as the statute requires.

The council of the respondent municipality, without any formal resolution as provided by the amended statute, held its meetings during several years at a place outside the limits of the municipality, and organized courts of revision there. These courts held all their meetings at the same place as the council and assumed to revise the municipal assessment rolls at those meetings. The council approved the rolls so revised and enacted by-laws, from year to year, levying rates and authorizing the collection of taxes on the lands mentioned in the rolls, and, after notice as provided by the statutes, sold lands so assessed and alleged to be in arrear for the taxes so imposed.

Held, Brodeur J. dissenting, that the assessment rolls were invalid, that the by-laws levying the rates and authorizing the collection of taxes on the lands mentioned therein were null and void, and that the sales of the lands so made for alleged arrears of taxes were illegal and of no effect.

Per Duff and Anglin JJ., Brodeur J. *contra*.—The default in payment of taxes, by the appellant, and his subsequent inaction and silence, while aware of the fact that his lands had been sold for alleged arrears of taxes, did not disentitle him from taking advantage of the statutory procedure respecting the contestation of sales for arrears of taxes either by estoppel, acquiescence or laches. The provisions of section 126(3) of the "Municipal Act, 1892," (now R.S.B.C. 1897, ch. 144, sec. 86(2),) have no application to invalid by-laws enacted by municipal councils on occasions when they could not perform legislative functions.

The judgment appealed from was reversed, Brodeur J. dissenting, on the ground that, as the council had held its first meeting in each year within the limits of the municipality and adjourned for the purpose of holding its next meetings at the place outside of the municipality where all other meetings were held, the by-laws approving of the assessment rolls and those levying rates and authorizing the collection of taxes were valid and the sale of the lands in question for arrears of such taxes was legal and effective.

APPEAL from the judgment of the Court of Appeal for British Columbia affirming the judgment of Clement J., at the trial, by which the plaintiff's action was dismissed with costs.

The plaintiff impeached the sale of certain lands,

in which he claimed an interest, purporting to have been made by the municipality for alleged arrears of taxes: the other defendants claimed the lands through the tax-sale purchaser, to whom the alleged tax-sale deed had been delivered in due course.

The questions in issue on the present appeal are stated in the judgments now reported.

A. H. MacNeill K.C. for the appellant.

Ewart K.C., for the respondent, Ralston.

W. H. D. Ladner for the respondent, Fleming.

THE CHIEF JUSTICE.—I entirely agree in the conclusion reached by my brother Idington.

IDINGTON J.—The appellant rightly claims that respondents, setting up a tax title, must shew that each step taken to impose the taxes in question and to sell the land in question, has been in conformity with the statutory powers given for such purposes. Indeed, this does not seem to be denied. Nor does it seem to be seriously denied that in several instances there exist departures from the mode pointed out by statute for doing what was done, but the respondents excuse them either by claiming they were in respect of unimportant matters or merely directory provisions, or that they have been cured by statutory provisions applicable thereto, or that the appellant, by reason of his failure to assert his claim earlier, cannot now be heard to complain, and that in any event these errors were each and all merely irregularities and did not result in producing nullities.

The gravest of all these infractions of law is the entire disregard during the years in question, being

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1893, 1894, 1895, 1896 and 1897, for which the taxes were claimed, by the courts of revision, of the proper place to hold their sittings, and almost equal disregard during the same time by the council of the proper place to hold its sittings.

The usual necessary proceedings, by way of by-law or resolution of the council, or resolution or other act of the courts of revision, upon the respective validity of which must rest the imposition of these taxes and of the council's acts founding and authorizing the sale of the land to enforce same, were each and all transacted at meetings held outside the limits of the municipality.

If these proceedings, or any one of them, were null, then I think the sale must be held void.

The municipality was incorporated in 1892, and derived its powers from, and was thenceforward subject to, the provisions of the "Municipal Act" of 1892, of which section 103, defining the jurisdiction of municipal councils, is as follows:—

> 103. The jurisdiction of every council shall be confined to the municipality the council represents, except where authority beyond the same is expressly given.

It has been said this is merely objective. In a sense that is true, but it does not cover the whole truth. If nothing else had been enacted and the council had bought (as an exercise of a power clearly given to erect or procure a town-hall for corporate use) a hall outside the municipality's limits and sought to constitute that the municipal town-hall and seat of the corporation's business, does any one suppose they could have levied a rate to pay therefor? Or from the strictly objective point of view, could the council have acquired title to this land outside the limits of the municipality?

I had always supposed such councils could not, except where expressly authorized by statute, buy a foot of land outside the municipal limits, for a graveyard, or a sand-pit, or a toll-bar, or anything else, no matter how urgently needed.

If the councillors, or reeve and councillors, of such a municipality had done so I have no doubt they could have been personally made to return into the municipal treasury its funds so used.

If they could not buy, no more could they rent.

Indeed, the power of acquisition, outside the municipal limits, was actually given later for some of these specified purposes, but none to acquire town-hall or seat or home for the council to use.

The discharge of their duties at home, in some chosen seat there, is implied in the legal history of such corporations; and in reading the language of statutory enactments creating them or empowering them, such history must be duly regarded. Thus read both sense and colour or a shade of meaning are given to the language of restriction just quoted. And along with that there must never be disregarded the oft-repeated legal principle that corporations being but the creatures of statute have no power but what the statute has given and much less has the council or other body the statute gives and directs as a means of corporate activity.

The presumption is entirely in favour of the legislative or administrative acts of such a corporation being confined within its territorial limits, unless where, by reason of some necessary implication requiring it in order to enable it effectually to discharge the duties its constituent Act has cast upon it to do, something must be done beyond such limits.

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On the 7th of May, in the year 1892, the council then in office held a meeting within the municipality's limits at which a resolution was carried

that the next meeting be held at the office of Shannon and McLaughlin on the 21st inst. at 1 p.m.

This place was on Hastings Street in an adjoining municipality.

It thus began a long course of illegal conduct. Of that I have not a shadow of doubt. The only doubt I have in that regard is whether illegal acts so done were nullities or mere irregularities.

The council had to appoint the assessor, and, when he had done his work, had to constitute a court of revision, by naming five of its members, if more than five, to be the court of revision.

This council consisted of a reeve and five councillors.

The language of the Act then in force is not as clear as it might be. It provides apparently for the council revising the roll, but that, being read in connection with other sections, I think merely means it shall see that duty is discharged by the methods given in the Act which consist of the council constituting a proper court and, as provided by section 157, appointing a time and place for the hearing of all complaints against the assessment.

It will be observed this power seems to indicate a power to name a place. Does that enable it to name a place outside the municipality for holding a court of revision ? I think not. The nature of the court, the duties it has to discharge, the nature of the complaints to be heard and means of hearing and adjudicating upon them properly, as well as facilities furnished for the members of the court and for those concerned

being in attendance with witnesses for whom no conduct money was to be allowed but only a *per diem* allowance, all seem to forbid the thought of the court being held outside of the limits of the municipality for if it could go a mile beyond it could go twenty or more. And when the council is given power to name the place of which notice has to be published it must be held to be bound to name a place within said limits.

But, in each year in question, these appointments of persons to form the court and of naming a place and time for their doing so were all directed by a council sitting outside its jurisdiction. Until the statute was changed such meetings could have no authority, and then only on complying with the conditions precedent to such authority, as given in later years of the period in question, to enable them to hold such sittings. This condition never was complied with. Hence their appointment of the members to hold the court and their selection of a time and place for its sitting were all illegal.

The next duty falling upon the council was to receive the roll and see that it had been duly revised and certified. Anything done in this regard was done in the same illegal fashion. And the rate by-laws all seem to have been passed in the like disregard of the law at sittings outside the municipality's limits; unless in the later years when the Act was changed, to which I will presently refer, we can presume authority.

In 1897 the council, from a resolution I accidentally notice, seems merely to have directed the clerk to advertise the time, and possibly did so in other years.

An attempt was made in argument to shew that, as the council and court of revision consisted of same

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members, the power given by legislation to the council on so resolving to fix meetings outside it, impliedly rested thereby in the court of revision. But this is an error of fact as well as law, for the council consisted of six members and this court of only five of them.

The courts of revision in question all sat outside the municipality. They are supposed to be courts of justice, but to try thus to enable the members thereof to sit outside the jurisdiction given them seems to be something very like constituting courts of injustice.

I know not how it operated in the peculiar circumstances of this municipality, nor do I, as a matter of law, here need to care. But I am quite sure that to sanction as legal, such a proceeding as the constitution of these courts by such methods, and the giving of directions involved in the councils fixing a place outside their jurisdiction as the only one for them to sit, would be fraught with danger to our municipal systems which are nearly all, in their main features, and especially in this regard, after the same pattern.

To hold such a thing legal would be, in the results, intolerable. To hold it a mere irregularity would be to open the door to reckless spirits of whom there exist only too many willing to take the risk. Indeed, our admirable municipal systems depend on all such men being sharply taught law and order.

In this connection I may say that if any one who had made a study of our whole frame of government were asked to point out in what single feature it is most distinguishable from all forms that have gone before he would put his finger on the distribution and decentralization of its powers and the localization thereof so as to bring each part, in such measure as may be practicable, as near to the people to be served as it is possible to do.

Such is the spirit of our frame of government and of the municipal part thereof especially. It would be grossly violating it to enable any bare quorum of five or six busy or lazy men to throw aside the law.

Courts of revision framed after this pattern were, from experience in Ontario, found possible of improvement.

The weaknesses of the pattern need not be intensified by countenancing such a departure from law and custom as respondents try to maintain here.

Let us look at the powers given for summoning witnesses and getting documentary and other evidence before such a court sitting where it never was intended to sit. How could it be enforced or he suffering from disobedience of the witness get relief ?

On the 11th of April, 1894, the council was given a power it had not hitherto possessed by the enactment of the following:—

> The "Municipal Act, 1892," is hereby amended by inserting the following as section 83*a*:—
>
> 83*a*. All meetings of a municipal council shall take place within the limits of the municipality, except when the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside the limits of the municipality.

This, in 1897, by chapter 30, section 2, was substituted by the following:—

> 28. All meetings of a municipal council shall take place within the limits of the municipality, except when the council have resolved that it would be more convenient to hold such meetings, or some of them, outside the limits of the municipality.

The council of the municipality in question never acted on either of these provisions. Legislators might doubt, but this council was undaunted. Their then clerk improperly seeks in his evidence to say they did resolve but when challenged in cross-examination, he

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is forced to admit the minute book contains all the resolutions, yet no such resolution exists but the one of 1892 above quoted, and which could have no relation to this new power.

We are asked to presume they did, though it nowhere appears on the record which they were bound by statute to keep and permit any one to inspect.

Then we are asked to presume it existed in the procedure by-law, which is not produced.

I find, since argument, in each of the first three successive years a procedure by-law was passed, but none of them have been produced.

A curiously worded provision exists in section 137, prohibiting a resolution or by-law of council from being in force for more than a year. I suspect this (which was no doubt intended to restrain councillors, for a year, from trying improperly to bind their successors) gave rise to the succession of procedure by-laws, but why are none of them produced, or if lost, why is the loss not proven and contents not shewn by secondary evidence? It was incumbent on respondent if possible to have proved thereby acts done in such an unusual way had at least the sanction of such a by-law. Good faith if nothing else in this regard made it desirable.

An inspection of the minute book, in order to see if it could give rise to a right to act on legal presumption, so far from helping me in that regard destroys any possibility of my doing so. The book is, on the whole, well kept and shews the minutes of each previous meeting were read and confirmed or corrected, except in the case of minutes of special meetings which were read along with those of the preceding regular meeting.

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The provisions for the council's meeting outside the limits of the municipality were not intended to create or sanction such an abuse as the court of revision also doing so, but to meet emergencies which are easily conceivable. Indeed, I observe that in England the power of some councils meeting within or without its seat of jurisdiction has been given by the "Municipal Corporations Act."

That sort of legislation tends to shew the supposed need of special enactment in that regard and, if we can conceive of such an irregularity being tolerated there, possibly it prevents us from having judicial authority directly bearing on the point.

The courts of revision, however, are, when duly constituted, courts of an inferior and essentially local jurisdiction confined to that jurisdiction.

We are thus driven to answer the inquiry of whether or not the acts of these councils, and especially of these courts, done whilst sitting beyond their territorial limits must be held null.

Except the case of *The Queen* v. *Inhabitants of Totness*(1), and the general principles laid down in Paley, we are not referred to authority. Relying thereon it seems clear the courts of revision could not act out of their jurisdiction and acts so done must be held invalid.

The council had no authority to direct them to act elsewhere, though they may have presumed to do so, and hence I think, their acts null, and, consequently, all that rested upon same also null.

The assessment rolls never were duly completed. The act of ratifying them and constituting them legal when once passed by the court of revision has never

(1) 11 Q.B. 80.

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operated. It only ratifies that supposed to have been done in the course of a due exercise of power.

All the other curative provisions are of no effect, for it was not competent for the council to do what followed.

The competency of the council is a condition precedent to the application of the curative Acts invoked.

And if we try to suppose there was a *de facto* court of revision its acts beyond its jurisdiction are still null.

The analogy to be drawn from acts of a council improperly or imperfectly constituted, yet to be held valid because a council *de facto,* does not apply here. The court of revision although constituted of some of the members of the council is essentially another body acting within its own rights and powers which it can neither limit nor extend, and over which when constituted, the council has no power save naming place for its sitting which I have already dealt with and shewn must be a place where by law it could sit.

The council could, after the Act was amended, resolve to sit outside, but was never given power to direct its courts of revision to so sit.

The council never attempted even when the law permitted it to exercise a power, to sit elsewhere. It is quite clear it did not try to do so on the few occasions it sat within the municipal limits. And when sitting outside, without such authority, it could not give itself authority for sitting there.

The case in many features is so curious I tried to find light from many sources. I found the acts of corporators when not all summoned and that in due form (and place being impliedly in question) as in the cases

of *Rex* v. *May*(1); *Smyth* v. *Darley*(2); *Musgrave* v. *Nevinson*(3); *Rex* v. *Hill*(4); *Rex* v. *Langhorn*(5); *Rex* v. *Mayor of Liverpool*(6), and others cited in these, were held null.

Incidentally the meeting place is only referred to as the proper or usual place and seemingly essential part of the foundation on which to rest acts of a corporation as such. But in the *Musgrave Case*(3) above, a case of meeting in a tavern instead of the moothall was held bad.

In the American municipal cases there seems a dearth of precedent as to the place of meeting, and I have found only one case where the revising court outside the municipal limits was the direct cause of holding taxes imposed void. The Supreme Court of Kansas, in the *Board of Commissioners of Marion County* v. *Baker*(7), had the very point presented to it and held the sale void.

Dillon, in section 264, or 505 of 5th edition, refers to cases that imply the doing so would be void, and Elliott on Public Corporations, 2nd ed., page 171, cites substantially the same cases.

But in the larger field of private corporations there is abundant authority to shew the corporation must not sit or attempt to act as such, outside its parent State, which is looked upon as its home and limit of jurisdiction, and acts done elsewhere are void.

See the cases of *Miller* v. *Ewer*(8); *Ormsby* v. *Vermont Copper Mining Co.*(9); (11 Sickels Reports)

(1) 5 Burr. 2681.
(2) 2 H.L. Cas. 789.
(3) 2 Lord Raymond 1358.
(4) 4 B. & C. 426.
(5) 4 A. & E. 538.
(6) 2 Burr. 723.
(7) 25 Kan. 258.
(8) 27 Me. 509.
(9) (1874) 56 N.Y. 623.

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in appeal at 625, and numerous like cases where other authorities are cited, and the curious can trace out the law there in such regard.

Of course some cases exist of directors being upheld in acting beyond the state, but that is put upon the ground that they are only agents of the corporation and so within the leading case of *The Bank of Augusta* v. *Earle*(1), entitling corporations to act abroad in the sense there in question.

Of course the analogy between the private and the public corporation is not close, but there is much less to be said or implied in favour of a local representative body going beyond its jurisdiction than for a business concern.

I think the appeal should be allowed with costs throughout.

DUFF J.—The validity of the respondent's tax sale deed is impugned on the grounds (1) that the conditions had not arisen under which alone the defendant municipality had lawful authority to sell the lands in question and (2) that in professing to sell them the municipal officers acted without the sanction of a legally effectual by-law by which alone they could acquire authority to make such a sale on behalf of the municipality.

The authority of the municipality to sell lands for the recovery of unpaid taxes at the time of the sale which is here in question was derived from section 50 (135) of the "Municipal Clauses Act," R.S.B.C. 1897, ch. 144; which enactment is in these words:—

50. In every municipality the council may, from time to time, make, alter and repeal by-laws for any of the following purposes,

(1) 13 Peters 519.

or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:—

* * * * *

(135) For the sale at public auction of land, or improvements, or real property, for all municipal taxes remaining unpaid at the date of the passing of such by-law: Provided there shall be taxes in arrears in respect of the said land, or improvements, or real property, for two years prior to the passing of the said by-law, and for providing for the municipality purchasing the real property when the price offered at such sale is less than the amount of arrears.

The sale was made ostensibly under the authority of a by-law alleged to have been passed by the municipal council in July, 1898. This instrument purporting to be a by-law passed in exercise of the power conferred by the enactment quoted, professed to direct the collector of the municipality to prepare a list of "the lands or improvements, or real property," upon which or in respect of which municipal taxes had been unpaid and in arrears for the space of three years prior to the passage of the by-law; and provided that upon the list being duly authenticated by the reeve and the reeve's warrant being issued in that behalf the collector should sell the properties included in it in the manner therein prescribed. It is quite clear, therefore, that the authority of the collector to sell the property in question as well as the authority of the council to authorize the sale, both rested upon the condition that there should be at the time of the passing of the by-law "taxes in arrear in respect of" it for a period of two years. The contention of the appellant is that there were no taxes in arrear for such period because the taxes due in respect of this property for the years 1891 and 1892 were paid and no taxes were validly levied in respect of it in the years 1893, 1894, 1895 and 1896. It is not denied that, in form, such taxes were levied; but it is said that the meetings of the municipal council at which the pro-

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ceedings essential to the validity of such levies took place, were held outside the territorial limits of the municipality and it is contended that such meetings were not permitted at all or only under conditions which had not been complied with and that anything done at them could not take effect as having been done in exercise of the legal powers of the council.

Under the statute referred to two requirements are essential to the lawful imposition of a tax in respect of land, first, an assessment of the property which is finally consummated only when the assessment roll prepared by the assessor has been passed upon by the council, sitting as a court of revision; and secondly, the passing of a by-law fixing the rate according to which the tax is to be levied. The assessment made in exercise of the statutory powers conferred upon the municipality, and the rate fixed by a by-law passed in exercise of those powers, are both elements which enter into and are essential to the constitution of a valid tax on real property.

I postpone for the moment the question whether it is now open to the appellant to impugn the validity of the various proceedings in which the council or the members of the council professed to effect such assessments and to prescribe such rates for the years mentioned, the first point to consider being whether, assuming these proceedings to be open to attack in this action, the appellant's property was or was not, by virtue of them, lawfully subjected to the burden of the taxes alleged to have been thereby imposed. It is not disputed that the meetings at which these proceedings took place were held outside the boundaries of the municipality, and the first point to be determined is what is the effect of that circumstance upon

the legal validity of those proceedings. It is convenient to consider the proceedings in the years 1893 and 1894 separately from those which took the place in the years 1895 and 1896. The statutory provisions under which the municipal council derived its powers for the first two years are to be found in the "Municipal Act" of 1892, which is chapter 33 of the statutes of that year. There is in that statute no enactment expressly dealing with the matter of the locality where the sittings of the council are to be held; and it does not appear to me to be necessary to decide whether or not it is a proper implication from the provisions of the Act that no sitting of the council for the effectual transaction of municipal business could be held except within the municipality; it appears to me to be clear that at least when acting as a court of revision it could not sit elsewhere. Section 103 enacts as follows:—

> 103. The jurisdiction of every council shall be confined to the municipality the council represents, except where authority beyond the same is expressly given.

I think it is indisputable that these words when applied to the sittings of a court of inferior jurisdiction deriving all its powers from statute, must be read as limiting the area in which it can act in the exercise of its jurisdiction. One of the powers, for example, of the council, when sitting as a court of revision (section 165) as one would expect, is the power to summon witnesses and to take their evidence under oath. With reference to such a jurisdiction, what is the meaning of the words "the jurisdiction * * * shall be confined to the municipality?" I think the fair construction of this language is that the jurisdiction is to be exercised not only for, but within

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the municipality. The Act was amended in 1894 by an Act passed on the 11th of April of that year, and in respect of subsequent sittings of the council it will be necessary to consider the effect of that amendment; but in the years 1893 and 1894 (the sitting of the court of revision, in 1894, was held in February) the members of the council while professing to perform the duty of passing upon the assessments for those years were governed by the Act of 1892 and they were, I think, not exercising the powers in that behalf derived from that Act, for the simple reason that, in professing to do so, they were sitting outside the limits within which alone they could lawfully exercise those powers. For those years, therefore, no tax became lawfully leviable in respect of real estate because there had been no valid assessment. In respect of the years 1895 and 1896 we must ascertain the effect of the amendment of 1894, which was as follows:—

> The "Municipal Act, 1892," is hereby amended by inserting the following as section 83*a*:—
>
> 83*a*. All meetings of a municipal council shall take place within the limits of the municipality, except when the council have unanimously resolved that it would be more convenient to hold such meetings, or some of them, outside of the limits of the municipality.

Before referring to the evidence bearing on the question whether the holding of the meetings of the council outside the municipality in the years under consideration can be justified by this enactment, it will be convenient to discuss what the enactment means by prescribing, as a condition of the legality of meetings so held that the council shall have "unanimously resolved that it would be more convenient, etc." Mr. Justice Clement thinks this provision does not require any act on the part of the council beyond the act of holding the meetings coupled with "unani-

mity of sentiment" on the part of the members of the council that such a course is convenient; and that the existence of this "unanimity of sentiment" could be inferred from the fact that the meetings, as in this case, uniformly took place outside the municipality. The Chief Justice of the Court of Appeal seems to take the same view. I think that view cannot be sustained. It is to be observed that what the statute requires is not that the members of the council as individuals shall unanimously "resolve," but that the council shall "resolve." A "resolve"—to adhere to the words of the Act—by the council as a body is necessary. I do not think a representative body in the exercise of legislative powers whether plenary or subordinate, can "resolve" in a practical sense upon a matter such as that which the section deals with without giving collective expression in some form to a decision upon it. I think it is clear that, before they can take advantage of this provision, they must, as a council, express a judgment that it is more convenient to hold their meetings outside the municipality and they must express that judgment while professing to act as the council of the municipality and in circumstances in which the law permits them as the organ of the municipality to transact business.

It is beyond dispute that if the council had, in that sense, passed upon the question of holding meetings outside the municipality some record of their determination upon it ought to have appeared in the minute book in which their proceedings were recorded ("Municipal Act, 1892," ch. 33, sec. 97); and I have not the slightest doubt that it would have appeared there. There is no record of any action having been taken in that direction in 1895 or 1896 except the

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record of the adjournment of the initial meeting in each year. At each of those meetings the council adjourned to meet in Vancouver; but in either case nothing was said about subsequent meetings. These were held at regular intervals of a month without a thought, apparently, of the provisions of the "Municipal Act." I am not able to escape the conclusion that the proceedings which took place at these meetings could not in law take effect as the proceedings of the municipal council.

It is said in one of the judgments of the court below that the consequences of this construction condemn it. Now, when considering a legislative provision of doubtful meaning, the respective consequences of rival constructions as these consequences may be supposed to have presented themselves to the legislature in passing the enactment may, of course, properly be looked at; but that is a very different thing from saying that the actual consequences of a given construction in a particular case are necessarily conclusive or even relevant. The enactment in question was not framed with reference to the special circumstances of South Vancouver, but applied generally to the municipalities of British Columbia. If preponderance of convenience is to be a governing ingredient in passing upon the construction of the provision, then it is the general convenience we must consider. In this provision be it observed the legislature was prescribing a condition which, when complied with, was intended to have legal and practical consequences that might in some cases be of considerable importance; and if considerations of general convenience are to be weighed I should have thought the balance to be clearly in favour of the view that the legislation re-

quired not an unexpressed concurrence of "sentiment" merely, the existence of which might be incapable of direct proof, but some pronouncement or proceeding which, at least, should be susceptible of being ascribed to a definite occasion and of being noted in the public records of the council. The construction, indeed, for which the respondents contend must come to this in its practical operation; that the legislative requirement is satisfied if the members of the council as individuals consent expressly or tacitly to holding meetings outside the municipality. If that was what the legislature intended it is not easy to see how the legislature could have avoided saying so. I do not think anybody wishing to enact a provision having that effect would have used the language we have to construe.

I may add that I do not see any good reason for thinking section 83*a* does not apply to the sittings of the court of revision. As I read the Act, it is the council which exercises the judicial or quasi-judicial functions of the court of revision. When the number of the council for ordinary purposes exceeds five, then those who are to exercise those functions are to be nominated by the council as a whole and, for the purposes of passing on the assessment roll, the council consists of the members so nominated. It appears to me to be clear that a sitting of the court of revision is properly described as a sitting of the council; and that all sittings of the council, whether for the exercise of legislative, administrative or judicial functions are within the purview of the provision in question. It is clear, however, if I am right in views above expressed, that not only the assessment but the "rate by-laws" (so called) of the years 1895 and 1896 were

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never in operation; and it also follows that the by-law professing to authorize the sale in question (which was passed at a meeting held outside the municipality and in the absence of any resolution, within the meaning of the statute sanctioning such a course) was on that ground alone apart from other grounds already mentioned wholly without legal effect.

The next point is whether, notwithstanding the absence of legal validity in the proceedings referred to, the appellant is precluded, by reason of certain statutory provisions, from relying on the objections he raises. Clement J. thinks he is precluded by section 126(3) of chapter 33, "Municipal Act, 1892;" R.S.B.C. (1897), ch. 144, sec. 86(2); which continued in force until 1899. That section reads as follows:—

> In case no application to quash a by-law is made within one month next after the publication thereof in the British Columbia Gazette, and notice as provided in section 125 of this Act, the by-law, or so much thereof as is not the subject of any such application, or not quashed upon such application, so far as the same ordains, prescribes, or directs anything within the proper competence of the council to ordain, prescribe, or direct, shall, notwithstanding any want of substance or form, either in the by-law itself, or in the time or manner of passing the same, be a valid by-law.

In my judgment this enactment applies only to by-laws passed by the council as a council on an occasion when it could lawfully transact business as the legislative organ of the municipality. It has, I think, nothing whatever to do with proceedings so fundamentally defective as those we have to consider in this appeal.

There remains the question whether the appellant has precluded himself by his own conduct from impeaching the proceedings and transactions in question. In considering that question the character of the action and the circumstances out of which it arose

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are important. The sale took place on the 6th October, 1908. On the 21st June, 1901, a deed was delivered to the purchaser. In October, 1906, an application was made for the registration of the purchaser's title which remained in abeyance until 1908 owing to the fact that the purchaser's deed had not been acknowledged as required by the "Land Registry Act." In 1908, the appellant received a notice from the registrar under chapter 31, section 3, statutes 1901, requiring him to contest the claim to register the purchaser's title within the time prescribed by the statute. Within the prescribed time a caveat was filed by the appellant and an action commenced. This action was not proceeded with, but a second action (out of which this appeal arises) was begun some months later: the first action not being dismissed, but apparently remaining technically on foot until the present time. I shall deal later with a point raised for the first time on the argument before this court that the second action was barred by the provisions of the statute last mentioned. That enactment is as follows:—

In case of applications under tax sales, the registrar shall not take notice of any irregularity in the tax sale or in any of the proceedings relating thereto, or inquire into the regularity of the tax sale proceedings, or any proceedings prior to or having relation to the assessment of the land, but a certificate from the proper officer of the Government, or the municipality, shall be furnished, shewing the years for which there were taxes due and in arrear for which the land was sold at such sale, and the registrar shall satisfy himself that the sale was fairly and openly conducted, and he shall also cause to be served upon all persons appearing by the assessment roll of the district in which the lands are situate, or by the records of the land registry office, to be the persons who, other than the tax purchaser or his assigns, are interested in such land, a notice requiring them within the time limited by such notice, to contest the claim of the tax purchaser, and in default of a caveat or certificate of *lis pendens* being filed or in default of redemption, before the registration as owner of the person entitled under such

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tax-sale, all persons so served with notice, * * * shall be forever estopped and debarred from setting up any claim to or in respect of the land so sold for taxes, and the registrar shall register the person entitled under such tax sale as owner of the land so sold for taxes.

There is no provision here for the determination of the question in dispute by the Registrar of Titles and it seems quite clear that either party, the applicant for registration under the tax sale or the contestant, could take proceedings to submit the question of title for judicial decision. I entertain no doubt that the Supreme Court would have jurisdiction to and would entertain a claim on part of either for a declaration of his or her legal rights without any demand for specific relief. In this case it was the contestant who invoked the decision of the court. He prayed for an injunction, but the substance of his claim was to have a declaration that his title ought to prevail over that of the applicant. His own title had not been registered and the result of the action would determine whether the applicant or himself was to be registered as owner. I emphasize this for the purpose of pointing out that the appellant's action is not in substance a claim for equitable relief. It is an action occasioned and justified by reason of the situation created by the Act of 1901 and the substantial relief claimed is the special statutory relief of a declaration of rights. This latter is not equitable relief and not subject to the peculiar incidents of such relief. *Chapman* v. *Michaelson*(1).

The rights, moreover, which the appellant asserts are legal and not equitable rights. Prior to the tax sale, October, 1898, he was the undisputed owner of a

(1) (1909) 1 Ch. 238, at pp. 242 and 243.

legal estate in fee simple, as tenant in common with another, of the land in question. If the sale — by reason of the proceedings essential to its validity being ineffectual in law — was in itself inoperative his title could not be affected by it. The sole question in the action is whether the pretended sale had or had not any legal effect and that question could have been raised in an action for the recovery of possession of the land as well as in the present proceedings. Something was made of section 153 of chapter 37, "Municipal Act," 1896, which is as follows:—

> The deed to the purchaser of any land or real property sold under the provisions of any by-law passed under the authority of this Act, shall have the effect of vesting such land or real property in the purchaser, his heirs or assigns, in fee simple or otherwise, according to the nature of the estate or interest sold; and no such deed shall be invalid for *any error or miscalculation in the amount of taxes or interest thereon in arrear*, or on account of the property having been assessed as land. And the *registrar-general, or any district registrar of titles, as the case may be, upon production of the deed and application in the usual form, and upon payment of the usual fees, shall register or record the same in the usual manner.*

This section, however, applies only where the sale has been made under a "by-law passed under the authority" of the "Municipal Act." It can have no effect where in point of law there has been no by-law and so we are again thrown back upon the question of the competence of the council to pass legally effectual by-laws while sitting outside the municipality. The appellant is, therefore, not a suitor seeking to enforce equitable rights or claiming equitable relief and consequently laches in itself would not disentitle him from maintaining his action. *Garden Gully United Quartz Mining Co.* v. *McLister*(1); *Clarke* v. *Hart*(2).

(1) 1 App. Cas. 39, at p. 57. (2) 6 H.L. Cas. 633.

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Has the appellant then by anything he has done or refrained from doing precluded himself from alleging that the sale was in law ineffectual to deprive him of his property? In considering this point it is, of course, to be presumed that, disregarding the statute of 1901, the sale in itself under which the respondent, Mrs. Fleming, claims was inoperative to affect the appellant's title. I shall assume also that the appellant knew of the sale in fact; and that he deliberately refrained from taking advantage of the provisions of the "Municipal Act" entitling him to redeem the property.

The reasoning on which the learned judges in the courts below proceeded appears to be this: The appellant paid no taxes from 1893 to 1898, he had notice of the proposed sale in 1898 and at that time he stated to the collector that he did not know whether the property was worth the taxes: that he came forward to dispute the purchaser's title only when the value of the property had become very much increased. Referring to these circumstances the Chief Justice says:

> Where there is, as I think there is here, conduct from which an abandonment of his property rights can with reasonable certainty be inferred a court of equity ought not to assist the plaintiff at the expense of innocent persons who have been guilty of no laches.

I have pointed out that the appellant's action is not based upon equitable grounds nor is the substantial relief claimed equitable relief and we, consequently, have nothing to do with laches or with the principles upon which a court of equity deals with suitors who are compelled to seek assistance of a kind which equity alone can give.

It is perhaps a little confusing to speak of a process by which the beneficial owner of a legal estate in

fee simple in land becomes divested of his property as "abandonment." Certainly the intention, however deliberately formed, not to pay taxes and to permit his property to be sold for the payment of taxes followed by the most absolute knowledge that it has been sold, will not of themselves suffice to vest it in a supposed purchaser at a tax sale if no taxes have in law become exigible in respect of it and the sale itself is in law inoperative. The circumstances mentioned may be of great importance in shewing that the owner has by his conduct precluded himself from impeaching the proceedings resulting in the supposed sale, but in themselves they could never deprive the owner of his title.

The principle applicable to this branch of the case appears to be this: An owner of land in fee simple may be precluded by his silence or inaction from denying the authority of a third person to deal with his property, although this latter is a mere stranger and has no interest in the property and in law and in fact no authority whatever in respect of it; but in such a case inaction and silence in themselves are not sufficient to deprive the owner of his property unless, at all events, his conduct in the circumstances amounted to a representation to those dealing with the property that he would not assert his rights, and they have acted on that representation, or his subsequent assertion of his rights would constitute a fraud on his part. That such is the principle is, I think, clear from the authorities. In 1723 in *Savage* v. *Foster*(1), the owner was held to be estopped from setting up his rights, "for it was apparent fraud in him not to give notice of his

(1) 9 Mod. Rep. 35.

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title to the intended purchaser." Another illustration of the method in which the court deals with such cases is afforded by the judgment of Fry L.J. in *Willmott* v. *Barber*(1), at pages 105 and 106. He says:—

> It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

Tried by these tests the respondent's case on this branch utterly fails. Nobody suggests that the appellant knew or suspected that the taxes for the years mentioned had not been lawfully levied and were not exigible. Where, then, was the fraud? Emphasis is placed on the fact that the appellant appears to have known the meeting of the court of revision was held in Vancouver in 1894. But it is obvious that the appellant never suspected that this circumstance vitiated the assessment of his property; and the muni-

(1) 15 Ch. D. 96.

cipal officers certainly knew and for all that appears in evidence the purchaser (who seems in the purchase to have acted on behalf of the mortgagee) may have known much more about the affairs of the municipality than the appellant. The contention really comes to this, that the owner of real estate having failed to pay taxes demanded of him and having had his property sold to pay them is acting fraudulently if after having discovered that no taxes were ever lawfully levied he resists a claim of the purchaser to register his title. Does the failure to pay taxes alone disentitle an owner of land from insisting that he can only be deprived of his property according to law? That appears to me to be an extreme view and a novel view as well. The purchaser at a tax sale has the same opportunities of examining the validity of the proceedings prior to the sale as the owner of the property sold. Why should the owner suppose that the proposed purchaser, still less the municipality, is acting upon the assumption that he will not take advantage of his legal position whatever it may be? If there is a fatal defect in the proceedings of which both purchaser and owner are ignorant how can the purchaser complain if the owner (who has been no party to the proceedings and has done nothing calculated to throw him off his guard) discovering the defect later takes his stand on his strict legal rights? If the purchaser cannot complain still less can the municipality. I should make a reference to *Jones* v. *North Vancouver Land and Improvement Co.*(1) and *Prendergast* v. *Turton*(2), which appear to have influenced the opinion of the court below. The principle of these

(1) 14 B.C. Rep. 285; [1910] A.C. 317.

(2) 13 L.J. Ch. 268.

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decisions is thus stated in *Clarke* v. *Hart*(1), by Lord Wensleydale:—

> Now, it appears to me that the principle to be deduced from *Prendergast* v. *Turton*(2) and *Norway* v. *Rowe*(3), is, that if a party lies by, and by his conduct intimates to the other, partners in the concern that he has abandoned his share, they may deal with it as they please; if his conduct amounts to a representation of that sort, he is estopped by it and cannot afterwards complain. Then the question is, whether upon the facts stated in this case the respondent is in that situation. * * * In that case the interpretation put upon the conduct of the parties, * * * was that they had laid by and pursued a course which was tantamount to saying, "You may go on with the concern at your own risk and for your own benefit; I will have nothing more to do with it." If the conduct of the party has amounted to that, it is, no doubt, a perfectly just principle that he shall be held estopped, and not afterwards be entitled to claim a share of the profit made by those persons to whom he has made that representation.

In all these cases it will be observed that the fact that the parties were co-adventurers had no small influence in determining the decision of the court that the conduct of the plaintiff had had the effect thus described by Lord Wensleydale. Conduct which would be most unfair and even dishonest as between persons thus associated may be unimpeachable where the parties concerned stand in no business relation to one another and have always been at arms' length. I do not think any good purpose would be served by going minutely over the facts of those cases. The question is whether the facts of this case bring it within the principle upon which those cases proceeded. In *Colls* v. *Home and Colonial Stores, Limited*(4), at pages 191 and 192, Lord Macnaghten said:—

> Speaking for myself, I doubt very much whether it is a profitable task to re-try actions which depend simply on questions of fact, or to

(1) 6 H.L. Cas. 633, at p. 670.
(2) 13 L.J. Ch. 268.
(3) 19 Ves. 143.
(4) [1904] A.C. 179.

review an endeavour to reconcile or distinguish a number of cases that naturally enough contain some statements which, taken by themselves and apart from the context, may seem to be contradictory, but which must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much more sense in the observations of Brett L.J. in *Ecclesiastical Commissioners* v. *Kino* (1): "To my mind," said his Lordship, "the taking of some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration."

It is possible, no doubt, to present some aspects of this case in such a way as to cause them to assume a superficial resemblance to the most striking features in the cases referred to. But examining it fairly as a question of fact, in light of all the facts disclosed by the evidence, it seems to me to be a very extravagant view that there was anything fraudulent in the appellant's conduct or that his silence or inaction was calculated to lead or did in fact lead anybody into shaping his course of action upon the belief that the appellant would refrain from asserting any right of which he had not been deprived by due process of law.

It was argued also that the action was too late. This defence is not pleaded and was not raised at the trial or in the Court of Appeal, and on that ground, I think, it ought not to be considered. Admittedly a writ was issued within the time prescribed by the Act of 1901 and the action so commenced for all that ap-

(1) (1880) 14 Ch. Div. 213.

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pears was on foot at the time of the trial. The object of commencing the second action appears to have been to avoid the expense of amending the first writ by adding some necessary parties. If the defence now put forward had been raised in the statement of defence the actions might have been consolidated or the second action discontinued and the first proceeded with and if the point had been taken at the trial the learned trial judge would probably, if he had thought it necessary, have made an order to consolidate the actions, or adjourned the trial to enable such an order to be made. In these circumstances it is clearly too late now to give effect to the point.

ANGLIN J.—The plaintiff seeks a judgment declaratory of the nullity of proceedings taken by the defendant municipality for the sale for arrears of taxes of certain lands, in which he had a half interest, and consequential relief, alleging that the taxes said to be in arrear had not been validly imposed and also irregularities in the sale proceedings.

The learned trial judge dismissed the action. He held that the taxes were valid and that there had been no fatal irregularity in the sale proceedings. He was further of the opinion that, if there was irregularity in the imposition of the taxes, the plaintiff was debarred from relief because proceedings to quash the taxation by-laws had not been taken within one month after each of them was promulgated. (B.C. "Municipal Act," 1892, sec. 126.) Any irregularity in the sale proceedings he thought would be covered by certain curative provisions of the same statute. Moreover, in his opinion, the defendants had established laches and acquiescence on the part of the plaintiff sufficient to defeat the action.

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On appeal Macdonald C.J. agreed with the trial judge that no fatal irregularity in the sale proceedings had been shewn and that the objections to the validity of the taxes themselves, based on the facts that the meetings of the municipal council, at which the by-laws imposing the rates were adopted, and of the court of revision at which the assessment rolls were passed, had been held outside the territorial limits of the municipality, failed, because, in his opinion, "the so-called court is merely a sitting of the council" and there was sufficient proof that the council had "unanimously resolved that it would be more convenient to hold (its) meetings * * * outside of the limits of the municipality," as it was authorized to do by 57 Vict. ch. 34, sec. 15. He also thought a case of laches and acquiescence had been made out. Galliher J.A. concurred, but upon the last mentioned ground only.

Irving J.A. would have allowed the plaintiff's appeal on the grounds that no resolution providing for the holding of council meetings outside the municipality had been proved; that no authority existed for holding meetings of the court of revision without the municipal limits; that notice of the sale to the plaintiff had not been established; and that the curative sections invoked were inapplicable. Acquiescence in his opinion was not established. Martin J.A. found no evidence of any resolution authorizing meetings of council outside the municipal limits and no proof of acquiescence on the part of the plaintiff.

From this affirmance, by an equal division in the Court of Appeal, of the judgment dismissing his action the plaintiff appeals to this court.

For the meetings of council held outside the limits

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of the municipality prior to the amendment of 1894 (57 Vict. ch. 34, sec. 15) there was no statutory authority whatever. As to the meetings held after that amendment became law, I agree with Irving and Martin, JJ.A., that the evidence is insufficient to support a finding that the municipal council unanimously adopted a resolution, formal or informal, giving the authority requisite under 57 Vict. ch. 34, sec. 15, for the holding of its meetings outside the municipality. I think the onus was on the defendants to prove such a resolution or to establish facts from which it might be fairly inferred. But, if the burden was upon the plaintiff to shew that such a resolution had not in fact been passed, the evidence, in my opinion, warrants that conclusion.

The "Municipal Act" (section 97) requires that

> the minutes of the proceedings of all meetings of the council shall be drawn up and fairly entered into a book to be kept for that purpose and shall be signed by the mayor, etc.

The minute book was produced. It contains no entry of any such resolution. This would probably suffice to establish its non-existence. Taylor on Evidence (10 ed.), par. 1781. But, if not, the evidence of the municipal clerk, Martin, to the effect that all resolutions of the council passed during his term of office appear in the minute book and that a resolution fixing Vancouver as the place of meeting would, if passed, appear in the minutes, makes complete the proof that there was no such resolution. In the face of this evidence it seems to me impossible to infer, merely from the fact that the council held practically all its meetings outside the municipality, that the requisite resolution had been passed. It would be still more difficult to infer that it had been passed unanimously.

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Notwithstanding the dearth of authority on the point, due probably to the rarity of such a departure from normal and eminently reasonable practice as would be the holding of meetings of municipal councils outside the limits of the municipality without special statutory authority, I entertain no doubt that the meetings held in the City of Vancouver, because not specially authorized by statute (*e.g., vide* "Ont. Mun. Act, 1903," sec. 265), were illegal and that the taxation by-laws enacted at them were not merely irregular, but were null and void. There appears to be no English or Canadian authority. *Paffard* v. *County of Lincoln*(1) may be referred to. But *Board of Commissioners of Marion County* v. *Barker*(2) seems to be the only case directly in point. See, too, *Harris* v. *State*(3); *Re Hill and Township of Walsingham*(4), at page 312.

But if an inference that such a resolution had been passed might be drawn from the course pursued by the council subsequently to the Act of 1894, that would not, in my opinion, authorize the holding of sessions of the court of revision outside the limits of the municipality. I am, with respect, unable to accept the view that "this so-called court is merely a sitting of the council." In many, perhaps in most cases, the personnel of the municipal council and that of the court of revision may be the same. (B.C. "Municipal Act, 1892, sec. 160.) But, notwithstanding the form of the opening paragraph of section 157 of the statute, they must be deemed distinct entities, at least to this extent—that the statutory provision authorizing the holding in certain circumstances of meetings of the

(1) 24 U.C.Q.B. 16.
(2) 25 Kan. 258.
(3) 72 Miss. 960.
(4) 9 U.C.Q.B. 310.

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council outside the limits of the municipality is inapplicable to the sessions of the court of revision. The complainants against the work of the assessor are obliged to attend these sessions either in person or by agent and nothing short of a direct and explicit statutory enactment would suffice to take away their right to have them held within the limits of the municipality. That the court of revision and the municipal council are not the same body is, I think, made abundantly clear by section 161 of the "Municipal Act":—

> 161. If the council consists of more than five members, such council shall by resolution appoint five of its members to be the Court of Revision.

The body discharging the functions of the Court of Revision might have a personnel entirely different from the council. Of this the cities of Ontario afford examples. (Ont. "Assessment Act," 4 Edw. VII. ch. 23, sec. 57.) That councillors act as members of the court is due mainly to considerations of convenience, or it may be of economy. When sitting *quâ* court of revision the members of it, although it should have the same personnel as the council, can exercise none of the legislative or administrative powers of the latter body: neither can the council, when sitting as such, discharge any of the judicial functions of the court of revision. The notice prescribed by section 157 of the Act leads to this conclusion. The procedure provided by section 158 is consistent with it.

That the Court of Revision is a court of limited jurisdiction constituted to discharge judicial functions is, I think, the proper conclusion from the provisions of sections 162, 164, 165 and 166 of the B. C. "Municipal Act" and from such authorities as

Toronto Railway Co. v. *City of Toronto*(1); *Re Crow's Nest Pass Coal Co.'s Assessment*(2); *Sisters of Charity of Providence* v. *City of Vancouver*(3), at page 37; and *Re Rosbach and Carlyle*(4); that its jurisdiction is territorially restricted by the limits of the municipality is undoubted. In the absence of express statutory authority permitting it to hold its sessions beyond the territorial limits over which it holds jurisdiction, such a court can validly exercise its powers only when sitting within that territory. *The Queen* v. *Inhabitants of Totness*(5); *Ex parte Graves* (6); *Phillips* v. *Thralls*(7). But if the sittings of the Court of Revision should be deemed meetings of the council, for reasons already given, they could not lawfully be held outside the municipality.

The "passing" of the assessment rolls at legal sessions of a duly constituted court of revision was, I think, essential to their validity. In the absence of rolls so "passed" there was no power in the municipal council to enact the by-laws imposing the rates complained of. It follows that the taxes in question were not legally or validly imposed or levied.

There is no curative provision in the statute which overcomes such an objection. The section invoked by the learned trial judge, which declares the validity of every by-law not moved against within one month after its publication, is restricted in its application to by-laws "within the competence of the council." The taxation by-laws impugned in this action were not within the competence of the council. Without

(1) [1904] A.C. 809.
(2) 13 B.C.R. 55.
(3) 44 Can. S.C.R. 29.
(4) 23 O.R. 37.
(5) 11 Q.B. 80.
(6) 35 N.B. Rep. 587, 593.
(7) 26 Kan. 780.

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valid assessment rolls duly "passed" by the Court of Revision it was not competent for the council to enact them. They were nullities. Proceedings to quash them were unnecessary.

Unless debarred by estoppel, acquiescence or laches, the plaintiff is, in my opinion, entitled to the relief he seeks.

The plaintiff is asserting a legal, not an equitable right. Mere laches, as distinguished from acquiescence or estoppel, will not preclude his recovery. *De Bussche* v. *Alt*(1); *In re Madever*(2).

There is no evidence of any actual representation or of any voluntary act on his part calculated to induce a belief that the defendant municipality was in a position to make a valid sale of the property in question for arrears of taxes, or that the plaintiff assented to or acquiesced in the sale. This case is, therefore, clearly distinguishable from *Toronto* v. *Russell*(3), much relied upon at bar. Neither was there any conduct of the plaintiff from which a purchaser could reasonably infer an intention on his part not to enforce his rights — if, indeed, that would suffice. *Chadwick* v. *Manning*(4) — or that he had no rights. The defendant municipality certainly had all the knowledge which the plaintiff could have had of the facts now relied upon to render the assessment invalid; its co-defendants, the purchasers, for aught that appears, had the same means of knowledge; and there is nothing to shew that they had not quite as much actual knowledge of these facts as the plaintiff had. The plaintiff's own knowledge of them is very doubtful; and that he was aware of their effect on the

(1) 8 Ch. D. 286, at p. 314.
(2) 27 Ch. D. 523.
(3) [1908] A.C. 493.
(4) [1896] A.C. 231.

validity of the taxes there is not a tittle of evidence. Although misleading action in ignorance of rights may in some circumstances give rise to an estoppel, *Sarat Chunder Dey* v. *Gopal Chunder Laha*(1), a party cannot, because of mere silence or inaction, be held to have acquiesced unless he was fully cognizant of his adverse right. *Earl Beauchamp* v. *Winn*(2); *Willmott* v. *Barber*(3). If he be ignorant of his right, the duty to speak, upon the failure to discharge which the equitable estoppel is based, does not arise. "Silence is innocent and safe where there is no duty to speak." *Chadwick* v. *Manning*(4). The evidence that the plaintiff knew of the intended sale is somewhat dubious. But, if he did, and if he was fully cognizant of his own rights, his duty to intervene is by no means clear having regard to the vendor-corporation's actual knowledge of the facts on which objection to the validity of the taxes for which the lands were to be sold is based and its public character — and to the means of knowledge available to the defendant purchasers and the absence of any evidence that they were, or that the plaintiff had reason to believe they were ignorant of such facts, or that he knew that his land would be purchased under a mistaken belief as to his rights. *Willmott* v. *Barber*(3); *Proctor* v. *Bennis*(5). I am unable to see how the plaintiff's inaction can be said to have been culpable, or to have induced the defendant municipality to sell or its co-defendant to purchase. That was the case which the defendants undertook to make out under their defence

(1) 19 Ind. App. 203, at pp. 214-5.
(2) L.R. 6 H.L. 223, at p. 225.
(3) 15 Ch. D. 96, at p. 105.
(4) [1896] A.C. 231, at p. 238.
(5) 36 Ch. D. 740, at p. 760.

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of acquiescence or estoppel. They have, in my opinion, failed to establish it.

It follows that this appeal should be allowed and that judgment should be entered for the plaintiff with costs throughout.

BRODEUR J. (dissenting).—By his action the appellant wants to set aside a tax sale that had taken place more than ten years before.

It was dismissed by the Superior Court of British Columbia, and, the Court of Appeal of that province being equally divided, the judgment of the Superior Court was not disturbed.

Several questions have been raised before this court, but they can be reduced to the two following:—

1st. Did the municipal council of South Vancouver impose a valid taxation and was the tax-sale valid although the council sat outside of the municipality?

2nd. Did the appellant acquiesce in the validity of the proceedings of the council and of the tax sale?

I will state the facts as briefly as possible.

In 1892 the municipality of South Vancouver was created by proclamation of the Lieutenant-Governor in Council under the provisions of the general municipal Act (55 Vict. B.C. ch. 33).

It was a rural municipality covering a large territy around the City of Vancouver.

It was sparsely settled, just a few houses here and there. Most of the residents had their business in the adjoining city and a large number of property owners were living and residing also in that city.

The communications between those different settlements were rather difficult, though all of them had an easy access to Vancouver.

One of the first questions that the municipal council had to decide was the selection of the locality where they would hold their meetings.

They had met for the purpose of organization on the 7th May, 1892, at a school house in the municipality. That school house was not, however, their property nor under their control.

They unanimously decided "that the next meeting be held" at 623 Hastings Street, in the adjoining City of Vancouver.

From that date the clerk of the municipality had his office at that place, the council sat there for their ordinary meetings and for their meetings as a court of revision. All the by-laws, including assessment, rate or tax sale by-laws were passed there and published in newspapers in Vancouver (since none were published in the municipality itself) and in the official Gazette; and those advertisements generally contained the above address, 623 Hastings Street, as being the place of business of the municipality and the place where the council had its meetings.

If notices had to be given to individuals they contained the same information.

It was then notoriously known that the council was sitting in the city.

The appellant himself, one day in 1894, appeared before council sitting as the Court of Revision, at that place, to appeal against assessment put on the property in dispute in this case.

He never raised the objection that the council, or the Court of Revision, was not holding its meetings at a proper place, though a decision adverse to his request was then rendered.

Neither the Attorney-General nor the provincial

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authorities ever objected as to their holding their meetings outside of the municipalities. Until 1894 no provision was inserted in the "Municipal Act" as to the places where the councils should sit. In that year an amendment was made which should be interpreted in favour of the validity of the councils' action. It declared that the meetings of the council should be held in the municipality unless the councillors unanimously resolved to hold them outside. We have in the municipal code in Quebec a similar provision (art. 106).

That amendment was interpreted by the clerk as meaning that the council of South Vancouver should hold its first meeting in January each year in the municipality and we see that in the next years they used to meet at a railway station in the municipality and pass a resolution to hold their meetings in Vancouver, always at the same place, 623 Hastings Street.

It is true that the resolutions are not as formal as should be desired, but we must not expect that the minutes of proceedings of those rural municipalities should be absolutely regular and formal.

Those proceedings were carried in good faith. They were notorious and known to the appellant.

It would be contrary to the welfare of our municipal institutions to allow a person to come after sixteen years and say that those proceedings were null and void.

The appellant knew his property was assessed for the payment of the municipal taxes. He was supposed to see in the official Gazette and in the local newspapers that the meetings of the council were held in Vancouver.

He never paid his taxes and even after the property was sold he never inquired for the payment of

the taxes. He received, until the property was sold for taxes, from the assessor and from the collector, notices shewing the assessment and the amount due for taxes. He claims that when the tax sale was made he did not receive the notice that the law provided.

It is one of the disputed facts of this case. The appellant relies a great deal upon the absence of such notice to maintain his appeal.

The evidence may be conflicting; but it is one of those cases where the trial judge, who had the opportunity of seeing and hearing the witnesses, is in a better position to express his opinion than by the mere reading of the evidence. I may add, however, that the hesitations of the appellant, in his evidence, convinced me that he received in due time that notice and I concur heartily in the finding of the trial judge that the appellant knew that the lot in which he was interested was advertised for sale to satisfy the taxes against it, and that he duly received a notice to that effect. In spite of his denial of the knowledge of an actual sale, he must be taken to have known that the advertised sale was duly carried out and that his land was sold.

Why then did he not move? The explanation of his silence is given to us by the clerk of the municipality who happened to meet him at the time and the appellant told him

> that he did not think the property was worth very much at the time. He did not know whether it was worth the taxes or not.

It may be added that the lot was then in the bush and that there was no access to it whatever. The appellant admits that he visited that lot only once. The property was sold for the amount of the taxes and

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purchased practically by the mortgagee of the property who, I suppose, wanted to protect his interests.

The appellant, who knew of the existence of that mortgage and the depression of the land market in the locality, was satisfied to let the lot be sold.

Ten years later, when the property had largely increased in value, and was worth perhaps $20,000, he comes and asks the courts to declare the tax-sale null and void because the council sat in the City of Vancouver, in the city where he was himself living. I think that the proceedings of the council should be held valid and that the appellant, by his actions, his declarations and his conduct generally in what has been done, is estopped by such acquiescence from setting up any title to the property.

I would not feel disposed to maintain his action.

In declaring all the proceedings of the council null and void we would simply create a state of chaos and confusion and cause the ruin of many innocent persons.

The appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *MacNeill, Bird, MacDonald & Bayfield.*

Solicitors for the respondent, Ralston: *Russell, Russell & Hannington.*

Solicitor for the respondent, Fleming: *W. H. D. Ladner.*

HIS MAJESTY THE KING EX REL. THE ATTORNEY-GENERAL OF QUEBEC (DEFENDANT) ..... } APPELLANT;

AND

CHARLES S. COTTON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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*Feb. 20.

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

Constitutional law—Construction of statute—B.N.A. Act, 1867, *s.* 92, *s.-s.* 2—*R.S.Q.* 1888, *s.* 1191(*b*), 1191(*c*); (*Que.*) 57 *V. c.* 16, *s.* 2; 6 *Edw. VII. c.* 11, *s.* 1—*Legislative jurisdiction—"Direct taxation within the province"—Succession duty—Extra-territorial movables—Decedent domiciled in province.*

The legislative authority of a province in the matter of taxation conferred by sub-section 2 of section 92 of the "British North America Act, 1867," which authorizes the levying of "direct taxation within the province," extends to the imposition of duties upon the transmission of movables having a local *situs* outside the provincial boundaries which form part of the succession of a decedent domiciled within the province. *Woodruff* v. *The Attorney-General for Ontario* (1908), A.C. 508, distinguished. Judgment appealed from (Q.R. 20 K.B. 164) reversed, Davies and Anglin JJ. dissenting.

At the time of the death of C.L.C., 11th April, 1902, the statutes in force in the Province of Quebec relating to succession duties provided that "all transmissions, owing to death, of the property in, usufruct or enjoyment of movable and immovable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death, etc." Subsequently, by 6 Edw. VII. ch. 11, a clause was added (sec. 1191(*c*)), as follows: "The word 'property' within the meaning of this section shall include all property, whether movable or immovable, actually situate or owing within the province,

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile (or residing), in the Province of Quebec at the time of their death," which was in force at the time of the death of H. H. C., 26th December, 1906. Succession duties were levied, in respect of both estates upon the whole value of the property devolving including, in each case, movable property locally situated in the United States of America. The action was to recover back those portions of the duties paid in respect of the value of the movables situated outside the limits of the Province of Quebec.

Held, reversing the judgment appealed from (Q.R. 20 K.B. 164), Davies and Anglin JJ. dissenting, that the movable property situated outside the limits of Quebec forming part of the succession of H. H. C. was subject to the duty so imposed.

On an equal division of opinion among the judges of the Supreme Court of Canada the judgment appealed from stood affirmed in so far as it held that the movable property situated outside the limits of Quebec forming part of the estate of C. L. C. was not liable to such taxation.

APPEALS from the judgment of the Court of King's Bench, appeal side(1), affirming, with a variation, the judgment of the Superior Court, District of Quebec, by which the respondents' petition of right was maintained.

The respondents, by their petition of right, claimed the refund of succession duties paid by them and exacted by the Government of Quebec in virtue of the statutes of the Province of Quebec in respect of duties exigible on the transmission of property in consequence of the death of the owner. The amount demanded was $31,492.02, of which $10,545.55 had been paid in respect of part of the succession of the late Charlotte L. Cotton, and the remainder in respect of part of the succession of the late Henry H. Cotton, her husband; the claim was made on the ground that

(1) Q.R. 20 K.B. 164.

these portions of the estates consisted of personal property which was locally situate in the State of Massachusetts, one of the United States of America, and, consequently, not subject to the imposition of succession duty by the provincial legislature.

The Superior Court maintained the petition of right as to the whole of the amount demanded, with interest from the date of the institution of the action. On appeal to the Court of King's Bench this judgment was affirmed, in effect, by the judgment now appealed from, which merely modified the judgment of the Superior Court by deducting therefrom the amount of $393, and ordering that each party should bear its own costs. The ground on which the deduction was made was that the Superior Court, for the purpose of ascertaining on what amount the tax was payable, should have deducted a proportionate amount of the debts due by the deceased owners of the property in question from that part of the property which was locally situate in the United States of America, instead of deducting the entire indebtedness from that part of the estates locally situate in the Province of Quebec.

On the present appeal the respondents gave notice of cross-appeal from the judgment of the Court of King's Bench, in so far as it varied the judgment of the Superior Court, on the grounds that, if the only property subject to duty was that locally situate in the Province of Quebec, the amount of the debts should be deducted only from the property so liable to taxation; that, if it were otherwise, the value of the property situate outside that province would be affected and lessened in value, and that, as their claims had been sustained in the Court of King's

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Bench, notwithstanding the reduction in the amount of the judgment, the costs on the appeal to that court should have been allowed to them.

The questions in issue on this appeal are stated in the judgments now reported.

Aimé Geoffrion K.C. for the appellant.

T. Chase-Casgrain K.C. for respondents.

THE CHIEF JUSTICE.—The question for the opinion of the court in this case is: If a person domiciled in the Province of Quebec dies leaving movable property such as bonds and debentures "locally situate" in Boston, Massachusetts, one of the United States of America, can that part of the estate be considered or taken into account in calculating the amount of the duty to be levied on the transmission of his estate under the succession duty law of that province? For the meaning of the term "locally situate" see Dicey, Conflict of Laws (2 ed.), p. 309; Hanson, Death Duties (6 ed.), pp. 108-109; and notes of my brother Anglin.

There are in fact two estates in connection with which this question arises here: that of Mrs. Cotton and that of her husband, H. H. Cotton; and the action is to recover from the Government the amounts paid as succession duty on both estates through error of law, as is alleged. Each of the cases presents a different state of facts for consideration, and the statutes relied on by the Crown as applicable to the two successions are not in terms identical.

Dealing first with the succession of Mrs. Cotton, it appears that she died in Boston, on the 11th of April, 1902, having made her will there on the 17th

of April, 1900, disposing of a fairly large estate in bonds and debentures, the bulk of which was, at the time of her death, locally situate in Boston. In the interval between the making of the will and her death, the deceased's husband bought a house, at Cowansville, in the Province of Quebec, where he was born, and he had actually taken up his residence there, although some of the winter months were spent in Boston. After his wife's death, the husband continued to reside at Cowansville, to which place he brought her body for interment, and there he died. I accept the finding of the courts below that Mrs. Cotton was, at the time of her death, domiciled in the Province of Quebec and that her estate devolved under the law of that domicile, but, in my opinion, the statute imposing the duty levied by the Crown does not extend to that portion of her estate which was locally situate beyond the limits of the province. The statute reads:—

All transmissions, owing to death, of the property in usufruct or enjoyment of movable and immovable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death.

Taken in their strict and literal meaning the words "movable and immovable property *in the province*" relate *primâ facie* to property locally situate within the limits of the province and, as my brother Anglin says, that such was the intention of the legislature is made superabundantly clear by reference to the French version of the statute where the words used are

toute transmission par décès, etc., de biens mobiliers ou immobiliers *situés dans la province*, etc.

If these words "situés dans la province" had been omitted and the language of the French law (art. 4,

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L. 22, Frim. An. VII.) from which the Quebec Act is taken adhered to, then all the French authors say that by application of the maxim *mobilia sequuntur personam* the meaning of the word "movable" might be enlarged so as to include all personal estate wherever it might be; but if effect is to be given to the language of the legislature, the result must be to say that by inserting the qualifying words "in the province" after the words "movable and immovable property" it was intended to exclude the application of that maxim and limit the impost to such movable property as, at the date of the death, would be found within the jurisdiction. The question on this branch of the case is not as to the power, but as to the intention of the legislature. Acts imposing death duties, like all other taxing statutes, must be construed strictly and in favour of the subject. Hanson's Death Duties (6 ed.), p. 78. I do not overlook the fact that in the declaration to be furnished the collector of provincial revenue the description and real value of all the property transmitted, whether movable or immovable and wherever situate, is to be supplied to that official; but no inference is deducible from this obligation which would extend the meaning to be given the section imposing the tax.

Dealing now with the estate of the husband, who died on December 26th, 1906, at Cowansville, in the Province of Quebec, having, by his will made there in notarial form, instituted the respondents his testamentary executors. A large amount of bonds and debentures physically situate in the United States formed part of that estate at its devolution. In the interval between the death of the wife and that of the husband, the law of Quebec was amended so as to sub-

ject to succession duty all movable property transmitted

wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death.

Mr. Justice White speaking for the court in *Knowlton* v. *Moore*(1), at p. 56, after making a careful review of the law concerning death duties in ancient and modern times, says:—

Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit or the transmission from the dead to the living on which such taxes are immediately rested;

and Fuzier Herman, *vo.* "Successions," No. 1899, says:—

Il suit de là que le droit de succession est dû chaque fois qu'il y a mutation, c'est-à-dire dessaisissement par mort, sans qu'il y aît à se préoccuper du titre en vertu duquel l'hérédité est dévolue. C'est donc le décès qui est le fait générateur du droit proportionnel. De même que, en droit civil (art. 718), les successions s'ouvrent par la mort, de même, en droit fiscal, c'est le décès qui, en opérant la mutation des biens, donne ouverture à la créance du Trésor. Ainsi que l'exprime un arrêt de la cour de cassation, l'impôt de mutation par décès "a le caractère d'une dette naissant avec l'ouverture de la succession et inhérente dès ce moment à tous les biens qui la composent."

In France, and the Quebec statute is an adaptation of the law of that country, it is universally accepted that the power to transmit or the transmission or receipt of property by death is the subject levied upon by all death duties. Fuzier Herman, *vo.* "Successions," No. 2028. The duty is not levied upon individual items of property which together make up the estate, but upon the transmission or devolution of the succession. The civil law of Quebec, in the light of

(1) 178 U.S.R. 41.

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which this statute must be read, is based upon the old Roman legal theory of universal succession or succession as a unit by means of which the legal personality of the deceased passed over to his heir.

Article 596 of the Civil Code says that succession means "the universality of the things transmitted" and that universality devolves at the domicile of the deceased (art. 600 C.C.). By the law of that domicile, the title under which the heirs receive the estate, the movable property of the deceased, wherever situate, is governed. In such a case the maxim of *mobilia ossibus inhærunt* finds its application, as my brother Duff clearly demonstrates in his notes, to which I would venture to add two authorities taken from the French law. In a note to Dalloz, 1897, 1, 139, M. Sarrut says:

> En vertu de la fiction *mobilia ossibus inhærent* l'universalité juridique d'une succession mobilière est censée adhérente à la personne du défunt; or le défunt était, en droit, au lieu de son domicile légal.

Pothier, Introduction générale, vol. 1, p. 7, No. 24.

> Les choses qui n'ont aucune situation sont les meubles corporels, les créances mobilières, les rentes constituées, autres que celles dont il a été ci-dessus parlé, quand même elles auraient un assignat sur quelque héritage: car cet assignat n'est qu'un accessoire. Toutes ces choses, qui n'ont aucune situation, suivent la personne à qui elles appartiennent, et sont par conséquent régies par la loi ou coutume qui régit cette personne, c'est-à-dire, par celle du lieu de son domicile.

To sum up briefly, I am of opinion that the right or title to the bonds and debentures situate in Boston passed on his death from the deceased to his heirs in the Province of Quebec by virtue of the law of that province and all the movable property transmitted by that title is subject to the duty which the legislation which creates the title chooses to attach as a condition of the transmission on those who

claim title by virtue of our law. Halsbury, vol. 13, p. 273, No. 373.

Let me test the soundness of this construction of the law by reference to section 6 of the Act we are now considering. That section is in these words:

> No transfer of the properties of any estate or succession shall be valid, nor shall any title vest in any person, if the taxes payable under this section have not been paid, and no executor, trustee, administrator, curator, heir or legatee shall consent to any transfers or payments of legacies, unless the said duties have been paid.

Payment of the duty is a condition of the transfer and no title is vested until it is paid. If the executors or legatees sought to enforce their title to the bonds in Boston, it would be a good answer to their claim that not having paid the succession duty they had no title to the bonds. In which case, where would the title to that portion of the deceased's estate vest? If, therefore, the heirs must invoke the Quebec Act as their title, the condition subject to which that Act transmits the property to them — payment of legacy duties — must be fulfilled. It is unnecessary to say that, in my opinion, this case is clearly distinguishable from the case of *Woodruff* v. *Attorney-General for Ontario* (1). There is no question here of an attempt to tax property situate beyond the jurisdiction; the Quebec statute merely fixes the conditions subject to which it gives a good title to the property of the deceased. In a word, the tax is imposed as a condition of the devolution, a condition subject to which the heirs take title. The amount of the tax is fixed by reference to the aggregate value of the property and the degree of relationship of the successors to the deceased; but there is nothing in the law which pre-

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vents a government from taxing its own subjects as in this case on the basis of their foreign possessions.

I would allow the main appeal as to the estate of H. H. Cotton.

As to the cross-appeals, the necessary result will be their dismissal, because that is the conclusion to which the opinions of the three members of the court who would allow the main appeal in the case of Mrs. Cotton would necessarily lead and it, therefore, becomes unnecessary for me to express any opinion on the merits of these cross-appeals.

The conclusion, therefore, to which I have come is that as to the estate of Mrs. Cotton the appeal should be dismissed and that it should be allowed as to the estate of Mr. H. H. Cotton.

As to costs, the costs of the Superior Court should be paid by the Crown; the costs in appeal and here should be paid by the estate of Cotton, as also the costs on the cross-appeals.

DAVIES J. (dissenting).—In the case of *Woodruff et al.* v. *Attorney-General for Ontario* (1), the Judicial Committee held that there was no sound distinction in point of law between the two transactions or assignments of property in question in that case. As said in their judgment:—

> They were both concerned with movable property locally situate outside the province and the delivery under which the transferees took title was equally in both cases made in the State of New York.

Had the judgment stopped there it would seem reasonably clear that the grounds of their Lordships' decision that the Ontario succession duties were not

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recoverable in that case, were the local situation of the property outside the province, coupled with a delivery of the property under which the transferees took title also in the State of New York. Under these facts and circumstances they did not agree with the Court of Appeal for Ontario which held that the assignment of 1902 fell within the Ontario Act imposing succession duties because it was, as that court held, a transfer of property made in contemplation of death to take effect only on and after the death of the transferor. As I understand the judgment of the Privy Council, up to this point, it did not matter whether the assignment so made was or was not made in contemplation of death and only to take effect on and after death. These facts, as found by the Court of Appeal, were immaterial in their judgment because, as they go on to say, "the pith of the matter" was the limitation in Canada's "Constitutional Act" of the powers of taxation given to the local legislatures, which limitation they said made

> any attempt to levy a tax on property locally situate outside the province beyond their competence.

This broad general statement it will be seen takes no account of the fact that such property may have been transferred abroad by the testator or intestate in his lifetime in contemplation of death and so as to avoid the succession duties. Such a factor as the transfer of the property abroad, which is given prominence to in the preceding part of the judgment, has no room in this part, where the Judicial Committee is apparently pointedly stating their opinion of the limitation placed upon the powers of the local legislatures in the grant to them of the power of "direct taxation within the province." The fact of there having been an as-

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signment of such property made abroad by the deceased in his lifetime in contemplation of death is in this statement of the limited character of the powers conferred on the local legislatures absolutely ignored as irrelevant, and the general proposition laid down that

> any attempt to levy a tax on property locally situate outside the province is beyond their jurisdiction,

that is, the jurisdiction of the local legislatures.

But the Judicial Committee do not stop there. If they had it might be contended that the language of their judgment, though broad and general enough to cover other cases, must be construed as applicable only to such facts as they were in that case dealing with, namely, where movable property was

> locally situate outside the province and the delivery under which the transferees took title was also made outside the province.

The latter words, however, of their judgment seem to render it impossible to attach such a limited meaning to the judgment, because they go on to deal with the arguments advanced by Sir Robert Finlay for the Attorney-General of Ontario. His argument, as reported, was to the effect that the legislation was *intra vires* the legislature because the tax was not a tax on property but one on the devolution or succession, that it was imposed on persons beneficially entitled by virtue of the will of the deceased or by virtue of the testamentary transfers made by him in his lifetime to take effect at his death. That these persons taxed were resident in the province and were directly liable for the duty.

Dealing with this argument the single remark the Judicial Committee make is:—

Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature had forbidden to the province, taxation of property not within the province.

Such a remark would be pointless if they had held the transaction of 1902 to have been a *bonâ fide* absolute assignment and not to have been of the character contended for by Sir Robert Finlay and found by the judgment in appeal before their Lordships, namely, one made in contemplation of death and only to take effect on and after death. The latter construction of the transfer had to be reached, otherwise there was no ground for discussion as to the property being taxable under the Act. The limitation upon the powers of the provincial legislatures to levy direct taxation within the province, rendered it unnecessary for their Lordships, as they said,

to discuss the effect of the various sub-sections of section 4 of the "Succession Duty Act," on which so much stress had been laid in the argument before them.

It is, therefore, evident to me that the judgment of the Privy Council in this case of *Woodruff* v. *Attorney-General for Ontario*(1) is of a wider and broader application than contended for by the appellant in this appeal, and that it is conclusive upon us in the appeal now before us. The distinction attempted to be made by Mr. Dorion, at the first hearing, between the two statutes of Quebec and Ontario levying these succession duties, namely, that the former expressly makes the taxation payable upon the transmission of the property, while the latter places it upon the property itself, is not a substantial distinction. In my judgment, under both statutes, the tax is one not on the property, but on its

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devolution or succession. (See *Lovitt* v. *Attorney-General for Nova Scotia*(1).) But no such distinction can be successfully invoked to take this appeal out of the binding effect of the judgment of the Privy Council in *Woodruff* v. *Attorney-General for Ontario*(2). That judgment was not based upon the mode in which the Legislature of Ontario attempted to levy the succession duties there in dispute, but upon the denial of the existence of any constitutional power in the legislature either directly or indirectly to impose such duties upon property not within the province. The head-note of the case correctly sums up what it really did decide, namely, that,

> it is *ultra vires* the legislature of the province to tax property not within the province; *Held*, accordingly, that the "Succession Duty Act" (R.S.O. 1897, ch. 24). does not include within its scope movable properties locally situate outside the Province of Ontario which *it was alleged* that the testator, a domiciled inhabitant of the province has transferred in his lifetime with intent that the transfers should only take effect after his death.

If I am right in my construction of this *Woodruff* decision, it is binding in this appeal, as the foreign bonds, stocks and other securities owned at her death by Mrs. Cotton, and at his death by Henry H. Cotton, and upon which, or the transmission of which, it was contended by the Crown in right of the Province of Quebec succession duties were payable under the provincial statute, were, at the times of the respective deaths of Mrs. Cotton and Henry H. Cotton, situate in Boston, Massachusetts, and not in the Province of Quebec, and had never been, so far as the record shews, physically situate in that province.

The appeal should, therefore, be dismissed.

(1) 33 Can. S.C.R. 350. (2) [1908] A.C. 508.

As regards the cross-appeal, I think this should be allowed. The Court of King's Bench modified the judgment of the Superior Court by deducting the debts of the estate from all the assets and not from the assets in the province only. I think the Superior Court was right in holding that the debts owing by the estate in the province should be deducted from the assets in the province only. In estimating the amount upon which succession duties should be paid, the executor or the courts have nothing to do with assets outside of the province which were beyond their jurisdiction, and which it is *ultra vires* of the legislature to tax. The statute says, section 1191(*b*), that these succession duties are to be calculated

upon the value of the property transmitted after deducting debts and charges existing at the time of the death.

What the legislature was dealing with and all that it had power to deal with was the property within the province — just as the reference to debts had to do exclusively with debts due in the province. If I am correct in my construction of *Woodruff's Case*(1) in holding that property "locally situate outside of the province" was not liable to the succession duties, then it must, I think, be held that the words "property transmitted" in section 1191(*b*) had no reference to property outside of the province, but had exclusive reference to the property within the province which, and which alone, the legislature in the matter of these duties had power to deal with.

I would, therefore, allow the cross-appeal and restore the judgment of the Superior Court.

As regards costs, the respondent should be allowed

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costs in all the courts and costs upon his cross-appeal in this court. The judgment in the court of appeal not allowing him costs in that court was based upon the assumption, wrongful to my mind, that the judgment of the Superior Court should be substantially modified. As I think the Court of King's Bench wrong upon that point, I would allow the respondent his costs of the appeal in that court as well as in this court, and also his costs in the cross-appeal.

IDINGTON J.—The issue raised herein is of very great importance. It involves the question of the interpretation and construction of the "British North America Act, 1867," section 92, sub-section 2, assigning to the exclusive power of the provincial legislatures

> direct taxation within the province in order to the raising of a revenue for provincial purposes;

and of the interpretation and construction of an Act of the Quebec Legislature professedly acting within said power enacting that

> all transmissions, owing to death, of the property in, or the usufruct or enjoyment of, movable and immovable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death:

or and as it now stands amended in 6 Edw. VII. ch. 11 (1906) (of Quebec).

The first question thus raised is whether or not this enactment is a competent exercise of the power given by the preceding enactment.

Before passing to the solution of this question, I wish to consider and dispose of the suggestions made by counsel for the respondent relative to the bearing

of the amending section 1191(*c*) and three or four following sections of said Quebec statute.

The contention set up is that these several later sections shew that it is not the transmission of property that is taxed, but the property itself.

Inasmuch as section 1191(*c*) of the Quebec Act is a declaration of the meaning of the word "property" where it occurs in the Quebec Act above referred to and quoted from, I am unable to see how it can affect the question at all if the act of transmission within the province is the subject of taxation and a proper basis therefor. And still less can the following sections thereof affect the question raised here, for it is frankly admitted by counsel that none of the property now in question here is of any of the kinds covered by these later sections.

Of course it may be a fair argument that finding these sections in the Act taxing the transmission of property, stated in the terms they respectively are stated, it is in truth a taxation of property that is involved. Whatever weight may be given thereto it seems to me impossible to reach such express language as quoted above as imposing taxation on anything but the transmission.

The case of *Lambe* v. *Manuel*(1) seems conclusive upon that point. In the language of Lord Macnaghten therein, page 72,

> the taxes are imposed by those Acts — this being one — on movable property are imposed only on property which the successor claims under and by virtue of Quebec law.

Another argument to support this contention of property being the subject of the tax was made for

(1) [1903] A.C. 68.

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appellant is this that immediately after transmission or granting of probate the personal representative is to be recouped in a specified way varying according to the distinction or character of each legacy. It seems to me this argument is more plausible than sound.

It is the first transmission that is in question and not the later transmission taking effect abroad as the result thereof.

I infer from the evidence adduced that it was erroneously supposed to be contended that the later transmission was had in view by the statute.

Neither the requirements of the rules of corporate bodies in which stock may have been held by deceased, nor those of a foreign state relative to the enforcing of claims therein are what is meant by the transmission named in the statute. It is that transmission, and only that, which vests any right, whatever it may be, in him getting by force of the law of Quebec, title to the property of deceased, that is meant by the use of the word in this statute. The purview of the Act shews that, if any doubt could otherwise exist.

I, with deference, doubt what Mr. Geoffrion seemed to concede resting upon the decision of Mr. Justice Pagnuelo in *In re Denoon*(1). The words of the Act are strong and the legislature competent to change the old law or keep its operative effect in suspense.

In another point of view the argument is met by the case of *Bank of Toronto* v. *Lambe*(2), where an analogous argument was put up.

The tax there had to be determined by the paid-up

(1) Q.R. 15 S.C. 567. (2) 12 App. Cas. 575.

capital of the bank and the number of offices or places of business it had in the province.

There, as here, the questions of direct or indirect taxation, the power over banks as such resting with the Dominion, and their rights to carry on business independently of provincial authority, and a foreign head office owning and controlling everything, were all relied upon.

The tax was held to be direct and the mode of fixing it was but the measure to be applied for ascertaining what the tax should be.

Here the tax is measured by the amount of property to be transmitted under certain conditions varying in each case just as in the cases of banks and other companies in that case.

Counsel for appellant then invokes the authority of the case of *Woodruff* v. *The Attorney-General for Ontario*(1), to shew that personal property actually situated in a foreign state cannot be taxed by a provincial legislature. The Ontario Act, R.S.O., ch. 24, is as fundamentally different from the Quebec Act we are called upon herein to consider, as such Acts can well be from each other. Section 4, sub-section (*a*) of the former is as follows:—

(*a*) All property situate within this province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in Ontario at the time of his death or was domiciled elsewhere, passing either by will or intestacy.

Let any one compare the two for a moment and what I have just stated seems clear.

Before proceeding further it is proper to inquire whether notwithstanding the radical differences between the two Acts it has, as is contended, in truth

(1) [1908] A.C. 508.

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been decided, by the Privy Council in the said *Woodruff* v. *Attorney-General for Ontario* (1), that the provincial legislature cannot tax a transmission in and by Quebec law of personal property outside the province, and that the maxim *mobilia sequuntur personam* so much relied upon relative to the laws of other countries, cannot avail in this case.

If that was the real issue raised in that case, and it has been therein definitely decided, there is an end of the matter. If it was not the real issue, and the decision did not necessarily involve the decision of such issue, then it cannot bind us.

I may at once say that the statement of fact in the following sentence of the judgment, seems to me to dispose of the question of the fundamental grounds the judgment proceeds upon.

> They (*i.e.*, the two transactions there in question) both were concerned with movable property locally situate outside the province and the delivery under which the transferees took title was equally in both cases made in the State of New York.

Surely that is as wide apart from what is involved here as can well be. The title upon which the attempted taxation herein rests arose in Quebec by virtue of the transmission its laws give vitality to. It is upon the act of giving force and validity thereto that the taxation is imposed. Whether such transmission is taxable or not and the legal ambit thereof is entirely another question. But it is not involved in the denial of a right by virtue of such a statute as the Ontario Act to tax the property itself when in, or after taken to, a foreign country, and has been in the lifetime of the deceased there transferred to

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another, and thenceforward remains in the foreign state the property of such transferee.

The Ontario Act was so framed that it did not give rise to the very question raised here. When the interpretation of that Act was called for, in said case, the first subject calling for consideration was the scope of legislation whereof the keynote was the subsection I have just quoted. It purports to tax property situate within the province and in taxing property, not the owner in respect thereof, or the transmission thereof, lies the radical difference between the Acts there in question and what we have to pass upon. In trying to arrive at the correct interpretation naturally the taxing power of the province was referred to. An obiter dictum appears relative thereto that read in relation to the situation of the property there in question and the facts relative thereto might well be attributed thereto. But it by no means proves it is to be taken in the wide sense now contended for here, in relation to another set of facts giving rise to other legal considerations. The judgment reached does not need its support nor does it seem the basis thereof.

And that is made abundantly clear when the judgment expressly refers to the case of *Blackwood* v. *The Queen*(1) as containing the reasoning which covers the case and I infer was in fact adopted in disposing of it.

If ever a case was decided on what was supposed by the court to have been the intention of the legislature, as expressed in its enactment, that was the case of *Blackwood* v. *The Queen*(1). The entire rea-

(1) 8 App. Cas. 82.

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soning of the judgment was elaborated in order to the making of that clear. The conclusion is thus summed up therein:—

> All these things, the person to pay, the occasion for payment, and the time for payment, point to the Victorian assets as the sole subject of the tax.

Whilst impliedly admitting the power of the colony of Victoria to go much further by using language shewing such a purpose, it would have been idle to elaborate as was done if the power in Victoria did not exist. All the case called for in such event was, if so, to declare accordingly.

The court adds that the reasons which led English courts to confine probate duty to the property directly affected by the probate, notwithstanding the sweeping general words of the statute which imposed it, apply in full force to the Victoria statute and the case arising upon it; yet the court made it quite clear that said reasons were only illustrative of how such Acts had been treated and their interpretation might form a guide for reaching the meaning of the Victoria statute.

For in the early part of the judgment the court points out that the discussion relative to the terms "probate duty" and "legacy duty" could only be used as descriptive of two classes of statutes familiar to English lawyers and adds: "If used for any more exact application they are misleading."

Now passing that we have the following declaration in the Quebec Act as amended which clears all this up if doubt ever existed. The amending clause was apparently designed to clear it up whether needed or not.

The clause is section 1191(*c*), as follows:—

> 1191(*c*). The word "property" within the meaning of this section shall include all property, whether movable or immovable, actu-

ally situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death.

This is most explicit as to what is to be covered by the transmission to be taxed and most comprehensive. Perhaps it comprehends too much, but as to that we are not concerned here, for the case now in hand of the transmission of the estate of the late Mr. H. H. Cotton who was domiciled at his death in the province, falls within the latter part of the clause just quoted and is preceded by language evidently intended to reach as far as the powers possessed might go to express the intention not found in the Victoria Act or the Ontario Act.

Nor are we concerned with the amendment since made to rectify what were possibly too extensive claims. Neither of these amendments is retrospective.

The clause should be held good for that which the legislature had the power to enact when the excess of authority, if any, was as here easily severable from what was *ultra vires* or capable of being read as expressing only what was *intra vires*.

I am only concerned thus far to see if there was an expression of intention such as was sought for but could not be found in the Victoria Act. For the present I assume, but by no means say, the language needed clarification.

It seems to me there can in regard to this Act thus amended be no doubt of its intention to impose a tax on the transmission in Quebec by force of its law, of the personal estate wherever situate.

The next and most important question which

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arises here is this: Does such express intention limited within what is necessary to cover the case of the transmission of the late Mr. H. H. Cotton's estate wheresoever situate, come within what it is competent for the Legislature of Quebec to enact?

This question starts several others. In the first place the taxability of any transmission of property in any case; the principle upon which it can be rested; and the kind of property respecting which its transmission may be taxed. I cannot think any doubt can exist as to the right to tax the transmission. The basis of such right as well expressed in *Winans* v. *Attorney-General*(1) by Lord Loreburn, page 30:—

> In both cases the property received the full protection of British laws, which is a constant basis of taxation, and can only be transferred from the deceased to other persons by a British court.

The basis of taxation and for transfer from the deceased to others is not exactly in the same way here in evidence, as there, but as to transfer is fully more so. The deceased had property in the province for which his executor could get no title or reach it without probate or authentic will (whichever happened to be the case), and that could only be got upon the conditions determined by law. Even if one of these conditions happened in the event to be most onerous, and possibly uncollectable by an action taken by the Crown, I fail to see how the respondents can now and here attack it.

Again, the *Lambe* v. *Manuel*(2) case, the converse of this upon the same statute before the amendments referred to, proceeds upon the recognition of the title got by the transfer or transmission involved

(1) [1910] A.C. 27. (2) [1903] A.C. 68.

in the grant of probate in another province where the deceased had his domicile at death.

It seems to me to give impliedly just that recognition of the grant relative to goods in another province which I have already suggested.

It may at least *primâ facie* be here given in a limited sense to the *mobilia sequuntur personam* rule.

In the next place arises the question of the power of the Quebec Legislature confined as already mentioned within the limits assigned by the "British North America Act" regarding direct tax and its imposition within the province.

Great stress is laid upon a passage in the judgment in the Woodruff case apparently denying the power of taxation of property beyond the province.

If I am right in pointing out as above that the court was proceeding upon the statement of facts quoted above, and the peculiarity of these facts, then the expression can only fairly be held to relate to the position of affairs at the death of the testator in that case.

The property had been passed in a foreign state to others and the maxim *mobilia sequuntur personam* could not on such a state of facts be applied in any of the various ways it has been made applicable in law.

The language of the Ontario Act did not permit of that being done on the facts dealt with in that case.

And as already suggested the expression relied upon might have a relevancy thereto, but cannot be fairly extended to something else not needed for the disposal of that case.

I cannot think the expression was intended to mean more, but if so it was *obiter dicta*.

Everything else aside from that partakes of *obiter*

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dicta, which, of course, must be given that respectful consideration due at all times to eminent authority. And giving that it is our duty, if an examination of the principles of law to be applied do not seem to us to permit of the application of what is expressed in *obiter dicta,* to say so, or at all events not feel bound thereby.

With great respect, I cannot assent to the said *obiter dicta* or its apparent assumption that "direct taxation within the province" necessarily means only taxation in respect of property physically within the province.

Counsel for respondents in his argument relied so much upon these observations it seemed as if his whole hope rested therein and the courts below have gone thereon entirely.

A man may be domiciled within a province and be made answerable for taxes imposed upon him in respect of property outside the province, but over which the laws of the province may have given him the only foundation he can have for dominion or legal possession.

For example, a man domiciled within a province may build railway cars and lease them to one of the railway companies running into the United States, and sometimes have them at home and sometimes abroad. Can he not be taxable in respect of such property ?

The Canadian farmer may use land on each side of the line between this country and the United States and his flocks or herds may be driven from his house and farm steading in any one province to the end of his farm and pasture in the foreign state. Can he not be taxed for or in respect of such personal property ?

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Is the right of taxation to be determined by the mere accident of where these cars, flocks or herds may be at a given time? Is the income derivable therefrom to depend also on such accident? Reason seems to say no. It is his domicile in the province that gives the power of taxation in his case validity.

Yet in taxing such property or the man in respect of such property, there is in a sense taxation of property which may be outside the province. The man is taxed and may be made to pay in respect of property abroad.

Is it conceivable that the right of taxation of a multitude of other and especially commercial properties can depend on anything else than the domicile of the man answerable for the tax and who is enjoying all his rights or property therein by virtue of the legislation of his province and the contracts he has formed therein? And for the protection of such rights should he not share part of the common expenses of such protection?

There are no doubt cases of personal property within a province owned by some one outside the province which can be taxed also.

Then we have the income tax which forms no mean part of the aggregate municipal taxation. Yet it often rests upon no other foundation in law than the domicile of the man taxed.

The income tax has never been questioned. Yet the sources from which the income flows may be in every quarter of the globe.

The legislature of the province, where he thus earning it is domiciled, having had committed to it the exclusive power over property and civil rights and imposed upon it the duty of protecting him there-

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in, has also the power of direct taxation to meet the expenses of discharging such duty. Surely the fact that the income may never have reached home and may be left abroad to earn more, is not to determine the power of imposing such a tax.

Lest it may be said taxation of income is indirect, I submit what was said in *Bank of Toronto* v. *Lambe* (1), at page 582, in the course of the judgment dealing with the power of direct taxation given the provinces. It is as follows:—

> It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

If, therefore, we may safely assume an income tax derivable from foreign ventures and not necessarily reaped and brought into the home custody of him liable to such tax, why should we in this case be confined to the test of the particular thing being physically within the province as the true limit of the power of taxation within a province?

It is to be observed also that the same court, in *Blackwood* v. *The Queen* (2), thus expressed its views in reference to the power of taxation. It said at page 96:—

> There is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each state levies its taxes, and not by mere reference to the laws which regulate successions to real and personal property.

This power, I submit, is that of direct taxation. It is not said that the extreme exercise suggested as

(1) 12 App. Cas. 575. (2) 8 App. Cas. 82.

possible would be a proper exercise of such power. It could not be exercised over any one domiciled in another country or province. But by every principle of convenience and reason relative to the partition of the powers thus existing and being apportioned between the respective jurisdictions of dominion and provinces, there is nothing that forbids and much that leads to the conclusion that it was intended to assign to the provinces whatever powers of direct taxation a province or state could properly exercise and usually exercised or had the power to exercise.

Direct taxation, except for local purposes, had never been resorted to by the old Province of Canada, and, so far as I am aware and as it is generally understood by the term, has not yet been resorted to by the Dominion, save possibly by the excise duties.

The Dominion quite consistently therewith might also by virtue of the power assigned it possibly resort thereto. But when the conditions existent relative to direct taxation were such as to induce the belief that its resort thereto by the Dominion might only be in a very remote contingency, why should we assume that the usual and general power was not that assigned to the provinces which alone were likely to exercise it; and that it was not intended to enable them to exercise it in their respective dealings with their own citizens ?

There is nothing to indicate that the general power declared as above to be possible, was reserved for the Dominion only, or that some implied limitation was intended, reserving and preserving part of it in a dormant condition, only to be exercised on extreme occasions, or for special purposes. In contradistinction to the power extending over all persons and given

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the dominion to resort to any mode of taxation, it was quite natural in assigning direct taxation to express it as appears.

I submit, what was intended was that which the language indicates, when we have regard to the nature of the Act which consists of a concise description of a number of enumerated powers.

It is an extremely improbable thing that for the mere purposes of raising a revenue for provincial purposes by direct taxation, any abuse such a power may be in this particular regard susceptible of, was dreamed of as a thing to be guarded against, by any one. If it had, we would likely have found other expression given thereto.

Moreover, we must bear in mind that of those federated provinces, Nova Scotia and New Brunswick had long enjoyed just as complete powers in this regard as the colony of Victoria of which the legislation was in question in the judgment I have referred to. It does not seem to have occurred to the court in making the remarks I have quoted, that any distinction then existed between the powers of that colony relative to such taxation and those of any other country.

Are we to assume that these other provinces surrendered in this regard what in theory they had enjoyed up to Confederation ? The same is true of the old Province of Canada; but as it was divided into two provinces, the illustration drawn therefrom is not so direct.

"Direct taxation within a province" and "direct taxation of property within a province" are, I submit, not interchangeable terms. It is the former term that is used, and if the meaning of the latter term

was what it purposed surely it would have been so expressed.

And when we find that the Privy Council has not adhered to the literal expression of the same power by limiting it to the "revenue for provincial purposes," but has heretofore found in that, despite the words used, power to delegate it to corporate municipal and school boards, I do not think we should seek in another spirit of interpretation, relative to words in the same sentence, to restrict the power by something not expressed and to something quite unusual. Parliament was not accurately defining the powers of a petty corporation to be created, but designating in general terms where that line was to be drawn in dividing the legislative powers of a great state. It must be borne in mind that the legacy duty had long been in force in England and that the "Succession Duty Act" had been passed some twelve years before the "British North America Act," and that both, within the memory of those transacting affairs, had been the subject of judicial construction whereby the line was drawn at where the rule *mobilia sequuntur personam* would put it. See *Thomson* v. *The Advocate-General*(1); and *Wallace* v. *Attorney-General* (2); each dealing with the respective Acts referred to. And to this day the rule said maxim implies has been applied in the *Manuel Case*(3) I have referred to, to govern in one way the construction of this very Act now in question before its amendment. The principle being so declared the converse case surely must be held and applied herein.

Or is this interpretation in *Lambe* v. *Manuel*(3)

(1) 12 Cl. & F. 1. (2) 1 Ch. App. 1.
(3) [1903] A.C. 68.

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when restrictive in its operation to be all right, and in the converse case all wrong ?

The view held in *Wallace* v. *Attorney-General*(1) may since have varied by statute but that does not affect the line of argument I suggest.

Again I shall not readily impute to the framers of the "British North America Act" the purpose of so limiting the powers of a province in this regard that the economic results of such limitations inevitably would be, by so limiting its taxing power, to drive a large portion of capital owned by those domiciled in a province to use it in a foreign country.

In conclusion it seems to me the man domiciled in a province is liable to such direct taxation for the specified purposes of provincial revenue as may be usually exercised over him for the like purpose in any other state.

When living he is liable to taxation upon his income derivable from his investments abroad, and if the legislature sees fit all else he has abroad, and when he is dead the transmission of his estate in so far as it requires the protection and support of the law (as in Quebec under the principles of the Civil Law or Code) the sanction or authority of the province exercised by or through the ordinary channels it has created for the purpose can only be obtained upon the terms the province has seen fit to enact as to the condition of giving that legal support or needed sanction or authority.

However much all I have advanced by way of illustration relative to the taxing power may be subject to limitation or reservation, I am unable to see

(1) 1 Ch. App. 1.

how or by what process it is possible to compel a province to give that sanction save on its own terms.

The will of the late Mr. Cotton was made in Quebec, where he undoubtedly was domiciled when it was made and at his death, and his will rested for its validity on the laws of Quebec, and was expressly made subject to the conditions imposed by this statute before it could obtain any force or effect.

The respondents have not shewn that in respect of this estate there was any mistake made in that regard or that the securities in respect of which, or upon the basis of the value of which, they paid this tax did not, or rather respondents in order to acquire title thereto did not, require this sanction.

I can conceive of a case wherein a foreign state or another province may have expressly provided for a statutory or other representative of a deceased person who in life was domiciled elsewhere, getting his personal property situate within its jurisdiction without any evidence of what had taken place in the jurisdiction of his late domicile. This, however, is not in accord with the known international law relative to personal property.

Primâ facie his personal property had according to the legal maxim *mobilia sequuntur personam* its location in the province where he was in life domiciled at the time of his death. And fully agreeing in and duly observing all that has been said in the case of *Blackwood* v. *The Queen* (1), relative to the interpretation of legislation which deals with personal property or estate by an Act of this kind not warranting the application of the said maxim to interpret the statute

(1) 8 App. Cas. 82.

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which does not make clear the purpose of its covering by the application of the said maxim all beyond the state of his domicile I yet think when the legislature has expressed a clear intention to cover all that, then the maxim may well be taken as a starting point of presumption which the plaintiff in a case such as this to recover back must rebut if it can be rebutted.

Whether or not because of another form of law and another mode of thought than ruled the minds of the framers of the Victoria Act dealt with in that case, the word transmission is used and a more direct and comprehensive result is reached.

Those enjoying the benefits of the transmission by virtue of Quebec law and Quebec courts must pay for or upon the transmission.

We had the *Attorney-General for Quebec* v. *Reed* (1), in the first but not on second argument, pressed upon us, but the respondents' factum still presents it as covering the alternative argument that if it was not property that was being taxed, then it was not direct, but indirect taxation.

In a like case I would feel bound to follow this authority, but fortunately the reasoning it proceeded upon and ground given in support thereof, have since been revised in the *Bank of Toronto* v. *Lambe* (2) case, by the same court and relieves from any embarrassment which otherwise might have been felt.

I would add that to my mind if we imposed no taxes but those which would not fall in part at least on someone else than he first paying, we never would be troubled with taxes.

No one possessing clearness of vision can imagine

(1) 10 App. Cas. 141. (2) 12 App. Cas. 575.

that a single tax upon land is not in part borne by others than the land owner who pays it.

Its payment or the burden of its payment has to be reckoned with and met by every member of society. Its simplicity is attractive.

It is admitted the probate of the late Mrs. Cotton's will executed in Boston was first applied for and got in Quebec.

And her husband as the executor of her will obeyed that law, concluded he was, and consequently his wife must be held to have been domiciled in Quebec at the time of her death.

I am unable to see how in face of the proceedings at the time the declarations made then and upon which the Court of Probate, if the will was probated as admitted, can be overturned by such evidence as now adduced. The amending section 1191(*c*) defining the word "property" is not applicable to her case, but as already suggested the statute did not, in my opinion, or my reading of the *Lambe* v. *Manuel*(1) case, need it.

The law of Quebec operated on each estate, was recognized as having so operated and I fail to see how his representatives can now claim to defeat the law in either case.

The appeal should be allowed with costs and doing so seems to render consideration of the cross-appeal needless.

DUFF J.—This appeal raises the question whether an Act of the Legislature of Quebec imposing certain duties described as "succession duties" in respect of

(1) [1903] A.C. 68.

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transmissions of property under the law of that province in consequence of death is within the competence of that legislature in so far as such transmissions affect movable property locally situate outside that province.

The court below held the Act to be in that respect *ultra vires* conceiving itself to be governed in the determination of the point in question by the decision of their Lordships of the Privy Council in *Woodruff* v. *Attorney-General for Ontario* (1).

In that case their Lordships had to pass upon the power of the Legislature of Ontario to impose a tax in respect of particular items of property locally situate outside the province on the occasion of a transfer of that property *inter vivos* effected by delivery of it in the State of New York.

The two cases seem to be clearly distinguishable; and I do not think we are relieved from considering the points raised on this appeal either by the decision itself in *Woodruff* v. *Attorney-General for Ontario* (1) or by any of the observations of the distinguished and lamented judge who delivered their Lordship's judgment. The learned judges in the courts below appear, if I may say so with the greatest respect, to have overlooked (in its bearing on this case) the fundamental difference in point of law between the devolution under the law of a province of a movable succession comprising movables having an extra-provincial *situs* and a transfer *inter vivos* of the title to particular movables (having such a *situs*) effected by delivery of them outside the province; and thus, as I conceive, to have missed the broad distinction between the question presented in this case and that pro-

(1) [1908] A.C. 508.

nounced upon in the decision by which they considered themselves to be governed.

It is a principle now generally recognized in countries where either the common law or the civil law prevails that as regards movables (wherever they may be situated in fact) a testate or intestate succession is for many purposes considered as an integer devolving under and governed by a single law — that namely which was the personal law of the decedent at the time of his death. "The logical consequences of this general principle are kept intact by the application of the fiction *mobilia ossibus inhœrent.*" (Bar, Private International Law, sec. 362.) The principle is recognized by articles 6, 599 and 600 of the Civil Code of Quebec; the latter of which in effect adopts in this connection the rule of English law that the "personal law" is the law of the territory in which the *decujus* had his domicile.

This principle has never, by the law of England at all events, been regarded as excluding the authority of the law of the *situs* in respect of the particular movable items comprised in a succession; but it does involve the regulation by the law of the domicile of the distribution of the beneficial surplus belonging to the succession after the satisfaction of such claims as debts and expenses of administration. By that law then is determined the extent to which the property is subject to testamentary disposition and the conditions upon which the beneficiaries become entitled to accede to a share of the estate through such disposition or by operation of law; and among the generally recognized logical consequences of this principle (preserved as above mentioned by the maxim *mobilia ossibus inhœrent*) is

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that the legislative authority of the domicile is acting within its proper sphere in assuming for public purposes a share of the surplus as a toll exacted from the beneficiaries by way of condition upon or as an incident of the accession to the benefits of the succession. Bar 254, 255; Wharton, 183, 184, 185; Dicey, 751, 752, 753; *Eidman* v. *Martinez*(1), at page 591; *State of Maryland* v. *Dalrymple*(2); West, Inheritance Tax, 180 to 188.

In the fiscal legislation of the United Kingdom these principles have for nearly a century had full play. The enactments of the statute (55 Geo. III. ch. 184) imposing legacy duty were expressed in general terms comprehensive enough in themselves to apply to all persons and to all bequests of or payable out of personal property wherever situate. It was held in a well-known series of cases that the statute must be construed in accordance with the principle expressed in the maxim quoted above. In 1842 in *Thomson* v. *Advocate-General*(3) all the Lords (accepting the unanimous opinion of the judges) affirmed that the legislature must be supposed to have been legislating with reference to the principle *mobilia sequuntur personam.* In 1865 (in *Wallace* v. *Attorney-General*(4)) Lord Cranworth in construing the general words found in the "Succession Duty Act" of 1853, said that the incidence of legacy duties was regulated by the principle that such imposts should be charged upon benefits accruing under "the laws of this country."

Nobody doubts, of course, the competence of the Imperial Parliament to pass legislation obligatory

(1) 184 U.S.R. 578.
(2) 3 L.R.A. 372, at p. 374.
(3) 12 Cl. & F. 1.
(4) 1 Ch. App. 1.

upon the courts of the Empire professing directly to affect property situate in foreign countries whatever the ownership under which it is held. But there are certain recognized principles of international conduct which in the absence of a clear indication to the contrary the courts will assume Parliament has not disregarded. It was in these cases considered to be no infringement of these rules that Parliament should impose legacy duties in respect of a succession composed in part of movables having an actual *situs* in a foreign country, provided the decedent had at the time of his death a domicile within the United Kingdom. This restriction of the duty to the estates of persons so domiciled was sufficient, as Lord Herschell said in *Colquhoun* v. *Brooks*(1), at page 503, to "bring the matter dealt with within our territorial jurisdiction."

I dwell upon this phrase of Lord Herschell's in order to emphasize the fact that this jurisdiction of the law-making authority of the domicile to tax the benefits derived from a movable succession as a whole has not been regarded in the courts of the United Kingdom as in any way resting on the extra-territorial authority which a sovereign power asserts in respect of its own subjects wherever they may be or as having any necessary relation to the nationality of the decedent. It is regarded simply as an exercise of the "territorial jurisdiction." Therefore, no distinction has been drawn in this connection between the legislative authority of a colony invested with powers of self-government or of a state or province which is the member of a federation and that of a Parliament possessing unrestricted sovereign powers.

(1) 14 App. Cas. 493.

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In the numerous cases which have come before the Privy Council from the Australasian colonies touching the scope of enactments imposing death duties the constitutional competence of the legislatures of those colonies to proceed in these matters on the principle *mobilia sequuntur personam* seems never to have been doubted. *Harding* v. *Commissioners of Stamps for Queensland*(1). Indeed, as Mr. Dicey has pointed out, since the Treaty of Independence with the American colonies in 1783, the policy of the Parliament of the United Kingdom has been to treat the colonies as in the matter of such taxation possessing fiscal independence. In the United States, it is perhaps superfluous to observe, in this respect the several States have been regarded as exercising an independent sovereignty.

Is the taxing authority of a province of Canada affected by any restriction which makes such a province incompetent to apply these principles in framing its plan of taxation in respect of successions ? Nobody can doubt that prior to Confederation the Province of Nova Scotia (let us say) possessed such authority. How far then was this authority curtailed by the "British North America Act ?" I make no apology for quoting once again what one may perhaps call the classic passage in Lord Watson's judgment in *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick*(2), at pages 441 and 442, where he explains the constitutional relation in which the provinces stand to the Canadian Union.

> Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to

(1) [1898] A.C. 769.

(2) [1892] A.C. 437.

disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Governments should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial governments. But, in so far as regards those matters which, by section 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.

The subject of taxation was not under the Act exclusively assigned as a domain of legislation to either the Dominion or the provinces. The Dominion in that field is given unrestricted authority; the provinces have a concurrent, but more limited, authority. The scope of this provincial authority is defined by the words

direct taxation within the province for the raising of a revenue for provincial purposes.

In this case we are concerned only with the condition that the taxation shall be "within the province." Some point, it is true, was raised on the words "direct taxation;" but since the decisions of the Privy Council in *Bank of Toronto* v. *Lambe*(1), and *Brewers and Maltsters Association of Ontario* v. *Attorney-General for Ontario*(2), it does not appear to be any longer open to question that duties imposed upon or in respect of benefits acquired under a will or intestacy are direct taxes within the meaning of the provision under discussion.

(1) 12 App. Cas. 575. (2) [1897] A.C. 231.

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The point for consideration then is this: Was the authority (which the provinces unquestionably possessed before Confederation) to impose duties upon or in respect of the benefits acquired under a succession comprising in part extra-territorial movables abrogated by the provision of the "British North America Act" which limits the provincial power of taxation to "taxation within the province."

The question at issue cannot, I think, be fully appreciated without taking into account the authority of the provinces to legislate upon the subject of "Property and Civil Rights in the Province." It is, of course, settled that the Dominion in the exercise of its authority relating to the subjects of legislation mentioned in section 91 may while acting within its own proper sphere legitimately pass laws which in their operation affect property and civil rights within the provinces; but it is equally well settled that over property and civil rights regarded as subjects of legislation in themselves the Dominion (except when acting under the specific provisions of that section) possesses no legislative authority. *Citizens Ins. Co.* v. *Parsons* (1), at pages 110 and 111. The subject of successions, the *decujus* being domiciled in Quebec, is one of those subjects which is within the exclusive authority of the Legislature of Quebec — in respect of which the authority of that legislature is in Lord Watson's phrase "as supreme" as before the passing of the Act. The right of a beneficiary entitled to share under such a succession is regulated by that legislature alone. In the courts of any country, which accepts the law of the domicile as prescribing the rules of succession,

(1) 7 App. Cas. 96.

the right of a person claiming to share in the benefit of such a succession would fall to be determined by the application of such rules as that legislature prescribes as applicable to such a case.

In accordance with the principles already indicated the "logical consequences" of this control of such successions by the Province of Quebec "kept intact" by the application of the fiction *mobilia ossibus inhærent* seem to involve this — every such succession may be deemed for the purpose among others of determining the incidence of duties imposed upon benefits accruing from the devolution of it to have as an entirety its seat in Quebec. On what ground, then, are we so to restrict the words "taxation within the province" as to exclude such successions from the taxing authority of that province? There appears to be no ground for doing so. The possibility of those words being so restricted does not appear to have occurred to the Judicial Committee when considering the case of *Lovitt* v. *The King*(1).

I have not been able to discover anything in *Woodruff* v. *The Attorney-General for Ontario*(2) which affects the force of these considerations. There was in that case no question of a testamentary or intestate succession. The Province of Ontario had attempted to exact duties in respect of transfers made *inter vivos,* though in contemplation of death, of movables having at the time the transfers were made a *situs* in the State of New York according to both the law of Ontario and the law of New York. The transfers were, as their Lordships held, effected by delivery in New York. It is argued, however, that a passage

(1) [1912] A.C. 212. (2) [1908] A.C. 508.

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in the judgment of Lord Collins lays down two propositions, 1st, that taxation, by a province, of property locally situated outside the province is *ultra vires*, and 2ndly, succession duties levied, by a province, upon benefits accruing from a succession devolving under the law of the province and composed in part of movables locally situate outside the province are taxes imposed on extra-provincial property within this rule. It is needless to say that if such were the sense of a passage which forms the ground, or one of the grounds, of the judgment it is not for this court to refuse to follow it or to seek to fritter it away by insubstantial distinctions.

I think this is a misreading of their Lordships' judgment. It is not without some bearing upon the point of the meaning of the judgment that the appeal then before their Lordships did not involve the consideration of the validity of taxes imposed upon a succession such as we have here and that their Lordships' judgment does not in terms mention such a succession.

Indeed, it seems to me that the second of the above mentioned propositions can be deduced from the judgment only through an assumption that it follows as a logical consequence from the first. A moment's consideration will shew that this is not the case. Such benefits are generally recognized as being subject to the taxing power of the province as we have seen upon the principle that the totality of objects constituting a succession is subject to the personal law of the *decujus* and consequently that the rights of persons claiming such benefits are governed by this personal law and are regarded as having their seat in the territory subject to it. There is, however, no prin-

ciple generally recognized under which transactions *inter vivos* respecting particular movables objects are held to be governed by the *lex domicilii*. The more generally accepted view appears to be that according to the principle indicated by the maxim *mobilia sequuntur personam* the *lex domicilii* does not become applicable to such transactions as those which were in question in *Woodruff* v. *Attorney-General for Ontario* (1), but that, broadly speaking, it is only in respect of those transactions which, (to use Mr. Westlake's phrase,) a person's property is conceived and dealt with, (e.*g.*, marriage contract,) "as an entirety grouped round the owner's person as a centre" that the *lex sitûs* has resort to the law of the domicile for its legal rules; and this on the ground that in such cases, as in the case of movable successions, convenience imperatively requires that they be governed by a single law. Westlake, p. 181-186, 191-195; Savigny (Guthrie's translation) 176, note (2); Wharton, vol. II., 680-684; Bar, 488-491; Fœlix, paragraph 62; 1 Aubry et Rau, p. 103; 1 Demolombe, pp. 110 and 111. According to the law of Ontario (which follows the law of England) there seems to be no room for controversy that the transactions in question in that case were governed by the law of New York. The authorities are fully reviewed by Mr. Westlake (pp. 191-195), and his argument appears to leave no doubt upon the point. The donees consequently derived nothing through the law of Ontario. That was the view presented by Mr. Danckwertz in his argument before the Privy Council on behalf of the appellants and that was evidently the view upon which their Lordships acted.

(1) [1908] A.C. 508.

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It is perhaps not to be expected that statutes such as that before us — which impose duties in respect of transmissions of the estates of domiciled residents including property situate abroad, and at the same time upon all property within the jurisdiction transmitted by death, wherever the domicile of the decedent may be — could escape criticism as putting into operation two seemingly incompatible principles. Strictly we are concerned in this case only with the question of the power of the legislature in respect of the first mentioned class of duties; and constitutionally the legislature's action in imposing such duties so far as it is constitutional, cannot be affected by the circumstance that it has also professed to exact them (if it have done so) in circumstances to which its authority does not apply. The truth is, however, that the practice very widely prevails of taxing all personal property having a *situs* within the territorial jurisdiction of the taxing power on the occasion of a transmission of title by or in consequence of death. The law of England, for example, maintains "the paramount authority of the *situs* over the assets themselves as distinguished from the beneficial in the clear surplus." Westlake, p. 125; and the estate duty applies to all such items having an actual local *situs* in the United Kingdom.

"No one doubts," says Mr. Justice Holmes, delivering the judgment of the Supreme Court of the United States, in *Blackstone* v. *Miller*(1), at page 204,

that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the *situs* accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a *universitas* and is taken into account again in the succession tax there. *Eidman* v. *Martinez*

(1) 188 U.S.R. 189.

(1). See *Mager* v. *Grima*(2); *Coe* v. *Errol*(3); *Pullman's Palace Car Co.* v. *Pennsylvania*(4); *Magoun* v. *Illinois Trust and Savings Bank*(5); *New Orleans* v. *Stemple*(6); *Bristol* v. *Washington County*(7); and for state decisions *Matter of Estate of Romaine* (8); *Callahan* v. *Woodbridge*(9); *Greves* v. *Shaw*(10); *Allen* v. *National State Bank of Camden*(11).

No doubt this power on the part of two States to tax on different and more or less inconsistent principles, leads to some hardship. It may be regretted, also, that one and the same State should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *mobilia sequuntur personam* and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe* v. *Errol*(3); *Knowlton* v. *Moore*(13).

There is certainly nothing in the "British North America Act" pointing to the conclusion that a Canadian province is confined to either one or the other of these principles of taxation. One province may adopt that which gives special prominence to the circumstance that the succession is regulated by the law of the domicile, another to the fact that the title to particular items of movable property is controlled by the law of the *situs*. Toll may be exacted as an incident of the accrual of the benefit or as a condition of the passing of the title. And since either may be validly acted upon to the exclusion of the other, I do not see upon what ground it can be said that both principles may not be brought, so to speak, under the same roof and combined in a single system. The decision of the Judicial Committee in *Lovitt* v. *The King*(14) appears to support this view.

(1) 184 U.S.R. 578, at pp. 586, 587, 592.
(2) 8 How. 490, at p. 493.
(3) 116 U.S.R. 517, at p. 524.
(4) 141 U.S.R. 18, at p. 22.
(5) 170 U.S.R. 283.
(6) 175 U.S.R. 309.
(7) 177 U.S.R. 133.
(8) 127 N.Y. 80.
(9) 171 Mass. 595.
(10) 173 Mass. 205.
(11) 92 Md. 509.
(12) 178 U.S.R. 41.
(13) [1912] A.C. 212; 43 Can. S.C.R. 106.

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This disposes of the question touching the duties charged against the benefits under the will of Henry Cotton.

It is not without some hesitation that I have concluded that the duties imposed by the earlier statute must be held to be leviable in the respect of Mrs. Cotton's estate as a whole. As to the question of domicile, Henry Cotton's admission creates a presumption which has not been displaced and the point now relied upon appears to have been taken for the first time in this court. The question upon which I have had some doubt relates to the construction of the statute itself. The provision to be considered is:—

> 1191(*b*). All transmissions, owing to death, of the property in, usufruct or enjoyment of, movable and immovable property in the province shall be liable to the following taxes.

That is the English version. In the French version, however, instead of the words "property in the province," we have "propriété située dans la province;" and the contention is that these words shew the legislature to have been aiming at transmissions only of property having an actual physical *situs* within the province or property which considered apart altogether from the fact of its constituting part of a succession devolving under the law of the province has a *situs* within the province by construction of law. After a most careful examination of the judgments in the case of *Lambe* v. *Manuel*(1) I think the decision in that case relieves us from considering the construction of the statute in this aspect. I think the effect of that decision is that the *situs* indicated by the phrase above quoted from the French version is the *situs* as determined in the case of movables by the application

(1) [1903] A.C. 68.

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of the maxim *mobilia sequuntur personam.* The question which arose in *Lambe* v. *Manuel*(1) was whether certain movables which formed part of the patrimony of a person who had died domiciled in the Province of Ontario, (but which admittedly, if that circumstance were to be left out of consideration, has a *situs* within the Province of Quebec) were dutiable under the enactment referred to. It was held they were not dutiable and on the ground as it appears to me that in the application of the phrase above quoted "située dans la province" the principle *mobilia sequuntur personam* must govern. In that case the contention on behalf of the Attorney-General was the contention which is now made on behalf of the respondents, viz., that the principle upon which the legislature had proceeded was that all property having (irrespectively of the operation of the maxim *mobilia sequuntur personam*) a local situation in the province should be subject to the duties imposed by the Act. That construction was rejected by the Superior Court, by the court of appeal and by the Judicial Committee successively. The ground upon which the Superior Court proceeded as appears by the judgment of Sir Melbourne Tait, was that the legislature had acted upon the principle consistently adopted by the English courts in construing the Legacy Duty Acts, viz., that for the purpose of determining the incidence of duties imposed upon transmissions of benefits in consequence of death the situation of the property is to be determined by the maxim referred to. His views are summed up in the last paragraph of his judgment, which is in the following words:—

(1) [1903] A.C. 68.

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I have come to the conclusion that I should interpret article 1191(*b*) in accordance with the rule of our law and of the English law regarding movable property above stated and hold that it means all transmissions of such property in the province, belonging to persons domiciled therein at the time of their death, in other words, transmissions resulting from a succession devolving here and that in the eye of the law *the movable property in question is not situated in this province* and is not subject to the tax sought to be imposed. This construction will not only be consistent with such rule, but also with the other provisions of the Act.

In the court of appeal the judgment of Mr. Justice Bossé is to the same effect as appears by the following passage:—

Il nous faut donc déclarer que, lors du décès, les biens dont il s'agit avaient leur assiette dans la province d'Ontario et qu'ils doivent être considérés comme situés dans Ontario, lieu du domicile due *de cujus*. Ils échappent partant, au droit de fisc de la province de Québec.

Notre statut rend la chose encore plus claire en imposant un droit sur les seuls biens situés dans la province de Québec.

Il n'était pas, d'ailleurs, nécessaire de faire cette restriction: nous ne pouvons pas taxer les biens situés à l'étranger.

The view indicated by this passage is emphasized by the citations made by Bossé J., from the judgment of Lord Hobhouse in *Harding* v. *Commissioners of Stamps for Queensland*(1), at page 773.

The judgment of the Judicial Committee was delivered by Lord Macnaghten and in the course of that judgment His Lordship says, referring to the reasons given by Sir Melbourne Tait and Mr. Justice Bossé:—

The decisions of the Quebec courts are, in their Lordships' opinion, entirely in consonance with well-established principles, which have been recognized in England in the well-known cases of *Thomson* v. *Advocate-General*(2), and *Wallace* v. *Attorney-General*(3), and by this board in the case of *Harding* v. *Commissioners of Stamps for Queensland*(1).

(1) [1898] A.C. 769. (2) 12 Cl. & F. 1.
(3) 1 Ch. App. 1.

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Now, what are the principles established in the cases to which His Lordship refers? These principles can best be stated in the *ipsissima verba* of the learned judges by whom those cases were decided. In *Thomson* v. *Advocate-General*(1), the Lord Chancellor, Lord Lyndhurst, said, at page 21:—

An Englishman made his will in England: he had foreign stock in Russia, in America, in France, and in Austria. The question was whether the legacy duty attached to that foreign stock, which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument by my noble and learned friend who argued the case, in the first place, that it was real property, but, finding that that distinction could not be maintained, the next question was whether it came within the operation of the Act, and although the property was all abroad, it was decided to be within the operation of the Act as personal property, on this ground, and this ground only, that as it was personal property, it must in point of law, be considered as following the domicile of the testator, which domicile was England.

Now, my Lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy. The property, personal property, being in this country at the time of the death, you must take the principle laid down in the case of *In re Ewin*(2), and it must be considered as property within the domicile of the testator, which domicile was Demerara. It is admitted that if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty. Now, my Lords, that is the principle upon which this case is to be decided. The only distinction is that to which I have referred, and which distinction is decided by the case *In re Ewin*(1) to be immaterial.

At page 26, Lord Brougham observed: —

The rule of law, indeed, is quite general that in such cases the domicile governs the personal property, not the real; but the personal property is in contemplation of the law, whatever may be the fact, supposed to be within the domicile of the testator or intestate.

And finally at page 29 these words are attributed by the Report to Lord Campbell:—

(1) 12 Cl. & F. 1. (2) 1 Cr. & J. 151.

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If a testator has died out of Great Britain with a domicile abroad, although he may have personal property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situate where he was domiciled, and therefore does not come within the Act; this seems to be the most reasonable construction to be put upon the Act of Parliament.

In *Attorney-General* v. *Napier*(1), — it may be added — Parke B. thus refers to the decision in *Thomson v. The Advocate-General*(2) :—

In the case of *In re Ewin*(3) the doctrine was first broached that the true criterion whether the parties were liable to legacy duty depended upon the fact whether the testator at his death was domiciled in England; and that is the rule adopted by the learned judges in their decision in the case of *Thomson* v. *The Advocate-General*(2); and Lords Lyndhurst, Brougham and Campbell put it upon the great principle that personal property is to be considered as situate in the place where the owner of it is domiciled at the time of his death.

The effect of the other two cases mentioned by His Lordship may be stated in the language of Lord Hobhouse in *Harding* v. *Commissioners of Stamps for Queensland*(4), at page 774:—

The matter appears to be well summed up in Mr. Dicey's work on the Conflict of Laws at page 785, in which he paraphrases Lord Cranworth's application of the principle *mobilia sequuntur personam* by saying that the law of domicile prevails over that of situation.

These then are the principles we are to apply; and, applying these principles, it seems impossible to escape the conclusion that for the purposes of this enactment the *situs* of movables forming part of a succession devolving under the law of Quebec must be taken to follow the domicile of the decedent.

ANGLIN J. (dissenting). — The Crown appeals against the judgment of the Court of King's Bench of the Province of Quebec disaffirming its right to re-

(1) 6 Ex. 217.
(2) 12 Cl. & F. 1.
(3) 1 Cr. & J. 151.
(4) [1898] A.C. 769.

tain succession duties levied against the estates of the late Charlotte Cotton and her husband, Henry H. Cotton, in respect of movable property consisting of bonds, stocks, promissory notes, jewellery and pictures actually situate in the United States of America at the date of the demise of each decedent.

That the actual *situs* of the tangible portion of this property was foreign is, of course, unquestionable. According to the rules stated in *Commissioner of Stamps* v. *Hope*(1), at pages 481-2, and accepted in *Payne* v. *The King*(2), at pages 559-60, the intangible portion also had a "local existence" — was "actually situate," or, as put in the cases (*Thomson* v. *Advocate-General*(3); *Winans* v. *Attorney-General*(4); *Woodruff* v. *Attorney-General for Ontario*(5), "locally situate" and, as far as property of that class can be, was "physically situated" (*Winans* v. *Attorney-General* (6)) either at Boston or elsewhere in the United States — certainly not in the Province of Quebec. No reason was advanced in argument, and I know of none, why those rules should not obtain in that province.

Although in many of the cases property so situate is described as "locally situate" I am unable to appreciate the force of the word "locally" in this phrase (*Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine*(7), *per* Lord James of Hereford at page 228; *Treasurer of the Province of Ontario* v. *Pattin* (8), unless, indeed, it is used in a sense which makes it interchangeable with the word "actually" — in the

(1) [1891] A.C. 476.
(2) [1902] A.C. 552.
(3) 12 Cl. & F. 1, 17.
(4) [1910] A.C. 27, at p. 29.
(5) [1908] A.C. 508, at p. 573.
(6) [1910] A.C. 27, at p. 31.
(7) [1901] A.C. 217.
(8) 22 Ont. L.R. 184, at p. 191.

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case of tangible property as the equivalent of "physically" and in the case of intangible property to denote that attribute of locality which it possesses according to such rules as those laid down in *Commissioner of Stamps* v. *Hope*(1); in *Commissioner of Stamps* v. *Salting*(2), and in *Re Hoyles*(3). To signify property thus situate, as well as property having a physical *situs*, within or without the territorial limits of the taxing province or state I shall in this opinion employ the phrase "actually situate."

Charlotte Cotton died on the 11th of April, 1902; Henry H. Cotton on the 28th of December, 1906. Both dates are important because the Quebec succession duties law was materially amended and was consolidated in the interval.

It is admitted that Henry H. Cotton was domiciled in the Province of Quebec when he died. The respondents allege that his domicile, which, of course, was also that of Mrs. Cotton, was at the time of her death in the State of Massachusetts. In the view of the case taken by the provincial courts it was unnecessary to pass upon the question of Mrs. Cotton's domicile, and it was left undetermined.

Henry Cotton made two solemn declarations respecting his wife's domicile which were filed with the provincial revenue officers. In the first, made in 1902, he stated that Mrs. Cotton's domicile at the time of her death was in the State of Massachusetts: in the second, made in 1904, that it was in the Province of Quebec. The decision of the Privy Council in *Lambe* v. *Manuel*(4), is put forward as the reason for his change of view. But the bearing of that decision on

(1) [1891] A.C. 476.
(2) [1907] A.C. 449.
(3) 27 Times L.R. 131.
(4) [1903] A.C. 68.

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the question as to the domicile of Mrs. Cotton is scarcely apparent.

When sixteen years of age Henry Cotton left the Province of Quebec and went to reside in Boston. He lived and carried on business there for thirty-six years. He became a naturalized American citizen. He married a lady born and brought up in the State of Massachusetts. During the summer he often paid visits with his wife to Cowansville, Quebec, where his mother resided. In 1901 he appears to have decided to retire from business. He came as usual to Cowansville that summer. During this visit he and his wife resided, as had been customary, with his mother. He, however, then bought a property in Cowansville and proceded to improve it with a view to making it his future permanent residence. In the autumn he returned as usual with his wife to Boston. They both appear to have remained there until Mrs. Cotton died in April, 1902. In his second declaration filed with the revenue officers he swore that he believed his domicile was at Boston when he married.

Notwithstanding the difficulty of establishing that a domicile of origin has been changed (*Winans* v. *Attorney-General*(1)), I have no doubt upon these facts that Henry Cotton had acquired a domicile in the Commonwealth of Massachusetts. It may require less cogent evidence to make out a case of change or loss of an acquired domicile, or domicile of choice, but upon the facts in evidence, notwithstanding the second declaration of Henry Cotton, my conclusion would be that, although he had, sometime before his wife died, formed an intention of abandoning his

(1) [1904] A.C. 287.

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Massachusetts domicile and of again acquiring a domicile in the Province of Quebec, he had not up to the time of her death actually carried out that intention; that, although he had taken some preliminary steps with that end in view, the actual change of domicile had not been made and he still retained his domicile in the State of Massachusetts, as well as his American citizenship.

The respondents, however, did not allege in their pleadings that Mrs. Cotton died domiciled in Boston. On the contrary, by claiming the return only of duties paid on her foreign assets they appear to admit and to base their action on her domicile being in Quebec. Moreover, in their factum in the Court of King's Bench, and again in their factum in this court, they state that Henry Cotton's "wife died in Boston, where he had returned to live *temporarily*." It would be regrettable if a misapprehension of counsel as to the proper inference to be drawn from, or as to the legal effect of the facts established, should prevent the appellants asserting their legal rights. Fortunately, so far as it affects Mrs. Cotton's estate, this case may be disposed of on another ground which leads to the same result as if she were held to have been domiciled at Boston when she died.

The provincial courts have held that, although the Quebec "Succession Duties Act" in terms imposes a tax on the transmission of the inheritance, the legislature intended that that tax should in fact be fastened on the property itself which passes from the decedent to his heirs or legatees; and that, in so far as it imposes this tax on movable property actually situate outside the province, the Act is *ultra vires* and unconstitional, this case being in their opinion ruled by the

decision of the Judicial Committee in *Woodruff* v. *Attorney-General for Ontario* (1). Upon this ground the plaintiffs have been awarded judgment for the repayment by the Crown of the succession duties which it received from both estates in respect of the property in question.

The respondents, in support of the judgment in their favour, also assert that, upon its proper construction, the Quebec "Succession Duties Act" applicable to the estate of Mrs. Cotton did not purport to impose a tax in respect of movable property of domiciled decedents, which was actually situate outside the province. Because before considering the constitutionality of any statute it is desirable, if possible, to appreciate its precise scope and purview and also because it seems fitting that a court should not determine an issue as to the constitutionality of a statute unless the cause before it cannot otherwise be satisfactorily disposed of, it will be proper first to deal with the contention of the respondents that the Quebec statutes in force in 1902 did not purport to impose succession duties on movable property actually situate abroad. It will be convenient at the same time to consider whether the intention of the legislature was to impose a tax upon the transmission of the property or upon the property itself. Counsel for both parties rejected a suggestion that the tax might be regarded as imposed on the beneficiaries, that upon a proper construction of the Act only beneficiaries within the province would be subject to it and that it should on that ground be held *intra vires*.

When Mrs. Cotton died the Act in force was the statute 55 & 56 Vict. ch. 17, amended by 57 Vict. ch. 16;

(1) [1908] A.C. 508.

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58 Vict. ch. 16, and 59 Vict. ch. 17; section 1191(*b*) (57 Vict. ch. 16, sec. 2), so far as material reads as follows:—

> 1191(*b*) All transmissions, owing to death, of the property in, usufruct or enjoyment of, movable and immovable property in the province, shall be liable to the following taxes, calculated upon the value of the property transmitted, after deducting debts and charges existing at the time of the death.

There followed a table of rates varying according to the value of the estate and the degree of relationship borne by the several beneficiaries to the decedent. The statute then contained no definition of the word "property."

In the form in which it stood at the time of Mrs. Cotton's death — except for an immaterial amendment (59 Vict. ch. 17) — the Quebec succession duties law was considered by the Privy Council in *Lambe* v. *Manuel*(1). In that case the question presented was whether certain bank stocks, registered and transferable at Montreal, Que., and a mortgage debt secured by hypothec on land in Montreal, which formed part of the estate of a decedent domiciled in the Province of Ontario, were liable to succession duties in Quebec. All this property was held not to be taxable because

> according to their true construction the Quebec "Succession Duties Acts" only apply in the case of movable property to transmissions of property resulting from the devolution of a succession in the Province of Quebec.

That the transmission of the property took place outside Quebec and not under Quebec law was the ground on which it was held that the Quebec statutes did not purport to authorize the imposition of the succession duties claimed. This judgment proceeds upon the

(1) [1903] A.C. 68.

view that by section 1191(*b*) the legislature intended to impose a tax on the transmission of the property passing and not on the property itself. The statute in express terms declares that "all transmissions owing to death * * * shall be liable" — "toute transmission par décès * * * est frappé." Notwithstanding that the value of the property determines the rate of taxation and that in several sub-sections the duty appears to be treated as charged upon and as payable out of the estate, it must, I think, be assumed that the legislature intended what it said when it expressly imposed the tax on the transmission. The decision in *Lambe* v. *Manuel*(1) appears to me to be conclusive upon that point, although it does not determine what is the real incidence or subject of the tax imposed. That question was not before the board. I am, therefore, with respect, of the opinion that, whatever may be in fact their ultimate incidence, the Quebec succession duties were intended to be imposed directly and primarily not upon the property of the succession, but upon its transmission.

In *Lambe* v. *Manuel*(1) the Judicial Committee proceeds upon a well-known principle of construction in determining that the word "transmissions," though not expressly qualified or restricted, should be held to include only transmissions taking place under the law of the province. Lord Macnaghten makes this abundantly clear, when he says that the decision is

> entirely in consonance with well-established principles which have been recognized in England in the well-known cases of *Thomson* v. *Advocate-General*(2), and *Wallace* v. *Attorney-General*(3), and by this board in the case of *Harding* v. *Commissioners of Stamps for Queensland*(4).

(1) [1903] A.C. 68.
(2) 12 Cl. & F. 1.
(3) 1 Ch. App. 1.
(4) [1898] A.C. 769.

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Their Lordships did not, as was contended at bar by counsel for the present appellants upon the first argument of this appeal, treat the words "in the province" found in section 1191(*b*) as qualifying or restrictive of the word "transmissions." The phrase "in the province" is referred to only in the statement of the object of the action in the earlier part of the judgment, where it is applied to the subject "movable or immovable property." If there could be any doubt upon the point — I have none — a glance at the French version of section 1191(*b*) makes it certain that this is its proper application:—

1191(*b*) Toute transmission, par décès, de propriété, d'usufruit ou de jouissance de biens mobiliers ou immobiliers, *situés dans la province*, est frappée des droits suivants, sur la valeur du bien transmis, déduction faite des dettes et charges existant au moment du décès

But for the appellants it is urged that by the words "in the province" — "situés dans la province" — the legislature meant to include not only property actually situate in Quebec, but also movable property which, though actually situate elsewhere, is for purposes of succession and enjoyment, according to the maxim *mobilia sequuntur personam* (*Blackwood* v. *The Queen*(1)), governed by the law of the testator's domicile, which has been assumed to be in the Province of Quebec. I am unable to accede to that view. *Primâ facie* the expressions "in the province" — "situés dans la province" — refer to property actually situate in Quebec. They are applied in the statute to immovable as well as movable property. To immovables the maxim invoked has, of course, no application. The force of the expressions is restrictive,

(1) 8 App. Cas. 82, at p. 93.

not expansive. Had the legislature meant to include all movable property passing under the law of Quebec — all property of which the transmission occurs in Quebec or is governed by Quebec law — wherever actually situate, I cannot conceive that it would have employed the terms "situés dans la province." In another section of the same Act (55 & 56 Vict. ch. 17), 1191(*a*), we find the expression "situés dans la province" — "within the province." There it clearly means physically or actually situated in Quebec. This affords "one of the safest guides to the construction" of the same words in section 1191(*b*), which immediately follows; *Blackwood* v. *The Queen*(1). If we may consider the subsequent action of the legislature in defining the word "property" as including all property, whether movable or immovable, actually situate within the province (3 Edw. VII. ch. 20), in afterwards extending this definition so that by express terms "property" was made to include all the movable property wherever situate of a domiciled decedent (6 Edw. VII. ch. 11, sec. 1191(*c*)) and in finally removing entirely the words "in the province" — "situés dans la province" — from section 1191(*b*) (7 Edw. VII. ch. 14, sec. 2), the view which I have taken of the proper construction of that section as it stood in 1902 would appear to be fortified. If by an application of the maxim *mobilia sequuntur personam* the words "situés dans la province" should be construed as including the movables actually situated abroad of a domiciled decedent, the concluding clause of the definition of the word "property" introduced in 1906 was quite unnecessary. *Winans* v. *Attorney-General* (2).

(1) 8 App. Cas. 82, at p. 94. (2) [1910] A.C. 27, at p. 34.

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Comparing the Quebec "Succession Duty Acts" and their development with the corresponding Acts of the Province of Ontario (55 Vict. ch. 6, sec. 4; R.S.O. 1897, ch. 24, sec. 4(*a*)) and their development (1 Edw. VII. ch. 8, sec. 6; 7 Edw. VII. ch. 10, sec. 6), it appears to me that, probably actuated by fears that a tax imposed upon or in respect of property not actually situate within the province would not be "taxation within the province" ("British North America Act," sec. 92(2)) the authorities of both provinces, in order to ensure the constitutionality of their legislation, at first advisedly confined themselves to the imposition of succession duties in respect of property actually situate within the province. Perhaps grown bolder as the needs of revenue became more pressing, or it may be more grasping and prepared to risk a contest upon the constitutionality of a mere severable amendment, or, possibly, having had their fears and doubts as to their jurisdiction allayed, both provinces later on sought to extend the scope of this taxation so that they might obtain succession duty revenue in respect of movable property of domiciled decedents actually situate abroad.

I am convinced that as the law stood in the Province of Quebec at the time of Mrs. Cotton's death only so much of her estate as was actually situate in that province was liable to the succession duties imposed by section 1191(*b*) above quoted. In respect of her foreign bonds, etc., her estate was not liable to Quebec succession duties, because, whatever may have been the power of the legislature in that respect, the statute as it then stood did not purport to impose a tax upon the transmission of property actually situate outside the province.

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But when Henry Cotton died the consolidated succession duties provisions of the Act, 6 Edw. VII. ch. 11, were in force. By that statute the portion of section 1191(*b*) above quoted was re-enacted in the same terms, except that the words, "or the," were inserted before the word "usufruct." There was added, however, section 1191(*c*) :—

1191(*c*). The word "property" within the meaning of this section shall include all property, whether movable or immovable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the debt is payable within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile, or residing, in the Province of Quebec at the time of their death.

The words "in the province" — "situés dans la province" — still remained in section 1191(*b*), being stricken out after Mr. Cotton's death by the Act, 7 Edw. VII. ch. 14.

There is a manifest repugnancy arising from the presence in the same Act (6 Edw. VII. ch. 11) of the words "in the province" found in section 1191(*b*) and the definition of the word "property" in section 1191(*c*). By the former the tax is confined to transmissions of property which is within the province; by the latter it is extended to property without the province. The two provisions are irreconcilable.

Having regard, however, to the history of this legislation and to the manifest intention of the legislature to extend the application of succession duties, first, in 1903, to all property of non-domiciled decedents actually situate within the province — obviously in order to meet the decision in *Lambe* v. *Manuel* (1) — and again, in 1906, to movable property of

(1) [1903] A.C. 68.

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domiciled decedents actually situate outside the province, I am of the opinion that in the consolidation of 1906 the words "in the province" — "situés dans la province" — should be deemed to have been allowed to remain in section 1191(*b*) *per incuriam*. Their deletion in the following year tends to confirm this view. Moreover, a construction which rejects them accords with the rule that if two sections of the same Act are repugnant the latter must prevail. *Wood* v. *Riley*(1), *per* Keating J.; *The King* v. *Justices of Middlesex*(2). The principles of statutory construction are, I think, the same in the Province of Quebec as in the other provinces of Canada where the English common law prevails.

It follows that at the time of the death of Henry Cotton, who was then admittedly domiciled in Quebec, his movable property actually situate abroad was subject to succession duties under the statutes of that province, if its legislature had the power to impose such taxation.

In determining this question of provincial legislative jurisdiction in Canada, decisions upon the proper construction, the scope, purview and effect of statutes enacted by Parliaments or legislatures whose powers of taxation are unrestricted are of little, if any, practical value. A consideration of them rather tends to confuse the issue.

In the matter of taxation, as in other matters, our provincial legislatures possess only such powers as the "British North America Act" confers upon them. By section 92 they are empowered

(1) L.R. 3 C.P. 26, at p. 27. (2) 2 B. & Ad. 818, at p. 821.

To make laws in relation to

(2) Direct taxation within the province in order to the raising of a revenue for provincial purposes.

These words clearly confer not a general power of taxation, but a power subject to a triple limitation. The taxation must be direct; it must be within the province; it must be imposed in order to the raising of a revenue for provincial purposes. The taxation in question is admittedly imposed "in order to the raising of a revenue for provincial purposes." But the respondents contend that it is neither "direct" nor "within the province." Of these two restrictions the first is obviously concerned with the delimitation of the line between provincial and Dominion powers, saving to the Dominion the field of indirect taxation; whereas the second appears to be designed to prevent encroachment by one province upon the domain of another, or of a foreign state. The latter limitation seems to me to present the more formidable objection to the constitutionality of the taxation here in question. The conclusion which I have reached upon it renders it unnecessary for me to consider the question whether a tax in terms imposed upon the transmission of property, but in its ultimate incidence falling upon the property transmitted, is direct or indirect taxation.

That the words "within the province" were introduced either as declaratory of a restriction on the provincial power of taxation which would have been implied, or in order to impose such a restriction, admits of no question. But the precise nature and extent of the limitation which is thus expressed as it affects the right to pass death duty legislation has been a subject of much debate. If these duties could

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be regarded as imposed upon the transmission only and not at all upon the property transmitted, in the case of the domiciled decedent the taxation in respect of his movable property abroad as well as at home might be "within the province:" if they should be regarded as imposed on the property transmitted, the taxation in respect of movable property of a non-domiciled decedent situate in the province, although the transmission of it takes place, usually, but not always (Dicey on Conflict of Laws (2 ed.), p. 753), under foreign law, would be "within the province."

Can it be that a provincial legislature empowered to levy taxation only within the province may validly impose death duties in respect of movable property actually situate abroad under the guise of a tax upon transmission, invoking the maxim *mobilia sequuntur personam* to bring such property constructively within the province, and at the same time, repudiating that maxim, may legitimately exercise the same taxing power in respect of movables which under it would be constructively situate aboard though actually situate within the borders of the province ? That it has the latter power is definitely established by the recent decision of the Privy Council in the *The King* v. *Lovitt*(1.) Has it also the former ? I cannot believe that it has under the restrictive words of the "British North America Act" with which we are now dealing. I adhere to the view which I expressed in *Lovitt* v. *The King*(2), at page 161, which is not affected by the disposition of that case by the Judicial Committee, that if the legislature of a Canadian province can

(1) [1912] A.C. 212.

(2) 43 Can. S.C.R. 106.

by legislative declaration make anything property "within the province" which would not be such according to the recognized principles of English law * * * this constitutional limitation upon its power (of taxation) would be a mere dead letter."

Could such a legislature validly enact that, as a condition of obtaining from its courts letters probate or of administration required for the reduction into possession and administration of assets, however trifling in value, actually situate within the provincial borders, a tax must be paid based on the value of the entire estate of the decedent, including movables (and in that case perhaps immovables also) actually situate elsewhere and in respect of the administration and collection of which such letters were wholly unnecessary — a tax which, however or by whomsoever payable in the first instance, would in most cases ultimately have the effect of reducing the value to the beneficiary of such foreign assets passing to him by succession? There is nothing in the law of nations which forbids the legislature of a sovereign state imposing such a tax. *Blackwood* v. *The Queen*(1). But, if the legislature of a Canadian province may do so, the restriction upon the provincial taxing power under the words "within the province" would, in the case of succession to movables, seem to be illusory.

In construing the restrictive words of the "British North America Act," "within the province," we must, I think, ascribe to the Imperial Parliament the intention that the restriction thereby placed upon the provincial power of taxation should be definite and certain and should be the same in every province. *The Queen* v. *Commissioners of Income Tax*(2); *Lord Saltoun* v. *Advocate-General*(3). This excludes the

(1) 8 App. Cas. 82, at p. 96. (2) 22 Q.B.D. 296, at p. 310.
(3) 3 Macq. 659, at pp. 677, 678, 684.

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idea that, confining itself to one or the other, each province may in this matter select its own basis of taxation — transmission and constructive *situs* according to the maxim *mobilia sequuntur personam,* or property and actual *situs.* If some provinces, adopting the maxim *mobilia sequuntur personam,* should impose a tax in respect of the movable property of their domiciled decedents "actually situate" abroad and others should declare dutiable all property actually situate within their respective local areas regardless of the domiciliation of the deceased owners, double taxation of some movables and entire exemption of others would result. Uncertainty, inconvenience and confusion would ensue; and the sanctity of the legislative domain of one province might be successfully invaded by the legislation of another.

It may be urged that such consequences could be obviated if the provinces would agree amongst themselves upon the basis of this taxation. But there is no assurance that all would concur in such an arrangement; and the jurisdiction conferred by sub-section 2 of section 92 of the "British North America Act" does not depend upon and cannot be determined by an agreement between provincial governments.

In order that a provincial tax should be valid under the "British North America Act," in my opinion the subject of taxation must be within the province. To determine what is the real subject of taxation the substantial result and not the mere form of the taxing Act must be considered. The ultimate effect of succession duties such as are provided for by the Quebec statutes, whether imposed directly upon the transmission or directly upon the property, is to reduce the amount of the estate to which the beneficiaries suc-

ceed. (Cooley on Taxation (3 ed.), p. 32.) Whether paid by the personal representative or secured by his bond before he obtains probate or letters of administration, or paid by him before handing over the property to the beneficiaries, or by the beneficiaries themselves prior to, or upon receipt of the property to which they succeed, the substantial result is the same — they come out of, or lessen the value of that which passes by the succession. The tangible thing affected by the tax is the property which passes. In substance the taxing state takes for itself directly or indirectly a part of the property transmitted from the decedent to his beneficiary.

Where a testator by his will provides that his legacies shall be exempted from death duties, he in effect adds to each bequest the amount of the duty which it would otherwise have borne. In such a case, therefore, although — it may be for the advantage of the beneficiary, or it may be for the convenience of the estate — the testator has provided that payment of the tax shall be made out of the residuary estate and not out of the property bequeathed to each individual beneficiary, the tax is none the less imposed in respect of that property and is in substance a tax upon it. In whatever form of words — tax upon transmission, tax upon succession to property devolving under the law of the province, or tax upon probate — the duty may be imposed, if the beneficiary ultimately has to pay it as a condition of receiving his share of the estate or has to accept that share reduced by its amount, or if the tax is paid out of the residuary estate in exoneration of the specific or pecuniary legatee, the result is that the real incidence of the tax is upon the property of the succession.

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This is always the case where taxation is levied in respect of particular property of whatever nature, whether the taxing Act constitutes the tax a lien or charge upon such property and provides for its seizure and sale if necessary to satisfy the impost, or the remedy prescribed for the recovery of the tax is by personal action or proceedings against the persons required to pay it.

That the property so to be affected should itself be within the province at the time when the taxation attaches in respect of it seems to me to be *primâ facie* the restriction which the Imperial Parliament intended to impose upon the provincial power of taxation in respect of property. Under the Quebec law the duties attach upon the transmission of the property — that is, at the moment of the decedent's demise. Its situation at that time determines its liability to provincial taxation. That the *situs* of the subject of taxation is the test by which provincial jurisdiction to tax it should be settled seems to be undisputed in the case of immovable property. In the case of movable property the large portion of it which is tangible has an actual physical *situs* equally with immovables. It is only intangible personalty which must of necessity be given a *situs* by fiction of law. If the maxim *mobilia sequuntur personam* be applied for the purpose of determining in respect of what property a Canadian province is by the "British North America Act" given the power of direct taxation all movable property, tangible and intangible alike, will be given a fictitious *situs* notwithstanding that tangible movables have an actual *situs* which is physical and that intangible movables have in contemplation of law an equally well-established actual *situs* — and that

for purposes of taxation. *Commissioner of Stamps* v. *Hope*(1); *Payne* v. *The King*(2); *Commissioners of Inland Revenue* v. *Muller & Co.'s Margarine*(3); *Commissioner of Stamp Duties* v. *Salting*(4). In fact movables actually situate outside the borders of the province are as far beyond the "direct power" of the Quebec Legislature as immovables similarly situate. *Blackwood* v. *The Queen*(5).

It is contended that to hold that, where provincial taxation is levied in respect of property, the property must be within the province is in effect to insert the words "on property" before the words "within the province" in sub-section 2 of section 92 of the "British North America Act," *Treasurer of Ontario* v. *Pattin* (6), and that the insertion of these words would exclude the imposition of many purely personal direct taxes — such as a poll tax — which it was certainly intended that the provinces should have the power to impose. But the view which I take of the "British North America Act" provision is that it should be read as authorizing direct taxation only where the real subject of the tax — whether person, business or property — is within the province. In testing the validity under this construction of any particular provincial tax it would, of course, be necessary to determine what is the real subject of taxation.

Under the Quebec Act imposing death duties for the reasons I have stated I am of the opinion that the real subject of taxation is the property passing, notwithstanding the clearly expressed intention of the legislature to fasten the tax upon the transmission.

(1) [1891] A.C. 476.
(2) [1902] A.C. 552.
(3) [1901] A.C. 217.
(4) [1907] A.C. 449.
(5) 8 App. Cas. 82, at p. 96.
(6) 22 Ont. L.R. 184, at p. 191.

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I think it improbable that the Imperial Parliament meant to confer on the provincial legislatures the right to tax any property real or personal beyond their "direct power." *Blackwood* v. *The Queen*(1). The Lovitt decision has established that it was not intended that a province should be denied the power to tax property actually situate within its borders merely because for some other purposes (*Blackwood Case*(1), at page 93), such property is in law deemed to be constructively elsewhere.

Apart from authority I would for the foregoing reasons hold that the Quebec Legislature in attempting to impose death duties in respect of property actually situate outside the province exceeded its constitutional powers.

But I also think the matter concluded by the authority of the decision of the Privy Council in *Woodruff* v. *Attorney-General for Ontario*(2). I concede that the facts in that case are readily distinguishable from those before us. It may also be said that *Woodruff* v. *Attorney-General for Ontario*(2) might have been disposed of, without determining the constitutional question now under consideration, on the ground that there a complete transfer of the property had taken place in a foreign state by an act *inter vivos* and the property itself was actually situated without the province, and the Ontario statutes, therefore, had no application. But their Lordships of the Judicial Committee did not see fit to rest their decision upon that ground. On the contrary they say:—

> The pith of the matter seems to be that, the powers of the provincial legislature being strictly limited to "direct taxation within

(1) 8 App. Cas. 82, at p. 96. (2) [1908] A.C. 508.

the province" ("British North America Act," 30 & 31 Vict. ch. 3, sec. 92, sub-sec. 2), any attempt to levy a tax on property locally situate outside the province is beyond their competence. This consideration renders it unnecessary to discuss the effect of the various sub-sections of section 4 of the "Succession Duty Act," on which so much stress was laid in argument. Directly or indirectly, the contention of the Attorney-General involves the very thing which the legislature has forbidden to the province — taxation of property not within the province.

The reasoning of this board in *Blackwood* v. *The Queen*(1) seems to cover this case.

"The contention of the Attorney-General" referred to can scarcely have been aught else than the reported argument of counsel representing him that the transfers were testamentary in substance;

the duty claimed was not a tax on property, but a tax on the devolution or succession: the duty was imposed on persons beneficially entitled * * * ; the persons taxed were resident in the province.

It is to this argument that Lord Collins makes reply that directly or indirectly — although the transfers should be deemed testamentary and although the tax should be regarded as primarily imposed on the transmission, or on the beneficiaries — it involves the very thing forbidden — taxation of property not within the province. Not content with expressly basing his judgment on this ground, his Lordship emphasizes its importance by the statement that it is "the pith of the matter."

Woodruff v. *Attorney-General for Ontario*(2) cannot be brushed aside by the familiar observation that the language used must be read in the light of, and confined to the facts of, that case, and is applicable only to legislation couched in the form of that then before the court. Their Lord-

(1) 8 App. Cas. 82. (2) [1908] A.C. 508.

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ships have anticipated and precluded such an argument in their statement that the contention of the Attorney-General directly or indirectly — *i.e.*, either upon assumptions that the transfers were really testamentary and that the Ontario Legislature should be deemed to have imposed its tax not on the property, but on the succession or devolution or on the persons beneficially entitled, or upon contrary assumptions — involved taxation of property not within the province; and "any attempt to levy a tax on property locally situate outside the province" is *ultra vires* of a provincial legislature.

Neither may this portion of their Lordships' judgment be regarded as *obiter dictum*. As put by Lord Macnaghten, in delivering the judgment of the Judicial Committee, in *New South Wales Taxation Commissioners* v. *Palmer* (1), at page 184:—

> It is impossible to treat a proposition which the court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined.

See also *Membery* v. *Great Western Railway Co.* (2), *per* Lord Bramwell, at page 187.

As I understand the judgment of their Lordships of the Judicial Committee in *Lovitt* v. *The King* (3), it determines nothing inconsistent with the view I have expressed. Their actual decision turns upon the construction of a deposit receipt which they held to be primarily payable at St. John. The asset which it represented, being a simple contract debt, therefore had a local *situs* in New Brunswick. As property locally situate in that province their Lordships held

(1) [1906] A.C. 179. (2) 14 App. Cas. 179.
(3) [1912] A.C. 212.

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that it might be made subject to the succession duty taxation of New Brunswick, notwithstanding that the testator died domiciled in Nova Scotia; and, the legislature having clearly expressed its intention to impose succession duties upon such property, their Lordships decided that those duties must be paid. Although in the course of the judgment passing reference is made to section 92 of the "British North America Act," and in the discussion of the maxim *mobilia sequuntur personam* invoked by the respondent some expressions occur which are perhaps consistent with a view contrary to that which I hold, the right of a provincial legislature to impose taxation in respect of movable property locally situate outside the province, and the double taxation of the same estate by two different provinces which might ensue are aspects of the case now before us which *Lovitt* v. *The King*(1) did not present and as to which the absence from their judgment of all allusion to *Woodruff* v. *Attorney-General for Ontario*(2) would seem to warrant the conclusion that their Lordships did not express an opinion.

For these reasons I conclude that in the case of Henry Cotton the taxation in question was *ultra vires* of the provincial legislature, and that on that ground the plaintiffs are entitled to succeed.

In the case of Mrs. Cotton, the plaintiffs would be entitled to succeed upon the same ground if the Quebec statutes in force when she died purported to tax movables of a decedent actually situate abroad; but they are, in my opinion, entitled to judgment in her case because the Quebec "Succession Duties Acts" as they stood at the time of her death did not purport to im-

(1) [1912] A.C. 212; 43 Can. S.C.R. 106.

(2) [1908] A.C. 508.

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pose a tax in respect of movable property not actually situate within the province and possibly also because Mrs. Cotton was not domiciled in Quebec at the time of her death.

I should, perhaps, note that, as the statute was amended in 1903 and consolidated in 1906, although the tax purports to be imposed upon the transmission, it is extended to the Quebec movables of a non-domiciled decedent the transmission of which takes place abroad and under the law of the decedent's foreign domicile. By further amendment made in the consolidation of 1906 the legislature sought to render dutiable the foreign movables not only of the domiciled decedent, but also of the decedent who is resident, though not domiciled, in the Province of Quebec. I allude to these peculiar features of the legislation to make it clear that they have not been overlooked and also because they indicate how far the legislature was prepared to go.

It was not urged on behalf of the appellants that the monies claimed by the plaintiffs could not be recovered because they were paid voluntarily and not in mistake of fact, but in mistake of law. Counsel no doubt refrained from presenting this contention because it appears to be well established under the system of law which obtains in the Province of Quebec that where a person voluntarily makes a payment because he erroneously believes he is compelled by law so to do, he may successfully maintain an action *en répétition de l'indû*. Articles 1047 and 1048 C.C. In that case the error is in that which was the principal consideration for making the payment (art. 992 C.C.) and, though voluntarily paid, the monies may be re-

covered. *Leprohon* v. *Mayor of Montreal*(1); *Boston* v. *L'Eriger*(2); *Leclerc* v. *Leclerc*(3); *Bain* v. *City of Montreal*(4), *per* Strong J., at page 265, *per* Taschereau J., at page 285.

The main appeal should, therefore, be dismissed with costs.

I agree in the disposition made of the cross-appeals on the ground indicated in the opinion of my Lord the Chief Justice.

BRODEUR J.—This case, it seems to me, should be decided according to the principles laid down by the Privy Council in the case of *Lambe* v. *Manuel*(5) and the decision of *Woodruff* v. *Attorney-General for Ontario*(6) cannot be successfully invoked.

There is a vast difference between the two statutes that were submitted to the courts in those two cases.

In the case of *Lambe* v. *Manuel*(5), the "Succession Duty Act" of Quebec was at issue, and in the matter of Woodruff, the Ontario "Death Duty Act" had to be interpreted.

The Quebec law imposes a succession duty *on the transmission or devolution of the estate.*

In the Ontario statute, on the contrary, *the property itself is taxed.*

Let me quote the two statutes side by side and we will easily see the difference that exists between those two enactments:—

(1) 2 L.C.R. 180.
(2) 4 L.C.R. 404.
(3) Q.R. 6 Q.B. 325.
(4) 8 Can. S.C.R. 252.
(5) [1903] A.C. 68.
(6) [1908] A.C. 508.

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Quebec Law.

All transmissions owing to death of the property in usufruct or enjoyment of movable and immovable property in the province shall be liable to the following taxes calculated upon the value of the property transmitted.

The word "property" within the meaning of this section shall include all property, whether movable or immovable, actually situate or owing within the province, whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province, and all movables, wherever situate, of persons having their domicile (or residing) in the Province of Quebec at the time of their death.

Ontario Law.

Save as aforesaid, the following property shall be subject to a succession duty as hereinafter provided, to be paid for the use of the province over and above the fee payable under the "Surrogate Courts Act;" (*a*) all property situate within this province, etc. * * * passing either by will or intestacy.

The word "property" in this Act includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

We are asked to decide whether movable property, consisting in bonds and shares of foreign companies belonging to a deceased person domiciled in Quebec is liable to death duties.

The Privy Council in the case of *Woodruff* v. *Attorney-General for Ontario*(1) had to deal, as I have already said, with a statute taxing the property itself. As the bonds in question in that case were due by foreign corporations, were in a foreign country, and had not passed by will or intestacy, it is no wonder that applying the provisions of the section 92, sub-section 2, of the "British North America Act" they have declared that under such a statute the Attorney-General of that province could not reach movable property whose *situs* were not in Ontario.

The Ontario law does tax movable property situate

(1) [1908] A.C. 508.

in the province and belonging to an outsider, but it does not affect any such property situate in another country.

The Quebec law, on the contrary, as interpreted by the Privy Council in the case of *Lambe* v. *Manuel*(1), cannot reach movable property situate in the province, because the duty that was authorized was not a duty on the property itself, but on the transmission of the property.

The testator in the case of *Lambe* v. *Manuel*(1) was domiciled outside of Quebec and left shares of banks having their place of business in Quebec.

The Privy Council confirmed the decision of the Provincial courts and adopted the views expressed by Sir Melbourne Tait and Mr. Justice Bossé that the Quebec "Succession Duty Act" only applies, in the case of movables, to transmissions of property resulting from the devolution of a succession in the Province of Quebec; or, in other words, that the taxes imposed on movable property are imposed only on property which the successor claims under, or by virtue of, the Quebec law.

It was declared that, in order to reach those securities they should be transmitted according to the laws of Quebec and that what was taxed was the right to inherit.

Applying those broad principles of *Lambe* v. *Manuel*(1) to the facts of this case, I come to the conclusion that Mr. and Mrs. Cotton's representatives are liable because the transmission of shares and bonds has been made according to the laws of Quebec, and that the duty is imposed upon the devolution or upon the privilege for their successors to take or

(1) [1903] A.C. 68.

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receive property under their wills. By fiction of the law, movable property is considered to be situate wherever the owner resides. It is referred to the domicile of the owner and governed by the law of that domicile (art. 6 C.C.). It becomes subject to the law governing the person of the owner.

Relying upon the following decisions in England, where the maxim *mobilia sequuntur personam* has been adopted, *Thomson* v. *Advocate-General*(1); *Wallace* v. *Attorney-General*(2); *Harding* v. *Commissioners of Stamps for Queensland*(3), I have come to the conclusion that the government had rightly collected duties on those securities and shares and that the action *en répétition de deniers* instituted by the respondents should be dismissed.

In order to fortify my opinion, I may quote Hanson "Legacy and Succession Duties," where he says:—

> It has already been pointed out that in order to render personal property liable to duty it is necessary that it should be situate within this country, and that as property of a movable nature accompanies in construction of law the person of its owner the situation of the owner's domicile at the time of his death and not the actual local situation of the property itself is the true test of the liability to duty.

I had some doubts, however, as to whether Mrs. Cotton's estate was liable to duty. The statute in force at her death did not contain a definition of the word "property," as quoted above.

That definition was made after the judgment in the case of *Lambe* v. *Manuel*(4). But the Quebec judges, in their decision as affirmed by the Privy Council, were so strong in their idea that what the statute contemplated was to tax any transmission re-

(1) 12 Cl. & F. 1.
(2) 1 Ch. App. 1.
(3) [1898] A.C. 769.
(4) [1903] A.C. 68.

sulting from a succession devolving here under the laws of the province, that my doubts were removed.

We must not forget that under our laws in Quebec the transmission of a succession takes place instantaneously at the death. "Le mort saisit le vif" is the old saying, and in that regard the laws of the two provinces of Ontario and Quebec shew a difference. (Arts. 596-599 and 600 C.C.)

The respondents have claimed before this court that Mrs. Cotton was not domiciled in Quebec when she died in Boston in 1902.

That question was not raised by the pleadings. On the contrary, it is there implicitly admitted that her domicile was in that province, when they acknowledged that her movable property locally situate there was duly taxed. According to the judgment of *Lambe* v. *Manuel*(1), her movable property even situate in Quebec was not subject to duty if she was domiciled elsewhere. The respondents in admitting by their pleadings that Mrs. Cotton's movable property in Quebec was liable to taxation admitted virtually that she was domiciled here.

Besides her husband has stated in his affidavit of the 10th February, 1904:—

> I have examined again that difficult question of domicile, and all the facts and circumstances of the case and I have come to the conclusion and admit that since the month of April, 1901, and, therefore, at the time of the death of my wife, my domicile (which was, of course, her domicile) was at Cowansville, in the said district.

The question of domicile, when a person does not reside all the time at the same place, is determined by his own intention; and if the person whose domicile is in question comes and declares that his domicile

(1) [1903] A.C. 68.

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is in a certain country, I believe that his legal representatives are bound by his extra-judicial admission, and such an admission can be sucessfully invoked against them.

I am of opinion then that the domicile of Mrs. Cotton at her death was in Quebec and that the respondents could not successfully raise that issue.

A cross-appeal has been made by the respondents by which they claim that the Court of King's Bench should not have reduced the amount of the judgment rendered by the Superior Court. They claim by this cross-appeal that the debts of a succession should be entirely deducted from the part of the amounts situate in this province when there is one part of the estate not liable to duty and situate elsewhere. As I am of opinion that, in this case, all the assets of the succession had to pay succession duty, I am not called upon to discuss the point raised. The cross-appeal then should be dismissed and the appeal allowed with costs of this court and of the courts below.

Appeal allowed in part with costs; Cross-appeal dismissed with costs.

Solicitors for the appellant: *Dorion & Marchand.*
Solicitors for the respondents: *Casgrain, Mitchell, McDougall & Creelman.*

McKILLOP & BENJAFIELD (DEFENDANTS) ..... APPELLANTS;

AND

CHARLES I. ALEXANDER (PLAINTIFF) ..... RESPONDENT.

1911
*Oct. 10.
1912
*Feb. 20.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Title to land—"Torrens System"—Priority of right—Registration—Caveat—Notice—Construction of statute—Saskatchewan "Land Titles Act," 6 Edw. VII. c. 24—Equities between purchasers—Assignment of contract—Conditions—Right enforceable against registered owner.

Under the provisions of the Saskatchewan "Land Titles Act" (6 Edw. VII. ch. 24), the lodging of a caveat in the land titles office in which the title to the lands in question is registered, prevents the acquisition of any legal or equitable interest in the lands adverse to or in derogation of the claim of the caveator.

A company, being registered owner of lands under the Act, entered into a written agreement to sell them to P., who assigned his interest in the contract to G., who then agreed to transfer the equitable interest, thus acquired, to A. Subsequently, without knowledge of A.'s interest, McK. & B. acquired a like interest from G. A caveat claiming interest in the lands was then lodged by A., in the proper land titles office, and, without inquiry or actual notice of the registration of the caveat, McK. & B. afterwards obtained the approval of the company to the assignment which had been made to them. In an action for specific performance,

Held, per Davies, Idington, Anglin and Brodeur JJ., that, as the purchasers from G. were on equal terms as to equities, A. had priority in point of time at the date when his caveat was lodged; that such priority had been preserved by the registration of the caveat, and that the subsequent advantage which would, otherwise, have been secured by the company's approval of the assignment to McK. & B. was postponed to any equitable right

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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which A. might have to a conveyance. And, further, *per* Idington J., that, irrespective of the lodging of the caveat, A. had prior equity to the subsequent assignees.

The agreement by the company provided that no assignment of the contract should be valid unless it was for the whole of the purchaser's interest and was approved by the company, and also that the assignee should become bound to discharge all the obligations of the purchaser towards the company. Until the time of the approval of the assignment to McK. & B., none of these conditions had been complied with.

Held, per Davies, Idington, Anglin and Brodeur JJ., that the conditions in restriction of such assignments of the original contract could be invoked only by the company.

Held, per Duff J., dissenting, that, as the rights of G. against the company had never become vested in A., according to the provisions of the contract, he had acquired no enforceable right against the company, the registered owner of the lands, and, consequently, he had no legal or equitable interest in them which could be protected by caveat.

Judgment appealed from (4 Sask L.R. 111) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), reversing the judgment of Johnstone J. and maintaining the plaintiff's action with costs.

The circumstances of the case and the questions in issue on the appeal are stated in the judgments now reported.

Ewart K.C. for the appellants.

Chrysler K.C. for the respondent.

DAVIES J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Anglin.

IDINGTON J.—The Canadian Northern Railway Company were registered owners of land under the

(1) 4 Sask. L.R. 111, *sub nom. Alexander* v. *Gesman.*

"Torrens System" and gave to a subsidiary company named the Canadian Northern Prairie Lands Company the management of these lands.

The latter company, under powers thus given, sold a section to one Potter who in turn sold it to one Gesman, and he, on the second of November, 1909, sold a half of the section to the respondent Alexander who paid $100 cash and was to pay balance of what accrued due to Gesman in respect of his equity, for the selling company had not been paid their price.

Then on the 4th of November, 1909, Gesman sold the same half section and the other half of the section to the appellants. Each of these transactions was reduced to writing and was so far as respects mere form a valid contract.

On the 6th of November aforesaid, respondent Alexander executed a caveat setting forth his claims against the half-section he had so purchased, and registered same on the 10th of November aforesaid.

On the 14th of December, 1909, Gesman was paid by appellants the balance of the $1,800 purchase money and they received from him an assignment of the original agreement of sale from the Prairie Lands Company to Potter.

The Prairie Lands Company had given a written agreement in which there was a provision guarding against the recognition of sub-purchasers.

The assignments to Gesman and by him to appellants were approved by the Prairie Lands Company on the 29th of November, 1909. I will hereafter refer to this feature of the case.

The respondent began this action on the 21st of February, 1910.

There is little if any dispute of fact.

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By their respective agreements of sub-purchase appellants and respondent Alexander each acquired an equitable interest in said lands.

Alexander invokes for his protection the maxim *qui prior est tempore potior est jure.*

It is an undoubted principle of law that as between owners of equitable interests the first in time prevails unless he who has acquired it has either done or omitted to do something he is by law required to do and thereby has lost this prior right.

Alexander had not done anything to taint his right and so far as I can see omitted nothing he was required to do.

His registration of notice of his claim may not have been requisite on the facts here presented, but was, if I understand the practice, exactly what is usually done by prudent purchasers under a time bargain.

And prudent buyers are well advised in making search for such notice of prior purchase. But though claimed to be here notice to the subsequent purchasers I desire not to express my opinion on that point, for in my view of this case that need not be considered merely from the point of view of notice.

An argument was presented by the appellants founded on the practice relative to the assignments of choses in action in pursuance of which notices of the assignment thereof are given to the debtor or trustee of the fund provided for the discharge of the obligation in question in the assignment.

I do not think the argument is well founded. Indeed, the mass of authority against it seems overwhelming.

In the case of *Taylor* v. *London and County Bank-*

ing Company (1), at page 254, in appeal, Stirling L.J. states as follows:—

> Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land" and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty.

He proceeds to quote from Sir William Grant in *Jones* v. *Gibbons* (2), at page 410, and cites *Wilmot* v. *Pike* (1845) (3).

The authorities cited bear out his statement of the law which is laid down to the same effect in Halsbury's Laws of England, vol. 13, page 79, where other authorities are collected.

There is nothing in this case in hand of what sometimes happens when the party holding the subsequent equity has been able to fortify it by the acquisition of the legal estate or its equivalent a declaration by him holding the legal estate that he so holds as trustee for him claiming.

Nor can I find anything in a minor suggestion made that the respondent purchaser should have possessed himself of the prior contracts or agreements on which his title of recognition must rest. The thing was impossible.

The next way it is put is that the respondent should have had an indorsement on the contract of Gesman or, perhaps, one on each contract all along the line to the company. Who ever heard of a sub-purchaser looking for such a thing? And there is no evidence appellants did so. No case is cited to support these remarkable propositions save such cases as arise from

(1) (1901) 2 Ch. 231. (2) 9 Ves. 407.
(3) 5 Hare 14.

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mortgages by deposit of deeds or the like where possession of the deeds is of the essence of the transaction.

Indeed, in transactions such as this, to require that would be, if not a manifest absurdity, most unusual. Nor can I find anything to distinguish, as against respondent Alexander, the case of assignment of a mortgage from that of an assignment of a purchase of land. Any distinction between them is in favour of Alexander, who in truth acquired an interest in the land, but not by way of security only, as a mortgagee does.

Dart in his work on Vendors and Purchasers (5 ed.), page 837, in a section devoted to the subject, treats purchasers of equitable title as bound by the same rule.

In this case we have then the ownership registered in the name of the Canadian Northern Railway Company, who were holders of the certificate of title, and then the agreement of sale to Alexander and notice thereof by the registration of his caveat founded thereon, and the holder of the certificated title acknowledging the authority of the Canadian Northern Prairie Lands Company to sell and submitting its rights and duties to the direction of the court. Can there be anything more to do than declare the equities between the other parties and direct accordingly ?

I agree with the reasoning of the judgment of the court below speaking through Mr. Justice Newlands wherein he relies on sections 136 and 139 of the "Land Titles Act," now sections 125 and 123. By accident it is in the judgment made to appear as if the first of these sections itself declared the effect, whereas it is the caveator who makes the claims and the result is to

render the acquisition of the legal estate by another impossible if the caveator's claim is rightly founded. It is pointed out in argument here the legal estate is not in question, but that does not dispose of the whole argument, for it only shifts the point and does not get rid of many reasons beginning with the scope of these sections and applying others in same Act which together tend to demonstrate that, considering, as in regard to interests in land we must, the equity of a purchaser filing a caveat, it must be held stronger than who does not. I need not elaborate for this case does not need it.

I still adhere to the views I expressed in the unreported case of *McLeod* v. *Sawyer-Massey Co.* (in 1910) that the clause in agreements of sale denying the right of any purchaser to assign unless with approval of the vendor are, as between others, of no consequence.

They are designed to protect a vendor from annoying entanglements and that unless and until the vendor sets up for his own protection any of such stipulations in case of a claim made against or through him no one else has a right to do so.

The appellants here try to present the approval in a somewhat different light from what was presented in the former case by suggesting that the first purchaser not having got approval, the second was entitled to assume there was no prior purchaser.

This is a new contention I gather from the judgments below and we are not pointed to a line of evidence shewing either ever searched or inquired at the company's land office.

Without such like evidence there is, in my opinion, no foundation for such an argument. It was not until

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long after purchase that the appellants applied to and got the approval in the vain hope it might in some way help. Meantime the respondents' caveat was entered and he became entitled, indeed bound, to assert in court his right which could not be defeated by such contrivance; without at least the co-operation of the owner cancelling the original agreement, much less when the owner assumes the attitude it takes here of merely submitting to the direction of the court.

I have referred to numerous authorities cited in appellants' factum as if to support some argument to be derived therefrom but fail to see their relevancy save to the point I have fully dealt with as to giving notice, and what I am about to refer to.

Two of these authorities are worthy of notice. *Rice* v. *Rice*(1), is a case where a vendor's lien existed yet the purchaser got his assignment with receipt for purchase money indorsed and therewith got the title deeds and by means thereof had by depositing them and this assignment raised a sum of money and absconded.

In the face of such a clear equitable mortgage induced by the very acts of the vendor claiming the lien, it was found possible to argue for the vendor's lien being prior. And why so ? Because the position of lien prior in time is so strong as to encourage the hope of overcoming such a later title fortified as this was.

And in the case of *Cave* v. *Cave*(2), the rule set out in the maxim was followed after a full examination of *Rice* v. *Rice*(1), and *Phillips* v. *Phillips*(3), and the principles underlying them.

(1) 2 Drew. 73. (2) 15 Ch. D. 639.
(3) 4 DeG. F. & J. 208.

I need not set forth the complicated facts of that case. Suffice it to say there seems, to my mind, a great deal more in the facts there than in those here to tempt a judge to discard the maxim, yet it was followed.

Here the man Gesman had in truth and law nothing to sell when he sold to the appellants.

It is only by a fiction, as it were, that we can refer to the second assignment, as an assignment, at all. It can only become an assignment by virtue of some act or omission on the part of him holding the prior assignment that may raise an equity in him getting the second to have the man holding the first restrained from setting it up and thus let the later one operate. How can the approval of the vendor in ignorance of another assignment have any such force as the statutory effect gives the first by virtue of the caveat and all it implies.

The appeal should be dismissed with costs.

DUFF J. (dissenting). — On the 28th February, 1906, the Canadian Northern Railway Co. (acting through the Canadian Northern Prairie Lands Company) agreed by two several agreements to sell to one Potter the two quarter-sections forming the south half of section one in township 32, and range 15 west of the Third Meridian in the Province of Saskatchewan. Before the whole of the purchase price was paid Potter assigned his rights under these agreements to one Gesman, who in turn on the second day of November, 1909, agreed with the respondent Alexander (the plaintiff in the action out of which this appeal arises) to assign his rights to Alexander. On the 4th day of the same month Gesman agreed with the appel-

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lants to assign the same rights to them. On the 10th day of November Alexander filed a caveat forbidding any transfer of the lands in question and, on the 29th of that month, the assignment from Gesman to the appellants was completed and, on the 15th of December, the consideration was fully paid. In February, 1910, Alexander brought his action in which he claimed specific performance of his agreement with Gesman and in which he also prayed for an order directing the appellants and the Canadian Northern Railway Co. to execute a proper conveyance to him of the lands that were the subject of these various dealings. The trial judge dismissed the action. The full court reversed this judgment on the ground that, while the appellants had the better equitable rights to a conveyance from the company, the respondent Alexander by filing his caveat had gained priority.

The agreements between the Canadian Northern Railway Company and Potter are both in the same form, were executed upon the same day and may for the purposes of this case be considered as if they had been one agreement embodied in one instead of two formal instruments. The purchase money (over and above a certain sum that was paid in cash) was to be paid in five annual instalments the last of these instalments being due the 28th February, 1911. The agreement contemplates and makes careful provision for the assignment of the purchaser's rights; and it will be necessary to dwell a little upon the effect of the stipulations upon this subject as they appear to me to be a governing ingredient in the considerations which determine the relative priority of the claims upon which we have to pass. The stipulations on part of the purchaser are formally declared by the instru-

ment to be binding upon his assigns; and the instrument contains this clause:—

No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser, and approved and countersigned on behalf of the company by a duly authorized 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 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 by the said company as aforesaid. But no assignment shall in any way relieve or discharge the purchaser from liability to perform the covenants and pay the monies herein provided to be performed and paid.

By these provisions it seems to me the parties have expressed their intention to give to the obligations of the company under the agreement 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.

No assignment shall be valid unless the same shall be for the entire interest of the purchaser.

That is to say, the purchaser cannot validly make any partial disposition of his rights; he cannot merely charge them, he cannot attach sub-equities to them; he can only affect them by a disposition which wholly divests him of them and vests them in an assignee who is substituted as purchaser for him. No assignment, moreover, though satisfying this condition, can take effect until it has been assented to by the vendors, until the vendors, that is to say, have accepted and approved of the assignee. The purchaser under such

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a contract stands, of course, in a position very different from that of a vendee of land under a contract of sale which is in the ordinary form and contains no such stipulation. A purchaser under such a contract may multiply sub-equities to any extent he pleases and the holders of such sub-equities again may each in his turn repeat the same process indefinitely. Where lands are sold under terms by which the payment of the purchase money is deferred for a considerable period during which the contract remains *in fieri* it is obvious that such sub-equities may become a source of embarrassment to the vendor; and it is doubtless in part with the object of escaping such embarrassment that railway companies (holding large areas of land for the purpose of sale only and having, of course, in repect of such lands a very great number of dealings) customarily introduce this clause into the form of contract which they commonly use when small parcels of lands are sold, upon credit.

But while the clause is thus beneficial to the company it is of even greater value to the purchaser and his assignee. The assignee whose assignment has been accepted gets the advantage of being placed in direct contractual relations with the vendor and being freed from the necessity of concerning himself about possible equities created by the purchaser in the meantime; and as to the purchaser (who cannot, of course, get a registered title so long as the purchaser's money remains unpaid) the advantage to him of being enabled to transfer to a sub-purchaser an unimpeachable title to his rights is obvious.

That the assignee under an approved assignment does get such a title (I am, of course, assuming now that the assignee is free from any imputation of *mala*

fides) is sufficiently apparent. It is manifest that the assignment contemplated and provided for by the agreement is intended to result, when accepted by the company, in a new agreement between the company and the assignee. By the express terms of the contract the obligations of the purchaser are declared to bind his assignees; and the assignee in presenting his assignment for approval undertakes, of course, to submit to this as well as the other terms of the contract. The company, on the other hand, comes under an obligation to the assignee to perform on its part the contract of sale — whether because of an implied undertaking with the assignee arising out of the acceptance of the assignment or *ipso jure* in consequence of the assignment vesting in him the purchaser's rights is immaterial. The original purchaser is not relieved from responsibility under his covenants, but the effect of the transaction is that the assignee is introduced as a party to the contract of sale; and under the contract so re-constituted the assignee is entitled to the rights, and assumes the primary burden of the correlative obligations of the purchaser as those rights and obligations are therein declared. Now one of the terms of the original contract is as we have seen that no rights under it shall be acquired through any disposition by the purchaser unless such disposition complies with conditions which are only fulfilled by the assignment to the accepted assignee; and consequently nobody claiming rights under the contract through any disposition by the purchaser (which rights obviously cannot be constituted in defiance of the express terms of the contract itself upon which they are founded) can dispute the title of the accepted assignee to the benefit of the purchaser's rights. The company, in a

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word, by its acceptance of the assignment becomes a trustee of the land for the purposes defined by the terms of the contract thereby constituted, and according to those terms the land is to pass to the assignee on the performance of the conditions defined. It is argued that the provisions we have been considering are for the benefit of the vendor alone, and that he alone can take the benefit and claim the protection of them. It would be sufficient to say that such a proposition applied to the facts of this case means in the last analysis that the company being under no legal disability to carry out its contract with the assignee may lawfully refuse to do so, for it is perfectly obvious that appreciating the rights of the parties as rights governed by the contract alone the company is legally bound to convey this property to the appellants and is under no sort of legal duty or obligation to Alexander, which creates an impediment in the way of its doing so. The contention, moreover, overlooks the circumstance that a new contract has been formed by which the assignees have come under obligations to the company. In entering into that relation the assignees were entitled to rely on this provision. They were entitled to rely upon it because it was one of the terms of the contract to which it was proposed that they should become parties and it was obviously as much for their benefit as for that of the company; and it is to be presumed that they did rely upon it. As against parties to the contract or persons claiming under the contract either directly or indirectly they are indisputably entitled to any protection which that provision may afford.

Indeed, as I have pointed out, it is an unwarrantable assumption to say that this clause was originally

framed exclusively in the interests of the company. It is obviously to the interest of all parties that sub-purchasers under such an agreement shall be able to pay their purchase money with perfect confidence in the title they are acquiring and on an unsophisticated reading of it, it is manifest that one of the main objects of this clause is to secure to the sub-purchaser an unimpeachable title as against the vendors. That being so, it is impossible to argue that the sub-purchaser is not entitled to the benefit of it or that his rights under it can be neutralized by any action of another party to the contract.

From all this it is clear enough that the respondent Alexander cannot succeed in this action unless there is some other fact or circumstance in addition to his agreement with Gesman which gives him some right of action against the company or the appellants. That he has no right of action against the company is clear, and it is clear also, as a result of the special terms of the agreement, that he can only succeed against the appellants by establishing that he is entitled to have the rights vested in them exercised for his benefit — that the appellants, in a word, are trustees of their rights for him. The contention on behalf of Alexander is that such a trust arises on one of these grounds: 1st, that his caveat bound Gesman's interest under the agreement for sale from the time it was filed and that the appellants took that interest charged with an obligation to carry out Gesman's contract with Alexander; 2ndly, that the caveat was, in law, notice to the appellants of Gesman's contract with Alexander and that they consequently must be held to have acquired Gesman's interest with notice of Gesman's breach of trust; and 3rdly, that the appellant's failure

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to search the register before paying the purchase money to Gesman was such negligence as to deprive them of the benefit of their legal position under the contract or to require the court to impute to them constructive notice of the facts stated in the caveat which, of course, would have been ascertained if the register had been examined.

The first and second of these contentions are, I think, based upon a misconception of the purpose for which the machinery of caveats was devised by the authors of this Act. The fundamental principle of the system of conveyancing established by this and like enactments is that title to land and interests in land is to depend upon registration by a public officer and not upon the effect of transactions *inter partes*. The Act at the same time recognizes unregistered rights respecting land, confirms the jurisdiction of the courts in respect of such rights and, furthermore, makes provision — by the machinery of the caveat — for protecting such rights without resort to the courts. This machinery, however, was designed for the protection of rights — not for the creation of rights. 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. Alexander's caveat consequently conferred no right upon him, it could only operate to protect such rights as he had and could enforce against the land, that is to say, against the

registered owner of the land. It is quite clear, as I have pointed out, that he had no such rights and the filing of the caveat, therefore, was a wrongful interference with the proprietary rights of the company for which Alexander might have been answerable in damages if the company had sustained any loss in consequence of it. It seems equally clear that the caveat could not affect the appellants as bringing home to them notice of the transaction between Alexander and Gesman. The statute does not say that the caveat shall operate as notice of the facts stated in it to intending purchasers, and there is not anything in the statute giving the least ground or colour for attributing to it any such operation. If an intending purchaser chooses to close his purchase by paying his purchase money without first acquiring a registered title, he runs the risk of finding that he cannot get a registered title until some unregistered claim has been satisfied or some unregistered interest acquired. But he incurs this risk not because he is deemed to have had notice of the claim and for that reason to be bound in good faith to recognize it, but because he can only acquire a title by registration and registration he cannot have free from an enforceable claim against the registered title in face of a caveat founded upon such a claim until that claim has been satisfied or the superiority of his claim has been established.

Section 173 of the Act, when read together with the provisions respecting caveats, would seem to establish beyond controversy that this view of the effect of a caveat correctly interprets the intention of the statute. "No person," the section reads,

> contracting or dealing with * * * owner of land for which a certificate of title has been granted shall except in case of land by such person * * * be affected by any trust or unregistered in-

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terest in land any rule of law or equity to the contrary notwithstanding.

It would be strange if after this formal declaration the legislature had proceeded to provide a statutory method of affecting the conscience of the purchaser with notice of unregistered interests. The assumption that the legislature has provided such a method in the system of caveats seems to be unwarrantable. The operation of the caveat according to the design of the Act (as affecting a purchaser) is, I think, aptly expressed in Lord Redesdale's language in *Underwood* v. *Lord Courtown*(1), at page 66; it is to "bind his title not his conscience."

The third ground of relief is put in this way. Alexander, it is said, had an equitable right which was prior in time to the equitable right of the appellants, and the subsequent right of the appellants ought not to be permitted to displace his prior right, 1st, because the appellants, in failing to search for caveats before closing their purchase from Gesman were guilty of such gross negligence as to make it inequitable to permit them to retain the advantage arising from their contract with the company; or 2nd, because the appellants, by reason of their neglect to search the register, had constructive notice of Alexander's claim.

To the first of these contentions, there is an objection which seems to me to be absolutely fatal, and it is this. The maxim *qui prior est tempore potior est jure,* is (as a great equity judge, Turner, L.J., said, in *Cory* v. *Eyre*(2), at page 167) :—

> founded * * * on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the

(1) 2 Sch. & L. 41.

(2) 1 DeG. J. & S. 149.

trust in the person in whose favour the trust is created or declared. Where, therefore, it is sought, * * * to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it.

Lord Westbury explains the maxim in the celebrated case of *Phillips* v. *Phillips*(1), in language which is to the same effect. The maxim has never been applied in favour of persons who have neither by themselves nor by those whose rights they are asserting, had any legal or equitable interest in the land which was the subject of the dispute.

It is clear, as I have said, that Alexander never acquired any right which he could compel the registered owner to recognize 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*(2), at pages 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

(1) 4 DeG. F. & J. 208.

(2) [1904] 1 Ch. 658.

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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. The wrong done him by Gesman was not to aid in defeating an unregistered right in the land (or against its registered owner) already constituted, but in preventing Alexander from constituting such a right by effectively transferring to the appellants the rights he had agreed to vest in Alexander. If the appellants were implicated in this wrong the court would find a means of making them account for what they acquired by means of it. But that must at least involve finding in them either guilty knowledge or guilty ignorance of Gesman's wrong-doing — neither of which is suggested.

The contention, moreover, fails because there is no adequate ground for imputing any such misconduct or negligence to the appellants as would justify the court in holding them accountable as trustees for Alexander.

The test to be applied is stated by Lindley, M.R., in *Oliver* v. *Hinton*(1), at page 274:—

> To deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate, it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority.

It may be observed in passing that Lindley L.J. is not here dealing with constructive notice; he is

(1) [1899] 2 Ch. 264.

assuming an absence of notice, either actual or constructive, and even in the absence of notice, the case from which his observation is taken decides that gross negligence, such as a failure to require the production of the title deeds, may deprive even a purchaser for value without notice of the right to retain his legal advantage, whatever it may be, to the disadvantage of the holder of a prior equitable interest. I have pointed out that Alexander is not the holder of such an interest — but putting aside that objection, we come to consider whether the appellant's negligence (so called) in failing to examine the register is of the kind or degree which Lindley L.J. had in view.

I should say before proceeding to apply this doctrine to the facts that I think it is doubtful whether the doctrine is one which can safely or properly be applied to impeach the rights of a purchaser contracting directly with a registered owner under the Act. I think there is something to be said in favour of the view that it cannot be applied consistently with the objects to be obtained by registration of title and that the design of the Act is that, as against such a purchaser, unregistered interests should depend for their protection upon caveats operating directly to bind the title of the registered proprietor. Doctrines developed under the old system of conveyancing for the protection of equitable rights ought no doubt to be applied very guardedly for the purpose of deciding controversies respecting unregistered interests in registered land; and the utmost vigilance ought to be observed to avoid the mistake of yielding a punctilious allegiance to the letter of a rule evolved under widely different conditions without determining to what extent the

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principle which underlies the rule is in the circumstances properly applicable. For the purposes of this case, however, I assume that the doctrine as stated by Lindley L.J., is applicable. If I am right in the opinion I have expressed as to the effect of the appellants' contract with the company, it is perfectly clear that negligence cannot be imputed to him because of his failure to make inquiries respecting dealings of Gesman. Gesman produced his agreement with the company and the assignment approved, and the appellants were entitled to rely upon that. A cautious or suspicious man might have done more, but they were not bound to be suspicious, and they are not to lose their legal rights because they might by "prudent caution" (to use Lord Cranworth's phrase in *Ware* v. *Egmont*(1), at page 473), have obtained more information than they did unless they have been guilty of "gross and culpable negligence." As Lord Selborne said in *Agra Bank* v. *Barry*(2), at page 157, the purchaser owes no duty to the "possible holder of a latent title" to exercise care with regard to the title of his vendor. A purchaser is under no legal obligation to investigate his vendor's title. *Bailey* v. *Barnes*(3), at page 35. The only relevant question is, were the assignees (from the point of view exclusively of their own interests) guilty of "gross and culpable negligence" in not examining the register? As regards the absence of concern respecting dealings by Gesman — which could not affect him — the point seems clear; it is only "by falling into the error attributed to those who are wise after the event" (see *per* Lindley

(1) 4 DeG. M. & G. 460. (2) 2 L.R. 7 H.L. 135.
(3) [1894] 1 Ch. 25.

L.J., in *Bailey* v. *Barnes*(1), at page 34), that one could charge the appellant with negligence in that respect. Then, can it be fairly said that in view of possible dealings by the company itself their failure to search was "gross and culpable negligence ?"

It is quite clear that a purchaser acquiring property in the ordinary way under an arrangement such as that entered into by Potter with a great railway company, cannot avoid such risks as there may be in the possibility of fraud by the company with which he deals. No amount of vigilance on his part could, for example, prevent the ultimate registration of a transfer in course of transmission to the registry at the moment of the execution of his agreement for purchase. In the absence of fraud, however, there is no risk; and suffice it to say, that in such purchases the possibility of such frauds does not enter into the calculations of purchasers unless at least they are abnormally given to suspicion. It, in my judgment, would be laying down a rule utterly at variance with the habits and modes of thought of people who engage in such transactions, to hold that it was gross and culpable negligence or indeed negligence in any degree for a purchaser in such a transaction to act upon the assumption that the company's good faith could be relied upon with absolute confidence. I think, for these reasons, that the suggestion that there was negligence of such a character as to be material here is utterly baseless.

As to constructive notice I am inclined to think that as regards purchasers dealing with the registered owner, the doctrine has been swept away by section 173 of the Act, and that the protection for unregis-

(1) [1894] 1 Ch. 25.

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tered interests substituted for it is the filing of caveats. As regards titles completed by registration it clearly has no place in the scheme of the Act. I am aware that in the Australasian courts, the first of these propositions appears to have been doubted, but I have seen no case in which the decision depended in any way upon a recognition of the doctrine as applicable to determine the rights of a purchaser from a registered owner. Knowledge and notice, of course, must often present themselves as ingredients in fraud or in the facts from which fraud may be inferred, or in the circumstances giving rise to an estoppel or an equity of some description affecting the relative priorities of unregistered claims; but notice of an unregistered right or interest in itself cannot, I think, affect the right of a purchaser dealing *bonâ fide* with a registered owner.

There is no necessary analogy between the position of a proposed purchaser dealing with a registered proprietor of land under a system of title by registration, and the position of a purchaser of land where no such system exists. In the course of centuries an elaborate system of rules has been developed touching the proof of title which such a purchaser is entitled to demand from his vendor and the practice of conveyancers points out the course a prudent solicitor will follow in order to protect the purchaser's rights. It was to avoid the delay, the uncertainty and the expense attendant upon the investigation of titles that the system of title by registration was devised; and one of the most fruitful sources of uncertainty and expense which the authors of this system designed to clear out of the way, was this doctrine of constructive notice. See Report of Commissioners on Registration, 1857, Hogg, "Incumbrances," pages 8 and 26.

Not the least of the difficulties attending upon the application of the doctrine of constructive notice has always been the vagueness of the doctrine itself.

Every one who has attempted to define the doctrine of constructive notice has declared his inability to satisfy himself,

said Lord St. Leonards in the 14th edition of his work on Vendors and Purchasers. An attempted definition inserted in a bill introduced by that great property lawyer in 1862 proved to be so unsatisfactory that it was struck out with the consent of the author of the bill. Again and again eminent judges in both common law and equity courts have declared that the doctrine has been carried too far and is not to be extended. In *English and Scottish Mercantile Investment Co.* v. *Brunton*(1), at page 708, Lord Esher, M.R. said:—

In a series of cases Lords Cottenham, Lyndhurst and Cranworth, Lord Justice Turner and the late Master of the Rolls, Sir George Jessel, have said that the doctrine ought not to be extended one bit farther; all the judges seem to have agreed upon that. In *Allen* v. *Seckham*(2), I pointed out that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them.

Bowen and Kay L.JJ. accepted this view. In the *"Birnam Wood"*(3), at page 14, Farwell L.J. said:—

The courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever.

And in the last edition of Dart on Vendors and Purchasers, at page 902, it is stated that

the tendency is to restrict the doctrine of constructive notice so far as is compatible with the rules of the court applicable to fraud.

(1) [1892] 2 Q.B. 700. (2) 11 Ch.D. 790.
(3) (1907) P. 1.

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In the latest decision of the Court of Appeal dealing with the subject, the view expressed by Lindley L.J. is that the doctrine comes into play only when there are facts justifying an inference of knowledge or circumstances indicative of wilful ignorance.

It is not necessary to decide whether or not the doctrine has any application in this case, because if I am right in the view I have just expressed, that the facts do not warrant any imputation of gross negligence — *à fortiori* they do not support an imputation of fraud or of that wilful departure from the usual course of business "in order to avoid acquiring a knowledge of a vendor's title" or that "wilful ignorance of defects" which according to the view expressed by Lindley L.J., in the case above referred to (*Bailey* v. *Barnes*(1), at pages 34, 35), it would be necessary to shew in order to impute constructive notice to the appellants. As Lindley L.J. said in that case "the doctrine of constructive notice," *i.e.*, as expounded in his judgment,

> is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers; and although this limitation has sometimes been lost sight of, still the limitation is as important and is as well known as the doctrine itself.

ANGLIN J.—The defendants, McKillop & Benjafield, appeal from the judgment of the Supreme Court of Saskatchewan *en banc* reversing the judgment of Johnstone J., who dismissed the plaintiff's action for specific performance holding that the defendants, although subsequent purchasers, by their diligence in procuring an actual assignment of their immediate

(1) [1894] 1 Ch. 25.

vendor's interest and the approval thereof by the original vendor, the railway company, in which the legal estate was vested, and by obtaining possession of the original contract of sale made by the company with such approval indorsed thereon, had acquired a position "much stronger in equity than that of the plaintiff," who "had nothing more than an agreement to assign."

The sale to the plaintiff was of one-half of the section purchased by his vendor: the sale to the defendant was of the whole section.

The court *en banc* was of opinion that the registration by the plaintiff of a caveat in respect of his claim, prior to the defendants' completing their purchase and obtaining the assent of the original vendor to the assignment to them of the interest of the original vendee, prevented the defendants from acquiring any right or interest in the land except subject to the plaintiff's claim.

The facts of the case are briefly, but sufficiently, summarized by Newlands J., as follows:—

> The plaintiff first obtained an equitable estate in the said half-section of land. Subsequently, but without notice of the plaintiff's equitable estate, the defendants, McKillop and Benjafield, also obtained an equitable estate in the said land. Before anything further was done by the said defendants, the plaintiff filed a caveat in the proper land titles office against the said lands, after which the said defendants completed their purchase and had the assignment to them approved of by the owner of the legal estate.

Apart from the effect of the "Land Titles Act" of Saskatchewan (6 Edw. VII. ch. 24), and of the caveat lodged by the plaintiff pursuant to its provisions, I incline to the view that the defendants would have been entitled to succeed, because, although subsequent purchasers, they had the best right to call for a conveyance of the outstanding legal estate and were,

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therefore, in equity entitled to its protection. Dart on Vendors and Purchasers (7 ed.), p. 845. They held this position not because they had given notice of their purchase to the holder of the legal estate, which the plaintiff had omitted to do, *Hopkins* v. *Hemsworth*(1), nor because the plaintiff had omitted to have a note of his purchase indorsed on the original contract from the railway company, *Jones* v. *Jones* (2) (points much insisted on at bar), but because they had obtained the consent of the railway company to the assignment to them of their vendor's interest in the land. As a result of the original sale the railway company became a trustee of the property for its purchaser, who in the eye of a court of equity was the real beneficial owner, *Shaw* v. *Foster*(3), at page 338. The defendants were purchasers of his interest for value and without notice of the plaintiff's claim. They procured the railway company to become a party to the conveyance to them of that equitable interest by obtaining its consent to the assignment under which they claim. Although the company did not formally convey or declare a trust of the legal estate in favour of the defendants, its privity and consent to the assignment to them gave them a position which (apart always from the effect of the "Land Titles Act" and of the caveat lodged by the plaintiff under it) was such that a court of equity would not interfere to deprive them of the better right so obtained to call for the conveyance of the legal estate; *Wilkes* v. *Bodington* (4); *Wilmot* v. *Pike*(5), at page 22; *Taylor* v. *London and County Banking Co.* (6), at pages 262-3. The

(1) [1898] 2 Ch. 347.
(2) 8 Sim. 633.
(3) L.R. 5 H.L. 321.
(4) 2 Vern. 599.
(5) 5 Hare 14.
(6) [1901] 2 Ch. 231.

effect of this consent of the railway company on the defendants' rights is certainly not lessened by the presence in the company's original agreement for sale of the following special clause:—

> No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser, and approved and countersigned on behalf of the company by a duly authorized 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 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 by the said company as aforesaid.

But before the defendants obtained the assent of the railway company and when they had paid only $700 on account of their purchase money and there was still $1,800 unpaid, the plaintiff lodged in the land titles office his caveat forbidding

> the registration of any transfer or any instrument affecting (the half-section in which he claimed an interest) unless such instrument is expressed subject to my claim.

The agreement for purchase held by the plaintiff was an "instrument" within the meaning of clause 11 of section 2 of the "Land Titles Act." Under section 136 the plaintiff was entitled to lodge a caveat in respect of his interest under that agreement; and when so lodged and while it remained in force, under section 139 the caveat had the effect of preventing the registrar from registering

> any memorandum of any transfer or other instrument purporting to transfer, encumber or otherwise deal with or affect the land in respect to which such caveat was lodged except subject to the claim of the caveator.

That the caveat remained in force is not questioned. Although challenged on the ground that it

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did not shew the interest of the caveator, the caveat, in my opinion, sufficiently complied with the requirements of section 137. It stated the claim of the caveator to be as

> the owner of the south half-section one, in township thirty-two (32), and range fifteen (15) west of the third meridian in the Province of Saskatchewan, under and by virtue of an agreement for sale in writing of the said property to me from G. A. Gessman of the City of DesMoines in the State of Iowa, one of the United States of America, agent.

It did not give the number of the certificate of title as prescribed in the form "W." But, in view of the complete description of the land which it contained, that was, in my opinion, unnecessary. The provision of section 137 should, I think, be regarded as directory and intended for the guidance of registrars. *Wilkie* v. *Jellett*(1). If a caveat enables the registrar to identify the land in respect of which it is lodged and if the interest claimed is stated with reasonable certainty, he properly receives it and, when duly lodged, it has the effect contemplated by the statute, although in some particular it should not be in strict compliance with the prescribed form.

A certificate of title to the land in question had been granted to the Canadian Northern Railway Company. Section 73 of the statute is as follows:—

> After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any (*sic*) land except a leasehold interest not exceeding three years or render such land liable as security for the payment of money.

By section 74 it is provided that

> upon the registration of any instrument * * * the estate, or interest specified therein shall pass;

(1) 2 Terr. L.R. 133 at p. 143; 26 Can. S.C.R. 282 at p. 288.

and by section 80, it is enacted that

> every instrument shall become operative according to the tenor and intent thereof, so soon as registered and shall thereupon create, transfer, etc., the land, or estate or interest therein, mentioned in such instrument.

Under clause 11 of section 2, "instrument" means

> any grant, etc., or any other document in writing relating to or affecting the transfer of or dealing with land or evidencing title thereto.

Under this definition the contracts both of the plaintiff and of the defendants were "instruments." Neither of them created or transferred any interest under the Act because unregistered. But the equitable interests or estates conferred by them would nevertheless be recognized and dealt with and would be enforced against the registered owner and others adverse in interest, in the exercise of the jurisdiction of a court of equity, *Re Massey and Gibson*(1). The plaintiff's caveat from the time it was lodged prevented the registration of any instrument except subject to his claim (section 139). *Primâ facie* that means subject to his claim as it stood at the time when the caveat was lodged. At that time both the plaintiff and the defendant had equitable rights as purchasers. The plaintiff had an agreement for a sale to him in respect of which he had paid $100 on account; the defendants had a like agreement in respect of which they had paid $700 on account. Inasmuch as every conveyance of an equitable interest is innocent, the defendants not having at that time taken any steps which would entitle them to priority or, which is the same thing, would entitle them to ask a court of equity not to interfere to deprive them of any

(1) 7 Man. R. 172.

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acquired right to call for a conveyance of the legal estate, and the plaintiff not having done or omitted to do anything whereby his priority would be impaired or affected, the defendants' claim as purchasers was still subject to his prior equity in respect of the half-section bought by him. That the plaintiff's caveat, if it had been lodged only after the defendants had obtained the formal assignment of their vendor's contract and had procured the assent of the railway company thereto, would still have sufficed to entitle him to prevent the registration of the defendants as owners under a conveyance to them from the railway company seems to me improbable, inasmuch as, apart from the provisions of the "Land Titles Act," the defendants would then have had a better right to call for the conveyance of the legal estate and would in equity be entitled to the protection of it against the plaintiff's prior equitable claim. But that question it is not now necessary to determine.

Whether a caveat duly lodged should be deemed notice is apparently an open question. *General Finance, Agency and Guarantee Co.* v. *The Perpetual Executors and Trustees' Association*(1), at page 744. Whether the plaintiff's caveat was in the present case notice to the appellants, in view of the fact that before it was lodged they had already made their contract and paid part of their purchase money, is, in the opinion of Newlands J., open to considerable doubt. But whatever its effect as notice, (and I incline to the view that it must be deemed notice to every person who claims to have acquired, subsequently to its being lodged, any interest in the lands, or to have increased or bettered any such interest already held), inasmuch as it is the

(1) 27 V. L.R. 739.

only means provided for the protection of unregistered interests and it was obviously intended by the legislature thus to afford adequate and sufficient protection for them, I am of the opinion that a caveat when properly lodged prevents the acquisition or the bettering or increasing of any interest in the land, legal or equitable, adverse to or in derogation of the claim of the caveator — at all events, as it exists at the time when the caveat is lodged. This, in my opinion, is the necessary result of a fair construction of sections 73, 74, 80, 81, 136 and 139 of the "Land Titles Act." I would refer to *General Finance, Agency and Guarantee Co.* v. *Perpetual Executors and Trustees' Association* (1); and *Re Scanlan* (2).

Moreover, as a document affecting the transfer of land, a caveat is an "instrument"; and section 81 provides that

> instruments registered in respect of or affecting the same land shall be entitled to priority, the one over the other according to the time of registration and not according to the date of execution.

It was, I think, incumbent upon the defendants McKillop & Benjafield before completing their purchase, to ascertain that no caveat had been lodged against the land, and, in default of their having done so, they cannot complain if the prior equity of the plaintiff, protected by his caveat, is held to be paramount. As put by Lilley C.J. in *Re Scanlon* (2), it is a

> plain, practical precaution for a purchaser * * * to ascertain that there is no caveat (in the registry) before he pays his purchase-money. * * * People cannot learn too soon that dealings outside, and without reference to the registry, are hazardous.

(1) 27 V. L.R. 739.

(2) 3 Queens. L.J. 43.

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The judgment for specific performance, against the defendants Gesman and McKillop & Benjafield appears to be unimpeachable. The Canadian Northern Railway Company having submitted their rights to the court may be taken to have waived any right which they might have had to refuse to approve of or recognize the assignment from Gesman to the plaintiff. Since they do not set up against the plaintiff the special clause in their agreement above quoted, their co-defendants cannot do so. The judgment for specific performance as against the company would, therefore, appear to have been quite proper. I express no opinion as to what the result should have been, if, in answer to the action, the railway company had pleaded and relied upon the special clause referred to and the exercise of any discretion which it conferred upon them.

For these reasons I would dismiss this appeal with costs.

BRODEUR J.—I concur in the opinion expressed by Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellants: *Embury, Watkins & Scott.*

Solicitors for the respondent: *Ferguson & McDermid.*

THE SHAWINIGAN HYDRO-ELECTRIC COMPANY (DEFENDANTS) . . } APPELLANTS;

AND

THE SHAWINIGAN WATER AND POWER COMPANY (PLAINTIFFS) } RESPONDENTS.

1911
*Nov. 10.
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*Feb. 20.

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

Municipal corporation—Statutory powers—Electric light and power—Waterworks — Immovable outside boundaries — Purchase on credit—Promissory notes—Hypothec—By-law—Loans—Approval of ratepayers — Special rate — Sinking-fund — Construction of statute—(Que.) 8 Edw. VII. c. 95—R.S.Q., 1909, tit. XI.—"Cities and Towns Act."

The council of the Town of Shawinigan Falls, acting under a special Act of incorporation, 8 Edw. VII. ch. 95, and the "Cities and Towns Act," R.S.Q., 1909, Title XI., enacted a by-law authorizing the purchase by the municipality of the appellants' electric light and power plant, which was situated outside the municipal boundaries, but within twenty miles thereof, for the purpose of establishing a system of electric lighting and waterworks within the municipality The price was to be paid in part by annual instalments, to be secured by the promissory notes of the municipal corporation, and the balance, being the amount of a subsisting hypothec and interest thereon, was to be satisfied by the corporation assuming the hypothecary obligations. The by-law had not been approved by a vote of the ratepayers, and it did not impose a special rate to meet interest and establish a sinking-fund, as required by article 5668 R.S.Q., 1909.

Held, affirming the judgment appealed from, (Q.R. 19 K.B. 546), Anglin J. dissenting, that the by-law was invalid.

Held, per Davies, Idington and Duff JJ., that the municipal corporation had no power to establish such works outside the boundaries of the municipality. *Per* Anglin J. dissenting, that in view of the situation of the electric and power plant, the

*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin J.

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peculiar circumstances of the case, and the special provisions of the Act incorporating the town, it was competent for the municipal corporation to acquire the property and to establish and maintain the works in question.

Per Davies J., Anglin J. contra, that the by-law was invalid for want of provision, either in itself or in another by-law contemporaneously enacted, fixing the necessary rate for the purpose of meeting interest and establishing a sinking-fund, as required by article 5668 R.S.Q., 1909.

Per Idington J., Anglin J. contra, that the by-law was one which required the approval of the ratepayers of the municipality, as provided by article 5783 R.S.Q., 1909, respecting loans, and, as their assent had not been obtained prior to enactment the by-law was invalid.

Per Anglin J.—The statutory obligation in respect of the imposition of a special rate to meet interest and establish a sinking-fund would be discharged by the levy of the necessary rates for those purposes from year to year until the debt to be incurred was extinguished.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of Three Rivers, and maintaining the plaintiffs' action with costs.

By the judgment appealed from the municipal by-law in question, authorizing the purchase of the electric light and power plant of the Shawinigan Hydro-Electric Co., was quashed and the municipal corporation of the Town of Shawinigan Falls and its officers were perpetually restrained from giving any effect thereto. The municipal corporation submitted to the judgment of the Court of King's Bench and the hydro-electric company took the present appeal.

The issues raised are stated in the judgments now reported.

Aimé Geoffrion K.C. for the appellants.

F. Meredith K.C. and *Holden*, for the respondents.

(1) Q.R. 19 K.B. 546.

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THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs.

DAVIES J.—This was an action brought to annul a by-law passed by the council of the Town of Shawinigan Falls authorizing the purchase from the appellants of immovable property with a power-house and plant thereon for $40,750, the property being admittedly situated outside of and beyond the territorial limits of the town. The sum of $15,750, part of the purchase money, was to be paid the vendor company in certain specified yearly instalments for which promissory notes were to be given by the town to the company. The balance of the purchase money, $25,000, was made payable

to the succession of the late William Burn to discharge the hypothec for that amount created by the company in favour of such succession.

In other words, the town proposed in its by-law to give its promissory notes in part payment of the purchase money and to assume an existing mortgage on the property for the balance. The by-law declared that the properties were being acquired by the town

for the purpose of an aqueduct and for the establishment of a system of electric lighting,

for the town and its inhabitants.

The by-law was adopted without having been previously submitted to the town's electors for approval and without incorporating in it, or otherwise providing for, a special annual tax to meet interest on the purchase money and provide a sinking fund. There was no indication in the by-law as to who or what property would be taxed.

The trial judge dismissed the action holding the by-law to be valid. The court of appeal (Archam-

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bault and Lavergne JJ. dissenting) allowed the appeal and annulled the by-law, on the grounds that the manner and way of establishing such a system of electric lighting as that contemplated was either that specially indicated in the "Cities and Towns Act" (1903), consolidated in the Revised Statutes of Quebec, 1909, arts 5256 *et seq.*, namely, by the imposition of a special annual tax on certain specially designated properties to defray the annual interest and to provide a sinking-fund and pay off the principal, or by the general method, namely, a loan with the approval of the rate-payers, neither of which was adopted by the council. The court of appeal further held that the town had not the power to issue promissory notes in part payment of the purchase money of the power-house and plant, etc., nor to assume the payment of the Burn mortgage which they held to amount indirectly to contracting a loan without the approval of the ratepayers.

The town submitted to the judgment of the court of appeal and the vendors (defendants) appeal to this court.

The questions raised before us are of great general importance involving the proper construction of the "Cities and Towns Act" of the Province of Quebec, 1903, and the powers and limitations of the councils of the towns and cities which come under its operation.

The appellants deny the validity of each and all of the grounds invoked to annul the by-law, and contend that the council had full power to purchase as they did, and give the promissory notes and assume the hypothec for the purchase money.

The respondents, in addition to supporting the judgment of the court of appeal on the grounds stated

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in their judgment contended that the by-law was illegal because the property attempted to be purchased was beyond the territorial limits of the town and necessarily involved, if purchased for the purposes intended, the carrying on of business outside of the town's territorial limits.

I have given much consideration to the questions involved and have reached the conclusion that the by-law is invalid and that the appeal should be dismissed on the two grounds, 1st, that neither the Act of 1908, 8 Edw. VII. ch. 95, revising and consolidating the charter of the Town of Shawinigan Falls, nor the "Cities and Towns Act," 1903, to the operation of which the town, by the 2nd section of the Act of 1908, is expressly made subject, authorized the council to pass the by-law in question for the purchase of the power-house, plant and property outside of its territorial limits; and 2ndly, if the extra-territoriality of the property purchased was not a fatal objection, the absence of the statutory provision, either in the by-law itself or otherwise, for meeting the interest on the cost of the purchase and to establish a sinking-fund to liquidate the principal as provided for in the section 5668, R.S.Q., of the "Cities and Towns Act," was fatal.

These two clauses of the Act, R.S.Q., arts. 5667 and 5668, are so important and controlling that I set them out in full:—

5667. The council shall have all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light their houses, buildings or establishments.

5668. The council may, by by-law, in order to meet the interest on the sums expended in introducing a system of lighting and to establish a sinking-fund, impose on all the owners or occupants of houses, shops or other buildings, an annual special tax, on the assessed value of each such house, building or establishment, including the land.

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I do not think the general loan-clauses of the Act contained in para. 28, articles 5776 to 5789, could be invoked to borrow the purchase moneys required. If they could, any by-law under them would require the approval of a majority in number and in real value of the proprietors who are municipal electors and who have voted.

Of course no such approval was sought for in this case because no attempt to borrow money under the loan-clauses of the Act was resorted to; but it was strongly contended by Mr. Geoffrion that, if the council could resort to the general loan clauses of the Act to raise the money required and was not limited to the special method designated by article 5668, they could on similar reasoning resort to any other general power the Act gave and that the one they resorted to was, therefore, good.

It is true that article 5776 of these loan-clauses authorizes the council to "borrow moneys generally for all objects within its jurisdiction," but I do not think these general words could be construed to apply "to the establishment and management of a system of lighting" as given in article 5667 because the method of raising the necessary funds for that special purpose is pointed out and defined in article 5668 and involves a special annual tax to defray interest and provide for sinking fund upon a special class of ratepayers and a special class of property.

The "special annual tax" required to be levied to meet the interest and the sinking-fund, under the general clauses relating to loans, is to be levied upon all the ratepayers and the council is obliged to provide for such interest and sinking fund "out of the general revenues of the municipality" while the "special annual tax" required to be levied for the estab-

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lishment and maintenance of a system of lighting is to be levied upon the special class of ratepayers who own or occupy houses, shops or other buildings, and upon this special class of property only. This would seem to my mind conclusive as against the right of the council to invoke these general loan clauses for the establishment of a system of lighting.

I do not agree with the contention that, because the legislature used the word "may" in this section of the Act and not "shall" that, therefore, the provision is to be construed as permissive only and not imperative. I think the intention of the legislature to authorize the establishment and management of a system of lighting is clearly expressed in article 5667 and the intention that the cost of such establishment and its maintenance should be imposed upon a specially designated class of citizens, and a specially designated class of property is equally clearly expressed in article 5668.

The exercise of the power to establish and manage the system necessarily involved resort to the special method prescribed of raising the necessary funds. It was not, in my opinion, open to the council to evade that expressed intention by adopting another and different system, such as borrowing the necessary moneys under the loan-clauses of the Act, or issuing promissory notes for the purchase money, and so throwing the burden off the special class and the special properties the Act said should bear it, upon the shoulders of the ratepayers generally.

Something might possibly be said in favour of the council's power to raise the necessary moneys by "loan" because such method involved the submission of the by-law to the ratepayers for their approval and, from that standpoint at any rate, might not appear

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as unjust, but for the reasons I have given I do not think resort could be had to an ordinary loan to establish the lighting system.

But I certainly cannot find any reason for so construing articles 5667 and 5668 as to justify the council's action in evading the expressed intention of the legislature by adopting a method of establishing a lighting system which, if sustained, would impose upon the town and the ratepayers generally a heavy debt with its necessary accompanying taxation, without either submitting a by-law, for the power to borrow the money necessary, to the municipal electors or imposing the special tax prescribed upon the owners or occupants of the property built upon for the payment of the interest and the sinking-fund.

This by-law, the annulment of which is sought for in this action, neither imposes the special tax required to be levied for the establishment of a lighting system nor provides for the raising of money by loan to pay for such establishment. The method adopted of giving the notes of the municipality for part of the purchase money and assuming the payment of the hypothec then upon the property for the balance of such money without either resorting to a loan which involved obtaining the approval of the electors, or to the prescribed taxation upon the house and building owners, was, in my judgment, a bold attempt to evade the expressed intention of the legislature.

It was sought to uphold the power to give the town's promissory notes for part and to assume the amount of the hypothec then upon the property for the balance of the purchase money under the general powers given to the council by article 5279, but, as I have already said, in my opinion, these general powers

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are like the loan-clauses and have no application to the special power given to establish and maintain a lighting system which is coupled with a special and prescribed method of raising the moneys necessary for the purpose on special classes of ratepayers and property. This method and this alone, in my opinion, can be resorted to when carrying out the powers given to establish a lighting system and when the council formally determines to establish such a system the duty becomes imperative upon it to provide the means of paying the interest and the annual sinking-fund in the special manner prescribed by the Act. The word "may" in the section must be read as "shall" and when imposing a debt upon the town for the establishment of a lighting system the council must at the same time provide for the imposition of the taxes prescribed by article 5668 necessary to pay the interest and the sinking fund to discharge that debt.

It is contended that the council may yet do this and that the by-law under which the property was purchased and the debt imposed upon the town is not necessarily bad because neither in it nor otherwise concurrently with it was any attempt made to comply with these special provisions of the Act.

In my judgment it is entirely opposed to the scheme and objects authorized by the legislature that the council should in the first place establish the system and impose the debt upon the town and leave to the chapter of accidents the adoption of the methods of defraying the expenditure specially indicated by the legislature. The establishing of the system and the incurring of the liability for the necessary expenditure were made, by the statute, duties to be exercised contemporaneously with the imposition of the taxes specially authorized to meet that expenditure.

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Difficulties of one kind and another have been suggested as to the working out of the statutory scheme, but I do not see any that are insuperable, and if there are any such they can be met only by amending legislation and cannot affect the proper construction of the articles and clauses of the Act as they now stand.

The next reason why I hold the by-law to be illegal is that the property purchased by virtue of it and the business to be carried on and in connection with the power-house to generate the electricity required, is beyond the territorial limits of the town and not authorized by the Act.

Article 5667 of the "Cities and Towns Act," R.S.Q., 1909, which confers the power to establish and maintain a lighting system was amended by the special Act of 1908 revising and consolidating the charter of the Town of Shawinigan Falls, section 18, by adding words authorizing the council to sell

> the surplus power produced by the power generating the electricity which it may have acquired or established for such purpose to the municipality of the Village of the Shawinigan Falls or to its inhabitants and to the Grand'Mère Electric Company or its successors.

The village and the company alike are beyond the territorial limits of the Town of Shawinigan Falls, and it has been suggested that the amendment conferred upon the town other and broader powers than the article 5667 of the "Cities and Towns Act" gave. It certainly does so far as the sale of surplus power is concerned; but not otherwise. The legislature evidently thought that the right to sell surplus power outside the town's territorial limits required express words to confer it, while if the appellants' contention is sound that the general words of the section as amended authorized the establishment of power-houses to gen-

erate electricity outside the territorial limits of the towns, the lesser power of selling the surplus power to other towns or companies would be necessarily implied and the express power to sell outside unnecessary. The amendment, therefore, rather indicates that the legislature did not intend, in passing article 5668 of the "Cities and Towns Act," to confer the greater power upon the towns and cities of establishing power-plants for lighting purposes beyond their limits.

But, assuming the amendment not to have any effect upon the construction of article 5667 beyond the express powers the words of the amendment give — what is the true construction of this article 5667 of the "Cities and Towns Act" ?

The consolidated Act of 1909, by its first section, is made applicable not only to all cities and towns thereafter incorporated by statute or letters patent, but to all cities and towns under special Acts which shall be declared subject to the general Act and to all cities and towns which had become subject to the "Cities and Towns Act" of 1903.

It is, therefore, practically a general Act applicable to the towns and cities of the whole province brought within its operation and is to be construed as such and not with reference to any special local conditions of particular cities or towns.

No language of any kind is used indicating an intention that the powers given might be used outside of the territorial limits of the municipality, and to give such a construction to the section it would be essential to hold that the application of such powers extra-territorially was clearly intended because they were necessary to the exercise of the powers themselves.

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Reading the Act as a whole, I am drawn to the conclusion that general words conferring powers upon a municipality brought within its operation must be given a territorial limitation unless from the very nature of the power it must be held that it was to be exercised extra-territorially, and that where it is intended that general powers, not absolutely necessary to be exercised extra-territorially, should, nevertheless, be so exercised, apt language must be shewn to evidence such a legislative intention.

Read articles 5280 and 5281, R.S.Q., 1909, which are as follows:—

> 5280. The territory of the municipality shall be that specified by its charter.
>
> 5281. The corporation shall have jurisdiction for municipal and police purposes and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it.

Here is found an express declaration that not only for municipal and police purposes, but *for the exercise of all the powers conferred upon it the corporation should only have jurisdiction "beyond its territory in special cases where more ample authority is conferred upon it."* That declaration seems to me to impose upon a corporation, acting under the powers given in that Act, the duty of shewing either that the powers the exercise of which were challenged as illegal were exercised within territorial limits, or, if beyond those limits, were only carried beyond to an extent *necessary* for their exercise, and so fairly to be implied from the language conferring the power, or *that express power to exercise the challenged powers beyond territorial limits was given.*

Then article 5588 (section X.), under the heading or sub-title "Powers of the Council," repeats over

again the statutory limitation as to territory in the exercise of the council's jurisdiction which article 5281 above quoted enacted. It says:—

> The council shall have jurisdiction throughout the extent of the whole municipality, and beyond the limits thereof in special cases where more ample authority is conferred upon it.

Now it is generally the case that special powers to act or carry on works extra-territorially are found in special charters given to municipalities and the general Act I am discussing in several analogous instances to the immediate one before us has conferred the "ample authority" required by article 5281 for special cases of extra-territorial work.

Take section X., para. 10, relating to "Water Supply" for the towns and cities. One would suppose that the necessity in obtaining such supplies of going beyond its limits and constructing the necessary water-works would, in such a case above any other, necessarily be implied, but in this section conferring the powers the legislature first in article 5645 gives in general terms the power to provide for the establishment and maintenance of water-works, reservoirs, etc., to supply water to the municipality and then takes special care in article 5646 to give the municipality power to "construct and maintain *in and beyond its limits for a distance of twenty miles the water-works,*" etc., authorized by article 5645; also in article 5647 power is expressly given the municipality to

> acquire and hold any land, servitude or usufruct, within its limits or *within a circuit of twenty miles thereof.*

Take also paragraph 15, relating to "Abattoirs." Article 5679 gives in express words power to

> establish, regulate and manage public abattoirs, either within or *without the municipality.*

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Here we find two instances at least of analogous powers conferred, one with respect to providing water-works to supply the towns with water and the other with respect to abattoirs, which concerned the health of the citizens, and in both cases we find extra-territorial powers expressly given while with respect to lighting the town with electricity any such extra-territorial powers are absent and withheld.

Construing, therefore, these sections providing for the establishment of "a system of lighting by gas, electricity or otherwise" in the cities, and towns in which sections no reference whatever is made to the exercise beyond the municipality's limits of the powers conferred, with the sections relating to waterworks and water and to abattoirs where it is specially declared that the powers given may be exercised extra-territorially, and construing them in the light of article 5281, above quoted, which gives jurisdiction to the municipalities (*inter alia*) for the exercise of all powers conferred upon them over its territory and beyond when specially conferred, I have no difficulty in limiting the exercise of the lighting powers they confer territorially, nor have I for the same reasons any difficulty in construing the general article 5279 giving the municipality the power to acquire movable and immovable property and to draw promissory notes, etc., in the execution of any of the powers conferred upon it by law as being confined to the territorial limits of the municipality and not exercisable with respect to property beyond them unless in cases where express extra-territorial powers have been given or where they will be necessarily implied from the very nature of the power exercised.

No such express extra-territorial power is given

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with respect to the lighting contracts; it should not in my opinion be implied as existing and arising necessarily out of the power to establish a lighting system, and, therefore, does not exist at all.

I have referred to and read the authorities which the respondents cite in their excellent factum, but I agree with Mr. Geoffrion that the question we have to decide is not one upon which authorities will help us very much. It is one of the fair and reasonable construction of the powers conferred on the councils of cities and towns by a general Act of the Legislature of Quebec.

I do not understand Mr. Geoffrion to controvert or question the general rule that a municipal corporation can exercise its corporate powers only within its territorial limits.

What he contended was that the general powers of the "Cities and Towns Act" were expressed in terms amply broad enough on a fair and reasonable construction to vest the council with the power of purchasing this power-house and plant admitted to be outside of the municipality, and that the method adopted for its purchase was also within the council's powers.

For the reasons given I cannot agree to either of his contentions, but conclude that the by-law in controversy is *ultra vires* and illegal.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—This appeal is taken by a corporate body that claims to have entered into a contract with the municipal corporation known as the Town of Shawinigan Falls, in the Province of Quebec, for the purpose of selling to the latter corporation an electric

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plant, including therewith a real estate property beyond the limits of the town.

The council of the town passed an alleged by-law to carry out said purchase involving a price of about $40,000.

The respondent, the Shawinigan Water and Power Company, being ratepayers objected and instituted this suit to set aside such proceeding on the grounds, amongst others, that, unless and until the ratepayers had approved, the council could not make such a contract, and that, in any event, the municipal corporation had no power to buy such real estate beyond the limits of the town.

We must never forget that a municipal corporation is the mere creature of a statute and can only exercise such powers as the statute gives it and in the manner given thereby.

It is urged that power was given by statute to the council to establish a system of gas or lighting by electricity and a further power to sell the surplus product when established.

These powers pre-suppose that the purpose permitted must be exercised in the manner in and by which the council, by its general power of creating debt, is enabled to so act.

If the establishment of either system had been possible within the means of the taxing power the council possessed, it was quite competent for it to have installed such a system.

It is conceivable a small beginning of that kind might have been instituted, but this far exceeded such a thing.

It is entirely beyond the purview of the special and general statutes on which the council of this

municipal corporation rests for all its authority that if without the ratepayers' vote can make such a contract as herein is involved.

If the price to be paid had been such as to fall within the powers of the then existent council relative to the imposition of rates or taxes, it might by virtue of the authority given and exercised have contracted for an electric plant.

Indeed, had it been attempted to found the contract upon an exercise of the special taxing power given by article 5668, R.S.Q., 1909, relative thereto, I am not prepared to say it would have been absolutely impossible to bind such specially selected classes of ratepayers as there had in view. I have not fully considered what are the possibilities involved therein, for it is entirely another thing that is being attempted. The vendor is not, by the terms of the by-law or bargain, to look to any special class, but to the entire body of ratepayers. We must, therefore, consider it as seeking by this by-law to bind the entire body of ratepayers. It is not a mere question of making one by-law as to part of a project and another later on, as may occasionally happen, in order to complete the business. The attempt is to mortgage, once and forever, the whole ratepaying property of the town, and contract on that basis. It is no answer to say the town had another power even if it had in truth as to which I say nothing.

The truth is the whole business seems to have been gone about under a misapprehension of the powers of the council, or disregard thereof.

The price exceeded the taxing powers of the council for the then current year and the ordinary power to contract or which by any reasonable implication

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could extend to a contract covering the long term over which the payments to be made in liquidation were spread.

Cases have been cited where a town has been made to pay for a fire-engine when the sale had been fully executed by the delivery and use thereof by the corporation, even when a doubt existed as to the council having acted properly. In all these cases I have seen, no doubt existed of the power to enforce by sufficient levy the price in any given year.

Even of such like cases when, as in the case of *Waterous Engine Works Co.* v. *Town of Palmerston* (1), which came to this court, the transaction has been nipped in the bud, as is sought to be done here, it has been held null when the goods had not been fully delivered and accepted, and the necessary forms had not been gone through for so completing the contract as to make the town a debtor.

A clumsily worded section in question here seems to give ground for saying some one contemplated the extensive system of the town not only supplying its own wants and those of its inhabitants, but also undertaking to produce and sell to an unlimited extent to others. But the very words imply that the usual powers vested in the council for the legal establishment of such works must be resorted to. To permit the execution of such a remarkable scheme was going a long way, but for us to tack on to it the power to dispense with the sanction of the people to pay would be going still further.

The council never sought the proper means of referring the question to the ratepayers to pass upon it.

(1) 21 Can. S.C.R. 556.

Appellants should have got a further amendment to the charter, either imposing the imperative duty on the council to carry out the scheme which might have implied dispensation from consulting the people, or by express language dispensing therewith.

It is not merely the form of a loan that is in question, but the absence of any distinct power in the council enabling the creation of an indebtedness which has to be provided for over a term of years in the future. In the absence of any such power to create indebtedness the municipal council has no implied power.

Borrowing to pay any debt extending over a period of years is what the general power contemplates. Certainly the council cannot do that indirectly which the law does not permit to be done directly.

It is urged that the power of establishment having been given everything else is to be implied, including the power to buy real estate outside the town.

Where a duty had been imperatively imposed upon a municipality and had to be discharged in obedience to a statute things necessary to be done to obey the law have been held impliedly as within a council's absolute power. The case of *Pratt* v. *City of Stratford*(1), was such a case. The obligation of the city there rested on a statute imposing a duty, and similar cases are to be found cited in the argument or judgment in said case. No such duty had been imposed here. It was left entirely optional.

If every power a municipal council has entrusted to it, were to be held as carrying therewith every pos-

(1) 16 Ont. App. R. 5.

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sible implication of power needed to execute it and to create without regard to the ratepayers debts to be met in future years, I fear our municipal system would receive some severe strains. It is urged that the town had power to buy land outside the municipal limits for water-works. Such a power has existed ever since 1857 by statute. But this transaction does not proceed thereupon. And, indeed, that power could not be used for any indirect purpose of trying to produce something else.

The two purposes might well be executed together if the legislature had said so, but it has not. And the mere fact that such express power had to be given by statute to enable the town to acquire land outside, is evidence of what the law has ever been held to be.

Some American cases are cited to shew this power exists by implication.

Of those cited a number clearly give no countenance to the proposition, but rest on statutory powers expressly given.

I was surprised to hear it said that the late Judge Cooley had given his sanction to such a proposition in the case of *The Mayor of Detroit* v. *The Park Commissioners* (1). But, on reference to that case, page 605, I find his position entirely misconceived. He said in his judgment therein:—

> But if we were to concede all that respondents claim in this regard the case would be still undetermined. This is not the ordinary case of a city park. Belle Isle is outside the city limits, and it is not pretended that the city could have purchased, improved, and controlled the same as a public park except by virtue of special legislation. This legislation was obtained (Local Acts, 1879, p. 215), and it not only empowered the city to purchase and create a debt therefor, but to erect a toll-bridge across to the island, and to extend its police authority over the territory. Here were very important

(1) 44 Mich. 602.

franchises which the city could not pretend to claim except by this sovereign grant.

In the same case there is an expression in relation to some cases cited which to a hasty reader might suggest some such notion as advanced in argument. But an examination of the sentence does not warrant it and a reference to the cases in question shews clearly the learned judge spoke of something else and in no way related to this point.

Another of these cases illustrates how difficult another able judge felt it to maintain even a small contract to procure an outlet to a sewer. The contract only involved the expenses of procuring labour, so far as I can see. And the case might well have rested on the imperative statutory duty to avoid a nuisance. The head-note is entirely misleading in this latter case.

It is not necessary, as this case has been fully dealt with in the court below, again to analyze as has so well and exhaustively been done in the court appealed from, all the statutes bearing upon it. I do not bind myself to uphold every opinion on minor details expressed in course of that work, but reaching, in the main, the same results, I do not see fit to enter upon the repetition of what I approve.

I think the appeal should be dismissed with costs.

DUFF J.—I think the appeal should be dismissed on the short ground that section 18 of the special Act of 1908 (chapter 95) does not authorize the establishment or maintenance outside the municipal boundaries of the works to which that section refers. Article 5281, R.S.Q. (1909), which admittedly governs the municipal corporation in question, provides:—

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5281. The corporation shall have jurisdiction for municipal and police purposes and for the exercise of all the powers conferred upon it, over the whole of its territory, and also beyond its territory in special cases where more ample authority is conferred upon it.

It seems to me to be indisputable that the "power to establish and maintain a system of lighting" by gas or electricity with which this municipality is invested by its special Act is one of the "powers" referred to in this article. Ambiguity, no doubt, lurks in the word "powers" and there are some corporate capacities and faculties commonly described as "powers" (the capacity to contract as suggested by Mr. Geoffrion is an instance of them), the exercise of which outside the municipal limits the legislature cannot have intended to prohibit. It is not necessary for the purposes of this case to define with precision the classes of powers which fall within the scope of the section in question. I see no reason to doubt that it does apply to all powers in respect of the establishment or operation of municipal undertakings which are *privilegia* in the strict sense. Wherever a corporation to which article 5281 applies is empowered by the legislature to construct or operate works which may in the construction or operation of them affect others prejudicially and where, by reason of such statutory authority, the responsibility of the corporation for harm caused by acts done in the course of exercising or professing to exercise such powers is determined by a rule which is not the same as that applicable to determine the responsibility of persons doing the like acts without statutory authority — then unless there be some legislative provision which expressly or impliedly provides to the contrary the powers so conferred are powers which under the terms of that article must be exercised within the municipal

limits. It seems to me to be incontestable that the powers conferred by section 18 are powers of this character. If the corporation were, for example, to establish a system of lighting by electricity under that section, it is not doubtful that their responsibility for harm arising from the operation of such a system would be governed by the principles of *Canadian Pacific Railway Co.* v. *Roy*(1), and *Dumphy* v. *The Montreal Light, Heat and Power Co.*(2), and not by articles 1053 and 1054 of the Civil Code. It was clearly not intended that the municipality should enjoy such a qualified immunity in respect of works established outside the municipal limits except in cases in which it is otherwise specially provided.

I should notice Mr. Geoffrion's contention that it is impracticable to establish within the municipal limits such works as those contemplated by section 18 and that, consequently, the authority to exercise the powers conferred by that section beyond those limits must be implied as necessarily incidental to the powers expressly conferred. Now such an implication is not permissible unless, on reading the relevant provisions of the Act as a whole, you find that they are not incompatible with the inference that the legislature intended to give the authority which is to be implied. It appears to me that article 5281 in terms forbids such an inference unless there is something in the language of the enactment by which the power is conferred indicating an intention that it is to be exercisable beyond the municipal limits. In the special Act there is in respect of the establishment and maintenance of a system of lighting (whatever may be

(1) [1902] A.C. 220. (2) [1907] A.C. 454.

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said respecting the authority to sell surplus power) nothing in the least degree indicating any such intention.

ANGLIN J. (dissenting). — In this action the validity of a by-law of the Town of Shawinigan Falls providing for the purchase of the plant and undertaking of the Shawinigan Hydro-Electric Co. (the appellants) is impugned by a rival company (the respondents).

The grounds of attack are:—

(1) That the plant to be purchased is situate outside the limits of the town.

(2) That the purchase involves the making of a loan by the corporation without the assent of the ratepayers required by law.

(3) That the by-law does not provide for an annual special tax on the owners or occupants of buildings to meet the interest on, and to provide a sinking-fund to repay, the debt to be incurred.

(4) That the scheme includes the giving of promissory notes by the town corporation for a considerable part of the purchase price.

Other grounds of attack were abandoned.

Without determining whether or not, if its powers depended solely on the general provisions of the "Cities and Towns Act" (R.S.Q. 1909, arts. 5256 *et seq.*), the acquisition by the Town of Shawinigan Falls of a power plant and electric light undertaking partly situate outside the town limits would be *ultra vires* (*vide* Dillon's Mun. Corporations (5th ed.), sec. 980, note 1), I am of the opinion that, having regard to the peculiar circumstances and to the special legislation enacted for the town, it was within its powers,

if otherwise properly exercised, to acquire this property beyond the municipal limits.

Article 5667 of the Revised Statutes of Quebec reads as follows:—

> The council shall have all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light their houses, buildings or establishments.

The corresponding provision in the charter of the Town of Shawinigan Falls (8 Edw. VII. ch. 95, sec. 18) reads:—

> The council is vested with all the necessary powers for the establishment and management of a system of lighting by gas, electricity or otherwise, for the requirements of the public and of private individuals or companies desiring to light up their houses, buildings or establishments, and for selling the surplus power produced by the power generating the electricity which it may have acquired or established for such purpose to the municipality of the Village of Shawinigan Bay or to its inhabitants, and to the Grand'Mère Electric Company or its successors.

The acquisition, as distinguished from the establishment, of a power development is clearly contemplated by this special article. It cannot have been the intention of the legislature to confine the town to the acquisition of a steam-power or plant in view of the many advantages of generating electricity by water-power, the general use now made of water-power for that purpose and the exceptionally favourable situation of the town for the utilization of such power. Moreover, the legislature would seem to have contemplated the acquisition of a power generating surplus energy. It provides for the disposition of the surplus power produced to another named municipality and to a named company. This provision obviously contemplates the acquisition of a water-power. It is most improbable that the legislature would

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authorize the town to embark in the business of producing power generated by steam in excess of its own requirements and selling the surplus to a neighbouring municipality and an electric company. The capacity of a steam-plant can be accurately gauged. But in order to secure a suitable or available water-power it might be necessary to acquire one which would produce considerable surplus energy. It would perhaps be too much to infer that the legislation of 1908 was enacted to enable the town to acquire the plant of the appellant company, which was actually supplying electric energy to the municipality and the company to which the town is authorized to sell its surplus power, although if this was not intended it is a little difficult to understand why these two bodies were named as prospective purchasers of the surplus. But it is certainly not unreasonable to assume that the legislature was informed of the situation at Shawinigan Falls in regard to water-powers: that it knew that no water-power within its limits was available to the town; that, by its ownership of the lands along the river bank, the respondent company was in a position to prevent the town acquiring any water-power within its limits; and that, if a water-power was to be acquired by the town, it must be in adjacent territory outside its limits. The evidence establishes these facts. When, therefore, the legislature specially provided for the acquisition by the town of a "power" and for the disposition to a neighbouring municipality and to a company of the surplus energy produced from such power, it seems a reasonable, if not a necessary inference, that it contemplated and intended to sanction the acquisition of a water-power situated outside the town limits. Of course

this purpose might have been more clearly expressed. Had it been, we probably should not have had this litigation.

Moreover, under the by-law, the property in question is to be acquired not merely for electric lighting purposes, but also for the establishment of water-works. Under the provisions of the "Cities and Towns Act," now consolidated as articles 5646-7, R.S.Q., 1909, the town had the right to acquire for water-works property situate within a radius of twenty miles beyond its limits. The property in question is within that radius. There is nothing in the record which warrants an inference that the town council did not *bonâ fide* intend to utilize it for the establishment and maintenance of water-works — nothing to justify the conclusion that the reference in the by-law to the establishment of water-works was introduced merely as a cloak to cover up any possible illegality in the acquisition of outside property for the purpose of an electric lighting system.

Articles 5281 and 5588 of the Revised Statutes of Quebec, bear upon the governmental authority of the municipality, not upon its right to own and use property. Dillon on Municipal Corporations, sec. 980, n. 1 (5 ed.).

For these reasons I think the first objection to the by-law fails.

Neither can I accept the view that a purchase of property by a municipality on credit involves the contracting of a loan within the purview of articles 5776 *et seq.*, R.S.Q. That it involves contracting an indebtedness is clear; but I think the distinction between the borrowing of money and the contracting of a debt as the result of a purchase on credit is equally

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clear. Dillon's Municipal Corporations (5 ed.), sec. 279(*n*). The "Cities and Towns Act," in article 5783, R.S.Q., marks the distinction between loan and other municipal indebtedness. A perusal of the articles 1762-1786 of the Civil Code, defining and dealing with loans, has satisfied me that the legislature did not intend to include under the term "loans" in the "Cities and Towns Act" debts incurred for purchases made on credit.

Nor does the fact that the property is acquired subject to a hypothec put the purchaser in the position of a borrower or give to the transaction any of the legal notes of a loan. True, the borrower obliges himself to pay to the hypothecary creditor the part of the purchase price represented by the amount secured by the hypothec; but he pays it as purchase money, not as the return of money borrowed. Of course, there might be a case in which a vendor had been induced to hypothecate his property on the eve of selling it to a municipality in order to enable the latter to evade the provisions of the law restricting its borrowing powers. When such a case is made out the court will, no doubt, find means to prevent an evasion of the law. This is not such a case. It is an ordinary purchase on credit of property subject to a hypothec with the result that part of the purchase price becomes payable not to the vendor, but to the hypothecary creditor to satisfy his charge.

I agree, however, with the majority of the learned judges of the Court of King's Bench that the provisions of article 5668, R.S.Q., should, notwithstanding the use of the word "may," be construed as imperative in the event of the exercise by the council of the power conferred by article 5667 in such a manner that it involves incurring a debt.

Money for the purchase or establishment of a municipal electric lighting system might, I incline to think, be raised by a loan contracted under the provisions of articles 5776 *et seq.;* and, in procuring money in this way, submission to the "proprietors who are municipal electors" would be requisite (art. 5782, R.S.Q.). Provision for re-payment of such a loan would, of course, be made under article 5777, R.S.Q. The money to pay it having been thus procured, no provision for future expenditure on account of the purchase price would be necessary and the duty imposed by article 5668, R.S.Q., would, in that case, not arise.

But if, instead of borrowing the money for that purpose, the municipal corporation purchases its plant upon credit, thus incurring a debt — a course which the provisions of articles 5667-8, R.S.Q., clearly imply its power to adopt — the council is obliged to exercise the powers conferred by article 5668 to meet the interest on the debt and to establish an adequate sinking-fund to pay the principal. The "Cities and Towns Act" contemplates indebtedness being incurred otherwise than by loan (article 5783), but it contains no provision, such as is frequently found in municipal legislation, (*vide* "Ont. Mun. Act," 1903, sec. 389), prohibiting the raising on the credit of the municipality of any money not required for ordinary expenditure and not payable within the municipal year otherwise than under a by-law submitted to the ratepayers. The burden of the special tax for payment of the expenditure being imposed upon the "owners or occupants of houses, shops or other buildings" (article 5668), and the total debt of the town not amounting to twenty per cent. of the value of the

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taxable immovable property (article 5783), no reason exists for requiring the approval of other ratepayers or proprietors. Not only do articles 5667 *et seq.* contain no reference to an approval of the expenditure for establishing a lighting system by electors or taxpayers being required, but there is no means provided in the statute for obtaining the approval of "owners or occupants of houses, shops, or other buildings." If, without the authority of express legislation, such as we find in articles 5667 *et seq.*, a town council would possess the power to make such an extraordinary expenditure as is involved in the acquisition or establishment of an electric lighting system, it certainly would not have the still more extraordinary power to make such a purchase on credit and to impose the debt thus created as a burden upon present and future owners or occupants of buildings without their assent. That a town council has the latter powers is an implication from article 5668. It follows, I think, that in exercising them, while the assent of owners or occupants of buildings or of ratepayers or electors is not required, the provisions of article 5668 are obligatory.

But, must the council, in the same by-law which provides for the purchase, or concurrently with its passage, at the peril of its being held invalid and quashed should it omit to do so, provide for the imposition of the special annual tax directed by article 5668 ? I think not. The exercise of the power conferred by article 5667 entails the obligation to provide for interest on any debt thus created and for a proper sinking-fund. To create this obligation a declarative recognition of it by by-law is not required and would serve no purpose. The obligation arises out of the in-

curring of the debt. To provide when enacting the purchase by-law for the levy of the annual special tax to meet interest and sinking-fund seems to be both unnecessary and impracticable. Revenue from the system may provide the amount needed in whole or in part. That revenue will vary from year to year. The special tax to be imposed for the annual interest and the sinking-fund, or for so much of them as the revenue, if applied to that purpose, does not cover, is to be an annual tax. The value of the property assessable may also vary from year to year. If the council were obliged to provide at the time of the purchase for the annual rate of the special taxation to be levied in each year, a figure too large or too small might be named. It is the right of the creditor that adequate provision be made; it is that of the taxpayer that the tax shall not be excessive. The rate of the tax may, no doubt, be struck in advance in each year upon an estimate of the amount required to be raised and of the value of the assessable property. An annual by-law imposing it and directing its levy would seem necessary. The council may be restrained from paying any part of the debt, principal or interest, out of its general funds or revenues. In proper proceedings, it may be compelled, by mandamus, to impose in any year a special tax under article 5668, adequate to provide for the interest and a proper sinking-fund so far as they are not met out of the revenue. But I find nothing in the Act which requires the council, when enacting the by-law for the acquisition or establishment of a lighting system, to provide even for the imposition of the annual special tax for the first year — still less for imposing that tax during the whole term of the debt.

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The obligation to impose an annual and an adequate tax exists. The council may be compelled to discharge that duty from year to year. It may be restrained from diverting other funds or sources of revenue to that purpose. The interests of the creditors on the one hand and of the general ratepayers on the other being thus protected, I see no reason to hold the by-law in question invalid because the council has not by it, or by a by-law enacted concurrently, formally declared that interest on the debt incurred and a sinking-fund to meet it shall be provided for by the annual special tax mentioned in article 5668, or that owners or occupants of buildings in the town shall be liable to such tax when annually imposed. *Lex neminem cogit ad inutilia.*

The failure to provide, in the impugned by-law, for the imposition of the special tax under article 5668 is not alleged in the declaration as a ground of its invalidity. This point was raised for the first time in the judgment of the majority of the learned judges of the court of appeal.

If empowered to acquire the property in question and to incur a debt in acquiring it, the town would appear to have the right to give its promissory notes to evidence that debt (art. 5279, R.S.Q., pars. 2 and 4). The provision in it for the giving of such notes would not in any case suffice to render the by-law void although the notes themselves should be held invalid.

For these reasons I would with respect allow this appeal with costs in this court and in the Court of

King's Bench and would restore the judgment of the learned trial judge.

Appeal dismissed with costs.

Solicitors for the appellants: *Geoffrion, Geoffrion & Cusson.*

Solicitors for the respondents: *Meredith, MacPherson, Hague & Holden.*

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*Oct. 11, 12, 16, 17.

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*March 21.

WILLIAM J. SMITH (PLAINTIFF) ....APPELLANT;

AND

THE NATIONAL TRUST CO. (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Mortgage—Manitoba "Real Property Act"—Power of sale—Special covenant — Notice — Statutory supervision — Registered title—Equitable rights—Possession by mortgagee—Limitation of action —Construction of statute, R.S.M., 1902, c. 148, s. 75—"Real Property Limitation Act," R.S.M., 1902, c. 100, s. 20.

In respect of lands subject to the operation of the "Real Property Act," R.S.M., 1902, ch. 148, mortgagees have no registered interest, but merely obtain powers of disposing thereof; these powers do not vest as incidental to the estate mortgaged, but are efficacious only by virtue of the statute. Where the mortgage stipulates for a power of sale, on default, without notice, and contains no proviso dispensing with the official supervision required by the statute, a sale by the mortgagee, purporting to be made under that power, without compliance with the requirements of section 110 of the Act or an order of the court, cannot operate to extinguish the registered title of the mortgagor. Judgment appealed from (20 Man. R. 522) affirmed, Idington and Anglin JJ. dissenting.

Per Davies, Duff and Brodeur JJ., affirming the judgment appealed from (20 Man. R. 522).—The registered title of mortgagors in lands subject to the operation of the "Real Property Act," R.S.M., 1902, ch. 148, and of persons claiming through them, are protected by the provisions of the 75th section of that statute denying the acquisition of title adverse to or in derogation of that of the registered owner of such lands by length of possession only; the limitation provided by section 20 of the "Real Property Limitation Act," R.S.M., 1902, ch. 100, in favour of mortgagees, has no application to lands after they have been brought under the "Real Property Act."

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Metcalfe J., at the trial and dismissing the plaintiff's action with costs.

The case is stated in the judgments now reported.

J. B. Coyne, for the appellant.

C. P. Wilson K.C. and *A. C. Galt K.C.* for the respondents.

DAVIES J. agreed with Duff J.

IDINGTON J. (dissenting).—In December, 1892, one Beattie mortgaged land in Manitoba to mortgagees whose assignees, exercising a power of sale therein, on default, sold the lands to appellant by a written agreement dated on the 10th of June, 1901, and followed that by a deed of 24th November, 1908, which purported to transfer said lands pursuant to said sale to appellant.

The mortgagees had taken possession some six years before the said sale. Prior to all these transactions the land had been brought under the "Torrens System" of registration, and so continued.

The registrar refused to register the above mentioned deed of transfer on the ground that the steps required by the "Real Property Act," R.S.M. 1902, ch. 148, as amended, for selling under mortgage, had not been taken.

The issue is thus broadly raised that mortgagor and mortgagee of land brought under said system

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cannot usefully contract with each other for any power of sale.

With great respect, such is the logical result of the reasoning proceeded on by the learned Chief Justice and Mr. Justice Perdue in the Court of Appeal, the former pointing to the question of possession which he seems to hold cannot be contracted for but must depend on the terms of the Act, and the latter, that, as the instrument in question is under the Act, failure to comply with the mode of sale provided thereby is fatal to the sale now in question.

Counsel for respondents properly accepts this as the result for which he argues.

Mr. Justice Richards, if I understand him aright, does not go so far, but rather relies on the construction he gives the power of sale here in question.

The power of sale relied upon here is as follows:—

> It is also covenanted between me and the said mortgagees that if I shall make default in payment of the said principal sum and interest thereon, or any part thereof at any of the before appointed times then the said mortgagees shall have the right and power and I do hereby covenant with the said mortgagees for such purpose and do grant to the said mortgagees full license and authority for such purpose when and so often as in their discretion they shall think fit to enter into possession either by themselves or their agent, of the said lands, and to collect the rents and profits thereof, or to make any demise or lease of the said lands, or any part thereof for such terms, periods, and at such rent as they shall think proper, or to sell the said lands and such entry, demise or lease shall operate as a termination of the tenancy hereinbefore mentioned without any notice being required, and that the power of sale herein embodied and contained may be exercised either before or after and subject to such demise or lease. Provided that any sale made under the powers herein may be for cash or upon credit or partly for cash and partly for credit and that the said mortgagees may vary or rescind any contract for sale made or entered into by virtue hereof."

By a preceding clause the mortgagor had attorned to the mortgagee.

If we bear in mind that the main purpose of the ex-

emplars of this Act was, if at all possible, to relegate forever to the juristic lumber-room so many conceptions that had long dominated the ordinary mind of the lawyer as to frustrate the execution of the purposes of men in their dealings with each other, we will be better able to understand and apply the Act and give effect to it in its proper sphere.

That sphere is not to limit the powers of contracting in relation to real estate. It is, in the language of the recital, the earliest one, the "Land Registry Act," 1862,

to give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealings with land more simple and economical.

And this is the key-note of all like legislation. But it by no means covers the registration of all such contracts.

What we have first to do is throw away some preconceived notions of what a mortgage must be, and apply the common sense of the ordinary man knowing none of these things, but knowing that a mortgage is as section 100 of the Act seeks to constitute it and section 1 interprets it.

Section 100 reads as follows:—

100. A mortgage or an incumbrance under the new system shall have effect as security, but shall not operate as a transfer of land thereby charged, or of any estate or interest therein.

Then the interpretation section 2, sub-section (*d*) is as follows:—

(*d*) The expression "mortgage" means and includes any charge on land created for securing a debt or loan or any hypothecation of such charge.

Again let us look at the definition of "mortgagor" in same section, sub-section (*f*):—

(*f*) The expression "mortgagor" means and includes the owner of land or of any estate or interest in land pledged as security for a debt.

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The preceding sub-section interprets "mortgagee" to mean "the owner of a mortgage registered under this Act."

A good deal has been said in argument here, as well as in text-books, to raise puzzling questions which the above quoted sections give rise to. Most of them are beside the questions we have to resolve.

The mortgagees were, in this case, given their power of sale by the very instrument of mortgage registered and, notwithstanding the length at which I will, out of respect to the argument put forward, deal with this case, I have never had but one opinion relative to this phase of the matter. It is this, that the registration was not only a registration of the charge of the statutory character defined by the sections I quote, but of that charge coupled with this power, and this latter became of the very essence of the transaction, duly recognized by the officers on whom was cast, by section 83 of the Act, the duty to pass upon and if need be reject what is not within the provisions of the Act, and also became part and parcel of that claim which the mortgagees tendered and had irrevocably placed on record and is, for that reason, a part of that to which the mortgagee thereof acquired an indefeasible title.

I have never been able to see, notwithstanding the argument well presented, how it could be cut down to mean something else than the plain language imports.

It was a power to sell. To sell what ? I answer, all the interest the mortgagor had in these lands; nothing less, nothing more. And once thus properly sold and conveyed by virtue of ordinary common law principles being applied, as well as the recognition there-

of given by the Act, the title of the mortgagor disappeared and became rightfully that of the appellant. An estate in fee simple being what the mortgagor had, and the mortgagee was given power to sell, passed thereby as effectually as if the mortgagor had executed the deed himself.

The mortgage as registered being a charge and power, there cannot be any difficulty, to my mind, any more than if the power had been (what it is not) a simple power of attorney authorizing a sale and the execution of a conveyance in the name of the mortgagor as vendor. Indeed, a learned writer suggests this latter method as a means of overcoming another difficulty he sees in one of the English Acts of a similar character.

The conclusion to which I have referred, that no power of sale can be contracted for, finds no countenance in the grammatical language of the Act.

There is not a line therein that specifically prohibits an "owner" or a "registered owner" from conveying and contracting relative to his land as he may see fit or to render null such conveyances or contracts as he may have made.

The language of section 115 at first blush might suggest that the duty of the officers under the Act is absolutely to ignore any proceedings of foreclosure or sale unless the mortgagee had filed a certificate of *lis pendens* or notice in the land titles office.

Counsel did not seem to rely on this.

I think him well advised in that regard. It is only intended to relieve the officers from being bound to take notice of such proceedings as they may progress elsewhere. That is an entirely different thing from dealing with the title the proceedings when completed

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may result in vesting in the mortgagee, or those claiming under him; when so completed as to shew that the registered title has passed from the registered owner to the mortgagee or purchaser from him, executing a power of sale, and no other conveyance of interest or notice thereof, or of other claim has intervened, the registrar is as much bound to take it up and record it as if presented with a direct conveyance given in the Act to transfer from owner to purchaser. And much less does there appear any prohibition against the resort to statutory or other powers to transfer title.

The mortgagee proceeding outside the Act, as Cozens-Hardy L.J. puts the matter in another aspect of the "Land Transfer Act, 1897," section 20, in the case of *The Capital and Counties Bank* v. *Rhodes*(1), at page 656 at foot, and top of page 657, may be unwise in running the risk of some intervention instead of proceeding under the Act, and the Act may thus furnish a sort of indirect compulsion to use the Act's provisions.

A new statutory remedy never takes away the old unless the new is given in substitution of the old or henceforth prohibits either expressly or by necessary implication those concerned from resorting to the old mode of relief.

The new Act may by its scope and provisions demonstrate such an inconsistency between the old and the new as to lead to the conclusion that the old remedy has been abrogated.

I infer from the scope and purpose as well as the terms of this Act that there can be no such necessary conflict or inconsistency between the rights and remedies existent before the Act and its enactments as to

(1) (1903) 1 Ch. 631.

drive us to the conclusion that this Act must be accepted not only as a registry Act designed to protect purchasers, but as one designed to limit the powers of contract in relation to interests in, or power over, real estate.

The Act itself by its very terms in section 70, sub-section (*j*), and section 126, demonstrates that this latter purpose was not within its purview.

Section 70 excludes specifically those numerous subjects of claim named, and as to sub-section (*j*) clearly anticipates future caveats, and on what can such caveats rest? I answer on any legal or equitable right enforceable against him getting the certificate.

Again section 126 is as follows:—

> Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud, or over contracts for the sale or other disposition of land, or other equitable interest therein, or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent court, which right it is hereby declared may be exercised in such court.

The sale in this case was made but only took its effective form by a conveyance some two years after the Act had stood amended as quoted. It is, therefore, to be tested by the Act as amended in latter part of the section.

How can it be said in face thereof that it is not competent for the court to declare the rights of these parties and that declaration bind the registrar to register?

Again let us look at the language of the section 108, which expressly declares the *first mortgagee*

> shall have the same rights and remedies at law and in equity as * * * if the legal estate in the land * * * had been actually vested in him.* * * *

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What does it mean by "rights and remedies at law and in equity" if the usual remedy of executing a power of sale or of foreclosure, for example, be not respectively such? If it had used less comprehensive language we might have supposed or imagined from the resemblance the form of security given by the statute bears to a hypothec in civil law, it is to be implied that some judicial proceeding to enforce it must be resorted to as required under that system of law as usually developed in modern times. To simplify and clarify the register is the purpose of this form of mortgage and to supplement that record by this and other sections of the statute and thus give efficiency and practical utility thereto, is the plan or scheme provided.

Then section 109, which is the basis of the procedure given by the Act for sale or foreclosure, is as clearly permissive as can be.

Counsel cited as authority to shew that "may" in certain cases imposing a duty on a public officer to act, must be read in an imperative sense.

But there is no duty cast by this section on the officer. It is merely a permissive step for the mortgagee to take as preliminary to and laying the foundation for the proceedings in the subsequent sections where "may" is possible of the construction claimed.

But the initial step, the right of election, lies in the mortgagee alone to invoke these powers of the later sections and is entirely permissive.

If the draftsman had any such notions as are now claimed to have governed him, he erred in thus beginning.

This is a mortgage where if the power is good no notice was required. We are, therefore, not concerned

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with the case, respecting which I express no opinion, of power conditional on a notice to be given and which once given it may be argued is imperatively required to be filed in the land office.

The power of sale herein is one that does not require notice.

I am not concerned with the bearing of the expression "without notice" in this power, for if notice is not required by the terms of a bare power it becomes operative on the events happening that are stipulated for as preliminary to its execution.

I am unable to reconcile the proviso at the end of section 110 with the contention set up that there cannot be a power of sale included in a registered mortgage.

Again the form of mortgage given by this Act leaves a space for covenants such as parties may agree upon and I would suppose it was intended to enable the parties to insert their agreed on terms and conditions of any kind not clearly inconsistent with the Act.

Not only does the Act fail to furnish ground for holding its provisions prohibitive of or inconsistent with the existence of a contractual power of sale, but the history of the law in regard to concurrent remedies for sale in the case of mortgages demonstrates them as existent both outside of such Acts as this and in harmony with the workings of such Acts.

Though foreclosure of mortgages by the court had existed for centuries, it was not until 1852, when by 15 & 16 Vict. ch. 86, sec. 48, an almost universal power of sale to enforce mortgages was conferred upon the court. The power had, as the result of the settled jurisprudence of that court, been before that enact-

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ment confined to a limited number of specific instances which are set forth by Story in paragraph 1026, page 207 (8 ed.), of his work on Equity Jurisprudence.

The court had half a century or more preceding this enactment reluctantly recognized as settled law that a power of sale might be agreed upon by the parties to the mortgage, and inserted therein, and when exercised honestly and in conformity with the terms of the power, the court could not interfere.

The arguments presented to us now as to clogging thereby the right of redemption and ousting or discarding the sacred powers and jurisdiction of that court, were, no doubt, ably presented and weighed for a long time before such an innovation could be conceded as possible.

The conferring by statute upon the court the ample powers of sale I have adverted to, never seems to have been so thought of by any one as to constitute that a substitution for the contractual power of sale so long recognized. Yet I venture to think it might as logically have been contended for as is the position taken here.

The "Cranworth Act," 23 & 24 Vict. ch. 145, sec. 11, as to trustees and mortgagees, some nine years later enabled the person to whom money secured or charged by a deed (as in the given terms is specified) was payable or his executors or administrators to sell.

Has any one ever conceived the idea that this new statutory power was so inconsistent with the powers of sale given the Court of Chancery as above or the usual contractual powers of sale that one or the other of these powers were superseded ?

This Act formed part of the law of England pre-

sumably introduced into Manitoba by, if not previous to, the declaratory Act of its own legislature, 38 Vict. ch. 12, which directs

> the court to recognize and be bound by the laws existing or established and being in England, as such were existing and stood, on the 15th of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province.

The terms of the "Cranworth Act" exclude the application of its powers from having any direct bearing on this case; but is it not in force in Manitoba? Can there be a doubt of its having been introduced before and in force when the "Torrens System" was introduced? Did any one ever suppose it was (if so introduced) in conflict with the then existing powers of the provincial courts or contractual powers as to affect them? And can the "Real Property Act," passed later be held to be so inconsistent with it as to repeal it?

Then we have in England the first indefeasible registration Act, 25 & 26 Vict. chs. 53-59, called by some as I have above, "The Land Registry Act, 1862," brought forward by Lord Westbury and so named hereafter as his Act.

Some lands were brought under that system and the registered owner thereof mortgaged them and later gave two subsequent mortgages.

On default the first mortgagee acting upon the power given by the "Cranworth Act," which was the earlier Act, sold and his purchaser applied for registration as appellant did here, and was refused.

Thereupon he appealed, and the appeal having been heard by Lord Romilly M.R., he directed registration. See *In re Richardson*(1).

(1) L.R. 12 Eq. 398.

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The registrar submitted but would not put the record so as to cut out the subsequent mortgages because of the restricted terms of the order, and again Lord Romilly was applied to(1), and he amended the order so that the purchaser got the indefeasible title the mortgagor had when he gave the first mortgage. The same learned judge in *Re Winter*(2), made an order resting upon similar views of that Act.

These cases are all instructive and the Richardson ones especially so when we consider the fact that Lord Romilly was two years before the first decision chairman of a royal commission to consider the "Westbury Act." The two first named cases are not very fully reported.

We have to rely on the statement of counsel for the source or character of the power there in question. The mortgage seems clearly to have been conformable to the Act, but the power was exercised by virtue of the "Cranworth Act."

Let it be noticed first that the learned Master of the Rolls states

> a first mortgagee sells under a power of sale to a purchaser

and next shews the existing subsequent mortgages on the register. He then points out that the purchaser has nothing to do with the application of the purchase money, which is the statutory protection given him, as is given by section 111 of the Act here in question. He then proceeds:—

> The registrar appears to think that there would be some inconsistency in registering the purchaser with an indefeasible title while the subsequent mortgages remain on the register; but I do not think that there is any inconsistency. The subsequent mortgagees have no claim against the land. They are entitled to be paid out of the sur-

(1) L.R. 13 Eq. 142. (2) L.R. 15 Eq. 156.

plus which remains after satisfying the first mortgage; but the purchaser has nothing to do with that; his title is perfectly good, and he is entitled to be registered as indefeasible owner.

Reading this I find much light shed on the peculiar form of mortgage given in the Act here and there which seemed such a puzzle to the court below and on argument here. Its purpose in each case was to create a charge without passing the legal estate and thus relieve from such puzzles.

The "Westbury Act" of 1862 expressly permitted the use either of the statutory form or the old form of a deed to create a mortgage, and hence this cannot be said to be a case decisive of the exact questions here. It is as a practical illustration of how the old and the new can be made to harmonize in a more complicated situation than the "Real Property Act" in question here may produce, that these decisions on that Act are instructive and thus demonstrate that it cannot be maintained there is any such necessary conflict or inconsistency as to drive us to hold that the power to contract for a power of sale has been abrogated and, as argued, can no longer exist.

The "Land Transfer Act" of 1875, amended in 1897, is much ampler in its provisions than the Manitoba Act, and has in it many provisions that suggest exclusiveness of contract, yet in the *Capital and Counties Bank* v. *Rhodes*(1), at pages 653 to 658, the possibility of working out such an Act is found to be quite consistent with the conveyancing powers outside its provisions being exercised.

It is true section 49 of that Act makes a reservation to remove any doubt on the subject, and hence the judgment in that case cannot govern this case.

(1) [1903] 1 Ch. 631.

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But like the cases cited above, it demonstrates how far men may go in dealing with land brought under the Act without resorting to the provisions of the Act and yet no necessity be found for holding them, as contended for here, exclusive.

Weymouth v. *Davis*(1), is another illustration. Here the land was on the register, and the possessory title appeared in a man who executed a charge in the form prescribed by the Act, but to save expense did not register it, but registered a notice of deposit of the certificate; and those things were all done after having taken a mortgage deed. The mortgagee foreclosed the latter, and on getting his final order of foreclosure and for possession, sought, though no reference had been made to the formal charge in such proceedings, to have his order of foreclosure registered, and on refusal of the registrar, an application was made to Swinfen Eady J., who ordered the rectification of the register as desired.

Stevens v. *Theatres Limited*(2), may be referred to as a case where the question of inconsistency between the exercise of the power of sale and foreclosure proceedings at the same time is discussed. However much the power of the court to interfere may exist yet the power of sale is held not extinguished by any mere inconsistency so as to defeat a purchaser's title under the power of sale.

I may also observe that in some jurisdictions the courts have passed orders to deprive mortgagees pressing all their remedies of ejectment, foreclosure, power of sale and action on the covenant at the same time, and I think statutory enactments exist to put them to their election in such cases.

(1) [1908] 2 Ch. 169. (2) [1903] 1 Ch. 857.

Such rules of court or statutes rather affirm than controvert the proposition that *primâ facie* they are in law not inconsistent.

In the case of *Cruikshank* v. *Duffin*(1), raising the question of the power of an executor enabled to mortgage, to give a power of sale in the mortgage, it was held he could. It was treated by the court then as a necessary incident of the power. See also *Russel* v. *Plaice*(2).

The reasoning upon which the judgment in the case of *Belize Estate Co.* v. *Quilter*(3) proceeds, may also be well borne in mind in this connection, as demonstrating that an Act such as the "Real Property Act" is not to be taken as an exclusive code relative to the rights men acquire in real estate.

Questions were suggested in argument as to a power of sale in an instrument merely charging the property, and suggestions were made as to the mortgagees not having the legal estate.

In the first place without needlessly going here deeply into the question of the legal estate, I may refer the curious to the work of Mr. Hogg on Australian Ownership, Part III., ch. 2, sec. 2 thereof.

The ascertainment of where the legal estate may, in any given case, be, under such a system as the "Real Property Act" creates, is there fully discussed.

I may also, to relieve those troubled about what seems to me vain imaginings relative to the legal estate, again refer to section 108, quoted from above.

I need not dwell upon the subject in the view I take of the power in question here.

The English "Conveyancing Act, 1881," section

(1) L.R. 13 Eq. 555. (2) 18 Beav. 21.
(3) [1897] A.C. 367.

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21, sub-section 4, provided that the power of sale conferred by that Act may be exercised by any person for the time being entitled to give and receive a discharge for the mortgage money.

It is equally competent, I think, for the contracting parties to provide a like power fully as efficient.

In the case of *In re Rumney and Smith* (1), it was contended the power of sale there in question could be executed by the party entitled to receive the money, but Stirling J. held they could not in that case and referred to the law as follows:—

> I am asked to hold that the power of sale contained in the mortgage deed is a mere security for the debt, and is exercisable in the absence of any contrary intention by any person who in equity can give a receipt for the mortgage money. I am far from saying that that would not be a reasonable state of the law, but the question is whether it is the present state of the law. In carefully drawn mortgages there is usually found a clause enabling any one who in equity can give a receipt for the mortgage debt to exercise the power of sale; but no such clause is found in the mortgage before me.

In considering this case in appeal, Chitty L.J. says, page 360:—

> We have now become so accustomed by virtue of improved conveyancing, and by reason of the statutes, to find a power of sale in a mortgage accompanying the debt, that there is a danger of assuming that as part of the general law. No doubt the statutes made it quite plain, and all the conveyances in years past made it perfectly plain.

I take it there can be no doubt of this and it all comes back to the proper construction of the power of sale herein.

The Act manifestly gives a power of sale which extends to and covers the legal estate or rather whatever estate the mortgagor may have. That is independent of any special power such as this in question.

(1) [1897] 2 Ch. 351.

The power in question expressly given by the instrument does not depend on the "Real Property Act" for its efficiency or execution, but must depend upon the intention of the parties so expressed.

A common law power does not need any technical language to give it force. The question always is whether it can be construed as giving the power. And repeating what I have already said there can be no doubt of the meaning and intent of the parties to this power as to what it was to enable the doing of.

Of course a power to operate by virtue of the "Statute of Uses" or in execution of some trust must, though needing no peculiar language to create it, be so expressed, as to shew its conformity to what such statute or trust may require.

Finding neither warrant in the statute nor in the principle of law applicable thereto for precluding mortgagees from stipulating for a power of sale in or collateral to a mortgage given on land brought under the "Torrens System" and the sale in question duly made under the mortgage in question I need not enter into the inquiry as to the effect of section 75 relative to the bearing of the statutes of limitations invoked in favour of appellant.

This appeal should be allowed with costs throughout.

I may observe that notwithstanding the profuse quotations from the opinions expressed here in disposing of the case of *Williams* v. *Box*(1), I fail to see the bearing of that case or what was said therein on this.

That was a case of a mortgagee resorting to this statute to enforce his rights of sale and foreclosure

(1) 44 Can. S.C.R. 1.

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seeking to set up his proceedings, which did not conform to the statute he chose to proceed under, to deprive the mortgagor of his property.

That case involved the examination of the judicial powers in that regard as contained in the Act. This case apart from the collateral questions incidentally arising, involves merely questions of conveyancing.

In turning to the report of that case I find it of the illuminating kind which contains neither full statement of fact nor argument, and hence apt to be misleading.

Since writing the foregoing the information has been given the court that section 110 was not in force till after the date of contract of sale, but in my view the fact does not alter though it may emphasize what I have already said.

DUFF J.—The action out of which this appeal arises was brought by the appellant against the respondents, the National Trust Company, as the administrator of the estate of one James Beattie, deceased, claiming a declaration that an "estate in fee simple" in certain lands — the property in dispute — became vested in him by virtue of a certain transfer to him executed by the Canada Permanent Mortgage Corporation. James Beattie was in his lifetime the registered owner of the lands in question which were registered under the "New System" established and governed by an Act of the Manitoba Legislature originally passed in 1885, and now known as the "Real Property Act." In 1892 the property was mortgaged by Beattie as registered owner in favour of the Freehold Loan and Savings Company, to secure the repayment of a loan, and the mortgage (with all the inci-

dental rights and powers of the mortgagees) was subsequently acquired by the Canada Mortgage Corporation. The transfer by the last mentioned company is said, according to the contention of the appellant, to have effectually transferred to him an estate in fee simple in this property on one of two grounds: 1st, that the company had acquired a title by possession, and 2ndly, that the legal authority to convey such an estate was vested in the company by a certain power of sale which was contained in the mortgage executed by Beattie and which, according to its terms, was exercisable by the mortgagees and their assigns.

As to the first of these grounds I may say at once that section 75 of the "Real Property Act," in my opinion, makes it untenable, and I am quite content to rest that view upon the reasons in support of it which have been given by the learned judges in the Court of Appeal for Manitoba.

The second contention raises questions of considerable importance which have been very ably discussed by counsel, and deserve a more particular examination. These questions turn primarily upon the effect of the legislative provisions which govern the transactions in dispute. It was assumed on the argument that it was only necessary to consider the Act of 1900 which was in force at the time of the attempted sale. I think it is immaterial in the result whether we confine our attention to the provisions of that Act or consider also the provisions of the enactments in force in December, 1892, when the mortgage was executed. I shall first discuss the effect of these latter provisions, which are to be found in the "Real Property Act" of 1891 as amended in April, 1892.

The mortgage in question is in the form prescribed

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by the Act and was admittedly intended to take effect under its provisions. By those provisions a statutory power of sale is an incident of every registered mortgage. It was not disputed on the oral argument before us that the transfer in question cannot be sustained as an exercise of this statutory power; but it was contended that a special agreement contained in the mortgage conferred on the transferors a conventional power of sale exercisable independently of the provisions of the statute. In considering this contention it is necessary to examine the constitution and characteristics of a mortgage under the Act.

By the provisions of the "Real Property Act" the owner of an estate in fee simple in land having applied to register his title under the system established by the Act called the "New System" and having complied with the statutory requirements leading to registration becomes entitled to a certificate called the "Certificate of Title" which declares him to be the owner of an estate in fee simple in the land of which he is the proprietor. This certificate is bound in a book called the "register," and a duplicate of it is delivered to the owner. Thenceforward the certificate not only evidences but constitutes the owner's title. Title to the land to which it relates can be affected only as the Act permits, and by an instrument registered as the Act provides. The purpose of the Act was to simplify and cheapen the transfer and the encumbering of and to give security of title to the owners of lands and interests therein; and, broadly speaking, the scheme devised is that title is acquired by registration in this register which contains the various certificates of title, each of which shews the interest of the registered proprietor and the encumbrances to which it is subject.

The mortgage contemplated and provided for by the Act is a real security which primarily derives its efficacy as a security of that character from the statute itself. Section 99 is explicit, that a registered owner intending to charge or to create a security upon land by way of mortgage (which by the interpretation clause includes "any charge on land created for securing a debt or loan") shall "execute a memorandum of mortgage in the form contained in Schedule D., or to the like effect"; and by section 83 no instrument is to be "effectual * * * to render" any land under the "New System" liable as security for the payment of money or against any *bonâ fide* transferee of such land until such instrument be registered in accordance with the Act. The registered owner can charge his land in such a way as directly to burden the registered title only by the execution and registration of a memorandum in the prescribed form. It is quite clear, moreover, that the registration of a mortgage under the Act is not intended to vest in the mortgagee any registered "interest" in the mortgagor's land as that term is used in the Act. By section 100 it is declared that

> a mortgage * * * shall have effect as security, but shall not operate as a transfer of the land thereby charged,

and, in 1900, this section was amended by adding the words "of an estate or interest therein." The amendment only had the effect, however, of making unmistakable the real operation of such a security under the law as it stood before the amendment was passed. That such was the effect of the statute appears readily enough when we compare and contrast the provisions relating to the transfer and registration of any interest less than full ownership and compare them with

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the provisions relating to the creation and registration of mortgages. The Act does not, in a word, treat the mortgage authorized by it as an instrument immediately effecting any dismemberment of the mortgagor's registered title. The operation of the statute is rather this: When a registered owner wishes to charge his registered title as security for a debt, he is to execute an instrument by which he declares that he "mortgages" his land and that instrument being registered the mortgagee becomes invested with such rights in respect of the possession of the land and its profits and the registered title becomes (for the benefit of the mortgagee) subject to such powers of disposition as the statute expressly or by implication declares. It is in these rights and powers that the virtue of the mortgage as a real security consists; and it is, consequently, to the statute that we must primarily resort to ascertain what are the rights and powers incidental to such a security.

It is argued that the view thus stated is too narrow, and another view is put forward, which is this: that the mortgage authorized by the Act is to be regarded as having annexed to it all the legal incidents which by law belong to a mortgage at common law and as being capable of having annexed to it by contract all the incidents which may by contract be annexed to a mortgage at common law in so far as such incidents are not expressly or by necessary implication excluded. I think in either view the practical result of this appeal must be the same; but I must say that it seems to me to be an artificial and unnatural reading of the statute to regard the mortgage contemplated by it as primarily a common law mortgage, and I think that in adopting such a reading one incurs some risk

of losing the point of view from which the legislator envisaged the problem to which he was addressing himself. There is much in the Act to indicate an intention on the part of its authors that under the statutory mortgage the powers and rights of the mortgagee should in substance be economically equivalent to those possessed by a mortgagee under a common law mortgage; yet, juridically considered, there is — as I have indicated — this essential difference between the two instruments, viz.: that at common law the rights and powers of the mortgagee as such in respect of the mortgaged property are rights and powers which are incidental to the legal or equitable estate vested in him as mortgagee while under the statutory instrument the rights and powers of the mortgagee do not and cannot take their efficacy from any such estate because none is vested in him and his rights and powers must consequently rest directly upon the provisions of the statute itself.

This view, of course, does not involve the consequence that the mortgagee's rights are those only which the statute expressly gives him. It is obvious that many things are left to implication; and where, in any particular case, it appears that the rules governing reciprocal rights of the mortgagor and mortgagee under the mortgage contract in relation to the mortgaged property are left to implication then it is a question to be determined upon an examination of the statute as a whole how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable as between mortgagor and mortgagee.

It is to be premised generally that the statute nowhere countenances the idea that a registered owner

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can, except under the authority of some specific provision of the Act, by instrument *inter vivos* confer upon another the power to defeat or override his title by transferring a registered title to his property without constituting the donee of the power his agent for that purpose and without transferring any interest to the donee himself. It is probably needless to repeat what was said upon the argument that at common law an attempt by an owner of the legal estate in fee simple in land to endow, by an instrument *inter vivos,* a third person having no estate or interest legal or equitable in the land with power to vest an estate of freehold in another must, in the absence of an assurance to uses or a trust express or implied, utterly fail for reasons of the most elementary and obvious character; and there is nothing expressly or impliedly abrogating this general rule. There is nothing in a word to indicate any intention on the part of the legislature to declare or recognize any such general principle as that a licensee under a bare license to sell or convey land registered under the new system, given *inter vivos,* may validly transfer a title to such land otherwise than as agent of the registered owner. On the contrary the Act expressly forbids the registration of any

> instrument purporting to transfer or otherwise deal with or affect land under the new system—except in the manner herein provided for registration under the new system nor unless such instrument be in accordance with the provisions of this Act as applicable to the new system.

The provision dealing with the transfer *inter vivos* generally (sec. 78), authorizes transfer only by the registered owner. Cases in which it is intended that such a power of disposition should be vested in other than the registered owner in consequence of some act

inter vivos seem to have been carefully considered and specially provided for. All this, of course, has no reference to powers arising out of testamentary instruments. These stand, as everybody knows, upon another footing; and the rules governing the exercise of them have, of course, no relevancy whatever to any question we are concerned with on this appeal.

The statute contains express provisions conferring powers on the mortgagee to defeat the mortgagor's title by causing a title to vest in a purchaser through proceedings outside the registry (analogous to proceedings under a conventional power of sale in a common law mortgage) as well as by proceedings in the registry. There is nothing in the Act, however, indicating any intention to recognize the exercise of powers in that behalf by the mortgagee in addition to and independently of those conferred by these statutory provisions. On the contrary an examination of the legislation in the light of its history seems to shew that the legislature was dealing exhaustively with the powers of the statutory mortgagee to defeat the mortgagor's registered title in the express enactments relating to that subject and that in this respect nothing has been left to implication. I am not for the present considering the effect of an agreement introduced into a statutory mortgage as giving rise to equities between the mortgagee and mortgagor affecting the land in the mortgagor's hands; that I postpone for the present. I wish to examine the legislation with a view to ascertaining whether there is fair ground for an inference that by means of a conventional power introduced into a statutory mortgage, the mortgagee may be endowed with a power of divesting the mortgagor of his registered title by causing a registered

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title to the mortgaged property to be vested in a purchaser without the intervention of a court of equity and without taking advantage of the machinery expressly provided by the statute for that purpose.

The system of title by registration was introduced into Manitoba, as I have mentioned, by an Act of the Manitoba Legislature passed in 1885. The system had then for some years been in force in some of the Australian colonies and on the subject of mortgages the provisions of the Manitoba Act (with one significant exception) appear to be in substance those then in force in Victoria as will be seen by a reference to Mr. Hogg's invaluable book, "The Australian Torrens System." These provisions of the Victoria statute had been the subject of consideration by the courts in that colony as well as by the Privy Council; it is quite clear that judicial opinion was unanimously in favour of regarding these sections as providing the only means by which the mortgagee could extinguish the mortgagor's title. In the *National Bank of Australasia* v. *The United Hand-in-Hand and Band of Hope Co.*(1), at pages 405 and 406, Sir James W. Colville in delivering the judgment of the Judicial Committee, said:—

> The company was the registered owner of the mine under the provisions of the "Transfer of Land Statute," and the mortgage was made under and subject to the provisions of the 83rd and following sections of that Act, and was duly registered thereunder. The instrument itself is in the form set forth in the 12th schedule to the Act, except that it contains, as that form permits, a special covenant or agreement which will be hereafter considered. Hence the only way in which the mortgagee could extinguish the rights of the mortgagor in the mine was by foreclosure under 31 Vict. No. 317 (of which there is no question here), or by a sale under the 84th, 85th and 87th sections of the "Transfer of Land Act."

(1) 4 App. Cas. 391.

To the same effect is the decision of the Chief Justice of Victoria in *Greig* v. *Watson*(1), pronounced in 1881. I think it cannot be presumed that the Manitoba Act was framed in ignorance of these authoritative pronouncements upon the effect of the legislation that province was adopting in a matter so deeply important as the rights of a mortgagee in respect of the foreclosure or sale of the mortgaged property. Yet nothing was introduced into the Act of 1885 to negative such a construction; and the only provision of the Victoria statute affording by its terms any plausible support to the appellant's view, a provision which afterwards (in 1900) was introduced into the Manitoba Act and which was largely relied on by the appellant in this connection, was left out of the Manitoba Act of 1885. The fair inference appears to be that the view of the effect of the Victoria statute expressed by the Privy Council was that which the framers of the Act of 1885 deliberately adopted; and the provisions of the Act as a whole strongly support this conclusion. The form of mortgage prescribed by section 99 contains a direction permitting the introduction of special covenants. There is no suggestion of conventional powers. That circumstance is, in my judgment, not without significance. It is quite true that a power of sale might be expressed in the form of a covenant, but if it is to confer upon the mortgagee the authority to execute an assurance of the mortgaged property and extinguish the mortgagor's title it is in substance much more than a covenant. The provisions of the Act shew that the distinction which lawyers understand between a power to deal with property in such a way as directly and immediately

(1) 7 V.L.R. 79.

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to effect the title to it and a mere personal obligation was not overlooked by the authors of the Act and in the form referred to the word "covenant" appears to be employed in this its usual sense. The Act again permits mortgages only in the specified form (sections 83 and 99), and declares this form to be a part of the Act (sections 3 and 4). If the intention had been to permit the introduction of an agreement authorizing the mortgagee to deal with the title in a manner which the Act itself not only does not provide for, but which would appear to do violence to some of its express provisions, I think, in view of these stringent provisions, we might have expected something more explicit than a direction authorizing the introduction of "special covenants." Then there is no provision for the registration of a transfer executed by a mortgagee under such a power. The Act, as I have pointed out, forbids the registrar to

> register any instrument purporting to transfer or otherwise deal with or affect land under the new system, except in the manner herein provided for registration under the new system, nor unless such instrument be in accordance with the provisions of the Act, as applicable to the new system (sec. 83).

The transfer authorized by section 78 of the Act is a transfer by the registered owner; and such a transfer could not, of course, be executed by a mortgagee, as such. Provision is specially made for the registration of the transfers made by the mortgagees in execution of the express powers of sale vested in them by the Act itself (section 110), but that provision is strictly limited to such transfers. Provision, moreover, is expressly made preserving the rights and powers of mortgagees under mortgages existing at the time the land is brought under the "new system." In face of all this the omission of any provision touching the

execution or the registration of transfers by a mortgagee under a statutory mortgage exercising a conventional power of sale appears to be significant.

There is a provision of the Act which was introduced as an amendment in 1889 and requires particular notice. It is contained in section 77 of that Act and is in these words:—

> 77 * * * Provided, however, that where an instrument, in accordance with the forms in use or sufficient to pass an estate or interest in lands under the old system deals with land under the new system, the inspector may, in his discretion in a proper case, direct the district registrar to register it under the new system, and when so registered it shall have the same effect as to the operative part thereof as and shall by implication be held to contain all such covenants as are implied in an instrument of a like nature under the new system, and if it is a mortgage the mortgagee may, for the purpose of foreclosure or sale under the mortgage, elect to proceed either under the provisions of this Act or as if the land were subject to the old system, but in case he proceeds under the provisions of this Act, and the mortgage covers other land not under the new system, he must before doing so bring all the land intended to be foreclosed or sold under the new system.

There can be little doubt as to the occasion which led to the enactment of this provision. The preparation of conveyances of land by unlearned persons (a practice facilitated by the general use of printed forms for such purposes even by professional lawyers) was, at the time of the passing of this Act, a very general practice in many of the provinces of Canada; and it was probably found that such forms in many cases were made to do duty for mortgaging and transferring land under the new system; and the provision mentioned was doubtless suggested by the frequent occurrence of such cases. It was evidently thought that in those cases it would be unfair to deprive the mortgagee of the benefit of powers which the parties might be presumed to have contemplated he should be entitled to exercise and he was given the option

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of resorting to them if the inspector of land registries should approve of the registration of his mortgage. The points to be noted are, first, that it was deemed necessary to make a special provision conferring on the mortgagee in such circumstances a right at his election to proceed under his conventional powers, a provision which seems superfluous if the appellant's contention be correct that the mortgagee under any registered mortgage may *ipso jure* have the benefit of rights and powers which he might at common law have exercised under a mortgage containing the like provisions; and secondly, the language used in authorizing the mortgagee "to proceed as if the land were under the old system" rather pointedly indicates that in the legislator's view proceedings by way of sale under a conventional power or by way of sale or foreclosure through a court of equity were as a general rule competent to a mortgagee only in respect of land "subject to the old system."

Thus far of the legislation as it stood in 1892 when the mortgage in question was executed. In 1900 some amendments were introduced and it was one of these (section 108 of that Act) on which Mr. Coyne chiefly relied on this branch of his argument. That section is as follows:—

> In addition to and concurrently with the rights and powers conferred on a first mortgagee, every present and future first mortgagee for the time being of land under this Act, shall, until a discharge from the whole of the money secured or until a transfer upon a sale or order for foreclosure (as the case may be) shall have been registered, have the same rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him with a right in the owner of the land of quiet enjoyment of the mortgaged land until default in the payment of the principal and interest money secured or some part thereof respectively, or until a breach in the performance or observance of some covenant expressed in

the mortgage or to be implied therein by the provisions of this Act. Nothing contained in this section shall affect or prejudice the rights or liabilities of any such mortgagee after an order for foreclosure shall have been entered in the register or shall, until the entry of such an order, render a first mortgagee of land leased under this Act liable to or for the payment of the rent reserved by the lease or for the performance or observance of the covenants expressed or to be implied therein.

The contention is that the mortgagee is by virtue of this enactment in the same position for all purposes as if the legal estate were vested in him and it follows, it is said, as a necessary corrollary that a conventional power of sale confers upon a statutory mortgagee the same powers of disposition over the mortgagor's title as would be vested in a legal mortgagee at common law.

The section read by itself with due attention to the phraseology employed appears to me to mean this: So long as the security is on foot as a security and the ownership of the land is consequently vested in the mortgagor the first mortgagee is to have certain rights and powers in respect of the land and they are to be the rights and powers to which he would by law be entitled if the legal estate were actually vested in him under an instrument such as that described. That is not to say — at least so it seems to me — that by this enactment the statutory mortgagee is endowed with any novel power to extinguish the mortgagor's title or to convey an estate to a purchaser; and there are some considerations which I think make it impossible to give such an effect to the section. The first of these considerations is that this section, as I have already mentioned, was to be found in the Act which the Judicial Committee was discussing in the passage I have quoted and I think if the intention in re-enacting the section in Manitoba had been to estab-

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lish the law upon a footing different from that indicated in the view there expressed we might have expected something explicit to indicate that intention.

Then this section deals with the rights of the first mortgagee only. That would appear to indicate that those rights only are contemplated with which the law would invest a legal mortgagee as peculiarly incidental to his possession of the legal estate. If rights of foreclosure and sale, independently of the other provisions of the Act, were in view there appears to be no explanation why the benefit of such rights was withheld from the holders of mortgages subsequent to the first.

In considering, moreover, the effect of the amendment embodied in section 108 it is to be observed that it must be read with other amendments which were introduced into the statute at the same time and particularly with the amendments affected by sections 100 and 110 of the Act. These latter amendments, it is true, are not expressly (as section 108 is) made applicable to existing mortgages. But it is not, of course, to be supposed that the last mentioned enactment having been declared to be applicable to existing as well as to future mortgages was intended to have an operation in respect of future instruments different from its operation in respect of those already existing; and we may properly look at the whole of the contemporary legislation which is *in pari materiâ* in order to ascertain the effect of any part of it. Section 100 makes explicit what, as I have already mentioned, was already implicitly in the Act; that the mortgage does not vest in the mortgagee any estate or interest in the land pledged as security. That section declares that the first mortgagee is to have no

"interest" in the land — thus emphasizing the characteristic of the statutory mortgage upon which I have been dwelling, viz., that, as regards title, the mortgagee has no registered interest, but only powers of disposition.

The amendment embodied in section 110 emphasizes another feature of the Act, viz.: that, in course of the exercise of the statutory powers to extinguish or dispose of the mortgagor's title, the legislature has provided for the protection of the mortgagor by subjecting such proceedings to the supervision of a public officer. The proviso to that section is as follows:—

> Provided that, in case the mortgage or incumbrance contains a provision that the sale may take place without any notice being served on any of the parties, the district registrar may order such sale to take place accordingly.

This enactment affords evidence of the care with which the legislature deemed it necessary to protect the mortgagor against oppression or unfairness or mere carelessness on the part of the mortgagee as well as improvidence on his own part in this matter of the sale of the mortgaged property. The provisions of section 109 by which the period of one month which that section requires shall elapse between the mortgagor's default and the service of notice of intention to sell is permitted to be extended, but is not allowed to be abridged; and the provision of section 110, first introduced in 1892, requiring that the manner in which the sale is to be conducted as well as the conditions of sale shall be determined by the registrar are other instances of the same careful forethought for the interests of the embarrassed mortgagor. I have no doubt these precautions were not taken without

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good reason; and it would require some language more apt to the purpose than that of section 108 to convince me that the legislature intended by that section to enable the mortgagee by the simple expedient of exacting a conventional power of sale to neutralize these carefully devised expedients for the protection of the mortgagor.

For these reasons I think that whether we regard the rights of the mortgagee as governed by the enactments of the Act of 1900, or by those in force in 1892 when the mortgage was executed, the conventional power of sale on which the appellant's title rests conferred no legal authority upon the mortgagee to extinguish the registered title of the mortgagor except under and according to the express provisions of the statute in that behalf.

It is still necessary, however, to refer to the Act of 1906. Sections 2 and 3 of that Act are as follows:

2. Section 108 of the said Act is hereby amended by inserting after the word "equity" in the seventh line thereof the words "including the right to foreclose or sell through any competent court."

3. Section 126 of the said Act is hereby amended by adding after the word "therein" in the fourth line thereof the following, "or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent court, which right it is hereby declared may be exercised in such court."

These enactments were passed long after the sale in question took place and, notwithstanding the form of the amendment in section 3 and notwithstanding the fact that the amendment of section 108 would by the express terms of that section apply to mortgages in existence at the time the amendment was passed, they cannot, I think, be taken to have any such retrospective effect as to determine the construction and operation of the "Real Property Act" at the date

either of the execution of the mortgage in question on this appeal or of the professed exercise of the power of sale. *Harding* v. *Commissioners of Stamps for Queensland*(1), at page 775. These amendments are, however, to a limited degree not without relevancy to the point under discussion. They afford an additional instance in which the legislature, having before it the subject of proceedings by the mortgagee for the extinguishment of the mortgagor's title, seems to have deliberately avoided any recognition of proceedings under a conventional power of sale; and, furthermore, while these enactments constitute a departure from the strict principle of the earlier enactments as explained by the Privy Council in *National Bank of Australasia* v. *United Hand-in-Hand Band of Hope Co.*(2), at pages 405 and 506, in that they provide for proceedings for foreclosure and sale in equity they indicate no abandonment of the principle to which I have adverted, of requiring all proceedings for the extinguishment of the mortgagor's title to take place under the supervision of a public officer.

As I have already said, I do not think it was seriously contended that the transfer in question could be supported as a transfer made in execution of the statutory power of sale; and I agree that such a contention is quite hopeless.

I think it is not a forced construction of the Act of 1891, as amended in 1892, or of the Act of 1900, to say that the express provisions of these statutes in respect of the exercise of the statutory power of sale relating to the supervision by the registrar over the manner and conditions of sale and to the

(1) [1898] A.C. 769. (2) 4 App. Cas. 391.

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giving of notice of intention to sell are imperative provisions; and that the "special covenants" which are authorized to be introduced into the statutory mortgage must be such as are not repugnant or contrary to those provisions. Assuming then that the power of sale in the mortgage in question may fairly be read as professing to give an authority to the mortgagee to sell without notice, and assuming also that the rights of the parties are not to be governed by section 110 of the Act of 1900, such a dispensation from observance of the requirements of the statute could, nevertheless, not be permitted to take effect. The respondent's case, however, does not necessarily rest upon this view that the proceedings by the mortgagee under the statutory power are thus inexorably prescribed by the statute; because it is perfectly clear that there is nothing in the mortgage indicating an intention to dispense with the supervision by the registrar, required by section 109 of the Act of 1891 as amended by that of 1892, and, moreover, there is no pretence that any supervision took place, or that there was any attempt in fact to observe the conditions of the statutory power or any intention to exercise that power.

But it is suggested that the power in question gave some authority to a mortgagee to vest equitable rights in a purchaser in defeasance of the mortgagor's title. On that suggestion I have to make two observations *in limine*. First: No court governed by equitable principles would permit itself to be made an instrument in effecting the evasion of the imperative provisions of section 110 (either as to notice or as to supervision), under the pretence of protecting equitable as distinguished from legal rights; and, secondly,

the action was not brought to enforce equitable rights. There is not a shadow of a suggestion of such rights in the pleadings or in the record from the first to the last page. The right asserted is the absolute legal right to be registered as owner of the mortgaged property. What facts relating to the conduct of the parties having a bearing upon the equities between them might have been disclosed if a claim based upon equitable grounds had been put forward it is impossible now to say. It is clear, however, from the mortgage deed alone that no equitable rights in the land in question have been vested in the appellant. If an attempt were made by a debtor (without formally vesting in his creditor an estate or interest and without creating any trust or executing any assurance to uses) to confer on the creditor as security for his debt a power to sell land held under a common law title then no doubt a court of equity might, in a proper case, find a method of giving effect to such an instrument by way of equitable charge. And in the case of an informal document professing to create such a power a trust in favour of the creditor or in favour of purchasers from him might be implied if it were necessary to imply such a trust in order to prevent the instrument failing of operation entirely. Such a case is perhaps conceivable.

But it is clear that it would be a violation of principle to imply any such a trust unless on the one hand it was manifest that the parties really intended a trust to be created or on the other it was necessary to assume they had done so in order to prevent a failure of consideration. Now consider the instrument before us. First the instrument is a formal conveyance prepared, as we may assume, by the solici-

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tors of a great mortgage company. There is not a word in the document to indicate an intention on the part of anybody that a trust in favour of the mortgagees or a purchaser should be created. On the other hand it is indisputable that the instrument was intended to be a statutory mortgage taking effect under the statute and all the probabilities of the case favour the view that the power of sale was intended to be a power taking effect as incidental to such a mortgage and to confer authority to deal with the registered title and to vest in the purchaser a title under the "Real Property Act" by the execution of a transfer which could be registered under that Act without resorting to judicial proceedings.

The assumption that the parties intended to create a trust in favour of the mortgagee, or a purchaser to be nominated by him, would really be a very extravagant one; and I do not think it was welcomed by Mr. Coyne when I suggested it to him during the course of his useful and able argument. It is really impossible to suppose that these parties ever entertained the idea of vesting in the mortgagee (in addition to the legal authority to deal with the mortgagor's estate conferred upon him by the statute) some equitable right to which effect could only be given by proceedings in equity or the authority to confer some such right upon a purchaser. The reading of the clause in question most consonant with the probable intentions and expectations of the parties is, as Mr. Wilson argued, that which treats it as a power of sale to be given effect to under the authority of and through the machinery provided by the statute.

ANGLIN J. (dissenting).—On this appeal several questions present themselves for determination:—

(1) Whether the title of a registered owner of land under the "Real Property Act" of Manitoba is extinguished by adverse possession of the land held by his mortgagee and persons claiming under him in circumstances and for the period which would under section 20 of the Revised Statutes of Manitoba, chapter 100, extinguish the title to it of the mortgagor if the land were not under the Act.

(2) Whether, in the case of a mortgage of land registered under the Act, the mortgagor may, by introducing apt and sufficient words into a statutory mortgage, confer upon his mortgagee a power of sale additional to and independent of the statutory power given by sections 109 and 110 of the Act, and whether such a power, if so created, may be exercised by the mortgagee as in the case of a like power conferred on a mortgagee of land not under the Act and without reference to the provisions of sections 109 and 110.

(3) Whether the power of sale contained in the mortgage in question in this action should be deemed a power independent of and additional to the statutory power conferred by sections 109 and 110 or should be deemed merely a variation of such statutory power.

(4) Whether the words used in the mortgage are sufficient to confer an effectual power of sale.

(5) Whether they give a power of sale without notice; and

(6) Whether, in view of the fact that the mortgagee takes no interest or estate in, but merely obtains security on, the land (section 100), the special power of sale, if effectually given, can be exercised without resorting to the provisions of sections 109-112 of the Act.

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The clause in the mortgage upon which the five latter questions arise is as follows:—

It is also covenanted between me and the said mortgagees that if I shall make default in payment of the said principal sum and interest thereon, or any part thereof at any of the before appointed times then the said mortgagees shall have the right and power and I do hereby covenant with the said mortgagees for such purpose and do grant to the said mortgagees full license and authority for such purpose when and so often as in their discretion they shall think fit to enter into possession either by themselves or their agent, of the said lands, and to collect the rents and profits thereof, or to make any demise or lease of the said lands, or any part thereof for such terms, periods, and at such rent as they shall think proper, or to sell the said lands and such entry, demise or lease shall operate as a termination of the tenancy hereinbefore mentioned without any notice being required, and that the power of sale herein embodied and contained may be exercised either before or after and subject to such demise or lease. Provided that any sale made under the powers herein may be for cash or upon credit or partly for cash and partly for credit and that the said mortgagees may vary or rescind any contract for sale made or entered into by virtue hereof.

The mortgage provides that the expression "mortgagees" wherever it is used in the mortgage shall include the mortgagees' "successors and assigns."

For convenience I shall deal with the questions in an order somewhat different from that in which I have stated them.

Assuming for the moment, that an owner of land registered under the "New System" can, in a statutory mortgage under the "Real Property Act," confer on his mortgagee a power of sale other than and independent of the statutory power, I think that the provision of the mortgage which I have quoted creates such a power. It purports to give to the mortgagee an express authority "to sell the said land" without attaching to it any of the conditions of the statutory power. The statutory power (at all events unless expressly negatived, section 157) is inherent in every statutory mortgage. No words conferring or declar-

ing it are required in the mortgage. Reference is properly made to it only for the purpose of modifying, or, perhaps, of excluding it. Unless another and an independent power was contemplated by the parties, the provision in the present mortgage granting to the mortgagees full license and authority to sell the lands is entirely supererogatory. It is scarcely necessary to refer to the canon of interpretation opposed to such a construction. Moreover, the reference in the concluding proviso of the clause quoted from the mortgage to "any sale made under the powers herein" indicates that the parties contemplated the existence of more than one power of sale — the inherent statutory power and also the power expressed in the mortgage.

In the absence of any other allusion in the mortgage to the statutory power I find no support for the suggestion that the purpose of the clause under consideration was not to create a special and independent power of sale, but merely to modify the statutory power.

I agree with the learned judges of the Court of Appeal for Manitoba that the words "without any notice being required" apply only to the termination of the tenancy of the mortgagor provided for in the mortgage and do not affect or qualify the authority to sell. But I am also of the opinion that, in the absence of any condition as to notice being annexed to it, the express power of sale conferred by the mortgage may be exercised without notice. *Jones* v. *Matthie*(1); Bythewood and Jarman's Conveyancing (4 ed.), p. 689; Smith's Equity (4 ed.), p. 297.

No precise or technical form of words is necessary

(1) 11 Jur. (1847) 504.

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to create a power of sale. It suffices that the intention be sufficiently denoted. Sugden on Powers (8 ed.), p. 182; Farwell on Powers (2 ed.), p. 48. The intention is here clearly expressed; the donor was competent; the instrument — a deed — is apt; and the object is lawful and proper.

The objection to the sufficiency of the power urged on behalf of the respondents, that the donee of it has no estate, legal or equitable, in the mortgaged land, is possibly met, as Mr. Coyne contended, by the provisions of section 108 of the Act which gives to every first mortgagee

> the same rights and remedies at law and in equity as he would have had or been entitled to if the legal estate in the land or term mortgaged had been actually vested in him, etc.

I rather think, however, that this provision is intended to preserve to, or to confer upon the mortgagee, for the protection of whatever interest he may have under the terms of the statutory form of mortgage, rights and remedies other than the power to convey the land and that it would not enable him in the exercise of a power of sale other than that conferred by the statute to give a conveyance which would have the effect of vesting in his purchaser the mortgagor's title and estate in the mortgaged registered land. I am confirmed in this view of the scope and purpose of section 108 by the fact that, notwithstanding its presence in the statute, the legislature deemed special provisions necessary to give to the conveyance of a mortgagee exercising the statutory power of sale the effect of vesting in the transferee the mortgagor's title and estate (sections 111, 112).

But the objection, in my opinion, cannot prevail, although it should be held that, for the purposes of

powers of sale section 108 is inapplicable and that the mortgagee is in the same position as if he were a stranger without any estate or interest in the land, and although the power should be regarded as simply collateral, or as a power in gross because exercisable for the benefit of the donee. Sugden on Powers, p. 47, para. 8. A power given to nominees of a testator to sell estates vested not in them, but in devisees of the donor was held by Kay J. in *Re Brown*(1), to be unquestionable and was treated as an instance of the equitable powers arising, as put by Lord St. Leonards in his book (8 ed., pp. 45-6) out of

> declarations or directions operating only on the consciences of the persons in whom the legal estate is vested.

and whom

> equity would compel * * * to convey according to the (donee's) contract (32 Ch. D. at p. 601).

In the *Brown Case*(1), the donor's devisees of the estate were bound in equity to convey to the purchaser from the donees of the power; in the present case the mortgagor, in whom the whole estate remained notwithstanding the mortgage (section 100) and those claiming under him are subject to the like duty arising out of the trust of the land declared by the mortgagor in giving to his mortgagees a special express power of sale, while retaining the whole estate in the land. If the mortgagees neither had themselves, nor had the right, by a contract made in the exercise of their power of sale, to create in their purchaser an equitable interest in the land, which the mortgagor or his representatives might be compelled to perfect by a transfer or conveyance, they were at all events em-

(1) 32 Ch. D. 597.

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powered to confer on him a right to claim such a transfer or conveyance which a court exercising equitable jurisdiction will enforce. The registrar is not obliged — indeed he is probably not entitled — to recognize or to register a transfer of the land executed by a mortgagee of new-system land acting under any other than the statutory power. But the equity which the mortgagee acting under a special power of sale creates as against the mortgagor and those claiming under him by the contract with his purchaser, will be recognized by the courts and will in a proper proceeding be enforced against them; *Re Massey and Gibson* (1); *Wilkie* v. *Jellett* (2); and the court will give proper directions for the execution of any necessary assurances and for action by the registrar upon them.

It is noteworthy that the statute itself contains a provision under which a purchaser from a mortgagee, selling new-system land under a power of sale in his mortgage may, in order to complete his title, be entitled in equity to a transfer from the mortgagor or the registered owner claiming under him and may be obliged to resort to a court of equity to compel such a conveyance. Section 83 provides for the registration of old-form instruments dealing with lands registered under the new system. As to its "operative parts," when so registered such an instrument is declared to have the same effect as "an instrument of like nature under the new system." Estates or interests in land under the new system are transferable not by execution and delivery of an instrument, but only by and upon registration of it (sections 80 and 81). An unregistered instrument merely confers a right or claim

(1) 7 Man. R. 172, at pp. 178-9.

(2) 2 Terr. L.R. 133; 26 Can. S.C.R. 282.

to its registration (section 90). An old-form mortgage of land under the new system, though its registration should be procured under section 83, does not transfer to the mortgagee any estate or interest in the mortgaged premises (section 100). But section 83, nevertheless, provides that

> the mortgagee may, for the purpose of foreclosure or sale under the mortgage, elect to proceed either under the provisions of this Act, or as if the lands were subject to the old system.

Should he exercise the latter option and proceed to sell under his power of sale without reference to the registrar, having no estate or interest in the land, he could not, in the absence of some statutory provision giving that effect to his conveyance, vest any legal title in his purchaser. *Re Hudson and Howes' Contract* (1). Such a provision is made by section 112 in respect of conveyance by mortgagees in the exercise of powers of sale contained in mortgages affecting the land before it was brought under the new system:

> Upon the registration of any memorandum or instrument or transfer executed * * * by a mortgagee selling under the power of sale in any mortgage which affected the land when the first certificate of title issued therefor, the estate or interest of the owner of the land mortgaged or incumbered shall pass to and vest in the purchasers, etc.

In the case of a purchase from a mortgagee exercising under the old system the power of sale in an old-form mortgage registered under section 83 against new-system land, unless the mortgagee had been made the mortgagor's attorney to convey his estate and the sale was made while the mortgagor was still the owner of the land, the purchaser or transferee would acquire merely an equitable interest or an equitable right to a transfer which the mortgagor, or his representative,

(1) 35 Ch. D. 668.

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would be compellable in a court of equity to perfect by a legal transfer of the mortgaged property.

If, therefore, it is competent for the registered owner of land under the new system, when giving a mortgage under the Act, to confer upon his mortgagee a power of sale independent of and additional to the inherent statutory power conferred by sections 109 and 110 and exercisable without reference to those sections, no case having been made of fraud or mistake affecting the creation, or of imposition or unfair dealing affecting the exercise of the power here in question, I see no reason why the sale under it by the assigns of the mortgagees should not be upheld as giving to their purchasers an equitable interest or right enforceable against the mortgagor or his representatives, or why the plaintiff, who was that purchaser, should not in this action obtain appropriate relief. In the absence of a provision, such as is found in section 112, or of a power-of-attorney from the mortgagor enabling the mortgagee effectually to transfer the mortgaged land to, and to vest it in his purchaser, the latter must, if the mortgagor or his representatives will not voluntarily execute a transfer in his favour, seek the aid of the courts to perfect his title and to put him in a position to become the registered owner.

Finding nothing in the statute which ousts their jurisdiction, I know of no reason why the courts should not grant to the plaintiff the relief to which he has shewn himself to be entitled.

But, can the owner of land registered under the "new system" give to his mortgagee a power of sale other than the statutory power and exercisable without observance of the requirements of sections 109

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and 110 of the Act ? There is no clause in the "Real Property Act" which forbids him doing so. Neither can it be said that the existence of such a right would be incompatible with any provision of the Act or destructive of any right which it confers or of the machinery which it provides for the cases to which it applies. All that the statute enacts is that, without an express power of sale being given him in his mortgage, a mortgagee taking a statutory form of mortgage is authorized and empowered to sell the mortgaged land. If he should elect to exercise this statutory power certain terms and conditions are prescribed which he must observe. But nowhere does the Act say that the statutory power shall be the only power of sale which a mortgagee of land under it shall have or exercise, or that any other power of sale which the mortgage may purport to give shall be exercisable only on terms and conditions the same as those prescribed for the exercise of the statutory power. Neither is it provided by sections 109 and 110, or by any other section of the Act, that, in every case and notwithstanding any provision to the contrary which may have been made in the mortgage, it shall be the right of a mortgagor that his mortgagee shall not exercise any power of sale of the mortgaged premises until there has been one month's default and (as the Act stood prior to 1900, or 1902) until a notice has been given by the mortgagee under section 109 and another month has elapsed after the giving of such notice. No such right is conferred on the mortgagor. All that the statute provides is that, if the mortgagee wishes to avail himself of the statutory power of sale which it confers, he may do so only upon observing the prescribed conditions. In this respect the provi-

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sions of the Manitoba "Real Property Act" are similar to those of "Lord Cranworth's Act." No one ever thought that the provisions for a statutory power of sale made by that legislation prevent mortgagors and mortgagees contracting for independent and additional powers of sale upon such terms as they may think proper.

It is contended for the respondents, however, that it is a fair and reasonable implication from the Act taken as a whole that the legislature intended to deny to mortgagors and mortgagees of land under it the right of contracting for any special power of sale and to prevent a mortgagee of such land obtaining any power of sale other than that which the Act itself confers on the statutory mortgagee; and in support of this view great reliance is placed on the fact that a mortgagee of land under the Act acquires no estate or interest in it.

In examining the statute in order to discover whether it affords evidence of any plan or scheme of legislation incompatible with the existence of a right to provide in the statutory mortgage for a special power of sale exercisable independently of sections 109 and 110, I find that in section 99 a form of mortgage of new-system land is prescribed. But by clause (*z*) of section 2, it is provided that:—

> Whenever a form in the schedules hereto is directed to be used such direction shall apply equally to any form to the like effect * * * and any variation from such forms not being a variation of a matter of substance shall not affect their validity or regularity, but they may be used with such alterations as the character of the parties or the circumstances of the case may render necessary.

On turning to the prescribed form, "D," I observe that, in the third clause, it contemplates special pro-

visions being made — "Here set forth special covenants if any." Section 157 of the statute provides that

> every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument or indorsed thereon.

Although the power of sale given by section 110 is not "declared to be implied in" the statutory mortgage, as are the covenant for indemnity mentioned in section 89 and the covenants and powers in statutory leases mentioned in sections 94 and 95, I incline to the view that the power of sale given by section 110 should be regarded as within the provisions of section 157. But whether that is or is not the case, the special power of sale given by the mortgage now under consideration was a "special covenant" and was an alteration in the nature of an addition to the prescribed form which it was, in my opinion, competent for the parties to make, if they thought "the circumstances of the case rendered it necessary," and it was not "a variation in substance" and certainly did not affect the "validity or regularity" of the instrument.

It is not the scheme of the Act that the implication of statutory covenants or powers in other instruments should preclude the introduction of express covenants and powers of an entirely different character and not mere modifications of the implied covenants and powers, or the enforcement, in the event of breaches, of such express covenants or of any special remedies for which the parties may have contracted. This has been held in respect to clauses in the New South Wales and South Australian Acts, similar to sections 93-96 of the Manitoba statute, which provide for implied covenants and powers in leases and for the determination of such leases by proceedings in the

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registrar's office where there has been non-observance of the implied covenants. *Baker's Creek Consolidated Gold Mining Co.* v. *Hack*(1); *Bucknall* v. *Reid*(2).

Provision is made by sections 83 and 112 of the Act, already alluded to, for the exercise by a mortgagee in certain cases of powers of sale in respect of new-system land other than that conferred by the statute and without observance of the provisions of sections 109 and 110. The respondent bases on the presence in the statute of sections 83 and 112 an argument, undoubtedly entitled to some weight, that they indicate an intention on the part of the legislature that, except in the cases thus specially provided for, no power of sale other than the statutory power conferred by section 110 shall be exercisable by a mortgagee of new-system land. I rather think, however, that these provisions indicate that the Act was not meant to be so inelastic as the respondents contend; that contractual powers of sale other than the statutory power are not precluded; and that, while, except in the special case dealt with by section 112, the statute does not facilitate the exercise of contractual powers specially created, or aid or give efficacy to transfers made under them, persons using them and claiming under them are permitted to assert and exercise such rights as their contracts expressly give them and to obtain such relief as the courts may allow.

There is nothing to prevent the parties inserting a provision enabling the mortgagee who exercises a special contractual power of sale to convey to his purchaser, as attorney of the mortgagor, the latter's estate in the mortgaged land. Because not essential

(1) 15 N.S. W.L.R. (Eq.) 207. (2) 10 S.A.L.R. 188.

to its exercise, the power of sale does not, I think, carry such a power of attorney as a necessary incident. To avoid the expense and delay involved in recourse to the courts, such an express provision would, however, seem to be reasonable and desirable in the interest of all parties whenever a special contractual power of sale is given. But when the mortgagee is not so empowered to convey the mortgagor's estate, or where the mortgagor has parted with his estate, I perceive no reason why the purchaser under a special power of sale lawfully exercised may not successfully invoke the equitable jurisdiction of the courts.

If this view be not correct it would be impossible for mortgagors and mortgagees to provide for the sale of land mortgaged under the new system until there had been one month's default as the Act now stands, and, as it was prior to the introduction in 1900, or 1902, of the proviso to section 110, until there had been at least two months' default and certain notice had been given. In many cases where the property dealt with is highly speculative in character or where for other reasons the mortgagee is willing to lend his money only if enabled in the event of default to realize immediately upon his security, owners of registered land might find themselves seriously embarrassed and perhaps even driven to sacrifice it because unable to obtain a loan upon it. Again, if the statutory power of sale is the only permissible power, and if it is necessarily inherent in every mortgage (as it must be unless it may be negatived under section 157) an owner of new-system land insisting that his mortgagee should have no power of sale whatever would find himself unable to give a mortgage on his land.

Having regard to the tendency of modern legisla-

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tion towards permitting freedom of contract in dealing with land as with other property and to the inconveniences and difficulties which such a construction of the statute would entail, I think we would not be justified in assuming that the legislature meant to tie the hands of owners of land registered under the new system, as is contended for the respondents, unless, that intention not being distinctly expressed, it is abundantly clear that the scheme of the Act would be defeated if the contrary view should prevail.

Notwithstanding the explicit language of section 80 that

> every transfer (of land) shall, when registered, operate as an absolute transfer of all such right and title as the transferor had therein at the time of its execution unless a contrary intention be expressed in such transfer,

I have no doubt that where it was intended to operate as a security for money, a registered transfer of land under the Act may, as between the parties, have no greater effect than a mortgage of land had under the old system, and that it is within the power of a court clothed with equitable jurisdiction to declare that the person registered as owner under such a transfer is merely a mortgagee and that his transferor has an equity of redemption in the land and to require the person registered as owner to submit to redemption. That such a court may exercise this jurisdiction where there is an unregistered deed of defeasance was determined in *Sander* v. *Twigg*(1). That it can afford the same relief where it is proved that the real understanding of the parties was that a transfer though absolute in form, should be taken by way of security only is, I think, equally clear — and that

(1) 13 V.L.R. 765.

apart from the provisions of section 126 of the statute. *Williams* v. *Box*(1). I make this passing allusion only because it is illustrative of the equitable jurisdiction which the statute, notwithstanding its sweeping terms, should be held not to have destroyed.

Although section 71 declares that—

> every certificate of title hereafter or heretofore issued under this Act shall, so long as the same remains in force and uncancelled be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified,

were it not for the express provision of section 75, the title of a registered owner of land holding such a certificate would, nevertheless, be extinguishable by adverse possession for the period prescribed by the Statute of Limitations. *Belize Estate and Produce Co.* v. *Quilter*(2).

Without committing myself to the proposition advanced by Mr. Coyne that the Manitoba "Real Property Act" "merely introduced a simpler system of registration" and did not in any other respect interfere with, modify or displace the general law respecting real property, I think, that, in view of the instances to which I have alluded, it cannot be said that there is any clear or well-defined scheme of the Act to which it would be repugnant that a mortgagee should be given by contract a special power of sale independent of, and exercisable without reference to the provisions of sections 109 and 110. It would have been so very easy for the legislature to have provided, if that were its purpose, that, whatever the provisions of his mortgage, a mortgagee of land under the new

(1) 44 Can. S.C.R. 1. (2) [1897] A.C. 367.

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system should not have or exercise over the mortgaged land any power of sale other than that conferred by the statute, that, in the absence of such a provision, I think we would not be justified in assuming that it was intended that this should be the effect of the statute.

The argument against the existence of the right to confer any power of sale other than the statutory power based on the fact that the mortgagee has no estate or interest in the land loses any force it might otherwise have when we find that, notwithstanding that fact, a contractual power of sale and its exercise without reference to the provisions of sections 109 *et seq.* are expressly permitted under section 83, the purchaser, in the absence of a special provision in the mortgage enabling the mortgagee to convey the mortgagor's estate, being left to obtain title either by the voluntary act of the mortgagor or his representatives, or through the intervention of a court of equity.

Although the observation of Lord Macnaghten that

> no one, I am sure, by the light of nature, ever understood an English mortgage of real estate (*Samuel* v. *Jarrah Timber and Wood Paving Corp.*(1)),

may be applied with peculiar fitness and significance to a mortgage under the Manitoba "Real Property Act," I am, for the foregoing reasons, of the opinion that it is competent for the parties to such a mortgage to provide for a special power of sale exercisable without reference to the provisions of sections 109 and 110; that in the mortgage now before us this has been sufficiently done; that, in the absence of any proof of fraud or mistake in its creation or of imposi-

(1) [1904] A.C. 323 at p. 326.

tion or unfairness in its exercise, the power was effectual and was well exercised; and that the plaintiff obtained if not an equitable interest in the land at least an equitable right to a conveyance of the land from the mortgagor or his representatives which the court, in the exercise of its equitable jurisdiction, will recognize and enforce.

I would, therefore, with respect, allow the plaintiff's appeal with costs.

Judgment should, in my opinion, be entered declaring that the sale of the lands to the plaintiff was a valid and proper exercise of the power contained in the mortgage in question, and directing that the defendants, the National Trust Company, in whom as personal representatives of the deceased mortgagor, the legal ownership of such land is vested under 5 & 6 Edw. VII. (Man.), ch. 21, shall execute and deliver a transfer of such lands to the plaintiff, and that, upon the plaintiff filing in the land titles office such transfer together with the deed executed by the mortgagees in the exercise of the power of sale, the district-registrar shall cancel the existing certificate of title and issue a new certificate of title to the lands in question in favour of the plaintiff for such estate as the mortgagor held therein. The plaintiff should also have his costs of this action including the costs of the appeal to the Court of Appeal for Manitoba.

BRODEUR J.:—I concur with the views expressed by Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Aikins, Fullerton, Coyne & Foley.*

Solicitors for the respondents: *Tupper, Galt, Tupper, Minty & McTavish.*

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Crown lands, and, by section 2, it was declared that such grants should be "free grants" subject only to the payment, on the issue of patents therefor, of the costs of survey and incidental expenses, at the rate of ten cents per acre. The lands in question formed part of the land-subsidy, earned by the railway company and reserved and set apart for that purpose by order-in-council, and had been conveyed by deed poll to the appellants by the railway company prior to the issue of a Crown grant. While still unpatented, these lands had been rated for taxes and condemned for arrears of taxes under the statute of Alberta, 7 Edw. VII. ch. 11. —*Held*, that the interest of the appellants in the said lands was subject to taxation and liable to be dealt with under the provincial statute, although letters patent of grant thereof by the Crown had not issued.—*Held*, also, that allotment of these lands as "free grants," under the subsidy Act, related only to exemption from the usual charges made in respect of public lands by or on behalf of the Crown, except the cost of survey, etc., and did not exempt the appellants' interest therein from taxation under the provisions of the provincial statute, although neither the legal estate nor any interest therein remaining in the Crown could be liable to taxation.—Judgment appealed from (2 Alta. L.R. 446) affirmed. *Rural Municipality of North Cypress* v. *Canadian Pacific Railway Co.* (35 Can. S.C.R. 550) distinguished. CALGARY & EDMONTON LAND CO. *v.* ATTORNEY-GENERAL OF ALBERTA **170**

AND *see* STATUTE 1.

2——*Negligence — Carriers — Operation of railway — Defective system — Gratuitous passenger — Free pass — Limitation of liability — Employer and employee — Fellow-servant — Evidence — Onus of proof.*] The plaintiff's husband was an employee engaged as a mechanic in the company's workshops and was travelling thither to his work on one of the company's passenger cars, as a passenger, without payment of fare. A freight car became detached from a train, some distance ahead of the passenger car and proceeding in the same direction; it ran backwards down a grade, collided with the passenger car

and the plaintiff's husband was killed. The manner in which the freight car became detached was not shewn. On the body of deceased there was found a permit or "pass," which was not produced, and there was no evidence to shew any conditions in it, nor over what portion of the company's lines nor for what purpose it was to be honoured. On the close of the plaintiff's case the defendants adduced no evidence whatever, and the jury found that the company was at fault, owing to a defective system of operation of their trains, and assessed damages, at common law, for which judgment was entered for the plaintiff.—*Held*, that there was a presumption that deceased was lawfully on the passenger car and, in the exercise of their business as common carriers of passengers, the company were, therefore, obliged to use a high degree of care in order to avoid injury being caused to him through negligence; that there was nothing in the evidence to shew that deceased occupied the position of a fellow-servant with the employees engaged in the operation of the trains which were in collision; and that, in the absence of evidence shewing any agreement, express or implied, or some relationship between the company and deceased which would exclude or limit liability, the plaintiff was entitled to recover damages at common law.—Judgment appealed from (16 B.C. Rep. 113) affirmed. *Nightingale* v. *Union Colliery Co.* (35 Can. S.C.R. 65) distinguished. BRITISH COLUMBIA ELECTRIC RAILWAY CO. *v.* WILKINSON **263**

3——*Construction of statute — "The Railway Act," R.S.C.* (1906), *c.* 37, *ss.* 77, 315, 318 (2), 323—(*D.*) 1 *Edw. VII. c.* 53—(*Man.*) 52 *V. c.* 2; 53 *V. c.* 17; 1 *Edw. VII. c.* 39 — *Board of Railway Commissioners — Complaints — Evidence — Agreement for special rates — Unjust discrimination — Practice — Form of order on reference.*] In virtue of an agreement with the Government of Manitoba, validated by statutes of that province and of the Parliament of Canada, the Canadian Northern Railway Company established special rates for the carriage of freight, etc., to points in Manitoba, and the Canadian Pacific Railway Company reduced its rates, which had been in force

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