REPORTS

OF THE

SUPREME COURT

OF

CANADA

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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.
" " Sir Louis Henry Davies C.J., K.C.M.G.
" John Idington J.
" " Lyman Poore Duff J.
" Francis Alexander Anglin J.
" Louis Philippe Brodeur J.
" Pierre Basile Mignault J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Hugh Guthrie K.C.

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 58 OF THE SUPREME COURT REPORTS.

Central Vermont Railway Company v. *Bain* (58 Can. S. C.R. 433). Leave to appeal granted, Dec. 8, 1919.

Cobalt, Town of, v. *The Temiskaming Telephone Co.* (59 Can. S.C.R. 62). Leave to appeal refused, Nov. 21, 1919.

Grand Trunk Railway Company v. *Bain* (58 Can. S.C.R. 433). Leave to appeal granted, Dec. 8, 1919.

Shepard v. *British Dominions General Insurance Co.* (58 Can. S.C.R. 551). Leave to appeal refused, Apr. 23, 1920.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

HERMAN C. MORSE (DEFENDANT)....APPELLANT;

AND

AMOS D. KIZER (PLAINTIFF).....RESPONDENT.

1919

*Mar. 10, 11

*May 6

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Registry laws—Registration of mortgage—Notice of judgment—Priority—Nova Scotia "Registry Act," R.S.N.S., [1900] c. 137.

The mortgagee of land in Nova Scotia who registers his mortgage with notice of a judgment against the mortgagor, afterwards registered, does not obtain priority over the judgment-creditor. Idington J. dissents.

Judgment of the Supreme Court of Nova Scotia (52 N.S. Rep. 112; 39 D.L.R. 640), affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), affirming the judgment.

One Blinn was convicted at Bridgetown, N.S., of having obtained money under false pretences. After the conviction the court made an order for compensation, having the effect of a judgment, under section 1048

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 52 N.S. Rep. 112; 39 D.L.R. 640.

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of the Criminal Code, which order was initiated by appellant who was counsel for the prisoner. Appellant on the next day took from the prisoner a mortgage on land in King's County, N.S., and had it registered before the judgment. The judgment creditor then brought action for an order declaring that his judgment had priority.

The trial judge granted such order and his judgment was upheld by the court *en banc*.

Morse, appellant in person.
O'Connor K.C. for the respondent.

THE CHIEF JUSTICE.—I concur in the reasons for judgment of my brother Anglin and would dismiss this appeal with costs.

IDINGTON J. (dissenting) — Notwithstanding the elaborate history of the law submitted I am of the opinion that this case should be decided by the construction of the relevant sections in the "Registry Act," R.S.N.S., 1900, ch. 137.

As I read same the bare fact that a mortgagee has notice of outstanding unregistered judgments against him giving the mortgage in no way touches the rights acquired by the mortgagee taking and registering a mortgage.

To hold otherwise would lead to rather alarming consequences.

Followed out logically a judgment debtor who was notoriously insolvent never could give a valid mortgage, not even for an actual advance of cash paid him.

Section 16 of the Act in question only makes registration of a judgment effective "from the date of such registry."

And if a mortgagee cannot rely upon that I do not see how any man can safely take a mortgage if he has reason to believe there is a judgment anywhere against his mortgagor.

If the facts had been as Mr. Justice Drysdale through error states them, then an entirely different case would have been presented For I think it is at least fairly arguable that if a man by theft or fraud deprives another of specific money which can be clearly traced into an investment in the purchase of real estate, a mortgagee taking with full knowledge thereof a mortgage upon such real estate would have some difficulty in maintaining his security against the party so defrauded.

Here it is neither alleged in the pleading nor attempted to be proved that appellant knew that the money which was invested in the real estate in question was that which had been obtained by false pretences.

It is alleged in the pleading that the said money was that so obtained.

Why the plaintiff so carefully abstained from alleging that appellant knew that alleged fact I cannot understand on any other hypothesis than that plaintiff did not believe such a charge and hence properly refrained from making it.

The temptation to make the charge I should surmise must have been great.

I think the appeal should be allowed with costs.

ANGLIN J.—This appeal from the Supreme Court of Nova Scotia, involving merely a question of priority between a judgment for $71 and a mortgage for $80 upon land said to be of a value insufficient to satisfy both claims, illustrates the necessity for further restricting the right of appeal to this court.

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The defendant, a barrister and solicitor, acted as counsel for one Blinn, accused of obtaining $71 by false pretences from the plaintiff. After convicting Blinn the County Court Judge, on the 14th of March, 1917, made an order for compensation against him under section 1048 of the Criminal Code, which is by that section given the force and effect of a judgment for debt. The defendant initialled the order to evidence his approval of its form. With this actual notice of it but, so far as the record shews, without any intention of defeating the plaintiff's judgment or of embarrassing him in its recovery and without any knowledge of the fact that the $71 fraudulently obtained had been invested in the property covered by it, the defendant on the 15th of March obtained from Blinn a mortgage on some real estate for $80, the amount of his fees for Blinn's defence, and immediately caused it to be registered. The plaintiff's judgment was registered only on the following day. By this action the plaintiff seeks

an order * * * declaring that the compensation order * * * may have precedence and priority on the records of the registry of deeds at Kentville in the County of King's over the said mortgage obtained by the said defendant from the said James F. Blinn.

The trial judge granted this relief and his judgment was unanimously affirmed on appeal.

Much of the argument at bar was devoted to the question whether the plaintiff's judgment gave him a lien on Blinn's real property before its registration. A judgment in nowise affected the debtor's lands at common law. Until the Statute of Westminster 2nd (13 Ed. 1, ch. 18) provided the writ of *elegit* the debtor's lands were not liable in satisfaction. Black on Judgments (2 ed.), sec. 397 *et seq.* Whatever might have been the case under the earlier Nova Scotia "Docketing Acts" of 1758 and 1822, I think it is perfectly clear

that under the registry legislation in force in March, 1917 (R.S.N.S., 1900, ch. 137) no lien arises until registration. But, in my opinion, the plaintiff's claim in this action does not depend on the existence of such a lien before registration.

Sections 2 (a), 15 and 16 of the "Registry Act" of 1900 are as follows:—

2. In this chapter unless the context otherwise requires:—

(a) The expression "instrument" means every conveyance or other document by which the title to land is changed or in any wise affected, and also a writ of attachment, a certificate of judgment, a lease for a term exceeding three years, and a vesting order; but does not include a grant from the Crown, a will, or a report of commissioners appointed to make partition.

15. Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument affecting the title to *the same land,* be ineffective unless such instrument is registered in the manner provided by this chapter before the registering of such subsequent instrument. R.S., ch. 84, sec. 18.

16. A judgment, a certificate of which is registered in the manner by this chapter provided in the registry of any district, shall from the date of such registry, bind and be a charge upon any land within the district of any person against whom such judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment. R.S., ch. 84, sec. 21.

Section 3 of ch. 170, "The Sale of Land Under Execution Act," is as follows:—

3. The land of every judgment-debtor may be sold under execution after the judgment has been registered for one year in the registry of deeds for the registration district in which the land is situated. R.S., ch. 124, sec. 1 (part).

The plaintiff's right after obtaining his order for compensation was to cause it at any time to attach to the judgment-debtor's lands in any particular registration district by registering a certificate of it in the Registry Office of that district under section 16. With actual notice of that right the defendant took his mortgage. His position is, I think, not distinguishable from that of an English mortgagee or purchaser taking his mortgage or deed with notice of the right of a

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judgment-creditor to attach the lands of the mortgagor or vendor by suing out a writ of *elegit*, or, if they were situated in a county having a registration system, by registering it in the Registry Office of such county.

The principle of equity on which such a mortgagee or purchaser is held to take subject to the rights of the judgment-creditor as against the mortgagor or vendor is perhaps most clearly stated by Vice-Chancellor Sir W. Page-Wood in *Benham* v. *Keane* (1). After reviewing the earlier cases (*Hine* v. *Dodd* (2); *Tunstall* v. *Trappes* (3); *Robinson* v. *Woodward* (4)), he says, at p. 704:—

> No person having notice of a judgment can by contract with the debtor put himself in a better position than the person with whom he contracts.

The same principle was acted on by Lord Elgin in *Davis* v. *Earl of Strathmore* (5), approved in *Greaves* v. *Tofield* (6).

As put by Lord Hatherly (formerly Page-Wood, V.-C.) in *Rolland* v. *Hart* (7), at p. 684:—

> Actual notice must be shewn, which amounts to fraud in the person who, having such actual notice, attempts through the medium of the "Registration Act" to get priority. * * * The authorities have been uniform in holding that the proof of notice must be very clear and distinct; but if actual notice is proved, then a man cannot take advantage of his registration to invalidate a previous unregistered security.

This doctrine is so firmly embodied in the English Equity system that nothing short of explicit legislation will suffice to render it inapplicable where that system is in force. We had to consider such legislation in the recent case of *Union Bank* v. *Boulter-Waugh* (8).

The language of the English "Registry Act" dealt with in the cases above cited was more explicit than section 16 of the Nova Scotia Act. The Registration

(1) 1 J. & H. 685.
(2) 2 Atk. 275.
(3) 3 Simons 286, 307.
(4) 4 De G. & S. 562.
(5) 16 Ves. Jr. 419, 429.
(6) 14 Ch.D. 563, 571, 573-6.
(7) 6 Ch. App. 678.
(8) 58 Can. S.C.R. 385

Act for the West Riding of Yorkshire (5 & 6 Anne, ch. 18) contained this provision as section 4:—

> No judgment * * * shall affect or bind any manors, lands, tenements or hereditaments, situate, lying and being in the said West Riding but only from the time that a memorial of such judgment shall be entered at the Registry Office.

The "Middlesex Registry Act," 7 Anne, ch. 20, by sec. 18, provides that:—

> No judgment * * * shall affect or bind any honours, manors, lands, tenements or hereditaments, situate, lying and being in the said county of Middlesex, but only from the time that a memorial of such judgment * * * shall be entered at the said Registry Office expressing, etc.

I read the affirmative provision of section 16 of the Nova Scotia Act as implying the negative expressed in both these English statutes and formerly found in the word "only" of the Nova Scotia statute of 1832, ch. 51, sec. 3; the R.S.N.S. 1851, ch. 113, sec. 20; the R.S.N.S. 1859, ch. 113, sec. 22; and the R.S.N.S. 1864 (Appendix), ch. 113, sec. 22, which was dropped in the revision of 1873, ch. 79, sec. 22.

I agree with Mr. O'Connor that it is the defendant and not the plaintiff who must seek the aid of section 15 of the Nova Scotia "Registry Act" to obtain a priority which equity denies him and that he is excluded from its operation because he is not "a person claiming * * * without notice," and possibly also because a judgment is not an "instrument" within the definition of that word in the statute. In any case, while unregistered, a judgment does not affect the title to land within the meaning of section 15.

Two cases were cited by the appellant as in conflict with the view which I have stated. In *Neate* v. *The Duke of Marlborough* (1), the judgment-creditor had not sued out a writ of *elegit* and it was accordingly held that having no legal right against his debtor's land he could not invoke the auxiliary jurisdiction of

(1) 3 My. & Cr. 407.

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a court of equity to reach his debtor's equitable interest. That decision has no bearing on the equitable doctrine as to the effect of actual notice. It might be in point if the plaintiff here were suing without having registered a certificate of his judgment.

The personal equity affecting the conscience, referred to by Lord Cranworth, in *Johnson* v. *Holdsworth* (1), which prevents a purchaser sheltering himself behind the "Registry Act" to the prejudice of a judgment-creditor of the vendor, with notice of whose judgment he paid his purchase-money, is equally applicable to a mortgagee. The true principle is that stated by Page-Wood V.-C., that no person can by contract made with notice gain a better position than that of the person with whom he contracts. Here, although the debt as security for which the defendant's mortgage was taken was incurred before the plaintiff's judgment had been obtained, the mortgagee had not and from the very nature of the case in the absence of legislation similar to 33 & 34 Vict., ch. 28, sec. 16 (Imp.), he could not have had before that time, any equitable lien or claim upon the land in question, such as might have arisen had the debt been incurred on a valid promise to secure it by mortgage—not dissimilar to the equitable interest of a purchaser who has paid over his purchase-money on the promise of a conveyance.

I would dismiss the appeal.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—I also concur.

Appeal dismissed with costs.

Solicitor for the appellant: *Harry Ruggles.*
Solicitor for the respondent: *John Irons.*

(1) (1850), 1 Sim. N.S. 106.

WILLIAM MAGILL AND LOUISE MAGILL (PLAINTIFFS)..... } APPELLANTS;

AND

THE TOWNSHIP OF MOORE AND THE MOORE MUNICIPAL TELEPHONE ASSOCIATION (DEFENDANTS)..... } RESPONDENTS.

1919
*April 3
*May 6

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Appeal — Amount — Apportionment of damages—Findings of fact — Inferences—R.S.O., [1914] c. 151.

An action brought under the "Fatal Accidents Act" (R.S.O., [1914] ch. 151), by a father and mother to recover compensation for the death of their son by defendant's negligence resulted in a judgment against defendants for $1,500 apportioned as follows: $500 to the father and $1,000 to the mother. This judgment was reversed by the Appellate Division and the action dismissed. On appeal to the Supreme Court of Canada:—

Held, that as the "Fatal Accidents Act" permits but one action to be brought for the entire damages sustained by the class entitled to compensation and the appeal must be from the judgment as a whole the full amount of $1,500 is in controversy in this appeal and the court has jurisdiction to entertain it. L'Autorité, Ltd., v. Ibbotson (57 Can. S.C.R. 340) dist.

Where the determination of an action depends on inferences to be drawn from established facts and the credibility of the witnesses is not in question an appellate court should review the inferences drawn by the lower courts and draw inferences for itself.

Idington and Mignault JJ. dissented, holding that the inferences drawn by the trial judge were correct and that his judgment should be restored.

Judgment of the Appellate Division (43 Ont. L.R. 372; 44 D.L.R. 489), reversing that at the trial (41 Ont. L.R. 375; 41 D.L.R. 78), affirmed.

APPEAL from a decision of the Appellate Division (1) reversing the judgment on the trial (2).

The material facts sufficiently appear from the above head-note.

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*PRESENT:—Idington, Anglin, Brodeur and Mignault JJ. and Masten J. *ad hoc*.

(1) 43 Ont. L.R. 372. (2) 41 Ont. L.R. 375.

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Idington J.

Tilley K.C. and *Logan* for the appellant.

Towers for the respondent The Township of Moore.

Weir for the respondent The Moore Municipal Telephone Association.

IDINGTON J. (dissenting).—I agree so fully with the reasons assigned by the learned trial judge for his judgment, and those reasons assigned by the learned Chief Justice of Ontario for not disturbing said judgment, that I need not repeat same here.

It occurred to me, however, in considering this appeal that the acts of the respondent township relative to the additional wires it put up and of which its reeve speaks as a witness, deserved, perhaps, more stress laid upon that phase of the case than has been directly done by either of said learned judges.

The reeve seems to put beyond doubt the fact that the lower wires were put there by the respondent township, as appears from the following:—

> HIS LORDSHIP.—The wires were put on before the accident, and after the Board had made their report? A.—Yes, the wires were put on after the Railway Board had made their report. There was a space, with pins there for the six wires.

Having regard to the jurisprudence which requires, in many cases, as a condition precedent to liability therefor, notice of want of repair of a highway, to be brought home to the municipal authorities, and the fact that the original construction in question was put there by an independent corporation for whose mere negligence the township could not readily be held responsible, it relieves one, when having to pass upon the question raised herein, of much of the inherent difficulty of the case to be able to consider the party accused from the point of view of having been an actor, rather than as one having a mere possible authority to interfere and hence having only a remote duty, if

any, to see that another having acquired a legal right to invade the highway, keeps strictly within its licence to do so.

And that is still more satisfactory (for the judge at all events) when having to pass upon the argument presented to us that the township is relieved by reason of the order of the Ontario Railway and Municipal Board authorizing, under the "Ontario Telephone Act," the township to take over and impliedly to continue the works in question.

To that argument there is the answer that what the Board had to deal with obviously was the financial aspect and all incidental thereto. Its exercise of authority by the order relied on goes no further. It enabled the township to acquire the works and proceed to carry on the business.

In course of doing so the primary obligation resting upon it, was not to invade the right of everyone to enter upon the highway wherever and whenever he saw fit. No one, save others in the common exercise of the same right, has the slightest authority to minimize the free and untrammelled use of the highway for the purpose of carrying any load he chooses, unless and only so far as statutory authority has expressly limited said right, by conferring on others a privilege, or restricting the use thereof by someone else, by reason of anything the legislature sees fit to prohibit.

Nothing of the latter kind is in question herein. The only thing involved here is the exercise of a privilege; and the question is whether it has been so exercised according to law.

Clearly the burden of asserting and proving that such an exercise of privileged rights has been done within the law conferring it, rests upon him asserting it.

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And these principles are none the less obligatory because the township council happens to be acting in a dual capacity as it were of guardian of the public highway and of the public who travel thereon, and at the same time of a trustee for others interested in claiming the exercise of the privilege.

I think the township failed absolutely in proving any such legal exercise of privilege and did an illegal act when it put on those wires constituting the lowering of the head-room under which deceased had to drive.

The cross-bar being there may have been a temptation which the careless man directing the placing of the wires could not resist, but did not in law enlarge the privilege.

If there is no rule laid down in the statutes conferring such a privilege, as to the correct means of its exercise, the law, of course, will imply that a reasonable regard for the rights of others must be observed. That was wholly neglected by him who was too stupid or too careless to consider what was necessary to preserve for him owning the field and entering it at the point in question his right of access to the highway.

I cannot understand why a man should blind himself with such sophistries as put forward by one of the witnesses testifying to the mode of construction adopted, of one height of head room for a gate at a farm yard and another for that at a field liable to have as high loads carried in and out.

Curiously enough he recognized that a similar gate in same vicinity was furnished with a higher set of poles.

So much for the aspect of the matter if free from regulations having force by statute. When we apply these there does not seem to have been a vestige of

right left in the township for adding to the wires already on as it did after the regulation of 20th April, 1914, which obliterated all former regulations of a like kind and established a standard which it was obligatory upon the township to have observed.

True it points to the provision in section 26 of the "Telephone Act" as if that constituted all prior erections valid. It does nothing of the kind as I read it. It preserves the rights of those erected, but of course, presupposes them to have been legally erected.

If my view, as above set out, is correct then this erection did not fall within the reservation and all done there must fall within the regulation.

The learned trial judge seemed troubled with the want of evidence of the exact date of the latest work. I respectfully submit that it was for those claiming the privilege to have proven they acted within and by virtue of it.

Holding as I do the erection illegal the argument presented in support of a defence of contributory negligence looks very much as if a ruffian had slapped in the face a man driving a load to market and thereby led to the team running away and killing the man, he could be excused from paying damages so resulting by shewing that the load was not built in the best way possible.

Indeed, some of the arguments elaborately put forward as to the alleged contributory negligence are amusing. Because the head-room was not ample, there should have been a wagon with higher wheels to render it less ample; or a culvert constructed which, of certainty, would involve an approach also lessening the head-room, or perhaps both; and, in short, deceased

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should not have been there; all of which seem ill-fitted to this case.

I have no doubt of the liability of the township and am only sorry I cannot see my way to deal with the quest on of giving relief over as desired so that the burden fall on those for whom the township were trustees and relieve the ratepayers not concerned.

But on this record, and having regard to the course of events at the trial, the only thing open to this court is to declare that the judgment should be without prejudice to that right if it can be established.

I, therefore, express no opinion as to such right either one way or another.

I think the appeal should be allowed with costs of appellant but not of respondent here and below as against the township.

I have some doubt if the extra costs created by adding said co-defendant should not be disallowed appellant.

ANGLIN J.—At the opening of the argument of this appeal a question of jurisdiction was raised by the court. While the judgment entered in the trial court was for $1,500, that sum was apportioned under sec. 4 (1) of R.S.O. ch. 151, $500 to the plaintiff William Magill, and $1,000 to the plaintiff Louisa Magill. We held in the recent case of *L'Autorité, Ltd.* v. *Ibbotson* (1), that where eleven plaintiffs joined in one action alleging injury by the same libel published in the defendant's newspaper and each claiming $2,000 damages, an appeal to this court from the Court of Review by the defendant could not be entertained, the minimum appealable amount from that court

(1) 57 Can. S.C.R. 340; 43 D.L.R. 761.

being $5,000. There, however, each plaintiff had a distinct cause of action; each could have brought a separate action. There might be defences as to one or more which did not exist as to others. There might be an appeal as to only one of the plaintiffs or a separate appeal as to each of several or of all of them. Therefore as to each plaintiff the matter in controversy on the appeal was his own right to recover damages for the injury done to himself. The court regarded the action as a joinder of several actions.

Here the right of action is purely statutory (R.S.O. ch. 151, sec. 3). The statute gives but one action (sec. 6) to be brought by the personal representative, or, on his default (sec. 8), by one or more of the relatives of the class for whose benefit it may be maintained. The cause of action is single; it is for the entire damages sustained by the whole class in whose behalf the statute provides that compensation may be recovered. Either of the present plaintiffs might have maintained this action without joining the other and would have recovered the whole amount to which both have been held entitled. Before that amount is distributed any costs not recovered from the defendants may be deducted from it (sec. 4 (1)). The appeal to a divisional court was necessarily from the judgment as a whole. The appeal to this court is to restore that judgment as a whole, and it is the whole amount of it, $1,500, that is "the matter in controversy on the appeal" ("Supreme Court Act," sec. 48 (c)). The court was unanimously of this opinion and jurisdiction to hear the appeal was, therefore, maintained.

The material facts sufficiently appear in the reports of the judgments of the learned trial judge and of the Appellate Division (1). I assume, without

(1) 41 Ont. L.R. 375; 41 D.L.R. 78; 43 Ont. L.R. 372; 44 D.L.R. 489.

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so deciding, that there was not statutory authority for placing the telephone wires just as they were, such as would bring this case within the principle of the decision in *Canadian Pacific Railway Co.* v. *Roy* (1). Having regard to the conflicting views as to the proper inferences to be drawn from the proven facts, as to which there is little, if any, dispute, I have thought it necessary to study and analyze with care all the evidence in the record. I shall, however, content myself with stating the conclusions to which it has led me. Unless in exceptional cases no good purpose is served, in my opinion, by setting out at length the considerations on which inferences of fact are based in an ultimate court of appeal. No question of credibility being involved, our right, if not our duty, to review the inferences drawn by the courts below is unquestionable. *Dominion Trust Co.* v. *New York Life Ins. Co.* (2).

Before reversing the judgment appealed from, however, we should be satisfied that it is erroneous. I am not so satisfied. On the contrary, my study of the evidence has left me in absolute uncertainty as to whether the presence of the telephone wires at the gateway contributed at all to the upsetting of the load of hay which resulted in the death of James Magill. While it is quite possible that it did, having regard to all the circumstances, it seems to me more likely that it did not—that, if the wagon, loaded as it was, had been driven in the same course, the same results would probably have ensued had there been no wires to have been passed under. Solely on this ground and without finding anything in the nature of a voluntary assumption of risk or contributory negligence

(1) [1902] A.C. 220. (2) [1919] A.C. 254, 257; 44 D.L.R. 12.

on the part of the deceased and also without requiring that it should be established that the negligence of the defendants was the sole cause of the occurrence which resulted in James Magill's death, I would dismiss this appeal—with costs if demanded.

BRODEUR J.—I concur with Mr. Justice Anglin.

MIGNAULT J.—In my opinion this appeal should be allowed.

The learned trial judge found as a fact that the telephone wires in question, which were only 13 feet 9 inches above the ground, were so placed on the highway as to form an obstruction and interfere with the driver on the top of an ordinary load of hay in driving out of the field on to the highway He also found that the position of the wires causing the deceased to stoop or to crouch down in passing under them was the proximate cause of the horses getting from under that control which was necessary to procure the safe passage of the load. He further found that the deceased was not guilty of contributory negligence.

The Appellate Division reversed the judgment, Sir William Meredith C.J. dissenting, the main reason, as I read the opinion of Mr. Justice Hodgins, being that while the learned trial judge was entitled to draw the inference that the obstruction resulting from the wires, having caused the driver to stoop or crouch down, was the proximate cause of the horses getting out of control, other inferences could be made, so that the matter was left in doubt and the present appellants could not succeed.

I think, with deference, that the inference drawn by the learned trial judge was a very reasonable one in view of the evidence of the boy Hird, who was on

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Mignault J.

the top of the load with the deceased. There was a clearance of only 3 feet 9 inches between the top of the load and the wires, of which there were six on the lower cross bar, so that the driver would have to stoop and in so doing would be unable, while crossing a considerable space, to control his horses. Under these circumstances, I cannot say that the findings of fact of the trial judge are clearly wrong.

I also approve of the disposition of the case by the learned trial judge with regard to the respondent, The Moore Municipal Telephone Association.

I would allow the appeal with costs here and in the Appellate Division and restore the judgment of the learned trial judge.

MASTEN J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellants: *John R. Logan.*
Solicitors for the respondent the Township of Moore: *Cowan, Towers & Cowan.*
Solicitors for the respondents The Moore Municipal Telephone Assoc.: *Parlee, Burnham & Gurd.*

1919
*Feb. 4.
*May 6.

THE GREAT WEST SADDLERY COMPANY (DEFENDANT)..... } APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..... } RESPONDENT.

THE JOHN DEERE PLOW COMPANY (DEFENDANT)..... } APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..... } RESPONDENT.

THE A. MACDONALD COMPANY (DEFENDANT)..... } APPELLANT;

AND

DANIEL WHITFIELD HARMER (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Constitutional law—Statute—"Companies Act," R.S. Sask, [1915] c. 14, ss. 23 and 25—Licence to do business in province—Dominion companies.

Secs. 23 and 25 of the Saskatchewan "Companies Act" requiring all companies, as a condition for doing business in the province, to be registered and take out an annual licence are *intra vires* of the legislature and apply to, and may be enforced against, a company incorporated by the Parliament of Canada to do business throughout the Dominion. *John Deere Plow Co.* v. *Wharton* ([1915] A.C. 330; 18 D.L.R. 353), distinguished.

Judgment of the Supreme Court of Saskatchewan, *Harmer* v. *A. Macdonald Co.* (10 Sask. L.R. 231, 33 D.L.R. 363), affirmed.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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APPEAL from a decision of the Supreme Court of Saskatchewan (1), affirming the judgment at the trial in favour of the plaintiff. The effect of this judgment was to affirm the convictions against the appellant companies in the other two cases.

The Great West Saddlery Company and the John Deere Plow Company were convicted by a police magistrate of Regina of violating the provisions of secs. 23, 24 and 25 of the "Companies Act" of Saskatchewan and on a case stated to the Supreme Court the convictions were affirmed. In the *Harmer Case* an action was brought to restrain the company from carrying on business without being registered or licensed under these provisions.

Secs. 23, 24 and 25 of the Act read as follows:—

"23. Any company, whether incorporated under the provisions of this Act or otherwise, having gain for its object or part of its object and carrying on business in Saskatchewan, shall be registered under this Act.

(2) Any unregistered company carrying on business, and any company, firm, broker or other person carrying on business as a representative, or on behalf of such unregistered company, shall be liable, on summary conviction, to a penalty not exceeding $50 for every day on which such business is carried on in contravention of this section, and proof of compliance with the provisions of this section shall be at all times upon the accused.

(3) The taking of orders by travellers for goods, wares or merchandise to be subsequently imported into Saskatchewan to fill such orders, or the buying or selling of such goods, wares or merchandise by correspondence, if the company has no resident agent or representative and no warehouse, office or place of business in Saskatchewan, shall not be deemed to be carrying on business within the meaning of this Act.

24. Any company may become registered in Saskatchewan for any lawful purpose on compliance with the provisions of this Act and on payment to the Registrar of the fees prescribed in the regulations:

Provided that the Registrar may in the case of all companies (other than those incorporated by or under the authority of an Act of the Parliament of Canada) or proposed companies refer the application to the Lieutenant-Governor-in-Council who may refuse registration at his discretion, and in the case of refusal such company or proposed company shall not be registered.

(1) 10 Sask. L.R. 231; 33 D.L.R. 363.

25. Every company may, upon complying with the provisions of this Act and the regulations, receive a license from the Registrar to carry on its business and exercise its powers in Saskatchewan.

(2) Such license shall expire on the thirty-first day of December in the year for which it is issued, but shall be renewable annually upon payment of the prescribed fees.

(3) A company receiving a license from the Registrar may, subject to the provisions of its charter, Act or other instrument creating it, carry on its business to the same extent as if it had been incorporated under this Act.

(4) There shall be paid to His Majesty, for the public use of Saskatchewan, for every license under this Act, such fees as may be prescribed by the Lieutenant-Governor-in-Council.

(5) Every company which carries on business in Saskatchewan without a license, and every president, vice-president, director and secretary or secretary-treasurer of such company, shall be respectively guilty of an offence and liable on summary conviction to a penalty not exceeding $25 for every day the default continues.

The decision of the Supreme Court of Saskatchewan as to whether or not these provisions were *intra vires* was asked by the stated case and appeal and given in favour of their validity.

Wenegast, for the appellant, submitted that the provisions could not be distinguished from those in the "Companies Act" of British Columbia held in *John Deere Plow Co.* v. *Wharton* (1), to be *ultra vires*.

Chrysler K.C. for the respondent the Government of Saskatchewan. The legislature has eliminated from the "Companies Act" the provisions held *ultra vires* in *John Deere Plow Co.* v. *Wharton* (1).

The present legislation is authorised by sec. 92 of the "British North America Act, 1867"; *Bank of Toronto* v. *Lambe* (2); *Brewers and Malsters Assoc.* v. *Attorney-General of Ontario* (3); and does not infringe the powers given the Dominion Parliament by sec. 91; *In re Insurance Act, 1910* (4); *In re Companies* (5);

(1) [1915] A.C. 330; 18 D.L.R. 353.
(2) 12 App. Cas. 575.
(3) [1897] A.C. 231.
(4) 48 Can. S.C.R. 260; 15 D.L.R. 251; [1916] 1 A.C. 588; 26 D.L.R. 288.
(5) 48 Can. S.C.R. 331; 15 D.L.R. 332; [1916] 1 A.C. 598, 26 D.L.R. 293.

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Lionel Davis for the respondent Harmer referred to *Citizens Ins. Co.* v. *Parsons* (1); *Colonial Building and Investment Assoc.* v. *Attorney-General of Quebec* (2); and *Attorney-General of Manitoba* v. *Manitoba License Holders Assoc.* (3).

C. C. Robinson for the Dominion of Canada. The *Wharton Case* (4) laid down general principles as to the rights and powers of federal companies; *In re Companies* (5); and the legislation in question does not accord therewith.

A provincial company can enter another province only by comity but a federal company does so of right. See *Bonanza Creek Gold Mining Co.* v. *The King* (6); and its right cannot be interfered with by provincial legislation. *In re Insurance Act, 1910* (7).

Nesbitt K.C. and *Barton* for the Ontario Government also contended that the legislation is *intra vires*.

THE CHIEF JUSTICE.—These three actions which were brought to test the constitutional validity of certain sections of the "Companies Act" of Saskatchewan, R.S.S. 1915, ch. 14, requiring all companies, provincial and foreign, to register in the province and to take out an annual licence and pay an annual fee before carrying on business therein and providing that every company carrying on business in Saskatchewan without such licence should be guilty of an offence and be liable on summary conviction to a penalty not exceeding $50 for every day the default continued, came before us in one consolidated appeal and were argued together.

(1) 7 App. Cas. 96.
(2) 9 App. Cas. 157.
(3) [1902] A.C. 73.
(4) [1915] A.C. 330; 18 D.L.R. 353.
(5) 48 Can. S.C.R. 331; 15 D.L.R. 332; [1916] 1 A.C. 598, 26 D.L.R. 293.
(6) [1916] 1 A.C. 566; 26 D.L.R. 273.
(7) 48 Can. S.C.R. 260; 15 D.L.R. 251; [1916] 1 A.C. 588, 26 D.L.R. 288.

The trial judge in the court of first instance upheld the validity of the impeached sections, and the Court of Appeal in that province, consisting of five judges, unanimously confirmed the judgment of the trial judge.

The sections in question, the validity of which is impeached, were enacted by the legislature of that province after the decision of the Judicial Committee in the case of *John Deere Plow Co.* v. *Wharton* (1), and were, no doubt, enacted in an honest attempt to comply with the principles which in that case it was declared should control provincial legislation with respect to companies chartered by the Dominion of Canada. The objectionable features of the previously existing legislation of the Saskatchewan Legislature, somewhat similar to those sections of the British Columbia Legislature which in the *Wharton Case* (1) had been held *ultra vires*, were eliminated and the present provisions introduced in lieu of them.

Whether the legislature has been successful or not in avoiding the constitutional perils of enactments which may be said to some extent to control and regulate the business activities in the province of Dominion companies is the question now before us. It depends altogether upon the construction given to the reasons for judgment of the Judicial Committee in the *Wharton Case* (1), before referred to. I have read and re-read this judgment several times and studied it most carefully. As a result, I cannot conclude that the legislature in this instance has exceeded its powers in enacting legislation requiring all companies, local and foreign, including Dominion, to register and pay an annual fee. Nor do I think the section imposing a penalty upon a Dominion company for every day it

(1) [1915] A.C. 330; 18 D.L.R. 353.

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carries on business in the province without having paid the annual fee is *ultra vires* or other than a reasonable sanction to the requirement of the payment of the annual tax or fee imposed.

I reach this conclusion not without grave doubt whether the section requiring the company to take out a licence to carry on business in a province is not objectionable and *ultra vires*. In the result, however, I have concluded that the Saskatchewan "Companies Act" as amended and now before us, while in form to some extent objectionable as seeming to require a provincial licence to enable a Dominion company to carry on its business in the province may nevertheless be so construed as to be held to be merely a taxing Act, levying an annual tax or fee, alike on local companies as on extra-provincial companies, including Dominion ones. Its form may be, and I think is, objectionable and unfortunate, but its essence and substance merely require the payment of an annual fee or tax with a provision that the company shall not carry on its business in the province until the annual fee is paid subject to a penalty for every day it so transgresses.

The requirement of payment of such a tax is not objectionable and is expressly referred to in the *Wharton Case* (1), by the Judicial Committee as permissible legislation by the province while the penalty for non-payment of the fee may be looked upon as a non-objectionable sanction for the recovery of the tax.

I do not think the requirement of a licence to enable the company to carry on its business is *intra vires*, but I would in this case treat it as negligible and inapplicable to Dominion companies, and if the tax was paid more in the nature of a receipt for its payment than as a licence to carry on business, I do not think the com-

(1) [1915] A.C. 330; 18 D.L.R. 353.

pany, after payment of the tax, would be liable to the penalty prescribed if it declined to accept the licence and continued to carry on its business. The legislature has no power to require the acceptance of a licence from it to enable a Dominion company to carry on its business in the province. It might require registration, it might impose an annual tax, it might possibly enact the penalty clause as a sanction for the recovery of the tax, but it could not compel the company to accept a licence from it to enable it to carry on its business. The company derived its power to do that throughout the Dominion from the Dominion which gave it its charter and while the legislature could not prohibit or control the exercise of these powers it nevertheless could, in my judgment, exact the payment of an annual tax from the Dominion company in common with other foreign companies and local companies which itself created and chartered and could probably enforce the payment of such tax by the imposition of a penalty. I reach this latter conclusion, as I have said, with difficulty and doubt. It is to be regretted that the legislation should take the form it did, but looking at its essence and construing it as I do, I will not hold it to be *ultra vires*.

Of course, the legislation requiring a licence and prescribing a penalty or penalties for not taking one out before carrying on business may take an objectionable form. In the case before us I think, on my construction of the statute, it, while objectionable in form, is not so in essence. The license required, the fee payable and the penalty prescribed apply equally to local and foreign companies, which include Dominion, and it cannot be successfully argued that the fees are excessive or that they are other than such fees as may reasonably be imposed as direct taxation

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for the purpose of revenue within the province. *Bank of Toronto* v. *Lambe* (1).

Nor can it be said that such fees and the penalties imposed on the company for carrying on its business without their payment are really calculated to affect the status or powers of a Dominion company. The penalties prescribed are only a means of recovering the annual fees. Once those fees are paid these penalties could not be exacted.

I may add that I have not reached my conclusion as to the licence without doubt and hesitation in view of the reasons for the decision in the *Wharton Case* (2), and as these appeals avowedly seek to obtain a judicial construction of the judgment of the Privy Council in that case it would have been better from every standpoint, in my opinion, if they had been taken direct to the fountain head which could best explain the exact meaning and effect of the principles it laid down, and so avoid the delays and costs of totally unnecessary appeals to this court.

I would, in view of the reasons given above, dismiss these appeals with costs.

IDINGTON J.—These appeals were by consent reargued together, and they ought to be decided upon the same single neat point of law whether or not a local legislature can tax an incorporated business company deriving its incorporation from the Dominion Parliament.

All the other issues attempted in argument to be dragged into the case seem entirely irrelevant. If the tax is paid the other issues become of no consequence for the purposes of the disposition of the litigation respectively involved in each case.

(1) 12 App. Cas. 575. (2) [1915] A.C. 330; 18 D.L.R. 353.

The issuing of any more interrogatories on merely abstract points of law by the Dominion Government to this court for purposes of information or of testing the limits of the powers of local legislatures in regard to some supposed assertion or possible assertion of power, seems for the present to have reached the bounds of its toleration, yet that does not seem to have exhausted the resources of ingenuity on the part of others for we are invited to answer in some of these cases questions needless to answer if the power of taxation in question exists.

The Legislature of Saskatchewan, having due and proper regard to the fate which rightly befell some extremely unjustifiable British Columbia legislation in the case of *John Deere Plow Co.* v. *Wharton* (1), decided to conform, so far as it could, to the decision in that case; repealed its old statutes bearing upon the like questions (of which some are not involved herein) and enacted a new "Companies Act" wherein it incorporated a provision for registration and licensing of all corporate business companies and subjected all, whether of local organization under the Act, or of Dominion or of foreign origin, to an initiative and annual license fee of the same graduated scale fixing the amount to be paid in proportion to capital. It clearly did this by way of taxation which the appellants seek to escape.

I know of no reason why they should not be subjected thereto or why the place of origin should be a ground for freeing them from the common burden all should bear in support of the government of the province—where they choose to carry on business—and seek the protection it gives.

Nor do I see any imperative reason for confining

(1) [1915] A.C. 330; 18 D.L.R. 353.

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the exercise of the taxing power to some statute earmarked as a taxing Act.

The questions of choice of subjects for taxation and equality of burden to be borne thereby, and best modes of enforcing payment thereof, have never yet been scientifically settled in a way satisfactory to those who have paid the greatest attention to such questions.

What we have primarily to deal with is the single issue of whether the annual tax for the non-payment of which one of these companies has been penalized, falls within what is referred to in the "British North America Act" as "direct taxation."

It seems to fall well within the decisions in the cases of *Bank of Toronto* v. *Lambe* (1), and the *Brewers & Malsters Association* v. *Attorney-General of Ontario* (2), as being direct taxation.

Indeed no question was raised in argument founded upon any doubt as to this tax being direct taxation.

In the graduated scale as a basis for its application I cannot distinguish it from the former and in the licensing fee as a mode of its imposition it seems to fall within the latter case.

I cannot, where the power seems so clear, entertain, as a valid argument, in answer to the judgment in the two first named cases enforcing the penalties, the objection that there are provisions in the Act claimed to be *ultra vires*.

These collateral contentions seem wholly irrelevant to the single issue before us, so far at least as concern the respective judgments for penalties.

Their introduction seems but an attempt to becloud the real issue which is a very narrow one.

As to the *Harmer Case*, though not differentiated in the argument from the other two, it occurred to me

(1) 12 App. Cas. 575. (2) [1897] A.C. 231.

that possibly the introduction of some of these alleged objections was not so far fetched.

In that we have to consider the basis upon which a shareholder is proceeding against his company for relief.

I am, however, of the opinion that there is quite enough in the plaintiff shareholder's complaint, when confined to the question of improperly incurring penalties by refusing to pay the tax and all implied therein, to maintain the action and the resultant judgment, without considering the other excuses for not doing so or contentions set up by either party.

It seems to me the same observations are applicable to the appeal in the Manitoba case.

I observe, however, that there is a slight difference between the language used in the final clause of the case stated in the *Harmer Case*, and that used in the final clause of the case submitted to the Manitoba courts. I shall revert to this in closing what I have to say.

I agree entirely with the reasons assigned by the late learned Chief Justice of Manitoba, and substantially with all advanced by Mr. Justice Cameron in support of the judgment of the Court of Appea from Manitoba in the *Davidson Case*.

In deference to the argument presented herein, I desire to point out that, in my opinion, a corporation, by whomsoever or whatsoever power created, has no greater right in any province than a private individual enjoying full rights of citizenship and not personally disqualified in any way, going there to do business and in many respects has less, unless expressly given same by virtue of some legislative authority endowed with power to do so as, for example, in the cases of banks or railway companies.

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If created by the Dominion authority its capacity must fall within what an exercise of the so-called residuary powers of the Dominion may create, unless in the cases specifically provided for either expressly or impliedly in the enumerated powers of the "British North America Act" conferred on the Dominion.

The Great West Saddlery Company in question in no way falls within any of the latter. There is, therefore, no reason for relying upon any such implication as may arise in favour of the corporation created to execute the purposes of any of the said enumerated powers.

It was suggested in argument that the judgment of the Judicial Committee of the Privy Council in the *Wharton Case* (1), had said the Dominion "Companies Act" rested upon item No. 2 of the said enumerated powers. I do not so read it. And after the numerous futile attempts theretofore made, before said court, to make that item relative to "Trade and Commerce" subservient to the enlargement of the powers of the Dominion in relation to conferring extraordinary powers upon ordinary trading companies, I submit respectfully, that any such expression if to be read as suggested, must be treated as *obiter dicta*.

It was in no way necessary for the decision of the single neat point decided in the *Wharton Case* (1).

Moreover, we have, since that case, the expression of opinion by it in the insurance case, *Attorney-General for Canada* v. *Attorney-General of Alberta* (2), which seems to deny the power to rest any licence thereon to carry on any "particular trade."

The pith of the said expression of opinion is contained in the following extract:—

(1) [1915] A.C. 330; 18 D.L.R. 353.

(2) [1916] 1 A.C. 588 at page 596; 26 D.L.R. 288.

There was a good deal in the "Ontario Liquor License Act," and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell* v. *The Queen* (1). But in *Hodge* v. *The Queen* (2), the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that the Dominion licensing statute, known as the "McCarthy Act," which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by s. 91. Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.

This express declaration of the court above relevant to the non-existence of the power claimed for the Dominion so far as rested upon the enumerated item of "Trade and Commerce" seems to be conclusive against the contention of appellant, for it is only by virtue of something alleged to rest upon said item the mysterious right is asserted.

If the Dominion cannot assert the power claimed for it by way of an express licence, much less can it do so by mere incorporation giving specified rights to certain parties to trade in a corporate capacity.

The legal entity must submit to the same laws properly enacted by and within the powers of a provincial legislature as the private individual.

The power to impose a tax and enforce its collection by means of prohibition to trade until it has been paid and its payment evidenced by a licence has been asserted and upheld especially in relation to the manufacture and sale of liquor in so very many ways that one is surprised to hear the argument now put forward that the doing so is to be treated as an improper

(1) 7 App. Cas. 829. (2) 9 App. Cas. 117.

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assertion of power and a denial of anything more than it means.

Though the testing of the power has been more in evidence before the courts in relation to the liquor traffic than any other, the successful assertion of the power has been asserted in manifold ways by provincial legislation ever since Confederation.

Much of that has been asserted through the powers given the municipalities, which again rests upon item No. 9 of sec. 92 of the "British North America Act," as to the licensing power as a means of raising revenue.

The taxation of transient traders by municipalities —a very old form of tax—and sometimes of the travelling circus, would be an illusory thing if the collection was not enforced by prohibition of carrying on the business of him so liable.

I only present these casual illustrations as a test of the possible need of the power to prohibit the carrying on of business until the tax may have been paid, in order to render it effective, of which no reasonable person, speaking of its possible exercise in relation to such cases, would be likely to deny. A judicial creation of a mere theoretical power to tax without any potentiality of its enforcement is apparently the high aim of the appellants.

But so long as the decision in *Citizens Ins. Co.* v. *Parsons* (1), and all involved therein stands as good law the power of the provincial legislatures over contracts will remain what it was always intended to be.

There would not seem to be in principle any difference in the quality of the power invoked whether exercised in relation to such transients or others presenting greater promise of permanency.

Yet the transient trader or the circus man might

(1) 7 App. Cas. 96.

easily become incorporated and often is in fact. Are we to say incorporation by virtue of the Dominion legislation inherently carries with it a greater sanctity than any other?

We do know from the record herein that the "John Deere Plow Company, Limited," one of the appellants herein, became so incorporated on the application of four gentlemen of Moline, in the State of Illinois, one of the United States of America, and a dealer in Winnipeg.

Why should such a legal entity be entitled to claim, merely because so created by virtue of Dominion legislation, professing only so to create, and not pretending thereby to confer greater rights to trade anywhere in Canada, than any mere private individual citizen of Canada possesses, that it has such superior rights?

The questions submitted are not necessary for the determination of the single issue which the pleading presents in either the *Harmer Case* from Saskatchewan or the *Davidson Case* from Manitoba.

Each plaintiff is entitled to succeed by reason of the company attacked defying the law of the province in question and thereby becoming liable to penalties and possibly more serious consequences.

I am strongly impressed with a suspicion begotten of circumstances coming under my observation in these proceedings and the needless frame of the questions submitted that these actions are collusive and used as a means of interrogating this court in a way it should not submit to at the mere whim of any private individuals desiring to know how far their companies can go.

Long ago, in the Province of Ontario, provision was made by legislation for the settlement of contentions between that province and the Dominion, or it and other provinces. And likewise provision was made for

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the court having jurisdiction at the suit of either the Attorney-General for Canada or the Attorney-General for Ontario to entertain an action for a declaration as to the validity of any statute or any provision therein, and the "Constitutional Questions Act" of Ontario had existed from an earlier period.

The existence of such legislation, as well as similar legislation by the Dominion, seems to indicate, to put it mildly, a doubt as to the propriety of private individuals attempting what is attempted by some part of what is before us herein.

I think the appeal should be dismissed with costs to each of the respondents in the case wherein he is concerned.

ANGLIN J.—The impeached provisions of the "Companies Act" of Saskatchewan (R.S.S. 1915 ch. 14) are, in my opinion, clearly distinguishable from those of the British Columbia statute held to be *ultra vires* in *John Deere Plow Co.* v. *Wharton*(1). The important differences are so fully and so satisfactorily pointed out and discussed in the judgments of Elwood and Newlands JJ. in the Saskatchewan courts, and in the opinions prepared by my brothers Brodeur and Mignault, which I have had the advantage of perusing, that I cannot do better than adopt the reasons given by them for concurring in the dismissal of these appeals.

BRODEUR J.—The three appellant companies are incorporated under the authority of the "Companies Act" of Canada (R.S.C. ch. 79) and are empowered to carry on their business throughout the Dominion of Canada.

(1) [1915] A.C. 330; 18 D.L.R. 353.

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By the provisions of secs. 23 and 25 of the Saskatchewan "Companies Act" any company carrying on business in the province must register and take out a licence. As the appellant companies have not registered and have not taken out the prescribed licence, they have been prosecuted. They claim that those provisions of the provincial statute are *ultra vires* and they rely on the decision of the Privy Council in the case of *John Deere Plow Co.* v. *Wharton* (1), to sustain their contention.

The *John Deere Plow Case* (1) had reference to the operation of the "Companies Act" of British Columbia, which empowered the provincial authorities to refuse to a federal company the right to carry on business on the ground that there was another company of the same name upon the local register. The evidence shewed that the John Deere Plow Company had applied for a licence and its application had been rejected. Such legislation and action affected the status of the company itself, though it had been incorporated by the Dominion authorities, and the Privy Council decided (1), that the legislation was *ultra vires* of a provincial legislature, as far as the federal companies were concerned.

When the John Deere Plow decision was rendered, the Saskatchewan legislation contained provisions similar to those of British Columbia, and the Saskatchewan Legislature, at its next session, repealed the objectionable provisions and the companies legislation is now contained in the ch. 14 of the statutes of 1915. The provisions as to registration and licensing, which were applicable formerly to foreign and Dominion companies, are now of general application to all companies, whether they are incorporated by the province

(1) [1915] A.C. 330; 18 D.L.R. 353.

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itself or by the Dominion or other provincial authorities or foreign states.

The statute simply provides that all companies, whether local or not, would be equally taxed by means of licence, and the statute also provides that they should all be registered.

The failure of those companies to take a licence or to register renders them liable to a penalty.

There is nothing in the statute which prevents them from carrying out their corporate powers to make contracts and to sue under those contracts, but they are simply required to observe the general registration provisions and take a licence for purposes of taxation.

The object of the registration provision is to keep the public informed as to the status of those companies. They are bound to hand over to the registrar a return shewing the amount of the share capital, the quantity subscribed and paid up, the names of the directors and some other useful information which the public may need to do business with those companies (section 34). It is of the utmost importance for a person who contracts with a corporation to know the legal status of the latter and to see whether the contract contemplated is within the powers granted to the company by its Act of incorporation or its letters patent.

The fees which the company have to pay for their registration look to me as being very reasonable and could hardly cover the expenses which the establishment of the registrar's office would entail.

The unauthorised and fictitious companies will then be prevented from deceiving the public, since any one may obtain from the registrar the information as to any *bonâ fide* company and may ascertain the powers and standing of such company in the same manner as

if the company had obtained its charter under provincial authority.

Perhaps that knowledge could be procured in applying to the Dominion authorities; but who is going to inform the person desirous of procuring that information that the company is a federal one? It might be a foreign or provincial company. Besides, the distances in our country are so great that each province should have in its capital the necessary data as to the existence, the status and the capacity of any company.

That provision concerning registration is a law of general application enacted under the powers conferred by section 92, and there is nothing in it which may deprive a federal company of its status and powers.

The obligation for a federal company to take out a licence from and pay a tax to the provincial authorities is also a law of general application; it and the companies incorporated locally have to pay for it just as well as the companies incorporated outside the province

In the case of *Bank of Toronto* v. *Lambe* (1), that question has been decided. It was there held that though the banks are incorporated by the Dominion Parliament, they may be bound to contribute to the public objects of the provinces where they carry on business.

That same principle was affirmed by the Privy Council in the *Brewers & Malsters Case* (2), where the Ontario "Liquor License Act," which provided that no person should sell any liquors for consumption in the province without having first obtained a licence was held to be valid.

The judgment of the inferior courts in the present

(1) 12 App. Cas. 575. (2) [1897] A.C. 231.

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cases, which decided that secs. 23 and 25 of the Saskatchewan "Companies Act" were valid and *intra vires*, are well founded.

The appeal should be dismissed.

MIGNAULT J.—These three appeals were argued together and the question is as to the validity of secs. 23 and 25 of the "Companies Act" of Saskatchewan, ch. 14 of the statutes of 1915.

That Act was passed after the decision of the Privy Council in the case of *John Deere Plow Co.* v. *Wharton* (1), and the intention was, no doubt, to conform to the rules therein stated. Whether the legislature has done so is the question which has now to be decided.

In my opinion in the case of the *Great West Saddlery Company, Limited* v. *Davidson* (2) I have stated the test, derived from the decision of the Privy Council in the *John Deere Plow Company Case*, according to which the validity of such legislation must be determined. This test is whether a Dominion company is compelled to obtain a licence and to be registered in a province as a condition of exercising its powers.

The material sections of the Saskatchewan statute, which essentially differs from the Manitoba "Companies Act" referred to in the other case, are secs. 23, 24, 25, 26, 27, 28 and 30, which are in the following terms.—

23. Any company, whether incorporated under the provisions of this Act or otherwise, having gain for its object or part of its object, and carrying on business in Saskatchewan, shall be registered under this Act.

(2) Any unregistered company carrying on business and any company, firm, broker or other person carrying on business as a representative or on behalf of such unregistered company, shall be liable, on summary conviction, to a penalty not exceeding $50 for every day on which such business is carried on in contravention of this section,

(1) [1915] A.C. 330; 18 D.L.R. 353. (2) 59 Can. S.C.R. 45.

and proof of compliance with the provisions of this section shall be at all times upon the accused.

(3) The taking of orders by travellers for goods, wares or merchandise to be subsequently imported into Saskatchewan to fill such orders or the buying or selling of such goods, wares or merchandise by correspondence, if the company has no resident agent or representative and no warehouse, office or place of business in Saskatchewan, shall not be deemed to be carrying on business within the meaning of this Act.

24. Any company may become registered in Saskatchewan for any lawful purpose on compliance with the provisions of this Act and on payment to the registrar of the fees prescribed in the regulations;

Provided that the registrar may in the case of all companies (other than those incorporated by or under the authority of an Act of the Parliament of Canada) or proposed companies refer the application to the Lieutenant-Governor-in-Council who may refuse registration at his discretion, and in the case of refusal such company or proposed company shall not be registered.

25. Every company may, upon complying with the provisions of this Act and the regulations, receive a license from the registrar to carry on its business and exercise its powers in Saskatchewan.

(2) Such license shall expire on the thirty-first day of December in the year for which it is issued, but shall be renewable annually upon payment of the prescribed fees.

(3) A company receiving a license from the registrar may, subject to the provisions of its charter, Act or other instrument creating it, carry on its business to the same extent as if it had been incorporated under this Act.

(4) There shall be paid to His Majesty, for the public use of Saskatchewan for every license under this Act, such fees as may be prescribed by the Lieutenant-Governor-in-Council.

(5) Every company which carries on business in Saskatchewan without a license, and every president, vice-president, director and secretary or secretary-treasurer of such company, shall be respectively guilty of an offence and liable on summary conviction to a penalty not exceeding $25.00 for every day the default continues.

26. Every incorporated company shall, before registration, file with the registrar a certified copy of its charter and by-laws and a statutory declaration of the president, vice-president, secretary, or manager, that it is still in existence, and legally authorized to transact business under its charter.

27. The Lieutenant-Governor-in-Council may prescribe and from time to time alter, such regulations as he may deem expedient for the registration of all companies, and may fix the fees and other payments to be made in connection with the administration of this Act, and such regulations shall have the same force and effect as if incorporated in and forming part of this Act.

(2) All regulations in connection with this Act shall be published in the *Saskatchewan Gazette*.

28. Every company not exclusively engaged in the business of banking, insurance, express, railways, telephones, telegraph, trust, loan,

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land, building, contracting, agencies, farming, ranching, employment, recreation, and such other business as may from time to time be determined by the Lieutenant-Governor-in-Council, shall not later than the first day of January in every year pay an annual fee prescribed by the regulations of the Lieutenant-Governor-in-Council.

30. Should the registrar not receive any fee prescribed by the regulations made by the Lieutenant-Governor-in-Council under this Act by the date such fee is due, he shall send to the company in default a registered letter notifying it of its liability and at the expiration of a period of one month, should such fee remain unpaid, he shall, without further notice, cause the name of the company to be struck off the register and publish the fact in the *Saskatchewan Gazette;*

Provided that the liability of every director or officer or member of the company shall continue and may be enforced as if the name of the company had not been struck off the register.

It is to be noted that these sections apply to all companies whether incorporated under the Saskatchewan statute or otherwise, and that the registrar does not appear to have the right to refuse registration to companies incorporated under the authority of an Act of the Parliament of Canada. There are no provisions, such as secs. 118 and 122 of the Manitoba "Companies Act," prohibiting a Dominion company from carrying on business in the province until it has obtained a licence, and denying it access to the courts to enforce contracts made by it while unlicensed

The real point, to my mind, is not whether the appellant companies were required to register and to obtain a licence but whether they were compelled to obtain registration and a licence as a condition of exercising their powers in the Province of Saskatchewan.

They were, no doubt, required to register and to secure a licence, and in default of registration they were subject to a penalty not exceeding $50 for every day on which they carried on business in contravention to section 23, and in the case of their failure to take a licence they were, under section 25, subject to a penalty for carrying on business in Saskatchewan without a

licence not exceeding $25 for every day the default continued.

The form of expression in section 25 is not exactly the same as in section 23, but the effect of both sections is that if these companies carry on business in Saskatchewan without having registered or without having obtained a licence, they incur a separate penalty for each day they so carry on business.

Do these provisions amount to compelling these companies to register and obtain a licence as a condition of exercising their powers in Saskatchewan? As I have said, there is nothing here, as in the Manitoba Act, prohibiting an unlicensed Dominion company from carrying on business or depriving it of the power to sue on contracts made by it in pursuance of its business. But inasmuch as carrying on business without registration and without a licence is made an offence punishable by a fine, it is argued that this business is thereby made illegal so that no right to sue on a contract made under these circumstances would exist by law.

It is to be noted that in the *John Deere Plow Co. Case* (1), the British Columbia "Companies Act" under consideration contained a similar provision (section 167) to secs. 23 and 25 of the Saskatchewan statute, and the Judicial Committee, at page 337, after mentioning, among other provisions of the British Columbia statute, sec. 167, said:—

> What their Lordships have to decide is whether it was competent to the province to legislate so as to interfere with the carrying on of the business in the province of a Dominion company under the circumstances stated.

And after discussing secs. 91 and 92 of the "British North America Act" they add:—

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It follows from these premises that these provisions of the "Companies Act" of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial licence of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the courts, are inoperative for these purposes.

Their Lordships did not attempt to define *a priori* the full extent to which Dominion companies may be restrained in the exercise of their powers by provincial legislation, although they stated that a Dominion company could not refuse to obey the statutes of a province as to mortmain, or escape the payment of taxes, although these may assume the forms of requiring, as a method of raising a revenue, a licence to trade which affects a Dominion company in common with other companies. Somewhat tentatively they added that it might have been competent to the legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated in the province to register for certain limited purposes, such as the furnishing of information.

The Saskatchewan statute applies to all companies whether incorporated in the province or otherwise. The registration required by section 23 does not *per se*, as I read the statute, furnish any information, but it is enacted by section 34 that, not later than the 1st March in each year after its registration, the company shall furnish certain particulars to the registrar. It is obvious, however, that the statute was drafted with the purpose of bringing it well within the rules laid down in the *John Deere Plow Co. Case* (1).

I now come back to the question which I stated above, whether sections 23 and 25 compel the appellant companies to register and obtain a licence as a condition of exercising their powers. My difficulty to answer

(1) [1915] A.C. 330; 18 D.L.R. 353.

this question in the affirmative is that, under the holding in the *John Deere Plow Case* (1), the province can for the purpose of raising a revenue, require a licence to trade which affects a Dominion company in common with other companies. If so, it can impose a penalty for failure to take out the licence ("British North America Act," sec. 92, sub-s. 15). Can this penalty be imposed for each day during which the company carries on business without taking out a licence? Inasmuch as the province can, for revenue purposes, require the taking out of a licence to trade, as decided in the *John Deere Plow Case* (1), it follows that it can impose a penalty for trading without such licence, and therefore for each day during which the unlicensed company carries on trade. This does not give to sections 23 and 25 of the Saskatchewan statute the effect of compelling the appellant companies to register and to obtain a licence as a condition of exercising their powers. These companies, with all other companies, are compelled to take out a licence to trade and to pay therefor the fees prescribed by the Lieutenant-Governor-in-Council, and their liability to pay the penalty is not due to the fact that they are exercising their powers under their charters but that they are carrying on business without taking out a licence to trade.

The appellants complain that the basis of the registration fee is the nominal or authorized capital of the company without regard to the amount paid thereon or the amount employed in the province. This may be objectionable, but I cannot see how it can affect the question of jurisdiction.

I would, therefore, think that sections 23 and 25 of the Saskatchewan "Companies Act" are not *ultra*

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vires, and that the appeals of the appellant companies should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Mackenzie, Brown, Thom, McMorran, MacDonald, Bastedo & Jackson.*

Solicitors for the respondent Harmer: *Cross, Jonah, Hugg & Forbes.*

Solicitor for the respondent The King: *H. E. Sampson.*

THE GREAT WEST SADDLERY COMPANY (DEFENDANT)..... APPELLANT;

AND

GEORGE DAVIDSON (PLAINTIFF)..... RESPONDENT.

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*Feb. 4
*May 6

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Constitutional law—Statute—Manitoba "Companies Act," R.S.M., [1913] c. 35—Licence to carry on business in Province—Dominion Companies.

The provisions of Part IV, Classes V and VI, of the Manitoba "Companies Act" (R.S.M., [1913] ch. 35) requiring companies incorporated by the Parliament of Canada to be registered and take out an annual licence as a condition of doing business in the province are *intra vires* of the legislature. *John Deere Plow Co.* v. *Wharton* ([1915] A.C. 330; 18 D.L.R. 353, distinguished, Davies C.J. and Mignault J. dissenting.

APPEAL from a decision of the Court of Appeal for Manitoba affirming the judgment at the trial in favour of the plaintiff.

This appeal raises the same question as that in the case immediately preceding.

The material provisions of the Manitoba "Companies Act," the validity of which is in question, are the following:—

106. In this part, except where the context requires otherwise, the expression "corporation" means a company, institution or corporation created otherwise than by or under the authority of an Act of the Legislature of Manitoba.

108. Corporations of the classes mentioned in this section are required to take out a license under this part, viz.:

Class V—Corporations (other than those mentioned in section 107) created by or under the authority of an Act of the Parliament of Canada, and authorized to carry on business in Manitoba;

Class VI—Corporations not coming within any of the foregoing classes.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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118. No corporation coming within Class V or VI shall carry on within Manitoba any of its business unless and until a license under this part so to do has been granted to it, and unless such license is in force, and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such corporation, carry on any of its business in Manitoba unless and until such corporation has received such license and unless such license is in force; provided that taking orders for or buying or selling goods, wares and merchandise by travellers or by correspondence, if the corporation has no resident agent or representative and no office or place of business in Manitoba, shall not be deemed a carrying on of business within the meaning of this part; provided also that the onus of proving that a corporation has no resident agent or representative and no office or place of business in Manitoba shall, in any prosecution for an offence against this section, rest upon the accused.

122. If any corporation coming within Class V or VI shall, contrary to the provisions of section 118, carry on in Manitoba any part of its business, such corporation shall incur a penalty of fifty dollars for every day upon which it so carries on business, and so long as it remains unlicensed under this part it shall not be capable of maintaining any action, suit or other proceeding in any Court in Manitoba in respect of any contract made in whole or in part within Manitoba in the course of or in connection with business carried on contrary to the provisions of said section 118; provided, however, that upon the granting or restoration of the license, or the removal of any suspension thereof, such action, suit or other proceeding may be maintained as if such license had been granted or restored, or such suspension had been removed, before the institution thereof.

123. If any company, firm, broker, agent or other person shall, contrary to the provisions of section 118, as the representative or agent of or acting in any other capacity for a corporation, carry on any of its business in Manitoba, such company, firm, broker, agent or other person shall incur a penalty of twenty dollars for every day upon which it, he or they so carry on such business.

119. No company, corporation or other institution not incorporated under the provisions of the statutes of this Province, shall be capable of acquiring, holding, mortgaging, alienating or otherwise disposing of or lending money on the security of any real estate within this Province, unless under license issued under any statute of this Province in that behalf.

(2) The foregoing provisions of this section 119 shall apply whether the said company, corporation or institution directly acquires, holds, mortgages, alienates, or otherwise disposes of, or lends money on the security of any real estate within the Province, or through any agent, personal or otherwise.

112. A corporation receiving a license under this part may, subject to the limitations and conditions of the license, and subject to the provisions of its own charter, Act of incorporation or other creating instrument acquire, hold, mortgage, alienate and otherwise dispose of

real estate in Manitoba and any interest therein to the same extent and for the same purposes and subject to the same conditions and limitations as if such corporation had been incorporated under Part I of this Act, with power to carry on the business and exercise the powers embraced in the license.

* * * * * * * * * * * * *

113. The powers of any corporation, licensed under the provisions of this part, with respect to acquiring and holding real estate, shall be limited in its license to such annual or actual value as may be deemed proper.

126. For a license to a corporation coming within Class V or VI, such corporation shall pay to His Majesty for the public uses of Manitoba such fees as may be fixed by the Lieutenant-Governor-in-Council, and no license shall be issued until the fee therefor is paid; provided that, with respect to a corporation carrying on outside of Manitoba an established business, when applying for a license under this part, the Lieutenant-Governor-in-Council may reduce the fee payable for such license to such sum as he may think just, having regard to the nature and importance of the business proposed to be carried on in Manitoba and the amount of capital proposed to be used therein. A corporation seeking a reduction under this section shall give to the Provincial Secretary such statements and information respecting its business and financial position as he may call for, and shall verify the same in such manner as he may require.

(2) There shall be paid to His Majesty for the public uses of Manitoba, upon transmitting to the Provincial Secretary the statement required by section 120, the fee of five dollars if the capital stock of the corporation does not exceed the sum of one hundred thousand dollars, and a fee of ten dollars if the capital stock of the corporation exceeds the said sum of one hundred thousand dollars, and until such fee has been paid such statement shall be deemed not to have been made and transmitted as required by said section.

109. A corporation coming within Class V shall, upon complying with the provisions of this part and the regulations made hereunder, receive a license to carry on its business and exercise its powers in Manitoba.

110. A corporation coming within Class VI may, upon complying with the provisions of this part and the regulations made hereunder, receive a license to carry on the whole or such parts of its business and exercise the whole or such parts of its powers in Manitoba as may be embraced in the license; subject, however, to such limitations and conditions as may be specified therein.

121. If a corporation receiving a license under this part makes default in observing or complying with the limitations and conditions of such license, or the provisions of the next preceding section, or the regulations respecting the appointment and continuance of a representative in Manitoba, the Lieutenant-Governor-in-Council may suspend or revoke such license in whole or in part, and may remove such suspension or cancel such revocation and restore such license.

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Notice of such suspension, revocation, removal or restoration shall be given by the Provincial Secretary in *The Manitoba Gazette*.

The trial court and Court of Appeal held these provisions *intra vires*.

Wenegast for the appellant

Lionel Davis for the respondent

Chrysler K.C. for the Saskatchewan Government.

C. C. Robinson for the Dominion of Canada.

Nesbitt K C. and *Barton* for the Province of Ontario.

THE CHIEF JUSTICE (dissenting) —This is an appeal from the judgment of the Court of Appeal for Manitoba which, on an equal division of opinion amongst the judges of that court, upheld the judgment of the trial judge affirming the constitutionality of those provisions of the Manitoba "Companies Act" which were in question in that case.

The case was one in effect asking the court to construe and apply to the sections in question of that Act the principles laid down by the Judicial Committee in the case of *John Deere Plow Co.* v. *Wharton* (1), which should govern and control provincial legislation with regard to Dominion companies.

Amongst those principles it was stated by their Lordships of the Judicial Committee that the

province cannot legislate so as to deprive a Dominion company of its status and powers.

Their Lordships went on, however, to state that this does not mean that the companies could exercise those powers in contravention of the laws of the province generally, but simply that the status and powers of the Dominion company as such cannot be destroyed by provincial legislation, and they held that it followed from those premises that the provisions of the Act of

(1) [1915] A.C. 330; 18 D.L.R. 353.

British Columbia there in question, compelling the Dominion company to obtain a provincial license or to be registered in the province as a condition of exercising its powers or of suing in the courts, are inoperative or these purposes

Applying these principles and this conclusion of their Lordships to the case of the sections of the Manitoba statute now before us, I cannot reach any other conclusion than that these sections are *ultra vires*.

I have, in my reasons for judgment in the case before us on the Saskatchewan "Companies Act," argued at the same time as this appeal was, stated shortly why I reached the conclusions that the sections there in question were not *ultra vires* of the legislature excepting one section requiring the company carrying on business within the province to take out a licence from the province to enable it to do so, and I there suggested that that one section might and should be construed as applicable only to foreign companies other than Dominion ones. In the case now before us, however, the legislation of Manitoba is entirely different from that of the Province of Saskatchewan, which latter legislation had been revised after the decision of the Judicial Committee in the *Wharton Case* (1), with the evident intention of complying with the principles laid down in that case.

It seems to be clear from the decision of the Judicial Committee in the *Wharton Case* (1), that while to some extent a provincial legislature may regulate and tax the activities within the province of a Dominion company, it cannot for any purpose prohibit or restrict its entry into the province or its carrying on business there.

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The primary question then with respect to this Manitoba legislation is whether the provisions of Part IV of its "Companies Act," purporting to confer upon such companies when a provincial licence has been obtained, and while it is in force, power to carry on business in Manitoba, exercise their powers, enforce their legal rights in the courts on contracts or otherwise and hold land necessary for their business and *until the licence has been granted* or *after it has ceased to be in force to prohibit them from doing any and all of these things*, are *ultra vires* of the provincial legislature.

In my opinion, such legislation, if upheld, would directly deprive the company of its status and powers conferred upon it by its Dominion charter and is clearly contrary to the principles laid down by the Judicial Committee in the *Wharton Case* (1) as those which should control and prohibit provincial legislation with regard to Dominion companies.

The provisions of Part IV of the "Companies Act" of Manitoba are, it is true, not identical with those of the British Columbia Act condemned by the *Wharton* decision, but with the exception of section 18 of the Act of British Columbia empowering the registrar to refuse a licence under certain circumstances to a Dominion company, they are substantially the same.

I agree with the contention of Mr. Robinson, counsel for the Dominion Government, that the decision in the *Wharton Case* (1), did not rest upon section 18 or upon the fact that under it the registrar had refused a licence to the appellant. The Lord Chancellor, at page 338 of the report of that case, states the question for determination by their Lordships to be whether legislation prohibiting unlicensed companies from suing in the province and penalizing

(1) [1915] A.C. 330; 18 D.L.R. 353.

the carrying on of their business there and prohibiting the licensing of a company with the same name as one already in the province was valid legislation. At page 341 he answers his questions as follows:—

> It follows from these premises that the provisions of the "Companies Act" of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of that kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the courts, are inoperative for these purposes.

The passage in the judgment at page 343, where their Lordships indicate what legislation would have been competent to the province, shews clearly that the whole of the legislation there in question and not merely section 18 of the British Columbia statute was decided to be beyond the provincial powers.

For these reasons and for those stated by Mr. Justice Perdue in the Court of Appeal, with which I fully agree, I am of opinion that this appeal should be allowed with costs and the questions with respect to the validity of the sections of the Manitoba Act answered as indicated by Mr. Justice Perdue.

IDINGTON J.—(See page 26 *ante*.)

ANGLIN J.—Not, I confess, without some hesitation I have reached the conclusion that this appeal should be dismissed. A vital difference, in my opinion, between the Manitoba Act now under consideration and the British Columbia statute dealt with in *John Deere Plow Co.* v. *Wharton* (1), lies in the absence from the former of any provision similar to section 18 of the British Columbia Act (sec. 6, ch. 3, stats. of 1912), which enabled the registrar to refuse a licence to any Dominion company whose name resembled that of an existing company, society, or firm carrying on business,

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or calculated to deceive, or otherwise, in his opinion, objectionable. The refusal to grant a licence under this provision was the ground of complaint in the *Wharton Case* (1). The Manitoba Act, on the other hand, by section 109, expressly provides that the right of a Dominion company—which, in this respect, differs from any other extra provincial company (section 110) —shall be absolute.

I cannot but think that the condemnation in the *Wharton Case* (1), of several sections of the British Columbia Act prohibiting an unlicensed Dominion company from carrying on business, denying to it the aid of the provincial courts, etc., depended largely, if not entirely, on the fact that the obtaining of a licence by such a company was not made an absolute right under the statute but rested in the discretion of the registrar. These sections were not condemned by the Judicial Committee without qualification, but only "in their present form" (p. 343). It was the discretion which section 18 purported to vest in the registrar that, if valid, would amount to an interference

with the carrying on of the business in the province of a Dominion company

(p. 337)—that would enable that provincial official

to deprive a Dominion company of its status and powers.

Short of such interference or deprivation, the right of the province to subject Dominion companies, in common with others, to taxation and to registration for purposes pertaining to the administration of justice or to civil rights in the province, such as the holding of property and the making of contracts, is fully recognized by their Lordships (pp. 341 and 343) and the exercise of such control may take the form of requiring the Dominion company, like others, to take a licence

(1) [1915] A.C. 330; 18 D.L.R. 353.

to trade from the province. The power to exact compliance with legislation of that character implies the right to enforce it by appending appropriate sanctions. So long as the Dominion company, by paying the tax imposed or by making the entry required, has the absolute right to obtain the provincial licence its status as a company is unimpaired and the exercise of its powers and functions is not unduly fettered.

Of course a province may not, under the guise of taxation, or of the exercise of any of its powers under section 92 of the "British North America Act," in substance and reality require a Dominion company to re-incorporate or otherwise to acquire from it anything in the nature of status, capacity or powers. The "pith and substance" of the legislation must be taken into account. But I agree with the views expressed by Meredith C.J.O. in *Currie* v. *Harris Lithographing Co.* (1), at pages 490-1, as to what should be the attitude of the court in approaching the consideration of this phase of the case Dealing with them in the spirit indicated by the learned Chief Justice I incline to accept the view of Mr. Justice Cameron that the concluding words of section 111 of the Manitoba statute,

such limitations and conditions as may be specified in the license,

which would otherwise be a source of embarrassment, should be held to relate only to the other "foreign" companies falling under section 110, which contains corresponding terms, and not to Dominion companies excluded from the application of section 110 and specially provided for by section 109, which entitles them to be licensed without qualifications.

Approaching the Manitoba statute with a view of upholding it, if by fair consideration of them the

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impeached provisions can be brought within the provincial legislative powers—I think they may be regarded as an exercise of the powers of direct taxation and in regard to the administration of justice and the control of civil rights conferred on the provincial legislatures by section 92 of the "British North America Act" and as not involving such an interference with status, capacity or powers of Dominion companies as would bring them within the condemnation of the Judicial Committee in the *Wharton Case* (1).

BRODEUR J.—The appellant company is incorporated under the authority of the "Companies Act" of Canada (R.S.C. ch. 79) and is empowered to carry on its business throughout the Dominion of Canada and with its head office in Winnipeg, in the Province of Manitoba.

By the provisions of the "Companies Act" of Manitoba (R.S.M. ch. 35, secs. 106 to 130) which deal with extra provincial corporations, a licence has to be applied for by all those corporations to the provincial authorities; the licence will have to be obtained before these corporations can carry on business in the province and they will not be authorized to acquire and hold real estate in the province, except to the amount and the value mentioned in the licence.

The appellant company not having applied for such a licence, the respondent, Davidson, one of its shareholders, has instituted an action to force the company to take such a licence and the Attorney-General of Manitoba has intervened in support of that action and to maintain the validity of those provisions which were attacked by the appellant company. It is claimed by the latter that the decision of the Privy Council in the

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case of *John Deere Plow Co.* v. *Wharton* (1), sustains their contention.

The *John Deere Plow Co. Case* (1), has reference to the construction of the "Companies Act" of British Columbia, which empowered the provincial authorities to refuse to a federal company the right to carry on business on the ground that there was another company of the same name upon the local register. The evidence shewed that the John Deere Plow Co had applied for a licence and that its application had been refused.

Such legislation and action affected the status of the company itself, though it had been incorporated by the Dominion authorities; and the Privy Council decided (1), that the legislation was *ultra vires* of a provincial legislature.

There is between the British Columbia legislation and the Manitoba legislation a vast difference. While the British Columbia legislation gave the provincial authorities the power to refuse the licence (sec. 18 B.C. statutes) the Manitoba statute declared on the contrary (sections 108-109), the corporations created under the authority of the Parliament of Canada and authorized by their Act of incorporation to carry on business in Manitoba are entitled to receive a licence to carry on their business.

What is the nature of that licence?

It is a method of taxation by which to secure a revenue for the purposes of the province. All the companies, whether incorporated by the local legislature, or by the Dominion Legislature, by any foreign state or any other provincial authority, are bound to pay the same licence in proportion to their capital.

The object of this legislation is also to keep the

(1) [1915] A.C. 330; 18 D.L.R. 353.

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public informed as to the status of those companies. They have to file a certified copy of their charter; they are authorized to transact business under their charter; they must have in the province an agent to accept service of process in all suits, except in the case when the head office of the company is in the province, and to publish at their expense in the *Official Gazette* and in a newspaper the fact that they are duly authorized to carry on business in the province.

It is of the utmost importance for a person who contracts with a corporation to know the legal status of the latter and to see whether the contract contemplated is within the powers granted to the company by its Act of Incorporation or its letters patent.

The unauthorized and fictitious companies will then be prevented from deceiving the public since any one may obtain from the Provincial Secretary information as to any *bonâ fide* company and may ascertain the powers and standing of such company in the same manner as if the company had been incorporated by the provincial authority. Perhaps that knowledge could be procured in applying to the Dominion authorities, but who is going to inform the person desirous of procuring that information that the company is a federal company? It might be a foreign or provincial company. Besides, the distances in our country are so great that each province should have in its capital the necessary data as to the existence, the status and the capacity of any company.

The obligation for a federal company to take out a licence under the Manitoba statute is a law of general application. The companies incorporated locally have to pay just as well as the companies incorporated outside of the province.

In the case of *Bank of Toronto* v. *Lambe* (1), that question has been decided. It was there held that though the banks are incorporated by the Dominion Parliament, they may be bound to contribute to the public objects of the provinces where they carry on business.

It is contended by the appellant that its status as a federal company is affected because the law provides that before carrying on business it is bound to take a licence.

There is a distinction to be made when it is said that a company will not trade in a district and that a company, if it does so, must have a licence.

That question came up in the case before the Privy Council in 1897, of the *Brewers & Malsters* v. *Attorney General* (2). It was the case of a Dominion company incorporated by a Dominion charter and authorized by a Dominion licence to manufacture liquor in all the provinces of the Dominion. The Ontario Legislature passed an Act declaring that before a person could sell liquor in Ontario he would have to take a licence from the provincial authorities. That legislation was held valid.

I am unable to distinguish this case from that decided by the Privy Council.

It is contended also that the legislation is *ultra vires*, because there is a restriction as to the powers of this federal company to hold real estate in the province.

That contention is disposed of by the judgment of the Privy Council in the case of *Colonial Building Assoc.* v. *Attorney-General of Quebec* (3).

In the *John Deere Plow Co. Case* (4), so much relied upon by the appellant, the noble lord who delivered the judgment said on that point:—

(1) 12 App. Cas. 575.
(2) [1897] A.C. 231.
(3) 9 App. Cas. 157, at p. 164.
(4) [1915] A.C. 330; 18 D.L.R. 353.

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Thus notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain (*Colonial Building & Investment Association* v. *Attorney-General of Quebec*) (1), or escape the payment even though these may assume the form of requiring as the method of raising a revenue, a licence to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*) (2).

That expression of views disposes, in my opinion, of the contentions of the appellant company. Its appeal fails and it should be dismissed with costs.

MIGNAULT J. (dissenting)—I so fully agree with the reasons for judgment of Mr. Justice Perdue, of the Court of Appeal of Manitoba, that it does not seem necessary to state at any length why I am in favour of allowing this appeal.

In expressing my opinion I shall strictly confine myself to the concrete case which is before this court and avoid stating general rules governing, in matters of company legislation, the jurisdiction of the Dominion Parliament or of the provincial legislatures, the more so as the Judicial Committee of the Privy Council has formulated, in the case of the *John Deere Plow Co.* v. *Wharton* (3), a plain rule whereby the present controversy can be decided.

The test of the validity of the Manitoba statute can therefore be stated, in the language of their Lordships in the *John Deere Plow Co. Case* (3), at page 341, as follows:—

> It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of the Dominion company as such cannot be destroyed by provincial legislation * * *
>
> It follows from these premises that these provisions of the "Companies Act" of British Columbia which are relied on in the present case

(1) 9 App. Cas. 157, at p. 164. (2) 12 App. Cas. 575.
(1) [1915] A.C. 330; 18 D.L.R. 353.

as compelling the appellant company to obtain a provincial licence of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of the opinion that this question must be answered in the negative.

Applying this test to the legislation in question, which was adopted before the *John Deere Plow Co. Case* (1) was decided, there can be no doubt that it cannot be sustained. I am here satisfied to adopt the statement of the purport and effect of this legislation made by Mr. Justice Perdue:—

In the "Manitoba Companies Act," Part IV, the expression "corporation" means a company, institution or corporation created otherwise than by or under an Act of the Legislature of Manitoba (section 106). Corporations created by or under the authority of an Act of the Parliament of Canada and authorized to carry on business in Manitoba, referred to as Class V, are required to take out a licence (section 108). To this there are certain exceptions, but these do not include the defendant. Class VI includes corporations not coming within the preceding five classes. A corporation coming within the class to which the defendant belongs shall, upon complying with the provisions of Part IV and the regulations made thereunder and paying the fee required, receive a licence to carry on its business and exercise its powers in Manitoba (section 109). A corporation coming within the class to which the defendant belongs or within Class VI "may upon complying with the provisions of this part (Part IV) and the regulations made hereunder, receive a licence to carry on the whole or such parts of its business and exercise the whole of such parts of its powers in Manitoba as may be embraced in the licence; subject, however, to such limitations and conditions as may be specified therein." See section III. A corporation receiving a licence may, subject to the limitations and conditions of the licence and of its own charter, acquire, hold and dispose of real estate in Manitoba (section 112); but it shall not be capable of acquiring or disposing of real estate unless it has been licensed (section 119). No corporation coming within the class which includes defendant shall carry on any of its business in Mani-

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toba unless a licence has been granted to it and is in force, and no agent of the corporation may carry on its business in Manitoba until a licence has been obtained; exception is made in regard to buying or selling by travellers or correspondence where the corporation has no resident agent or place of business in Manitoba (section 118). If such a corporation carries on business in Manitoba without a licence it shall incur a penalty of $50.00 a day and, so long as it remains unlicensed, it shall not be capable of maintaining any action, suit or proceeding in any court in Manitoba in respect of any contract made in whole or in part in Manitoba (section 122). If its agent carries on any of the business of such a corporation in Manitoba while it is unlicensed he shall be liable to a penalty (section 123).

This legislation, no doubt, differs in degree from the British Columbia statute, the validity of which was questioned in the *John Deere Plow Co. Case* (1), but it clearly fails when the jurisdiction of the Manitoba Legislature is measured by the test laid down in that case. This statute compels the appellant company to obtain a licence and to be registered *as a condition of exercising its powers and of suing in the courts.* This the legislature could not do.

It has been contended that this is a taxation measure and as such was one which it was competent for the legislature to enact. It is further urged that the province has exclusive mortmain jurisdiction and that, therefore, it is for it alone to determine the conditions under which a Dominion corporation can acquire and hold property.

I think the answer is obvious. Granting the jurisdiction of the province in these matters the province cannot, in my opinion, so exercise this jurisdiction as to deprive a Dominion company of its status or powers. In other words, it cannot, in imposing taxation, prevent the company from exercising its powers until it has paid the taxes imposed. Nor can it, as was done by this statute, deprive the company of its power and capacity to acquire, hold and dispose of real estate in

(1) [1915] A.C. 330; 18 D.L.R. 353.

Manitoba, or to carry on its business, unless and until a provincial licence is obtained.

To decide otherwise and to sustain the validity of such a statute would in effect restrict the power of the Dominion Parliament to the creation of the company and the enumeration of its powers, but the company would find itself paralyzed and its powers would be inoperative so long as it had not complied with the requirements exacted by the province. I cannot think that the Judicial Committee ever contemplated, in the *John Deere Plow Co. Case* (1), that this could be done.

I would allow the appeal and answer the first four questions in the negative and the fifth question in the same manner as Mr. Justice Perdue. The respondent's action and the interventions of the Attorneys-General of Ontario and Manitoba should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *A. E. Bowles.*
Solicitor for the respondent: *J. B. Hugg.*

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*June 2

THE TOWN OF COBALT (DEFENDANT) . Appellant;

AND

THE TEMISKAMING TELEPHONE COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Municipal corporation—Franchise—Telephone company—Use of streets —Time limit—"Ontario Municipal Act," 1903, 3 Edw. VII. c. 19, ss. 330, 331 (1) and 559 (4).

The Legislature of Ontario has not given the municipalities of the province authority to permit telephone companies to occupy the streets and highways with their poles and wires for a longer period, at one time, than five years.

An agreement by a municipality to permit, by irrevocable license, a telephone company to occupy the streets with poles and wires is *ultra vires*.

Judgment of the Appellate Division (44 Ont. L.R. 366), reversed; that on the trial (42 Ont. L.R. 385), restored.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2), in favour of the appellant.

The respondent brought action for an injunction to restrain the Town of Cobalt from removing its poles and wires from the streets and for damages. The streets were so occupied under an agreement with the town made in 1905 which the respondent claimed gave it a perpetual franchise. The two questions raised were whether or not the perpetual franchise was given and, if it was, whether or not the town had power to give it. The present appeal was disposed of on the second question.

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*PRESENT:—Idington, Anglin, Brodeur and Mignault JJ. and Masten J. *ad hoc*.

(1) 44 Ont. L.R. 366; 46 D.L.R. 477.

(2) 42 Ont. L.R. 385; 43 D.L.R. 724.

Tilley K.C. for the appellant.
H. J. Scott K.C. for the respondent.

IDINGTON J.—The question raised herein is whether or not respondent, which is a telephone company incorporated under and by virtue of the Ontario "Companies Act," has, under the circumstances I am about to refer to, the right to maintain on the public highways of appellant, which is a municipal corporation, poles and wires and ducts against the will of appellant's council.

It may conduce to clarity of thought on the subject to appreciate correctly the limits of power, right, and jurisdiction which these corporate bodies respectively had, or have, in the premises in question.

The respondent is a legal entity which only has the capacity given it by its charter and so far only as that is effective by virtue of the said "Companies Act."

That charter only professes to give it the corporate capacity:—

> To carry on within the District of Nipissing the general business of a telephone company and for that purpose to construct, erect, maintain and operate a line or lines of telephone along the sides of or across or under any public highways, roads, streets, bridges, waters, water courses or other places, subject, however, to the consent to be first had and obtained, and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated, and to such terms for such times and at such rates and charges as by such councils shall be granted, limited and fixed for such purposes, respectively.

The exercise of such powers as it may thus acquire is subjected to the limitations contained in a long proviso following this definition of capacity, expressed in distinctly separate paragraphs enumerated from (a) to (k).

Many of them are express limitations on the jurisdiction of the municipal corporations which may be concerned and designed to protect the public against

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the possibilities of neglect by municipal authority or aggressive acts of respondent impairing the rights of others.

It is to be observed that all the respondent can acquire is by the above quoted definition of its capacity expressly subject

> to the consent to be first had and obtained, and to the control, of the municipal councils having jurisdiction * * * and to such terms for such times and at such rates * * * as by such councils shall be granted * * *

It does not always happen that the legislature is so cautiously and properly restrictive relative to what a municipal council can do as has been thus expressed. Its acts here in question should be interpreted and construed consistently therewith.

Now let us turn to the powers of the municipality and see how far its council could go in disregard of the rights of those coming after it.

The title in and to the road allowance for a public highway may be, and generally is, technically vested in the municipal corporation, whose council has jurisdiction over it. But the jurisdiction of its council over that property is limited to discharging the duties relative to its maintenance and use as such, and it has no more power to grant concessions such as now in question to any one, than any man on the street has save so far as expressly conferred by statute.

As to its powers in that regard we are referred in argument to the provision in the "Municipal Act," 3 Edw. VII. ch. 19, sec. 559, sub-sec. 4, enabling the council to pass by-laws:—

> (4) For regulating the erection and maintenance of electric light, telegraph and telephone poles and wires within their limits.

And to the amendment of that by 6 Edw. VII. ch. 34, which amended it by substituting the following:—

(4) For permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upo the highways or elsewhere within the limits of the municipality.

These are simply general powers under the caption of Highways and Bridges to pass general by-laws, repealable when the council chooses, relative thereto and, besides the fact that no such by-law of appellant is in evidence, give respondent nothing more than in substance is conferred, by sub-sec. 3 of same section, on cabmen to occupy certain stands on the street.

Can any one pretend that because a certain stand has been so allotted as therein provided, a cabman acquires thereby a right in perpetuity to stay at or on that same stand no matter what change of circumstances or by-law?

All that the amendment does relative to our present inquiry is to insert the word "permitting" which was rather stupidly omitted from the first of those enactments.

They furnish, however, incidentally, a very good illustration of how little importance is to be attached to the mere power of permission without anything more being given.

Section 331 of same Act is in truth the only one the respondent can rely upon and that is as follows:—

331. (1) The council of every city, town and village may pass by-laws granting from time to time to any telephone company upon such terms and conditions as may be thought expedient the exclusive right within the municipality for a period not exceeding five years at any one time to use streets and lanes in the municipality for the purpose of placing in, upon, over or under the same poles, ducts and wires for the purpose of carrying on a telephone business and may on behalf of the municipal corporation enter into agreements with any such company not to give to any other company or person for such period any licence or permission to use such streets or lanes for any such purpose; but no such by-law shall be passed nor shall any such agreement be entered into without the assent of two-thirds of the members of the council of the municipality being present and voting therefor.

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I fail to find in this section any warrant for the claim that a perpetual franchise could be granted by the municipality even if it desired. Nothing but an exclusive franchise and that for a limited time is countenanced in a single syllable of this section and, properly so, those who stop to think will say.

The implication in the proposition put forward that there is such a power seems to me, I submit with due respect, bordering upon the absurd, if not quite beyond.

The grant may be "from time to time" but it must be exclusive. The municipality cannot, as a matter of public convenience, grant more than one such company rights to encumber and endanger the public highway, and the terms thereof must be so well considered and approved of, that two-thirds of the members of the council must approve.

The enactment of the provision therein specifically enabling the council to assure the successful applicant for the grant that no other shall be granted indicates how limited the legislature deemed the contracting powers of the council relative to such a subject matter had been.

And it can only be for a term of five years that it can be granted. The only right, otherwise given, is pursuant to another provision to give private parties a personal convenience, if desirable for their business reasons, and not detrimental to the public.

The assumption that the enactment in above quoted section was ever contemplated as giving powers to grant concurrent franchises to more than one public company is fraught with such evil consequences that it can only be reached, I submit, by a disregard of the future possibilities of a growing town and an overlooking of the nature of the subject matter so involved.

The business is of a nature that, from every point of view, must involve a crossing of streets, by the works to carry it on, even if the cumbering of the public highway with poles or other appliances could be avoided; prudence, therefore, palpably dictates that the like appliances should not be multiplied.

The legislature, no doubt, had that in view and conferred no other power than the granting of one such concession at a time. It is not a kind of interference with public right to use the highway which we should try to spell out from possible constructions of the language used. It is a jurisdiction given to be used within the most restricted meaning possible that will effectuate the obvious purpose had in view in the same manner as every private act invading public rights is construed.

I submit there is no such plain and express language conferring the jurisdiction alleged to have been exercised as would have entitled the council of the appellant to have granted a perpetual franchise.

Nor do I think the council ever so intended by the agreement in question. To read the first clause of that standing alone as governing the whole instrument is not the way to interpret such a document.

It must be governed by the same restrictive canon of construction as relative to private Acts.

Read as a whole, and as amended by the later agreement if we have regard to the scope and purpose of the business in hand, can there be a doubt as to the intention of the council?

And as to the particularistic criticism of the amendment indicating a longer term than five years to which to apply the operation of the amendment, surely there was within the view of all concerned the possibility, nay, probability, of a satisfactory service leading to a

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continuation of business relations between these parties on the same terms as then reached.

On any other supposition we are driven to say that the first clause alone of the whole agreement was to stand when all else in it had become null and void and the respondent had a free hand unrestricted by the necessity of observing obligations important to the appellant to be duly observed by one serving the public.

In other words, the respondent was no longer to be a public servant, but a master of the public streets and possessed of a right of property therein which would debar the appellant from closing or widening or narrowing any of same unless upon such terms as the respondent should choose to dictate.

To test the construction contended for, and upheld below, suppose the agreement had consisted of nothing but clause 1, could it have been maintained as within the power conferred by section 331?

I cannot reach such a conclusion as to answer in the affirmative, and, therefore, think the appeal should be allowed with costs throughout, and the judgment of the learned trial judge be restored.

ANGLIN J.—The plaintiff company sues for an injunction to restrain the defendant municipal corporation from removing poles and wires of the plaintiffs from its streets, the company having itself refused to do so. The learned trial judge dismissed the action (1), holding that the only right of the company to maintain its poles and wires on the streets of the town was conferred by an agreement made in June, 1912, with the municipal corporation, that the power of the latter to enter into such an agreement existed only by

(1) 42 Ont. L.R. 385; 43 D.L.R. 724.

virtue of sec. 331 (1) of the "Municipal Act" of 1903 (3 Edw. VII. ch. 19), and that under that section the right to operate as a monopoly for the period of five years could alone have been given.

In passing I may observe that, notwithstanding the history of sec. 331 (1) (see Biggar's Municipal Manual, page 345, note) and its collocation, I agree with what I conceive to have been Mr. Justice Middleton's idea that it should be regarded not as merely providing for an exception to the prohibition of sec. 330, but as conferring a substantive power to create a monopoly which a municipal council might not possess even were sec. 330 not in the "Municipal Act." But I cannot accede to the view that sec. 331 (1) is the only provision of that Act empowering a municipal council to authorize the use of its highways by a telephone company.

In the second Appellate Divisional Court this judgment was reversed (1), the majority of the court (Mulock C.J., Sutherland and Kelly JJ.), holding that a municipal corporation had power under sec. 559 (4) of the "Municipal Act," as enacted by 6 Edw. VII. ch. 34, sec. 20, irrevocably to authorize the use of its streets by a telephone company for the purpose of erecting and maintaining its poles and wires for an indefinite period or in perpetuity, although its power to confer an exclusive right was restricted by sec. 331 (1) to a term of five years, and that upon the proper construction of the agreement in question such authorization for an indefinite term or in perpetuity had been granted. Riddell and Latchford JJ. dissented, holding that on the proper construction of the contract the authorization was limited to the five year term for which the municipal corporation had agreed that the right of the company should be exclusive.

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The Town of Cobalt is in the District of Nipissing. In June, 1912, the plaintiff company had already established telephone lines in the town. In that month an agreement was made between the company and the municipal corporation on the efficacy of which as an irrevocable consent or licence to the exercise of its powers within the municipality it is now conceded that the right of the company to maintain its poles and wires on the streets of Cobalt solely depends. It thus becomes unnecessary further to consider what the company had done in Cobalt prior to June, 1912, or the physical conditions then existing in regard to its poles and wires on the streets of that town, on which, at an earlier stage of this case, the plaintiffs had partly rested their claim of right to continue to maintain them.

While two questions—the first one of construction of the agreement of June, 1912, and the other one of the power of the municipality to make that agreement, if it should bear the construction put upon it by the plaintiff company—are presented for our consideration on this appeal, I have found it necessary to deal only with the second of these questions, which may be stated as follows:—If, notwithstanding the negative provision of the seventh clause of the agreement limiting the exclusive rights of the company to a period of five years and other clauses relied upon as indicating that the consent of the municipal corporation

> to the company exercising its powers by constructing, maintaining and operating its lines of telephone upon, along, across, or under any highway, square or other public place within the limits of the town, etc.,

given by the first clause should be likewise restricted in its operation to the same term of years, the consent, permit or licence so accorded should be regarded as having been intended to be effective and irrevocable

for an unlimited period, was it within the power of the municipal corporation to give such a consent, licence or permission?

Having regard to its definition clause, its scope and the fact that telephone companies were the subject of a special statute concurrently enacted, I agree with Mr. Justice Middleton that the "Municipal Franchises Act" of 1912 (2 Geo. V. ch. 42) does not apply to those companies.

The "Telephone Companies Act" of 1912 (2 Geo. V. ch. 38) only came into force on the 1st July of that year and, therefore, did not apply to the agreement of the 19th of June, 1912.

The plaintiff company was incorporated in April, 1905, by Letters Patent issued under the Ontario "Companies Act" (R.S.O. 1897, ch. 191)

to carry on within the District of Nipissing the general business of a telephone company, and for that purpose to construct, erect, maintain and operate a line or lines of telephone along the sides of, or across, or under, any public highways, roads, streets, bridges, waters, water courses, or other places, subject, however, to the consent to be first had and obtained, and to the control, of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated, and to such terms, for such times and at such rates and charges as by such councils shall be granted, limited and fixed, for such purposes respectively.

Under section 9 of that Act the Lieutenant-Governor in Council was empowered to grant a charter of incorporation,

for any of the purposes and objects to which the legislative authority of the Legislature of Ontario extends,

with certain immaterial exceptions. By section 15 it was enacted that the corporation so created

shall be invested with all the powers, privileges and immunities which are incident to such corporation or are expressed or included in the Letters Patent and the "Interpretation Act" and which are necessary to carry into effect the intention and objects of the Letters Patent and such of the provisions of this Act as are applicable to the company.

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At bar the case was discussed as if, apart from the effect of any municipal by-law or contract conferring powers or rights upon the company, ch. 191 of the R.S.O., 1897, were the only legislation to be taken account of in determining its status, capacity, powers and rights. No allusion was made, nor do I find any in the judgments below or in the factums, to the legislation of 1907 repealing that Act and replacing it by a new "Companies Act" (7 Edw. VII. ch. 34) which, by sec. 210 (c), is made applicable (except so far as otherwise provided) *inter alia*

> to every company incorporated under any special or general Act of the Legislature of the Province of Ontario.

By sec. 211 (1) this statute enacts that:—

> Any Letters Patent * * * made or granted with respect to any company, corporation or association within the scope of this Act under any enactment hereby repealed shall continue in force *as if it had been made or granted under this Act.*

It would seem to follow that the plaintiff company cannot invoke sec. 15 of ch. 191 of the R.S.O. 1897, of which I find no counterpart in the Act of 1907, to support or justify the existence or exercise of any powers or rights subsequent to the 1st of July, 1907.

On the other hand, Part XII. of the Act of 1907, dealing with

> companies operating municipal franchises and public utilities,

is, by section 154, confined in its operation to "applications for incorporation" by such companies, and would, therefore, seem not to apply to a company like the plaintiff already incorporated, unless it should seek reincorporation (sec. 9) or (possibly) the grant of additional powers by Supplementary Letters Patent (sec. 10). Section 3 of the Act of 1907 re-enacts sec. 9 of the superseded statute of 1897, and its purview is unaffected by a subsequent formal amendment

made by the 8 Edw. VII. ch. 43, sec. 1. Section 17 is in part as follows:—

17. A company having share capital shall possess the following powers as incidental and ancillary to the powers set out in the Letters Patent or Supplementary Letters Patent:—

* * * *

(f) To enter into any arrangements with any authorities, municipal, local or otherwise, that may seem conducive to the company's objects, or any of them, and to obtain from any such authority any rights, privileges and concessions which the company may think it desirable to obtain, and to carry out, exercise and comply with any such arrangements, rights, privileges and concessions.

* * * *

(i) To purchase, take on lease or in exchange, hire or otherwise acquire, any personal property and any rights or privileges which the company may think necessary or convenient for the purposes of its business and in particular any machinery, plant, stock-in-trade;

* * * *

(q) To do all such other things as are incidental or conducive to the attainment of the above objects.

The corresponding provisions of the present law are to be found in the R.S.O. 1914, ch. 178, sec. 23, sub-sec. 1, clauses (f), (i) and (q).

It may be probable that under the Act of 1907 Letters Patent in the terms of those granted to the plaintiff would not be issued and it is not improbably the correct view that a company obliged to have recourse to clauses (f), (i) and (q) of that Act as the source of its powers and rights in that regard would possess nothing more than a subjective capacity to receive from a municipal corporation such rights upon its highways as it should see fit, acting within its powers, to confer. But I incline strongly to the view that the opening paragraph of section 17 has the effect of a legislative recognition of the existence of the powers which their Letters Patent purport to confer, if not in the case of companies incorporated under the Act of 1907, at all events in that of companies then in existence which had been incorporated under any of

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the superseded Acts—*inter alia* ch. 191 of the R.S.O. 1897. That recognition, I think, placed companies incorporated under the Act of 1897 in the same position after 1907 with regard to the character and efficacy of the powers and rights which their Letters Patent purported to confer as if section 15 of that Act were still in force.

I am, with respect, unable to appreciate the force of the contention of counsel for the appellant that the powers and rights of a company incorporated as this company was under the Ontario "Companies Act" of 1897 in regard to the use and occupation of the streets of a municipality (apart from the effect of the "Companies Act" of 1907) differed from what they would be had it been incorporated by a private statute *conferring the same rights and powers in identical language.*

We are probably bound, in deference to the authority of the Judicial Committee in *Bonanza Creek Gold Mining Co.* v. *Rex* (1), to hold that a company incorporated by Letters Patent under the Ontario "Joint Stock Companies Act"

> purports to derive its existence from the act of the Sovereign (through his representative the Lieutenant-Governor) and *not merely* from the words of the regulating statute,

and therefore possesses

> a status resembling that of a corporation at common law—a general capacity analogous to that of a natural person.

But—I speak with deference—it possesses, in addition within the province whatever capacity, powers and rights, within its competence the legislature, having provided for the creation of the corporation by the Lieutenant-Governor in Council, as its delegate, has seen fit by the terms of the "Companies Act" itself

(1) [1916] 1 A.C. 566; 26 D.L.R. 273.

to bestow upon it when so created; and it derives its existence, at least in part, from that statute under and pursuant to which the Lieutenant-Governor in Council purported to act in creating it and in defining its purposes, I am, with respect, unable to read the facultative language of authorization of sections 9 and 15 of the Ontario "Companies Act" of 1897 as amounting to nothing more than

> words * * * which merely restrict the cases in which such a grant (*i.e.*, of corporate existence) may be made

by the Lieutenant-Governor in the exercise of the prerogative (1). In both cases alike—that of such a company incorporated by Letters Patent issued under the Act of 1897 and that of the like company incorporated by special Act—the source of the power or right to use or occupy the highways is the legislature, the corporate body enjoying them being brought into existence in the one case by the act of its delegate, the Lieutenant-Governor in Council, and in the other by direct legislative action. In both alike, on the assumption that it is conferred in identical terms, the exercise of the power or right is conditional on the consent of the municipal corporation being obtained—which, so far as the constating instrument of the company affects the matter, may be given on such terms as the municipal corporation sees fit to impose—and remains subject to its control and regulation. But when and so far as that consent is effectively given the condition is satisfied and the power and right is then exercisable not by virtue of the consent, which merely removes a restriction that might not exist if unexpressed: *City of Toronto* v. *Bell Telephone Co.* (2); but see *Sherbrooke Telephone Association* v. *Corporation of Sherbrooke* (3);

(1) [1916] 1 A.C. 566 at p. 583. (2) [1905] A.C. 52.
(3) M.L.R. 6 Q.B. 100.

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but by virtue of the authority of the legislature over public highways exerted on behalf of the company, *British Columbia Electric Rly. Co.* v. *Stewart* (1).

If, on the other hand, the view should prevail that the effect of its incorporation, whether by Letters Patent issued under the "Companies Act," or by special statute (the purpose and powers in either case being formulated in the terms of the plaintiff company's letters patent and of the Ontario "Companies Act" of 1897 above set forth), is merely the endowment of the company with a quasi-subjective capacity to acquire from those in control of it rights and powers in regard to the use of property vested in others, so that the exercise of such rights and powers when they are conferred upon it by those in control of the property on or over which they are to be enjoyed will not be *ultra vires* of the company or something to which any shareholder may object—for instance, to acquire from a municipal corporation the right to use and occupy highways under its control, so that the true source of the company's rights and powers in that respect is the act of the municipal council—what I am about to say as to limitations upon the consent, licence, or permission to use its highways which a municipal council in Ontario may give to a telephone company will lose none of its force.

When the question before us is considered from the aspect of the power of the municipality to permit or consent to the use of the public highways, it may well be that such a power would be implied from a special Act of the legislature incorporating a company and granting to it powers similar to those here conferred in similar language, whereas the like implication would not arise upon the grant of Letters Patent of incorpora-

(1) [1913] A.C. 816 at p. 824; 14 D.L.R. 8.

tion under the "Companies Act" couched in like terms. The Lieutenant-Governor in Council is not by that Act made the delegate of the legislature to confer powers on municipal corporations. Any implication from a special Act incorporating a telephone company, however that power is thereby conferred on a municipal corporation to license the use of its highways by the company, would, in my opinion, be subject to such restrictions as are imposed by secs. 330 and 331 (1) of the "Municipal Act."

But if the charter of the plaintiff company did not impliedly authorize the Corporation of the Town of Cobalt to give the requisite consent to the exercise of its powers by the plaintiff company within that municipality, sec. 559 (4) of the "Municipal Act," in my opinion, clearly did so, subject, however, to such limitations as were imposed by secs. 330 and 331 (1) of the same Act.

Sub-section 4 of sec. 559 (as enacted by 6 Edw. VII., ch. 34, sec. 20) and secs. 330 and 331 (1) of the "Municipal Act" of 1903 (3 Edw. VII., ch. 19) are as follows:—

559. By-laws may be passed by the councils of the municipalities and for the purposes in this section respectively mentioned, that is to say * * *

* * * *

(4) For permitting and regulating the erection and maintenance of electric light, power, telegraph and telephone poles and wires upon the highways or elsewhere within the limits of the municipality.

330. Subject to the provisions of secs. 331 and 332 of this Act no council shall have the power to give any person an exclusive right of exercising within the municipality any trade or calling or to impose a special tax on any person exercising the same or to require a licence to be taken for exercising the same unless authorized or required by statute, so to do, but the council may direct a fee not exceeding $1 to be paid to the proper officer for a certificate of compliance with any regulations in regard to such trade or calling.

331 (1). The council of every city, town or village may pass by-laws granting *from time to time* to any telephone company upon such terms and conditions as may be thought expedient the exclusive right

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within the municipality for a period not exceeding five years at any one time to use streets and lanes in the municipality for the purpose of placing in, upon, over or under the same poles, ducts and wires for the purpose of carrying on a telephone business and may, on behalf of the municipal corporation, enter into agreements with any such company not to give to any other company or person for such period any licence or permission to use such streets or lanes for any such purpose; but no such by-law shall be passed nor shall any such agreement be entered into without the assent of two-thirds of the members of the council of the municipality being present and voting therefor.

Sections 331 (1) and 559 (4) being both found in the same statute must, if possible, be harmonized. So far as they may conflict, sec. 331 (1) dealing with the special subject of user of highways by telephone companies must prevail over sec. 559 (4), which has to do with the more general subject of the erection and maintenance by electric light, power, telegraph and telephone companies of poles and wires, whether on highways or elsewhere within the limits of the municipality. Whatever restriction or limitation may be necessary to give full effect to sec. 331 (1) must be placed on sec. 559 (4).

For the purposes of this appeal I shall assume that, were it not for the effect of secs. 330 and 331 (1), the defendant municipal corporation might, under sec. 559 (4), have permitted or licensed a telephone company to erect and maintain its poles and wires upon highways within the municipality for an indefinite term without power of revocation. Whether that has in fact been attempted in the present instance is, of course, another question. But I am, with respect, of the opinion that secs. 330 and 331 (1) impliedly precluded the giving of such a consent or the granting of such an irrevocable permit or licence to be effective for more than a term of five years. It was, in my opinion, incompetent for the municipal corporation to do any act which would have the effect directly or indirectly

either of creating a monopoly prohibited by section 330, or of divesting itself of, or curtailing the free exercise of, the power conferred on it by sec. 331 (1) of providing, *by by-laws to be passed from time to time*, for an exclusive right of user of its streets for the purpose of carrying on a telephone business during a period of five years being vested in some one telephone company.

A municipal corporation cannot validly contract not to use discretionary powers committed to it for the public good. *Ayr Harbour Trustees* v. *Oswald* (1), at page 634, *per* Lord Blackburn; *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations* (2), at pages 268, 278-9; Brice on Ultra Vires (3rd ed.), p. 111. Dillon on Municipal Corporations (1911), par. 245; *Town of Eastview* v. *Roman Catholic Episcopal Corporation of Ottawa* (3). This case does not fall within the line of exceptions to or qualifications on this salutary rule indicated in *Stourcliffe Estates Co.* v. *Corporation of Bournemouth* (4). The municipal corporation in the exercise of its control over streets is a trustee for the public. It can sanction or licence the exercise of rights which derogate from the public right of user of the highways only in so far as it is given legislative authority to do so.

The necessary effect of granting for an indefinite period—a period which might, therefore, endure throughout the existence of the licence—an irrevocable licence or permit to use the streets of the municipality for the purpose of carrying on a telephone business would be to preclude the municipal council from granting to any other company at any future time such an exclusive right as sec. 331 (1) contemplates it

(1) 8 App. Cas. 623.
(2) L.R. 1 H.L. 254.
(3) 44 O.L.R. 284.
(4) [1910] 2 Ch. 12.

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may grant *"from time to time."* The continued existence of such a licence is incompatible with the creation of such an exclusive right. In *Hull Electric Co.* v. *Ottawa Electric Co* (1), cited at bar, the licence of the respondent was revocable.

Having regard to the practical necessity for a single telephone system in a municipality owing to the manifest and manifold disadvantages and inconveniences of duplication, the granting of such an irrevocable licence for an indefinite term would, in effect, be tantamount to the conferring of an exclusive right of equally indefinite duration upon the licensee. The legislature certainly did not contemplate that a municipality should be enabled, however indirectly, to tie itself up to one company as a donee of an exclusive right of indefinite duration. Its doing so would alike be contrary to the spirit, if not to the letter, of the prohibition of section 330 and would set at naught the limitation imposed by sec. 331 (1).

Upon the grounds that the granting of an irrevocable consent or a licence or permit of indefinite duration, such as it had been held the respondent company obtained, would involve the municipal corporation divesting itself of the discretionary power conferred by sec. 331 (1), which it was the manifest policy of the legislature that it should retain in order to be in a position to exercise it *from time to time* in the interests of the municipality, and would, in effect, operate as an evasion, if not a direct violation, of section 330, I am of the opinion that such a consent, licence or permit, if the agreement here in question purported to grant it, would be *ultra vires* and therefore void.

I would, accordingly, allow this appeal with costs

(1) [1902] A.C. 237.

here and in the Appellate Division and would restore the judgment of the learned trial judge.

BRODEUR J.—Without expressing any view on the power of a municipal corporation to make a perpetual grant to a telephone company I am of opinion that in this particular case the contract passed between the appellant and the respondent would not authorize the respondent to claim a perpetual franchise in the streets of Cobalt.

The telephone company had no right to put its poles upon the streets of the municipality without the consent of that municipality and on such terms for such times and at such rates and charges as were agreed upon with the municipal authorities. In this particular case, the time limit was five years and even during that time the privilege should be exclusive.

The contract was for that period of time only. The municipal corporation is now entitled, the five years having expired, to have the poles removed from the streets and the telephone company cannot claim a perpetual franchise.

The appeal should be allowed with costs of this court and of the court below and the respondent's action should be dismissed.

MIGNAULT J.—The question involved in this appeal is whether the appellant having, in 1912, made a contract with the respondent, whereby it consented to the latter exercising its powers by constructing, maintaining or operating its lines of telephone in the Town of Cobalt, and having agreed during the period of five years not to give to any other person, firm or company any licence or permission to use the highways, squares and public places of the town for the purpose of carrying on a telephone business, the respondent has

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the right to maintain its lines and poles in the said town indefinitely and in perpetuity.

It would, I must confess, require very cogent reasons to make me think that the parties ever contemplated that by this contract the Town of Cobalt had granted to the respondent a perpetual right to use its streets and public places for the purposes of its business. And notwithstanding the negative form of clause 7 preventing the town from granting to any other person or company during five years the right to use its highways, I would think, reading the contract as a whole, that it should be construed as having given to the respondent an exclusive right for five years to construct, maintain and operate its telephone lines, and that at the expiration of this term any right of the respondent to maintain its lines and poles in the public streets of the town came to an end unless a new agreement was made. I would not easily assume, in the absence of an express and clear covenant, that a perpetual right was granted, which would virtually deprive the town from exercising its full powers as to its streets and from making improvements or alterations therein.

But, if I am wrong in this construction of the agreement, I am of the opinion that in view of the terms of secs. 330 and 331 of the "Municipal Act" of 1903 (3 Edw. VII. ch. 19), fully discussed by my brother Anglin, the appellant could not grant a perpetual right to the respondent to construct and maintain its telephone lines and poles in the Town of Cobalt. Had the appellant granted such a right—and I think it has not—it would have abdicated its power to

> pass by-laws granting from time to time to any telephone company upon such terms and conditions as may be thought expedient, the exclusive right * * * for a period not exceeding five years at any

one time to use streets and lanes in the municipality for the purpose of carrying on a telephone business.

That such abdication by a municipal corporation of its powers over and to its streets and highways would be contrary to law and against public policy does not seem to me open to doubt. *Dubuc* v. *La Ville de Chicoutimi* (1).

If the consent contained in the first clause of the respondent's contract with the appellant be severable from the exclusive right conferred on the respondent by the seventh clause, so that it would continue after the expiration of the exclusive period, I would think that it would amount to a mere licence or permission which would be revocable at any time after the five years.

I would, therefore, allow the appeal with costs here and in the Appellate Division, and restore the judgment of the learned trial judge.

MASTEN J. (*ad hoc*).—This is an appeal from the judgment of the Appellate Division of the Province of Ontario, declaring that the respondent has the right in perpetuity to maintain and operate on the streets of Cobalt its telephone system, and enjoining the appellant corporation from interfering with such rights.

Concurring as I do in the result at which other members of the court have arrived, I think the appeal should be allowed and the judgment of the trial judge restored.

I base my conclusions on the view that the rights of the respondent company were acquired by agreement with the municipality of Cobalt and that such rights terminated either on the expiry of the five year term mentioned in clause seven of the agreement of June,

(1) Q.R. 37 S.C. 281.

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1912, or by an effective revocation by the appellant corporation of any licence granted under clause 1 of that agreement—if such licence continued in force after the expiry of the five year term.

I think that what is termed in popular language "the franchise" granted by the agreement is to be defined in legal phraseology as a licence coupled with an interest and the duration of such licence, that is to say whether it was terminable or existed in perpetuity, is to be ascertained by an investigation of the intention of the parties and of their powers.

No express stipulation is made in the written agreement with regard to the continuance of the licence after the expiry of five years of exclusive enjoyment and consequently the intention of the parties as to its duration falls to be ascertained by a general consideration of all the terms of the agreement, the surrounding circumstances, the capacity of the parties and by an application of the principle that a grant in derogation of a public right is in case of doubt to be construed in favour of the public and against the licencee. I agree with the view expressed by Riddell J. in the court below, that clause 9 of the agreement (see Note "A" below) indicates that the parties intended an agreement for a certain term, that is a terminable agreement, not an agreement in perpetuity.

Note A.—Clause 9 above referred to is as follows:—

> That the said company shall not, during the term of said franchise, charge more than forty dollars per year for a business wall telephone and twenty dollars per year for a private wall telephone to said municipality.

I also think that there is great force in the argument of the appellant corporation as stated in their factum in these words:—

> * * * that the Letters Patent shew clearly that a consent once given is not an end of the matter particularly where, as here, no

consent whatever was given before the lines were constructed. The first action by the town that is claimed to amount to a consent occurred in 1912. By the Letters Patent, the consent of the Municipal Council was a condition precedent and they also provide for "control" by the municipality after consent is given. It could also impose and fix "terms," "times," "rates and charges," at any time after granting consent. Assuming, therefore, that the town consented to the respondent using its streets and originally imposed no limitation as to time and fixed no terms and rates, it could at a subsequent date limit the time and impose and fix terms and rates. Until the company fixed a time in a binding way its hands were free. The Letters Patent so provided.

For the terms of the charter see Note B.:—

Note B.—To carry on within the District of Nipissing the general business of a telephone company and for that purpose to erect, construct, maintain and operate a line or lines of telephone along the sides of or across or under any public highways, roads, streets, bridges, waters, water courses or other places subject, however, to the consent to be first had and obtained, and to the control of the municipal councils having jurisdiction in the municipalities in which the company's lines may be constructed and operated and to such terms for such times and at such rates and charges as by such councils shall be granted, limited and fixed for such purposes respectively.

With respect to the surrounding circumstances, I note that in June, 1912, the respondent company had for some years been occupying the streets of the appellant corporation with their poles and wires. No consent had been given to such occupation and claim had been frequently put forward on behalf of the appellant corporation that the respondent company were trespassers. I think that clause 1 of the agreement was intended to operate as a fulfilment of the requirement of the charter as to municipal consent and an elimination of the claim which had theretofore been put forward that the respondent company had been or were then trespassers. Having thus cleared the ground, the next step taken by the parties was to provide by the combined operation of clauses 1 and 7 for an exclusive franchise definitely granted for a period of five years. It is possible that at the expiry of the

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five years of exclusive franchise the situation as contemplated by the parties was that the respondent company should still be in occupation of the streets, not as trespassers, but as licencees under the provisions of clause 1. In other words, that clause 1 remained in effect notwithstanding the expiry of the exclusive franchise granted for the first five years, but in that event I think that the right of the appellant corporation to fix the time of the duration of the licence came into operation and enabled it to effect a revocation, which it has done.

With respect to the capacity and power of the appellant corporation, I observe, without attempting to reach any positive conclusion, that it is manifest from the course of judicial decision in this case that grave doubts exist regarding the extent of the powers conferred on the municipality by the "Municipal Act." In ascertaining the intention of the parties respecting the duration of the franchise the presumption is that the appellant corporation intended to act within the powers which it clearly possessed and not that it intended to assume powers the right to which was at least doubtful.

Lastly, if doubt remain notwithstanding the consideration to which I have adverted, such doubt is to be resolved in favour of the public right and against the respondent company.

I think that the principle of construction enunciated by Lord Stowell in *The Rebeckah* (1), at page 230, applies to this case.

> All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes and for the public use it shall not be intended that such pre-

(1) 1 Ch. Rob. 227.

rogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.

I think that the principle so stated applies to a licence granted by a municipal corporation whereby the rights of the public in a highway are diminished. The principle was so applied by the Supreme Court of the United States in *Knoxville Water Co.* v. *Knoxville* (1), where Mr. Justice Harlan, in delivering the judgment of the court, after referring to the various cases where the above principle had been applied, said:—

> It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings.

The same view was maintained in *Blair* v. *City of Chicago* (2).

This conclusion renders it unnecessary for me to consider the capacity or powers of the appellant corporation or of the respondent company, but in view of the discussion that has taken place in the courts below respecting the effect of the "Companies Act" and the Letters Patent incorporating the respondent company, I ought perhaps to add one word.

It seems to me that when the agreement of June, 1912, was made the respondent company was governed by the "Companies Act" of 1907 as amended in 1908 and 1910. In support of that view I refer to secs. 210 (c) and 211 (1) of the "Companies Act" of 1907. I agree with the view that the ultimate source from which the powers of a company are derived is the

(1) 200 U.S.R. 22. (2) 201 U.S.R. 400.

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legislature and in certain cases the Crown (*Bonanza Creek Gold Mining Co.* v. *Rex* (1). I also agree that the legislature can clothe the company with rights as well as with powers and that in so doing it can act either directly or by delegating to the Governor-in-Council the necessary authority. I fail, however, to find in the provisions of the "Companies Act" of 1907, as amended in 1908 and 1910, any warrant for holding that there has been delegated by the legislature to the Lieutenant-Governor in Council power to confer on a company objective rights as distinguished from subjective powers, or that this company was invested with such rights in 1912. I think that the "pith and marrow" of the "Companies Act" of 1907 is the incorporation of a company—the designation of its powers and the definition of the mutual rights of its shareholders *inter se*. In other words, the authority conferred upon the Governor-in-Council is, in my opinion, merely to bring into existence the entity known as the company and to endow it with certain powers, but I think the Act gives to the Governor-in-Council no authority as against other subjects of His Majesty to confer on the company so created objective rights of the kind here in question.

Dealing concretely with the facts of this case, I think that no actual immediate right to occupy the streets of Cobalt was, or could be, conferred on the respondent company through the provisions of the "Companies Acts" under which it was constituted, but that any such right must have been acquired from the appellant corporation. I agree on this point with the views expressed by the trial judge and by Kelly J. in the courts below.

(1) [1916] 1 A.C. 566; 26 D.L.R. 273.

The appeal should be allowed and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Tilley, Johnston, Thomson & Parmenter.*

Solicitor for the respondent: *F. L. Smiley.*

1919
*May 13
*June 17

JOHN D. MITCHELL (PLAINTIFF).....APPELLANT;

AND

THE MORTGAGE COMPANY OF CANADA (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Landlord and Tenant—Lease—Agreement for lease—Memorandum—Statute of Frauds—Date when term begins.

The appellant, suing for the specific performance of an agreement for a lease, relied on the following memorandum:

Prince Albert, Sask.

Received from Mr. John D. Mitchell the sum of Fifty Dollars, being deposit on rental of St. Regis ground floor, building taken at $100.00 per mo., for a term of five years to start from completion of repairs or when handed over to Mitchell.

$50.00. ROMERIL, FOWLIE & Co.,
"A. ROMERIL."

Held, Idington and Brodeur JJ. dissenting, that the document was insufficient to satisfy the requirements of the Statute of Frauds, it being impossible to determine from it the time of the beginning of the contemplated term.

Judgment of the Court of Appeal (11 Sask. L.R. 447; 43 D.L.R. 337), affirmed, Idington and Brodeur JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge, Taylor J., and dismissing the plaintiff's action with costs.

The material facts of the case and the questions in issue are fully stated in the judgments now reported.

Eug. Lafleur K.C. for the appellant.
F. H. Chrysler K.C. for the respondent.

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

(1) 11 Sask. L.R. 447; 43 D.L.R. 337; [1918] 3 W.W.R. 838.

IDINGTON J. (dissenting).—The authority given by the respondent in its telegram of 21st December, 1916, confirmed by its letter of 22nd December, 1916, would seem to confer ample authority on the alleged agents to make an agreement for a lease for five years subject to submission to the respondent of the tenders for repairs and improvements.

Pursuant thereto the agents on 27th January, 1917, and 30th January, 1917, reported all that seemed required as condition precedent and named appellant as proposed tenant.

To this respondent answered by a telegram on 5th February, 1917, as follows:

290 Garry Street, Feb. 5, 1917.

Romeril, Fowlie & Co.,
Prince Albert, Sask.

What rental is Mr. Anderson prepared to pay for ground floor? Not given in your letter.

MORTGAGE COMPANY OF CANADA.

To this wherein the name of the proposed tenant was accidentally confused with that of the man tendering for the work to be done, the following reply was sent by the agents:—

Prince Albert, Sask., Feb. 5th, 1917.

Mortgage Company of Canada,
290 Garry Street,
Winnipeg, Man.

Ground floor one hundred month not including heat. Tenant John Mitchell, rush lease Avenue.

(Sgd.) ROMERIL, FOWLIE & Co.

On the 8th February, 1917, the appellant and the said agents of respondent agreed as evidenced by the following receipt:—

Prince Albert, Sask.

Received from Mr. John D. Mitchell the sum of Fifty Dollars, being deposit on rental of St. Regis ground floor, building taken at $100.00 per mo., for a term of five years to start from completion of repairs or when handed over to Mitchell.

$50.00. ROMERIL, FOWLIE & Co.,
A. ROMERIL.

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Idington J.

The date is not given but that is supplied by the cheque of the appellant shewn to have been given at same time.

This documentary evidence read in light of the surrounding facts and circumstances leaves no doubt in my mind of a concluded contract sufficient to meet the requirements of the Statute of Frauds.

The date of the beginning of the term was made certain within the recognized maxim *id certum est quod certum reddi potest.*

Cases of this nature requiring certainty of the term of a lease are curiously enough those which the learned author of Brooms Legal Maxims puts in the foreground of his commentary on this maxim and cites in 7th ed., p. 465, as illustrative of the meaning of the maxim.

The only question raised by the Court of Appeal seems to have been the effect to be given the concluding words of the receipt "or when handed over to Mitchell" which that court seems to have read as casting a doubt upon the certainty of meaning in the receipt.

I feel no difficulty in regard thereto for obviously there is nothing more implied than if there had been added to the preceding language a stipulation that in the event of the parties agreeing on another date that might by consent be substituted for the operative words already used, which in themselves were binding.

These words on which stress is laid are clearly, as counsel for appellant suggests, mere surplusage.

The bargain thus closed could not be affected by the later correspondence between respondent and its agents, which tried to introduce a term, previously unthought, of giving the right to the respondent to terminate by a three months' notice the five years' lease it was bound to give.

Nor could the doubt suggested later of the repairs

and improvements contemplated throughout by the earlier correspondence being likely to exceed the estimate, affect the contract.

Any possible difficulty on that score was, as matter of fair dealing, removed by the offer of appellant to bear the extra expense.

The contract if need be might be read as one to spend at least the sum named in such repairs, alterations, or improvements and thus remove any difficulty of non-compliance with the Statute of Frauds which might in law attach to the verbal offer of the appellant to bear such extra expense.

The question of the agents signing their own name instead of the respondent's was not very seriously pressed in argument, but is amply answered by the authorities cited in Leake on Contracts, 4th ed., 189: and in Fry on Specific Performance, 4th ed., 236: and see also the case of *Rosenbaum* v. *Belson* (1), and the case of *Fred Drughorn Limited* v. *Rederi Aktiebolaget Transatlantic* (2).

I do not think we are bound to exercise our mental ingenuity to find excuses for any one pursuing the course respondent saw fit to pursue.

The appellant if confined to a claim for specific performance might be sufficiently met by some of these subterfuges but I submit it had broken a pretty plain obvious agreement and should pay the damages thereby suffered.

The appeal should be allowed and the judgment of the learned trial judge restored with costs here and below.

DUFF J.—The contract, if there was one, between the appellant and the respondent company was that a

(1) [1900] 2 Ch. 267. (2) 120 L.T. 70.

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certain building, of which the respondent company was the proprietor, should be altered in certain respects; and that on the date of the completion of the alterations the appellant should receive and accept a lease of part of it for five years, subject to determination on three months' notice. This contract as a whole would be a contract within the fourth section of the Statute of Frauds, the agreement to make the changes being in part consideration for the undertaking by the appellant to accept the lease.

I am inclined to think that the provision as to determination upon notice is not sufficiently evidenced in writing, but assuming it to be so, it is quite evident that it is at least doubtful whether the respondent company's agents had authority to undertake to effect alterations at a cost greater than $800.00, and there is no doubt that when it was discovered that the cost of the projected alterations would exceed this figure both the appellant and the company's agents proceeded to negotiate afresh, treating the whole matter as at large. An understanding between them was reached, but the conclusion I have arrived at, after carefully reading the statement of the 15th of February and the letters of the 20th and 24th of the same month, is that there is too much indefiniteness in the expressions used in relation to the subject of alterations to enable one to say that the beginning of the contemplated term is ascertained by reference to the date of the "completion of repairs" within the meaning of the memorandum of February 20th.

The appeal should be dismissed with costs.

ANGLIN J.—I concur with Mr. Justice Duff.

BRODEUR J. (dissenting).—This is an action for specific performance of an agreement for a lease or for damages

The property in question is on the ground floor of a property known as the St. Regis Hotel in the Town of Prince Albert, Saskatchewan. It had been for a few years without any tenant and was probably in a very dilapidated condition. The respondent company was the owner of it and as its office is in Winnipeg it had instructed the firm of Romeril, Fowlie & Co., of Prince Albert, to rent the ground floor of the building, the company undertaking to make some repairs not to exceed $1,000.00, and they wrote them on the 22nd of December, 1916, that they would "rent the ground floor at $100.00, per month, we to do the repairing to the plumbing and heating, and any other repairs that are absolutely necessary."

On the 8th of February, those agents agreed with the appellant to rent that property and gave him the following receipt:

Prince Albert, Sask.

Received from Mr. John D. Mitchell the sum of Fifty Dollars being deposit on rental of St. Regis ground floor, building taken at $100.00, per mo., for a term of five years to start *from completion of repairs or when handed over to Mitchell.*

$50.00. ROMERIL, FOWLIE & CO.,
A. ROMERIL.

It appears that the appellant intended to carry on on those premises a restaurant and that a man named Maclean, who was keeping a restaurant in the vicinity, did not like the idea of having a competitor in his neighbourhood and tried to obtain the lease for himself, offering to pay part of the repairs and also to give a larger rent.

Those new offers evidently tempted the respondent company; and, disregarding the most elementary principles of honesty, it accepted the proposition to lease the property to Maclean.

Being sued by Mitchell for specific performance or for damages, it was condemned by the trial judge to pay a sum of $550.00 in damages.

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The Court of Appeal (1), reversed that judgment on the ground that the agreement was not a concluded agreement which would satisfy the Statute of Frauds and that the receipt given by the real estate agents did not specify the date at which the lease would start.

The respondent company pleaded also that the agents had no authority to give the receipt which they had given to the appellant; but the two courts below decided against it in that respect and this point was not very strongly pressed at the argument. There is no doubt that Romeril, Fowlie & Co. were the agents of the respondent company, that they had been instructed to lease the property in question for a sum of $100.00 per month and that they had agreed to do some repairs and alterations in order to render the property habitable; and there is nothing in the receipt which would induce one to question the authority of the agents. It must be stated to credit of the agents that they had been urging upon the respondents to carry on their agreement with Mitchell; but evidently the temptation of having a larger sum of money was too strong for the honesty of the company.

There is no doubt that it is essential to the validity of a lease that it shall appear on what day the term is to commence. There must be a certain beginning: otherwise it would not be a perfect lease, and in a contract for lease, in order to satisfy the Statute of Frauds, the term of commencement must be shewn. *Marshall* v. *Berridge* (2).

But the commencement of the term may be collected from the memorandum or by reference to some of their writings. Then the question comes up whether

(1) 11 Sask. L.R. 447; 43 D.L.R. 337; [1918] 3 W.W.R. 838.

(2) 19 Ch. D. 233.

we can collect from the language of the agreement at what date the lease was to commence.

In the case of *Oxford* v. *Provand* (1), it was decided that where a certain amount of rental has to be paid from the date at which a building should be completed that those terms expressed with sufficient clearness the intention of the parties to bind themselves from the time it was made to do the several acts stipulated. Mr. Justice Lamont in the Court of Appeal admitted that, if the agreement provided simply that the term should commence when the repairs should be completed, the case of *Oxford* v. *Provand* (1), would apply; but that by inserting in the receipt given by Romeril, Fowlie & Co. an alternative time for the beginning of the term it was impossible to hold that the commencement is fixed or can with reasonable certainty be concluded from the document.

The lease stated that the term was to start from the completion of the repairs or when the building was handed over to Mitchell. I would construe this language as meaning that the lease shall commence at the termination of the repairs; but if by a new agreement between the parties the property was handed over before or after the repairs were complete, in such a case the lease would start from the latter date. But I maintain that the primary agreement of the parties was that the rent should start from the date at which the repairs would be complete and that there is no reason then to distinguish the present case from the case of *Oxford* v. *Provand* (1).

In those circumstances, I have come to the conclusion that the judgment of the trial judge should be restored and the appeal allowed with costs of this court and of the court below.

(1) L.R. 2 P.C. 135.

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MIGNAULT J.—The appellant sues for specific performance, or, in the alternative, for damages on a contract of lease which he alleges he made with the respondent of certain premises in the City of Prince Albert, Saskatchewan. The agents of the respondent for renting these premises were Messrs. Romeril, Fowlie & Co., and assuming that the latter did rent the premises to the appellant, there is a question whether the agents did not exceed their authority by not stipulating the right of cancellation on giving three months' notice. I think however that for the decision of this case it will suffice to determine whether or not the writing on which the appellant relies satisfies the requirements of the Statute of Frauds. This writing is in the following terms:

Prince Albert, Sask.

Received from Mr. John D. Mitchell the sum of Fifty Dollars, being deposit on rental of St. Regis ground floor, building taken at $100.00 per mo., for a term of five years to start from completion of repairs or when handed over to Mitchell.

$50.00. ROMERIL, FOWLIE & Co.,
A. ROMERIL.

The rule to be applied has been authoritatively stated as follows:

> It is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements. *Marshall* v. *Berridge* (1), at p. 244.

Measured by this rule, the receipt relied on by the appellant evidently fails to satisfy the requirements of the Statute of Frauds. I doubt whether the parties ever intended it to be a memorandum witnessing a contract, or anything more than a receipt for the money paid by the appellant. Even if it can be looked

(1) 19 Ch. D. 233.

on as a memorandum it is impossible to determine from it the time of beginning of the lease. The term of five years is stated

to start from completion of repairs or when handed over to Mitchell.

These repairs are not described, nor is it said who is to make them. It is true that the respondent, in correspondence with the agents, expressed its willingness to spend on repairs the sum of $800.00, and that the agents, but only after the date of the receipt, sent it an estimate specifying certain repairs and improvements amounting to $1,122.00. When the respondent demurred at paying more than $800.00, the appellant says that he agreed to pay the excess in cost, over and above the $800.00, which would shew that the matter had not been finally closed by the receipt which imposed on him no such obligation.

But looking at this receipt, the time of commencement of the lease is not stated nor can it be inferred from its language. Could Mitchell be forced to take possession and pay rental before the repairs were completed? Or when these repairs, and they had not then been specified, were made, and a delay ensued before the premises were handed over to Mitchell, from which of the two events, the completion of the repairs or the handing over of the premises, would the five year lease begin? The receipt is too vague to permit any answer being given to these questions, and consequently it cannot be taken as complying with the Statute of Frauds.

The appellant relies on the decision of the Privy Council in *Oxford* v. *Provand* (1), but I think that this decision is clearly distinguishable from the present case. In *Oxford* v. *Provand* (1), the Privy Council as a court of equity considered the surrounding circumstances

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and the conduct of the parties in dealing with the property comprised in an agreement vague in its language, in the interval between the making of the agreement and the commencement of a suit for its enforcement. The tenant, who attacked the memorandum, had before the suit taken possession and had sub-rented a part of the buildings referred to in the agreement as having to be constructed, or the building of which had then to be completed. I would have had no hesitation in the present case had the appellant been put in possession of the premises referred to in the receipt. But such was not the case and the receipt stands alone and without the aid of any surrounding circumstances or of any conduct of the parties in dealing with the property that can shew a certain time at which the term of the lease would begin.

Although I cannot think that the respondent acted in the matter as the rules of fair dealing required, still there is no escape from the conclusion that in law the appellant cannot succeed in this appeal, which must in my opinion be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Halliday & Davis.*
Solicitors for the respondent: *Lindsay & Mudie.*

THE CITY OF CALGARY (DEFENDANT) ..... } ..APPELLANT;

AND

JANSE-MITCHELL CONSTRUCTION COMPANY (PLAINTIFF) .... } RESPONDENT.

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*May 14
*June 17

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Contract—Construction of sewer—Delay in completion—Sum payable per day after contract's date of completion—Waiver—Penalty or liquidated damages—"Extra work."

The respondent contracted to construct for the appellant a sewer to be 12,000 feet long and to complete it by the first of July, 1912. The contract provided that the appellant's engineer might "at any time while the works are in hand, increase, alter, change or diminish the dimensions * * * or vary the form of dimensions of any part of the said work" (clause 7); and that "in the event of delay to the works" for certain reasons, including "extra work," "such additional time as may be deemed fair and reasonable shall be allowed by the" appellant if notified in writing by the respondent: (clause 11). By clause 12, it was also provided that "the time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of twenty-five dollars per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of a failure to complete said work as herein agreed, and in no event as a penalty, but to the full amount thereof, and in addition to any other damages sustained, or the amount may be recovered from the sureties." Clause 13 provided that "any extra work, changes," etc., should not "lengthen the delay within which the works were to be completed" and "shall be considered as if originally in (the) contract." The appellant, a few days after the contract was signed, authorized the construction of 700 additional feet of sewer. On the first of July, 1912, the appellant notified the respondent that two months' extra time would be

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

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allowed for the completion of the work. The engineer's certificates as to the amounts due to the respondent were calculated, even after the first of September, 1912, without making any deductions for delay. On the 12th of January, 1914, when the engineer delivered a "final" certificate establishing as the date of the completion of the works the 21st of December, 1913, the appellant retained in its possession 20% of the contract price.

Held, Idington and Anglin JJ. dissenting, that, under the circumstances of this case, the conduct of the appellant and its engineer constitutes a waiver of the provisions making time the essence of the contract and of the clause fixing damages for delay in completion.

Per Idington, Duff and Anglin JJ.—The sums payable under clause 12 must be regarded as liquidated damages, and not as a penalty. Mignault J. *contra.*

Per Mignault J.—The retention by the appellant of 20% of the contract price could not be construed to cover the $25 per day for delay in completion. Anglin J. *contra.*

Judgment of the Appellate Division (14 Alta. L.R. 214; 45 D.L.R. 124; [1919] 1 W.W.R. 142), affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming, the Court being equally divided, the judgment of the trial judge, Ives J., in which he gave judgment for the plaintiff for $9,288.10 as the balance due on contract and dismissed the defendant's counterclaim for liquidated damages.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. and *Marcus* for the appellant.

W. N. Tilley K.C. and *H. P. O. Savary* for the respondent.

IDINGTON J. (dissenting).—I am of the opinion that the provisions in the contract in question for liquidated damages falls as such well within the rules laid down by Lord Dunedin in *Dunlop Pneumatic Tyre*

(1) 14 Alta. L.R. 214; 45 D.L.R. 124; [1919] 1 W.W.R. 142.

Co. Ltd. v. *New Garage & Motor Co.* (1), at pp. 89 *et seq.*, for testing whether the sum named is to be treated as a penalty or, as the express language of the contract designates it, as liquidated damages.

In the very nature of the things the parties were contracting about, it seems to me most appropriate that they should contemplate the loss to the appellant by a daily deprivation of the use of that which was being contracted for; and none the less so when in all probability there would have been paid by it ere the time for the clause in question becoming operative, the substantial part of the cost price of the work and hence intend to anticipate and decide what would be reasonable damages. Having regard to the sum involved and paid and the result of the deprivation of the use of the work, the daily payment fixed does not seem so harsh or extravagant as to suggest a mere penalty was only being considered.

The case of *Jones* v. *St. Johns College* (2), seems to answer the objection in law relative to the construction of the instrument involved in the provisions for extra work as an excuse for relief.

And as a matter of fair dealing I think the engineer's allowance of time in that regard covers the ground, and I suspect was in fact intended to be in conformity with the expectation implied in the contract though not literally observing its terms.

And in the same sense I think the view of the learned Chief Justice below, as to the final estimate of the engineer being taken as substantial completion, should be adopted.

I fail to find any ground of waiver on which respondents should be permitted to rest.

(1) [1915] A.C. 79. (2) L.R. 6 Q.B. 115.

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I think the appeal should be allowed and judgment go in the manner the learned Chief Justice and Mr. Justice Stuart in the court below indicated, and with costs of appeal here and below.

DUFF J.—The appeal turns in my judgment upon the construction and application of articles 11 and 12 of the contract. These articles are in the following terms:

11. If the engineer or corporation should at any time be of the opinion that the work is unreasonably or unnecessarily delayed, or that the contractor is not on his part fulfilling this contract, or that the force employed is not sufficient to complete the work within the time herein provided, the said engineer shall thereupon require said contractor to proceed within such delay as may be mentioned in the notice with such force as he shall direct, and in case of his refusal or neglect to comply with such requirements, or if at the expiration of the time specified for the completion of the works embraced in this contract, such works are not fully completed, the said corporation may put on sufficient force as it may see fit or take possession of and complete said work at the expense of said contractor, as herein provided in case of failure or insolvency, and all money paid by the corporation in such case shall be deemed payment made on account of this contract. But in the event of delay to the works by reason of strikes or combinations on the part of the workmen employed, or by extra work, or by any act or omission of the corporation, such additional time as may be deemed fair and reasonable shall be allowed by the corporation: provided that the contractor notify the engineer in writing within 24 hours of the cause of such delay otherwise he shall have no claim.

12. The time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of twenty-five dollars per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of failure to complete said work as herein agreed, and in no event as a penalty, but to the full amount thereof, and in addition to any other damages sustained, or the amount may be recovered from the sureties.

The sums payable under article twelve must, I

think, be regarded as liquidated damages, and not as a penalty.

The judgment of Lord Dunedin in *Commissioner of Public Works* v. *Hills* (1), at p. 375, furnishes the appropriate test. The question is, can the sums mentioned be considered as a genuine pre-estimate of the creditor's probable or possible interest in the performance of the contract? If so, it is immaterial that the parties may be reasonably supposed to have relied upon the clause as an "instrument of restraint." As Lord Robertson pointed out in the *Clydebank Engineering Co.* v. *Ramos* (2), at pp. 19 & 20, the intention that such agreements shall so take effect in some degree may always be assumed to be present. That is nevertheless of no importance unless you come to the conclusion, to use Lord Halsbury's phrase in the same case, "that the parties only intended" the agreement "as something *in terrorem.*"

I have no doubt that this article must be construed as a genuine appraisal of the value of a real interest of the municipality in the performance of the contractor's principal obligation.

Article twelve contemplates the deduction of the penalties as the primary method of recovery. It does not differ materially in this respect from the article construed by the Exchequer Chamber in *Laidlaw* v. *Hastings Pier Co.* (3), at pp. 15 and 16, in which it was provided that the penalty was

> to be paid to and retained by the company as ascertained and liquidated damages.

The provision for drawback does not, I think, materially affect this point.

The power to extend time was given to the engineer,

(1) [1906] A.C. 368. (2) [1905] A.C. 6.
(3) 2 Hudson on Building Contracts, 13.

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and the granting of certificates by him, from time to time, subsequent to the date fixed for completion, without deduction for penalties, was treated as overwhelming evidence of the intention to exercise this power. Here the power is given to the municipality. But article eleven does more than vest in the municipality the power to extend the time, it creates in the cases specified in article eleven an obligation to do so if the contractor shall reasonably be entitled to demand it.

In the case before us, certificates were granted by the engineer, without deduction, and paid by the municipality, without deduction. Coupled with the circumstance that the municipality had taken possession, and with the correspondence, these facts constitute, I think, sufficient ground for requiring us to draw the inference that the time for completion was extended until the date when the works were substantially completed by the contractor in July, 1913.

ANGLIN J. (dissenting).—The facts of this case, so far as material, may be found in the opinions delivered by the learned judges of the Appellate Division (1).

Several questions are presented on this appeal—

(1) Whether a provision of the 12th clause of the contract that

> if the contractor shall fail to complete the work by the time specified, a sum of twenty-five dollars per day for each and every day thereafter as liquidated damages * * * shall be deducted from the money payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final,

should be regarded as a contractual pre-ascertainment of damages for delay or as in the nature of a penalty;

(1) 14 Alta. L.R. 214; 45 D.L.R. 124.

(2) Whether by directing an extension of the sewer for 700 feet at its lower end, from which the work was to begin, the city waived the provision of the contract making time of its essence and thus rendered the clause fixing the amount of damages for delay inapplicable;

(3) Whether certificates given by the city engineer for amounts payable to the contractor, and particularly his certificate of the 12th of January, 1914, marked "final," in which no deduction was made for damages for delay in completion, preclude the city from claiming such damages;

(4) Did the city by making partial use of lower portions of the sewer as constructed waive the provision for damages for delay in completion of the entire work?

(5) If damages at the rate stipulated are recoverable, for what period should they be allowed?

The date fixed by the contract for completion was the first of July, 1912. The additional 700 feet of sewer (the original length was 12,000 feet, for the construction of which the contract allowed eleven months), was authorized by the engineer a few days after the contract was signed and before actual work upon it was begun. The contract expressly provided that the engineer might

> at any time while the works are in hand, increase, alter, change or diminish the dimensions * * * or vary the form of the dimensions of any part of the said work

(clause 7), and that extra work, changes, alterations, increases or diminutions should not lengthen the delay within which the works were to be completed but must themselves also be completed by the 1st of July, 1912, as if originally in the contract (clause 13). I agree with the learned Chief Justice of Alberta that this

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latter provision distinguishes the case at bar from *Dodd* v. *Churton* (1), at p. 567, relied on by the learned trial judge and the two learned appellate judges who affirmed his judgment, and brings it within the authority of *Jones* v. *St. Johns College* (2).

The works were "in hand" from the moment when the contract was executed. It stipulated that they should be commenced immediately. The contract further provided that should the works be delayed by extra work, if the contractor should advise the engineer of such delay and its cause, the corporation should allow such additional time for completion as might be deemed fair and reasonable (clause 11).

If, as I incline to think and as all parties seem to have treated it, the addition of the 700 feet was "extra work" within the meaning of the foregoing provisions, no notice of delay thereby occasioned or of its cause was given by the contractor. Nevertheless, the city engineer, either *proprio motu* or by direction of the municipal corporation, by letter of the 1st of July, 1912, formally notified the contractor that two months' extra time would be allowed it for the completion of the work on account of the extra 700 feet. I think the city may fairly be held bound by this act of its official and that the time for completion should therefore as against it be regarded as having been extended to the 1st of September, 1912. Not having taken advantage of the provision in its favour made by clause 11, the contractor cannot complain that it has not been allowed for delay entailed by extra work. But, if it could, the allowance of two months for 700 feet additional seems eminently reasonable in view of the fact that the time for construction of the 12,000 feet originally contracted for was eleven months.

(1) [1897] 1 Q.B. 562. (2) L.R. 6 Q.B. 115.

I agree with Harvey C.J. that the city engineer's estimate of the 12th of January, 1914, certifying to work done up to the 31st of December, 1913, and marked "final" should also be taken to establish that the works were completed on that date so that the contractor's default should be computed as from the 1st of September, 1912, to the 31st of December, 1913, or 487 days in all. There is no evidence in my opinion that would justify a finding that the works had been completed at an earlier date. Moreover, under clause 4 of the contract it was the function of the engineer to determine all questions as to its execution and his decision is made

final and conclusive and unimpeachable for any cause.

If, on the other hand, the additional 700 feet was not "extra work" which the contract allowed the engineer to direct, but should be regarded as an independent undertaking upon which the contractor was at liberty to enter or not as it might elect, its doing so did not affect its rights or obligations under the existing contract and would not entitle it to an extension of time for its completion.

Connecting with lateral sewers as sections of the trunk sewer were finished was quite a usual course and must from the first have been contemplated by the parties to the contract. Such partial user of the trunk sewer as these connections entailed would not involve the waiver of the provision fixing damages for non-completion of the entire work.

The engineer's certificates of amounts due the contractor calculated without making any deductions for delay at first blush present a little difficulty. But when it is borne in mind that the city retained a drawback too of 20%, amounting to $36,489.22 on the final

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estimate of the 12th of January, 1914, that difficulty largely disappears. It was, no doubt, intended by the engineer that any damages the city should be entitled to for delay in completion and other matters should be taken from the sum so withheld on the final adjustment of accounts with the contractor. The omission of a deduction for delay from the certificates therefore does not imply any abandonment of the city's right to claim it or any judgment of the engineer adverse to such a claim. In his letter of the 31st of July, 1912, granting the contractor the two months' extension

on account of the extra 700 feet of sewer laid at the lower end and sundry unforeseen and unavoidable delays

the engineer expressly notified them that after September 1st

the penalty clause in your contract will be enforced,

adding

it would be to your advantage therefore to put on such extra force and appliances to ensure a speedy closing up of your contract.

The effect of this letter was to put matters in the same position as if the date originally fixed for completion of the works had been the 1st of September, 1912, instead of the 1st of July, 1912. The contract conferred power on the corporation to make this change and it was exercised by its officer. From time to time we find letters to the contractor complaining of delay and urging the employment of more men—a night shift—more rapid progress. But no further extension of time was ever granted and I fail to find in the correspondence and certificates or in the conduct of the corporation and its engineer a waiver of the provisions making time of the essence or of the clause fixing damages for delay in completion.

We had in the comparatively recent case of *Canadian General Electric Co.* v. *Canadian Rubber Co.*

(1), to consider with some care when a clause providing for the payment of a fixed sum for each day's delay in completing a contract should be regarded as

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and when it should be deemed a penalty. The English authorities were there so fully discussed that further reference to them is scarcely necessary. The parties in the present instance have themselves designated the sum fixed as "liquidated damages;" it is payable on only one event, not on the occurrence of one, or more, or all of several events, some of which may occasion serious and others trifling damage: it is not extravagant or unconscionable under the rule indicated by Lord Davey in *Clydebank Engineering & Shipbuilding Co.* v. *Don Jose Ramos* (2), at p. 17, being in fact slightly less than the equivalent of interest on the contract price at 5%: there were no adequate means of ascertaining either before or after the default the damage attributable to the breach of the contract. All these tests of

a genuine covenanted pre-estimate of damage

indicated by Lord Dunedin in the *Dunlop Pneumatic Tyre Co.* v. *New Garage & Motor Co.* (3), at pp. 87–8, are present here. It is in such a case that the parties might be expected to have intended to contract that they should estimate the damages for default at a certain figure and thus dispense with the extremely difficult, if not impossible, proof of the actual damage to which delay in completion of the work would subject the municipal corporation.

A reported case resembling this in its nature and circumstances is *Law* v. *Local Board of Redditch* (4), where in default of completion by a specified date of

(1) 52 Can. S.C.R. 349.
(2) [1905] A.C. 6.
(3) [1915] A.C. 79.
(4) [1892] 1 Q.B. 127.

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sewerage works to cost £630 the contractor agreed to pay the sum of £100 and £5 for every seven days during which the work should be uncompleted after the date fixed as and for liquidated damages. It was held by the Court of Appeal that these sums were recoverable as liquidated damages.

On the whole case I think judgment should be entered as indicated in the opinion of the learned Chief Justice of Alberta, including the disposition of costs. The appellant is entitled to its costs of the appeal to this court.

BRODEUR J.—The question in this appeal is whether the appellant corporation is entitled to claim $25.00 a day from the respondent company for delay in the construction of the sewer the latter undertook to build. The trial judge dismissed that claim and the judges of the Appellate Division being equally divided the decision of the trial judge stood confirmed.

It is not necessary for me to decide whether the clause upon which the corporation based its claim was a penalty clause or constituted liquidated damages, because I have come to the conclusion that this clause was waived.

By the contract the engineer of the corporation is the sole judge to determine the amounts of work to be paid and to decide all questions which may arise relative to the interpretation and execution of the contract; and his estimates, directions and decisions are final and unimpeachable for any cause.

Cash payments were to be made monthly on the written certificate of the engineer

apportioning same in accordance with the actual value of the work done in proportion to the contract as a whole.

The contract should have been completed on the 1st July, 1912: but an extension of two months was

given by the engineer for some extra work. The engineer, from September, 1912, to October, 1913, gave very frequently progress estimates and in none of those estimates does he claim any damages for delay in the execution of the contract. It would have been however very easy to do that because a sum of $25.00 a day had been stipulated for such delay; but for reasons which appealed, I suppose, to the sense of justice of the engineer he did not find it advisable that the contractor should pay that penalty.

Now that the work is completed and accepted by the municipal authorities, the corporation of Calgary claims, when they are sued for the payment of the balance due on the contract that a penalty exceeding $12,000 should be paid.

It seems to me that the engineer had been satisfied that the work had been carried out properly or that the provision of the time limit had ceased to operate after the extension of the work. In that case, the city lost its right to demand the penalty or liquidated damages.

The appeal should be dismissed with costs.

MIGNAULT J.—The principal question here is whether the appellant is entitled to claim from the respondent the sum of $25.00 a day for delay in completion of a sewer which the respondent contracted to build and built for the appellant. The contract allowed eleven months for its construction, and under clause 12 the appellant, when sued for the balance due the respondent, claimed the sum of $28,125.00 for liquidated damages at the rate of $25.00 per day from September 1st, 1912, to October 1st, 1915. The trial judge, Mr. Justice Ives, dismissed the appellant's counterclaim and allowed the respondent the sum of $9,288.10. He also found as a fact

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that the work was completed on July 5th, 1913, while the date fixed by the contract for completion was July 1st, 1912, the appellant admitting that it cannot complain of any delay prior to September 1st, 1912. Both parties appealed from the judgment of the trial court, the appellant in order to get judgment on its counterclaim, the respondent because it was not satisfied with the rate of interest granted by the learned trial judge. In the Appellate Division, the learned judges were equally divided, so the judgment of the trial court stands unless it is interfered with by this court.

The first point to be considered is the nature of the right claimed by the appellant under clause 12 of the contract. Is it a penalty or liquidated damages? The learned trial judge held that it was a penalty, while Chief Justice Harvey and Mr. Justice Stuart were of the opinion that it was liquidated damages. Mr. Justice Beck (Mr. Justice Hyndman concurred with him but gave no reasons), held that the appellant had waived any right to this sum of $25.00 per day and did not think it necessary to discuss the nature of the claim.

This, however, is the first point to be dealt with. I will cite clause 12 of the contract between the parties:

PENALTY.

12. The time of beginning, rate of progress and time of completion are essential conditions of this contract; and if the contractor shall fail to complete the work by the time specified, the sum of twenty-five dollars per day, for each and every day thereafter as liquidated damages, together with all sums which the corporation may be liable to pay during such delays until such completion, shall be deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final. This sum shall be in addition to any penalties otherwise specified, and shall be paid by the contractor to the corporation, or deducted from any moneys due to the contractor in the event of a failure to complete said work as herein agreed, and in no event as a penalty, but to the full amount thereof,

and in addition to any other damages sustained, or the amount may be recovered from the sureties.

The language of this clause is not aptly chosen, and very likely it was modified or added to in the drafting. It obviously opens the door to two constructions. Apparently, but of course this is only a surmise, the parties, as the title shews, started out with the idea of providing for a penalty in case of delay in completion, and then it was thought better to make it a stipulation for liquidated damages. Possibly a doubt was felt whether some kind of damages should not be expressly provided for, so it was agreed that the sum of $25.00 per day of delay should be paid

together with all sums which the corporation may be liable to pay during such delays until such completion.

So the "liquidated damages" do not include these sums, which obviously are damages caused by the delay to complete the works during the time prescribed.

Then the clause says that

this sum shall be paid in addition to any penalties otherwise specified * * * and in addition to any other damages sustained.

Viewing the whole clause and the portions to which I have specially referred, I cannot say that the learned trial judge was wrong in holding that this sum of $25.00 per day was a penalty and not liquidated damages, and if this be so, *cadit questio*, for no proof of damages for delay has been made.

It appears further that this sum was to be

deducted from the moneys payable under this contract, and the engineer's certificate as to the amount of this deduction shall be final.

As a matter of fact, the engineer gave a certificate which he marked "final" on January 12th, 1914, and in this certificate no deduction of the $25.00 per day was made, and he certified that $2,740.86 was then

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due the respondent. It is true that the certificate shewed that 20% of the contract price was held back, amounting to $36,489.22, but this retention of 20% was governed by clause 20 of the contract, and its object was not to cover the $25.00 per day for delay in completion. It was to be held back until 33 days after the completion of the works,

> to pay thereout the claims of all persons who have done work or furnished material in execution of any part of this contract to or for the contractor.

After the 33 days, 15 per cent. was to be paid to the contractor, and the appellant was to keep 5% for twelve months to cover repairs or the cost of finishing work. It therefore cannot be said that the retention of the 20% on the certificate of January 12th, 1914, was a reservation of the right of the engineer to deduct the $25.00 per day, the more so as the work, as found by the trial judge, had then been completed for more than six months.

Mr. Craig, the engineer, first claimed this penalty in an estimate dated November 30th, 1917, nearly four years after his final estimate of January 12th, 1914, and in his evidence says that he never rendered an account for the $25.00 per day before that time. I cannot help thinking that the claim first made by the appellant on November 30th, 1917, was an afterthought, to defeat the right of the respondent to be paid the drawback, and it does not commend itself to my mind as coming within any rule of fair dealing between the parties to such a contract.

I may add that immediately after the contract, the appellant ordered the respondent to begin the sewer at a point 700 feet further away from the point determined in the contract for its starting point. Without stopping to enquire whether this was an extra

or an independent contract, it is obvious that this addition to the work changed all the time conditions of the contract. After this order of the appellant, I would think the parties were at large in so far as the penalty for delay in completion is concerned.

I would not interfere with the judgment of the learned trial judge as to the interest he allowed the respondent, that is to say five per cent. which is the legal rate.

In the result the appeal should in my opinion be dismissed with costs here and in the Appellate Division. The respondent should not have the costs of its cross-appeal to the latter court.

Appeal dismissed with costs.

Solicitor for the appellant: *C. J. Ford.*
Solicitors for the respondent: *Savary, Fenerty & Chadwick.*

*1919
May 12.
Oct. 14.

CASE THRESHING MACHINE COMPANY (PLAINTIFF)..... } APPELLANT;

AND

MITTEN AND OTHER (DEFENDANTS).. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Sale—Principal and agent—Written contract—Evidence—Acceptance —Verbal representations—Warranty—Return of goods.

The respondent ordered from the appellant "one Case 40 Horse Power Case Gas Engine." The agreement provided that "the purchaser" could claim "the return of moneys paid * * * only * * * after he has returned the * * * goods to the place where he received them"; and that "no representations, warranty or conditions, expressed or implied, other than those herein contained nor * * * any agreement collateral hereto be binding upon the vendor unless it is in writing." The engine was delivered to the respondents, accepted by them in May, 1915, and never returned to the appellant. A promissory note due in November, 1915, was paid by the respondents without any protest. The engine had two tanks, one labelled "kerosene" and one "gasoline." An agent of the appellant represented to the respondents that the engine would also operate on kerosene and promised to send experts; but it stopped whenever so operated.

On an action by the appellant for the price of sale, the respondents alleged fraud and misrepresentations.

Held, Idington J. dissenting, that, upon the evidence, the engine delivered was accepted by the respondents as the engine ordered in the written agreement of sale.

Per Duff J.—The written contract is explicit, and its terms are not susceptible of modification by evidence of contemporary or antecedent negotiations.

Per Anglin J.—The agreement contained no warranty that the engine would run on kerosene, breach of which would support a claim for damages. *Schofield* v. *Emerson* (57 Can. S.C.R. 203), distinguished.

Per Brodeur J.—By paying their promissory note without protest and, *per* Brodeur and Mignault JJ. by not returning the engine to the appellant, the respondents waived any right they might have to rescission.

Judgment of the Court of Appeal ([1919] 1 W.W.R. 101), reversed, Idington J. dissenting.

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

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of Taylor J. at the trial (2), and maintaining the plaintiff's action, and less certain deductions, without costs. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Lafleur K.C. and *Bastedo* for the appellant.
Belcourt K.C. for the respondent.

IDINGTON J. (dissenting)—I agree so fully with the reasoning upon which the judgments of the learned trial judge and that of Mr. Justice Lamont on behalf of the majority of the Court of Appeal proceed, that I must dissent from the judgment herein allowing entirely this appeal.

I may be permitted to add that the generic term "gas engine" is in the circumstances ambiguous and fails to describe accurately what beyond doubt all concerned had in mind; and regard must be had to the conduct of the parties and collateral inscription on the machine in order to make clear what kind of gas engine was meant.

I have an impression in view of the state of the pleading that possibly a new trial limited to the determination of what would have been the proper sum to allow for the engine might well have been directed, but in view of the decided opinions of my colleagues I have not seen any good purpose to be served by fully examining that aspect of the case.

DUFF J.—The written contract declares in explicit words that the terms of the agreement between the parties are to be found in the writing and in the writing

(1) 12 Sask. L.R. 1; [1919] 1 W.W.R. 101.
(2) 11 Sask. L.R. 238; [1918] 2 W.W.R. 871.

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Duff J.

exclusively. In face of this provision it is not, in my opinion, competent for a court of law to resort to contemporary conversations or prior conversations or even to the legend on the article for the purpose of discovering a contract differing in its terms from that expressed in the unambiguous language of the instrument.

ANGLIN J.—After some hesitation I concur in the allowance of this appeal. This case is distinguishable from *Schofield* v. *Emerson Brantingham Implement Co.* (1), inasmuch as the evidence here establishes acceptance by the defendants of the engine supplied to them as that which they had agreed to purchase from the plaintiff. Their letters of the 20th and 26th of October, 1916, afford practically conclusive proof of that fact. Moreover, there is no warranty that the engine contracted for would run on kerosene, such as I thought existed in the *Schofield Case* (1), in regard to the rated horse power, breach of which would support a claim for damages. The defendants may have relied on some promises made to them by employees of the plaintiff that the engine would be made satisfactory to them but their contract precludes effect being given to such promises. The provisions of a formal written contract executed without fraud, mistake or surprise, cannot be entirely ignored.

BRODEUR J.—This is an action by the appellant company to recover from the respondents the amount due by virtue of promissory notes which defendants have signed for the price of some agricultural machinery.

In 1915, the defendants, who are farmers and dealers, bought a separator and a 40 horse-power engine

(1) 57 Can. S.C.R. 203.

with different attachments for the price of $4,410. Those different articles were all delivered by the plaintiff company to the defendants on the 21st May, 1915. The defendants then gave a second-hand engine in part payment and made in favour of the plaintiffs three notes amounting to $3,660, falling due on the first of November, 1915, 1916 and 1917 respectively.

On the 1st November, 1915, a note became due and it was duly paid without any protest on the part of the purchaser.

In 1916, a few days before the payment became due, the defendants wrote a letter to the plaintiffs stating that they did not intend to make their payment this year until they were given their commission certificates on their machinery and, namely, on this gas engine and separator which they had received on the 21st May, 1915.

That letter remained unanswered. The appellant company did not feel disposed to pay any commission or to issue these commission certificates and the defendants failed to pay the notes which became due on the 1st November. An action was then taken by the plaintiffs a short time after, for the payment of the balance of the purchase price of the machinery, viz., $2,928. The defendants pleaded fraud and misrepresentations, claiming that it had been represented to them that the engine was a kerosene burning engine and that they had not received delivery of the machinery purchased. They counterclaimed also, repeating the allegation of fraud.

The trial judge found (1), that there was no fraud or misrepresentation but gave the defendant a set-off in damages for $1,885 on the implied condition that the engine was to be a kerosene burning engine. This

(1) 11 Sask. L.R. 238; [1918] 2 W.W.R. 871.

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judgment was confirmed by the Court of Appeal (1), Mr. Justice Newlands dissenting.

It seems to me that this defence of the respondents is the result of an afterthought. The machinery which was sold and delivered was a gas engine. The gas could be formed either by kerosene or by gasoline; in fact, there were two tanks on which the words *kerosene* and *gasoline* were painted. There seems to be no doubt that it did not work properly with kerosene (at least the evidence is conflicting on that point) but it worked very well with the use of gasoline. If the defendants were not satisfied with the machine as it was, why did they not return it in due time? Or why did they not then take proceedings to that effect? But they kept the machine for a year and made during that year enough profit to pay the cost of the whole machine. They paid their note which became due during that year, without any protest; and then, a year after, they would have paid the notes which then became due if the company had been willing to pay them some commission for which, I suppose, they had a claim more or less legitimate.

They seem to have waived in that way the rights which they might have if the machine did not run properly with kerosene; and in that respect they are too late now to claim what they virtually abandoned.

I am then, with deference, obliged to differ from the opinion expressed in the courts below.

The appeal should be allowed with costs of this court and of the courts below.

MIGNAULT J.—The appellant claims from the respondents the price of certain farming machinery sold to them, among which was a gas traction engine,

(1) 12 Sask. L.R. 1, [1919] 1 W.W.R. 101.

and the respondents have refused to pay because this engine, which apparently was designed to work with gasoline and kerosene as a fuel, would not run on kerosene. The respondents signed an order for the machinery on May 21st, 1915, while the appellant's engine was loaded on the cars, and it was immediately after delivered to them. This order or contract contains very strict conditions to which the respondents submitted by signing it, among others the following:—

4. Said goods are warranted to be made of good material, and durable with good care, and to be capable of doing more and better work than any other machine made of equal size and proportions, working under the same conditions on the same job, if properly operated by competent persons, with sufficient power, and the printed rules and directions of the manufacturers intelligently followed.

6. The purchaser shall not be entitled to make any claim for any breach of warranty unless he within ten days after his first using the said goods sends by registered letter a notice of the defect complained of, describing the same, and stating when it was discovered, addressed to the home office of the vendor, and to the dealer through whom this order was taken and unless the vendor fails to remedy such defect within a reasonable time after the receipt by it of such notice.

8. In no event shall the purchaser have any claim whatever under the agreement against the vendor for any damages but only for the return of moneys paid and securities given, and his claim for such shall only arise after he has returned the said goods to the place where he received them.

11. Nothing done by either party shall operate as a waiver of any of the provisions of this agreement unless the same is evidenced by writing signed by the party to be charged with such waiver.

12. The whole contract is set forth herein. There are no representations, warranties or conditions, expressed or implied, other than those herein contained, nor shall any agreement collateral hereto be binding upon the vendor unless it is in writing hereupon or attached hereto and duly signed on behalf of the vendor at its said home office.

The undersigned hereby acknowledge to have received a full, true and correct copy of this order, and that no promises, representations or agreements have been made to or with me not herein contained.

HENRY J. MITTEN,
WILLIAM J. MITTEN.

The learned trial judge, who decided in favour of the respondents, and whose judgment was affirmed by

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the Court of Appeal of Saskatchewan, Mr. Justice Newlands dissenting, has found that there was no misrepresentation on the part of the appellants, but that the respondents had previously purchased from the latter a gas engine which, when delivered, admittedly proved unsatisfactory in that it would not pull the load when working on kerosene. The appellant, the learned trial judge finds, agreed to take back this engine and credit the respondents with $750.00 on the purchase of another gas engine, the one in question, which, it was distinctly understood between the parties, was to be a kerosene burning engine. A casual examination of the engine, he adds, would lead to the belief that it was of a type specially designed to operate with kerosene, for it had two tanks, the larger one labelled "kerosene," and the smaller one for gasoline which was to be used only for starting the engine. He also finds that the appellant's agent Given had previously represented to and assured the respondents that the engine would operate on kerosene, and that he had seen engines of this type operating on kerosene, using 3½ gallons of kerosene to plow an acre of land. When it was attempted to run the engine on kerosene, it stopped, and the appellant, the learned trial judge finds, promised the respondents to send experts to make it work on kerosene, and did so, but to no avail.

Under these circumstances the learned trial judge held that the action of the respondents in relying on the undertaking of the appellant to make the engine work on kerosene, was entirely reasonable. He adds that he is satisfied that the respondents agreed to purchase one kind of engine, that that kind was never delivered to them, and that the engine actually delivered was worth at least $1,885.00 less than the engine

they should have received. And in answer to the contention of the appellant that this engine answers the description in the order "one case 40 Horse Power Case Gas Engine," he finds that this description is ambiguous, applicable to any type of gas engine, warranting the admission of evidence to shew which type of engine was intended.

The whole question is whether on these findings of fact, the appellant is entitled to recover from the respondents. The position of the latter is weakened not only by the terms of their contract, but also by the letters which they wrote to the appellant, which, up to that of the 11th November, 1916, do not mention the grievance that the engine would not run on kerosene, but merely complain that certain commission certificates which they claimed from the appellant had not been sent to them.

I have looked at this case from every possible angle, but notwithstanding Mr. Belcourt's able argument for the respondents, it all comes back to the question whether the respondents can escape from the obligations of the contract they have signed. The learned trial judge has found that there were no misrepresentations on the part of the appellant and therefore the contract stands. It is no doubt a very rigorous one, but persons who sign such a contract cannot expect a court of law to relieve them from its obligations because its terms seem harsh. The respondents strenuously argued that the engine they contracted for was not delivered to them. If this means that the appellant did not deliver the engine mentioned in the order, the contrary is proved and even admitted by the respondents. If it means that the engine delivered was defective and did not come within the description and warranties of the contract, the respondents have

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not returned the engine as required by paragraph 8 of their contract. Although the respondents allege in their plea that the engine was returned to the appellant, such is not the fact, and the respondents in their factum admit that they are liable to pay what the engine is worth. The appellant did not specifically deny this averment of the respondents (see Rule 153 of the Saskatchewan Rules of Court), but when the objection founded on paragraph 8 of the contract was argued before this court, the respondents did not suggest that the engine was returned, and they could not do so in view of the evidence and the judgment of the trial court which shew that the engine was never returned, but has been dealt with by the learned trial judge as having been sufficiently paid for. Under these circumstances, Rule 153 does not relieve me from my duty to deal with this case according to the state of facts which appear by the record.

I am for these reasons forced to the conclusion that the appeal should be allowed with costs throughout, and that the appellant's action should be maintained and the respondents' plea and counterclaim dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Gilchrist & Hogarth.*
Solicitor for the respondent: *A. E. Hetherington.*

THE MARITIME COAL, RAILWAY AND POWER COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

WILMA PEARL HERDMAN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM WALKER HERDMAN (PLAINTIFF) ..... RESPONDENT.

*1919
Mar. 14.
May 6.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Railway Company—Trespasser—Licencee—Penalty for trespass—Nova Scotia Railway Act (R.S.N.S. [1900] c. 99, s. 264).

By sec. 264 of the "Nova Scotia Railway Act" (R.S.N.S., [1900] ch. 99), every person not connected with the railway who walks upon a railway track is liable to a penalty. H. was killed while walking along a track on a stormy night in winter and on the trial of an action by his widow the jury found the railway company negligent in not having lights and having a defective whistle and that the public had, to the knowledge of the company, habitually travelled on the track at the place in question. They refused to find that running the engine without lights and without sounding the whistle at this place was a reckless disregard of human life but considered it careless.

Held, Davies C.J. and Anglin J. dissenting, that H. was a trespasser on the right of way; that the only duty owed him by the company was not to run him down knowingly and recklessly which was not done and the jury so found; and that the company was, therefore, not liable.

Per Davies C.J. and Anglin J. dissenting. Deceased was a licencee being on the track by permission and consent of the company which owed him the duty of not increasing the ordinary and normal risks which he would incur as such licencee and the negligence of the company added to those risks made it liable.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), affirming the verdict at the trial in favour of the plaintiff.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 52 N.S. Rep. 185; 40 D.L.R. 96.

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THE MARITIME COAL, RAILWAY AND POWER CO. v. HERDMAN.

The facts are sufficiently stated in the above headnote.

Jenks K.C. and *A. G. Mackenzie K.C.* for the appellants. Deceased was a trespasser and the company owed him no duty but that of not wilfully injuring him: *Grand Trunk Railway Co.* v. *Barnett*, (1).

Frequent user of the track by the public does not necessarily imply licence to use it: *Grand Trunk Railway Co.* v. *Anderson* (2).

Milner K.C. and *Hanway* for the respondent, referred to *The King* v. *Broad* (3), *Lowery* v. *Walker* (4), and *Davis* v. *Chicago and North Western Railway Co.* (5).

THE CHIEF JUSTICE (dissenting)—This is an appeal from the judgment of the Supreme Court of Nova Scotia affirming the judgment of the trial judge in plaintiff's favour for the damages found by the jury.

The action is one brought under the "Fatal Injuries Act" of Nova Scotia by the administratrix of the estate of the late Dr. Herdman for the benefit of herself as widow of the deceased and his infant daughter Helen, for damages caused by the negligence of the defendant company and its employees in the operation of one of its trains over the company's railway between River Hebert and Strathcona, two villages along the line of railway about three-quarters of a mile apart, on the 10th of February, 1917, whereby the said Dr. Herdman was killed.

The evidence shewed that the public generally in that neighbourhood had, for a period of from twenty

(1) [1911] A.C. 361.
(2) 28 Can. S.C.R. 541.
(3) [1915] A.C. 1110.
(4) [1911] A.C. 10.
(5) 58 Wis. 646.

to twenty-five years before the accident, habitually walked along the railway track between the said two villages and that this use of the railway by the public was well known to the defendant company's officials and employees. The company never took any steps to interfere with such public user of the road and no prosecution was ever brought against any one for such user under the provisions of the Nova Scotia "Railway Act" which, in its 264th section, provided as follows:—

264. Every person, not connected with the railway, or employed by the company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

This provision of the Act was virtually a dead letter so far as this section of this railway was concerned.

The undisputed facts as I gather them were that the deceased was killed on the evening of the 10th day of February, 1917. An engine and tender had left Joggins Mines during the afternoon helping a heavily loaded train out beyond Strathcona. The engine and tender took a side track to permit the loaded train to go by and then backed to Joggins Mines. The whistle was out of order on the return trip and could not be used. Darkness had set in. There were no lights on either the engine or tender. Snow was falling fast and the wind was high and blowing in the direction from Joggins Mines to Strathcona. The fireman gave evidence that the frost on the window prevented him seeing; that he didn't see anything; that he could not see out. The driver gave evidence that he could not see and again that he could not see much, sometimes he could see the tender and sometimes he could not. The snow was resting on the ground unevenly so that in some places the rails were covered

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and in other places they were bare. It was on this return trip from Strathcona back to Joggins Mines that the deceased was overtaken by the defendant's engine and tender, and killed. The accident occurred between Strathcona and River Hebert. The deceased was a physician residing in the village of River Hebert. On the afternoon in question he had gone out to Strathcona on the loaded train before referred to, to make a professional call, and after making this call he was seen to return to the railroad and start towards River Hebert. He was not seen again alive.

The plaintiff contends that she is entitled to recover because of the habitual and unchecked use by the public of the railroad to the knowledge of the company's servants and employees, and of the facts that the engine which ran down the deceased was not at the time of the accident equipped with either a whistle or with lights, and was running backwards, making it difficult, if not impossible, for the men in the engine cab to observe a man on the track owing to the obstruction caused by the tender and that owing to its defective whistle it had not given the usual signal at the railway crossing a short distance from the place of the accident to warn persons on the track.

In my opinion, the evidence in the case amply warranted the several findings of the jury.

The chief defence relied upon by the company was that the deceased in walking on the track as and when he did was, under the section of the statute quoted above, a trespasser to whom they did not owe any duty beyond that of not wilfully injuring him.

Apart altogether from the statute I do not entertain any doubt whatever of the liability of the company.

The findings of the jury supported, in my opinion, by ample evidence substantially were that the absence

of lights and the defective whistle were the proximate cause of the accident which the deceased, though careless, could not have avoided; that the public habitually travelled along the defendant's railway at the place in question, of which fact the company had notice but never interfered to stop or prevent; that the deceased had no reason to believe an engine would overtake him without blowing a whistle at Pugsley's crossing, and without carrying lights, and that the absence of the whistle and the lights prevented deceased from knowing the engine was coming along; that such an engine without lights and not sounding a whistle at Pugsley's crossing was more likely to kill a foot passenger at the point where the deceased was killed than an engine with lights which sounded a whistle at Pugsley's crossing, and that the running of such an engine under the circumstances was a careless but not a reckless disregard of human life.

Under these findings upon which I think the case must be determined it seems to me clear that the deceased was not a mere trespasser on the track, but that he was, at the time he was killed, there by the tacit permission and consent of the company and at the lowest was a bare licencee to whom, however, they owed a duty not, indeed, of the same character as that which they owed to a passenger on their train but still a duty clear and defined, namely, not to increase the normal or ordinary risks which the licensee would incur when exercising the permission or licence granted to him. In the case of *Gallagher* v. *Humphrey* (1), Cockburn C.J. in delivering the judgment of a very strong court, stated the law to be as follows:—

> I doubt whether on the pleadings and this rule it is competent to enter into the question of negligence, and whether the whole matter

(1) 6 L.T. 684.

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does not turn upon the question whether permission was or was not given to the plaintiff to pass along the way. But I should be sorry to decide this case upon that narrow ground. I quite agree that a person who merely gives permission to pass and repass along his close is not bound to do more than allow the enjoyment of such permissive right under the circumstances in which the way exists; that he is not bound, for instance, if the way passes along the side of a dangerous ditch or along the edge of a precipice to fence off the ditch or precipice. The grantee must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger.

I have not found any case where this statement of the law is either challenged or impugned.

In a later case of *Thatcher* v. *The Great Western Rly. Co.* (1), Lord Esher M.R. said

that if a person was on the premises of another with that other's consent, the latter had a duty to take reasonable care not to act in such a way as to cause personal injury to the former. It was the business of a railway company to carry as passengers persons who came to their stations for the purpose of travelling to various destinations. It was a matter of every day occurrence that, when persons intending to be passengers came to railway stations, their friends came with them to see them off. The company knew that it was the practice of passengers' friends so to come to their stations, and they permitted them to come. They knew that whenever two persons came to the station it might well be that one of them was not intending to travel, but merely came to see the other off. What duty had the railway company to those persons? No doubt in strict logic they had not the same amount of duty to them as they had to persons who paid them money in consideration of being carried as passengers. But, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between their duty to the one class of persons and their duty to the other. In short, it was their duty to take reasonable care with regard to both. The defendants, therefore, owed the plaintiff the duty to take reasonable care not to do anything to endanger his personal safety. Such duty had been recognized in *Holmes* v. *North-Eastern Railway Co.* (2), and *Watkins* v. *Great Western Railway Co.* (3).

(1) 10 Times L.R. 13. (2) L.R. 4 Ex. 254.
(3) 46 L.J.Q.B. 817.

The case of *Tough* v. *North British Railway Co.* (1), decided by the Court of Session, Scotland, in 1914, consisting of Lords Salvesen, Guthrie, Ormidale and Lord Justice Clerk, approves entirely of the judgment in *Thatcher* v. *The Great Western Rly. Co.* (2), referred to above and decided that

a person who goes upon premises as a mere licencee is not there at his own risk if he suffers injury through the negligent act of the servants of the owner committed, in the course of their employment, after the licensee has entered the premises. (1).

The latest case on this branch of the appeal is that of *Lowery* v. *Walker*, decided by the House of Lords (3), reversing the decisions of the Divisional Court and also of the Court of Appeal.

The material facts in this case were that the defendant, who owned a savage horse which he knew to be dangerous to mankind, put it, without giving any warning, into a field of which he was the occupier and which he knew the public were in the habit of crossing without leave on the way to a railway station. The plaintiff in crossing that field was attacked, bitten and stamped on by the horse. The County Court judge found as a fact that the defendant was guilty of negligence in putting a horse which he knew to be ferocious in a field which he knew to be habitually crossed by the public and gave judgment accordingly.

The House of Lords, reversing the decisions of the Divisional Court and the Court of Appeal which had held the defendant occupier not liable, held that the effect of the learned judge's finding that the plaintiff appellant was in the field without express leave but with the permission of the defendant entitled the plaintiff to recover.

The Lord Chancellor, Lord Loreburn, says, at page 12:—

(1) 1913-14 Sess. Cas. 291. (2) 10 Times L.R. 13.
(3) [1911] A.C. 10.

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I think the substance of the finding (of the trial judge) amounts to this, that the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be lodged in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal.

The other Law Lords all concurred expressing themselves substantially to the same effect as the Lord Chancellor, viz., that, although the plaintiff was not proved to be in the field as of right, he was one of the public who *habitually* used the field to the occupier's knowledge and without his having taken steps to prevent the user and in those circumstances was liable for the injuries inflicted on the plaintiff by the savage horse.

Applying to this case the principles on which *Lowery* v. *Walker* (1), was decided, I cannot see, leaving for the moment the question of the statute aside, how it is possible for the company in this case successfully to argue their non-liability for the death of the deceased doctor. Instead of a savage horse as in the *Lowery Case* (1), we have in this case as Mr. Justice Ritchie says in his judgment

an engine running on a windy stormy night, backwards, an extra trip, not a regular train, without lights and a defective (in fact, useless) whistle put on the track and set in motion.

The jury have found this constitutes negligence and that the deceased was prevented from knowing that the engine was coming by the absence of the whistle and lights.

If the jury had found that the running backwards under the circumstances of such an engine shewed a reckless disregard of human life, I cannot believe the company would not be held liable. The fact that they

(1) [1911] A.C. 10.

found it was only a *careless* disregard of human life, cannot, in my judgment, absolve the company from liability.

Dublin, Wicklow and Wexford Railway Co. v. *Slattery* (1), is in some aspects instructive on this appeal. For instance, on the question of notices having been put up forbidding persons to cross the line at a particular point, it was held that these notices having been continually disregarded by the public and the company's servants not having interfered to enforce their observance, the company could not in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury.

The English text books on the subject are to the same effect as to the liability and obligations of the railway company to a licencee. See 21 Halsbury, sec. 660 and notes, and Salmon on Law of Torts, pp. 400 to 404.

The decisions of the courts in the United States, though of course not binding on us, are to the same effect as those English cases to which I have referred with respect to the rights of licencees or persons permitted to use lands or premises of an occupier or owner.

In the case of *Davis* v. *Chicago and North West Rly. Co.* (2), it was held by the Supreme Court of Wisconsin, after citing amongst other authorities that of *Gallagher* v. *Humphrey* (3), and quoting Chief Justice Cockburn's judgment in that case with approval, that

where the right of way of a railway company has been in constant use by travellers on foot for more than 20 years, without objection from the company, it is for the jury to say whether the company acquiesced in such user. Such a user, while not establishing a public highway upon

(1) 3 App. Cas. 1155. (2) 58 Wis. 646; 17 N.W. Rep. 406.
(3) 6 L.T. 684.

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the company's right of way, would relieve the persons passing over the same from being treated as trespassers by the company. There is a clear distinction between the care which a railroad company is bound to exercise towards mere trespassers and towards those who are on its right of way by the licence of the company, and in case of a long and constant user of such way the company and its servants are charged with notice of it, and cannot neglect precautions to prevent danger to persons travelling thereon. Wilful injury is not the only ground of liability in such a case.

In *Corrigan* v. *Union Sugar Refinery* (1), Gray J. in delivering the judgment of the Supreme Court of that State, said:—

> The material question is, whether the keg fell upon the plaintiff's head by reason of the negligence of the defendants' servants. If it did, then whether this was a public or a private way, and whether the plaintiff was passing over it in the exercise of a public right, or upon an express or implied invitation or inducement of the defendants, or by their mere permission, he was rightfully there, and may maintain this action. Even if he was there under a permission which they might at any time revoke and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants, which increased the danger of passing and in fact injured him.

See also to the same effect the judgment of the Court of Appeal, State of New York, *Barry* v. *New York Central and Hudson River Railroad Co.* (2).

From all the cases I have referred to I find the law of England and of Scotland and of many of the United States of America is the same, namely, that while a mere licencee entering upon premises of the owner does so at his own risk with regard to all normal and ordinary risks which he may incur or be subject to on the premises, the licenser, owner or occupier remains liable to him for injuries caused to him by abnormal and extraordinary risks brought about or introduced through the negligence of the licenser or his servants.

Passing now from this branch of the case to the effect of the provision of the Nova Scotia Railway Act,

(1) 98 Mass. 577. (2) 92 N.Y. 290.

sec. 264, before cited, it will be observed that the section only makes every person not connected with the railway or employed by the company who walks along the track thereof liable to a penalty not exceeding ten dollars.

The section does not intend or purport to deal with the rights or obligations of such person so offending to the company or with those of the company to such person.

Whether such person, being one of the general public, had express or implied authority from the company to walk upon the railway would not matter as affecting his liability for the penalty.

If sued for the penalty, proof of such express or limited authority would not be any defence. The section was passed as a matter of public policy and was not intended in any way to interfere with the rights or obligations of the parties to each other in the exercise of a permission by the company to walk on the track.

When the legislature intended to interfere with or take away such civil or private rights they said so in express terms. See sections 189 and 262(3), the former of which says—

> 189. The persons for whose use farm crossings are furnished, shall keep the gates at each side of the railway closed when not in use; and no person, any of whose cattle are killed by any train owing to the non-observance of this section, shall have any right of action against any company in respect to the same being killed.

and the latter of which reads as follows:—

> 262. If the cattle of any person, which are at large contrary to the provision of this section, are killed or injured by any train at such point of intersection, he shall not have any right of action against any company in respect to the same being so killed or injured.

The legislature, in the section we are interested in, merely imposed a penalty for walking on the track. It uses no language which can be construed as interfering with the relative legal rights of the offending

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person and the railway. It simply declares a public policy breach of which gave rise to a penalty.

While therefore, in my judgment, no railway could alter that policy or prevent the attached penalty from being enforced against any offender by any consent it might give, on the other hand, the section carefully abstained from interfering with the private or civil rights or obligations which might arise between the parties by reason of any person walking on the railway track with the permission of the railway.

The penalty for breach of the public policy was absolute whether the railway assented to the breach or not. The obligations of the railway to one to whom it gave permission so to walk were not interfered with or done away with. Could it for a moment be successfully contended that a wilful injury done to such a licencee from the railway, by its servants, was without remedy. I certainly think not and that such a result never was intended and equally so do I think it was not intended to take away the civil right from such licensee of suing for damages sustained by the negligence of the company in adding additional dangers and risks to those which the licensee assumed in accepting the licence and from which additional dangers and risks he suffered damage. The case of *Davis* v. *North Western Railway Co.* (1), above cited by me on the other branch of the case, expressly determines that such a statute making it an offence to walk upon the track does not alter the rule. No authority was cited to us in support of the appellant's contention that the section imposing a penalty merely made a person violating it a trespasser and took from him civil rights which he otherwise would possess as licencee against the company giving him such licence.

(1) 58 Wis. 646.

It seems to me, however, that the language used by the Judicial Committee in the case of *Rex* v. *Broad*, (1), is an authority to the contrary of appellant's contention. It was there held that sec. 191, sub-sec. 2 of the Public Works Act, 1908, of New Zealand, suspended during the period therein referred to the absolute right of the public to pass along a highway over a level crossing but *left unaffected the right of those who did so pass to have reasonable care exercised by the railway authority in using the line.* Lord Robson, who delivered their Lordships' judgment, says, at page 115:—

> The language of the sub-section is amply satisfied by holding that on the specified approach of a train the public's absolute right to pass is suspended leaving unaffected the question of other rights if nevertheless persons do pass.

I adopt this language and think it peculiarly applicable to the penalty clause in question.

On the whole I would dismiss the appeal with costs.

IDINGTON J.—This is an action by respondent, the widow and administratrix of the late Dr. Herdman, for damages arising from his death alleged to have been caused by the wrongful act or negligence of the appellant.

Deceased on returning from a professional visit to a patient attempted to do so by walking on the railway track of appellant instead of travelling by the common highway, and is found to have met his death by a locomotive and tender moving backward at the rate of about ten miles an hour and overtaking and knocking him down.

This occurred after dark in the evening in February, 1917, in the midst of a snowstorm described by

(1) [1915] A.C. 1110.

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some as "an awful storm" and by others as "blustery and very cold."

The locomotive and tender were returning from a short run taken to assist a train up a heavy grade of a mile or more to a station a few miles distant from River Hebert, the home town of deceased, and the station where this ancilliary engine was kept. The case was tried before Mr. Justice Drysdale with a jury, who answered ten questions submitted to them, and in answer to the eleventh assessed the damages at $6,000 for which judgment was entered; and that has been maintained by a majority of the Court of Appeal.

The first two questions and answers are as follows:—

1. Was the proximate cause of the accident that killed Dr. Herdman the negligence of the company? If so, state it. What was it? Yes, not having lights and a defective whistle.

2. Notwithstanding such negligence, could Dr. Herdman, by the exercise of reasonable care, have avoided the accident? We think the doctor was careless but could not have avoided the accident.

The accident did not take place at or so near to any crossing, at or approaching which there might have been involved the breach of a statutory duty to give warning.

The only statutory duty seems to have been, in that regard, to either ring a bell or whistle at certain distances from a highway crossing.

These obligations were fully discharged, as sworn to by the engine driver and fireman in charge, and there is no contradictory evidence on the point.

The whistle was in fact by reason of the frost, as I understand, out of service.

The sole ground of complaint in law, upon which the judgment rests, is that people in the neighbourhood had been habitually using the railway track, as so often happens, when inclined to take a shorter way in pursuit of any chance errand; and that no one had been

prosecuted for doing so though the evil practice had been of such frequent occurrence that local officials of the appellant might be presumed to have had notice of its existence.

The railway track was fenced in, and not the slightest suggestion was made that it had been conceded as a public highway.

It is merely the toleration of such an evil practice, as pedestrians in many instances adopted, knowing, as some of them frankly said, they did it at their own risk, or, as many others said, without ever thinking of the consequences, that is relied on.

There was a railway bridge over the river in the vicinity, on which some of them crossed; and as an electric line was carried over it a large printed notice had been posted in 1915, by direction of appellant's superintendent, at each end of it, on which was inscribed a warning:—

Danger, keep off; this means you.

No other notices of warning against trespassing are in evidence.

The statute law of Nova Scotia contains a provision prohibiting the walking on any railway track, and providing for a penalty being imposed upon any such trespassers.

There is not in that province any provision, such as exists in some provinces, for punishing in like manner petty trespassers on other property.

It is thus clear that what the deceased, on the occasion in question did, and others had been doing, in the way of walking on the track was illegal and rendered him liable to a penalty.

The appellant relies, and I think rightly, upon the decision of this court in the case of the *Grand Trunk*

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Railway Co. v. *Anderson* (1), and other cases holding that there can be no recovery for damages suffered under such circumstances unless something else, than apparent herein, shewing gross negligence, or wilful misconduct on the part of those concerned on behalf of the railway company.

The learned trial Judge relied upon the case of *Lowery* v. *Walker* (2).

The charge of the learned trial judge to the jury was obviously influenced by his view of the said decision and hence some of the findings of the jury.

The Court of Appeal adopt the same view and think it is supported by other cases.

I cannot agree that there is anything in that or other cases relied upon, which in principle is applicable to the undisputed facts in this case, and that they did not present a case which should have been submitted to a jury.

I fail to see the resemblance between a railway company running its engine, in course of its daily and hourly exercise of right and discharge of duty, and that of a man who has in fact permitted a pathway to be used across his field with no dangerous animals therein, suddenly and without warning rendering the pathway highly dangerous by turning a vicious animal at large therein.

Even assuming all that is alleged to be true, as to the use by pedestrians of appellant's track, to the knowledge of its management, the risk has never been increased or use of the track for what it was built for changed in the slightest.

If the right of way had been out of use for a time and then suddenly and without warning put into

(1) 28 Can. S.C.R. 541. (2) [1910] 1 K.B. 173; [1911] A.C. 10.

active service, some analogy might be found in doing so to what the *Lowery Case* (1) presents.

But in fact this engine was running just as it was accustomed to do about the same hour, if not daily, at least on an average every other day in the week.

The distance home for the deceased, where he was going, was shewn to be some three hundred feet longer by the railway than by the road.

The circumstances shew that he chose the railway track instead of the highway because the latter was deeply covered with snow and the railway track not so, because the cars and engines were running thereon and brushing aside or crushing down the snow.

It is not for the courts to impose a new mode of running a railway, or upon those doing so, a new code of regulations for the protection of trespassers.

There are cases such as in evidence in the well known *Slattery Case* (2), where the station arrangements were such as to mislead, or regulations at crossings such as in *The King* v. *Broad* (3), make the conflicting duties of those using the highway and those running the railway often the subject of anxious inquiry, and require a rigorous enforcement of statutory regulations, lest the unwary and accidental trespasser may be caught and a case to submit to a jury arise.

We had such a case in *Garside* v. *Grand Trunk Railway Co.* (not reported) a year or two ago in which I had no doubt the deceased was technically trespassing upon the unfenced land of the railway company, yet we maintained the right of action because of the neglect by those running an engine to observe the statutory duties of giving warning.

It was attempted there to shew that a bar across

(1) [1910] 1 K.B. 173; [1911] A.C. 10. (2) 3 App. Cas. 1155.
(3) [1915] A.C. 1110.

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the highway served same as in the *Broad Case* (1), since reported, took away all right to cross and with it a remedy for killing the pedestrian.

Wherever there is a statutory duty imposed it must be observed. We have no right to create such a duty.

No obligations rested upon the appellant towards the protection of the deceased in the way of lights or whistles.

Of course its servants would have no right to run him down knowingly or recklessly, any more than the defendant in the case of *Davies* v. *Mann* (2), had a right to run down the donkey tethered in the highway, or many a like offender has done since.

There is nothing to bring this case within that line of cases. I think the appeal should be allowed and the action dismissed with costs throughout.

ANGLIN J. (dissenting) concurs with the CHIEF JUSTICE.

BRODEUR J.—I am of opinion that this appeal should be allowed with costs of this court and of the courts below for the reasons given by my brother Idington.

MIGNAULT J.—This is a case of very considerable difficulty.

The respondent's husband, Dr. W. W. Herdman, who lived at River Hebert, was killed while walking on the track of the appellant company, on the evening of the 10th February, 1917, between the village of River Hebert and Strathcona, Nova Scotia. The appellant there operates a line of railway which crosses the river

(1) [1915] A.C. 1110. (2) 10 M. & W. 546.

on a bridge and goes up by a rather steep grade toward Strathcona and then continues on to a place called Jubilee. On the afternoon in question a regular train left Joggins, the other side of River Hebert, a little after 4.30 p.m., and was hauled, on account of the grade, by two engines, the front one, an old engine, driven by Forrest, the engineer, with Landry as fireman. This front engine was used for getting the train up the grade and at Jubilee it usually returned backwards, tender first, to Joggins. Dr. Herdman, that afternoon, took the train at River Hebert to visit a patient at Strathcona, where he got out, made his visit and then telephoned at 6.30 p.m. to his wife that he would immediately return. The night was a cold and very stormy one, with some snow and a high wind blowing across the railway. Dr. Herdman wore a raccoon coat and started out pulling up his collar and pushing down his cap over his ears. Unfortunately he chose to return by the railway track, a short cut which, the evidence shews, was very commonly used by men, women and even children in preference to the road which Dr. Herdman could have taken but which probably on such a night would have been a difficult one for a pedestrian to travel on. Later in the evening Dr. Herdman's body was found between the rails a short distance from the railway bridge.

He was killed by Forrest's engine which was returning to Joggins from Jubilee, tender first and without any headlight or any light on the tender. Forrest started from Joggins about 6.15 p.m., and having got his engine under way, shut off the steam and ran down the grade at a moderate speed. His whistle had become disconnected before reaching Jubilee, and he was unable to repair it on account of the escaping steam before he started to return. He therefore could

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not whistle at Pugsley's crossing, just before Strathcona, but his fireman rang the bell more or less continuously, with however some interruption, the latter says, when he got down from his seat to feed his fire. Both Forrest and Landry say that the storm was so severe that they could not see out of the cab window on account of the frost, and they did not think any one would be on the tracks on such a night. They never saw the victim and did not know that he had been killed until his body was found.

The case was tried before Mr. Justice Drysdale and a jury, and the latter have found as follows:—

1. Was the proximate cause of the accident that killed Dr. Herdman the negligence of the company? If so, state it. What was it? Yes, not having lights and a defective whistle.

2. Notwithstanding such negligence, could Dr. Herdman by the exercise of reasonable care have avoided the accident? We think the doctor was careless but could not have avoided the accident.

3. Up to the time that Dr. Herdman was killed did the public habitually travel along the defendants' railroad between the villages of Strathcona and River Hebert? Yes.

4. If so, did the defendant company have notice of it? Yes.

5. Before Dr. Herdman was killed did the defendant company interfere with persons so travelling along the railway? No.

6. Had Dr. Herdman reason to believe that an engine would overtake him without blowing the whistle at Pugsley's crossing and without carrying lights? No.

7. Was Dr. Herdman prevented from knowing that the engine was coming by the absence of the whistle and lights? Yes.

8. Was an engine running without lights and not sounding a whistle at Pugsley's crossing, more likely to kill a foot passenger at the point where Dr. Herdman was killed than an engine with lights and sounding a whistle at Pugsley's crossing? Yes.

9. Was the running of the engine which killed Dr. Herdman, without lights and without sounding a whistle at Pugsley's crossing a reckless disregard of human life? No, but consider it careless.

10. What amount of damages do you find; and how much do you allow to the widow and how much to the daughter? $6,000, divided as follows: widow $2,500, daughter $3,500.

In accordance with this verdict judgment was entered against the appellant for $6,000.00, and on an appeal to the Supreme Court of Nova Scotia, this

judgment was affirmed by a court consisting of Russell, Longley and Ritchie JJ. Mr. Justice Longley dissenting. The appellant now appeals to this court.

The jury having negatived contributory negligence on the part of Dr. Herdman—and I do not think that I should interfere with their finding, whatever doubts I might feel on this point in view of all the circumstances—the appellant can, in my opinion, succeed only if it shews, 1st, that Dr. Herdman was a trespasser on its line, and 2nd, that assuming he was a trespasser, it has discharged any duty it owed to him as such trespasser.

To answer the first question regard must be had to the facts found by the jury that up to the time that Dr. Herdman was killed the public habitually travelled along the appellant's railroad between the villages of Strathcona and River Hebert; that the appellant had notice of it and did not interfere with persons so travelling on the railway. Assuming these facts, was Dr. Herdman a trespasser?

Section 264 of chapter 99 of the R.S.N.S., enacts that

> every person, not connected with the railway or employed by the company who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

The courts below relied on the decision of the House of Lords in *Lowery* v. *Walker* (1), which in their opinion is not distinguishable from the present case. There the respondent, without giving any warning, put a savage horse which he knew to be dangerous to mankind, in a field of which he was the occupier and which he knew the public were in the habit of crossing without leave on their way to the railway station. The appellant in crossing the field was attacked, bitten

(1) [1911] A.C. 10.

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and stamped on by the horse. The County Court judge found as a fact that the respondent was guilty of negligence in putting a horse which he knew to be ferocious into a field which he knew to be habitually crossed by the public, and gave judgment for the appellant. This judgment was reversed by the Divisional Court (1), and by the Court of Appeal (2), but the House of Lords set aside both these judgments, holding that the effect of the trial judge's finding being that the appellant was in the field without express leave but with the permission of the respondent, the appellant was entitled to recover.

In this case their Lordships construed the finding of fact of the trial judge as meaning that the appellant was in the respondent's field not as a trespasser but with the permission of the respondent, and they applied the law to this finding of fact.

The appellant cites another case, *Grand Trunk Rly. Co.* v. *Barnett* (3), where the respondent was undoubtedly a trespasser on the platform of a railway car where he was injured. The case was considered upon this basis by the Judicial Committee, and the respondent's action claiming damages for his injuries was dismissed. Lord Robson, speaking for the Privy Council, held that the obligation of the railway company was merely not to wilfully injure the respondent, that is to say

> they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way.

The real difficulty, to my mind, is the statute which I have cited, and I have not been able to convince myself that what the House of Lords decided in *Lowery* v. *Walker* (4), with respect to a field over which,

(1) [1909] 2 K.B. 433.
(2) [1910] 1 K.B. 173.
(3) [1911] A.C. 361.
(4) [1911] A.C. 10.

according to the findings of the trial judge, as construed by the House of Lords, the owner or occupier permitted the public to pass, can be applied to a railway line where the law punishes with a fine

every person not connected with the railway or employed by the company who walks along the track thereof.

If mere passiveness of a railway company could be regarded as a defence against a criminal action for trespass, the statute, which undoubtedly was enacted for the protection of the public as well as of railway companies, would soon become a dead letter. Dr. Herdman chose to walk upon the track, as hundreds of people had done before him, probably because he was hurrying to attend a sick call, and his motive was no doubt a good one, but he did so at his own risk and was, in my opinion, a trespasser on the railway. On this point I think *Lowery* v. *Walker* (1), is clearly distinguishable from the present case and moreover their Lordships there proceeded upon a statement of facts found by the trial judge which, as construed by them, went further than the facts found in this case by the jury.

When the evidence as to this user by the public of the railway tracks is examined it is seen that two witnesses, Charles A. Smith and Stuart Rector, say they walked on the railway track at their own risk, one, Rufus S. Hibbard, supposed that in doing so he was a trespasser, and William McIsaac admits that he did not think he had any right to walk on the track. All these were witnesses for the plaintiff. Other witnesses never considered whether or not they had a right to thus use the railway, but did so because they saw others walking along the tracks. The railway was fenced in and a notice of warning was placed on the railway bridge. All this evidence shews a state of

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facts materially different from what was found in *Lowery* v. *Walker* (1).

The second question is, assuming that Dr. Herdman was a trespasser on the right of way, did the appellant discharge any duty it owed him not to injure him wilfully, according to the rule laid down by the Privy Council in *Grand Trunk Railway Co.* v. *Barnett* (2). In other words did it

> unnecessarily and knowingly increase the normal risk by deliberately placing unexpected dangers in his way?

The findings of the jury do not justify an affirmative answer to this question, which would involve a reckless disregard of human life. The jury refused to find any such reckless disregard of human life and they would not go any further than to state that the running of the engine without lights and without sounding a whistle at Pugsley's crossing was careless. I therefore must answer this question in the negative.

The case is one where every sympathy may legitimately be felt for the victim of this accident, who, I think, was hurrying to attend to a sick call when he was unfortunately killed. But this sympathy would not justify me in making the appellant pay damages in a case where I am convinced no legal liability exists.

The appeal must therefore, in my opinion, be allowed and the plaintiff's action dismissed. The appellant is entitled to its costs here and in the courts below if it thinks fit to collect them from the respondent.

Appeal allowed with costs.

Solicitor for the appellants: *John S. Smiley.*
Solicitor for the respondent: *Eugene T. Parker.*

(1) [1911] A.C. 10. (2) [1911] A.C. 361.

THE CANADIAN PACIFIC RAILWAY COMPANY..... APPELLANT;

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*June 2.
*Oct. 20.

AND

ALBERTA ALBIN..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Railway—Injurious Affection to land—Loss of business profits—Compensation—"Railway Act," R.S.C. [1906] c. 37, s. 155.

Where land is injuriously affected by construction of railway works, the owner is not entitled to compensation for loss of business profits resulting therefrom. Such compensation can be given only when land is taken.

In the construction of section 155 of the "Railway Act" the English decisions under the "Railway Clauses Consolidation Act" of 1845 to the above effect should be followed. Idington and Brodeur JJ. dissenting.

Judgment of the Appellate Division (45 Ont. L.R. 1; 47 D.L.R. 587), reversed.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Ontario(1), setting aside the award of arbitrators and referring the case back for reconsideration.

The appellant company by constructing a subway on Yonge street, Toronto, so lowered the grade of the street in front of respondent's shop as to practically destroy access thereto. An arbitration was had to fix the compensation for such injury and the award gave appellant, *inter alia*, $4,500 for injury to her business. The Appellate Division held that she was entitled to indemnity for loss of business but that the arbitrators had estimated it on a wrong basis and referred the award back to be dealt with as stated in the judgment.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 1; 47 D.L.R. 587.

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Geary K.C. and *Colquhoun* for the appellant. Respondent is not entitled to compensation for loss of business when no land is taken. *Metropolitan Board of Works* v. *McCarthy*(1); *Caledonian Railway Co.* v. *Walker's Trustees*(2); *Powell* v. *Toronto, Hamilton and Buffalo Ry. Co.*(3); *Leblanc* v. *The King*(4).

H. J. Scott K.C. for the respondent. The English cases respecting compensation for loss of business are not applicable in Canada owing to the difference between our "Railway Act" and the Acts on which those decisions were founded. See *Parkdale* v. *West*(5), at p. 613. Section 155 of the "Railway Act" obliges the company to make full compensation for injury, which means to place the injured party in as good a position as he was before.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J. (dissenting).—The question raised by this appeal is confined to whether or not under section 155 of the "Railway Act," which reads as follows,

> 155. The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers,

the compensation recoverable thereunder is limited by the exact market value of the property taken or, in the case of its being injuriously affected, by the exact difference in such market value before and after it has been so injuriously affected by the exercise of the power in question.

(1) L.R. 7 H.L. 243.
(2) 7 App. Cas. 259.
(3) 25 Ont. App. R. 209.
(4) 16 Ex. C.R. 219; 38 D.L.R. 632.
(5) 12 App. Cas. 602.

In view of the uniform approval heretofore of this and other courts to the allowance of ten per cent. generally added by arbitrators to the market value of the property taken, the proposition that the market price is the utmost limit seems a little startling.

Yet such a proposition seems to be the basis of this appeal which has one merit that it is confined to one exceedingly narrow point.

True this case in which the question is raised seems to be one in which the right of property which was invaded was a taking away in two places of the means of access to, and egress from, same to the public highway, and the incidental support an owner is entitled to for his buildings; and thus in one way of looking at the matter may be fairly arguable as a case of injuriously affecting the property.

I incline to agree with the learned arbitrator, as I understand him, that there has been taken from the owner a very substantial part of that which constituted her dominion over or ownership of the property as its owner and that the case is not merely an injurious affection such as might arise from a neighbouring nuisance.

We held in the case of *Canadian Northern Ontario Rly. Co.* v. *Holditch*(1), that where the railway company did not touch or legally injure, by the exercise of its powers, a parcel of land as defined by the plan of its survey, the owner could not recover any compensation on either ground and in this were upheld by the court above(2). How that and numerous other well known cases cited here and below can affect the question to be resolved herein, I fail to see.

It is admitted that the respondent had a very

(1) 50 Can. S.C.R. 265; 20 D.L.R. 557.

(2) [1916] 1 A.C. 536; 27 D.L.R. 14.

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substantial right to indemnity under the Act and all that is before us, as counsel for appellant frankly admitted, is whether or not a person so damnified as to be entitled to indemnity is confined to the difference between the market value of the property when the works touched it and when completed and is not entitled to have any consideration extended to her by reason of the forcible taking away of her rights in any way, such as in this case the disturbance of her business carried on in the premises in question.

We are not called upon to decide anything in relation to the measure of such damages, or the bearing of any of the elemental facts to demonstrate the cause of such loss or the extent to which they should be considered.

The bare right to any consideration of how injuriously or otherwise the exercise of the power may have affected the owner or her business is denied save as to diminution in market value of the land itself or buildings thereon.

I am and long have been of a different opinion, as evidenced by what I may be pardoned for shewing by quoting from my opinion in the case of *Dodge* v. *The King*(1), at page 155, as follows:—

> The market price of lands taken ought to be the *primâ facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and, the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

That opinion was concurred in by the majority of the court.

It is fair to say that the exact question raised herein was not what was in fact under consideration therein

(1) 38 Can. S.C.R. 149.

and hence binds no one but myself; yet it was the result of much consideration of many decisions and other authorities.

The usual ten per cent. allowance I therein referred to is intended to cover contingencies of many kinds. Experience teaches me it has served to prevent injustice in many cases and in most covers incidentally the loss for disturbance of business and possible removal. It is not a rule of law though sometimes it has been sought to be made so for the service of those who actually bought lands they expected to be expropriated and gain thereby. In such like cases it has been discarded by this court when observing that its misapplication had been sought.

The rule now sought by this appeal to be laid down as the meaning of the section 155 in relation to damages for which compensation is to be given certainly never could have been thought to be law or the allowance of such percentage should have been discarded long ago.

In the case of *Lake Erie and Northern Rly Co.* v. *Schooley*(1), the question of business value came up in this court in another way and the several judgments evidence how the question was viewed by the different members of this court. I may say that was for many reasons an unsatisfactory sort of case.

The then Chief Justice aptly put the point by relying upon the decision of the Judicial Committee in the case of *Pastoral Finance Association* v. *The Minister* (2), from which, on page 417, he quoted as follows:—

> The substantial ground on which the majority of the court based their decision was that the appellants were not entitled to anything beyond the market value of the land * * * Their Lordships have no hesitation in deciding that the principle underlying this

(1) 53 Can. S.C.R. 416; 30 D.L.R. 289. (2) [1914] A.C. 1083.

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decision is erroneous. The appellants were clearly entitled to receive compensation based on the value of the land to them.

This last sentence illustrates what runs through all the cases where the question has fairly come up, and whether put under the name of "special adaptations" or designated by other like phrase, means nothing more nor less than that justice must be done the owner whose land is taken or affected.

In resorting to English authorities decided on the meaning of the "Lands Clauses Consolidation Act," we must ever be on our guard; for, as has been often and well said, the provisions differ so essentially from our provisions in the "Railway Act" and other legislation dealing with compensation to be given parties damnified by the exercise of powers given to expropriate that little value is to be attached to most of these English decisions that are usually and herein cited for determining such questions as raised herein.

The difference is not to the casual reader quite evident. It is when one has to examine the process of reasoning and difference of opinion by which the result was reached in the earlier leading cases, such as *Hammersmith and City Ry. Co.* v. *Brand*(1), and the consequences flowing therefrom in so many cases, that one feels we better observe the express terms of our own legislation which does not give occasion for the application of the same process of reasoning. It is idle to read only two sections, one from each Act, and compare the words when we know, or ought to know, that the said decision did not turn upon the consideration of only a single section in the English Act.

For this opinion I need not rely upon what a consideration of many such cases has impressed upon my mind but am content to submit the following quotation

(1) L.R. 4 H.L. 171.

cited to us in argument herein by respondent's counsel from the judgment of the court above in *Parkdale* v. *West*(1), at page 613:—

> There is a marked difference between the provisions of the Dominion Act and those of the "English Land Clauses Consolidation Act," 1845, and decisions upon the English Act * * * afford little assistance. In the Dominion Act the taking of land, and the interference with rights over land, are placed on precisely the same footing.

It is the last sentence of this that was important there and is herein for that was a case wherein deprivation of access as herein was the essential feature invoked.

Its due observance coupled with regard to the rule that it is the value of the land to him from whom it is taken for such purposes as he may have been using it that must be primarily observed.

In the great majority of cases of compensation the mere market value is decisive and in all cases must be had in mind, but it should never be forgotten that there are cases such as this where that rule is only to be taken in its *primâ facie* sense as the basis for whatever else is done in order to do justice.

I am not to be taken as expressing any opinion on the merits of the case or coinciding with what the learned arbitrator accepted as his guide for fixing damages.

I think the appeal should be dismissed with costs.

ANGLIN J.—The grade of the street immediately in front of the respondent's shop having been so lowered in the course of the construction of a subway ordered by the Board of Railway Commissioners as practically to destroy access to the premises, on an arbitration to fix compensation under the "Dominion Railway Act" she was awarded in all $10,866, which the arbitrator,

(1) 12 App. Cas. 602.

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in the written reasons delivered with his award, apportioned as follows:—$6,366 for injury to property and $4,500 for injury to business.

On appeal to the Appellate Division the award as to the injury to property was upheld, but the majority of the court being of the opinion that, while the claimant was entitled to compensation for the loss of business occasioned to her by the execution of the work in question in addition to compensation for depreciation in the value of her property, the three year basis on which the arbitrator had fixed the amount of her business loss attributable to injury to the good-will of the property as distinguished from injury "of a personal character" (about two-thirds of the whole net profits) was erroneous, judgment was pronounced so declaring and referring the matter back to the arbitrator to ascertain the entire compensation to which the claimant is entitled, including as a part thereof such compensation for loss of business as he may see fit to allow her having regard to the declaration of the court(1).

From this judgment the contestant appeals on two grounds:—

(1) That the plaintiff is not entitled to compensation for loss of business in addition to full compensation for depreciation in the value of her property occasioned by the lowering of the street level; and

(2) That the compensation allowed for the property itself should be reduced by $192, the arbitrator having in computing it deducted from the gross value of the property before the works were begun, ascertained by him to have been $9,274.00, not the $3,100 realized on the sale of it after the works were completed but only $2,908, the difference of $192 representing the claimant's costs incurred in effecting such sale.

(1) 45 Ont. L.R. 1; 47 D.L.R. 587.

Neither the right of the claimant to compensation for depreciation in the value of her property occasioned by the construction of the works nor the power of the Appellate Court to refer the matter back to the arbitrator instead of itself pronouncing the judgment which should have been given is contested by the appellant. As to the former the claimant's right would seem to be indisputable. There was "a physical interference with a right which the owner was entitled to use in connection with his property" which substantially diminished its value. *Metropolitan Board of Works* v. *McCarthy*(1); *Caledonian Rly. Co.* v. *Walker's Trustees*(2), at page 303; *Wood* v. *Stourbridge Rly. Co.*(3); *Chamberlain* v. *West End of London and Crystal Palace Rly. Co.*(4); *Bowen* v. *Canada Southern Rly. Co.*(5), at pages 8-9, and *Mason* v. *South Norfolk Rly. Co.*(6). As to the latter—the power to refer back—the view which I have taken of the merits of this appeal renders it unnecessary to deal with that aspect of the matter. But see *Canadian Northern Rly. Co.* v. *Holditch*(7).

For the respondent it is contended that the cutting off of immediate access from the property to the highway on which it abuts is tantamount to taking part of the land itself and that compensation should therefore be assessed upon the footing that part of the claimant's lands had been taken. This appears to have been the opinion of the learned arbitrator based on the view that

all the rights which go to make the land available for use are part of the land itself.

(1) L.R. 7 H.L. 243.
(2) 7 App. Cas. 259.
(3) 16 C.B.N.S. 222.
(4) 2 B. & S. 617.
(5) 14 Ont. App. R. 1.
(6) 19 O.R. 132.
(7) 50 Can. C.R.S. 265; 20 D.L.R. 557; [1916]1 A.C. 536; 27 D.L.R. 14.

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I am clearly of the opinion, however, for the reasons indicated by Mr. Justice Riddell in the Divisional Court and upon such authorities as *Wadham* v. *North Eastern Rly. Co.*(1); *McCarthy's Case*(2); *Walker's Trustees' Case*(3); *Macey* v. *Metropolitan Board of Works*(4), and *Bowen* v. *Canada Southern Rly. Co.*(5), that the arbitrator's view is erroneous and that where no part of the owner's land is taken, but access to it merely is interfered with, however close the interference and however complete the destruction of the access, the case is one not of the taking of land but of injurious affection.

While, as is stated by the learned writers of the article on "Compulsory Purchase of Land and Compensation" in Halsbury Laws of England, vol. VI., at p. 32, no clear principle can be deduced from the English authorities why the measure of compensation should be more liberal in the case of a taking of land than in that of mere injurious affection, the distinction is too well established in England to admit of further discussion there. In the former case loss of good-will and loss of business in so far as they enhance the value of the land to the owner, including all that forms part of it in the eyes of the law, may be taken into consideration in estimating the compensation. The learned authors of Browne & Allen on Compensation (2 ed., p. 101) suggest that

> this is because it is the owner's interest in the land that is to be assessed.

But it is equally "the owner's interest," that is affected —it is the value of the land to him that is diminished— in the case of injurious affection. Yet in the latter case to entitle the owner to any compensation the injury

(1) 14 Q.B.D. 747; 16 Q.B.D. 227.
(2) L.R. 7 H.L. 243.
(3) 7 App. Cas. 259.
(4) 33 L.J. Ch. 377.
(5) 14 Ont. A.R. 1.

must be such as affects the land—lessens its value—apart from the use to which any particular owner or occupier might put it; and profits of a business carried on on the property can properly be considered only in so far as they indicate not any special or exceptional value to the present proprietor, but the value of the property as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put, including of course such a purpose as that for which the present proprietor makes use of it. *Wadham* v. *North Eastern Rly. Co.*(1). This decision is very much in point because it deals with a case of injurious affection by cutting off access to a public highway. The street in which the house in question was built had been stopped up. See too *Beckett* v. *Midland Rly. Co.*(2), at pages 94-5. The English authorities are collected in Browne and Allen on Compensation (2 ed.) *ubi sup.* and at p. 116; 6 Halsbury Laws of England, No. 36 and Nos. 49 and 53; and Cripps on Compensation (5 ed.), pp. 107-8 and 146. Many of them are reviewed in the opinions delivered in the Divisional Court in the present case. Under English law an award for loss of business profits in a case of injurious affection cannot be maintained.

Counsel for the respondent further contended that under s. 155 of the "Railway Act" (R.S.C. 1906, ch. 37) she is entitled to compensation for all injury occasioned to her by the exercise of powers conferred by that statute, and that owing to the difference between the provisions of the Dominion "Railway Act" and those of the English "Railway Clauses Consolidation Act" of 1845, and the English "Lands Clauses Act" the decisions upon the latter Acts do

(1) 14 Q.B.D. 747, 752; 16 Q.B.D. 227. (2) L.R. 3 C.P. 82.

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not govern the construction to be placed upon s. 155 of the Dominion "Railway Act" that under the Canadian Act the taking of land and the injurious affection of land are precisely on the same footing.

Prior to the enactment in 1888, as s. 92 of the "Railway Act" of that year (ch. 29), of the provision now found in the "Railway Act" of 1906 as s. 155, Canadian courts applying the provisions of the "Consolidated Railway Act" of 1879, ch. 9, and the earlier Acts; 31 Vict. ch. 68; C.S.C. ch. 66 and 14 & 15 Vict. ch. 51; had upheld awards of full compensation for all injury occasioned, whether ascribable to the construction of the railway or to its future operation, in cases where an entire parcel of land had been taken, or where part of a parcel had been taken and the injury to the remainder of it was ascribable to the operation of works constructed on the part taken. *Great Western Rly. Co.* v. *Warner*(1); *Atlantic and North West Rly Co.* v. *Wood* (expropriation in February, 1887)(2). But, following English decisions, they had refused to recognize the right of the owner to any compensation where neither his land itself nor a right incidental to its ownership had been physically interfered with so as to lessen the value of the land, *In re Widder and Buffalo and Lake Huron Rly. Co.*(3); *Widder* v. *Buffalo and Lake Huron Rly. Co.*(4); or for injury due to operation as distinguished from construction where none of his land was taken; *In re Devlin and Hamilton and Lake Erie Rly. Co.*(5); or where the works, the operation of which caused the injury, had not been constructed on the portion of his land taken. In *Bowen* v. *Canada Southern Rly. Co.*(6), where the lowering of a street

(1) 19 Gr. 506.
(2) Q.R. 2 Q.B. 335; [1895] A.C. 257.
(3) 20 U.C.Q.B. 638; 23 U.C.Q.B. 208.
(4) 24 U.C.Q.B. 520.
(5) 40 U.C.Q.B. 160.
(6) 14 Ont. App.R. 1.

in front of two town lots affecting access to them and thus depreciating their value was held to be an injurious affection of land entitling the owner to compensation, Osler J.A. at p. 3, speaking of s. 5 and s.s. 5 of s. 11 of the C.S.C. ch. 66 (the "Railway Act" preceding those of 1868 and 1879), says:

> These clauses are substantially similar to those in the "Railway and Lands Clauses Consolidation Act" (Imp.)

Sec. 155 of the Act of 1906 (ch. 37) takes the place of s. 5 of ch. 66 of the C.S.C., and s.s. 5 of s. 11 has its counterpart to-day in s. 191.

In *The Queen* v. *Buffalo and Lake Huron Rly. Co.* (1), at page 211, Draper C.J., delivering the judgment of the Court of Queen's Bench, speaking of the English statute, 8 Vict. ch. 18, and particularly of s. 68, and of the 6th section of the English statute 8 Vict. ch. 20, said:

> We see no solid distinction between the language of these English statutes and that used in our own (C.S.C., ch. 66.)

The applicability of the English decisions establishing the distinctions between the measure of compensation in cases where land is taken and that in cases of mere injurious affection would seem to have been fully recognized. See also *Widder* v. *Buffalo and L. Huron Rly. Co.*(2); *Paradis* v. *The Queen*(3); *The Queen* v. *Barry*(4); *Leblanc* v. *The King*(5), at page 221; *Sisters of Charity* v. *The King*(6) at page 394; *The King* v. *MacArthur*(7).

With the law in this position, s. 92 of the "Railway Act" of 1888, ch. 29, was enacted as a new provision presumably to supply the omission from the Acts of 1868 (ch. 68) and of 1879 (ch. 29) of the express provision for compensation found in s. 5 of the former "Railway

(1) 23 U.C.Q.B. 208.
(2) 29 U.C.Q.B. 154.
(3) 1 Ex. C.R. 191.
(4) 2 Ex. C.R. 333.
(5) 16 Ex. C.R. 219; 38 D.L.R. 632.
(6) 18 Ex. C.R. 385.
(7) 34 Can. S.C. R. 570.

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Act", C.S.C. ch. 66, into which it had been carried from 14 & 15 Vict. ch. 51, s. 4; *Bowen* v. *Canada Southern Rly. Co.*(1), at page 9. The right to compensation under the Acts of 1868 and of 1879 both in regard to land taken and land injuriously affected depended upon the general principle of the law that, unless the contrary clearly appears, legislative intention to authorize the taking away of, or injury to, property without payment of compensation will not be presumed and the almost irresistible inference to be drawn from the provision made for its ascertainment. Burton J.A. thought the omission from the Act of 1879 of a provision similar to s. 5 of ch. 66 of the C.S.C. quite immaterial. *Bowen* v. *Canada Southern Rly.*(1), at page 4. Sec. 92 of the Act of 1888 was not meant to create new rights in regard to compensation. At least that was the view taken of it by the courts notwithstanding the patent differences between its terms and those of s. 5 of the C.S.C. ch. 66, and the difference between its collocation in the Canadian "Railway Act" and that of the proviso in the English statute. Section 92 was certainly an adaptation of the proviso of s. 16 of the "Railway Clauses Consolidation Act" of 1845, ch. 20 (Imp.), the language of that proviso being reproduced, with some additions immaterial in the present case. At the date of its introduction there was no provision in the Dominion "Interpretation Act" such as is now found in R.S.C. ch. 1, s. 21, s.s. 4.

The construction of this new section so far as applicable to cases of injurious affection was carefully considered in the Ontario Court of Appeal in *Powell* v. *Toronto Hamilton and Buffalo Rly. Co.*(2), at page 215, Osler J.A. says:—

(1) 14 Ont. App. R. 1. (2) 25 Ont. App. R. 209.

The damage intended by s. 92 is some actual injury or damage to lands occasioned by the exercise of the powers of the railway. It is, in short, damage of the same character as that for which compensation is recoverable under the English Acts where no land is taken * * *. Under the Canadian Act * * * it must be held as under the Imperial Acts that, arising as it does from works authorized by the legislature, it must be such as would apart from the statute have been the subject of an action, and it must also be such as to diminish the value of the property irrespective of any particular use which might be made of it.

Maclennan J.A., at p. 218, refers to the identity of s. 92 with the proviso to s. 16 of the English "Railway Clauses Act," and adds

our law is, therefore, substantially the same as the English law.

Moss J.A. at p. 220, said:—

The damage sustained for which compensation is to be made is damage to land, either from taking materials or on account of its being injuriously affected by the exercise of any of the powers granted to the railway. And it is well settled that the compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the estate or land itself and not on personal inconvenience or discomfort to the owner or occupier.

A similar view had been expressed by Ferguson J. in *In re Toronto, Hamilton and Buffalo Rly. and Kerner*, in 1896(1), at page 20. That learned judge regarded as in point *Ford* v. *Metropolitan Rly. Co.*(2), where Cotton L.J. points out, at p. 25,

that the inconvenience or injury which arises solely from the particular use to which the particular occupier puts the buildings must not be regarded

and that

injuries sustained by them in carrying on their business

cannot be made the subject of compensation.

In *St. Catharines Rly. Co.* v. *Norris*(3), in 1889, Galt C. J., following English authorities, held that injury to trade as distinguished from injury to property did not entitle the owner to compensation for injurious affection.

(1) 28 O.R. 14. (2) 17 Q.B.D. 12.
(3) 17 O.R. 667.

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With these decisions before it Parliament re-enacted s. 92 of the statute of 1888 in the "Consolidated Railway Act" of 1903, as s. 120 (ch. 58) and again re-enacted it in the revision of 1906 as s. 155 (ch. 37) in *ipsissimis verbis*. Although s.s. 4 of s. 12 of the "Interpretation Act" (R.S.C. ch. 1, in force since 1890 (53 Vict., ch. 7, s. 1), declares that

> Parliament shall not be re-enacting any Act or enactment or by revising, consolidating or amending the same be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language.

We

> cannot assume that the Dominion Legislature when they re-enacted the clause verbatim (in 1903 and again in 1906) were in ignorance of the judicial interpretation which it had received. It must on the contrary be assumed that they understood that (s. 92 of the Act of 1888) must have been acted upon in the light of that interpretation.

Casgrain v. *Atlantic and North West Ry. Co.*(1), at page 300.

It is unreasonable to suppose that if Parliament were not satisfied that its intention had been thereby given effect to it would have re-enacted the section in the same terms. As already pointed out, when the proviso to the English s. 16 was first introduced into Canada we had no such interpretation provision as is now found in s.s. 4 of s. 21 of ch. 1 of the R.S.C. 1906. *Arnold* v. *Dominion Trust Co.*(2), at pages 448-9. Under these circumstances, although not bound by the dicta of the eminent Ontario judges to which I have referred, even if I entertained doubts as to the meaning of s. 155 in the present Act, I

> would have declined to disturb the construction of its language which had been (so often) judicially affirmed.

Casgrain v. *Atlantic and North West Rly. Co.*(1); *City Bank* v. *Barrow*(3), at pages 673, 679.

(1) [1895] A.C. 282. (2) 56 Can. S.C.R. 433; 41 D.L.R. 107.
(3) 5 App. Cas. 664

In *Canadian Pacific Rly. Co.* v. *Gordon*(1), the applicability of English decisions in regard to the right of compensation in cases of injurious affection under the Dominion "Railway Act" was again recognized by Clute J., who delivered the principal judgment in the Appellate Division in the case now at bar.

The decision of the Privy Council in *Holditch* v. *Canadian Northern Rly. Co.*(2), certainly overrules the view expressed by Armour C. J. in *In re Birely and Toronto, Hamilton and Buffalo Rly. Co.*(3), (already "scotched" in *Powell* v. *Toronto Hamilton and Buffalo Rly. Co.*(4), that the introduction of s. 92 into the Dominion "Railway Act" of 1888 had effected such a material change in the scope of the provisions for compensation in that Act that in cases where no land had been taken compensation might thereafter be recovered for injuries due to the operation of the railway. Their Lordships there point out (p. 544) that that section (now s. 155) is taken from s. 16 of the English "Railway Clauses Consolidation Act," 1845, and they approve the application of the English decisions to determine its purview in the Canadian statute. Their earlier decision in *Grand Trunk Pacific Rly. Co.* v. *Fort William Land Investment Co.*(5), points in the same direction.

Notwithstanding the passage from Lord Macnaghten's judgment in *Parkdale* v. *West*(6), at page 616, in which he says—of course *obiter*—

> their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted,

(1) 8 Can. Rly. Cas. 53.
(2) [1916] 1 A.C. 536; 27 D.L.R. 14.
(3) 28 O.R. 468.
(4) 25 Ont. App. R. 209.
(5) [1912] A.C. 224.
(6) 12 App. Cas. 602.

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to which I allude merely to make it clear that it has not been overlooked, the utmost use that can be made of evidence of loss of business ascribable to the exercise of powers conferred by the "Railway Act" in cases of injurious affection is indicated in my opinion in the following passage from the judgment of Lopes L. J. in *Howard* v. *Metropolitan Board of Works*,(1) quoted by Clute J.:—

> The plaintiff's house was injuriously affected by the execution of the works and the jury awarded compensation, not for the loss to trade, which would not, *per se*, be a legitimate head of damage, but for the deterioration in the value of the house as measured by the loss of trade.

It is as to the necessity for payment of compensation before interference with the right that cases of injurious affection are held by Lord Macnaghten to stand under the Canadian Act on precisely the same footing as cases of actual taking, in that respect differing from the like cases under English Lands Clauses Consolidation Act of 1846. *Parkdale* v. *West*(2).

In *Parkdale* v. *West*(3), the corporation was held liable as a wrongdoer not protected from the consequences of its tort by any statutory provision, and it was on that basis that Lord Macnaghten thought the municipality liable "to the full extent" and that damages were assessed against it.

I am, for these reasons, of the opinion that the construction of s. 155 of the Canadian "Railway Act" of 1906 is governed by the English decisions on the purview of the proviso of s. 16 of the "Railway Clauses Consolidation Act" of 1845, and that the respondent is not entitled to compensation for loss of business occasioned by the execution of the works in question. The award should therefore be reduced by $4,500.

(1) 4 Times L.R. 591. (2) 12 App. Cas. 602, at page 613.
(3) 15 O.R. 319.

The respondent has been allowed the full benefit of evidence of loss of business in so far as it affected the value of her property as "a marketable article." The $9,724 found by the arbitrator to have been its value before the works were begun, represented a valuation on the same basis as the £1,550 allowed in *Wadham's Case*(1), *i.e.*, it included any special value which the premises had as a stand for the particular class of business carried on by the respondent.

There should also be a further reduction of $192 as claimed by the appellant from the $6,366 allowed for injury to the land for the reasons indicated by Riddell and Kelly JJ. in the court below. The award will therefore stand for the sum of $6,174—and costs.

The appellant is entitled to its costs in this court and in the Appellate Division.

BRODEUR J. (dissenting).—This is an appeal from the Appellate Division of the Supreme Court of Ontario which referred back to the arbitrator an award concerning lands for which the respondent claims compensation.

The appellant company for the purpose of building a subway in the City of Toronto on Yonge street had lowered the level opposite the respondent's property and practically left it without access to the street.

The arbitrator to whom the question of compensation was referred awarded $6,366 for the bare depreciation of the land and $4,500 for loss of business based on an estimate of profits for three years.

The Appellate Division held that the respondent was entitled to compensation for the loss of business but that the amount had been arrived at by an erroneous principle and the case was referred back to the

(1) 16 Q.B.D. 227.

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arbitrator to ascertain the compensation which the respondent was entitled to in that regard.

There is no dispute as to the depreciation of the property itself. The only question then is whether some compensation should be given for the loss of trade, or the diminution of the claimant's good-will in her business, consequent on the destruction of the access to the premises in which the business was carried on. Section 155 of the "Railway Act" is the law under which the claim of the respondent to compensation is made. It reads as follows:—

> The company shall in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

There is no doubt that the respondent is an interested person, since the access to the street which she had before is virtually destroyed. Nobody disputes that she is entitled to damages. If some land had been taken, there is no doubt under the authority of the English cases that the measure of damages would be the difference between what the premises as a running concern would be worth to the expropriated party and the value of the land afterwards, and would include compensation for loss of business.

But a distinction is made in England as to the measure of damages in the case of lands taken and in the case of lands injuriously affected. When in the case of lands taken full compensation including loss of business is given, in the case of lands injuriously affected the compensation does not include personal inconvenience.

1856, *Caledonian Railway Co.* v. *Ogilvy*(1); 1864, *In re Stockport Timperley and Altringham Rly. Co.*(2);

(1) 2 Macq. 229.
(2) 33 L.J.Q.B. 251.

1862, *Chamberlain* v. *West End of London and Crystal Palace London Railway Co.*(1); 1865, *Brand* v. *Hammersmith and City Rly. Co.*(2); 1867, *Beckett* v. *Midland Rly. Co.*(3); 1867, *Ricket* v. *Metropolitan Rly. Co.*(4); 1871, *Duke of Buccleuch* v. *Metropolitan Board of Works* (5).

These decisions in England are somewhat conflicting and not very satisfactory. The Lord Chancellor in *Ricket's Case*(4), stated that it was a hopeless task to attempt to reconcile the contradictory decisions which have been rendered on the questions at issue.

But should those decisions be invoked here under our Canadian legislation?

I do not hesitate to say no, because our own legislation differs from the English statutes and I rely in that respect on the views expressed by Lord Macnaghten in *Parkdale* v. *West*(6), where he said at page 613.

> There is a marked difference between the provisions of the Dominion Act and those of the English "Lands Clauses Consolidation Act," 1845, and that decisions upon the English Act, such as *Hutton* v. *London and South Western Railway Co.*(7), which was referred to in the argument, afford little or no assistance in the present case. In the Dominion Act the taking of land, and the interference with rights over land, are placed precisely on the same footing.

In view of that decision in the *Parkdale Case*(6), I say that we should not refer to decisions rendered under English statutes, but we should find whether the provisions of s. 155 might cover the loss of trade in cases where lands have been simply injuriously affected.

Section 155 enacts that compensation should be made for all damage caused. There is no distinction

(1) 2 B. & S. 605.
(2) L.R. 1 Q.B. 130.
(3) L.R. 3 C. P. 82.
(4) L.R. 2 H.L. 175.
(5) L.R. 5 H.L. 418.
(6) 12 App. Cas. 602.
(7) 7 Hare 259.

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in this section in case of lands taken and in case of lands injuriously affected. We have to revert to the ordinary rule governing torts and find whether the damage is the necessary result of the injury done.

When the clause of the statute applies, the party is entitled to recover full compensation for all damage in respect of the diminution in value of his property *Buccleuch's Case*(1).

The loss to an owner includes not only the actual value of the lands but all damage directly consequent on the taking thereof under statutory powers. The arbitrators called upon to fix the compensation should take into consideration the probable diminution in the value of the claimant's good-will in his trade.

See decisions quoted by Cripps, 4th ed., pp. 98 and 99; *In re Davies and James Bay Rly. Co.*(2); *Caledonian Railway Co.* v. *Walker's Trustees*(3), at p. 276.

I am unable to find that the court below was in error in stating that the respondent was entitled to compensation for loss of business.

The appeal should be dismissed with costs.

MIGNAULT J.—I have had the advantage of reading the very full and carefully considered reasons for judgment of my brother Anglin, and with some hesitation, caused by the very wide language of s. 155 of the "Railway Act" (R.S.C. 1906, ch. 37), I have finally come to the conclusion that my brother Anglin is right in his construction of this section. Section 155, if I may use the term, is a condition of the grant of extensive powers to a railway company. It is taken almost verbatim from the proviso of s. 16 of the English statute, the "Railway Clauses Consolidation

(1) L.R. 5 H.L. 462. (2) 28 Ont. L.R. 544; 13 D.L.R. 912.
(3) 7 App. Cas. 259.

Act," 1845, and if it is to receive the same construction as the English courts have given to the latter section, damages for loss of business carried on on lands not taken but merely injuriously affected by the construction of the railway cannot be granted. There appears to be no escape from the conclusion that the wide language of s. 155 must receive some limitation, and this has been done with respect to damages caused by the operation of the railway as distinguished from its construction, *Holditch* v. *Canadian Northern Ontario Railway Co.*(1), which would be damages caused by the exercise of the powers of the company. And if s. 155 be construed as s. 16 of the "Railway Clauses Consolidation Act," 1845, has been construed, damage for loss of business in respect of land not taken but injuriously affected cannot be awarded. This does not mean that I can appreciate the reason for the distinction which has been made between cases where land is taken and cases where land is not taken but merely injuriously affected, but this distinction is now clearly and authoritatively established, and, as I have said, no damages are granted for loss of business where lands are not taken but only injuriously affected. There is no doubt much force in the contention of the respondent that the construction of s. 16 of the English statute has been influenced by other provisions of the Imperial statutes, but looking at our own "Railway Act" and its enactments—perhaps rules of procedure—governing the taking and using of lands and compensation and damages (ss. 172 to 214 inclusive, and more especially ss. 191 and 193), it seems to me that these sections can be compared to the other provisions of the English statutes referred to by Mr. Justice Clute as having influenced the construction of s. 16.

(1) [1916] 1 A.C. 536; 27 D.L.R. 14.

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So we have a construction authoritatively placed on the proviso of s. 16 which has been copied into the Canadian Act, and after due consideration I feel that this construction should be adopted here.

I would, therefore, allow the appeal with costs here and in the Appellate Division, and restrict the compensation to the sum of $6,366.00 awarded by the learned arbitrator for damage caused to the respondent's property, deducting however the sum of $192.00, expenses of the auction sale effected by the respondent after the construction of the appellant's works. The learned arbitrator valued the respondent's property as it stood before the construction of the works and deducted from this gross value the net proceeds of the auction sale. It is obvious that if the respondent had sold her property at the higher valuation before it was injuriously affected, she would have incurred the necessary expenses of the sale, so that it seems to me a fallacy to compare the gross value before the construction of the works to the real value, less expenses of sale, after the property had become depreciated. The deduction of this sum of $192 reduces the compensation to $6,174, and costs.

Appeal allowed with costs.

Solicitor for the appellants: *William Johnston.*
Solicitor for the respondent: *William Laidlaw.*

HIS MAJESTY THE KING (DEFENDANT)..... } APPELLANT;

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*Oct. 14.
*Oct. 15, 16.

AND

JEU JANG HOW (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FROM BRITISH COLUMBIA.

Appeal—Jurisdiction—Habeas corpus—"Criminal charge"—Person at large—R.S.C., c. 139, ss. 39 (c.) and 48 "Supreme Court Act,"—8 & 9 Geo. V., c. 7, s. 3.

A Board of Enquiry, proceeding under the "Immigration Act," ordered the deportation of the respondent, who thereupon applied for a writ of *habeas corpus*. The writ was refused by the trial judge; but the Court of Appeal granted it and ordered the respondent's discharge.

Held, that an appeal from the court of final resort in any province except Quebec in a case of *habeas corpus* under sec. 39 (c) of the "Supreme Court Act" will not lie unless the case comes within some of the provisions of sec. 48, as amended by 8 & 9 Geo. V., ch. 7, sec. 3. *Mitchell* v. *Tracey* (58 Can. S.C.R. 640; 46 D.L.R. 520, followed.

Per Duff and Anglin JJ.—The words "criminal charge" in sec. 39 (c) of the "Supreme Court Act" mean a charge preferred before a tribunal authorized to hear such a charge either finally or by way of preliminary investigation; and the Board of Enquiry under the "Immigration Act" is not a tribunal by which the respondent could have been convicted of a criminal offence.

Per Duff and Anglin JJ.—The right of appeal given by sec. 39 (c) in cases of *habeas corpus*, does not exist where the court below has ordered the release of the person, the legality of whose custody was in question in the court below and that person is at large. *Cox* v. *Hakes* (15 App. Cas. 506), followed(1). Mignault J. *dubitante.*

APPEAL from the judgment of the Court of Appeal for British Columbia(2), reversing the judgment of

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) REPORTER'S NOTE.—See also *Fraser* v. *Tupper* (Cout. Dig. 104).
(2) 47 D.L.R. 538; (1919) 3 W.W.R. 271.

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the trial judge, Murphy J.(1), allowing an application for a writ of *habeas corpus* and ordering that the respondent should be accorded his liberty and freed from the order for deportation issued by the Board of Enquiry under the "Immigration Act" (9 & 10 Edw. VII., ch. 27, sec. 73, sub-s. 7, as amended by 1 & 2 Geo. V. ch. 12).

A motion was made to quash the appeal on three grounds: (1) That the right of appeal is taken away by section 48 of the "Supreme Court Act," as amended by 8 & 9 Geo. V. ch. 7, sec. 3; (2) That the proceedings for *habeas corpus* arise out of a criminal charge and are therefore not within clause (c) of section 39 of the "Supreme Court Act"; (3) That the fact that the respondent was at large under an order for his discharge precludes any right of appeal.

Sir Charles Tupper K.C. for the motion, referred to *Cox* v. *Hakes*(2), and *Barnardo* v. *Ford*(3).

R. V. Sinclair K.C. contra.

THE CHIEF JUSTICE.—We were all of the opinion at the close of the argument on this motion that it must succeed.

The appeal sought to be quashed clearly does not come within any of the classes of enumerated cases stated in section 48 of the "Supreme Court Act" as amended, within which an appeal as of right to this court is given, and as no special leave to appeal as provided for in sub-section (e) of that section was obtained, we are clearly without jurisdiction to hear the appeal.

This objection being, in my opinion, a fatal one,

(1) (1919) 2 W.W.R. 844. (2) 15 App. Cas. 506.
(3) [1892] A.C. 326.

I do not discuss the other important points raised at the hearing of that motion.

As to the question of allowing costs, we were of the opinion that, as the case was not one within the rules requiring a notice of motion to quash to be given within the definite time prescribed by Rule 4 of the Supreme Court Rules (it being a *habeas corpus* appeal in which no security is required), the motion was in order; the applicant was not in fault or default, and was entitled to costs of his motion.

The order of the court, therefore, is to grant the motion to quash the appeal for want of jurisdiction, with costs both of the appeal and of the motion to quash.

IDINGTON J.—Under and by virtue of the amendment of section 48 of the "Supreme Court Act" it seems to me hopeless to contend that, without leave, this case is appealable. The appeal should, therefore, be quashed for want of jurisdiction, with costs.

The suggestion of Mr. Sinclair to let the case stand on the docket until the Crown had applied to the Court of Appeal for British Columbia to allow an appeal, seems at first sight, in view of what we have done in some cases, plausible, but after due consideration of all the facts leading up to this appeal and to the hearing of this motion, and no attempt having been made to invoke the sanction of the Court of Appeal, until now, I think we should not encourage such neglect or even suggest that it is a proper case for now giving leave to appeal.

DUFF J.—A fatal objection to the jurisdiction arises out of the provisions of the recent amendment of section 48, the appeal clearly not coming within any of

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the classes enumerated in that section and leave to appeal not having been granted; but it is desirable, I think, to deal with another exception to the jurisdiction of this court taken by Sir Charles Tupper which appears to be well founded. Section 48 is a negative section which prescribes essential conditions, but it does not in any way dispense with the conditions prescribed by other provisions of the Act. A ground for jurisdiction must therefore be found under the enabling sections and the provision to which appeal is made 39(c). It is argued that the proceedings in this case arise out of a criminal charge but it is plain enough that "criminal charge" in this provision means a charge preferred before a tribunal authorized to hear such a charge either finally or by way of preliminary investigation. The board which directed the deportation of Jeu Jang How is clearly not a tribunal of that description.

Another objection, however, is advanced by counsel for the respondent, to which I think effect must be given, and that is that the right of appeal given by section 39(c) in cases of *habeas corpus* does not exist where the court below has ordered the release of the person, the legality of whose custody was in question in the court below and that person is at large. In *Barnardo* v. *Ford*(1), it was held unanimously by the House of Lords that an order directing the issue of a writ of *habeas corpus* to test the right to the custody of a child was an order within the meaning of section 19 of the "Judicature Act" of 1873 and as such appealable to the Court of Appeal. This view of section 19 that orders and judgments in matters of *habeas corpus* were appealable under that section, was not considered incompatible with the decision of the House

(1) [1892] A.C. 326.

of Lords in *Cox* v. *Hakes*(1), to the effect that under the same section no appeal would lie to the Court of Appeal from an order in *habeas corpus* proceedings discharging a detained person from custody.

The decision last mentioned was based upon two grounds which are best expressed in the judgments of Lord Herschell and Lord Halsbury.

Section 19 gives to the Court of Appeal general jurisdiction and power to hear appeals from "any judgment or order." It was not denied that an order for the discharge of a person in custody was *primâ facie* an order to which the section applied, but it was held that the provision following this general provision (a provision which has its analogue in section 39 of the "Supreme Court Act") is obviously intended to make the power of review complete and effectual by furnishing the means of enforcing it. As in such a case—when the person in custody has been discharged—the order made by the High Court could not be effectively interfered with by the Court of Appeal, it was considered that such an order did not belong to the class of orders within the intendment of section 19 in respect of which a right to hear and determine appeals is given.

The other reason for the decision was that the granting of the right of appeal in such cases would, to adopt the language of Lord Halsbury, amount to a sudden reversal of the policy of centuries in regard to the summary determination of the right of personal freedom and that such a reversal of policy ought not to be inferred from general language which, having regard to the context, was reasonably open to another view as to its effect.

(1) 15 App. Cas. 506.

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These reasons appear to me to govern the construction of section 39(c).

ANGLIN J.—A Board of Enquiry proceeding under sec. 73, sub.-sec. 7, of the "Immigration Act" (ch. 27, 9 & 10 Edw. VII., as amended by ch. 12, 1 & 2 Geo. V.), ordered the deportation of the respondent and an appeal by him to the Minister of Immigration and Colonization was unsuccessful. Thereupon he applied for a writ of *habeas corpus* which was refused him by Murphy J. On appeal the Court of Appeal of British Columbia granted the writ and ordered the prisoner's discharge. He is now at large in the Province of Alberta. The Crown and the Controller of Immigration at Vancouver appeal to this court from the judgment of the Court of Appeal.

The respondent moves to quash the appeal on three grounds:

(1) That the right of appeal is taken away by section 48 of the "Supreme Court Act," as amended by 8 & 9 Geo. V. ch. 7, sec. 3;

(2) That the proceedings for *habeas corpus* arise out of a criminal charge and are therefore not within clause (c) of section 39 of the "Supreme Court Act";

(3) That the fact that the respondent is at large under an order for his discharge precludes any right of appeal.

On the opening of the motion counsel for the appellant admitted (very properly, having regard to our recent decision in *Mitchell* v. *Tracey*(1)), that section 48 presents a fatal obstacle to the appeal unless leave to appeal can be obtained from the British Columbia Court of Appeal and he asked that the motion to quash

(1) 58 Can. S.C.R. 640; 46 D.L.R. 520.

and the hearing of the appeal should be adjourned to permit of his making application for such leave. While it is not unusual to grant this indulgence, before doing so the court should be satisfied that in the event of leave being granted the appeal would lie. It therefore becomes necessary to consider the second and third objections taken by counsel for the respondent.

I am satisfied that the proceedings for the writ of *habeas corpus* do not arise out of a criminal charge. The respondent could not have been convicted on the proceeding before the Board of Enquiry of any criminal offence. Provision for that purpose is made by section 7(b) of the "Chinese Immigration Act," ch. 95 of R.S.C., 1906, as amended by 7 & 8 Geo. V. ch. 7.

But I think the third ground on which counsel for the respondent claims that the appeal should be quashed is well taken. The principle of *Cox* v. *Hakes*(1), would seem to me to be applicable to section 39(c) of the "Supreme Court Act." I concur in what my brother Duff has said on this aspect of the case.

Since, therefore, leave to appeal if obtained would be futile, the application to adjourn the motion to quash and the hearing of the appeal to permit of such leave being asked for should be refused and the motion to quash should now be granted.

BRODEUR J.—Concurs with the Chief Justice.

MIGNAULT J.—I would not care to say that in my opinion the principle laid down in *Cox* v. *Hakes*(1), and especially in the passage from Lord Herschell's judgment at p. 527, quoted in the decision of this court *In re Charles Seeley*(2), has the effect of restricting

(1) 15 App. Cas. 506. (2) 41 Can. S.C.R. 5.

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or cutting down the generality of the terms of section 39(c) of the "Supreme Court Act." This section, which is not found in any English statute that I know of, gives (subject of course to the other sections of the "Supreme Court Act") a right of appeal from the judgment in any case of proceedings for or upon a writ of *habeas corpus* not arising out of a criminal charge. But the policy of the law seems to me to be clearly against interfering with an order of discharge or release obtained by means of the writ of *habeas corpus*. On that ground I concur in the judgment quashing the appeal, which of course must be quashed in view of section 48 of the "Supreme Court Act," without suspending our adjudication so as to permit the appellant to apply for leave to appeal. Had the appellant applied to this court for leave to appeal, I would not, under the circumstances of this case, have granted him leave, and had he obtained leave from the Court of Appeal, for the reason I have stated, I would not have interfered with the judgment discharging the respondent. I therefore simply concur in the judgment quashing this appeal in view of the terms of section 48 of the "Supreme Court Act."

Appeal quashed with costs.

DAME MARY LAVIGNE AND VIR (PLAINTIFFS) ..... } APPELLANTS;

AND

DELLE M. NAULT AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1919
*May 19, 20.
*Oct. 14.

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

Servitude—Servitude of support—Conventional—"Destination de père de famille"—Common wall—"Pignon" or gable—Arts. 522, 551, 560 C.C.

The appellants are the owners of lot No. 694 of the City of Three Rivers, and the respondents are the owners of the adjoining lot No. 695. These two lots formerly belonged to one Hart, who, in 1832, sold lot No. 694 to one Woolsworth. One clause of the deed reads as follows: "Il est convenu et arrêté entre les parties que Erastus Woolsworth aura droit à perpétuité de bâtir, accoter contre et sur le mur en pierres et en briques du pignon nord-ouest du magasin et maison du dit sieur vendant et érigée sur l'autre partie du dit lot de terre, lequel pignon sera mitoyen entre les parties."

Held, that the right of *mitoyenneté* claimed by the appellants is a conventional servitude and not a *servitude par destination du père de famille.*

Held, that in the clause quoted the word "pignon" means not merely the triangular gable at the top of the wall but the entire north-west gable end of the grantor's house, and the whole wall, including its foundation, has been declared *mitoyen* by the deed of sale. Duff and Mignault JJ dissenting.

Judgment of the Court of King's Bench (Q.R. 28 K.B. 14) reversed, Duff and Mignault JJ. dissenting. *Delorme* v. *Cusson* (28 Can. S.C.R. 66), distinguished.

APPEAL from a judgment of the Court of King's Bench, appeal side(1), Province of Quebec, maintaining the judgment of the Superior Court, Drouin J. in the

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 28 K.B. 14.

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district of Three Rivers, and dismissing the appellants', plaintiffs', action with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Aimé Geoffrion K.C. for the appellant.
Lafleur K.C. and *Duplessis* for the respondents.

THE CHIEF JUSTICE.—I concur with Mr. Justice Brodeur.

IDINGTON J.—For the reasons assigned by Mr. Justice Cross in the court below I would allow this appeal with costs and direct judgment to be entered on the terms his notes indicate.

Since writing the foregoing I have read but not fully considered all my brother Brodeur has written and assent to the result he reaches.

DUFF J. (dissenting)—I concur with Mr. Justice Mignault.

ANGLIN J.—I have had the advantage of reading the opinions prepared by my brothers Brodeur and Mignault. I concur in their view that the servitude or right of *mitoyenneté*, which the plaintiffs (appellants) assert, is conventional in its origin. Evidence of facts existing in 1832, when the deed creating it was executed, which would warrant classifying it as a servitude by destination of the proprietor—*servitude par destination du père de famille* (art. 551 C.C.)—is lacking.

While I incline to think with my brother Brodeur that the servitude intended to be created was defined with sufficient precision in the Hart-Woolsworth deed, if it was not, I accept the view of the Court of King's

Bench that the parties have by their conduct supplied any deficiency in that respect and that the admission in the defendants' plea of the existence in 1908 of actual conditions which conformed to the rights claimed by the plaintiffs fully meets the difficulty which the learned judge of the Superior Court found insuperable. This admission also answers any objection based on the omission from intermediate conveyances in the plaintiffs' chain of title of all reference to the servitude or right of *mitoyenneté* which they claim, and, as the Court of King's Bench has said, fixes its nature and extent. The plea states explicitly that the building owned by the Bank of Hochelaga (under which the plaintiffs claim) prior to its destruction on the 22nd of June, 1908, "*appuyait sur celle des défendeurs conformément au droit de servitude dont il est question en cette cause.*"

Nor do I find the lack of precision in the plaintiffs' claim which the Court of King's Bench deemed fatal to their action. They no doubt, as is not unusual, claim more than they are entitled to. But when the evidence is applied to their demand it enables the court in my opinion to determine with reasonable certitude, within the limits of what they assert, the measure of their right.

The terms in which the right in question is conferred by the deed of 1832—notably that it should exist in perpetuity and that the north-west gable end (pignon) shall be a party wall (mitoyen) between the parties—in my opinion make it clear that it was not intended that that right should last only so long as the house then upon the grantor's land should remain standing, but that it should be a true right of *mitoyenneté* entailing all the incidents, including obligations of reconstruction, etc., indicated in arts.

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512 *et seq.* of the Civil Code, so far as they are applicable having regard to its conventional origin.

I agree with my brother Brodeur that the word "*pignon*" as used in the deed in question means not merely the gable of the wall but the entire north-west gable end of the grantor's house. The right conferred is to build "*contre et sur le mur * * * du pignon nord-ouest*"—against and upon the wall of the north-west gable end. It is inconceivable that the parties intended that the right of *mitoyenneté* should exist only in the triangular gable at the top of the wall.

No doubt the fact that there is a common or *mitoyen* lane between the two properties, which is to be kept open to a height of nine feet, over which the plaintiffs have the right to build, would present a difficulty if we were dealing with a claim of *mitoyenneté* made under the common law. But in this, as in other matters, the convention of the parties, if not illicit, constitutes their law. (Art. 545 C.C.). Whether on the true construction of the deed of 1832 the title to the whole lane is common (mitoyen), or each party owns the half of it lying to his side of its central line, as the description in the conveyance would indicate, the wall in question has been declared *mitoyen* in explicit terms and it must, I think, be so treated as a whole, including its foundations. Foundations and a wall to the height of nine feet adequate to carry above it a *mitoyen* wall sufficient to meet the legal requirements of the plaintiffs are essential to the enjoyment of the right conferred by the deed. Both parties are interested in the foundations and lower wall and equity requires that they should bear equally the cost of their construction and maintenance. The only reasonable and fair inference from the instrument taken as a whole is that while the entire

wall was thereby made *mitoyen*, the right of the plaintiffs' predecessor in title to use it as such was restricted to the part of it above nine feet from the ground—a provision perhaps quite unusual in regard to *mitoyen* walls but not illegal and therefore within the power of contracting parties to make should they see fit. The use and the extent of (conventional) servitudes are determined according to the title which constitutes them. (Art. 545 C.C.).

Of course the height and length of the wall existing in 1832 would measure in those respects the extent of the plaintiffs' rights. The defendants may not be compelled to build a wall either higher or longer than that in which Hart gave to Woolsworth rights of *mitoyenneté*. (Arts. 522 and 558 C.C.). By the defendants' admission, however, the right as enjoyed by the plaintiffs' predecessor in 1908 was in conformity with that deed and may therefore be taken as the measure of what they are entitled to.

It is well established that the length of the party wall in 1908 was twenty-nine feet. The land on which it stood having since been expropriated by the city to a depth of 14 feet, 2 inches, no wall can be built on that portion of it. The plaintiffs' rights therein have been extinguished. (Art. 559 C.C.). But on the remaining portion, 14 feet, 10 inches in length, they continued, and to a party wall of that length and built on that land they are now confined.

I agree with my brother Brodeur that the case of *Delorme* v. *Cusson*(1), is readily distinguishable from that at bar which is neither a case of an improvement made in good faith under common error as to title nor of tacit acquiescence in the doing of an act, which the plaintiffs might have prevented, inconsistent with

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the right they now assert. I also accept my learned brother's view that, notice not having been given the plaintiffs or their predecessor by the defendants of their intention to build the wall of which demolition is now sought and that wall being admittedly insufficient to serve as a party wall, the defendants must bear the expense of its removal to the extent necessary to permit of a proper party wall being constructed; and I agree in the detailed disposition which he suggests of the appeal in other respects.

BRODEUR J.—Il s'agit d'une action confessoire et en démolition instituée par l'appelante contre les intimés au sujet d'un mur qu'elle allègue être mitoyen.

Le litige porte surtout sur l'interprétation d'un contrat de vente par Moses Hart à Erastus Woolsworth le 21 février 1832.

Moses Hart était alors propriétaire de tout le lopin de terre qui forme aujourd'hui les nos. 694 & 695 du cadastre de Trois-Rivières. Par l'acte de vente en question il a cédé ce qui forme le no. 694 à Woolsworth et le terrain vendu y est décrit comme suit:—

Une part du lot de terre faisant le coin nord-ouest des rues du Platon et Notre-Dame et par derrière par une ligne qui sera tirée parallèlement à la dite rue Notre-Dame dans et par le milieu de la porte de cour actuellement existante sur la rue du Platon et ce depuis icelle jusqu'à la ligne de division entre le terrain sus vendu et le terrain de Pierre Deveau, tenant d'un côté au nord-est à la dite rue du Platon et d'autre côté au sud-ouest au dit Pierre Deveau avec une maison sus érigée.

Deux autres dispositions de cet acte de vente doivent être citées textuellement afin de connaître l'étendue de la servitude réclamée par l'appelante qui est aux droits de Woolsworth. Elles se lisent comme suit:—

Il est convenu et arrêté entre les parties que Erastus Woolsworth aura droit *à perpétuité* de bâtir, accoter contre et sur le mur en pierre

et en briques du pignon nord-ouest du magasin et maison du dit sieur vendant et érigée sur l'autre partie du dit lot de terre, lequel pignon sera mitoyen entre les parties.

Et il est de plus convenu et arrêté entre les parties qu'elles laisseront à toujours un passage de huit pieds de largeur et de neuf pieds de hauteur entre la maison du dit sieur vendant et celle déjà construite ou à construire du dit sieur acquéreur pour aller et communiquer dans leurs cours respectives, lequel passage sera mitoyen entre les parties, leurs hoirs et ayant cause à l'avenir.

Cet acte, il me semble, est assez clair. La propriété vendue s'étend pour le bas jusqu'au milieu de la porte de cour dans le passage mitoyen. Pour la partie supérieure du passage, elle s'étend jusqu'au mur de la maison de Hart, puisque ce dernier donne à son acheteur le droit d'appuyer sa bâtisse sur ce mur. De plus, le mur, quoiqu'il ne se trouve pas dans le bas aux extrémités des héritages respectifs, est déclaré mitoyen par les parties contractantes.

Nous avons donc une propriété qui pour neuf pieds de haut s'étend à quatre pieds du mur en question mais qui au delà des neuf pieds s'étend jusqu'au mur lui-même. Et afin qu'il n'y ait pas de doute sur la nature du droit de propriété du mur, on le déclare mitoyen, c'est-à-dire qu'ayant été construit par Hart seul, son voisin Woolsworth en acquiert de lui la communauté. Pothier, éd. Bugnet, vol. 4, no. 129, p. 313.

Woolsworth et ses ayants cause construisirent au-dessus du passage mitoyen et appuyèrent leurs bâtisses sur ce mur déclaré mitoyen. Le passage fut toujours conservé mitoyen.

En 1908 la ville de Trois-Rivières était presqu'entièrement incendiée; et, entr'autres bâtisses détruites se trouvaient les propriétés en question en cette cause.

Les intimés, qui étaient les propriétaires du terrain no. 695, rebâtirent leur maison ou magasin; et, dans la ligne de séparation, ils érigèrent un mur qui pouvait

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être suffisant pour eux mais certainement trop faible pour supporter l'édifice que l'appelante, qui est propriétaire du terrain Woolsworth, le no. 694, voudrait construire. Ils ont fait ce mur sans en avertir cette dernière qui est maintenant forcée de se pourvoir en justice pour faire reconnaître les droits qu'elle a dans ce mur mitoyen.

La Cour Supérieure et la Cour d'Appel (1) ont renvoyé l'action, mais pour des motifs différents.

La Cour Supérieure s'est basée sur le fait que le contrat de 1832 constituait une servitude établie par destination de père de famille et qu'elle n'avait pas la nature et l'étendue que l'article 551 du Code Civil exige pour ces servitudes.

La Cour d'Appel a également exprimé l'opinion que c'était une servitude établie par destination du père de famille, mais que les admissions des défendeurs dans leur plaidoyer avaient suppléé à l'insuffisance de précision de l'acte de 1832. Elle a renvoyé l'action en s'appuyant sur la cause de *Delorme* v. *Cusson* (2), parce que la demanderesse n'avait pas protesté quand les défendeurs avaient érigé le mur après l'incendie.

D'abord, est-ce bien là une servitude établie par la destination du père de famille? Je n'hésite pas à dire que non.

Qu'est-ce que la destination du père de famille? C'est le cas où celui qui possède deux héritages peut s'en servir de manière que l'un soit assujetti à l'autre. Cette disposition que fait un propriétaire peut devenir servitude lorsque les deux héritages cessent d'appartenir à la même personne. (Desgodets, *Bâtiments*, vol. 1er, page 298). Et alors, suivant l'article 551 du Code

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Civil, la destination du père de famille, lorsqu'elle est par écrit et que la nature, l'étendue et la situation en sont spécifiées, constitue une servitude valable.

La servitude réclamée par l'appelante n'est pas le résultat d'une destination faite par Hart quand il était propriétaire des deux héritages; mais elle est consignée dans un acte entre Hart et l'acquéreur d'une partie de son terrain. Et alors ce serait une servitude conventionnelle ordinaire et non pas une servitude établie par la destination du père de famille. Les cours inférieures ont donc fait une erreur en classifiant la servitude en question en cette cause parmi les servitudes créées par la destination du père de famille.

Le mur originaire, qui était de pierre et de brique, était assez fort pour appuyer l'édifice de la demanderesse; mais il a été reconstruit, après l'incendie de 1908, en brique et en bois; et alors il est certainement trop faible, de l'aveu même des défendeurs, pour qu'on puisse y étayer la moindre poutre.

Les intimés ont voulu, lors de la plaidoirie, donner au mot *pignon* mentionné dans l'acte un sens trop restreint; et ils ont invoqué à cette fin le dictionnaire de Larousse, qui définit le mot pignon comme signifiant la partie supérieure et triangulaire d'un mur. Mais les termes mêmes de l'acte et la preuve démontrent que le terme *pignon* n'a pas rapport seulement à la partie supérieure et triangulaire du mur mais à tout le mur lui-même. Le mot a été employé dans son sens ordinaire et populaire. Ainsi, quand on parle du pignon nord ou sud d'une maison, on réfère à tout le mur qui se trouve du côté nord ou du côté sud de cette maison et non pas à la partie supérieure et triangulaire seulement de ce mur.

Quand il est dit dans l'acte que l'acquéreur pourra s'appuyer sur le mur du pignon nord-ouest du magasin,

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on voulait certainement dire tout le mur qui se trouvait du côté nord-ouest. Cette propriété avait, en effet, deux étages pleins et un toit triangulaire qui faisait le troisième étage. Alors comment l'acquéreur, qui avait le droit de bâtir au-dessus du passage à neuf pieds de terre aurait-il pu appuyer ses poutres sur le mur s'il ne pouvait utiliser que le pignon lui-même, qui se serait trouvé au moins dix pieds plus haut?

John Bourgeois est examiné sur la longueur du mur des défendeurs avant le feu, et sa réponse est comme suit:—

Le mur du *pignon* de la maison des défendeurs avait, avant le feu de 1908, vingt-neuf pieds.

Cette réponse bien simple d'un arpenteur et d'un ingénieur civil démontre bien clairement que le mur d'un pignon, dans la langage ordinaire, comprend non-seulement la partie supérieure et triangulaire mais aussi la partie inférieure.

Dans l'acte de 1832, quand on dit que le pignon sera mitoyen entre les parties, on entendait déclarer tout ce mur du côté nord-ouest comme étant mitoyen.

Quelle est l'effet de cette déclaration? C'est que ce mur est devenu la propriété des deux parties. Pothier, éd. Bugnet, vol. 4, no. 129, page 313.

Ce n'est plus la propriété exclusive de Hart et de ses ayants-cause, mais il est la propriété commune de Hart, de Woolsworth et de leurs ayants cause.

C'est d'ailleurs une stipulation bien rationnelle quand on songe que Woolsworth acquérait par sa vente le droit de bâtir à perpétuité et d'accoter contre et sur le mur, alors les parties ont voulu éviter tout doute en stipulant que ce mur serait mitoyen, quoiqu'il fût assis sur la propriété du vendeur seul.

S'il n'y avait pas eu cette stipulation de mitoyenneté, je crois que la demanderesse aurait pu forcer les défendeurs à reconstruire le mur à leurs frais et dépens.

En règle générale, le créancier d'une servitude a droit de faire tous les ouvrages nécessaires pour en user et la conserver et ces ouvrages sont à ses frais, à moins que le titre constitutif de la servitude ne dise le contraire (arts. 553 and 554 C.C).

Je considère que la servitude stipulée dans les termes suivants:—

> Erastus Woolsworth aura droit à perpétuité de bâtir, accoter contre et sur le mur en pierre et en briques du pignon nord-ouest du magasin et maison du dit sieur vendant

constitute non-seulement une servitude d'appui, mais une servitude de support.

Fournel, dans son traité du Voisinage, Vol. 2, page 444, dit que le droit de support est une obligation imposée au propriétaire voisin d'entretenir *perpétuellement* en bon état un mur.

Dans le contrat que nous avons à interpréter, les mots *à perpétuité* qui s'y trouvent sembleraient, à première vue, créer la servitude de support dont parle Fournel. Mais ces expressions rapprochées de la déclaration des parties que la mur sera mitoyen impliquent seulement qu'on a voulu incorporer les principes ordinaires de la mitoyenneté.

Ces principes se trouvent exposés dans les articles 510 et suivants du Code Civil. L'épaisseur du mur doit être de 18 pouces (art. 520 C.C.). Celui qui existait sur la propriété lors du contrat de 1832 et lors de l'incendie de 1908 était en pierre et en brique et on ne nous en a pas prouvé l'épaisseur. Mais il était assez fort pour soutenir une construction aussi élevée chez le voisin que celle qui existait alors. Quant à l'épaisseur, la demanderesse pourrait, en vertu de la loi, exiger 18 pouces, mais elle se contenterait de 16. Le mur érigé par les défendeurs depuis l'incendie n'a que onze pouces et a été fait en bois et en brique et

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est certainement trop faible pour que la demanderesse puisse y appuyer sa bâtisse. Ce mur devrait être démoli, du moins pour la partie où se trouvait l'ancien mur.

Maintenant qui devrait supporter les frais de cette démolition? C'est, suivant moi, les défendeurs.

En vertu de l'article 203 de la Coutume de Paris, qui est encore en force (art. 2613 C.C.), les défendeurs ne devaient pas réédifier ce mur sans appeler la demanderesse qui avait intérêt dans cette reconstruction. Et alors s'ils sont exposés à encourir les frais de démolition, ce n'est dû qu'à leur négligence.

Desgodets, Loi des Bâtiments, page 173, édition de 1777, dit:—

> Si celui qui a fait bâtir le premier avait fait une cloison ou pan de bois de charpenterie au lieu d'un mur joignant sans moyen à l'héritage de son voisin, si le voisin voulait bâtir contre, il pourrait obliger le premier à démolir son pan de bois et à contribuer pour la part dont il serait tenu à reconstruire un mur *mitoyen* à frais communs, depuis le fond jusqu'à la hauteur de son héberge: et au cas que la fondation fût suffisante pour porter l'élévation du nouveau mur, celui qui voudrait adosser contre serait tenu d'en faire le remboursement à l'autre de moitié de sa valeur.

Dans une cause de *Sicotte* v. *Martin*(1), il a été décidé par la Cour Supérieure, présidée par l'honorable juge Archibald, et ce jugement a été confirmé par la Cour de Revision(2) composée des honorables juges Sir Melbourne Tait, Sir Henri Taschereau et Loranger, que si un propriétaire construit un mur insuffisant il peut être condamné à le démolir à ses frais.

Cette décision est conforme au principe énoncé dans l'article 203 de la Coutume de Paris, que j'ai mentionné plus haut.

Les intimés ayant reconstruit le mur sur lequel la demanderesse appuyait sa bâtisse, la servitude d'appui ou de support stipulée en faveur de la propriété de

(1) Q.R. 19 S.C. 292. (2) Q.R. 20 S.C. 36.

cette dernière par l'acte de 1832 se continue (art. 522 C.C.). Demolombe, vol. 12, page 505, no. 973, dit:—

> Pareillement le mur, la maison ou le bâtiment quelconque auquel étaient attachés des servitudes actives ou passives, après avoir été démoli ou détruit, est relevé. Les servitudes actives et passives se continuent à l'égard du nouveau mur ou de la nouvelle maison.

Il était du devoir des défendeurs, en reconstruisant leur mur, de le faire de façon à ce que la servitude d'appui stipulée dans l'acte de 1832 ne fût pas affectée et pût s'exercer. N'ayant pas accompli cette obligation, les défendeurs doivent en subir les conséquences. Pardessus, vol. 2, no. 295.

La cause de *Delorme* v. *Cusson*(1), invoquée par la cour d'appel n'est qu'un arrêt d'espèce qui ne saurait s'appliquer dans une cause où les faits sont différents. Il s'agissait dans cette cause de *Delorme* v. *Cusson*(1), d'une erreur commune dans laquelle les parties étaient tombées pour déterminer leur ligne de séparation: et on a appliqué les règles ordinaires qui régissent la matière de l'erreur. Il n'est pas question d'erreur dans la présente cause; mais les défendeurs, contrairement aux exigences de la loi, ont rebâti leur mur sans en avertir ceux qui étaient propriétaires dans le temps du terrain voisin.

Suivant moi, on devrait reconnaître par le jugement à intervenir.

1° que le mur qui était mentionné dans l'acte de 1832 était un mur mitoyen pour les nos. 694 and 695 du cadastre de Trois-Rivières;

2° que ce mur ayant été en partie détruit par l'incendie de 1908, sa reconstruction était à la charge des propriétaires des dits lots (art. 512 C.C.);

3° que le mur qui a été construit par les défendeurs devrait être démoli par les défendeurs pour la partie où se trouvait l'ancien mur et qu'à défaut par les

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défendeurs de faire cette démolition dans les quinze jours qui suivront la signification du jugement la demanderesse est autorisée de la faire aux frais et dépens des défendeurs;

4° que le mur soit reconstruit en brique aux frais et dépens des parties en cette cause avec une épaisseur de 16 pouces pour les deux premiers étages et de 12 pouces pour le troisième étage.

L'appel devrait donc être maintenu avec dépens de cette cour et des cours inférieures.

MIGNAULT J. (dissenting).—Il se soulève dans cette cause une intéressante question de droit d'appui ou de mitoyenneté, et l'appelante, qui réclame ce droit, invoque un titre qui remonte à près d'un siècle. Pour l'explication des faits de la cause il vaut mieux commencer par ce titre.

Il s'agit de la vente d'un emplacement dans la ville de Trois-Rivières par Moses Hart à Erastus Woolsworth, passé devant J. N. Badeaux et confrère, notaires, le 21 février, 1832. L'acte décrit assez vaguement la propriété vendue comme suit:

Une part du lot de terre situé en cette dite ville, faisant le coin nord-ouest des rues du Platon et Notre-Dame et par derrière, par une ligne qui sera tirée paralellement à la dite rue Notre-Dame dans et par le milieu de la porte de cour actuellement existante sur le rue du Platon et ce depuis icelle jusqu'à la ligne de division entre le terrain sus vendu et le terrain de Pierre Deveau, tenant d'un côté au nord-est à la dite rue du Platon, et d'autre côté au sud-ouest au dit Pierre Deveau, avec une maison dessus érigée.

Et l'acte contient en outre les clauses qui suivent:—

Il est convenu et arrêté entre les parties que Erastus Woolsworth aura droit à perpétuité de bâtir, accoter contre et sur le mur en pierre et en briques du pignon nord-ouest du magasin et maison du dit sieur vendant et érigée sur l'autre partie du dit lot de terre, lequel pignon sera mitoyen entre les parties.

Et il est de plus convenu et arrêté entre les parties qu'elles laisseront à toujours un passage de huit pieds de largeur et de neuf pieds de hauteur entre la maison du dit sieur vendant et celle déjà construite ou à

construire du dit sieur acquéreur pour aller et communiquer dans leurs cours respectives, lequel passage sera mitoyen entre les parties, leurs hoirs et ayants cause à l'avenir.

Autant qu'on peut le juger par les énonciations de cet acte de vente, il y avait une maison sur le terrain vendu, mais il est impossible de dire si cette maison, telle qu'elle existait alors, appuyait sur le mur de la maison du vendeur. Et en supposant même qu'elle s'y appuyait, l'acheteur n'a acquis d'autre servitude d'appui que celle que lui confère l'acte de vente. Quant au terrain lui-même que Hart a vendu à Woolsworth, il s'étendait, d'après les indications de l'acte—mais ces indications manquent de précision—depuis la rue Notre-Dame jusqu'à

une ligne qui sera tirée paralellement à la dite rue Notre-Dame dans et par le milieu de la porte de cour actuellement existante sur la rue du Platon et ce depuis icelle rue jusqu'à la ligne de division entre le terrain sus vendu et le terrain de Pierre Deveau.

En rapprochant cette description de celle du passage mitoyen, le terrain vendu par Hart paraît s'étendre depuis une ligne tirée par le milieu du passage mitoyen jusqu'à la rue Notre-Dame. C'est du reste ce qui ressort de la déclaration de l'appelante, où elle dit que James Dickson, un de ses auteurs, contribua pour moitié au passage mitoyen.

L'acte de vente par Hart à Woolsworth créait deux droits de servitude: 1° le droit d'appui sur la maison de Hart; et 2° le passage mitoyen. Cependant la série d'actes que produit l'appelante fait voir que le droit d'appui ou de mitoyenneté réclamé par cette dernière a été mentionné dans une vente du 8 octobre 1833 par Woolsworth à James Dickson, mais que les titres subséquents n'y font aucune allusion. Il appert, par la preuve, qu'avant 1908 la Banque d'Hochelaga avait une bâtisse à trois étages sur le terrain vendu par Hart à Woolsworth et sur un autre

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terrain en arrière, et que les intimés, successeurs de Hart, avaient une maison de deux étages avec pignon, sur lequel pignon, de l'aveu des intimés, la bâtisse de la banque s'appuyait. En 1908 arriva le grand incendie de Trois-Rivières, qui détruisit les deux bâtisses; et la municipalité en profita pour exproprier une lisière sur la rue du Platon et la rue Notre-Dame d'une largeur de dix-sept pieds, ne laissant que quatorze pieds environ du site de l'ancien mur de la maison qui, avant l'incendie, appartenait aux intimés. Depuis l'incendie, ces derniers ont construit sur leur propriété, celle qui appartenait à Hart, une maison en bois, briques et crépi dont le mur du côté des appelants ne peut, à raison de sa construction en bois et briques, servir comme un mur mitoyen. Le terrain de l'appelante, celui que Hart vendit à Woolsworth, n'a pas été bâti depuis l'incendie; cependant, d'après des indications assez vagues qu'on trouve dans la preuve, l'appelante aurait essayé de poser des piliers en beton dans le passage mitoyen pour appuyer une construction qu'elle se proposait d'ériger, mais sur une poursuite intentée contre elle par les intimés il aurait été décidé par la Cour Supérieure qu'elle n'en avait pas le droit. Ce jugement toutefois n'est pas invoqué comme chose jugée et l'honorable juge de première instance a refusé de le laisser produire à moins que ce ne fût comme autorité. Il se trouve au dossier, mais les parties n'ont pas jugé à propos de l'imprimer avec les autres documents de la cause.

L'appelante par son action demande qu'il soit déclaré qu'elle a un droit perpétuel de bâtir et accoter le mur d'un magasin qu'elle entend ériger sur son terrain contre et sur le pignon nord-ouest de l'édifice des intimés à partir d'une hauteur de neuf pieds jusqu'à la sommité du toit de cet édifice; qu'il soit

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déclaré que ce pignon est mitoyen entre les parties; que, dans le délai qui sera fixé, les intimés soient condamnés à démolir à leurs frais le mur nord-ouest de leur édifice et à le remplacer à leurs frais jusqu'à la hauteur de neuf pieds par un autre d'une force et épaisseur suffisantes pour recevoir le mur de pignon de l'appelante, et qu'à partir de neuf pieds jusqu'à la sommité du toit de l'édifice des intimés, le mur soit remplacé à frais communs par un mur d'une force et épaisseur suffisantes pour assurer à l'appelante l'exercice de sa servitude de pignon; enfin qu'à défaut par les intimés d'exécuter le jugement à être rendu contre eux, l'appelante soit autorisée à le faire aux risques, frais et péril des intimés.

Cette action a été contestée par les intimés, qu ont réussi dans les deux cours, et l'appelante nous demande d'infirmer les jugements rendus contre elle

En première instance, l'honorable juge Drouin s'est basé sur le fait que les actes subséquents à la vente par Woolsworth à Dickson (8 octobre 1833) ne mentionnent nullement les droits de servitude et mitoyenneté réclamés par l'appelante et qu'aucune inscription de ces droits n'a été enregistrée sur la propriété des intimés. Il a exprimé l'opinion qu'il s'agit ici d'une servitude constituée par destination du père de famille, laquelle servitude n'est pas désignée à l'acte comme l'exige l'article 551 du code civil. Le savant juge n'a trouvé dans la preuve rien qui indique d'une manière certaine que l'édifice qui existait avant l'incendie sur la propriété de l'appelante appuyait sur celui érigé alors sur le terrain des intimés.

Le cour d'appel (Lavergne, Cross, Carroll et Pelletier, JJ.)(1), a également vu dans la servitude

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dont il s'agit une servitude créée par destination du père de famille, mais elle était d'opinion que les termes de l'acte sont trop vagues pour la constituer. Se basant cependant sur l'aveu des intimés dans leur plaidoyer qu'avant l'incendie l'édifice des auteurs de l'appelante appuyait sur l'édifice des intimés, conformément au droit de servitude dont il est question en cette cause, elle arriva à la conclusion que les parties avaient suppléé à ce qui manquait dans l'acte constitutif pour créer la servitude par destination du père de famille. Toutefois la cour d'appel, sous l'autorité de la décision de cette cour dans la cause de *Delorme* v. *Cusson*(1), a renvoyé l'action de l'appelante pour le motif que celle-ci avait laissé les intimés reconstruire leur maison après l'incendie, sans prétendre qu'elle avait le droit de s'y appuyer, et que maintenant elle ne devrait pas être écoutée à en demander la démolition.

Le juge Cross n'a pas partagé cette opinion. Il était d'avis de permettre à l'appelante de démolir et reconstruire, à ses frais, la partie du mur des intimés qui se trouve sur le site de l'ancien mur.

Malgré l'opinion contraire de la cour supérieure et de la cour d'appel, je ne trouve rien dans l'espèce qui ressemble à la servitude par destination du père de famille. Cette destination consiste en la disposition ou arrangement que fait le propriétaire de deux fonds ou même d'un seul fonds, au moyen de quoi l'un de ces fonds ou une partie d'un fonds est destiné au service de l'autre. A certaines conditions énumérées par l'article 551 C.C., cette destination vaut titre. Ici rien ne fait voir qu'il existait, lors de la vente de 1832, la disposition requise pour la destination du père de famille. Du reste, il y a un titre exprès créant une servitude conventionnelle, et il serait bien oisif de se demander si,

(1) 28 Can. S.C.R. 66.

en l'absence d'un tel titre, on aurait pu prétendre qu'il y avait destination du père de famille, dont le seul but est de suppléer au titre qu'exige la loi.

Tout ce qu'il y a ici donc, c'est la création d'une servitude ordinaire d'appui et de passage. Le passage mitoyen n'est pas en question dans cette cause et il ne s'agit que du droit d'appui, créé conventionnellement, et qu'on doit soigneusement distinguer de la servitude légale de mitoyenneté. Cette dernière espèce de servitude existe sans convention et en vertu de la loi seule, et elle suppose nécessairement que les deux terrains sont contigus et que le mur a été construit sur la ligne de séparation entre ces terrains. Si, comme les titres l'indiquent, les terrains des parties sont séparés par le passage mitoyen dont elles paraissent avoir fourni chacune la moitié, il n'existe aucun droit de mitoyenneté, en vertu de la loi, sur un mur qui se trouverait construit entièrement sur le terrain des intimés, mais en bordure du passage mitoyen qui sépare les deux immeubles.

Cependant le droit d'appui sur la maison de Hart a pu très bien être accordé conventionnellement par ce dernier, avec le droit de bâtir au-dessus du passage mitoyen, et telle a été à mon avis la convention des parties. Ce droit d'appui est une véritable servitude conventionnelle. Il faut toutefois avoir égard aux termes par lesquels cette servitude conventionnelle a été créée. L'acte déclare que

> Erastus Woolsworth aura droit à perpétuité de bâtir, accoter contre et sur le mur en pierre et en briques du pignon nord-ouest du magasin et maison du dit sieur vendant et érigée sur l'autre partie du dit lot de terre, lequel pignon sera mitoyen entre les parties.

Woolsworth a acquis le droit à perpétuité de bâtir et accoter sur le mur du *pignon* du magasin et maison de Hart, et c'est ce *pignon* qu'on déclare mitoyen entre les parties. Or le mot *pignon* est défini comme la

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partie supérieure d'un mur qui se termine en pointe et dont le sommet porte le bout du faitage d'un comble à deux égouts. (Nouveau Larousse, vo. Pignon.)

On objecte cependant que, d'après le sens populaire du mot "pignon" dans la province de Québec, ce mot s'entend de tout le mur latéral d'un édifice, et non pas seulement de la partie supérieure de ce mur. En supposant qu'il en serait ainsi, et la preuve est silencieuse à cet égard, je ne puis arriver à la conclusion que les parties aient envisagé, comme le mur de pignon qui était sujet à la servitude et était déclaré mitoyen, autre chose que la portion supérieure du mur latéral de Hart à partir de neuf pieds du sol. Toute la déclaration de l'appelante le démontre. Elle veut que les intimés reconstruisent à leurs frais la partie de ce mur depuis les fondations jusqu'à la hauteur de neuf pieds du sol, et qu'à partir de cette hauteur le mur de pignon soit construit à frais communs, alors que si tout le mur latéral était mitoyen toute cette reconstruction serait à frais communs. Je cite les paragraphes 47 et 48 de sa déclaration:

> 47. Qu'elle (l'appelante) est encore en droit d'exiger d'eux qu'ils remplacent à leurs frais et jusqu'à la hauteur de neuf pieds le dit mur par un autre de force et d'épaisseur suffisante *pour recevoir le mur de pignon.*
>
> 48. Qu'à partir de neuf pieds jusqu'à la sommité de leur édifice, les défendeurs construisent à frais communs avec la demanderesse *un mur de pignon* qui assure à la dite demanderesse l'exercice de sa dite servitude de pignon telle que décrite au paragraphe 5 de la présente déclaration.

(Ce paragraphe 5 rapporte les termes mêmes de l'acte de vente entre Hart et Woolsworth.)

Donc ce que l'appelante entend par "mur de pignon", objet de la servitude et déclaré mitoyen par l'acte de vente de Hart à Woolsworth, c'est la portion supérieure du mur latéral à partir d'une hauteur de neuf pieds du sol et non pas tout ce mur latéral.

Il ne peut, il me semble, rester l'ombre d'un doute quant à l'interprétation plutôt restrictive qu'extensive que l'appelante donne au mot "pignon" quand on aura lu ce qu'elle dit elle-même dans son factum que je cite textuellement:—

> The contract of 1832 declared *that Woolsworth's mitoyenneté in the respondents' northwest wall only began at the height of 9 feet* because it was set out in the convention entered into between the parties that there should always exist between their buildings a mitoyen passage 8 feet in width and 9 feet in height. *The mitoyenneté only beginning at a height of 9 feet it follows that up to that height the wall is not mitoyen* and should, as in the case of all non-mitoyen walls, be built at the sole expense of the party to whom it belongs.

Je dois donc refuser pour ma part d'écarter le sens que les lexicographes et l'appelante elle-même donnent au mot "pignon" pour un sens soi-disant populaire et ordinaire, et j'entends par le pignon, qui était sujet au droit d'appui et mitoyen entre les parties, la portion supérieure du mur latéral de Hart à partir d'une hauteur de neuf pieds du sol. En décider autrement serait entièrement refaire la demande de l'appelante.

Il est par conséquent bien clair que le droit conventionnel de mitoyenneté légale dont il s'agit se restreint au mur de pignon de Hart commençant à une hauteur de neuf pieds du sol. Nous sommes donc loin des conditions de la mitoyenneté qui implique la co-propriété du mur depuis les fondations jusqu'à l'héberge (art. 510 C.C.), (c'est-à-dire jusqu'à la ligne de la hauteur de l'édifice le moins élevé, lorsque les deux édifices sont de hauteur inégale), et aussi la copropriété du sol sur lequel le mur est assis. Ici il y a copropriété et mitoyenneté du pignon seulement, et non du mur entier ou de ses assises, et cela à partir d'une hauteur de neuf pieds du sol seulement.

Celà étant, j'arrive à la conclusion que le droit accordé à Woolsworth, bien que ce droit soit qualifié de perpétuel, était le droit de s'appuyer sur le pignon

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d'une maison désignée comme actuellement existante lors de la passation de l'acte de vente, et non pas, comme on aurait pu le dire, le droit de s'appuyer sur tout mur ou édifice qui pourrait être construit sur le terrain de Hart, et le pignon seul à partir de neuf pieds du sol était mitoyen entre les parties. Ce droit de servitude, qui avait pour objet ce pignon, ne pouvait s'exercer que tant que le pignon subsistait lui-même. Si ce pignon, objet de ce droit de servitude, venait à périr par cas fortuit, le droit de servitude cessait (art. 559 C.C.), car tout droit, perpétuel ou non, cesse lorsque son objet n'existe plus (art. 1200 C.C.).

Je ne perds pas de vue la disposition de l'article 522 C.C., mais cet article laisse encore à déterminer si les parties dans l'espèce ont réellement voulu créer un droit de servitude qui devait subsister plus longtemps que l'objet sur lequel ce droit devait s'exercer, et je ne crois pas qu'elles aient eu cette intention.

Or, le mur de pignon et toute la maison de Hart, ainsi que la bâtisse qui s'y appuyait, ont été détruits dans l'incendie de 1908, ce qui évidemment est un cas fortuit. Le droit accordé à Woolsworth se trouvant dès lors sans objet a cessé de pouvoir s'exercer, et les ayants cause de Hart n'étaient pas obligés de reconstruire leur maison, car, en matière de servitude, l'obligation du fonds servant est passive, ce qu'on exprimait autrefois par la maxime: *servitutum non ea natura est ut quis aliquid faciat sed ut patiatur et non faciat.*

Il est vrai que les intimés ont bâti une maison dont le mur latéral se trouve en partie seulement sur l'emplacement de l'ancien mur, mais on ne peut dire avec l'article 560 C.C. que

> les choses sont rétablies de manière qu'on puisse en user,

car l'appelante allègue que le mur de la nouvelle maison

ne peut servir de mur mitoyen. Et pour cette même raison elle veut forcer les intimés à reconstruire à leurs frais le mur de leur maison jusqu'à la hauteur de neuf pieds du sol, de manière qu'il puisse supporter le poids de la construction que l'appelante veut ériger. Si, après l'incendie, l'appelante ne pouvait forcer les intimés à reconstruire leur mur, je crois qu'elle ne peut les obliger à démolir et à refaire le mur qu'ils ont bâti, pour la raison que ce mur ne suffirait pas comme mur d'appui pour la construction de l'appelante.

L'appelante donc se trouve dans cette situation que le droit de mitoyenneté qu'elle invoque ne peut plus s'exercer, et elle n'est pas dans les conditions de la mitoyenneté légale, car son terrain n'est pas contigu au site de l'ancien mur. Son action, avec les conclusions qu'elle renferme, manque absolument, à mon avis, de base juridique.

Pour ces motifs—et sans décider si le défaut de mention dans les actes subséquents du droit d'appui en question et le défaut d'enregistrement de la servitude ont rendu cette servitude inopposable aux intimées—je suis d'avis de renvoyer l'appel de l'appelante avec dépens.

Je n'exprime aucune opinion quant au motif sur lequel la cour d'appel se base en s'appuyant sur la décision de cette cour dans la cause de *Delorme* v. *Cusson*(1). Cette décision ne me paraît qu'un arrêt d'espèce que l'on aurait tort de vouloir ériger en arrêt de principe.

Appeal allowed with costs.

Solicitor for the appellant: *Fortunat Lord.*
Solicitors for the respondents: *Duplessis & Langlois.*

(1) 28 Can. S.C.R. 66.

1919
Aug. 4.
Aug. 19.

JAMES J. RILEY (PLAINTIFF).....APPELLANT;

AND

CURTIS'S AND HARVEY (OF CANADA) LIMITED (IN LIQUIDATION) AND J. LEONARD APEDAILE (DEFENDANTS).....RESPONDENTS.

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

Appeal—Leave to appeal—"Winding-up Act", R.S.C. 1906, c. 144, s. 106.

Leave to appeal to the Supreme Court of Canada from a judgment in proceedings under the "Winding-up Act" will not be granted, though the amount in controversy exceeds $2,000, if no important principle of law nor the construction of a public Act nor any question of public interest is involved.

MOTION for leave to appeal from a decision of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of MacLennan J. and dismissing a claim made by the appellant for $50,000.

The facts are fully stated in the judgment of Mr. Justice Mignault on the application for leave.

Chauvin K.C. for the motion.
Elder contra.

MIGNAULT J.—This is a motion made before me by the appellant on August 6th, 1919, for leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench (appeal side) of the Province of Quebec, of the 26th June, 1919, which unanimously affirmed the judgment of the Superior Court (MacLennan J.) of the 11th February, 1919, dismissing a claim made by the appellant against the respondents for $50,000.00.

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*PRESENT:—Mr. Justice Mignault in Chambers.

The litigation arose out of an agreement of the 13th March, 1917, between the appellant and Curtis's & Harvey (of Canada), Limited, whereby the latter, for the consideration therein stated, promised to pay the appellant the sum of $250,000,00, payable as follows:—$25,000.00 in ten days, $75,000.00 before the end of May, 1917, and $150,000.00 before the 15th July, 1917, with option to the company, in the event of its obtaining any new contract involving deliveries after the completion of existing contracts, that it might pay the last instalment of $150,000.00 in three amounts of $50,000.00 on the last days of July, August and September, 1917, with interest at 6%.

By clause 7 of the agreement, it was provided that until full payment of the sum of $250,000.00, the company would not deal with, dispose of or charge its assets, save in the ordinary course of its business operations, under a penalty of $50,000.00 payable to the appellant.

The company paid the two first instalments, and the condition provided for having happened, it made option to pay the balance of $150,000 in three instalments, and it paid the first of these instalments, $50,000.00, which became due on the 31st July, 1917. On the 18th August, 1917, practically the whole of the company's plant and materials at Dragon were destroyed by fire and explosions which prevented the continuance of the company's manufacturing operations, and it was decided that it was inadvisable to rebuild the plant.

The company had then an unfinished contract with the United States Government, entered into in July, 1917, for the manufacture of 10,800,000 pounds of refined trinitro-toluol, which contract was cancelled after the fire, and the United States Government

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made a new contract with Canadian Explosives Limited out of which a substantial percentage of profit was to be paid, and was paid, to the company.

A winding-up order was made against the company on the 5th October, 1917, on the petition of the secretary of the company in his capacity as shareholder, but at the request of the company which acquiesced in the winding-up order.

The appellant filed his claim with the liquidator for the balance of $100,000 then due to him, and also claimed the penalty of $50,000.00 on the ground that the company had violated clause 7 of the agreement. This latter claim was contested by the liquidator whose contestation was maintained by the Superior Court and by the Court of King's Bench.

It is stated in the reasons for judgment of Mr. Justice Martin, in the latter court, that the liquidator has since paid the appellant $75,000.00 and that there remains only due $25,000.00 on the $250,000.00 payable under the agreement.

With regard to the penalty of $50,000.00, both courts have held that the appellant cannot claim it under clause 7 of the agreement, the Superior Court because the company had not dealt with its assets in the manner provided against, and the Court of King's Bench mainly because by the happening of the fire of the 18th August, 1917, the condition of clause 7 no longer applied and the company was entitled to deal with its remaining assets in the manner in which it had done in the interest of the appellant and its other creditors.

Under these circumstances the appellant has applied to me for leave to appeal to this court from the judgment of the courts below. This appeal cannot be taken, under section 106 of the "Winding-Up Act"

(R.S.C. ch. 144), unless the amount involved exceeds $2,000.00, and unless leave be obtained from a judge of the Supreme Court of Canada.

Here the amount involved is sufficient to give jurisdiction to this court. The sufficiency of the amount is not however conclusive of the right of the appellant to appeal to this court. He must obtain leave, and the discretion to grant or refuse this leave must be exercised judicially, that is to say, for sufficient reason in the judgment of the judge to whom the application for leave to appeal is made.

The question as to the sufficiency of the reasons for granting leave to appeal is not now a new one, and certain rules have been laid down which I feel I should follow.

Thus in *Lake Erie and Detroit River Ry. Co.* v. *Marsh*(1), where special leave to appeal was applied for under sec. 48, sub-section e, of the "Supreme Court Act"—and I conceive that the same rule should be followed in cases arising under section 106 of the "Winding-Up Act"—Mr. Justice Nesbitt stated that:

> Where the case involves matter of public interest, or some important question of law, or the application of Imperial or domestic statutes, or a conflict of Provincial or Dominion authority, or questions of law applicable to the whole Dominion, leave may well be granted.

While the learned judge disclaimed the intention of laying down any rule which would not be subject to future qualification, I think his statement of the reasons why the discretion to grant leave should be exercised furnishes a convenient test for the guidance of the court or of its judges in a matter like this. And I would also think that where the only importance of a case is on account of the amount at issue, and where, however important the matter may be for the parties

(1) 35 Can. S.C.R. 197.

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to the litigation, the only question to be determined is the construction and effect of a private contract, leave to appeal to this court from the unanimous judgment of two courts should not be granted.

Moreover, *In re The Ontario Sugar Company (McKinnon's Case)*(1), Mr. Justice Anglin refused leave to appeal, under section 106 of the "Winding-Up Act," on the ground that the proposed appeal raised no question of public importance, and that the affirmance or reversal by this court of the judgment of the Ontario Court of Appeal would not settle any important question of law or dispose of any matter of public interest.

This is emphatically the case here. The proposed appeal would deal exclusively with the question whether there has been a breach on the part of the company of the obligation it assumed under clause 7 of its agreement with the appellant, entitling the latter to claim the penalty of $50,000.00, and the affirmance or reversal of the judgment of the Quebec Court of King's Bench would not settle any important question of law or dispose of any matter of public interest.

I can therefore see no reason why I should exercise the discretion given me by section 106 of the "Winding-Up Act" and grant leave to appeal from the judgment of the Court of King's Bench. The motion of the appellant is dismissed with costs.

Motion dismissed with costs.

(1) 44 Can. S.C.R. 659.

THE ROYAL BANK OF CANADA (DEFENDANT) ..... APPELLANT;

AND

J. L SKENE AND J. S. CHRISTIE (PLAINTIFFS) ..... RESPONDENTS.

1919
*Oct. 14, 15.
*Oct. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Judgment—Setting aside—Common error of parties.

In a former action between the appellant and the respondents, the trial judge pronounced an oral judgment finding in favour of the appellant upon certain contested items and in favour of the respondents upon certain other contested items and fixed the rate per foot upon which the sum for which judgment was to be finally given in favour of the appellant was to be calculated; and a reference to the registrar was directed to work out this judgment and express the result in figures. The solicitors then agreed to substitute a report by architects for this reference. It had been expressly stated that it was the respondent's intention to appeal from the judgment. The order, drawn up by agreement and initialled by the solicitors for both parties, apparently deprived the respondents of that right. Subsequently, the respondents appealed but the appeal was dismissed on the ground that it was a judgment by consent. The respondents then took a direct action to set aside the judgment.

Held, that there had been common error in the expression of the intentions of the parties and the judgment was properly set aside. *Wilding* v. *Sanderson*, [1897] 2 Ch. 534, followed.

Per Davies C.J. and Duff, Brodeur and Mignault JJ.—The appellant, having succeeded in his contention that the judgment was drawn in a form which made it unappealable, cannot now be allowed to say, as against the respondents, that this was not in law the construction of the order.

Judgment of the Court of Appeal ([1919] 3 W.W.R. 740), affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1919] 3 W.W.R. 740.

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the trial judge, Morrison J., (1), and maintaining the respondents', plaintiffs', action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. and *Sir Charles Tupper K.C.* for the appellant.

W. N. Tilley K.C. for the respondent was not called upon.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Duff.

IDINGTON J.—The judgment in the original action by appellant against respondents, on the main issue therein, clearly was pronounced by the learned trial judge against the will of the respondents.

And their avowed intention to appeal therefrom appears in the answer by their solicitors, to the suggestion of appellant's solicitors, that they should mutually try to avoid the expense of a reference to determine the amount of the allowances to be made the respondents, within the terms of the opinion judgment given by the learned trial judge. That renders it difficult for me to understand how appellant could in good faith take the objection made to hearing an appeal from the formal judgment issued as the result of the adjustments reached to avert a reference.

The appellant's solicitors expressly recognized in their reply to said answer the right and intention to appeal.

The adjustment of the matters to be the subject of a reference was all that either party contemplated giving assent to.

(1) [1919] 1 W.W.R. 390.

The initialling of the consents was evidently only intended to shew an adjustment had been made of the said matters and need for a reference.

As I read the memo thus initialled it was all done on the "basis of the judgment" pronounced by the learned trial judge. And as I understand the facts appellant's counsel unfairly refused to let the Court of Appeal get seized of these facts when the motion for appeal was heard, and thus have the ambiguous document illuminated by what the letters clearly shew the parties intended.

Hence there was a failure of that court to recognize the right of appeal and I imagine a failure of justice.

As the learned trial judge herein well expressed his view of the situation thus created:—

> It would be a reproach upon our juridical system if it were impossible to put the parties to this action in a position whereby the judgment of the trial judge could be worked out ultimately according to its true intent and meaning.

I, therefore, entirely agree with the judgment appealed from.

It may be that if called upon to consider the judgment in appeal against said judgment I should not agree with the result arrived at.

The mere question of practice or procedure relative to the proper method of rectifying what seems to be a grave wrong, is one that according to the settled jurisprudence of this court we must not interfere with unless a result has been reached that violates natural justice.

The bringing of an action instead of proceeding by way of motion may have resulted in greater expense to be borne by appellant.

Of this the appellant has no right to complain for its course of conduct in refusing to accede to the

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request for a stay of proceedings, when the appeal was being heard, in order to enable the respondents to move and rectify the form of judgment which raised the doubt and difficulty, is the cause of resorting to a more costly mode of procedure.

I think this appeal should be dismissed with costs.

DUFF J.—There is no dispute as to the agreement between Mr. McMullen and Mr. Bull respecting the judgment which was to be entered in the action. The trial judge at the conclusion of the trial had pronounced an oral judgment in which he found in favour of the bank upon certain contested items and in favour of Skene and Christie upon certain other contested items for which credit was claimed in the defence and fixed the rate per foot upon which the sum for which judgment was to be finally given in favour of the bank was to be calculated; and a reference to the registrar was directed to work out this judgment and express the result in figures. After some correspondence the solicitors agreed that the two architects who had been examined as witnesses for the respective parties before the trial judge should be requested to make the necessary measurements and calculations and to report to the solicitors, it being understood that, if they reached an agreement, the result of the investigation in figures should be adopted and that they should be incorporated in the judgment as if they had been arrived at by the learned trial judge himself. It was not only understood but expressly stated that it was Mr. McMullen's intention to appeal from the adjudication of the learned trial judge, that is to say, from the principle of the judgment. The findings, of course, in so far as they rested upon the report of the architects or upon the calculations of the

solicitors themselves were the necessary result of the adjudications of the trial judge and must stand or fall with these adjudications.

I cannot accept the contention that on these points there was not a concluded agreement. The correspondence read together with a document which finally became the judgment but which was not a judgment until it had been approved of by the trial judge affords a complete demonstration not only of the general terms but of the particulars of the agreement between the solicitors. Moreover, there is no dispute upon it. Mr. Bull's evidence is explicit and the effect of the documents and the oral evidence is that both Mr. McMullen and Mr. Bull believed that both of them were giving their assent to certain findings which, taken with the adjudications of the trial judge, should together constitute a judgment; a judgment which, save as regards these agreed findings, was the judgment of the trial judge based upon his own decision. The truth is that as regards these consent findings the solicitors intended that they should be in precisely the same position as findings upon admissions made in the course of the trial.

The trial judge, in giving judgment, I repeat, was acting in the ordinary course of jurisdiction, not at all *extra muros*; indeed there was nothing irregular in what was done and a judgment beyond all question could have been drawn in a form which would have excluded any possible suggestion that the judgment itself was a consent judgment or that on any ground the adjudications of the trial judge were not to be open to the appeal to which everybody intended that they should be subject.

I express no opinion upon the point whether or not the form of the judgment presented is strictly

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an obstacle in the way of an appeal. The counsel for the bank took the objection that the judgment was drawn in a form which made it unappealable. I am not sure that I quite understand the precise nature of the objection but I gather from the evidence of Mr. McMullen that the view taken by the majority of the Court of Appeal on the occasion was that one paragraph in the judgment shewed that the adjudication was an adjudication by consent, not an adjudication resting upon judicial decision; and that consequently the parties were, as no doubt they would be if such were the case, precluded from impeaching the adjudication by way of appeal. I repeat, that I express no opinion as to this view, but counsel for the bank having contended for this construction and having succeeded in his contention and having got the appeal dismissed as a result of his successful contention, the bank cannot now be allowed to say as against the respondents, that this was not in law the construction of the order. I refer to a well known passage in a judgment of Bowen L.J. in *Gandy* v. *Gandy*(1):—

> I am not certain that this is not *res judicata* within the view which has been taken of *res judicata*, when the same questions arise again between the same parties litigating similar subject matter. But whether it is *res judicata* or not, it seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn around and win the new suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the court allowed that.

Admittedly this construction of the judgment is one which defeats the intentions of the solicitors whose agreement the judgment was intended to give effect to. There is, as Chitty L.J. said (2), common error in the expression of the intentions of the parties and therefore the instrument must be rectified or set

(1) 30 Ch. D. 57, at p. 82. (2) [1897] 2 Ch. 534, at p. 551.

aside. I think *Wilding* v. *Sanderson*(1), governs this case.

It is, I think, nothing to the purpose to say that this is strictly not a judgment by consent. The paragraph in the judgment which gave rise to the difficulty was a paragraph which was intended to express the agreement of the parties and indeed, the judgment may, for the purposes of this appeal, be read as two judgments; (*Belcher* v. *McDonald* (2)); the judgment formally expressing what was orally pronounced by the trial judge and the judgment by consent expressing the result of the findings and the calculations which the parties had agreed to. It was in attempting to express the result of these findings and calculations, in other words, in attempting to give effect to that part of the judgment which rested on consent, that the solicitors unfortunately used language which was afterwards thought to give a character to the whole judgment which nobody ever intended it should bear.

Nor should effect be given to the suggestion that the proper course for the present respondent was to apply for an amendment of the judgment by the trial judge. For myself, I entertain no doubt that the trial judge would have been quite within the ambit of his competency in making the amendment, because the trial judge never intended to approve a judgment which nobody ever intended that he should approve, a judgment which should make him say that his adjudications rested upon the consent of the parties and not upon his own decision except in respect of the calculations mentioned. While that is so, it is quite clear that counsel for the bank took this position before the Court of Appeal and succeeded in maintaining it—that the trial judge was *functus officio;*

(1) [1897] 2 Ch. 534. (2) [1904] A.C. 429.

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and on that ground induced the Court of Appeal to reject the application made by appellant's counsel for an adjournment. It is not now open to the appellant bank in view of this course of conduct to argue that the present action is unnecessary.

The appeal should be dismissed with costs.

ANGLIN J.:—As between the parties to this action I think it must be taken to be *res judicata* that the judgment in the former action was non-appealable. If so, on the merits this case is clearly governed by *Wilding* v. *Sanderson*(1). On matters of procedure, such as the appellant complains of, it is the usual practice of this court not to disturb the judgments of the provincial courts.

The appeal fails and should be dismissed with costs.

BRODEUR J.:—I concur in the opinion of Mr. Justice Duff.

MIGNAULT J.:—I concur with Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Tupper & Bull.*
Solicitor for the respondents: *J. E. McMullen.*

(1) [1897] 2 Ch. 534.

NATIONAL MORTGAGE CO. (PLAINTIFF)..... APPELLANT;

1917
*Feb. 14, 15.
*May 1.

AND

HENRY S. ROLSTON (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Lien—Unregistered purchaser—Priorities—Cancellation of application to registrar—"Land Registry Act," R.S.B.C., 1911, c. 129, ss. 22, 35; and ss. 104 and 108, as amended by (B.C.) 1912, c. 28—"Mechanics' Lien Act," R.S.B.C., 1911, c. 154, ss. 9, 19.

P., a beneficial but unregistered owner of land, agreed to sell the land to B. who never registered his agreement, J. being then the registered owner. P. shortly afterwards let contracts to four contractors for the clearing of the land. On May 3, 1912, P. made an application for a certificate of indefeasible title which was granted. A report, dated May 23, 1913, made upon a reference as to title ordered in a mechanics' lien action taken by the labourers who had cleared the land certified that "there are no charges of any kind whatsoever against the title" except the liens. On May 18, 1912, P. conveyed the land to N.M. subject to the agreement with A. and also assigned to him this agreement. On May 20, 1912, N.M. applied to register the assignment as a charge, but, not until October 31, 1913, did N.M. make any application to be registered under the grant. On January 6, 1914, the sheriff sold all the right title and interest of P. to R. The Court of Appeal held that this sale was a sale of the fee in the lands charged only by the liens.

Per Fitzpatrick C.J.—When N.M. acquired title from P. the land was already impressed with the mechanics' liens.

Per Duff J.—Where an application to the registrar has been cancelled under the provisions of sec. 108 of the "Land Registry Act," the application must be deemed, for the purposes of the "Land Registry Act" and particularly for the purpose of applying sec. 28 of the Act of 1912, to have been void *ab initio;* and it follows that when the lien affidavits were registered there was, in contemplation of law, no application for registration of the N.M. interest "pending."

Per Duff J.—N.M. was not in the position of a mortgagee but of a person "claiming under" P. and a person "whose rights are acquired after the work of service, in respect of which the lien is claimed, is commenced."

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

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NATIONAL MORTGAGE CO. v. ROLSTON.

Per Duff J.—N.M. lost its status with respect to the registered title by its acquiescence in the registrar's notice of cancellation, given on July 10, 1913.

Per Anglin J.—N.M. had "no estate or interest either at law or in equity" in the land in question which made it a proper or necessary party to the mechanics' lien action under the judgment in which R. derives his title; nor had it any estate or interest of which the plaintiffs in that action or R. should be deemed to have had "any notice, express, implied or constructive." "Land Registry Act," secs. 104, 108.

Judgment of the Court of Appeal, 32 D.L.R. 81; [1917] 1 W.W.R. 494, affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Hunter C.J., and dismissing the appellant's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Eug. Lafleur K.C. for the appellant.

W. C. Brown for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs. It seems to be abundantly proved that when the appellant company acquired title from Passage, the common auteur, the land was already impressed with the mechanics' liens which are the foundation of the respondent's title. Passage had a certificate of indefeasible title which, under the "Land Registry Act," dates from May 3rd, 1912. He conveyed the land to the plaintiffs subject to the Patterson agreement on the 18th May, 1912, and at that date the work in respect of which the mechanics' liens were created was commenced. The contracts under which the work was done are admitted, the land is identified, and the date at which work started is also proved.

(1) 32 D.L.R. 81; (1917), 1 W.W.R. 494.

DAVIES J.—I think this appeal should be dismissed with costs.

IDINGTON J.—I think the appeal herein should be dismissed with costs.

DUFF J.—On two distinct grounds I think this appeal must be dismissed. First: The services in respect of which the lien-holders acquired their liens were performed in execution of the contract between Passage and certain contractors, dated the 30th of November. The work was begun within the first week in May and whether the appellant company did or did not become, by virtue of the transfers under which it claims, entitled to registration as owner in fee or as mortgagee, admittedly the instruments were not executed until the 18th of May and no advance was made by the appellant company before that date. By section 9 a mortgagee is entitled to the benefit of that section or to the status of a mortgagee under it only in respect of the principal sum actually advanced to the borrower at the time the works or improvements in respect of which the lien is claimed, are commenced; the appellant company is therefore not in the position of a mortgagee but of a person "claiming under" Passage and a person "whose rights are acquired after the work or service in respect of which the lien is claimed, is commenced," that is to say, of an "owner."

This is not a case therefore in which any difficulty could arise as to compliance with the provisions of section 19 (a) and the interest of the appellant company was therefore bound by the filing and registration of the affidavit required by that section.

Second: The filing and the registering of the lien affidavits on the 15th Oct., 1912, established the

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priority of the lien-holders over the interest the appellant company then had or any right the appellant company then had in relation to the land or the title to the land. I am not at this moment satisfied that the appellant company would not acquire in virtue of the transfers of the 18th of May, 1912, the right to register a charge. It may well, I think, be doubted whether sec. 35 of the "Land Registry Act" has any application to such a case. There is authority for the proposition that a vendor under a contract for the sale of land is not entitled to transfer his title in such a way as to put it out of his power to carry out his contract with the vendee and that the vendee may obtain an injunction to restrain him from doing so. *Echliff* v. *Baldwin*(1); *Spiller* v. *Spiller* (2), and if that be the correct view of the vendor's position it is perfectly clear that the registrar having notice of the agreement for sale with Patterson could not properly register the appellant company as owner in absolute fee subject to a charge in favour of Patterson; while on the other hand there could be no doubt of the right of the vendor to charge the interest in the land held by him as security for the payment of the purchase money subject to the rights of the purchaser. However that may be, it is very clear to my mind that the appellant company lost its status with respect to the registered title (which I am inclined to think it might have maintained) by its acquiescence in the registrar's notice of cancellation of the 10th of July, 1913. My reason for thinking so is this. The lien-holders by registration under sec. 19 of the "Mechanics' Lien Act" acquired the status of incumbrancees, a status recognized by sec. 22, 1 g., of the "Land Regis-

(1) 16 Ves. 267. (2) 3 Swans. 556.

try Act" and became at least on the registration of the lien affidavits on the 25th Oct., 1912, the holders of a charge or incumbrance on "registered real estate" and therefore by force of sec. 28, ch. 15, British Columbia statutes of 1912 they were unaffected by any notice, expressed, implied or constructive of any unregistered title, interest or disposition in or relating to the property in question unless an application for the registration of such interest or disposition was then "pending." I have come to the conclusion and in this I concur with what I take to be the opinion of the Chief Justice of the Court of Appeal, that where an application to the registrar has been cancelled under the provisions of sec. 108 of the "Land Registry Act," the application must be deemed, for the purposes of the "Land Registry Act" and particularly for the purpose of applying sec. 28 of the Act of 1912, to have been void *ab initio;* and it follows, of course, that when the lien affidavits were registered there was, in contemplation of law, no application for registration of the appellant company's interest "pending." We may therefore put aside as having no bearing on the question of law raised for decision, any considerations based upon suggestions of notice by reason of the presence in the Land Registry Office of the application of the 22nd of May and the documents by which it was supported.

The effect of section 104 seems to be conclusive in point of law against the appellant company. The instruments of the 18th of May could not in the sense of that section "pass any estate or interest either at law or in equity." It is quite true that they confer a right to registration but there can be no manner of doubt, I think that this right to be registered can only take effect as against registered interests through

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the instrumentality of an application to register consummated by registration.

It follows that, if the appellant company had been made a party to the proceedings, its claim of priority must have failed; and it has therefore suffered no substantial wrong calling for the intervention of this court.

ANGLIN J.—Having regard to the provisions of sec. 104(1) and (2) and sec. 108(1) and (2) of the "Land Registry Act," R.S.B.C., 1911, ch. 127, as amended by ch. 15, sec. 28 of the statutes of 1912 and ch. 43, sec. 63, of the statutes of 1914, the appellant company, in my opinion, had "no estate or interest either at law or in equity," in the land in question which made it a proper or necessary party to the mechanics' lien action under the judgment in which the respondent derived his title. *Levy* v. *Gleason*(1); *Goddard* v. *Slingerland*(2). Nor had it any estate or interest of which the plaintiffs in that action or the present respondent should be deemed to have had "any notice express, implied or constructive."

The plaintiffs in the mechanics' lien action were "holders of a charge or incumbrance" on the registered land in question, their liens having been duly filed against it in the Land Registry Office on the 25th of October, and action thereon commenced on the 31st of October, 1912. Neither of the "title (or) interest" asserted by the appellant, nor of the "disposition" under which it claims, was "the registration * * * pending" when the mechanics' liens arose, when they were registered, when action on them was brought, when judgment therein was recovered, when sale of the land was ordered, or when it was effected and conveyance thereof was made to the respondent.

(1) 13 B.C. Rep. 357. (2) 16 B.C. Rep. 329.

(May, 1912—March, 1914.) This I take to be the effect under sec. 108(2) of the final refusal of the appellant's two applications for registration made respectively on the 22nd of May, 1912, and the 31st of October, 1913. They thereby became "cancelled and void" and questions of title must, as to "strangers," be dealt with as if they had never been made. The conveyance of March, 1914, transferred to the respondent whatever estate or interest in the lands in question any of the defendants to the mechanics' lien action had. One of them, Passage, was the registered owner of an indefeasible fee and the holder of the only estate or interest in the lands in question of which, under the circumstances of this case, the "Land Registry Act" permits the courts to take cognizance. By that transfer the respondent obtained "the right to apply to have such conveyance registered," which, by his application of the 26th of June, 1914, he asserted prior (see sub-secs. 72-3) to the only application for registration of the appellant company now extant—that made on the 13th of August, 1914. That company is, *quoad* the respondent, a "stranger," in the same position as if the instrument under which it claims had been executed on the date on which that application was made.

The authorities cited on behalf of the appellant appear to be readily distinguishable from the case at bar. It has no equity such as was recognized in *Barry* v. *Heider, et al.* (1). There was no fraud such as formed the ground of relief in *McEllister* v. *Biggs*(2); and in *Chapman* v. *Edwards*(3). The unregistered conveyance on which it founds its claim was not made prior to the 1st of July, 1905, as was that recognized

(1) 19 Commonwealth Law Rep. 197. (2) 8 App. Cas. 314.
(3) 16 B.C. Rep. 334.

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in *Howard* v. *Miller*(1). Section 104(1) applies to it and not sec. 105 (formerly sec. 75).

Moreover, although the appellant holds a transfer absolute in form, the interest which it asserts is only that of a chargee or mortgagee. The advance in respect of which that interest is claimed was made on the 18th of May, 1912—the date of the transfer. The work for which the mechanics' liens were claimed began between the 1st and the 15th of May, 1912. Although it is somewhat obscurely framed, the probable purpose of clause (a) of sec. 9 of the "Mechanics' Liens Act," R.S.B.C., 1911, ch. 154, would seem to be to postpone the claim of a mortgagee in respect of advances made subsequently to the commencement of the works to the rights of the lien-holders. If the appellant had duly applied for registration it might nevertheless as a subsequent incumbrancer have been entitled to be given an opportunity in the lien action to redeem the lien-holders. Any such right which it might otherwise have had, however, it lost through failure to make an effective application for registration until after the land had been sold to the respondent.

I would, for these reasons, dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. W. St. John.*
Solicitors for the respondent: *Ellis & Brown.*

(1) 22 D.L.R. 75; [1915] A.C. 318.

J. GLEN GRANT (DEFENDANT).....APPELLANT;

AND

LEONARD SCOTT (PLAINTIFF).....RESPONDENT.

1919
*Nov. 6.
*Nov. 10.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Promissory note—Non-indorsement by payee—Liability of indorser—"Bills of Exchange Act," R.S.C., [1906] c. 119, s. 131.

The indorser of a promissory note before it is indorsed by the payee may be liable as an indorser to the latter. *Robinson* v. *Mann*, 31 Can. S.C.R. 484, followed.

Judgment of the Supreme Court of Nova Scotia (52 N.S. Rep. 360), affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), affirming the judgment for the plaintiff at the trial.

The defendant, to secure a debt due by one Holmes to the plaintiff, wrote his name across the back of a promissory note made by Holmes in favour of the plaintiff who afterwards wrote his name under that of defendant. The note was protested and an action brought against defendant as an indorser. The courts below held him liable.

Finlay Macdonald K.C. for the appellant. The plaintiff is not a holder in due course as the same is defined by section 56 of the "Bills of Exchange Act." *Steele* v. *McKinlay*(2); *Jenkins & Sons* v. *Coomber*(3); *Shaw* v. *Holland*(4); *Robertson* v. *Davis*(5).

In *Robinson* v. *Mann* (6), the respondent's liability on the note was not the issue.

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*PRESENT:—Sir Louis Davis C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 52 N.S. Rep. 360.
(2) 5 App. Cas. 754.
(3) [1898] 2 Q.B. 168.
(4) [1913] 2 K.B. 15.
(5) 27 Can. S.C.R. 571.
(6) 31 Can. S.C.R. 484.

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Neil R. McArthur for the respondent relied on *Robinson* v. *Mann* (1) and also cited *McDonough* v. *Cook* (2); *Davis* v. *Bly* (3).

THE CHIEF JUSTICE.—I am of opinion that the unanimous decision of this Court in the case of *Robinson* v. *Mann* (1), that under section 56 of the "Bills of Exchange Act," 1890, a person who indorses a promissory note not indorsed by the payee may be liable as an indorsee to the latter, is conclusive in this appeal.

I myself was a party to that judgment. It has remained now for many years unquestioned and been accepted throughout Canada as law. I see no reason for raising any doubt now upon its correctness.

The appeal should be dismissed with costs.

IDINGTON J.—It seems to me that the question raised in the appeal herein is decisively concluded by the decision in *Robinson* v. *Mann* (1), and therefore that this appeal should be dismissed with costs.

DUFF J.—This appeal should be dismissed with costs.

I concur in the unanimous judgment of the court below that it is governed by the decision of this court in *Robinson* v. *Mann* (1).

ANGLIN J.—The appellant, intending to become a surety for the maker to the payee, wrote his name across the back of a promissory note. On precisely similar facts this court in *Robinson* v. *Mann* (1), held the defendant liable as an indorser by virtue of section 56 of the "Bills of Exchange Act" of 1890—now section 131 of R.S.C. 1906, ch. 119, made applicable

(1) 31 Can. S.C.R. 484. (2) 19 Ont. L.R. 267.
(3) 164 N.Y. 527.

to promissory notes by section 186. That decision has been uniformly accepted as the law of Canada in the provincial courts and by text writers of repute. The respondent makes the following references:—

Slater v. *Laboree*(1); *McDonough* v. *Cook*(2); *Knechtel Furniture Co.* v. *Ideal House Furnishers*(3); *Johnson* v. *McRae*(4), Falconbridge on Banking (2nd ed.) 701; Maclaren on Bills and Notes (2nd ed.) 334.

I had occasion shortly after becoming a member of this court to examine with some care how far the doctrine conveniently designated *stare decisis* should be held to govern it. *Stuart* v. *Bank of Montreal* (5), at p. 536. I have had no reason to change the views there expressed. Holding them, this case is for me concluded against the appellant by *Robinson* v. *Mann*. I may add that personally I agree with the interpretation there placed on section 56 of the "Bills of Exchange Act" of 1890.

BRODEUR J.—This case is concluded by the decision of this court in *Robinson* v. *Mann* (6).

By section 131 of the "Bills of Exchange Act," it is provided that when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course and is subject to all the provisions of the Act respecting indorsers.

This section contains an important addition to the corresponding section of the Imperial Act and it would not be advisable then to follow the British decisions.

(1) 10 Ont. L.R. 648.
(2) 19 Ont. L.R. 267.
(3) 19 Man. R. 652.
(4) 16 B.C. Rep. 473.
(5) 41 Can. S.C.R. 516.
(6) 31 Can. S.C.R. 484.

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In the case of *Ayr American Plough Co.* v. *Wallace* (1), decided in 1892 on a promissory note made before the above addition, Sir Henry Strong stated that if the case were under the new law the defendant would have been held liable. This dictum was followed in the Province of Quebec where the doctrine had always existed. (Pothier, Traité du change, no. 132, art. 2311 C.C.) and also in some other provinces.

1892 *Balcolm* v. *Phinney* (2).

1894 *Watson* v. *Harvey* (3).

1895 *Fraser* v. *McLeod* (4).

1897 *Pegg* v. *Howlett* (5).

The question, as I said before, was finally settled by this court in 1901 in the case of *Robinson* v. *Mann* (6), where it was held that the Molsons Bank were holders in due course of a note made payable to their order and which the defendant had indorsed above them and that his indorsement was a form of liability which the "Bills of Exchange Act" had adopted.

I do not see any reason why this decision which has been followed should be changed.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—The point to be decided in this case is a very simple one.

The appellant signed his name across the back of a promissory note whereby one Holmes promised to pay to the respondent $500.00 twelve months after date with interest at 8% per annum as well after as before maturity. He claims to have thus signed the

(1) 21 Can. S.C.R. 256.
(2) 30 C.L.J. 240.
(3) 10 Man. R. 641.
(4) 2 Terr. L.R. 154.
(5) 28 O.R. 473.
(6) 31 Can. S.C.R. 484.

note as security for Holmes. He now contends that he is not liable as an indorser of the note.

Section 131 of the "Bills of Exchange Act" (R.S.C., ch. 119), which applies to both bills of exchange and promissory notes, states that

> No person is liable as drawer, indorser or acceptor of a bill who has not signed it as such; provided that when a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liability of an indorser to a holder in due course and is subject to all the provisions of this Act respecting indorsers.

In *Robinson* v. *Mann* (1), a similar case, it was said by this court, under the authority of section 56 of the "Bills of Exchange Act," 1890, now section 131, that a person who indorses a promissory note not indorsed by the payee may be liable as an indorser to the latter.

The fact that the payee, Scott, when he placed the note in the hands of the Royal Bank for collection, also indorsed the note, and he did so under the signature of the appellant, does not take the case out of the operation of section 131, and I cannot follow the argument of the appellant when he says that the respondent was not a holder in due course, for he clearly was one as the word is defined by section 56. *Robinson* v. *Mann*(1), is conclusive authority that the payee can hold as an indorser a person who signs the bill or note otherwise than as a drawer or acceptor.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Finlay Macdonald.*
Solicitor for the respondent: *Neil R. McArthur.*

(1) 31 Can. S.C.R. 484.

1919
*Nov. 4.
*Nov. 10.

THE CITY OF SYDNEY (DEFENDANT) ..... APPELLANT;

AND

JAMES SLANEY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Negligence—Care of streets—Duty to repair—Ice on sidewalk.

A municipality under a statutory obligation to keep a street in repair fails to discharge such obligation if ice is allowed to remain on the sidewalk in a condition dangerous to pedestrians, and is liable in damages to a person injured by reason of such condition.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), affirming, by an equal division of opinion, the judgment at the trial in favour of the plaintiff.

The plaintiff fell on a sidewalk and was injured. The trial judge found that the fall was due to the slippery condition of the sidewalk and that the municipality had neglected to keep it in repair. His judgment for the plaintiff was affirmed by an equal division of opinion in the full court.

Finlay Macdonald K.C. for the appellant. The municipality is not liable for non-feasance. *Municipality of Pictou* v. *Geldert*(2); and see *City of Vancouver* v. *McPhalen*(3).

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*PRESENT:—Sir Louis Davies, C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 46 D.L.R. 164. (2) [1893] A.C. 524.
(3) 45 Can. S.C.R. 194.

As to the duty of the city in regard to the sidewalk see *Palmer* v. *City of Toronto*(1). See also *German* v. *City of Ottawa* (2).

Rogers K.C. and *J. McG. Stewart* for the respondent. *Municipality of Pictou* v. *Geldert*(3), was decided on the ground that no express duty to repair was imposed on the muncipality by the legislature.

This case is governed by *City of Vancouver* v. *McPhalen*(4).

THE CHIEF JUSTICE.—Accepting as I do the findings of fact of the trial judge, confirmed as they are by the full court in Nova Scotia, and giving proper weight to the frank admissions of the learned counsel for the city appellant on the argument at bar, I find myself, after giving the facts and admissions much consideration, unable to hold the city not to be liable for the injuries sustained by the plaintiff.

The city's statutory duty to keep the street in repair on which the accident to the plaintiff happened was certainly not discharged by the simple giving of a notice to the "frontager" to remove the frozen slush and ice. That notice given in pursuance of its by-law was one of the means adopted by the city of having its statutory duty with respect to the streets discharged. Whether neglect on the part of the frontager after such notice to remove the dangerous snow and frozen slush would render him liable to an injured party is quite another question not now before us. But it is clear that the giving of such a notice would not in itself be a discharge of the city's statutory obligation and duty.

The injuries sustained by the plaintiff from the

(1) 38 Ont. L.R. 20; 32 D.L.R. 541.
(2) 56 Can. S.C.R. 80; 39 D.L.R. 669.
(3) [1893] A.C. 524.
(4) 45 Can. S.C.R. 194.

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The Chief Justice.

dangerous condition of the sidewalk were, therefore, in my opinion, attributable to the defendant's negligence in not causing the frozen slush to be sanded or otherwise made reasonably safe for pedestrian traffic.

In Ontario the legislature has deemed it necessary for the due protection of cities and municipalities to provide that for injuries which may be sustained by pedestrians and others by reason of ice and snow on their sidewalks they shall only be liable for "gross negligence." But there is no such provision in the legislation of Nova Scotia.

That provision or limitation upon the city's liability may account for some of the decisions in cases which at first sight may seem at variance with the conclusion I have reached as to the city's liability in this case.

The appeal must be dismissed with costs.

IDINGTON J.—The liability of the appellant rests upon section 249 of the Act incorporating it as a city, which reads as follows:—

> The City Council shall keep in repair all such streets as prior to the passing of this Act have been dedicated to and accepted by the Town of Sydney by resolution of its council, and all streets laid out under any law of the Province and no other.

There might be a doubt arise, from the peculiar wording of the limitations therein, as to whether or not this street in question fell within the definition of the streets in regard to which the duty to keep in repair was imposed; but for the clear admission in the statement of defence relative to paragraphs one, two, and three of the statement of claim.

The said third paragraph alleged that

> The streets of the City of Sydney are vested in the defendant, City of Sydney, and the said City is required to keep them in repair.

The facts found by the learned trial judge amply justify the conclusion he reached.

It is now well settled jurisprudence relative to the measure of responsibility imposed upon municipalities by legislation providing for their repair of highways that on such facts as he finds the municipality is liable.

The appeal should, therefore, be dismissed with costs.

DUFF J.—I concur in the view that section 249 of the Sydney "Corporation Act" gives a right of action to persons who suffer harm in consequence of default in performance of the duty thereby imposed on the municipality to repair certain streets. I think the contention fails that George Street is not one of those streets in respect of which this duty arises. Accepting the construction suggested by Mr. Justice Mellish and urged upon us by counsel for the municipality that the sections confer upon the city council the power of determining by resolution what streets shall be kept in repair and that the statutory duty exists only in relation to such streets—I think there was sufficient evidence to establish a *primâ facie* case that responsibility for repairing George Street had been accepted by the municipality. *City of Victoria* v. *Patterson*(1).

It has repeatedly been decided that natural accumulations of snow and ice on a highway may amount to disrepair within the meaning of statutes requiring municipalities to keep highways in repair; and counsel for the appellant did not deny that these decisions may legitimately be appealed to as a guide for the construction and application of the statute now before

(1) [1899] A.C. 615.

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Duff J.

us. There can, I think, be little doubt that the accumulation of ice and snow which occasioned the respondent's injury constituted a serious danger to pedestrians, though proceeding with ordinary care, a condition which amounts to disrepair within the contemplation of the statute.

It is desirable, I think, to add a word of comment upon an argument based upon the supposed necessity of notice to the municipality of the dangerous condition of the street as one of the conditions of liability. The statutory duty is to keep in repair. That does not, of course, involve absolute responsibility for disrepair. Such provisions, it has been many times held, do not create liability for the consequences of a state of things which has not arisen through the failure of the municipal authority to observe reasonable precautions to prevent it. *Jamieson* v. *Edmonton* (1), *Hammond* v. *Vestry of St. Pancras*(2); *Bateman* v. *Poplar District Board of Works*(3).

But where the disrepair complained of consists in a condition such as that in question here in a frequented street a condition, not to put it moderately, outside the purview of reasonable anticipation in a Nova Scotia winter, then the municipality can only escape responsibility by shewing that the measures taken came up to the standard of reasonableness and this may include a proper system of inspection.

I concur in the opinion of the majority of the court below that the municipality failed to discharge its duty.

ANGLIN J.:—I would dismiss this appeal. I agree with Chisholm, Russell and Ritchie JJ. that the

(1) 54 Can. S.C.R. 443, at pp. 454-5; 36 D.L.R. 465, at p. 473.
(2) L.R. 9 C.P. 316. (3) 37 Ch.D. 272.

City of Sydney is civilly liable to a person injured through non-repair of streets in respect of which the city charter (s. 249) imposes the obligation to repair where such non-repair is due to inattention to the duty so imposed sufficient to constitute negligence. I accept Mr. Justice Russell's view that

> the law imposing upon the city the duty of keeping the streets from falling into disrepair in consequence of snow and ice must be reasonably interpreted and applied.

With him also

> I am unable to say that it has not been so applied by the learned trial judge in this case.

The facts in evidence establish a condition amounting to disrepair likely to be productive of danger known to the city authorities at all events on the day before the plaintiff met with his accident. It was the duty of the city officials to see to it that that state of affairs was remedied and they had abundant opportunity to do so. The finding of negligence is supported by the evidence. It follows that there was a breach of statutory duty resulting in an injury to the plaintiff which entailed civil liability on the part of the city.

BRODEUR J.—The only question in this case is whether the appellant municipal corporation has been negligent.

The snow had been permitted to accumulate on the sidewalk at the place where the respondent fell, and the slush which the mild weather had formed was converted into ice as a result of the night frost. The sidewalk became dangerous for pedestrians. The City of Sydney is bound by the law to keep in repair all its streets. That would involve the duty to take reasonable precautions against the streets becoming dangerous by reason of the ice and snow.

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I would distinguish this case from *Pictou* v. *Geldert* (1), and *Sydney* v. *Bourke*(2), because no duty to repair was imposed by the statute then under consideration.

It is not contended at bar that the duty to repair would not cover the removal of the ice and snow on the sidewalk, or the sanding of the sidewalk. As a question of fact, the sidewalk had been sanded some time before; and by a by-law of the city the snow should be removed by the ~~riparian~~ abutting owners.

The question is whether the municipality has discharged its duty in a reasonable manner. That becomes then a question of fact and the concurrent findings of the courts below in that respect should not be disturbed.

The appeal should be dismissed with costs.

MIGNAULT J.—On the findings of fact of the learned trial judge that the accident was caused by the slippery condition of the sidewalk; that the appellant was aware of the condition of the sidewalk and allowed the snow to remain there for some time, when, to the knowledge of the city officials, a lowering of the temperature was very likely to take place and the slush to be frozen over night; that the street in question was one of the principal streets of the city, travelled over by thousands of people by day, or at all events on Sunday; that its condition on the day of the accident could have been prevented, the city having the means to clear the sidewalk and having failed to employ these means; and on the admission of the learned counsel for the appellant that to leave ice on the sidewalk for an unreasonable time would be a lack of repair, an admission which I think he rightfully made—I am

(1) [1893] A.C. 524. (2) [1895] A.C. 433.

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of the opinion that the judgment of the learned trial judge should not be disturbed.

The statute obliged the city council to repair the streets and it failed to fulfil this obligation and under the circumstances it is liable for the accident.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Finlay Macdonald.*
Solicitor for the respondent: *A. D. Gunn.*

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LOCAL UNION NO. 1562, UNITED MINE WORKERS OF AMERICA AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM WILLIAMS AND W. H. REES (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Trade unions—Inducing dismissal of non-unionists by threatening strike—Right to damages—Liability of individual members—Practice and procedure—Unincorporated body—Representative action.

The respondents, being miners and members of the Local Union appellant, were employed by the Rose-Deer Mining Company. The manager of the company, becoming dissatisfied with the actions of the Union, closed the mine down with the object, successful for a time, of destroying the weight of the Union; but he opened it again, and the respondents returned to work, agreeing to the condition not to pay any Union dues. The respondent Williams then received an anonymous letter calling him a "scab." The manager of the company having taken the ultimate decision to live at peace with the Union for the security of his own interests, a new Local Union was organized, but both respondents refused twice the invitation to become members until the matter of the letter was "cleared up." Later on, the manager of the mining company advised the respondents that they would be discharged unless they settled with the Union as he had received notification that the Union would declare a strike if they continued to work. This notification was given by the appellants Young and Stefanucci. The respondents then applied for membership in the Union, but were refused, though the Union withdrew the objection formally taken to them as co-workmen in the mine. The respondents, having been subsequently discharged took an action against the individual appellants on the ground of conspiracy to injure them by inducing their dismissal and against the Local Union for unlawful intimidation by the threat of a general strike. The Local Union was not incorporated, nor registered under the "Trades Union Act"; and an application was made at the close of the trial to amend the statement of claim by making the individual appellants defendants in their representative capacity, but this was not granted.

Held that, upon the evidence, the respondent's action should be dismissed, except as to the appellants Young and Stefanucci; Idington and Mignault JJ. dissenting; Duff J. would have dismissed the action *in toto*.

Per Duff J.—The conduct of the appellant Young cannot be construed as intimidation or coercion by "threat" and did not expose him to an action in damages in the absence of the characteristic elements of a criminal conspiracy to injure. *Quinn* v. *Leatham* (1901) A.C. 495, discussed.

Per Duff J.—The object of "The Industrial Disputes Act" is to interpose investigation and negotiation with a view to conciliation between the institution of a dispute and the culmination of it in a strike or lockout; but there is nothing illegal (notwithstanding the legislation) in an employer or his workmen deciding to pay no attention to outside advice or decision but to insist upon their or his terms and to enforce them by all legal means and nothing illegal in making this known to the other party to the dispute.

Per Anglin and Brodeur JJ.—In the absence of legal evidence that they were present at the meetings where the acts complained of were authorized or that they had otherwise sanctioned them, mere membership in the Local Union would not render the individual appellants personally answerable in damages for the results of these acts.

Per Anglin, Brodeur and Mignault JJ.—The dismissal of the respondents was the direct and intended outcome of the action of the Local Union's committee, such action amounting to a coercive threat and being therefore an unlawful means taken to interfere with the respondents' engagement, the liability of the Local Union appellant if suable is established, and the delivery of the message of the committee by the appellants Young and Stefanucci to the manager of the mining company, having regard to all the circumstances, makes them personally liable towards the respondents.

Per Anglin and Brodeur JJ.—The issue of want of legal entity was sufficiently raised by the explicit denial of the allegation that the Local Union was a body corporate.

Per Anglin and Brodeur JJ.—No action lies against an unincorporated and unregistered body in an action of tort such as the present one.

Per Anglin and Brodeur JJ.—The rule of practice by which, when numerous persons have a common interest in the subject matter of an action, one or more of such persons may be sued on behalf of all persons interested, which rule was invoked in support of the application for an order for representation, cannot properly be applied in an action of tort such as the present one without evidence that the individual appellants could fairly be said to be proper representatives. Idington J. *contra.*

Per Idington and Mignault JJ. dissenting—The Local Union having throughout the litigation acted as if rightly sued, it is too late now to urge the objection of want of legal entity; and per Mignault J., the judgment of the trial judge should not be interfered with on a matter of procedure.

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

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LOCAL UNION No. 1562, UNITED MINE WORKERS OF AMERICA v. WILLIAMS AND REES.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), affirming, the court being equally divided, the judgment of the trial judge, Simmons J.(2), and maintaining the respondents', plaintiffs', action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

A. M. Sinclair K.C. and *H. Ostlund* for the appellants.

E. V. Robertson for the respondents.

IDINGTON J. (dissenting).—This appeal is taken jointly by all the defendants, condemned by the formal judgment of the learned trial judge, and maintained on appeal therefrom, by an equal division in the Appellate Division of the Supreme Court for Alberta.

The respondents' statement of claim presents several causes of action and prays for relief in more ways than one.

The first of these causes of action as stated, and in respect of which relief was sought, seemed to raise the question of a legal right of each of the respective respondents to become a member of the said Union but nothing has been determined in regard thereto, or raised by this appeal, save indirectly.

The second cause of action is framed as if against half a dozen members of the said Union for conspiracy with each other and other persons to wrongfully, unlawfully and maliciously injure the plaintiffs, now respondents, by depriving them and each of them of their employment and to induce the dismissal of

(1) 14 Alta. L.R. 251; 45 D.L.R. 150; [1919] 1 W.W.R. 217.

(2) 41 D.L.R. 719, [1918] 2 W.W.R. 767.

each from the employment of the Rose-Deer Mining Company, Limited, a mining company in Alberta.

It is further charged that pursuant to such conspiracy and combination they, by intimidation of the company and threatening to go on strike and tie up the mine, succeeded without lawful reason or excuse in having respondents dismissed and deprived of employment.

There is ample evidence to support these claims against some, at least, of these parties. Hence they should not succeed herein.

Seeing that the money has been paid into court to meet the judgment for damages without regard to any distinction between or amongst these several appellant parties and hence if the judgment appealed against stands against a single one of the defendants the judgment will be satisfied, it seems to me the rest of the appeal becomes somewhat academic.

In deference to the views of others whereby elaborate argument was heard, notwithstanding the admission of the payment thus made, I have examined the various questions presented.

In view of the following several considerations: that the misleading use by the appellant of a seal which presumably would be supposed to indicate a corporate capacity in the Union, and of the fact that no steps were taken to remove such impression, save by a formal denial in the pleadings; that the proceedings for discovery, and examinations for discovery, and indeed the whole trial were each allowed to proceed as if the Union was at least registered and thereby liable to be sued as a corporation, and that the parties defendant all joined in one defence, and no motion at any time to set aside such clearly erroneous proceedings if, as now contended, the Union was not a legal entity,

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I think the learned trial judge should at once, when asked by counsel for the plaintiffs (now respondents), have allowed the amendment of the pleadings to make them conformable to the case presented by the evidence adduced without objection. Then he should, if the defendants (now appellants) so desired, have given them an opportunity to answer the case so made. I presume as no objection made to amendment, or claim to adduce further evidence, appellants must have concluded nothing further in way of evidence for defence thereto was available.

Notwithstanding the case of *Walker* v. *Sur*(1), relied upon by appellant, I think the action of a representative character will still lie against an unincorporated union, for wrongs such as complained of. That case is easily distinguishable from the numerous other authorities relied upon by the respondents herein.

I agree with the view of Lord Macnaghten in the *Taff Vale Ry. Co.* v. *Amalgamated Soc. Ry. Servants* (2), at page 438, where he says:—

> I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body,

and also with what Lord Lindley says in the same case on the same subject.

And I may add that the obvious reason for the qualification of the representative persons chosen is to avoid the possibility of the Union being bound by a collusive action, or by one not properly defended by all the force it might officially choose to bring in its own defence if made a party.

The Union itself having taken part in the defence and being beyond doubt the party actively defending, cannot now be heard to set up such a mere technical objection occasioned by a slip in the pleading.

(1) [1914] 2 K.B. 930. (2) [1901] A.C. 426.

Surely at this time of day when we, sometimes at least, try to get at and grasp the realities instead of the mere formalities, such an objection comes too late.

The party that says it is not a legal entity has had the courage to proceed as if it were, whilst saying it was not.

It strikingly illustrates in doing so the course pursued in the circumstances, out of which this action arises, by its refusing on the one hand to admit the respondents as members, though well qualified to become such, and in no way disqualified except by reasons founded on the evidence of highly probable motives on the part of those possessed of obvious hate and malice, being permitted to direct such a course of conduct, and on the other at one and the same time, offering to let them work whilst creating an atmosphere that rendered the doing so an impossibility. I hope our law, begotten of freedom and justice, has not grown so feeble as to tolerate such injustice.

It is clear to my mind on the facts presented that such inconsistencies of conduct are attributable only to that malice in law by which the accused representatives of the Union are claimed to have been actuated.

Being moved thereby they cannot claim they were simply defending their honest legal rights in what they did.

And if the majority of the members of a union permit even a few of the master spirits to so illegally and improperly dominate the action of their union. then in law the union must suffer the consequences.

Added to this the intimidation of a strike which was threatened, regardless of the law as enacted in "The Industrial Disputes Act," sec. 56, was evidently illegal.

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The sooner that the mere offence of threatening to disregard such a law or any other is understood, the better for all concerned.

I think this appeal should be dismissed with costs.

DUFF J.—The view of the facts which I accept is that which is very fully and lucidly explained in the judgment of Stuart J.(1).

Three or four events are of capital importance. The lockout by Tupper in Jan., 1917, with the object, successful for a time, of destroying the weight of the Union; the ultimate decision of Tupper to live at peace with the Union for the security of his own interests and the consequent re-establishment of relations between them; the invitation given twice to the plaintiffs to become members of the Union and their refusal to do so; the application (the first) by the plaintiffs on Dec. 21st, and the answer of Jan. 6th, refusing to accept them as members but withdrawing the objection formally taken to them as co-workmen in the mine.

In order to prevent misconception, I ought to state, without passing any opinion upon the extent of the jurisdiction conferred by Rule 20 of the Alberta Rules (I need hardly say that I should hesitate before differing from the united opinion of Lord Macnaghten, Lord Lindley and Lord Dunedin) that this is not in my judgment, a proper case for amendment; and moreover, that in disposing of the appeal we are bound to give effect to the contention that the union is not a suable entity. I should also state explicitly that I concur with the conclusion of Mr. Justice Stuart that there is no evidence against Stefannuci, Gerew, Marcelli, Lorenzo and Kamuckle.

(1) 14 Alta. L.R. 251; 45 D.L.R. 150, at page 151; (1919), 1 W.W.R. 217, at page 221.

The case as presented in the Supreme Court was a case of conspiracy, it was tried as a case of conspiracy and as such it must succeed or fail.

Looking at the course of events broadly and especially noting those just mentioned, the evidence of actionable conspiracy seems to be too slight to support an affirmative finding.

For the principle to be applied it is my habit in these cases to resort to the charge of the trial judge in *Quinn* v. *Leathem* (Fitzgibbon L.J.)(1):—

> I told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from the acts legitimately done to secure or advance their own interests.
>
> * * * * *
>
> To constitute such a wrongful act for the purpose of this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by which the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade.

This statement of the law received the approval of the Lords of Appeal.

Subject to special legislation contained in the "Industrial Disputes Act," as to which I shall have something to say presently, the union men were quite entitled to refuse as a body to work with non-union men and to advise their employer of their policy. Tupper appears to have been quite aware of the attitude of the union men and quite willing to take any course necessary to meet their views.

The whole weight of the case lies in the difficulties

(1) [1901] A.C. 495 at page 500.

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which are said to have been made regarding the reception of the plaintiffs as members of the Union. But the plaintiffs appear to have made no application until the end of December, the result being that the objection to them as miners was withdrawn.

The plaintiffs appear to have been reluctant to regularize themselves and I can see no ground for a finding that an earlier application would not have had the same effect as that of Dec. 21st.

I am quite unable to concur in a finding of intimidation or coercion. As already mentioned, Tupper had decided upon his course long before the incidents in question arose and I am convinced that Tupper's only concern was to know with certainty the attitude of the men. His course in consequence of that knowledge cannot fairly be attributed to anything which could properly be described as the imposition of their will upon his but should be ascribed to his deliberate choice of the policy of accepting the Union terms for the sake of peace and in his own interests.

The situation being quite well understood on both sides, I do not perceive the aptness of the description "threat" as applied to the communications made to Tupper.

The truth seems to be that the impulse behind those communications came from the men as a body and that the emissaries who interviewed Tupper were really the agents of the men and that in these communications they were faithfully imparting to Tupper (as he desired them to do) the facts as regards the terms on which the men could be induced to work. No authority so far as I am aware warrants the suggestion that such conduct exposes either the members of the Union as such, or the Union officials as such, to an action in the absence of the characteristic ele-

ments of the class of cases to which *Quinn* v. *Leathem* (1), belongs, cases of criminal conspiracy to injure. Lord Lindley goes further perhaps than any other legal authority of his eminence has gone in countenancing the doctrine that threats when they result in coercion—threats, that is to say, of "serious annoyance and damage" as distinguished from threats to do something itself punishable by law (as threats of bodily harm—are in themselves *primâ facie* "wrongs inflicted upon the persons coerced;" but it is evident from his judgement (1), at pages 507 and 508, that Lord Lindley would not have considered what occurred here to be within the category of "coercion by threats."

As to the special legislation ("The Industrial Disputes Act") the object of the statute is to interpose investigation and negotiation with a view to conciliation between the institution of a dispute and the culmination of it in a strike or lockout. But there is nothing illegal (notwithstanding the legislation) in an employer or his workmen deciding to pay no attention to outside advice or decision but to insist upon their or his terms and to enforce them by all legal means and nothing illegal in making this known to the other party to the dispute.

I am not satisfied that what was said necessarily meant that the men intended to act illegally. If the point had been taken at an earlier stage the facts would no doubt have been more closely investigated.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The history of the events out of which this litigation arose and the material facts are fully stated in the judgments of the learned trial judge

(1) [1901], A.C. 495.

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(1), and of the Appellate Division of the Supreme Court of Alberta(2). The plaintiffs hold a judgment against all the defendants for $100 for general damages and for $435.62 for loss of wages.

Local Union No. 1562, U.M.W., an unincorporated and unregistered Trades Union, was sued as a corporation and the six other defendants as individuals and not in any representative capacity. There appears to be some uncertainity whether the trial judge intended that judgment should be entered against the Local Union. It would seem to have been his opinion that the assets of that body could be reached "only by suing the individual members"—presumably all of them or certain members properly selected as representatives of all treated as a class. But an amendment asked for by the plaintiffs at the close of the trial whereby the six individual defendants should be constituted representatives of all the members of the Local Union and authorized to defend as such, while not refused, does not appear to have been allowed and the formal judgment was entered against the Union as well as against the individual defendants personally. The appeal taken from that judgment to the Appellate Division stands dismissed by the order of that court, which consisted of four members. Two of them (Stuart and Hyndman JJ.) would have allowed the appeal, holding that no actionable wrong had been established. The learned Chief Justice of Alberta was of the opinion that the appeal should be dismissed with costs. Mr. Justice Beck,

in view of the difference of opinion amongst the members of the Court,

concurs in the disposition of the appeal made by the

(1) (1918), 41 D.L.R. 719; (1918), 2 W.W.R. 767.

(2) 14 Alta. L.R. 251; 45 D.L.R. 150; (1919), 1 W.W.R. 217.

Chief Justice: but, if giving effect to his own view, he would have required the plaintiffs to elect to

take judgment (1) against the individual defendants in their individual capacity, or (2) against the individual defendants as representing the Union, or (3) against the Union by name.

The grounds of appeal to this court are:—

(1) That no actionable wrong has been proved against any of the defendants; and (2) that the Local Union, as an unincorporated and unregistered Trades Union, cannot be sued.

To deal with the appeal satisfactorily it is necessary to appreciate the cause or causes of action as formulated in the statement of claim. Against the Local Union there are two distinct grounds of complaint: (1) that the plaintiffs were twice wrongfully refused membership in it contrary to the terms of its constitution and by-laws; and (2) that by wrongfully and maliciously objecting to their being employed by the Rose-Deer Mining Company, Limited, and intimidating that company by threatening a general strike the Local Union induced it to dismiss the plaintiffs from its employment. Against the six individual defendants the cause of action set up is wrongfully and unlawfully and maliciously conspiring and combining to deprive the plaintiffs of employment and to induce their dismissal by the Rose-Deer Company and in pursuance thereof intimidating that company by threats etc., resulting in the plaintiffs' discharge etc.

It will be convenient to deal first with the case of the individual defendants. The learned trial judge, as I read his judgment, makes no finding of conspiracy or combination. In this he may possibly have been well advised.

Mr. Justice Stuart says:—

With respect to the matter of conspiracy or combination, there does not, in fact, appear to be any evidence at all against the defendants

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Stefanucci, Gerew, Marcelli, Lorenzo and Kamuckle that they took part in any way whatever in the matter. Whether they were present when any concerted arrangement or combination was made or not, or had anything to do with it in a meeting or otherwise, is not suggested anywhere in the evidence. I cannot assent to the contention that every member of the Union is individually liable for whatever the other members may have done quite apart from him, and with no evidence at all of his connection or participation therein, unless, of course, the Union were (what it is not) in itself an unlawful association with unlawful objects, in which case it might be otherwise.

Except probably as to the defendant Stefanucci, who accompanied the defendant Young and one Rose (not made a party) on a mission to communicate the attitude of the Local Union to Tupper, the manager of the Rose-Deer Company, this statement of the effect of the evidence appears to be accurate. Redpath's evidence on discovery, as an officer of the Local Union, that Gerew and Kamuckle attended a meeting at which the plaintiffs' applications for membership were rejected is not admissible against them in their individual capacity. There appears to be no evidence that Marcelli attended any meeting and nothing except the silence of the statement of defence to shew that Lorenzo was even a member of the Local Union.

As to Stefanucci and Young, apart from any question of conspiracy and combination, as delegates of the Local Union they personally conveyed the message of that body to Tupper. If the delivery of that message, having regard to all the circumstances, amounted to a coercive threat designed to bring about the dismissal of the plaintiffs and had that result, there is in my opinion no room to doubt the individual liability of these two defendants. That they acted as agents for the Union, or, to speak more accurately, of its members, of course affords them no answer in this action for tort.

Nor do I think they should be heard to set up that the only case alleged against them is one of

conspiracy. As to them there is probably sufficient evidence to sustain a judgment on that ground also. But, at the trial, they made common cause with the Local Union, and the substantial defence of both was a justification of all that had been done by the Union and on its behalf. Moreover, they are charged with having actually intimidated the plaintiffs' employer by threats and thus procured their discharge. The allegation that this was done in pursuance of a conspiracy, if not proven, may be treated as surplusage. I would incline to hold them liable on both grounds—but, at all events, on that of participation in the actual commission of the wrong done the plaintiffs.

The learned trial judge rests his judgment against the other four individual defendants solely on their responsibility as members of the Union for the authorized acts of its duly constituted agents. What he says as to the liability of these defendants is contained in the following passage from his judgment:—

> The officers of the Local Union were the agents for the individual members and the principal is bound by the authorized acts of the agent acting within the scope of his authority.
>
> The individual members of the association or Local Union were each liable for what was done by their agents.
>
> The defendants do not deny membership in the Local Union during the period when the boycott took place. Two of them, Young and Stefanucci, took an active part as officers of the Union.

With great respect, in the absence of some evidence, admissible against them, that they were at least present at the meetings when the acts complained of were authorized or approved of, or that they otherwise sanctioned them, I think a case has not been made against these defendants. Mere membership in the Union would not, in my opinion, render them personally and individually answerable in damages for the results of those acts. There is no evidence

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of any participation by them in the commission of the actual wrong done the plaintiffs.

The evidence, however, convinces me that, acting through authorized agents, the Local Union as a body brought about the dismissal of the plaintiffs by threatening a general strike should they be retained in the company's employment and I think it is a fair inference from the proven facts, that while subsequently professing willingness to allow them to be re-employed by the company, the Local Union in fact made their re-employment impracticable and that it fully intended to bring about that result. I am, with great respect, unable to appreciate how the complacency of the manager of the Rose-Deer Company, induced by various considerations which Mr. Justice Stuart emphasizes, affects the matter. It merely served to render easier the accomplishment of the Local Union's design. Nor do I perceive the force of the distinction which that learned judge draws between the responsibility of the Union as a body for the threat of a strike and that of its members as employees of the Rose-Deer Company. The threat was made by the Union through its delegates on behalf of all its members who were the company's employees. It was the act of the Union (so far as such a body can be said to act) done by its instructions and for its purposes.

I think it is also a fair inference from all the circumstances in evidence that a desire to prevent the plaintiffs continuing in the employment of the Rose-Deer Company and to punish them for remaining non-union men after the re-establishment of Local Union 1562, in 1916, and their refusal to join it when it was first suggested to them to do so actuated its conduct in seeking their dismissal rather than any genuine wish to promote the interests of trades-union-

ism generally or its own immediate welfare. Otherwise I find it very difficult to understand the Local Union's refusal to accept the plaintiffs as members even when urged to do so by the officers of the Union of District No. 18, to which it is in some degree subordinate.

On this view of the evidence the liability of the Local Union, if it be susceptible of being held responsible and be suable as a body, or the liability of all its members who participated in or sanctioned the steps taken to secure the dismissal of the plaintiffs, if the application made by the plaintiffs' counsel at the trial to amend by making the individual defendants defendants also in a representative capacity on behalf of its members should be granted, is, in my opinion, established. Injury to the plaintiffs has been proved. That injury was the direct and intended outcome of action of the Local Union's committee taken by its direction for that purpose. That action amounted to a coercive threat and was therefore an unlawful means taken to interfere with the plaintiffs' employment, the use of which, damage having ensued, constituted in itself an actionable wrong. The authorities bearing on this aspect of the case at bar have been so fully and carefully reviewed in the able judgment recently delivered by McCardie J. in *Pratt* v. *British Medical Association*(1), that further reference to them seems unnecessary. See especially pages 256-7, 260, 265-8, and 277-8.

Perhaps it may not be amiss, however, to mention as very closely in point Lord Justice Romer's judgment in *Giblan* v. *National Amalgamated Labourers' Union* (2), and Lord Lindley's speech in *Quinn* v. *Leathem*(3).

(1) [1919] 1 K.B. 244. (2) [1903] 2 K.B. 600, at pp. 619, 620.
(3) [1901] A.C. 495, at pp. 534-5.

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The Local Union's vindictive motive excludes any possible defence of "justification" or "just cause" in the present case, if, indeed, where unlawful means have been resorted to that defence would be open however innocent or even laudable the purpose may have been. This aspect of the case is fully discussed by McCardie J. in the *Pratt Case*(1), at pages 265 *et seq.* See too the *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (2).

I have reached the foregoing conclusions of fact without taking into consideration, except as against himself, the discovery evidence given by Albert Young, which, I agree with Mr. Justice Stuart, would be inadmissible against the Local Union, even if it had been properly sued either as a corporation or quasi-corporation or is estopped by its conduct from denying that it was so sued, or as against the other defendants either individually or in any representative capacity. Young was examined for discovery solely as an individual defendant and not in any sense as an officer selected to make discovery on behalf of the Union or its members. His evidence so given is not within the provisions of Alberta Supreme Court Rule 250. If the Local Union, though not a corporation, had been rightly made a defendant the evidence of Redpath would be a admissible as against it, and, having regard to the provision of Rule 3 of the Alberta Supreme Court that

> as to all matters not provided for in these rules the practice, as far as may be, shall be regulated by analogy thereto,

I incline to think it would also be admissible against the individual defendants if sued as representatives of all the members of the Union.

There remain for consideration the questions whether the Local Union was properly made a defendant in the first instance or is estopped from denying

(1) [1919] 1 K.B. 244. (2) [1905] A.C. 239.

that it was so; and, if both these questions should be answered in the negative, whether the plaintiffs' application to amend should be granted.

I have no doubt that the Local Union, as an unincorporated and unregistered body, was not properly made a defendant and that service on it must have been set aside had application been made for that relief. *Metallic Roofing Co.* v. *Local Union No. 30*(1).

While I should have thought it better, had the defence in addition to the bare denial of incorporation contained a plea that the Local Union is not registered, is not a partnership, and, as an entity not known to the law, cannot be sued by its adopted name (R. 93), I incline to think this issue was sufficiently raised by the explicit traverse of the allegation that the Local Union is a body corporate. But, if not, the objection to suing the Local Union being its non-existence as an entity known to the law, I confess my inability to understand how any conduct of those representing that body, such as that here relied on, can create an estoppel which would justify the granting of a judgment against it. A judgment should not wittingly be entered against a non-entity.

In *Krug Furniture Co.* v. *Berlin Union of Woodworkers*(2), relied upon by the Chief Justice of Alberta and Mr. Justice Beck, the defendant Union, sued as a corporation, appeared, apparently as such, unconditionally and its statement of defence did not contain the plea *nul tiel corporation* as required by the Rules of Court. Its incorporation was accordingly presumed. The explicit denial of incorporation in the present instance precludes any such presumption. In my opinion the judgment against the Local Union in its adopted name cannot be maintained.

(1) 9 Ont. L.R. 171, at p. 178. (2) 5 Ont. L.R. 463.

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The question of representation presents more difficulty. The selection for that purpose of the six individual defendants before the court was not happy. Four of them are admittedly persons of no importance in the Local Union and cannot fairly or properly be said to represent it. The remaining two were Young and Stefanucci. Young was an ex-secretary and both he and Stefanucci had "represented" the Union in discussions with the Rose-Deer management on several occasions and also had had interviews with the plaintiffs on its behalf. These are the only grounds on which it can be claimed that they would be proper representative defendants. Neither of them appears to have been an officer of the Union at the time the action was begun. Whatever funds or other property the Local Union may possess, there is nothing to shew in whose name or names such funds or other property stand; and if, as is probable, these are held by trustees, the trustees are not before the court; nor is it sought to add them as defendants. Yet the avowed purpose of suing the Local Union is to reach its funds. If the case were otherwise one in which an order might be made for representation of the members of the Local Union by properly selected defendants, I strongly incline to the view that in the exercise of a sound judicial discretion the six individual defendants now before the Court, whom it is asked to approve for that purpose and to authorize to defend the action on behalf of the membership, should be held not to be proper representatives. (See observations of Lord Macnaghten in the *Taff Vale Case*(1)), and that on that ground, strengthened as it is by the fact that it was sought only at the close of the trial, the suggested amendment should be refused.

(1) [1901] A.C. 426, at pages 438-9.

Moreover, notwithstanding what was said *obiter* in *Duke of Bedford* v. *Ellis*(1), (a case of representative plaintiffs), in *Taff Vale Rly. Co.* v. *Amalgamated Society of Rly. Servants*(2), (where a Union was successfully sued in its registered name) and in *Cotter* v. *Osborne*(3), and *Cumberland Coal & R. W. Co.* v. *McDougal* (4), to which I refer in order to make it clear that they have not been overlooked, I am with respect, of the opinion that in two recent cases, *Walker* v. *Sur*(5) and *Mercantile Marine Service Association* v. *Toms*(6), the English Court of Appeal has made it clear that the rule of practice invoked in support of the application for an order for representation cannot properly be applied in such an action as this. Rule 20 of the Alberta Rules is an adoption, substantially *in ipsissimis verbis*, of English Order XVI., r. 9. All the objections to the applicability of that rule indicated by the Lords Justices in the *Walker Case*(5), exist here, notably those mentioned by Kennedy L.J. on page 937. As is pointed out by Swinfen Eady L.J. in the *Toms Case*(6), many members of Local Union 1562 might have defences not open to the proposed representative defendants, and there are many other reasons against applying the rule in cases of tort such as this. Lord Parker of Waddington, whose authority in regard to the scope and purview of an equity rule such as O. XVI., r. 9, is of the highest, in his speech in *London Association for Protection of Trade* v. *Greenlands Limited*(7), points out some of the serious difficulties which must be encountered in seeking to apply it to such a case as this. Fully as I realize the desirability of finding some method whereby bodies such as Local

(1) [1901] A.C. 1.
(2) [1901] A.C. 426.
(3) 10 W.L.R. 354, at p. 356.
(4) 9 E. L.R. 204, at pp. 207-8.
(5) [1919] 2 K.B. 930.
(6) [1916] 2 K.B. 243.
(7) [1916] 2 A.C. 15, at page 39.

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Union 1562 may be made answerable in the courts for wrongs similar to that done to the plaintiffs, the two authorities to which I have referred seem to me to afford sound reasons for the conclusion that that desirable end cannot be attained by an application of Rule 20. Nor does the other rule invoked, No. 31(2), corresponding to English Order XVI., r. 32 (b), appear to advance the plaintiffs' case. Any attempt to apply it here is open to the same objections which preclude an application of Rule 20. The caution with which Rule 31(2) should be applied is shewn by the course taken by Buckley J. in *Morgan's Brewery Co.* v. *Crosskill*(1). Moreover, not a little may be said in favour of restricting the meaning of the word "class" in that rule by reason of its collocation with "heirs or next of kin." I cannot think it was ever intended to provide by it for such a case as that at bar.

In view of the fact that Rule 20 is a reproduction of English Order XVI., r. 9, I am unable to accept the ingenious suggestion of Mr. Justice Beck that because law and equity have always been concurrently administered by the same court in the Province of Alberta, Rule 20 may be extended to a case held not to fall within its prototype in England. I should add that I have not overlooked Lord Atkinson's comprehensive observation in *London Association, etc.* v. *Greenlands, Limited*(2), Neither the *Walker Case*(3), nor the *Toms Case*(4), however, appears to have been cited at their Lordships' bar.

In the result I am of the opinion that the action fails and must be dismissed except as against the defendants Young and Stefanucci, as to whom the appeal should be dismissed.

(1) [1902] 1 Ch. 898.
(2) [1916] 2 A.C. 15, at page 30.
(3) [1919] 2 K.B. 930.
(4) [1916] 2 K.B. 243.

BRODEUR J.—I concur with my brother Anglin. The appeal should be allowed and the action dismissed, except as to the defendants Young and Stefanucci. There should be no costs here or in the Court of Appeal.

MIGNAULT J. (dissenting).—After carefully reading the evidence and considering the authorities, I can see no sufficient reason for disturbing the judgment of the learned trial judge as to which the learned judges of the Appellate Division were equally divided. The defence of the defendants that the acts done by them with reference to the plaintiffs were

> done solely with intent to further the legitimate objects of the organization known as the United Mine Workers of America and not with the intent to injure the plaintiffs or either of them,

is not, in my opinion, made out. On the contrary, the defendants twice refused to admit the plaintiffs into their Union, and then notified the mine operator that they declined to work with them, so that the mine operator, who was told that he could choose between operating his mine with the two plaintiffs alone or with the members of the Union without the plaintiffs, considered it good business to choose the latter alternative and to refuse to employ the plaintiffs. It is unnecessary, under the circumstances of this case, to decide whether the conduct of the defendants would have been actionable had they allowed the plaintiffs to join their Union and refused to work with them if they did not join. But here the door was closed on the plaintiffs when they claimed admission to the Union and under the circumstances the refusal of the defendants to work with them—and no sufficient reason is shewn for refusing to admit them in the Union or to work with them—was in my opinion a wrongful act and a deliberate and successful attempt to obtain their dismissal from the mine.

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I feel some doubt whether the Local Union No. 1562, not being an incorporated body or a registered labour union, could be sued as has been done in this case. But throughout this litigation the local Union has acted as if it had been validly sued, has joined with the other defendants in contesting the action by one and the same plea and has also united with the other defendants in appealing by one appeal from the judgments of the trial court and the Appellate Division. I consider therefore that it should not now be heard to urge the objection that it could not be sued. Further, this is a matter of procedure on which I would not interfere with the judgment of the trial court.

Appeal allowed in part.

Solicitor for the appellants: *H. Ostlund.*
Solicitor for the respondents: *E. V. Robertson.*

BRITISH COLUMBIA ELECTRIC RAILWAY Co. (DEFENDANT)..... } APPELLANT;

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AND

NELLIE F. DUNPHY (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Contributory—Collision—Automobile and street car—Jury's findings—Sufficiency.

The action is for damages for injuries suffered in a collision between an automobile driven by the respondent, and appellant's street car. At the trial one witness for the respondent, who was in the automobile, testified to having warned the respondent before the accident; and the respondent was not called to explain his failure to act upon this warning. The jury, after having found the appellant guilty of negligence, specified such negligence in the following terms: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

Held, that the jury's findings, if read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge, were justified both as to appellant's negligence and as to absence of respondent's contributory negligence and were not too vague to support a judgment for respondent.

Per Duff J.—The practice in jury cases in British Columbia is that the jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any witness; they may believe that part of a witness' evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate. *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (3 App. Cas. 1155), followed.

Judgment of the Court of Appeal ((1919), 48 D.L.R. 38, [1919] 3 W.W.R. 201), affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) (1919) 48 D.L.R. 38; [1919] 3 W.W.R. 201.

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the trial court with a jury and maintaining the respondent's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

W. N. Tilley K.C. for the appellant.
Mayers for the respondent.

THE CHIEF JUSTICE.—I confess that at the close of the argument on this appeal I felt inclined to allow it on the grounds submitted by Mr. Tilley, first, that the evidence of Cross, one of the witnesses for the respondent and who was in the respondent's motor car at the time the collision with the street railway happened, shewed clearly that he, Cross, had seen the electric car approaching and had warned the respondent Dunphy who was driving the motor car about thirty or forty feet away from the track: "Look out, look out the car." (No evidence was given challenging or qualifying Cross's evidence as to his having given the warning or to the effect that it had not been heard by Dunphy), and secondly, that the jury had failed to find in answer to the question put to them as to what the negligence of the defendant company consisted of—anything definite or certain—and that their finding was altogether too vague and uncertain to uphold the verdict entered against the defendant.

However, after reading the evidence over and the judge's charge to the jury, which was very clear, and considering that in appreciating the weight to be given to Cross's evidence the jury had the advantage of having had a "view" of the locality where the collision occurred and of seeing and deciding as to the extent the alleged growing trees between the motor and the car would have prevented Clarke seeing from the motor

the approaching electric car, I am, but with some doubt, of the opinion that we would not be justified in allowing the appeal and either dismissing the action or granting a new trial.

Read in connection with the judge's charge to them, the jury's findings as to the defendant's negligence may be held to be definite enough and the evidence of Cross with respect to the warning shouted by him when he says he saw the electric car approaching would be much better understood and appreciated by the jurymen who had a view of the locality than it can possibly be by the judges of this court on the printed evidence and the conflicting contentions of counsel upon that evidence.

Not being convinced, therefore, that the judgment appealed from is clearly wrong, I will not dissent from the judgment dismissing the appeal.

IDINGTON J.—I find the answers of the jury quite intelligible when read in light of the evidence and the learned trial judge's charge to the jury.

The question of contributory negligence was one for the jury and their answer leaves no reason to rest the appeal thereon.

The appeal should be dismissed with costs.

DUFF J.—Mr. Tilley bases his appeal upon two grounds: First, he argues that the admissions made by a witness called on behalf of the plaintiff, and indeed admissions brought out by the plaintiff's counsel in examination-in-chief, conclusively establish the defence of contributory negligence.

The passages relied upon are as follows:—

Q. When did you realize that the street car on the interurban was upon you, or was there? When did you first realize that it was coming? A. Well, I glanced up to the track, when we were about,

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I suppose, 30 or 40 feet away from the B.C. Electric tracks. I am not saying this definitely, but approximately, I glanced up to the track towards the east, and I saw the street car coming, and I shouted then to Mr. Dunphy: "Look out, look out, the car."

Q. And you saw the car coming? A. And I saw the car coming, yes.

Q. It would have been then about how far away? A. About three car lengths I should think. I could see the top of the car and not the bottom of it. It was the trolley pole I saw first.

Q. Well, how long after you shouted was it that you were struck by the other car? A. Well, it was so quick I could not say. It was not more than a second or a couple of seconds.

Q. From the time you shouted to Dunphy until the time you were struck? A. Yes.

The evidence as it stands affords no doubt very powerful support to the contention of the defendants that the plaintiff, if his attention had been reasonably alert to the situation as he was coming up to the railway track, must have had sufficient notice of the approach of the car in time to avoid a collision, and coupled with the observations of Mr. Taylor on the following page and with the fact that the plaintiff was not called to explain the failure to act upon Cross's attempt to warn him, it must, I think, be held to have established for all the purposes of the trial, the fact that Cross did shout to the plaintiff as he says he did. The discussion of the law to be found in the books on the effect of a statement made by a witness damaging to the party who calls him, is not entirely satisfactory. The Common Law Procedure Act of 1854, sec. 22, which is the parent of the corresponding statute in British Columbia, provides that a party may

> in case the witness produced by him shall, in the opinion of the judge prove adverse, contradict him by other evidence,

seeming, as Mr. Justice Stephens (Digest Note XLVII.) points out, to imply that the right to contradict his own witness in such circumstances rests upon the condition that the trial judge shall consider and hold

the witness to be adverse. This, however, Mr. Justice Stephens remarks "is not and never was law": *Greenough* v. *Eccles*(1). And the generally accepted rule appears to be that it is always open to a party to adduce evidence inconsistent with statements made by one of his witnesses, which, of course, is a very different thing from discrediting him by general evidence as to character.

There is a passage, however, in the judgment of Lord Sumner then Hamilton J. in *Sumner* v. *Brown*(2), which seems to enunciate a somewhat stricter rule:—

> Upon the question of the plaintiff Leivesley's evidence, Mr. Keogh had called him with his eyes open and with full knowledge of what he was likely to say, and that it was not competent for the defendants to contradict him on the vital point of contract or no contract. It was not as if unexpected evidence had been given or there had been some contradiction in details. When two equally credible witnesses called by the same side flatly contradicted each other, it was not competent for the persons calling them to pick and choose between them. They could not discredit one and accredit the other. That, in his opinion, although no decision might have been reported, had been the practice for some time.

Hamilton J. was, of course, speaking not only as a judge who had the responsibility of giving directions as to the law to be applied but as the tribunal of fact as well, and it may be doubted whether he meant to lay down a rule absolutely controlling the discretion of a jury.

The practice at all events in British Columbia in jury cases has followed the rule enunciated by Lord Blackburn in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery*(3), as follows:—

> The jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any

(1) 5 C.B.N.S. 786.
(2) 25 Times L.R. 745.
(3) 3 App. Cas. 1155, at page. 1201.

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witness. They may believe that part of a witness' evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate;

and the view expressed by Sir James F. Stephens.

Cross's evidence, however, as to locality and point of time—where and when the incident which he relates occurred—is vague and of course naturally so; what he says about the position of the motor car with reference to the track at the time he shouted is couched in language quite consistent with the conclusion that, although he was quite certain that the motor car was quite close to the track and that the collision followed very quickly, he had nevertheless no very precise notion of the exact position of the car.

I think effect must be given to Mr. Mayers' contention that the evidence of the plaintiff and Hammond describing the occurrences accompanying the accident and the succession of events as the motor car approached the track, was evidence which it is impossible to say it was the duty of a jury to disregard and from that point of view I am unable to assent to the conclusion that the defence of contributory negligence was established with such certainty as to necessitate setting aside the verdict.

The onus of proving contributory negligence in the first instance lies on the defendant and it would be the duty of the jury to find the issue in favour of the plaintiff unless satisfied that the defence had been affirmatively proved.

Mr. Tilley's second contention was that the findings were insufficient to support the judgment. I concur with the opinion of the learned trial judge, Macdonald J. that the verdict presents no difficulty. It is quite

true that the jury did not respond to an invitation by the learned trial judge to particularize the charges of negligence which they found to be proved. But as the learned trial judge observed in pronouncing judgment upon the motion for judgment, when the answer to the second question is read with the charge, it becomes perfectly intelligible.

I may add that the answers to these questions read together are equivalent to an affirmation that the plaintiff's injuries were due to the negligence of the defendant company and that the plaintiff is entitled to recover as damages the amount mentioned. Read together the answers constitute a perfectly good finding for the plaintiff for that sum. There can be no practical difficulty in giving effect to this as a general verdict because the instructions in the charge were quite sufficient to enable the jury intelligently to return a general verdict.

Had the answers been objected to as insufficient at the time they were given, the trial judge, no doubt, could have presented to the jury the alternative of specifying their findings of negligence more particularly, or returning a general verdict in the usual form. No such exception having been taken, it is not, I think, open to the defendants to take exception to the form—albeit an unusual form—in which the jury have expressed their findings.

The appeal should be dismissed with costs.

ANGLIN J.—The defendant appeals on two grounds from the judgment of the Court of Appeal for British Columbia dismissing its appeal from the judgment for the plaintiff entered by Macdonald J. on the findings of the jury. It contends that the evidence of the witness Cross called by the plaintiff established con-

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tributory negligence on his part and that upon it the judge should have withdrawn the case from the jury. Accepting Cross's statement that he shouted a warning to the plaintiff, it is not clear that he did so in time to enable the plaintiff to avoid the collision; nor is it quite certain that the plaintiff heard the warning. Passages in the plaintiff's evidence as well as in that of Hammond rather indicate that he did not. The question of contributory negligence was in my opinion by no means concluded against the plaintiff by Cross's testimony and was therefore properly submitted to the jury and their verdict negativing it cannot be impeached.

The second point made by Mr. Tilley is that the jury, having found the defendant guilty of negligence which caused the accident, failed, in answer to the second question—"If so, in what did such negligence consist?"—to specify the negligence. They said—"Insufficient precaution on account of approaching crossing and conditions on morning in question." As Mr. Mayers very properly pointed out the words "in approaching crossing" make it clear that it was negligence on the part of the motorman which the jury had in mind. Only two faults on his part were charged—failure to sound the air-whistle and excessive speed—both of them matters of more than usual importance in view of the "conditions on the morning in question," by which the jury, no doubt, meant the failure of the automatic warning signals at the crossing known to the motorman. The learned trial judge in his charge distinctly warned the jury that they must confine themselves to the negligence charged and should not import matter "in the nature of a suggestion * * * that some other precaution could have been taken." We may not assume that the jury

ignored this direction and unless we do so it would seem reasonably certain that the motorman's failure to sound his air-whistle and to moderate the speed of his car was the "insufficient precaution" which, in the jury's opinion, constituted the "negligence which was the cause of the accident." Meticulous criticisms of a jury's findings are not admissible and they must always be read with and construed in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge. While it might have been more satisfactory had the second finding been more specific, if dealt with in the manner I have indicated it seems to be sufficiently certain what the jury meant by it.

I would dismiss the appeal.

BRODEUR J.—This is a street railway accident, and a jury trial found the appellant company guilty of negligence. There is some evidence given by the plaintiff's own witness which would shew that the victim had been guilty of contributory negligence. But the evidence of that witness is somewhat conflicting and the jury were properly charged as to its consideration. It was for the jury to determine in those circumstances whether there was contributory negligence or not; and their finding in that regard is not such that we would consider it as perverse.

The appeal should be dismissed with costs.

MIGNAULT J.—Mr. Tilley attacked the judgment of the Court of Appeal and the judgment thereby affirmed of Mr. Justice Macdonald giving effect to the verdict of the jury on two grounds:

1. That the judgment should have been in favour of the defendant, appellant, for the reason that the evidence at the trial disclosed the fact that Dunphy

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drove into the street car after a warning received from Cross that it was coming and without looking to see where it was.

2. That after finding that the accident was caused by the negligence of the appellant, the jury entirely failed to state in what such negligence consisted.

First ground. This ground is based on the evidence of Cross who was riding in the motor car with Dunphy and the latter's brother-in-law, Hammond. Cross swore that when they were about thirty or forty feet away from the track—but he adds that he was not saying this definitely but approximately—he saw the street car coming and then shouted to Dunphy: "Look out, look out, the car." Further on Cross states that after shouting it was not more than a second or two before they were struck by the car.

Although Dunphy and Hammond were not asked whether they had heard this shout, they both swear that the first thing they knew was that the car struck them. The latter was running, on approaching the crossing, at a speed of 18 to 20 miles an hour, and at the best from Cross's own story it is impossible to say whether his warning was given in time to be of any avail.

Under these circumstances, after the learned trial judge had fairly left to the jury the question of the warning received from Cross, the latter found that the accident was the result of the appellant's negligence, the majority stating that Dunphy was not guilty of contributory negligence. I cannot say that this finding is clearly wrong, and, on this first ground, I would not disturb the verdict.

Second ground. This objection is at first sight more serious. The jury, after answering that the appellant was guilty of negligence which caused the accident,

were asked in what such negligence consisted. They replied: "Insufficient precaution on account of approaching crossing and conditions existing on morning in question."

This answer seems very vague, but taken in connection with the judge's charge, I think it sufficiently assigns the lack of sufficient precautions which in the jury's opinion caused the accident. The learned trial judge fairly placed the matter before the jury and explained the conditions which, according to the evidence, prevailed on that morning at the crossing. He said:—

> Then you have to consider whether the rate of speed which would not have been too great ordinarily, was upon the morning in question too high a rate of speed, and whether this rate of speed is one subject to the surroundings. You have had pictured to you, and probably you have vizualized yourselves the condition of affairs that morning. There seems to be no question that the British Columbia Electric had, as an extra precaution for the safety of those using that highway, installed not only bells that would ring automatically on the approach of a street car, but also a light which would give evidence of the approach of a street car. On this particular morning, to the knowledge, however, of the motorman, those safeguards were not in operation; so that it left a condition of affairs which it may well be argued, and you may conclude, that required a precaution on the part of the motorman different from that he would have required to pursue, say, the day before.
>
> Then, again, you have the question of the bushes growing up in that locality, and obstructing, more or less, the view of the approaching street car. I instruct you, as far as the question of crossing is concerned, there is no law resting on the railway company to clear its right of way. That is a matter that pertains, and has to do with another branch of the duties placed upon a railway company operating in the country; but it is a fact that you can take into consideration when you determine whether or not, at that point, the motorman, upon the occasion in question, having in view that situation, was acting with due regard to those entitled to use the highway.

When, therefore, the jury found that the appellant had not taken sufficient precautions on account of the approaching crossing and the conditions existing on the morning in question, I think that their answer

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clearly means that in view of the fact that, to the knowledge of the motorman, the bell and the light at the crossing were not in working order that morning and that the bushes obstructed the view, the motorman had not taken sufficient precautions for the protection of persons entitled to use the highway. I would therefore conclude that Mr. Tilley's attack on this answer is not a reason for setting aside the verdict.

My opinion consequently is that the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McPhillips & Smith.*

Solicitors for the respondent: *Taylor, Mayers, Stockton & Smith.*

H. D. REID AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

W. H. R. COLLISTER AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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*Oct. 17.
*Oct. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Mines and mining—Certificate of improvements—Application for—Affidavit—Cessation of work—"Mineral Act," R.S.B.C. 1911, c. 157, ss. 49, 52, 56, 57.

The respondents, owners of mining claims under the "Mineral Act," complied with all the requirements of section 57 except the filing of the affidavit required by sub-section (g), which they were deterred from doing by the statement of the mining recorder that an adverse action had been begun and notice thereof had been filed with him, and this being so, the respondents were not in a position to swear that they were "in undisputed possession" of the claim. The respondents waited for such adverse claimants to proceed with their action and allowed two or three years to elapse without doing further work or making further payment on the claim. Section 49 provides that "if such work (annual work) shall not be done, * * * the claim shall be deemed vacant and abandoned, any rule or law of equity to the contrary notwithstanding."

Held, that, under the circumstances of this case, the respondents were relieved from the necessity of doing further work on the claims pending the issue of the certificate of improvements and that they were not subject to section 49.

Judgment of the Court of Appeal ((1919), 47 D.L.R. 509; [1919] 3 W.W.R. 229), affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Gregory J. and maintaining the respondent's, plaintiff's, action.

The material facts of the case and the questions in

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

(1) (1919), 47 D.L.R. 509; [1919] 3 W.W.R. 229.

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issue are fully stated in the above head-note and in the judgments now reported.

Mayers for the appellant.
Bass for the respondent.

IDINGTON J.—Not without some doubts but largely because of such, I am unable to assent to the allowance of this appeal.

It seems to me that, on the evidence adduced, the curative sections of the Act relevant to the several questions raised, as to all but one question, which I am about to refer to, meet and answer them effectively.

The one question about which I have doubts is whether the learned trial judge was right in holding that because the respondents failed to meet the formal requirements of the "Mineral Act," they forfeited all their rights, and their claims are to be *ipso facto* deemed vacant and abandoned.

I agree so far with the learned trial judge that the language of section 49 is so plain and expressive that it requires a very exceptional case (such as this I fancy is) to render it possible to hold otherwise than he does.

It seems to me that having regard to a consideration of the purview of the statute, whilst it may be possible rightly to hold as the judgment of the learned trial judge does, that when there has in fact arisen default in a literal compliance with the requirements of the Act, no matter how induced, forfeiture must ensue. Yet the Act should not be so construed, when the omission to comply with its terms has been brought about, (through no fault of the claimant, who has had done everything to entitle him to a grant, save in the mere formal requirements of application therefor, being compiled with, and the acts necessary therefor have

been prevented), by the wrongdoing of some malicious person rendering it impossible to make the necessary affidavit in its entirety.

When we find, as herein, that the mere issue of a writ setting up an adverse claim, but never served though made to appear of record in the office of the Mining Recorder, is virtually held to suffice to frustrate an honest claim, I think we must pause and consider, as the Court of Appeal has done, whether the purpose and scope of the Act imperatively requires a declaration of forfeiture instead of any other alternative.

Indeed, the learned trial judge suggests other alternative courses were open to the respondents, but either of those suggested involved a possible, and probable, loss of time that would work a forfeiture if the section is to be taken in the sense declared or an expenditure never contemplated as part of the policy of the legislature before the claimants' right to a grant was recognized.

I cannot think the legislature ever in fact desired to produce such grossly unjust and absurd results and they should be averted if a more reasonable construction is open to us.

I am inclined rather to adopt one or other of the alternative views presented in the opinion judgments delivered in appeal and now called in question, and hence must refuse to allow this appeal.

Indeed my doubts, to put the matter no higher, preclude my assenting thereto.

I think there is, for the respective reasons assigned by Mr. Justice Martin, nothing in the other objections taken in support of the appeal herein. In some of such objections which are taken I do not agree with appellants' view of the facts.

I would dismiss the appeal with costs.

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DUFF J.—The question of substance presented for determination on this appeal is by no means free from difficulty; but after a full examination of the considerations presented by the appellant I think the better view is that expressed in the judgment of the Chief Justice in the court below. With his reasons I concur.

The appeal should be dismissed with costs.

ANGLIN J.—I concur in the opinion of the majority of the learned judges of the Court of Appeal as to the construction and effect of section 52 of the "Mineral Act" and as to the sufficiency of what was done by the plaintiffs as a compliance with its requirements. But, without further consideration, I am not prepared to accede to Mr. Justice Martin's view as to the scope and effect of section 56, which, if correct, would seem to render section 52 quite superfluous. The presence in the Act of the latter section indicates that the existence of the conditions which render section 56 operative does not *per se* suspend the obligations imposed by section 48. On the other questions in issue between the parties I accept Mr. Justice Martin's conclusions.

The appeal should be dismissed with costs.

BRODEUR J.—The plaintiffs, respondents, were the recorded owners of the claim in question; and if they have not filed with the Mining Recorder an affidavit shewing the performance of the conditions required by the "Mineral Act," it is due to the fact that an adverse action had been instituted against them by the appellants and that they had to swear in that affidavit that their possession was not disputed.

The appellants, however, did not proceed with their action before the courts; but they located mineral

claims upon the same land of which the respondents were the recorded owners.

The present action has been instituted by the respondents to restrain the defendants, appellants, from interfering with their rights.

I entirely agree with the view expressed by the learned Chief Justice of the Court below.

The appeal should be dismissed with costs.

MIGNAULT J.—The only serious question in this case is whether, in view of section 49 of the "British Columbia Mineral Act" (R.S.B.C. 1911, ch. 157), the mineral claims of the respondents must be deemed to have been vacant and abandoned. The learned trial judge considered this section as being conclusive against the respondents and expressed his regret at having to dismiss their action, the more so as in his opinion, and in this opinion Mr. Justice Martin of the Court of Appeal fully concurred, the appellants had simply "jumped" the respondents' claims. In the Court of Appeal, however, the objection based on section 49 did not prevail with the majority of the court and the learned trial judge's judgment was reversed.

The whole question is as to the effect of the "Mineral Act." And if section 49 does not stand in the way of the respondents, the appeal must be dismissed.

After consideration, I have come to the firm conclusion that section 49 does not deprive the respondents of their claims, for I cannot doubt that they had applied, which they could do verbally, to the Mining Recorder for a certificate of improvements. They were fully entitled to this certificate, having done and recorded work or made payments to the amount of $500.00 on each claim. And when they applied for

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the certificate of improvements, the Mining Recorder informed them that an adverse claim had been filed and that the filing of that adverse claim stopped all proceedings in the matter of obtaining a certificate of improvements. The respondents had complied with all the requirements of section 57, with the single exception of the affidavit required by sub-section (g) of that section. But inasmuch as that form of affidavit obliged the affiant to swear that he was in undisputed possession of the claim, it was impossible for the respondents to make this statement on account of the filing of the adverse claim and the Mining Recorder told them that they could not make the affidavit.

Under these circumstances my opinion is that in view of the making of the application for a certificate of improvements, and while this application was pending, section 52 exempted the respondents from the obligation of doing any more work or paying any more money in connection with their claims. The result is that section 49 does not apply and the respondents' claims are not to be deemed vacant and abandoned.

Had I any doubt as to this result I would not, in the words of Chief Justice Macdonald, give the appellants, whose conduct places them in a somewhat unenviable position, the benefit of this doubt, but I really can feel no doubt after reading the judgment of the learned Chief Justice and the very complete and convincing opinion of Mr. Justice Martin.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Courtney & Elliott.*
Solicitors for the respondents: *Bass & Bullock-Webster.*

JACOB F. HONSBERGER (DEFENDANT) ..... } APPELLANT;

AND

THE WEYBURN TOWNSITE COMPANY (PLAINTIFF) ..... } RESPONDENT.

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*May 27, 28.
*Oct. 14.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Constitutional law—Provincial Company—Status ab Extra—Comity—Right of Action—License—"Extra-Provincial Corporations Act," R.S.O. [1914] c. 179.

Item 11 of sec. 92 "B.N.A. Act," 1867, empowering the legislature of any province to make laws in relation to "the incorporation of companies with provincial objects" does not preclude a legislature from creating a company with capacity to accept extra-provincial powers and rights. *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566, 26 D.L.R. 273, followed.

Such capacity need not be expressly conferred. It is sufficient if the intention of the legislature to confer it can be gathered from the instruments creating the company.

A Saskatchewan Company may, on obtaining a license under the "Extra-provincial Corporations Act," (R.S.O. [1914] ch. 179), carry on business in Ontario. It may enforce in the Ontario Courts the performance of a contract entered into with a resident of that province and the action may be maintained though the license was not granted until after it was instituted.

Judgment of the Appellate Division (45 Ont. L.R. 176), reversing that on the trial (43 Ont. L.R. 451), affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment on the trial(2), in favour of the defendant.

The questions raised on the appeal were whether or not the respondent company, incorporated under the "Companies Act" of Saskatchewan for the purpose of buying and selling land, could enforce in the

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 45 Ont. L.R. 176. (2) 43 Ont. L.R. 451.

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Ontario Courts, an agreement for sale of its land in Saskatchewan to a purchaser in Ontario; and whether or not license to resort to the courts of the latter Province had been validly granted by the authorities there.

The trial judge held that the company could not carry on its business outside of Saskatchewan and dismissed the action. His judgment was reversed by the Appellate Division.

Hellmuth K.C. and *Kingstone* for the appellant. The reasoning of Lord Haldane in the *Bonanza Creek Gold Mining Co.* v. *The King* (1), is that a provincial company must have express authority before it can operate beyond the limits of its Province. And see *Florence Mining Co.* v. *Cobalt Lake Mining Co*(2).

Tilley K.C. and *Payne* for the respondent.

THE CHIEF JUSTICE.—This appeal must, in my opinion, be decided in accordance with the law as laid down by the Judicial Committee of the Privy Council in the *Bonanza Case*(1), as to the powers and capacities of companies incorporated by provincial legislatures.

I think the head-note of the case correctly defines what their Lordships in that case determined. It is as follows:—

Section 92 of the "British North America Act," 1867, confines the actual powers and rights which a provincial government can bestow upon a company, either by legislation or through the Executive, to powers and rights exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the Executive to incorporate by charter so as to confer a general capacity analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corporation with this general capacity. The power of incorporation by charter transferred to the

(1) [1916] 1 A.C. 566; 26 D.L.R. 273. (2) 18 Ont. L.R. 275.

Lieutenant Governor of the Province of Ontario by section 65 of the above mentioned Act has not been abrogated or interfered with by the "Ontario Companies Act" R.S. O. 1897, ch. 191.

The doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1), does not apply to a company which derives its existence from the act of the Sovereign and not merely from the regulating statute.

Lord Haldane in delivering the reasoned and considered judgment of their Lordships overrules the judgment of the majority of this court, of which I was one, when the *Bonanza Case*(2), was before us, as to the meaning of sub-section 11 of section 92 of our Constitutional Act empowering legislatures exclusively to make laws in relation to the

incorporation of companies with provincial objects.

Our judgment placed a territorial limitation upon the powers which the provincial legislatures were authorized to confer upon the companies created or incorporated by them, and this limitation was, Lord Haldane says, at page 577, so complete

that by or under provincial legislation no company could be incorporated with an existence in law that extended beyond the boundarise of the province.

Whether His Lordship stated with accuracy the real meaning and effect of the decision of this court I do not stop to discuss. We are concerned alone with the proper construction of the judgment of the Judicial Committee for whom His Lordship was speaking, as to the meaning of this 11th sub-section.

I think, as I have said, the head-note of the Bonanza judgment correctly epitomizes the gist of that judgment, namely, that while the "powers and rights" which a provincial legislature can bestow are confined to those exercisable within the province, that does not preclude such legislature from legislating so as to create by statute a corporation with the

(1) L.R. 7 H.L. 653. (2) 50 Can. S.C.R. 534; 21 D.L.R. 123.

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general capacity to acquire in another province of the Dominion power to operate in that province with respect to the carrying out of its corporate powers granted by the province incorporating the company.

The question in this case, in my opinion, under the construction I put upon the Privy Council judgment in the *Bonanza Case*(1) was confined to two points, first, whether the company had the capacity given to it by the legislature to obtain power *ab extra* to carry on in another province its authorized business of buying and selling real estate in Saskatchewan, and secondly, whether it had obtained such power from the Province of Ontario, assuming that its contract in question was made there.

I am, as I have said, of the opinion that its corporate powers "to carry on real estate loan and general brokerage business" in the Province of Saskatchewan, under the *Bonanza Case*(1), decision of the Judicial Committee, conferred on it the *capacity* to obtain such power from Ontario under what is known as the law of comity.

Of course, such a statutory corporation as the respondent could not obtain *ab extra* power to carry on any business not strictly within its corporate powers, but within these powers it had such capacity. My construction of the powers conferred upon the company "of real estate loan and general brokerage business" is that they referred to real estate in the Province of Saskatchewan alone, and not to real estate elsewhere. The lands in question in this case were, of course, situate in the Province of Saskatchewan

The question is then raised whether it did obtain such powers *ab extra* or not.

On that point I cannot think there can be any

(1) [1916] 1 A.C. 566; 26 D.L.R. 273.

doubt. The law of Ontario has, as is pointed out by the trial judge, Masten J., always recognized, subject to certain specified restrictions which do not enter into this case, the right of foreign corporations to carry on their authorized business and make contracts within their authorized powers outside of the country in which they are incorporated, so that the contract sued on in this case even if made in Ontario, being admittedly within the express corporate powers of the company to buy and sell real estate in Saskatchewan, was not *ultra vires* and was capable of being enforced in the Ontario courts.

The appellant relied upon the "Extra-Provincial Corporations Act," R.S.O. ch. 179. The plaintiff admitted it did not have the license required by section 7 of that Act until after it had commenced this action, but it did then obtain the license and the statute expressly provides that the granting of the license put the company's right of resort to the Ontario Courts in the same position as if it had been granted before the action was instituted.

In the result I am of the opinion that whether the contract sued on was made in Saskatchewan as found by the Appellate Division, or in Ontario as contended by the appellant, the right of the plaintiff to maintain an action upon it in Ontario was clear.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant is and has been throughout the period of time involved in the negotiations and bargaining in question herein, and this litigation founded thereon, a resident of Ontario.

The respondent is a company incorporated (23rd March, 1912) under and by virtue of the "Saskatchewan Companies Act" "to carry on real estate, loan and general brokerage business."

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In the course of carrying on said business the respondent had its head office in Weyburn in Saskatchewan and acquired some lands in the said province. The appellant by an agreement of sale dated the 15th October, 1912, made between the respondent and himself, agreed to purchase from the former certain blocks of said land and to pay the price named, for balance of which this action is brought.

The defences set up at the trial failed, except as to one which raised the question that the said contract was *ultra vires* the respondent company and hence null and void.

The learned trial judge maintained this contention and dismissed, for that reason alone, respondent's action.

The first Appellate Division of Ontario reversed this and directed judgment to be entered for respondent for the sum claimed.

The agreement in question was drawn up in duplicate at Weyburn in Saskatchewan and forwarded to the appellant in Ontario, who executed both copies and returned them to the respondent, who, then in Weyburn, executed same there. That does not seem to me to constitute anything *ultra vires* the corporate powers or capacity of the respondent.

The said "Companies Act" of Saskatchewan appears in the Consolidation of 1909, which is enacted by a statute of the legislature, assented to January 26th, 1911, and professes to be an enactment of His Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan.

The first chapter of said Revised Statutes is called "The Interpretation Act" and by the second clause thereof provides that the following words may be inserted in the preamble of Acts and shall indicate

the authority by virtue of which they are passed, that is to say:—

His Majesty by and with the consent of the Legislative Assembly of Saskatchewan enacts as follows:—

From this Act I infer as well as from the words in the preamble to the Act respecting the Revised Statutes of Saskatchewan, 1909, which adopts these enacting words

His Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan,

that the enactments in the consolidation are to be treated as if they were made in that form.

The fifth clause of the "Companies Act" declares as follows:—

Any three or more persons associated for any lawful purpose to which the authority of the Legislature extends * * * may by subscribing their names to the memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company with or without limited liability.

I am unable to understand how a company incorporated, without any limitations upon the powers or capacity of the legal entity thereby created, under and by virtue of an enactment professing to be enacted by His Majesty by and with the advice of the legislature, and expressly intending that the full power of incorporation which a provincial legislature has to incorporate for certain specific objects is being exercised, can be said to have been acting *ultra vires* of the power thereby conferred, when confining its action within the obvious purposes of its creation; and that no matter where acting unless in violation of the law of the country or province where so acting or other local limitations upon the usual observance of the comity of a foreign state in relation to the recognition of corporations created beyond its jurisdiction.

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I most respectfully submit that what was said in the *Bonanza Creek Case*(1), having been intended to be applicable only to an enactment using entirely different language and mode of thought for expressing the purpose of the legislature, and also to a different state of facts from those presented herein, cannot be helpful herein or further than in an expressly identical sort of case.

I am quite sure that whenever it is in such an enactment the obvious intention of the legislature when indicated as above to exercise to the fullest extent the powers given it by the "British North America Act," the incorporating power it thereby confers upon those obtaining incorporation thereunder all the power and capacity that can be given by virtue of such powers as conferred by section 92, Item No. 11 of said Act.

"The Legislature," which must be taken to mean all that section 92 of the "British North America Act" implied by the use of that very term which Parliament used when it expressly endowed each province with the incorporating power in question, has in the plainest and most comprehensive language quoted above, expressed such a purpose, and I am not prepared to minimize in the slightest degree the full effect thereof.

What Parliament in that regard conferred upon each province in question in the "British North America Act" has been conferred, by a process needless to trace here in detail, upon the Province of Saskatchewan.

What, in my opinion, that implied in Item II of the "British North American Act," I have heretofore expressed in several cases. I am the more inclined to adhere thereto when I recall that I had reached the

(1) [1916] 1 A.C. 566; 26 D.L.R. 273.

same result in the *Bonanza Case* (1) as did the court above, and I now hear it argued as it was, relying upon the reasons assigned by the said court in that case, by counsel for appellant herein, that the corporate body created in Saskatchewan as this was has no power to sue in another province.

Though that proposition was ably and logically presented as a corollary of some of the reasons I cannot assent thereto.

Nor do I think the negotiations which took place in Ontario leading up to the execution of the above mentioned instrument under seal in which they would, so far as in any way affecting the relations between the parties, be merged therein, can affect the answer to be given the question raised in one way or another.

As to the right to sue in Ontario I assume that a corporation created by the like authority which created respondent may, as any one else may, be debarred from using the courts of a province in violation of a valid statutory prohibition; but anything of that kind which may have existed was removed by the licence issued respondent.

There is nothing in the Ontario legislation which affects, or pretends to affect, in any way the legality of the contract.

I am, therefore, of the opinion that this appeal should be dismissed with costs.

DUFF J.—I shall assume for the purposes of this judgment that the respondent company was carrying on business within the meaning of the Ontario statute, in Ontario, when the contract was made and that the contract, which is the subject of the action, was effected in the course of carrying on that business.

(1) 50 Can. S.C.R. 534, 21 D.L.R. 123.

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On that assumption, the principal question is whether the respondent company possesses capacity recognized by the laws of Ontario to become a party to that contract. The question whether it enjoys such capacity is primarily, of course, a question to be determined by the Ontario law Ontario law on this subject, in so far as it has not been altered by statute, is the common law of England. The common law of England recognizes the legal personality of juristic persons, speaking generally, for the purposes for which they have been endowed with capacity to be the subjects of rights and duties by the authority to which they owe their existence. The concrete point for decision is therefore, under the assumption above mentioned, did the respondent company under the law of Saskatchewan receive capacity to procure recognition in Ontario as a corporation and to acquire the right to enter into the contract it seeks to enforce?

It is argued that from the fact that the legislative authority of a Canadian province in relation to the incorporation of companies is an authority limited in respect of territory and subject matter, one of these two results follows: either (it is said) 1st., A corporation (to which the doctrine of *ultra vires* applies) owing its existence to legislation passed under the authority of No. 11 of section 92 is inherently wanting in capacity in consequence of the limitations laid down in the "British North America Act" to acquire recognition abroad for the purpose of pursuing the objects for which it is incorporated, or 2nd., it receives such capacity only when that is given in express words by the instruments defining its constitution.

To deal with these propositions in the order in which I have stated them, the legislative authority of a province is, of course, territorially limited—the

power conferred by section 92 in relation to the subjects enumerated being a power to make laws for the province; but when a question arises in another jurisdiction touching the recognition of a right acquired under the law of a Canadian province or alleged to have been so acquired, the rules applicable for deciding the question do not in any presently relevant respect differ from those applicable where rights are alleged to arise under a system of law owing its sanctions to a sovereign authority unlimited as regards subject matter and unlimited by any constitutional instrument as regards territory. The very point was discussed by Mr. Justice Willes in his most illuminating judgment at pages 18, 19 and 20(1), delivered on behalf of the Exchequer Chamber in *Phillips* v. *Eyre*, and he there says:—

> We are satisfied * * * * that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, as to matters within its competence and the limits of its jurisdiction has the operation and force of sovereign legislation, though subject to be controlled by the Imperial parliament.

Almost identical language is used (with reference to the particular case of the Canadian Provinces) by Lord Watson in delivering the judgment of the Judicial Committee in *The Maritime Bank* v. *Receiver General of New Brunswick*(2), and by Lord Haldane in giving judgment on behalf of their Lordships in *In re The Initiative and Referendum Act*(3), at page 5. Lord Haldane's exact words are:—

> Subject to this (the qualification has no bearing on the present discussion) each province was to retain its independence and autonomy, and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in

(1) L.R. 6 Q.B. 1. (2) [1892] A.C. 437.
(3) [1919] A.C. 935; 48 D.L.R. 18 at 22; [1919] 3 W.W.R. 1.

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the plenitude of its own freedom before it handed them over to the Dominion and the provinces, in accordance with the scheme of distribution which it enacted in 1867.

There seems to be no reason for suggesting that the recognition of corporateness or juristic personality, which is only the capacity to be the subject of rights, should stand on a lower plane than, e.g. rights arising from a judgment (see Dicey, page 469 note and page 23); and speaking generally the law of England recognizes such capacity subject to the restrictions (if any) imposed by the authority from which the capacity is derived. Where corporate capacity is derived from a legislature, having limited authority as regards the creation of corporations, the limits set to the legislative authority must, of course, be considered in determining the scope of such capacity and as I have already said the contention now advanced is that No. 11 of section 92 does confine the authority of a provincial legislature in relation to that subject to the creation of companies having capacity only to carry on business within the limits of the province.

The judgment of the Judicial Committee in the *Bonanza Company's Case*(1), seems to be decisive of the point in the opposite sense.

Their Lordships there enunciate at page 578, an interpretation of No. 11 of section 92 in these words:—

> For the words of section 92 are, in their Lordships' opinion, wide enough to enable the Legislature of the province to keep the power alive, if there existed in the Executive at the time of confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. Such provincial objects would be of course the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province.

And at page 583:—

> The whole matter may be put thus: The limitations of the legislative powers of a province expressed in section 92, and in particular

(1) [1916] 1 A.C. 566, 26 D.L.R. 273.

the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial government can bestow, either by legislation or through the Executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another.

And again at page 584.—

Assuming, however, that provincial legislation has purported to authorize a memorandum of association permitting operations outside the province if power for the purpose is obtained ab extra, and that such a memorandum has been registered, the only question is whether the legislation was competent to a province under section 92. If the words of this section are to receive the interpretation placed on them by the majority of the Supreme Court the question will be answered in the negative. But their Lordships are of opinion that this interpretation was too narrow. The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted ab extra. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted.

The language of No. 11 of section 92 —

incorporation of companies for provincial objects.

had of course never been supposed by anybody to import any limitation by which companies created under it would be disabled from acquiring status and recognition abroad for the purpose of pursuing the objects for which they were legitimately incorporated. It was never supposed, for example, that a mutual fire insurance company authorized by provincial legislation to carry on business in a single county would, because of this restriction of its business operations, be disabled from enforcing the payment of a

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premium note in the courts of another jurisdiction against a defaulting member who had left the province.

The view which had been taken was that "provincial objects" had no immediate reference to legal powers and capacities but that the word "objects" denoted the undertaking of the company in the commercial or economic sense; and that these words "for provincial objects" expressed a condition requiring that the business or the undertaking of a provincial company must be so restricted as to fall within the description "provincial" and that in applying this condition, the word "provincial" must be interpreted in a territorial sense It followed—on the assumption that No. 11 was to be construed and applied in the spirit of the doctrine of *ultra vires*—that, such a company being a corporation only for such restricted objects, *Ashbury Carriage Co.* v. *Riche*(1), at page 669, per Lord Cairns, and at pages 693 and 694, per Lord Selborne, its capacity to enjoy status and rights outside the province must exist only in respect of such status and such rights as might be necessary to enable it to pursue these objects; although it was by no means involved in this that particular transactions outside the province could not be within the capacity of such a company, as incidental to or consequential upon the pursuit of objects, in substance provincial in a territorial sense.

This view of No. 11 of section 92, which was the view adopted by the majority of this court, was rejected by the Judicial Committee in the *Bonanza Company's Case*(2), as the extracts already quoted sufficiently shew, and it must be accepted as settled law that the words "for provincial objects" in No. 11

(1) L.R. 7 H.L. 653. (2) [1916] 1 A.C. 566; 26 D.L.R. 273.

do not import any restriction upon the "objects" of a provincial company in the sense above mentioned; and moreover—and on this point the effect of the passages cited seems to be unmistakable—that the words "with provincial objects" are merely declaratory of the necessary limits upon the operation of provincial legislation on the subject mentioned which in the absence of them would have been the consequence of the legal principle that corporate status and capacity, in like manner as rights, arising under provincial law, cannot, in jurisdictions beyond the boundaries of the province be legally operative *ex proprio vigore* but only by virtue of recognition, express or implied, accorded by some other political authority or system of law.

It is true that in the *Bonanza Company's Case*(1), it was held that the company whose capacity was there in question was not a company to which the doctrine of *ultra vires* applied. But the language of the passages cited is perfectly general and the principle laid down thereby is broad enough to embrace the case of a company to which the doctrine is applicable. Indeed once the point is reached that the scope of the undertaking (in the sense already mentioned) of a company incorporated under the authority of No. 11 of section 92, is not necessarily limited territorially by virtue of any limitation of legislative authority supposed to reside in the phrase "with provincial objects," it manifestly results that, as regards statutory corporations affected by the doctrine of *ultra vires*, the scope of corporate capacity must be determined by reference to the language 1st, of the statute, and then, if the statute be a general one, of the instrument defining the powers of the particular company under consideration.

(1) [1916] 1 A.C. 566; 26 D.L.R. 273.

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Nor does there appear to be any good reason why in interpreting a provincial statute providing machinery for the incorporation of companies generally, or a special statute incorporating a company and defining its constitution, or a memorandum of association taking effect under the authority of a general statute, general words defining the constitution of a particular company and prescribing the scope of its activities, or general words defining corporate capacity, should be read as subject to some stringent canon of construction supposed to have its logical and legal foundation in the fact that the statute is a provincial statute, or that the instrument derives its legal effect from the authority of a provincial statute.

With great respect for the learned trial judge, who seems to have taken the opposite view, I know of no legal principle—and here we come to the second branch of the argument I am considering—and no consideration of convenience, derived from business practice, requiring the court to read the language of such a statute or instrument defining the scope of the company's activities as *primâ facie* confining those activities within the province, or to read the language defining the capacity and powers of the company as *primâ facie* denuding the company of capacity to acquire rights and status abroad; or as *primâ facie* limiting the application of the rule that whatever may fairly be regarded as incidental to or consequential upon things authorized, ought not, unless a contrary intention appear, to be held by judicial construction to be *ultra vires*. *Attorney General* v. *Great Eastern Ry. Co.*(1).

Coming to the concrete case before us I cannot agree with the view that there is anything in the

(1) 5 App. Cas. 473.

Saskatchewan Statute to support the inference that companies incorporated under it are to be limited in their business activities to the territory of the province; and I cannot agree that the unqualified language of the memorandum of the respondent company can be read as subject to some qualification arising from the fact that the company is incorporated in Saskatchewan and has its head office there. Further, had the memorandum, in otherwise unqualified words, authorized dealings in Saskatchewan lands only, I should not have deduced from the two circumstances mentioned alone, a presumption confining within the province the operations of the company either in making contracts of purchase or in making contracts of sale, or indeed in establishing agencies for sale. I do not think there is any solid basis for such a presumption

In this view the Ontario statute (R.S.O. 1914, ch. 179, secs. 7 and 16) admittedly presents no difficulty.

The provisions of section 16 shew plainly enough that the policy of this licensing enactment is primarily in its object and effect a revenue enactment; and sub-section 2 of the last mentioned section explicitly provides that a license granted during the progress of an action is sufficient to support the right of action.

As regards the "Saskatchewan Act" of 1917 (ch. 34, sec. 42) I should only like to say that I pass no opinion upon the question whether the law of Ontario in recognizing a foreign corporation as a juristic person, takes account (for the purpose of determining the capacity of such a corporation) of the enactments of a retroactive statute conclusively binding upon the courts of the jurisdiction where the corporation had its origin and has its principal place of residence.

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The point is an important one and can more conveniently be considered when a case arises in which it is necessary to pass upon it.

The appeal should be dismissed with costs.

ANGLIN J.—The defendant appeals from the judgment of a divisional court of the Supreme Court of Ontario(1), reversing the decision of Masten J. who dismissed the action(2), and directing specific performance of a contract for the purchase of land in Saskatchewan, and payment of the purchase price with interest amounting in all to $6030.35. The facts are fully stated by Mr. Justice Masten.

The execution of the agreement for purchase was not contested. The plaintiff company was incorporated under the "Saskatchewan Companies Act," 1909, sec. 72, pt. 1, by a memorandum of association duly subscribed and registered, in which its objects are declared to be

to carry on real estate, loan and general brokerage business.

The following questions were in issue in the action:

(1) Was the contract procured by misrepresentations which made it voidable by the defendant?

(2) Was the contract made in Saskatchewan, or was it made in Ontario, or in the course of carrying on business by the plaintiff company in Ontario?

(3) If made in Ontario, or in the course of carrying on business there, was it invalid?

(a) because the Legislature of Saskatchewan lacked power to endow a body corporate created by it or under its authority with the subjective capacity to avail itself outside the province of powers, rights or privileges, similar to those enjoyed by it in Saskatch-

(1) 45 Ont. L.R. 176. (2) 43 Ont. L.R. 451.

ewan, of which any other province or foreign state should by comity permit the exercise within its territory;

(b) because, if the Saskatchewan Legislature possessed that power, it was not exercised in favour of the plaintiff company; or

(c) because at the time of the execution of the contract the plaintiff company did not hold a license under the "Ontario Extra-Provincial Corporations Act" R.S.O. ch. 179?

(4) Did the want of such license at the date of instituting the action render it unmaintainable although a license was procured before the trial?

(1) The learned trial judge was of the opinion that the defence based on misrepresentation wholly failed. His view was affirmed by the Appellate Division and that defence has not been made a ground of appeal to this court.

(2) After stating the facts at some length, the learned trial judge expressed his views on this aspect of the case in these words —

> The agreement sued on is dated October 15th, 1912. The only agreement made between these parties was the agreement which was negotiated on that date at Jordan, Ontario, between Gayman, Bowman and Griffin, agents of the company, of the one part and the defendant of the other part. The company subsequently treated what took place on October 15th, not as an offer but as an existing agreement which the company then ratified as of the 15th of October and confirmed and evidenced by executing under its corporate seal a formal written agreement bearing date October 15th.
>
> * * * * * *
>
> In the present case it seems to me that the question is whether the sale in question is essentially bottomed on acts of the plaintiff company done outside the territorial limits of Saskatchewan.
>
> When the plaintiff company appointed Gayman, a resident of Ontario, to be its permanent representative and agent in St. Catharines, and when he, along with the President and Secretary of the company, approached the defendant at his residence in Ontario, sold him the lands in question, made the agreement of which Exhibit 1 afterwards became the written record and at the same time received from

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him, as part of the purchase price, the promissory note payable in Ontario, and when Gayman at St. Catharines afterwards received from the defendants payments on account of the price and renewals of the note, the plaintiff company was, I think, carrying on in Ontario essential parts of the transaction in question and was assuming to exercise powers and acquire rights outside of Saskatchewan.

In so far as the question is one of fact I so find on the evidence.

The view taken in the Appellate Division was that notwithstanding the negotiations conducted and the resultant verbal agreement made in Ontario, accompanied by part payment of the purchase money by the giving of a promissory note, and the execution there at a later date by the defendant of the formal instrument now sued upon, because of its execution by the plaintiff company subsequently in Saskatchewan, whereby it became a concluded agreement, it must be regarded as a contract made in Saskatchewan. Hodgins J.A. expressed this opinion perhaps more pointedly than the learned Chief Justice of Ontario, with whom the other members of the court concurred.

I am with great respect not quite prepared to accept without some qualifications the reasoning on which this conclusion has been based. It is the purchaser who is sued. Whatever answer the Statute of Frauds might have afforded him had he not signed the formal instrument, upon his signature being affixed to it a memorandum sufficient to meet the requirements of that Act existed and the verbal contract made at Jordan, Ontario, if otherwise valid, would have been enforceable against him. But, apart from that view of the matter the execution of the agreement in Saskatchewan by the company was merely the carrying to completion of the oral bargain made and already in part performed in Ontario. Yet, assuming that all that had transpired there was void, because *ultra vires* of the company, and that while matters remained in that position the defendant would

have had an unanswerable defence, what had been so done was not illegal and as such incapable of being made the basis of an agreement binding on the parties. There was nothing to preclude the company by a valid contract made in Saskatchewan from selling its land to a non-resident of the province—nothing to prevent it accepting in Saskatchewan an offer from such a non-resident though obtained in and transmitted from another province, even if the company's power and capacity were as restricted as the defendant contends. If all that had been done up to the time he executed the formal agreement was ineffectual because *ultra vires* of the company, the defendant, if aware that he was dealing with a provincial corporation, might be presumed to have been cognizant of the constitutional limitations upon its powers and of the legal consequences which lack of capacity on its part would entail. But, even without the aid of that presumption I would incline to accede to the view that the document signed by him and forwarded with his knowledge for execution by the company, if everything which preceded it were void, might be regarded as an offer to purchase then made by him to the company which was subsequently accepted by the latter in Saskatchewan and thereby became a valid contract binding upon it. Apart, therefore, from some considerations arising out of the phraseology of the "Extra-Provincial Corporations Act" of Ontario presently to be noticed, I would be disposed to agree in the conclusion of the learned Chief Justice of Ontario that, assuming the restrictions upon the corporate capacity of the plaintiff company asserted by the defendant, the contract eventually executed by it should not be regarded as open to the objection to its validity on which he relies.

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3 (a) But if that view of the case should be wrong and in order to guard against being taken to hold the opinion expressed by Masten J., in which Hodgins J.A. expressly concurs, that it is beyond the legislative jurisdiction of a provincial legislature to incorporate a company with capacity to carry on in another province or state, by virtue of its sanction express or tacit, business within the objects of its incorporation and not otherwise open to exception, I desire to state that on this aspect of the case I adhere to the opinion which I expressed in the *Companies' Reference*(1), and in the *Bonanza Case*(2), and I find that opinion upheld by the judgment of the Judicial Committee on the appeal in the latter case(3). I venture to quote the following passages from what I said in the Companies' Case:—

> If the operations or activities of any foreign corporation should depend for their validity upon the powers conferred upon it by the law of the incorporating state, it would in my opinion be difficult to sustain them, inasmuch as the law of no country can have effect as law beyond the territory of the Sovereign by whom it was imposed. But the exercise of its powers by a corporation extra-territorially depends not upon the legislative power of its country of origin, but upon the express or tacit sanction of the state or province in which such powers are exercised and the absence of any prohibition on the part of the legislature which created it against its taking advantage of international comity. All that a company, incorporated without territorial restriction upon the exercise of its powers, carries abroad is its entity or corporate existence in the state of its origin coupled with a quasi-negative or passive capacity to accept the authorization of foreign states to enter into transactions and to exercise powers within their dominions similar to those which it is permitted to enter into and to exercise within its state of origin. Even its entity as a corporation is available to it in a foreign state only by virtue of the recognition of it by that state. It has no right whatever in a foreign state except such as that state confers.
>
> * * * * * *
>
> The provincial company is a domestic company and exercises its powers as of right only within the territory of the province which creates it. Elsewhere in Canada, as abroad, it is a foreign company and it

(1) 48 Can. S.C.R. 331; 15 D.L.R. 332.

(2) 50 Can. S.C.R. 534; 21 D.L.R. 123.

(3) [1916] 1 A.C. 566; 26 D.L.R. 273.

depends for the exercise of its charter powers upon the sanction accorded by the comity of the province in which it seeks to operate, which, although perhaps not the same thing as international comity, is closely akin to it.

In delivering the judgment of the Judicial Committee in the *Bonanza Case*(1) Lord Haldane said:—

The whole matter may be put thus: The limitations of the legislative powers of a province expressed in section 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the *actual* powers and rights which the provincial government can bestow, either by legislation or through the executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another.

* * * * * *

Where, under legislation resembling that of the "British Companies Act" by a Province of Canada in the exercise of powers which section 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by the "British Companies Act," the principle laid down by the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(2), of course, applies. The capacity of such a company may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorize, and therefore excluded, incorporation for such a purpose.

Note the contrast between the form of the clause dealing with the memorandum and that of the clause dealing with the statute. The antithesis is so significant that it is impossible that it was not intentional.

Assuming, however, that provincial legislation has purported to authorize a memorandum of association *permitting operations outside the province* if power for the purpose is obtained ab extra, and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under section 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But *their Lordships are of opinion that this interpretation was too narrow.* The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity

(1) [1916] A.C. 566; 26 D.L.R. 273. (2) L.R. 7 H.L. 653.

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analogous to that of a natural person. *Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity.* What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects *outside the province,* while leaving untouched the ability of the corporation, if otherwise adequately called into existence, *to accept such powers and rights, if granted ab extra. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted.*

On this branch of the case, therefore, I find myself unable to agree with the views expressed by Masten J. and Hodgins J.A. Meredith C.J.O. expressly reserved his opinion on the scope of provincial legislative jurisdiction in regard to the incorporation of companies.

(b) This question presents more difficulty. It was because he thought that whatever power the province possessed to confer the extra-territorial capacity under consideration had not been exercised in favour of the plaintiff company that Meredith C.J O., with the concurrence of three of his colleagues, was of the opinion that

> the appellant company by its incorporation acquired no capacity to carry on its business beyond the limits of Saskatchewan.

The purview and scope of the power and capacity of the plaintiff company depend entirely upon the combined effect of the statute under which it was incorporated and the terms of its memorandum of association. Not having been incorporated by letters-patent, as was the Bonanza Creek Mining Company, it cannot, in order to supplement the powers and capacity derived from its purely statutory incorporation, invoke the prerogative power (if it be vested in the Lieutenant Governor of Saskatchewan) to the exercise of which their Lordships of the Judicial Committee saw fit to impute the possession by the Bonanza Creek Mining Company of the powers and

capacity, similar to those of a natural person, appertaining to a common law corporation. Since the plaintiff company depends for its existence entirely upon the statute subject to the question of constitutional limitation upon the provincial legislative jurisdiction already dealt with, the problem presented on this branch of the case is to ascertain whether upon the fair intendment of the statute and the memorandum of association it should be deemed to have had conferred upon it the capacity to take advantage of the comity of other provinces and states to enable it to exercise its powers within their jurisdiction It cannot derive that capacity from any other source As pointed out by Lord Haldane in the *Bonanza Case*(1), at page 578 —

> The question is merely one of the interpretation of the words used.

The principle of *Ashbury Carriage Co.* v. *Riche*(2), applies. That principle, as stated by his Lordship,

> amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning whatever that may be.

His Lordship adds:—

> The doctrine means simply that it is wrong in answering the question of what powers the corporation possesses when incorporated exclusively by statute to start by assuming that the legislature meant to create a company with a capacity resembling that of a natural person such as a corporation created by charter would have at common law and then to ask whether there are words in the statute which take away the incidents of such a corporation.

In the passage already quoted referring to a provincial company incorporated by means of a memorandum of association under legislation resembling that of the "British Companies Act" his Lordship, applying the principle laid down in the *Riche Case*(2), said:—

(1) [1916] A.C. 566; 26 D.L.R. 273. (2) L.R. 7 H.L. 653.

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The capacity of such a company may be limited to capacity within the province either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the province or because the statute under which incorporation took place did not authorize and therefore excluded incorporation for such a purpose.

While at first blush this language might seem to import that the subjective capacity now in question must be conferred in explicit terms, his Lordship nowhere says so, and I cannot think he meant that in a statute providing for the incorporation of companies general terms may never be given a broad construction of which they are susceptible in order to carry out what should, having regard to all the circumstances and the context of the Act, be considered as having been the intent of the legislature in passing it, but must always be read in the most restricted sense however unreasonable, inconvenient or even mischievous the result. The doctrine of reasonable intendment; *Boon* v. *Howard*(1); *The Duke of Buccleuch*(2), at page 96; *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners*(3), at page 702; *Llewellyn* v. *Vale of Glamorgan Rly Co.*(4), at page 478; *Reid* v. *Reid*(5), at page 407; in my opinion applies to such a statute just as it does to others.

In the "Saskatchewan Companies Act" I find at least two provisions which afford, I think, sufficient indication that the legislature meant that companies incorporated under it

for any lawful purpose to which the authority of the Legislature extends (section 5)

without any restrictive provision, express or implied, in the memorandum of association should possess, to use Lord Haldane's terms, all the "actual powers

(1) L.R. 9 C.P. 277.
(2) 15 P.D. 86.
(3) 7 App. Cas. 694.
(4) [1898] 1 Q.B. 473.
(5) 31 Ch. D. 402.

and rights" which it could bestow and also the fullest "capacity" which it could confer

to accept extra-provincial powers and rights.

By section 17 the "Saskatchewan Companies Act" of 1909 provides that every body incorporated under that Act shall be

capable of exercising all the functions of an incorporated company

and by section 4 it is enacted that

No company association or partnership consisting of more than twenty persons shall hereafter be formed for the purpose of carrying on any business to which the authority of the Legislature extends that has for its object the acquisition of gain by the company association or partnership or by the individual members thereof unless it is registered as a company under this Act or is formed in pursuance of some other Act of the Legislature.

The creation in Saskatchewan by charter of a common law corporation having more than twenty shareholders is probably precluded by this latter section. There appears to be no other general Act of the Saskatchewan Legislature providing for the incorporation of companies, and no provision for the registration of domestic companies created otherwise than under statutory authority. It would seem therefore that, unless by a special Act, a corporation with more than twenty shareholders having the capacity to avail itself of international comity cannot be brought into existence in that province if it may not be done under the "Companies Act." Compare secs. 18 and 4 of the "Companies Act," 1862, ch 89 (Imp.) and secs. 16(2) and 1(2) of the "Companies (Con.) Act" of 1908, ch. 69 (Imp.); and compare also secs. 95 and 97 of the "Saskatchewan Companies Act" of 1909 with sec. 37 of the "Companies Act" of 1867, ch. 131 (Imp.) and sec. 76 of the "Companies (Con.) Act" of 1908. (Imp.)

I think it is abundantly clear that the legislature of Saskatchewan intended to confer upon companies

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to be incorporated under the "Companies Act" of 1909, whose memoranda of association contain no restrictions thereon, the fullest powers, rights and capacity for the attainment of their objects which its legislative jurisdiction empowered it to bestow and which may be requisite or useful to enable it to exercise "all the functions of an incorporated body" for that purpose. It must not be understood, however, that my reference to the provisions of sections 4 and 17 implies that had they been omitted the general terms in which the "Saskatchewan Companies Act" provides for incorporation would not have sufficed to vest in corporations formed under it the capacity we are considering.

There is nothing in the memorandum of association of the plaintiff company which—to quote Lord Haldane again

> has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries.

Its declared objects do not import activities confined to any limited area.

We are not now dealing with a question which affects only provincial corporations. The same problem is presented in the case of every company which has been incorporated by memorandum of association under the "English Companies Acts" in general terms for objects not of such a nature as to imply an intention that the exercise of its powers should be restricted to the United Kingdom and without any such restriction being expressed, but also without any explicit provision that it may carry on its business abroad or may avail itself of the comity of foreign nations or of the self-governing overseas Dominions of the Empire. I am satisfied that thousands upon thousands of contracts have been made by and on behalf of

such corporations outside the United Kingdom in the course of carrying out the objects of their incorporation and that it would surprise and shock its directors and legal advisers if the power of an English company so constituted to make such contracts were called in question and they were told that under the doctrine of *Ashbury Carriage Co.* v. *Riche*(1), its activities must be strictly confined to the United Kingdom. Yet that would seem to be the effect of the Bonanza judgment as interpreted by the learned trial judge and the learned judges of the Appellate Division.

The "English Companies Acts" of 1862 and 1908 nowhere provide expressly that corporations formed under them shall possess, or may acquire, the capacity to accept powers and rights abroad. Section 55 of the Act of 1862 (section 78 of the "Companies (Consolidated) Act" of 1908) providing for foreign attorneys, and the recital and sections 2, 3 and 6 of the "Companies Seals Act" of 1864, (chapter 19) (section 79 of the "Companies (Con.) Act" of 1908), providing for foreign seals, appear to assume that such a capacity might be acquired under the Act of 1862. It is not without significance that it was thought necessary explicitly to restrict the possession of the powers conferred by the Act of 1864 to companies expressly authorized to exercise them by their articles of association. The English sections referred to have no counterpart in the "Saskatchewan Companies Act," 1909.

While it may be said that the presence of these provisions in the English statute, at all events since 1864, made the intention to enable the companies incorporated under it to acquire the capacity under consideration clearer than it is in the case of the

(1) L.R. 7 H. L. 653.

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Saskatchewan statute, the difference is merely one of degree. In neither case is there explicit language conferring the capacity. In both its existence depends on the doctrine of reasonable intendment. Does the language of the statute fairly interpreted sufficiently indicate that the legislature meant to provide for the enjoyment of this capacity by the companies to be formed under its authority?

No doubt the plaintiff company, as a statutory corporation, would not have the powers and capacity of a natural person unless conferred upon it by the statute. That is the doctrine of *Ashbury Co.* v. *Riche* (1). But it has nowhere been determined, so far as I am aware—and certainly not in the *Bonanza Case*(2) that in the absence of express language purporting to confer upon it capacity to avail itself of the comity of nations a corporation, formed under a statute, which by reasonable intendment should be taken as having been designed to vest in the bodies corporate created, without restriction, under its authority all the powers and rights and the fullest capacity which the legislature had jurisdiction to bestow, and having objects which imply no territorial restriction and powers set forth in the most general terms, is by English law unable to avail itself of the comity of other nations or dominions and is therefore obliged to confine its activities within the territorial limits of the jurisdiction of the legislature to which it owes its existence.

I am for these reasons of the opinion that the power which the Legislature of Saskatchewan possessed to endow corporations created by it with capacity to exist and to carry on outside the limits of the Province of Saskatchewan business within the objects of its incorporation sanctioned by the country where

(1) L.R. 7 H.L. 653. (2) [1916] 1 A.C. 566; 26 D.L.R. 273.

it is transacted has been exercised in favour of the plaintiff company.

I entirely agree with the learned judges of the provincial courts that the plaintiff can derive no assistance from the Saskatchewan declaratory statute of 1917. If the contract in question had been *ultra vires* of the plaintiff company when entered into such *ex post facto* legislation could not render it enforceable in courts not subject to the jurisdiction of the legislature of Saskatchewan.

Ontario, as Mr. Justice Masten points out, has always recognized

> the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation and not prohibited by its charter and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burdens imposed by the laws enforced therein.

Canadian Pacific Rly. Co. v. *Western Union Telegraph Co.*(1), at page 155.

Howe Machine Co. v. *Walker*(2), cited by the learned judge is a comparatively early instance of the affirmation of that right, and, as he adds,

> so far as I am aware it has ever since been maintained without question.

It follows that, unless prohibited or rendered void by Ontario legislation, the contract sued upon, even if made in Ontario, being admittedly for the attainment of one of the provincial objects of the plaintiff company, was not *ultra vires* and is enforceable in the Ontario Courts.

(c) The only legislation of Ontario on which the appellant relies is the "Extra-Provincial Corporations Act" (R.S.O. ch. 179). The plaintiff company admittedly did not hold the license required by section 7 of that statute when the contract in question was made,

(1) 17 Can. S.C.R. 151. (2) 35 U.C.Q.B. 37

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nor indeed until after this action was begun. Was the contract therefore void and unenforceable in the Ontario Courts? It was undoubtedly negotiated in Ontario and was executed there by the defendent, whose liability upon it it was sought to enforce, and was not an isolated transaction. It was, in my opinion, clearly a contract, within the purview of section 16 (1) of the "Extra-Provincial Corporations Act,"

> made * * in part within Ontario and in the course of or in connection with business carried on contrary to the provisions of said section 7

of that statute, i.e., by or on behalf of an Extra-provincial corporation not then licensed (see section 7, sub-section 2). The Ontario statute however, does not declare such a contract void. On the contrary, it merely deprives the offending extra-provincial corporation of the right

> of maintaining any action or other proceeding in any court in respect of any such contract so long as it remains unlicensed

and upon the granting of a license puts its right of resort to the Ontario courts in the same position

> as if such license had been granted * * * before the institution

of the action or proceeding.

It is the prosecution of "such action or other proceeding"; i.e.

> an action or other proceeding * * in respect of any contract made wholly or in part within Ontario in the course of or in connection with bsuiness carried on contrary to the provisions of said section 7

that section 16(2) expressly authorizes. That provision is utterly repugnant to the idea that the statute was intended to render such contracts void. The "Extra-Provincial Corporations Act" of Ontario does not affect the validity of the contract.

(4) The statute in explicit terms provides by sub-section 2 of section 16 that upon the granting of

the license a pending action upon a contract made contrary to the provisions of section 7

> may be prosecuted as if such license had been granted * * before the institution thereof.

I am, for the foregoing reasons, of the opinion that the contract sued upon was not *ultra vires* of the plaintiff company and is enforceable in the courts of Ontario and that the judgment for its specific performance should be upheld.

I would dismiss the appeal with costs.

BRODEUR J.—A company duly incorporated in a province becomes an artificial person authorized by its charter and with the capacity of carrying on its business in all the parts of the world where by the comity of nations such business is not repugnant or prejudicial to the policy or to the interests of the local authority.

Supposing that in this case the respondent company had been selling in Ontario lands situate in Saskatchewan (a fact which is denied by the respondent) it was certainly within the limits of its authority and there was nothing in the Ontario laws which would prevent a company incorporated by another province from doing business so long as it would pay for the licences imposed upon it.

The facts disclosed in the evidence do not shew that the contract in question was made in violation of the powers conferred by its charter and by the comity of nations on the respondent company.

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Ingersoll & Kingstone.*
Solicitors for the respondent: *Payne & Bissett.*

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*May 28, 30.
*Oct. 14.

JAMES S. FULLERTON AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

ANNIE LOUISE CRAWFORD AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Company—Director—Secret profit—Ratification—Action by shareholder—Disqualification—Sale of company's land—Director acting as broker—Commission — Statute — Application—"Companies Act," R.S.O. [1914] c. 178, s. 82.

A company formed to buy land for re-sale purchased a block on which W. held an option. W. made a profit of over $11,000 which he shared equally with F. and D. promoters and directors of the company who did not disclose the fact to the other members for several months.

Held, that F. and D. had received a secret profit to which the company was entitled.

The company passed a resolution purporting to refuse to allow its name to be used and C., a shareholder and former partner of F., brought action, on behalf of himself and all other shareholders except the defendants, to recover this secret profit for the company.

Held, that the capacity of a single shareholder, against the will of the majority, to assert the right of the company to this money is doubtful; *Towers* v. *African Tug Co.*, ([1904] 1 Ch. 558) referred to; he must succeed on his own merits alone; and, Davies C.J. and Duff J. dissenting, as it was shewn that he was aware of the payment to F. and D. at an early date, and elected to treat F's portion as an asset of the partnership between them by demanding his share of it he was disqualified from bringing the action in respect to these secret profits.

D., who was a land agent, sold the property purchased from W. at an advantageous price and was paid the usual broker's commission. At a meeting of the shareholders a resolution was passed sanctioning this payment. C. claimed the return of this money also.

Held, that as D. did not receive the money in his capacity of director, sec. 92 of the Ontario "Companies Act" did not apply and a by-law authorizing the payment was not necessary.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

Held, also, that there was noting to prevent D. from serving the company as an employee and receiving proper remuneration therefor. In *re Matthew Guy Carriage and Automobile Co.* (26 Ont. L.R. 377; 4 D.L.R. 764), approved.

Per Davies C.J. and Duff J. The payment of the commission could only be legal if sanctioned by the shareholders. At the meeting when the resolution professing to sanction all the payments attacked was passed the capital of the company had been impaired by payment of a dividend without the funds sufficient therefor. The resolution, therefore, had no effect and the impugned transactions had no sanction. As to C's right to bring the action it was not pleaded nor raised in the Courts below and cannot be questioned on this appeal.

Judgment of the Appellate Division (42 Ont. L.R. 256; 43 D.L.R. 98), affirming that at the trial (37 Ont. L.R. 611), reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial (2), in favour of the plaintiff.

The material facts and the questions raised for decision are sufficiently indicated in the above headnote.

Hugh J. Macdonald for the appellants, Fullerton and the Doran Estate, referred to *In re Matthew Guy Carriage Co.* (3); *Canada Bonded Attorney Co.* v. *Leonard-Parmiter Co.* (4); and *Andreæ* v. *Zinc Mines of Great Britain*(5).

Tilley K.C. and Urquhart for the appellants the other directors.

McMaster and *J. H. Fraser* for the respondent Crawford. Plaintiff had a right of action: *Theatre Amusement Co.* v. *Stone*(6).

As to delay see *Hutton* v. *West Cork Ry. Co.*(7); *DeBussche* v. *Alt*(8), at page 315.

(1) 42 Ont. L.R. 256; 43 D.L.R. 98; sub nom. *Crawford* v. *Bathurst Land and Development Co.*
(2) 37 Ont. L.R. 611.
(3) 26 Ont. L.R. 377; 4 D.L.R. 764.
(4) 42 Ont. L.R. 141; 42 D.L.R. 342.
(5) [1918] 2 K.B. 454.
(6) 50 Can. S.C.R. 32; 16 D.L.R. 855.
(7) 23 Ch. D. 654.
(8) 8 Ch. D. 286.

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THE CHIEF JUSTICE (dissenting).—I concur with Mr. Justice Duff.

IDINGTON J.—This suit is ostensibly concerned with the rights of a shareholder in a company to keep erring promoters and directors in the path of duty, but in truth is the outcome of an unsavoury squabble between two late partners in a law firm which had been solicitors for the company and could not, on a dissolution of their firm, settle their partnership accounts without adjusting the affairs of the company.

The appellant Fullerton, an elderly practitioner of law in Toronto, took, in January, 1912, as junior partner, one Crawford, a young man who professed to have some knowledge of company law, on the understanding that he was to bear the burden of the office work.

We are not very fully informed as to the exact details of their arrangements, but we are told that they were to divide the results of the office on the basis of five to Fullerton and three to Crawford "but each to have the liberty of having business in which" he might "have a personal interest done in the office without charge."

Fullerton had a proposition made to him, by a client and personal friend named Wallace, to buy from one Bicknell a hundred and fifty-nine acres in the township of York at $725 an acre. An optional agreement was obtained by Wallace therefor, which was drawn in the said law office. To secure that, the selling agent, and one Doran, and Wallace, each contributed in nearly equal parts to a deposit of $2,500 which Wallace as buyer was required to pay.

Having in view the ultimate purpose of forming a joint stock company to carry out the speculation, a

syndicate agreement was drawn up in the office of Fullerton & Crawford whereby Fullerton was to buy from Wallace at $800 an acre the land which he had thus secured at $725 an acre.

This agreement purports to be made in duplicate, on the 4th March, 1913, between Wallace the vendor of the first part, and Fullerton as trustee thereinafter called the purchaser of the second part, and the subscribers whose names are signed, of the third part; and to provide that a syndicate is thereby formed with a capital of $75,000 divided into $100 shares to carry out said purchase by Fullerton. Doran was to be the manager of the syndicate; Fullerton to be treasurer; and it was declared to be the intention to organize a joint stock company in which each syndicate shareholder was to become a shareholder in proportion to the number of shares held by him in the syndicate.

The trustee Fullerton was then to convey the land to said company. The details were to be decided at any meeting of the syndicate.

Crawford subscribed said syndicate agreement for $5,000. An agreement of sale was entered into on same day for the sale by Wallace to Fullerton at the price of $800 an acre.

Inasmuch as Fullerton is described in both documents as a trustee I see no importance to be attached to this latter, save its being referred to in the syndicate agreement as definitely fixing the terms of purchase.

It was contended by Crawford in this suit, and by his personal representative in this appeal, that he was entitled, a year and seven months later, to bring an action against Fullerton and Doran to recover for the company which was duly formed as projected in said agreement, about six weeks later, the respective sums of $3,877.20, each which Wallace had paid each out of the profits he had thus made of $75 an acre.

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The learned trial judge and the Appellate Division upheld such contention.

I assume for argument's sake that the company if suing might have recovered said profits.

Indeed, very early in the argument it was intimated by this court to the counsel for the representative of Crawford, that as to the said amount so received by Fullerton they might so assume also, and direct their attention to the claim made by the respondents, that Crawford had become disqualified and disentitled to bring such an action especially in face of the almost unanimous opposition of his fellow shareholders.

I have sought in vain for any decision in favour of a shareholder coming into court with so many impediments in his way, by reason of honest opposition on the part of his fellow shareholders to any assertion of such right as he claimed and with the evident disqualification attaching to him by reason of his knowledge of and acquiescence in the conduct of those accused until he had failed in an attempt to profit thereby and to extort by virtue thereof a share of such part as Fullerton had got.

The learned trial judge rejected another item of his claim which was to recover for the company moneys paid out by reason of the said payments impairing capital.

That claim was rejected, not because unfounded in law if made by the company or a proper party, but solely by reason of the plaintiff's disqualifications resulting from his sharing in such illegal payments.

The same principle as thus acted upon and as applied in the case of *Towers* v. *African Tug Co.*(1), ought on the evidence of the plaintiff to be applied to the rest of the claims in question.

(1) [1904] 1 Ch. 558.

Shortly after the events I have already related in regard to the origin of the claim for recovery of secret profits above referred to, the company became incorporated on the application by petition of Fullerton, Doran, Crawford and others who were named as provisional directors.

The papers connected with this application were all prepared by Crawford and he made the usual affidavit verifying the petition.

The papers already referred to, and those others to found this proceeding upon had been all kept in the office vault of Fullerton & Crawford and along therewith the agreement between Wallace and Bicknell which Crawford admitted seeing and handling.

The interest of Crawford evidenced by his subscribing one-fifteenth part of the whole proposed capital in the syndicate, coupled with opportunity and duty alike to know should have led any intelligent man to learn by the time incorporation was completed the fact that there was a profit going to Wallace.

We are not left to rest on these circumstances alone for Crawford in his evidence spoke of the relations between Wallace and Fullerton, as follows:—

Q.—After the 4th of March—prior to that have you any recollection of any conversation with either Doran or Fullerton? A.—Yes, some time prior to that, I think it was before the 4th of March, Mr. Fullerton told me that he was taking this deal in Wallace's name because he did not want himself to go on any covenant.

Q.—Then he was taking this deal in Wallace's name as he did not want to go on any covenants—is that the first statement that you recollect as having been made by any person about this matter? A.—So far as I know it is, although I know that I had a number of office conversations with him.

Q.—Probably prior to that time. Then do you want us to understand that Mr. Fullerton was putting Wallace forward as a stool pigeon in this matter and you knew that from the first? A.—Why, of course.

Q.—Just go the limit if you will? A.—Of course, he was putting Wallace forward.

Q.—Pardon? A.—He was taking the deal in Wallace's name so there was no liability on his part.

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Q.—So from the first—? A.—If he was not successful in raising a syndicate——

Q.—So you want us to understand the first conversation you had with anybody about this matter you recall is one in which Mr. Fullerton represented to you that he was taking this, which was his, Fullerton's deal, in Wallace's name, so as to avoid his, Fullerton's, personal liability? A.—I would not say that was the first conversation, but that was one of the conversations."

And again

Q.—Yes? A.—And was considering getting up this syndicate.

Q.—Will you please give me something definite, is it the first conversation you recollect or not? A.—So far as I know it is.

And to his taking an interest:—

Q.—I understand you were very little interested in it at that time —where did it take place? A.—Somewhere in the office.

Q.—In your office or his? A.—I cannot say as to that. He used to walk into my office and talk to me about it and in his office and in Doran's office, and he would talk about it, it was the talk of the whole office.

Q.—Mr. Fullerton was not hiding anything under a blanket or keeping anything from you? A.—I do not believe he was.

Q.—The matter was discussed pro and con? A.—I thought so.

Q.—You were in Mr. Doran's office and took it up with him? A.—I think so.

Q.—You went in to Mr. Doran's office, any conversations about it? A.—Yes, we used to talk about it.

* * * * *

Q.—Well, you ought to remember it—when did you first make up your mind to take an interest in this proposition? A.—It would be about the 10th of March.

Q.—And you subscribed for how much? A.—$2,500.

Q.—$2,500—was that your original subscription? A.—The original subscription was $5,000 which included $2,500 of Mr. Eatons.

* * * * *

Q.—Now, tell me, Mr. Crawford, had you any other investments of a similar character to this, at that time? A.—No.

Q.—Had you any other money in any other real estate transactions at or about that time? A.—No.

Q.—Can you suggest any other investment you made in 1913? A.—No.

Q.—Had you any other investments that were of a similar amount, or to any extent in 1912? A.—No.

Q.—Had you any in 1914? A.—No.

Q.—Then so far as this was concerned, this was practically your ewe lamb in the way of investment? A.—Yes.

Q.—Your ewe lamb, and the one, therefore, in which you were particularly interested? A.—Yes.

And again as to Doran's contribution:—

Q.—When did you have the first interview with Mr. Doran about the matter? A.—Oh, I cannot say.

Q.—Can you recall any interview with Mr. Doran prior to the 10th of March, when you agreed to go in? A.—I can recollect several conversations with Mr. Doran.

Q.—Can you cast your mind back, and having regard to this, your first and most important and practically your only investment at that period of time, can you cast your mind back to any conversation with Mr. Doran, and fix that conversation in your mind with Mr. Doran, and say what took place? A.—Not previous to the signing up of the deal.

Q.—Not previous—what do you mean by signing up of the deal? A.—The agreement of the 4th of March.

Q.—What? A.—The agreement of the 4th of March.

Q.—But previous to the 4th of March, and after the 4th of March, if you recollect any conversation with Mr. Doran, what was the first you remember? A.—I remember Mr. Doran telling me that he had put up the $2,500.

Q.—The whole $2,500? A.—The whole $2,500.

Q.—Do you remember the time that Doran told you that? A.—No, it was some time shortly afterwards, and he was bragging, he bragged to me of having put one over on Boehm.

Q.—What? A.—He was—

Q.—Don't characterize it bragging—you know, give us the conversation? A.—He told me in other words that he had got ahead of Mr. Boehm.

Q.—Yes? A.—He succeeded in getting Mr. Boehm to put up a third of the deposit.

Q.—He had succeeded in getting Mr. Boehm? A.—To put up a third of the deposit.

Q.—In addition to them—was that at the same time he was discussing about having to put up the $2,500? A.—Yes.

Q.—So that you understood at that time, that in the $2,500 that was put up, Boehm had contributed one-third of the deposit? A.—Yes, from what he told me.

And again as to Wallace:—

Q.—Now, Mr. Wallace was not in this real estate business for his health, so far as you could see, was he? A.—No, I do not suppose he was.

Q.—You thought it reasonable that Mr. Wallace went into these ventures with a view to make a profit? A.—Apparently so, if he disclosed them.

Q.—I am not asking whether he disclosed them or not, so far as Mr. Wallace was concerned, he transferred by an agreement to Mr. Fullerton, certain rights and interests in that property at $800 an acre—you knew that, you knew that? A.—I knew he had an agreement with Mr. Fullerton.

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Doran, who had taken an office about the 1st July, 1913, to carry on real estate business in same building and, as I understand the evidence, adjacent to those rooms occupied by the firm of Fullerton & Crawford, would seem thus to have had the opportunity of daily intercourse with Crawford as well as Fullerton in regard to the joint venture in which he put $5,000 for himself and a friend.

I cannot accept the statement he (Crawford) seems to have made that he did not know that there was a profit of $75 an acre to somebody, for it is inconsistent with what he admits in relation thereto and the exercise of ordinary common sense applied to the business he was so deeply interested in for himself and others.

His pretension was that he only became aware of the amount Fullerton got by looking at the papers in the vault in January or February, 1914, after his partnership with Fullerton had ceased, as it did in said January.

Why, or how, he should have, as it were accidentally, discovered it then and not before on the many opportunities equally good for doing so, I am unable to understand.

I prefer to think he obviously had either forgotten or had not felt the same keen interest as this suit indicates in sharing in the profits made by Fullerton.

Indeed, he puts it rather as a realization of the fact in the following evidence:—

Q.—Then you told us yesterday that you had made some discovery about this alleged property, I think you said, in February, 1914? A.—Yes.

Q.—Just tell us what the discovery was that you then made? A.—The discovery was that Mr. Wallace had made this profit of eleven thousand and some hundreds of dollars.

Q.—Yes? A.—That was the first time that I realized that Wallace had made that money.

Q.—Tell me the date on which you discovered it? A.—I cannot tell you that, but the day—

Q.—Well, about the day? A.—It would be some time about the latter end of February.

The learned trial judge expressly finds as a fact, notwithstanding Crawford's denial, that he knew a profit was being made by Wallace.

But for his omission to find also that he knew, or must be held to have known, that Fullerton and Doran were interested therein, I should not have set forth the foregoing evidence so fully as I have done.

Crawford at the trial would have the court believe that, though the facts were plain and palpable to anyone possessed of the documents as he was, he had failed to realize the actual situation in which Fullerton had placed himself by what said documents demonstrated. I do not think this improved his claim to found such a suit as this.

And still less so when we find him immediately attempting to make merchandise of his realization of the fact by the attempt to frighten Fullerton into giving him a share of what he claimed herein to be an illicit profit, as evidenced by the following letter:—

401 Crown Office Building,
Toronto, March 13th, 1914.

James S. Fullerton, Esq. K.C.,
Toronto, Ont.

Re Accounts.

Dear Sir:—

I contend that you received moneys from Mr. Edwin Wallace in connection with the purchase of Bathurst Centre, and must now ask you to account to me for the same under our partnership.

I think my share nearly amounts to $1,500.00.

Yours truly,
(Signed) J. P. Crawford.

This letter admittedly refers to the said secret profits got by Fullerton. I cannot think that a suitor who proposed, as this one in this letter did, to share in that complained of, is entitled, within the doctrine

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laid down in many cases but latest in the *Towers Case* (1) cited above, to bring in support of such a claim such an action as this when he failed to intimidate and extort a division of the spoils.

His share therein as a shareholder in the company as the result of success herein in that regard might be $300, but he was willing to take $1500 if the item was brought into the accounts of Fullerton & Crawford.

The suppression of secret profits is most desirable but I submit it will never be accomplished by upholding the claim of one who thus attempted first to make use of such a club to promote his own ends, and then only months afterwards when he failed to so intimidate, resorts to an action ostensibly in the interest of the company.

To recognize such a suitor as well entitled first to attempt such a levy and then entitled, despite his failure therein, would be productive of evils far surpassing those springing from a single successful reaping of secret profits, especially when the latter has been maintained as rightful by nearly all those concerned but himself.

On that ground the appellant Fullerton is entitled, in my opinion, to succeed as to this item of the claim made.

I am, moreover, very far from holding the opinion that a single shareholder can insist, against an overwhelming majority of fellow shareholders who have no interest adverse to the claim for recovery in such a case, save the honest purpose of allowing him who has received such compensation to retain it, though so ill advised as to have kept his doing so secret instead of manfully proclaiming the fact.

In such a case the question of *ultra vires* or fraud in

(1) [1904] 1 Ch. 558.

the sense used in the decision bearing upon such an issue may not arise and the matter be within the competence of a disinterested majority of the shareholders to deal with.

What is clear from the latest decisions such as *Alexander* v. *Automatic Telephone Company*(1), is that shareholders in maintaining an advantage for themselves not shared by others, cannot be permitted to accomplish the wrong merely on the pretence that it falls within the internal management of the company.

This decision followed the judgment in the case of *Menier* v. *Hooper's Telegraph Works*(2), wherein, as also in *Gray* v. *Lewis*(3) at page 1051, Sir W. M. James L.J. expressed comprehensively what I may be permitted to think is still the law governing such cases as this when the question raised may not present some act merely *ultra vires* the company and the test have to be applied whether or not a fraudulent use is being made of its powers by the majority of the shareholders or directors as the case may be.

In the case at bar the plaintiff fails, I think, to bring himself within the principles there laid down not only as to the first item but also the other remaining items of his claim when we consider, as I think we must, the action of the shareholders at the September meeting which was called at his instance.

The other items I refer to are Doran's share of the profits made by Wallace and Doran's commission on the resale. As to the former, all I have said and set forth, relative to the claim against Fullerton, applies.

It may be observed that though there was no demand made upon Doran for a share, yet the obvious

(1) [1900] 2 Ch. 56. (2) 9 Ch. App. 350.
(3) 8 Ch. App. 1049.

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purpose of the litigation was the same improper one in its origin, and suit was taken after long knowledge and acquiescence.

As to Doran's commission on the resale I think there was beyond a doubt present to Crawford's mind the knowledge that it was Doran's effort that produced the resale, that he knew Doran would be expecting a commission and was the only man entitled to commission and whose claim could alone be that referred to in the circular letter of the 22nd of April, 1914, to him and all other shareholders, announcing the sale and referring to the year's operations and the paying of commissions on sale, could refer to nothing else than Doran's commission.

Yet in face thereof he not only refrained from objecting thereto but actually participated in the distribution of the moneys as therein suggested, and I hold must be held to have assented thereto.

Inasmuch as he drew the misleading by-law of the company which provided as follows:—

> 6. Except in so far as the remuneration of the directors shall be fixed by this by-law the directors themselves shall have power to fix their remuneration either as directors or as officers of the company, and also the salaries or remuneration to be paid to all salaried officers of the company, and to vary the same when it may be expedient to do so.

upon which no doubt the directors may well have imagined they had a right to act in fixing the commission, I do not think he was entitled to complain of the result.

Under all the foregoing circumstances I am of the opinion that he had no right to complain of this commission and was not entitled to override the action of the shareholders by the bringing of this action though other shareholders may have had such right by virtue of the statute.

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I think the appeal should be allowed with costs throughout.

DUFF J. (dissenting).—The liability of the appellants in respect of three sums at the suit of the respondent in a representation on behalf of the shareholders is to be determined on this appeal: The sum of $3,867.36 for which the appellant Fullerton has been adjudged responsible and the like sum for which the Doran estate has been adjudged responsible and the sum of $8,121.22 for which all the appellants have been adjudged responsible.

The question raised, whether Crawford, the original plaintiff, was entitled to maintain the action, whether, that is to say, he had not lost any right he might otherwise have had by acquiescence or estoppel, would naturally come first in order of consideration but the discussion of it may conveniently be postponed until after the discussion of the substantive question of responsibility.

The learned trial judge, Masten J. gave judgment against the appellants and the Doran estate respectively for the sums first above mentioned and against all the appellants in respect of the sum of $8,121.22. This judgment was sustained by the Appellate Division and that court was unanimous as regards all points except in respect of the liability of the defendants Murray, Gibson and Brian, in relation to which there was some difference of opinion.

The first two sums were paid to Fullerton and Doran respectively by Wallace out of the purchase money, which, on the same day, had been paid to Wallace by Fullerton on behalf of the syndicate, and constituted in each case one-third of Wallace's profit by the sale, which amounted in all to $11,601.75. It seems to be

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unnecessary in regard to this transaction to say more than that Fullerton and Doran were both in the position of promoters of and consequently of trustees for the syndicate, and in that character incapable of retaining any profit derived in this way from the transaction. These moneys, therefore, which they received from Wallace remained the property of the syndicate and later of the company in their hands. In passing it may be noted that these moneys were, of course, part of the proceeds of the original subscriptions, that is to say, of the original capital of the syndicate.

The substantive defence of the appellants in respect of these sums rests upon certain resolutions, which were passed on the 4th November, 1914, by the shareholders of the company, professing to take effect as a release of the company's claim to them. I concur with the view of the learned trial judge that, in the situation in which the company found itself on the date mentioned, it was not competent to the shareholders to transfer without consideration a title to these moneys to Fullerton and Doran.

The company made a sale of its lands in the spring of 1914 and, at the end of May, the directors, after paying a commission of $8,000 odd to Doran, proceeded to distribute $36,000 odd in dividends; and the resolutions of the 4th November already alluded to professed to ratify this payment to Doran and to secure a title to Doran in respect of this sum as well as to deal with the sums distributed by Wallace already referred to.

In May, 1914, the profits arising from the company's transactions (treating Doran's claim for commission as a liability of the company) had reached $25,000 odd on the assumption, and this is rather important, that a third mortgage of $50,000 odd given by the purchasers of the land sold in the spring of 1914 was worth its

face value, and on the further assumption that in respect of the two mortgages, one assumed and the other given by Wallace, the company was under no contingent responsibility. Thus the directors in paying the dividend mentioned as well as the Doran claim had disposed of at least $11,000 in excess of the moneys available for distribution among the shareholders.

On the 4th November, therefore, the capital of the company had actually been diminished by a considerable sum and the principle of *Newman's Case*(1), forbade any further distribution of its assets among the shareholders until the statutory proceedings had been taken. *In re Newman & Co.* (1); *Paton's Case*(2), at page 406; *Hutton* v. *West Cork*(3); *Flitcroft's Case* (4), at pages 534-5.

Now the sums in the hands of Fullerton and Doran which had been paid to them by Wallace were assets of the company, just as the moneys standing to the credit of the company in the bank were; and the attempt on the 4th November, to hand this property over to Fullerton and Doran was just as illegal, and inoperative in point of legal effect, as would have been a resolution authorizing the directors to transfer any asset, *e. g.*, the mortgage above mentioned into the name of any one of them and to sell and dispose of it for the benefit of the directors.

As to the Doran commission. I am disposed to agree with the view of section 92 of the Ontario "Companies Act" advanced on behalf of the appellants; I am inclined to concur in the view that this section does not contemplate special payments of the character here in question which are not made by way of remuner-

(1) [1895] 1 Ch. 674.
(2) 5 Ont. L.R. 392.
(3) 23 Ch. D. 654.
(4) 21 Ch. D. 519.

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ation for services of a director as director, but a special allowance made on some other ground.

Our attention has not been called to any other provision of the Ontario "Companies Act," and I assume that if there had been such a provision our attention would have been called to it, that in any way weakens the force of the rule by which directors, trustees of their powers for the shareholders, are incapacitated from retaining as against the company any profit arising from a contract made between themselves and the body of directors of which they are members, unless the company knows and assents. *Imperial Mercantile Credit Association* v. *Coleman*(1), at page 566; *James* v. *Eve*(2), at page 348; *Gluckstein* v. *Barnes*(3); *Boston Deep Sea Fishing Co.* v. *Ansell*(4). The application of the principle does not appear to be affected by the provisions of by-law 6 of the company's general by-laws. The power given thereby to the directors is a power to fix their own remuneration as directors or as officers of the company; and, no doubt, it would have been competent to the directors acting thereunder to attach a salary to the office of director or to the office of vice-president, or to the office of general manager, but it is impossible to suggest that what is alleged to have been done here in order to support the payment to Doran, is or bears any kind of resemblance to any of these things. What is alleged is a contract between the company and Doran through the instrumentality of the board of directors of which he was a member, allowing him a specific fee for a specific service—a service given in the ordinary course of prosecuting his calling as land agent. That would be a transaction which could not be brought within the authority given

(1) 6 Ch. App. 558.
(2) L.R. 6 H.L. 335.
(3) [1900] A.C. 240.
(4) 39 Ch. D. 339.

by this by-law. Doran, it may be noted, on the 4th November was still vice-president, director, general manager. The fee which had been illegally paid to him was the property of the company in his hands. It is quite true it required only the assent of the company to give him a title and the resolution of the 4th November is relied upon as furnishing adequate evidence of that assent.

The first objection which is taken to the proceedings on the 4th November is based on the fact already mentioned, namely, that in paying the dividend of the 29th May the company had more than disposed of all its available distributable assets, and that objection seems to be fatal.

It is quite true that if the company had possessed itself of the moneys in Fullerton and Doran's hands, amounting to $15,000 odd, then, assuming always that the third mortgage on the lands disposed of should be counted at its face value, it would appear that there would be a small surplus, $4,000 odd; but on the closest calculation the retention of neither the Wallace donations nor the Doran fee could be sanctioned without obliterating this surplus and there is, I think, no escape from the conclusion that these proceedings of the 4th November, which were virtually simultaneous, must on this account be held to be without legal effect.

There is another grave objection, moreover, to these proceedings which I should have preferred not to mention and which I should have passed over in silence had it not been that it has material weight in considering the important question of the right of the plaintiff to maintain the proceedings.

It is unfortunately too clear that knowledge of the participation in the Wallace profit was industriously withheld by Fullerton and Doran from the shareholders

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—until in the autumn of 1914 the curiosity excited by Crawford's activities, left them no other choice than disclosure. At the trial Fullerton still maintained the attitude that these payments were bonuses and any suggestion of impropriety in the non-disclosure of them was treated rather contemptuously as a quibble. I am referring, of course, to Fullerton's own attitude, not to that of his counsel. In view of this state of mind, one is not surprised to discover in a letter written on the 11th September to Mr. Ruckle, for the information of persons from whom proxies were to be obtained, the statement that Wallace came to him, Fullerton, as any other client would have come, and told him that he had an option on this property at $800, that no other price was ever mentioned and that "the deal was put through" at that price; and again in a letter of the 6th of July, addressed to the shareholders generally, this statement: "Edwin Wallace's option was at the price of $725 per acre and he offered it to the syndicate at $800 per acre, whereby Mr. Wallace made a profit of the balance." Mr. Fullerton's attitude is perhaps best brought out in some parts of his own evidence:—

Q.—Then you say that you first knew that you were going to get something on what date? A.—Oh, my recollection now is that it was on the 14th day of March.

Q.—On the 14th day of March? A.—Yes.

Q.—That you first knew that you were going to get something? A.—Yes—or rather I did not know that I was going to get something until I got it, but on the 14th day of March Wallace spoke to me about it.

Q.—Wallace spoke to you about it and then you did not know what amount you were going to get then? A.—I did not.

Q.—And when did you find out what amount you were going to get? A.—When I got the cheque.

Q.—When was that? A.—I cannot say whether it was the afternoon of the 14th or the morning of the 15th. I can only state that I deposited it on the 15th or that it was deposited for me on the 15th. In my examination I was speaking from the deposit, and I thought it was on the 15th I got it, but further recollection the 14th or 15th—

Q.—The 14th or 15th—now up to that date you did not know yourself you were going to get anything? A—I did not.

Q.—And any knowledge Mr. Crawford could have acquired up to that date could not have conveyed that information to him? A.—No.

Q.—Is that right? A.—That is right.

Q.—He could not have found it out if he had known all about Wallace's profit? A.—Yes.

Q.—He could not have told you were getting anything and he could not have told Doran was getting anything? A.—I cannot tell you.

Q.—You cannot tell that then when you did get something, Mr. Fullerton, why did you not disclose it to your friends and associates? A.—I am not much in the habit of disclosing to my friends and associates what my deals are or what was done.

Q.—I mean your associates in this particular deal—why did you not disclose it? A.—I did not disclose it but I have no particular reason except that I am rather reticent about my business and I did not intend to disclose it at that time.

Q.—Now, Mr. Fullerton, on the 18th Sept. when all the checks were spread out before you and when apparently Mr. Crawford had all this time information for the $11,000 cheque was there, now why—come to the time when he knew about the $11,000 odd cheque—it was there before you? A.—Yes.

Q.—And Mr. Crawford said "Mr. Fullerton and Mr. Doran are you getting any share of that?" A.—Yes.

Q.—And you heard Mr. Wallace say that he would not say how he had distributed it, that that was his own business, do you remember that? A.—Yes.

Q.—Why did you not then say you got a part of it? A.—Because I was calling a meeting of the company I intended calling a meeting of the company and intended to make disclosure there in regard to the whole matter and I knew that Mr. Crawford was seeking information at that time for the purpose of his suit, and I did not intend to give it until I called my own meeting.

Q.—You did not intend to give it? A.—Until I called my own meeting. That was absolutely the reason why. Mr. Crawford had written me a letter in which he had demanded $1,500 on the belief and sole belief that he was considering whether to bring an action against me in the partnership or on the other, and I did not propose to assist him at that meeting if I could avoid it.

Fullerton and Doran, as directors and officials of the company, were under a duty to the company and to the shareholders as a body to see that the fullest information was laid before the shareholders regarding the transactions under review at the meeting of the 4th November. *Cook* v. *Deeks*(1).

(1) [1916] 1 A.C. 554; 27 D.L.R. 1.

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It is regrettable that no effort was made to perform this duty; that these gentlemen considered themselves entitled to act within the spirit of the communications and the evidence just set out; and that the members represented by proxy at the meeting of November 4th seem to have remained in ignorance of the facts to the very end. In these circumstances I think the resolution of the 4th November cannot be treated as satisfactory evidence that a majority of the shareholders with knowledge of the facts approved these transactions of which Fullerton and Doran were the beneficiaries: *Cook* v. *Deeks*(1); *Pacific Coast Coal Mines* v. *Arbuthnot*(2).

As to Crawford's right to maintain these proceedings. The status of a single shareholder to attack an *ultra vires* proceeding is, as a rule, unquestionable, in the absence of evidence disclosing conduct making it unjust that he should be permitted to go forward with his attack.

As regards the Doran commission: It is not, I think, seriously argued that Crawford did anything to preclude him from impeaching that payment.

As regards the sum given by Wallace to Doran I have heard no suggestion requiring discussion pointing to any conduct of Crawford's precluding him from taking steps to impeach that.

As to the sum received by Fullerton from Wallace. It is now said, 1st, that Crawford knew of the distribution of the Wallace profit from the beginning, and 2nd, that in March, 1914, he wrote a letter to Fullerton calling upon him to account for the sum received from Wallace as part of the partnership proceeds and that this last mentioned act constituted such a participation in the conduct of Fullerton as to make it inequitable

(1) [1916] 1 A.C. 554; 27 D.L.R. 1.

(2) [1917] A.C. 607; 36 D.L.R. 564.

and contrary to justice to permit Crawford now to complain of it.

It is necessary to keep clearly in view two things, 1st, that the moneys in question, as I have already said, in Fullerton's hands constituted an asset of the company; 2nd, that the general rule is that a single shareholder is entitled to impeach an *ultra vires* or illegal act of a company without using the name of the company subject to the qualification that the right of a single shareholder to proceed where the majority refuse to allow the name of the company to be used, in such case rests upon the proposition that justice requires the sanction of the proceeding. *Russell* v. *Wakefield Waterworks Co.*(1), at page 480.

It follows of course that if in a particular case it would be unjust to permit a single shareholder to take a proceeding, the right is denied him and virtually the point to be determined at this stage is this: In view of the circumstances mentioned would it be unjust to permit Crawford to maintain the action? Consider the conduct of Fullerton as disclosed by the communications and the evidence above referred to; he was a promoter, not technically merely but actively engaged in soliciting subscriptions and support from all quarters. He deliberately and with set policy withheld the fact that he was making a substantial profit out of the promotion. This fact he withheld until at the very last he was virtually forced to disclose it. He says that as late as September, 1914, Crawford was searching for information to enable him to take proceedings and that he was resisiting his attempts to get it.

Crawford, as the learned trial judge found, understood that Wallace was making a profit at a comparatively early stage, but the evidence of Fullerton read

(1) L.R. 20 Eq. 474.

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with that of Crawford is convincing upon the point that as regards Fullerton and Doran, Crawford had nothing more than a suspicion down to the middle of 1914, and Crawford's explanation of the letter, namely, that it was written with the object of getting information is virtually accepted by Fullerton himself.

Crawford's delay in actively pressing his inquiries may perhaps be accounted for by the fact that it was only after the dissolution of the partnership with Fullerton that he decided to press his claim; but in truth it is hardly disputable that until months after the dissolution Crawford was not in possession of information which would have justified him in charging Fullerton and Doran with participating in Wallace's profit. This is evident from Crawford's own course and is virtually asserted by Fullerton himself. And when one considers the course of conduct deliberately pursued by Fullerton and Doran, the persistent determination to conceal the facts touching their relations with Wallace and the actual destination of the profit derived by Wallace from the sale to the syndicate, it seems an extreme view that by writing the letter of March, a letter which was never acted upon, which affected nobody's conduct, nobody's rights or interests, Crawford was doing something making it unjust that he should institute legal proceedings to compel these fiduciaries to account to the shareholders for the property of the shareholders in their hands.

It should be noted perhaps at this point that the trial judge in declining to accept Crawford's testimony to the effect that he did not know the price at which Wallace bought, acquits him of any intention to misstate the facts.

The question for disposition here has little analogy to that which arose in *Towers* v. *African Tug Co.*(1), where

(1) [1904] 1 Ch. 558.

an action was brought by a shareholder against directors seeking to hold them responsible for moneys distributed among the shareholders which were not available for distribution. The shareholder who was plaintiff in that action had received his share of these moneys knowing the facts and brought the action with the proceeds of the distribution in his pocket; in other words, he had made himself a party to—he had participated in—the very act he was complaining of. Crawford, on the other hand, received nothing and moreover did nothing which could have precluded him from saying to Fullerton, if in response to his letter Fullerton had offered to divide his profit with him—the money is not yours to divide.

In *Towers' Case*(1), each one of the Lords Justices dwells upon the fact that when the action was brought and when it was tried Towers still had in his pocket his share of the proceeds of the *ultra vires* act of which he was complaining. Vaughan-Williams L.J. at page 565; Stirling L.J. at page 569; Cozens-Hardy L.J. at page 572. Moreover, the transaction in *Towers' Case*(1), was not impugned as a transaction in which directors or trustees had tried to benefit themselves at the expense of their co-adventurers; it was a case in which there had been an equal distribution among shareholders, by the consent of every one of them, of a small part of the company's capital not legally distributable; and the Lords Justices (see especially Lord Justice Sterling at page 570) emphasize the fact that no one had ascribed fraud or dishonesty to anybody concerned in the distribution.

There is another and fatal objection to the contention of the appellants on this point and that is that it is not raised in the pleadings as originally framed, nor by

(1) [1904] 1 Ch. 558.

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any amendment, nor is there anything in the course of the proceedings at the trial to justify the inference that the pleadings were treated as amended in such a way as to make this defence available. The cross-examination by counsel for the defendants was, after repeated objections, allowed to proceed in deference to the contention that Crawford's conduct, with regard to all these matters, was material on the question of credit and the cross-examination of Fullerton proceeded on much the same lines. The point now contended for, namely, that the letter of March plus the delay was an act precluding Crawford from taking these proceedings, is not noted in the judgment of the trial judge who, it is to be observed, deals with the issue raised by the allegation in the defence—the narrow issue raised by paragraph 10 of Fullerton's defence and paragraph 4 of Doran's defence—that Crawford knew that Wallace had made a profit. The trial judge deals with this issue and finds that Crawford became aware of this profit having been made. He also deals specifically with the defence set up in answer to another claim, a claim in relation to the moneys distributed as profits, the defence that, having received his share, he was precluded, under the authority of *Towers' Case*(1), from disputing the regularity of the distribution. He deals with this and gives effect to the defence, but there is not a word in his judgment from the beginning to the end countenancing the idea that any such defence as that I am now considering was put before him. There are, moreover, discussions reported in the appeal book which seem to shew affirmatively that this defence, if it was in view, was never in any way put forward at the trial.

(1) [1904] 1 Ch. 558.

I refer specifically to two examples only of this. At page 171 the following occurs:—

Q.—If Mr. Doran pledges his positive oath against your uncertain memory of other matters that that conversation did take place, will you undertake to contradict him? A.—I certainly will. I asked particularly about that commission at the meeting in September. I did not know then about the commission.

Mr. McMaster: Surely my Lord, the right to commission does not turn on his knowledge or lack of knowledge. Surely this is wasting a lot of time—his knowing has nothing to do with Doran's right to take commission.

Mr. Dewart: It is a matter of his right to take commission of 5%. It may have an important bearing on the evidence we will offer, my Lord.

If the defence I am now discussing was to be relied upon it is quite impossible to suppose that this colloquy could have taken place in these words.

Again at pages 340 and 341 there is the following:—

His Lordship: I might say to counsel frankly, my own idea is that all that long discussion and great conflict of testimony in regard to what was done, and what was not done, and various things of notice to Mr. Crawford, makes no difference. I think that the subject—I am not giving judgment, understand, at all, by any means, and I am entirely prepared to hear what everybody has to say, and I may be entirely wrong, but my present view is these moneys were promotion moneys and these people were originally in the position of having received promotion moneys and were promoters and that it all becomes a question, the whole question comes down to the effect of what we have been recently discussing. Now, as to the subject of ratification, that is on that original part, that is my view—I do not want at all to interfere with your elaborating just as fully as you choose for the benefit of any court of appeal, on the different view.

Mr. Rowell: Of course, as the whole matter has been raised in issue, we want to get all the facts in this connection with the transaction.

His Lordship: I am not interfering in any way.

Mr. Rowell: That is my only reason for mentioning now, until we get in the contents of this note book, and have Mrs. Dack called, I cannot ask Mr. Fullerton in reference to a point I want to ask him.

Mr. McMaster: What I mean, is the great conflict there was whether Mr. Crawford knew that Mr. Wallace was getting something—now how can it effect this case against the other two directors whether he did know that or did not know it? Just simply I want to get through with the case as early as possible, that is all.

Mr. Dewart: The evidence directs itself solely to a different branch than that.

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If the defence of knowledge of the Fullerton and Doran participation and condonation of that was to be raised in this court (the defence not having been pleaded) it should have been specifically brought forward at this point.

It is not the practice of this court to allow an appellant to reinforce his hand with cards he has hitherto been concealing in some part of his habiliments.

The defence, as one would expect, is not referred to in any of the judgments of any of the learned judges of the Appellate Division.

It should be added that the status of the respondents to maintain the proceedings rests upon two grounds, 1st, the illegality of the proceedings of the 4th November. 2nd, a recognized exception to the rule that the company is the only proper plaintiff in an action to recover company property is that where misconduct on the part of the company and one or more of its officers is to be investigated the arm of the law is not stayed by the rule. *Cockburn* v. *Newbridge Sanitary Steam Laundry Co.*(1), at page 258; *Cook* v. *Deeks*(2).

For these reasons the appeal should, in my judgment, be dismissed with costs

ANGLIN J.—As the syndicate acquired the Bicknell property merely to hold it pending the incorporation of the projected company and its members became shareholders in that company in proportion to their respective interests in the syndicate, I do not distinguish between rights of the company and rights of the syndicate.

At the outset I should state that I entertain no doubt that upon the receipt by the defendants, Fullerton and Doran, of their shares in the Wallace

(1) [1915] 1 I.R. 237. (2) [1916] 1 A.C. 554; 27 D.L.R. 1.

profit liability to account for them to the company immediately arose. *Archer's Case*(1).

But it is not so clear that this is one of the exceptional cases, referred to in *Towers* v. *African Tug Co.*,(2) in which a single shareholder, suing on behalf of himself and of shareholders other than the defendants, may, against the will of the majority, assert a right of the company to recover its property and compel its enforcement (Lindley on Companies, 6 ed., 779, 781; Buckley on Companies, (1909) 612-14), or that the plaintiff in this action had not disqualified himself from maintaining it. On this branch of the case I find it necessary to pass definitely only upon the latter question.

The learned trial judge expressly found, contrary to the testimony of the plaintiff Crawford, that he was fully apprised of the profit made by Wallace on the sale to Fullerton as trustee for the syndicate, adding, however, that neither he nor any of the subscribers of the syndicate were aware of the division of that profit with Fullerton and Doran. A study of the evidence, all of which I have found it necessary to read with care, has satisfied me that little reliance can be placed on the plaintiff's testimony. His cross-examination is most unsatisfactory. His witness, Eaton, seems to be even less reliable; and there is practically no other corroboration of the plaintiff's story on controverted points. The evidence of Fullerton and Doran, while not entirely satisfactory, is, in my opinion, much more reliable than that of Crawford.

While Crawford may not have known of the actual payments by Wallace to Fullerton and Doran at the time they were made, with great respect I think the evidence leaves no room for any real doubt that

(1) [1892] 1 Ch. 322. (2) [1904] 1 Ch. 558.

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he knew at a comparatively early date that the defendant Fullerton had shared in Wallace's profit and I cannot believe that he remained long in ignorance of the actual division made of it. His reiterated statement that Fullerton had told him from the first that he (Fullerton) was the real purchaser from Bicknell and that he had taken the agreement to purchase in Wallace's name merely to escape liability on covenants, coupled with his letter of the 13th of March, 1914, in my opinion puts Crawford's knowledge as to Fullerton's share beyond question His admitted knowledge that Doran had furnished one-third of the deposit of $2,500 made by Wallace with Bicknell to secure the property, another one-third of it having been obtained from one Boehm (Bicknell's agent for sale), and his familiarity with all the details of the purchase by Wallace, of his sale to Fullerton as trustee, of the formation of the syndicate and of the incorporation and organization of the defendant company, which I think the evidence establishes, warrant the inference that he also knew of Doran's receipt of one-third of the Wallace profit. With that knowledge he determined to treat the $3,877.20 received by Fullerton as money properly obtained by him for which he should account as partnership assets of the firm of Fullerton and Crawford. By his letter of the 13th of March, 1914, he distinctly demanded from Fullerton an accounting "under our partnership" of the "moneys received (by him) from Mr. Edwin Wallace in connection with the purchase of Bathurst Centre"—the property in question. That, in my opinion, amounted to such acquiescence in the receipt by Wallace of the profit on the sale to the syndicate and its distribution between himself, Fullerton and Doran, that the plaintiff is disqualified from complaining of it individually; and

he cannot get any greater right of complaint because his action is in form an action by himself and all the other shareholders of the company. In fact, he must succeed by his own merits and not by the merits of the other shareholders.

Towers v. *African Tug Co.*(1), at page 572, *per* Cozens-Hardy L.J.

On this ground the action, in my opinion, fails as to the two sums of $3,877.20 each claimed respectively from Fullerton and Doran.

Moreover, the receipt by Fullerton and Doran from Wallace of part of the latter's profit—their sharing that profit with him on the understanding which the learned trial judge found had existed from the inception of the project—was neither something which it was *ultra vires* of the company to sanction, nor something *in se* illegal and therefore not susceptible of ratification by the shareholders. It was not within the "Secret Commissions Act" (8 & 9 Edw. VII. (D) ch. 33, sec. 3), because not accepted or obtained *corruptly*. Had the Wallace profit, and the interest of Fullerton and Doran in it, been fully disclosed to the shareholders from the first its payment and distribution could not have been successfully challenged. It was the concealment and secrecy of the payments to Fullerton and Doran that made them fraudulent against the company and entitled it to recover them back. *Shipway* v. *Broadwood*(2), at page 373, *per* Chitty L.J. Viewed as a fraud on it carried out by a breach of duty on the part of the defendants Fullerton and Doran, who occupied a fiduciary position in regard to it, the company had the option to elect to ratify what had been done or to demand an accounting from Fullerton and Doran.

There is not a little to indicate that a majority of the shareholders not in anywise implicated or interested

(1) [1904] 1 Ch. 558. (2) [1899] 1 Q.B. 369.

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in the payments to Wallace, Fullerton and Doran have been prepared to ratify those payments and are opposed to the plaintiff's attempt to compel Fullerton and Doran to account to the company for their shares. The shareholders' meeting of the 4th of November, 1914, appears to have been fairly called. From the plaintiff himself and in the directors' notice calling the meeting they had received full information of the transactions of which he complains and of which their sanction and approval were sought. The defendants, Fullerton and Doran, made the mistake, however, of allowing proxies procured for an earlier meeting, held in September, to be used in the voting of the 4th of November. When those proxies were given it is not at all clear that the shareholders had been fully apprised of the payments to Doran and Fullerton now in question. Although Crawford had notified them in a circular letter of the 4th of July that there had been "a secret profit of $11,601.75 made by some of the promoters of the syndicate," it was only in his circular letter to them of October 23rd that he distinctly charged Fullerton and Doran with having in this way obtained $3,867.20, each, and Doran with having been paid $8,121 as a commission. With that knowledge, however, the shareholders who had given proxies in a most general form to Fullerton, Doran and Ruckle apparently allowed them to stand unrevoked and available for use at the November meeting called expressly to ratify and confirm these payments. While, under these circumstances, there is not a little to be said for the view that they intended to have their votes recorded in support of the proposition made by the directors in the notice calling the meeting of the 4th of November, on the whole, apart from any question to which the impairment of capital then existing gives

rise, I think it would not be safe to treat what occurred there as a sufficiently certain expression of the views of shareholders whose votes were cast under the September proxies. *Pacific Coast Coal Mines Co.* v. *Arbuthnot*(1).

But for this difficulty in regard to the votes cast by proxies, in the absence of any ground to question the good faith of the action of the majority in sanctioning and approving what had been done, the right of a minority shareholder to maintain this action to compel repayment to the company—to recover its property—to enforce its rights—would be at least questionable. The corporation is *primâ facie* the only proper plaintiff in such an action. Had the use made of the proxies at the November meeting been beyond suspicion, this would not appear to be one of the exceptional cases in which a dissentient shareholder should be permitted to exercise the company's right against the will of the majority—cases which, to quote Sir George Jessel's observation in *Russell* v. *Wakefield Water Works*(2), cited by Stirling L.J. in the *Towers Case*(3),

> turn very much on the necessity of the case; and that is the necessity for the court doing justice.

I rest my judgment for the defendants on this branch of the case, however, on the plaintiff's disqualification to maintain the action.

The $8,121.22 paid to the defendant Doran as a commission on the very advantageous sale of the company's property to Robins, Limited, undoubtedly effected by him, stands on a different footing. While there was some delay after the plaintiff had knowledge of the actual payment to Doran in bringing this action and he accepted a dividend which he knew had been recommended and passed on the basis that it represented a

(1) [1917] A.C. 607; 36 D.L.R. 564. (2) L.R. 20 Eq. 480.
(3) [1904] 1 Ch. 558.

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balance divisible amongst shareholders after payment of the outstanding unsecured liabilities of the company, including a commission on the sale to Robins, Limited, there is not in regard to this item the evidence of unequivocal acquiescence which the plaintiff's letter of the 13th of March, 1914, affords as to the distribution of the Wallace profit. I therefore prefer not to rest my judgment in regard to it on personal disqualification of the plaintiff by acquiescence.

The reasonableness of the amount paid, if Doran was entitled to a commission, is not questioned and I find nothing to justify the suggestion that either his employment or the payment to him was in any sense secret or surreptitious. On the contrary, the fair inference from the evidence is that all who were interested in the company including the plaintiff, knew that upon the lapse of the Sorley option the sale of the property was placed in the hands of Doran, whose business was real estate brokerage. The suggestion now made that he negotiated the sale as the general manager of the company acting without remuneration, is one which I cannot accept. His expenditure out of his own pocket in endeavouring to effect the sale is utterly inconsistent with any such view of the footing on which he was proceeding.

The objections made to the payment of this commission are that since Doran was a director of the company any payment to him must, under section 92 of the Ontario "Companies Act," be authorized by a by-law confirmed by a general meeting of the shareholders; that it was not proved that he was employed to make the sale; and that the payment to him was made out of capital.

The commission was not paid to Doran as a director of the company, but as an agent employed by it to sell

its property. I think such a payment does not fall within section 92 of the Ontario "Companies Act." I agree with the view expressed by Middleton J. in *Re Matthew Guy Carriage and Automobile Co.*(1), at page 379, that this section does not extend to a payment to a director at the ordinary market price for a service rendered by him in his capacity of a mere employee of the company. After reviewing the authorities in *Canada Bonded Attorney and Legal Directory Co.* v. *Leonard-Parmiter Co.*(2), Mr. Justice Riddell, dealing with section 92, says, at page 144:—

> There is no reason, however, why one who happens to be a director should not serve the company in another capacity, as servant, clerk, bookkeeper, mechanic, etc., and receive reasonable remuneration therefor. It is of course the duty of every director, a duty which he owes to his company and to the other shareholders, to see to it that he does not receive too great a remuneration for such service as he does render.
>
> If the services are such that only a director can perform them, *e. g.*, attending board meetings or acting in other regards as a director, he can recover compensation, payment for such services, only by complying with the statute; but, if he is employed in a subordinate capacity and at a reasonable figure, there is no necessity for a by-law confirmed at a general meeting.

Ferguson J.A. concurred in this judgment; Rose J. while differing on some of the facts, concurred in Mr. Justice Riddell's statement of the law; and Lennox J. concurred with Rose J. I think a by-law was not necessary to authorize the defendant Doran to act as agent of the company for the sale of its lands. Nor was a by-law confirmed by a general meeting required to authorize his being paid for services rendered in that subordinate capacity. They were not services rendered in the government of the company. *Mackenzie* v. *Maple Mountain Co.*(3), at page 621, *per* Meredith J.A.

(1) 26 Ont. L.R. 377; 4 D.L.R. 764, at 765.
(2) 42 Ont. L.R. 141; 42 D.L.R. 342.
(3) 20 Ont. L.R. 615.

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Mr. Justice Rose summarizes the evidence on this branch of the case—very fairly, if I may be permitted to say so—as follows:—

> Mr. Doran swore, and Mr. Fullerton's evidence seems to support his statement, that it was understood amongst the directors that he should not be given a regular salary for acting as vice-president and general manager, but should have the opportunity of finding a purchaser for the land and, if he succeeded, should be paid the usual land agent's commission, and should accept that as his "recompense" for performing the duties of his office.

At a meeting of shareholders, he was instructed, informally, to endeavour to find a purchaser. He did make a sale, and he managed to induce the purchasers to add to the price first offered by them, which price some, at least, of the shareholders and directors were in favour of accepting, a sum practically equivalent to the amount of the commission; and apparently, all the members who knew about the matter were content. It was paid and the question is whether there was legal authority for paying it.

At the meeting which was held on May 29th, 1914, and which seems to have been a directors' meeting, although the minutes called it a meeting of the company, the secretary-treasurer is reported to have put in a statement of liabilities shewing the solicitor's charges in connection with the sale, a commission to Doran of $8,121.22, small sums for fees of the several directors, and a small salary to the secretary-treasurer. The statement ended with the following memorandum:

> The amount at present in the bank is $45,014.48. The disbursements as above are $8,829.22, which will enable us to pay a dividend of 57% and leave the balance in the bank of $161.76 to the credit of the company.

Resolutions were passed that the directors be paid $10.00 per meeting for meetings attended by them; that the secretary be allowed the sum mentioned in the statement as owing to him; and that a dividend

of 57% be declared and be paid to the shareholders forthwith. On the same day cheques were issued for the commission and for the dividend.

There was no resolution referring to the commission or to the solicitor's charges.

While there is no doubt a lack of proof of a by-law or resolution formally authorizing Doran to act as the company's selling agent, the impression left on my mind by the whole of the evidence bearing on this issue is that he was authorized at the shareholders' meeting of the 27th of March, 1914, at which Crawford admits he was present, to sell the company's property as a real estate broker on commission, and that acting on that authorization he proceeded in good faith to procure and did procure a purchaser for the lands at an advantageous price. While the absence of a minute of this action of the shareholders affords ground for adverse comment, it by no means conclusively establishes that Doran was not in fact so authorized. *Bartlett* v. *Bartlett Mines Co.*(1); *In re Fireproof Doors Co.*(2). I accept Doran's uncontradicted statement, partly corroborated by Fullerton's testimony, that he was. The company had the benefit of what he did and was, in my opinion, liable to him for a commission. Doran's employment as selling agent being established, the amount of the commission paid him is readily defensible on a *quantum meruit* basis.

I incline to think that it was only because they deemed it unnecessary to do so that the directors did not at their meeting of the 29th of May, 1914, pass a formal resolution for the payment to Doran of his commission of $8,121.22. Payment of the item for solicitor's charges shewn in the secretary-treasurer's statement submitted to the meeting was likewise not

(1) 24 Ont. L.R. 419. (2) [1916] 2 Ch. 142.

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covered by any specific resolution. That statement admittedly shewed this commission as an outstanding liability of the company and it was on the footing of its being paid that it proceeded to indicate that there would be enough money left in the bank to warrant a distribution of 57% of the amount of the company's capital as a dividend amongst the shareholders—leaving $161.76 still in bank to the credit of the company. It was on that statement, as the minutes shew, that the directors resolved to pay the 57% dividend. I have no doubt (as Masten J., Meredith C.J.C.P. and Lennox J. appear to have thought) that it was intended at this meeting to recognize the Doran commission claim as a liability of the company and to authorize its payment. Otherwise the dividend there directed to be paid would have been not 57% but 69%. The purpose was to act on the memorandum submitted by the secretary-treasurer and to leave in bank the comparatively insignificant sum of $161.76 to meet current petty expenses—not $8,300. The $8,121.22 was paid to Doran on the same day (May 29th, 1914) by the company's cheque, signed by J. A. Murray, president and Jas. S. Fullerton, secretary-treasurer and it is reasonable to assume that this payment preceded the payment of the 57% dividend. If so, the capital was intact when and after it was made and, however irregularly made, it was not *ultra vires* of the company.

What I have said as to the proceedings at the shareholders' meeting of the 4th of November applies to this branch of the case. While upon the whole evidence I have little doubt that the majority of the shareholders approved of the payment of a 5% commission to Doran and would have ratified and confirmed the action of the directors in making it, the uncertainity as to the

use at the November meeting of the September proxies having been quite legitimate prevents the resolutions passed at it from being given whatever effect they might otherwise have had. But without the aid of this attempted ratification, the payment of the commission to Doran may be upheld as the liquidation of an honest debt by the company which it was within the authority of its officers to make.

No one suggests any fraud or dishonesty on the part either of Doran or of the directors. All that was done, if done regularly, would not have afforded a scintilla of ground for complaint. Mistakes may have been made and foolish courses adopted; but fraudulent intent has not been established.

I would, for these reasons, allow this appeal with costs here and in the Appellate Division and would dismiss the action with costs.

BRODEUR J.—This appeal should be allowed and I concur with my brother Idington.

Appeal allowed with costs.

Solicitor for the appellants Fullerton and the Doran Estate: *Hugh J. Macdonald.*

Solicitors for appellants Murray, Gibson and Bryan: *Urquhart, Urquhart & Page.*

Solicitors for the respondent Crawford: *McMaster, Montgomery, Fleury & Co.*

Solicitor for the respondent the Bathusrt Land Co.: *J. Earl Lawson.*

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*Oct. 28.
*Nov. 10.

THE WINNIPEG ELECTRIC RAILWAY COMPANY (DEFENDANT).... } APPELLANT;

AND

THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

AND

ANDREW JACKSON BARTLETT.....PLAINTIFF.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Railways—Joint defendants—Dangerous situation—Prompt action.

A street car had stopped at a railway crossing as a train was coming. When the latter was seventy-five or one hundred feet away the motorman, without a signal from the conductor, started to cross. When half way over the power was increased, the car went forward with a jerk and two ladies at the rear end were either thrown or jumped off and falling on the diamond were killed by the train. In an action against the Electric Ry. Co. and the Canadian Northern Ry. Co. by the husband of one of the victims:

Held, affirming the judgment of the Court of Appeal (29 Man. R. 91), that the motorman was guilty of negligence in crossing under these conditions and the Electric Company was liable.

Held also, reversing said judgment, Idington and Brodeur JJ. dissenting, that the Canadian Northern Ry. Co. was likewise liable; that on approaching the crossing it was the duty of the employees to exercise great caution; that it was shewn that the train was travelling slowly and could have been stopped in time if the train hands had acted promptly; that failing to stop when the situation of danger arose was negligence, and the fact that the manner in which the accident happened could not reasonably have been anticipated was of no importance and the further fact that but for the negligence of the Electric Ry. Co. the deceased would not have been killed no excuse.

Held per Duff J.—The respondent company was obliged to take precautions to obviate the risk of harming passengers in the electric car and the wrongful neglect of that duty having directly caused the harm the question of remoteness of damages cannot arise.

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

APPEAL from a decision of the Court of Appeal for Manitoba (1), affirming the judgment at the trial against the Electric Company and in favour of the Canadian Northern Co.

The facts are sufficiently stated in the above headnote.

Tilley K.C. for the appellant.

The respondent could have stopped its train in time to avoid the accident which must, therefore, be ascribed to its negligence. See *City of Calgary* v. *Harnovis*(2), *British Columbia Electric Ry. Co.* v. *Loach* (3).

O. H. Clarke K.C. for the respondent cited *"The Bywell Castle"*(4), at pages 223 and 227; *"The Tasmania"*(5), at page 226; *Weir* v. *Colmore-Williams* (6).

IDINGTON J. (dissenting).—This is a remarkable appeal. The appellant, and the Canadian Northern Railway Company, which I shall for brevity's sake hereinafter designate respectively the "Electric Railway" and "Steam Railway," were sued for damages arising from the death of the wife of the respondent administrator, alleged herein to have been caused by the negligence of both or one of the said railway companies at a point where their respective tracks cross each other in Winnipeg.

The declarations of the plaintiff therein alleged sufficient to constitute grounds of action which might render both or only one of said companies liable.

(1) 29 Man. R. 91; 43 D.L.R. 326, sub nom. *Bartlett* v. *Winnipeg Electric Ry. Co.*
(2) 48 Can. S.C.R. 494; 15 D.L.R. 411.
(3) [1916] 1 A.C. 719; 23 D.L.R. 4.
(4) 4 P.D. 219.
(5) 15 App. Cas. 223.
(6) 36 N.Z.L.R. 930.

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And the defendants each by its pleading not only denied the allegations made in the declaration as against itself but also alleged contributory negligence on the part of the deceased.

The plaintiff in reply denied each of these allegations of contributory negligence and joined issue.

The defendants each agreed with plaintiff before the trial that he was entitled to a verdict for $6,000 and $300 costs and reduced this to writing. The respective counsel for plaintiff and defendants at the opening of the trial announced the fact of settlement and the disposition of the case made thereby, and that there was nothing to be tried except this subsidiary question of whether or not either defendant was solely to blame or they were both liable.

No amendment of pleadings was made and nothing definitely settled in that regard.

Inasmuch as each of the companies in its pleading had carefully abstained from alleging anything against the other, how can we hold this an appealable case?

If the case had proceeded in the usual way of the plaintiff proving, or attempting to prove, his case then there might have arisen incidentally thereto ample grounds for adducing evidence, which would have disposed of such an incidental issue, but how there can be said to have been a trial of that sort of case made, I am unable to see.

To make matters worse the settlement agreement, which one of counsel said would be filed, is neither printed in the case presented to us, nor to be found in the record.

The novelty and difficulty of such a situation seems to have occurred to the learned trial judge, and respective counsel for each of the companies.

The following seems to cover all that there is in the final result of the discussion:—

Mr. Clark: It would be better for us to have this understanding that neither party be bound by the pleadings in this case, because practically a new issue has arisen now.

His Lordship: I do not see why you should not leave the pleadings as they stand, subject to any amendments you may suggest, because I cannot try the case without any pleadings.

Mr. Clark: Then we will go on, it being understood that neither party will hold the other down to the pleadings.

Mr. Guy: I would very much prefer that the Canadian Northern Railway Company put in their evidence first. When the question of the settlement was discussed, there was a question as to which one would put in his evidence first.

Mr. Clark: I was not present then.

Mr. Guy: And the question was left open.

His Lordship: Is it material? You are both defendants.

Mr. Guy: We were not in a position to have an examination for discovery, and in order for me to proceed, it may be necessary for me to prove my case by calling employees of the Canadian Northern Railway Company, and I do not want to do that and be bound by their evidence.

His Lordship: They are in the same position.

Mr. Guy: Yes, but I don't think their case is affected in the same way as our case is.

His Lordship: I think you had better proceed with the evidence and do the best you can. It is a very unusual kind of a case, and we are dealing with it in an unusual manner.

So far as I can find there was no amendment of any kind to the record of pleadings.

The formal judgment gave the plaintiff a recovery of $6,300 against the Winnipeg Electric Company, and then dismissed the action as against the Canadian Northern Railway Company, and awarded the latter as against the former its costs of this action.

I regret the actual situation I have thus outlined was not presented to us or present to my mind intent on hearing what counsel had to say.

I am so much impressed with the nature of such a trial of an issue not raised by the pleadings being one by a court chosen by the parties as *persona designata* and hence non-appealable, that if I could come

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to the conclusion that both courts below upon what was tried have erred in mere concurrent finding of the facts, I should have desired to hear argument on the question before so determining.

I have considered all that was argued as to the facts and relevant law.

I am, after reading not only all that we are referred to, but also much more of the evidence, unable to see wherein the courts below can properly and judicially be now held to have erred.

As quite natural in such an extraordinary and shocking exhibition of foolhardy conduct on the part of the man in charge of the car that ventured to cross under the circumstances presented, the witnesses were liable from mere excitement, and haste due thereto, to give inaccurate and unreliable estimates of distances.

One can pick out, if he discards all else, quite enough in the evidence to constitute grounds for holding the steam railway company not only liable but also solely liable.

Any such conclusion would seem to disregard the impressions of fact which a great many people, no doubt better placed than we are to appreciate the local situation and hence be probably seized of the right view of the facts, would receive.

It appears on the case before us that several duly constituted authorities had acted in a way quite contrary to what one would expect if the "Steam Railway" Company was alone to blame.

And then we have in accord with the action of these other authorities a view taken by the learned trial judge of the facts presented to him at the trial for which there is ample ground and that maintained by a court of appeal consisting of three judges,

all from local knowledge of the situation having an advantage over us, unanimously concurring in the finding.

I cannot, without anything conclusive and uncontradicted to guide me, save in one particular which I am about to refer to, reverse such a finding, which ought not to be controlled any more than the verdict of a jury, by us here unless we can find undisputed facts and circumstances which beyond reasonable doubt would demonstrate error on the part of those making such concurrent findings.

The fact that appellant's argument is made only to turn upon its view of a very narrow margin of time and space, ascertained from guesses of fact, makes one pause.

I have been unable to find from which side of the electric car the deceased jumped or was thrown, and yet that fact alone, if I apply experience and common sense, would make a possible difference in what we are asked to deal with of ten or twelve feet.

Nobody at the trial, I venture to think, deemed that the issue could reasonably be decided upon a calculation or finding of such a narrow nature as it is to be herein unless upon our holding that every car in the "Steam Railway" train must, by law, be linked up by the air brakes and the use thereof applied with the utmost celerity on pain of those applying them being possibly held liable to conviction of a charge of manslaughter in such events as presented herein.

As to the engineer acting upon the signal given him by his brakesman, I accept his story and as between two statements prefer his to that of the brakesman who was placed in a distressing situation, which probably accounts for the evident doubts,

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inaccuracies and inconsistencies that exist in his evidence.

The only conflict pressed herein was whether or not the engineer acted on the first emergency signal given, or the second a few seconds later. The engineer swears he was looking and acted promptly. He knows probably better than a brakesman what time is necessarily lost in the operation.

The section 264, sub-section 3 of the "Railway Act" then in force, reads as follows:—

> 3. There shall also be such a number of cars in every train equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed, or bring the train to a stop in the quickest and best manner possible, without requiring brakesmen to use the common hand brake for that purpose.

Then follows sub-section 4 which renders it imperative to have, in the case of passenger trains, a continuous system of brakes applied to the whole train capable of being applied by engineer or brakesman instantly.

It seems the connection in the case in question was only between the engine and tender which those in charge had deemed sufficient for the service which was to be performed.

The witnesses explain why, in the shunting operations, on which they had been engaged, it was deemed impracticable to have brakes on each car to be shunted connected with the tender.

There is a discretion evidently permissible under the Act in that regard. And the weight of the evidence clearly is that so far as concerned the train in question running at the slow rate it was, the said method adopted herein of bringing into effect the air brake was usually sufficient.

The test of highest possible efficiency and results known to be got therefrom, as testified to by an expert,

does not seem to me a fair one or such as the statute imperatively requires in such circumstances as in question.

Each case must be determined upon the circumstances in question as to how far beyond the connection of the air brake with the tender its connection is to be extended and to be made with the other cars, and may be reasonably necessary.

The courts below have held that the connection adopted was in this case sufficient for the required efficient service being performed with such a train. I am unable to say they erred.

It is to be observed that though citing the decision in the case of *Muma* v. *Canadian Pacific Ry. Co.* (1), the Court of Appeal does not rest upon that but upon the result of applying the facts in question herein.

I may point out that the decision in the *Muma Case* (1), proceeded upon the "Railway Act" when in this regard different from that now in question. The Act has been so amended as to make the law in question much clearer.

The rigid enforcement of the statute, or any other statute designed to protect life and property, I hold to be imperative. But reason must be applied and when it comes to a minute calculation of how many, or few, feet and seconds are involved in the application of the law we must decide reasonably.

Fifteen seconds was the guess of one man as to the time involved and so many as fifteen feet in falling short of safety in performance is the guess of appellant's argument, and all dependent on the guesses of naturally excited people, unless as to one man who claims he was so cool and collected that he sat still and could

(1) 14 Ont. L.R. 147.

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by the eye measure, when looking from a moving car crossing at right angles the path of the moving train, its exact distance from his car.

The primary gross negligence of the appellant as the *causa causans* of that which is complained of, and in the circumstances was the natural consequence, is unrelieved by the interposition of independent responsible human action, and is all too obvious to be swept aside by any such guesses if the appellant is not to be allowed to escape having justice meted out to it.

The same proof of reasoning would lead to absolving both companies on the ground they each set up of contributory negligence, for, as I may repeat, why could not the unfortunate ladies have picked themselves up in four or five of these fifteen seconds of time which they had?

For aught we know their necks were broken and they dead already as the result of appellant's car jerking them off.

And if we had to decide this case as against the "Steam Railway" we would have to ascertain exactly the measure of damages each company was responsible for.

There is no room for joint liability.

Their acts were distinctly separate and each responsible for the consequences of its own conduct and dependent in part upon the application of distinctly different principles.

I need not elaborate this and illustrate how the law has stood at least ever since the case of *Davies* v. *Mann* (1), was so long ago decided.

The court below does not go further than to find upon the peculiar circumstances in this case that

(1) 10 M. & W.546.

there was no negligence of respondent which led to the accident.

On that view of facts I am not able to reverse.

This case was one for the application of sound sense and not fine spun theories of what might have been, and I am sure the former was applied and guided the courts below.

Hence I would dismiss the appeal with costs.

DUFF J.—This litigation arises out of a most regrettable accident in which the deceased wife of the plaintiff Andrew Jackson Bartlett, was run over by a train of the respondent company and killed. Mrs. Bartlett was a passenger on a car of the Winnipeg Electric Company on Portage Avenue, which crosses the Canadian Northern track. She and two other passengers were thrown from the car on to the railway track in front of a freight train the front truck of which passed over Mrs. Bartlett's body. The surviving husband sued both companies charging both with negligence. The claim was settled but the litigation proceeded for the purpose of determining whether both or only one, and if so which, of the companies was properly chargeable with the negligence that was the real cause of the accident. On the facts the negligence of the Electric Railway Company was not seriously open to dispute. Mr. Justice Galt who tried the action and the Court of Appeal from Manitoba unanimously acquitted the railway company of negligence.

Negligence or no negligence is of course a question of fact and the two courts have pronounced in favour of the railway company upon that issue. The judgment is therefore one which ought not to be disturbed unless the appellant has clearly established error in

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some specific matter and error of such importance as to vitiate the conclusion of the courts below. Careful judgments were delivered by Galt J. and by the Chief Justice of Manitoba in Court of Appeal. I have examined these judgments closely and, with very great respect, I am unable to escape the conclusion that they cannot be sustained.

Portage Avenue is a much used thoroughfare traversed as already mentioned by an electric car line. As the Canadian Northern train which was made up of a number of cars preceding and a number of cars following a locomotive approached this street, it was the duty of those in charge of the train to exercise great caution and particularly to be on the alert for the perception of any dangerous situation which might arise as the train reached the street car track. There is a rule of the railway company governing this crossing requiring trains to stop at least one hundred feet before reaching the Winnipeg Electric Company's tracks and requiring them not to proceed until a proper signal is received from the signalman or from one of the train crew "located in a proper position" on the crossing.

It is not very material for the purposes of this appeal whether this instruction does or does not strictly apply to a train of this character—which, it is alleged, was engaged in a shunting operation. The instruction is valuable evidence of the view taken by competent persons responsible for the working of trains approaching this crossing as to the kind of precaution necessary to obviate the risks incidental to the running of a train over it.

The grounds of Mr. Justice Galt's judgment are indicated in the following passages quoted textually from his reasons:—

When it was about 75 or 100 feet from the crossing, the motorman of the electric car, without having received any signal from the conductor, started his car to get across before the train arrived. As I have said, the situation was perfectly apparent, and some of the people in the car, seeing the freight car coming towards them, got alarmed and moved towards the door at the rear end of the car. Amongst these people were two ladies; one of them was Grace Jane Bartlett, wife of the plaintiff.

By the time the electric car reached the diamond crossing the freight train was perhaps within 30 or 40 feet of the car. The evidence (to which I will allude more particularly hereafter) shewed that at this juncture the brakesman, who was stationed on the front freight car, shouted to the motorman to get across. Whether the motorman heard him or not does not appear, but there is evidence that the car, which was ahead in motion, started forward with a jerk and the two ladies either stepped off hurriedly, or were thrown off the rear steps of the car and fell on the diamond crossing. The brakeman on the freight train had already given a violent signal to the engine-driver to stop, but the freight train was not completely stopped before the front truck of the freight car had run over the two ladies and inflicted such injuries upon them that they both died.

* * * * *

Then again it was argued that the steam railway was negligent, that the engineer did not apply his emergency brake to the engine soon enough. It is quite possible, and the evidence seems to indicate that the engineer missed the first violent signal given by the brakesman, but the engineer had no reason to expect such a signal and had every reason to suppose that the way was clear.

As I read the "Railway Act" and the rules and regulations applicable to these defendant companies, I should certainly say that at the time in question the steam railway had the right-of-way across Portage Avenue. Even if it had been otherwise, the action of the motorman of the electric car in approaching the crossing and then stopping operated as an invitation to the engineer of the freight train to continue on his course. The whole trouble was caused by the frantic haste of the motorman to get across the diamond before the freight train.

The opinion of the learned judge that the train was about 75 or 100 feet from the crossing is affirmed by the Court of Appeal and is fully supported by the evidence. It does not appear to be necessary for the purpose of deciding the appeal to discuss or to consider any of the earlier incidents. When the motorman was seen by the brakesman to be starting his car across the track, a situation full of grave risk arose if the train were not stopped. The brakesman must have

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realized this if his story is to be accepted because he had already given a signal to stop the train, and he says that in doing so—although he had the rule in mind—he was also influenced by the fact that he had noticed a car approaching the crossing. Upon seeing the motorman start his car he immediately gave the more vigorous signal used to indicate to the locomotive engineer that an emergency had arisen requiring the instant stopping of the train. It matters little whether one accept the evidence of the brakesman or not, for if he acted as he says he did, he appears to have done his duty, if he did not he was incurring a grave and quite unnecessary risk in not taking instant steps to stop the train upon perceiving that the motorman was about to cross the track. So also as regards the locomotive engineer (if the signal was given) it is of no consequence whether he observed the signal or did not observe it, it was his duty to be on the alert for signals and instantly to obey a signal to stop.

With great respect, I think these considerations are not met by the reasoning of the learned trial judge or by that of the Court of Appeal.

The learned judges of the Court of Appeal appear to have considered that a dangerous situation requiring special precautions arose for the first time when, in consequence of the violent jerk forward of the Electric Company's car, Mrs. Bartlett was thrown to the ground. That, with respect, appears to be a misconception of the position. The approach by a train of this character towards a much used street having on it a street car line in operation, was in itself a situation involving risk and this, as I have already said, is recognized in the instruction mentioned above. It was a situation requiring in itself exceptional precautions as the instruction shews. Add to that the fact

that a street car was on the line approaching the point of intersection and you have a not inconsiderable increase of risk; a situation imperatively demanding that the precaution prescribed by the instruction, namely, of coming to a stop, should not be omitted; and, as I have already said, a situation full of grave possibilities arose and became apparent when the street car was seen to move forward across the track.

Mr. Clark in his concise and able factum faces the difficulty thus:—

> The appellant's contention amounts to this, that when Cammell saw the street car start to move it should have occurred to him that some of the passengers might fall on the track in front of the train, and his duty to avoid the consequences of the appellant's neglect began then and not when the last dangerous situation actually arose. Admitting that it was the natural thing for passengers in such a critical situation to rush to the front or rear of the car, no one would presume that when jumping they would select the diamond—the only dangerous spot there was upon which to alight. But even assuming that the brakesman should have foreseen what actually took place, the appellants are not entitled to complain if Cammell, who was thrown into a state of excitement by their negligence, did not act in the most reasonable manner.

This extract from the respondent's factum puts very forcibly the point upon which the respondent company must rely in view of the findings of fact already referred to. These contentions are first open to the observation—although in the present state of the litigation the controversy has become one between the appellant company and the respondent company—that the decision of that controversy must be dictated by the answer given to the question whether the plaintiff had or had not a cause of action against the respondent company. And it is perhaps needless to say that in passing upon that issue the conduct of the Electric Company's servants is not to be imputed to Mrs. Bartlett as her conduct; and further the situation if it was critical and embarrassing was brought about, at least in part, by the failure to bring the train to a stop conformably to the practice.

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The substance of the contention is that the persons responsible for the train might reasonably in the exercise of their judgment assume, and act upon the assumption, that the car would clear the railway track before the train reached the point of intersection; and that in the circumstances there was no ground for apprehending that the passengers would leave or be thrown from the car and remain helpless on the track as the train approached them. The first observation to suggest itself is an important one. The onward motion of the train was not the result of the judgment of the brakesman that it was safe to proceed; on the contrary he, as we have seen, took the opposite view. The second is virtually a repetition of what already has been said, namely, that once the electric car started forward the risk of the situation imperatively demanded that the train should be stopped. The fact that in the event the car did clear the track without injury is little to the purpose; failure of the mechanism might have brought it to a standstill before the track was passed. The duty of the respondent company was to take suitable measures to obviate the danger incurred by the passengers of the car of injury from the respondent company's train arising out of the situation, and the fact that the particular manner in which the injury did occur was one not naturally to be anticipated is really of no importance. See *Hill* v. *New River Co.*(1); *Clark* v. *Chambers* (2).

The obligation to take care, default in respect of which constituted the negligence charged, was an obligation due to the passengers in the car, and that being so, the respondent company is responsible for harm suffered by them in consequence of its default

(1) 9 B. & S. 303. (2) 3 Q.B.D. 327.

to the extent to which the damages are not, in the language of the law, too remote.

Are the damages too remote? Was the running down of Mrs. Bartlett in the circumstances a consequence for which in law the respondent company was responsible? The rule as regards remoteness of damage was recently discussed by the President of the Probate and Divorce Division in *H. M. S. London*(1), and, with respect, I concur in the view there expressed that where the harm in question is the direct and immediate consequence of the negligent act then it is within the ambit of liability. Here the injury complained of was the direct and immediate consequence of the failure to stop the train.

Moreover, it is sufficient in this case to say that the railway company being under an obligation to take precautions to obviate the risk of harming the passengers in the electric car through the instrumentality of its train moving across the car track and the wrongful neglect of this duty having resulted directly in the very harm it was the duty of the company to avoid, remoteness of damage is out of the question. *Clark* v. *Chambers* (2).

Where there is a duty to take precautions to obviate a given risk the wrongdoer who fails in this duty cannot avoid responsibility for the very consequences it was his duty to provide against by suggesting that the damages are too remote, because the particular manner in which those consequences came to pass was unusual and not reasonably foreseeable.

One aspect of the case was the subject of a good deal of discussion and I refer to it only to make it quite clear that I neither dissent from nor concur in the views expressed by the courts below with regard to it.

(1) [1914] P. 72. (2) 3 Q.B.D. 327.

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The point to which I refer is that which arises upon the contention of the Electric Company's counsel that section 264 of the "Railway Act" is applicable and that the railway company should be held responsible for failure to observe the requirements of those sections with reference to braking appliances. I express no opinion upon the question whether this section applies to a train such as this.

ANGLIN J.—The liability of one or other or both the defendants to the plaintiff being admitted, the purpose of continuing this litigation is to determine where the responsibility rests, the defendants having agreed amongst themselves for contribution (on some basis with which we are not concerned) should both be held liable. The learned trial judge's view was that the appellant is solely answerable and his judgment was unanimously affirmed on appeal. The evidence so conclusively establishes that its negligence was a cause of the death of the plaintiff's wife that so far as it seeks to be wholly discharged its appeal is quite hopeless. Assuming that due care by its co-defendant would have enabled it to avoid running down the plaintiff's unfortunate wife, notwithstanding the peril in which she had been placed by the appellant's negligence, that fact could afford the latter no answer to the plaintiff's claim. *City of Toronto* v. *Lambert* (1); *Algoma Steel Corporation* v. *Dubé* (2).

Upon the other question—that of the joint liability of the respondent—there is much more to be said.

The learned trial judge could

find no particular in respect of which the steam railway company were guilty of any negligence conducing to the accident,

(1) 54 Can. S.C.R. 200; 33 D.L.R. 476.

(2) 53 Can. S.C.R. 481; 31 D.L.R. 178.

and the Court of Appeal took the same view. I gather from his judgment that the learned trial judge was of the opinion that there was no evidence on which a jury could have found actionable negligence on the part of the employees of the steam railway company and in effect so directed himself; and from the reasons for judgment of the Court of Appeal, delivered by the learned Chief Justice of Manitoba, I infer that in his opinion because, the electric tramcar having crossed in safety, the immediate peril to the deceased caused by her jumping or being thrown from that tramcar and falling on the diamond crossing in front of the approaching train was a situation which the steam railway employees could not reasonably have been expected to anticipate and because when it actually arose it was possibly too late to stop the train and prevent the accident, or, at all events, the train crew had little, if any, opportunity to think and act, liability on the part of the steam railway company could not be found. With profound respect, although the idea is not very clearly expressed, these views would seem to imply that the liability of the doer of a negligent act is restricted to consequences which he should have anticipated would flow from it as natural results.

> Where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not * * * ; but when it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

Smith v. *London and South Western Ry. Co.* (1), at page 21, *per* Channel B.

> What the defendants might reasonably anticipate is, as my brother Channel has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. *Ibid, per* Blackburn J.

(1) L.R. 6 C.P. 14.

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Mr. Beven in his work on Negligence (Can. ed., p. 85), introduces a discussion of this and other cases bearing on this aspect of the law of negligence by stating

> a distinction of importance for understanding this branch of the law; between acts from which injurious consequences in the result flow to others, but which are not negligent in law, because these consequences would not antecedently have been anticipated to flow as natural results; and acts which carry liability because their probable outcome is injurious acts, though, in fact, the consequences which flow are not those anticipated.
>
> The doer of a negligent act, says the learned author, is responsible for the consequences flowing from it in fact, even though antecedently, to a reasonable man, the consequences that do flow seem neither natural nor probable.

See too Shearman and Redfield on Negligence (6 ed.), secs. 26a, 29a, and 30.

The Canadian Northern train was moving very slowly—between one and two miles an hour. The evidence establishes that, equipped as it was, it could easily have been stopped in 40 feet. The engineer deposed that he believed he had in fact stopped it within 15 feet on receiving the first signal to do so. The evidence also establishes that when the electric tramcar started to move towards the crossing, thus creating a situation of danger, which in my opinion made it the duty of those in charge of the advancing steam railway train to stop it, or at least to get it under such control that it could be instantly stopped if the reckless conduct of the motorman in driving the electric tramcar on to the diamond crossing should give rise to a situation making that necessary—a duty which they owed to all the people on the tramcar—the train was at least 75 feet from the diamond crossing. The brakesman on the front car so tells us. He saw the tramcar start. Had he at once signalled the engineer to stop or even to prepare to stop before reaching the crossing and had

the latter promptly obeyed the signal, no harm would have ensued. Still later, when the electric tramcar was approximately two-thirds across the diamond and had almost stopped, as the brakesman informed us, the danger being thus greatly increased and the duty to stop all the more pressing, the train was still 50 feet from the crossing, and prompt action by the brakesman and engineer would have brought it to a stand at least 10 feet before it reached the crossing. That the appellant's train may have had the right of way over the electric tramcar affords no excuse for not fulfilling this duty. It would not justify the respondent running down the appellant's car if it could avoid doing so by reasonable care—still less killing the plaintiff's wife. Whatever the brakesman may have done to signal the engineer, the evidence indicates that no attempt to stop or even lessen the speed of the train or to get it under better control was made by the engineer until it was almost upon the crossing, since when it was actually stopped the foremost part of the front car was in fact 16 feet beyond the crossing. There was in my opinion abundant evidence on which a jury might have found negligence imputable to the steam railway company either on the part of the brakesman or on that of the engineer.

Had the electric tramcar been run into on the crossing, as would have happened if the motorman had failed for any reason to get it clear, the liability of the steam railway company for damages sustained in the collision at all events by passengers on the tramcar would seem to me to be incontrovertible. It was only by suddenly "speeding up" in response to the shouted warning of the brakesman, given when his train was only 30 feet from the crossing, that

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the motorman succeeded in taking his car out of danger, possibly as a result precipitating the plaintiff's wife and two other persons on the crossing in front of the still advancing train then only 15 feet away. The actual danger which the brakesman should have anticipated, and apparently did in fact, anticipate, viz., collision with the tramcar, was thus obviated. But the negligence of the Canadian Northern employees, which was a cause of that peril having continued until the car escaped from the danger zone, did not thereupon cease to operate. It had a further and, under the circumstances, a natural consequence, in the sense explained in Shearman & Redfield's work (sections 29a and 30), in the running over of the plaintiff's wife, and the steam railway company, in my opinion, cannot escape liability merely because that particular consequence or the immediate situation in which it occurred cannot be said to have been something which was or should have been within the contemplation of the train crew when they negligently failed, while the tramcar was in a position of peril, either to stop their train or to have it under such control that it could at any moment have been stopped before reaching the crossing.

Considerations such as arise between a plaintiff and a defendant in cases of contributory negligence are quite foreign to the question now before us—that of the liability of a defendant to a plaintiff against whom no contributory negligence is suggested.

In my opinion not only was there evidence of negligence on the part of the respondent—proper for submission to a jury—but on the uncontroverted facts a finding of such negligence should be made.

The negligence of both defendants conduced to the death of the plaintiff's wife. Had that of either

been absent the lamentable tragedy would not have occurred.

It is our duty to give the judgment which the court appealed from should have given. Exercising the power conferred on the Court of Appeal by sec. 9 of R.S.M. [1913], ch. 43, I would set aside the judgment of the learned trial judge and direct the entry of judgment declaring both defendants liable to the plaintiff for the sum agreed on as damages with costs. There should be no costs as between the defendants of the proceedings in the Court of King's Bench, but the appellant is entitled to be paid its costs here and in the Court of Appeal by the respondent.

BRODEUR J. (dissenting)—The question in this case is whether the Canadian Northern Company has been at fault in the accident which caused the death of Mrs. Bartlett. The evidence may lead to the conclusion that there was negligence on the part of the employees of the railway company in not stopping the train after the engineer in charge of the locomotive had received the proper signals. But the evidence is not very positive and is in some respects conflicting. In view of the unanimous findings of the courts below in that respect I would not feel disposed to interfere.

The appeal should be dismissed with costs.

MIGNAULT J.—The whole question here is not whether the plaintiff, Bartlett, was entitled to recover damages for the death of his wife, for both the appellant and the respondent admitted that he was, but whether the plaintiff had a valid cause of action against the respondent as well as against the appellant.

In other words, would the plaintiff on the evidence be entitled to recover damages for the death of his wife against both defendants or against one only of

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them? The learned trial judge came to the conclusion that judgment should be entered in favour of the plaintiff against the defendant, the Winnipeg Electric Railway Company, and that the action should be dismissed against the defendant, the Canadian Northern Railway Company, with costs to be paid by Winnipeg Electric Railway Company to its co-defendant, the Canadian Northern Railway Company.

The conduct of the trial to a certain extent obscured this simple issue, for, as the learned trial judge observed:—

> The whole course of the trial consisted of evidence and arguments adduced by each of the co-defendants to shew that the other should be held liable.

And so before this court the argument was directed to shew that one company rather than the other should bear the burden of the admitted liability towards the plaintiff, with the result that the one emphasized the negligence of the other, especially the respondent the negligence of the appellant, while the latter, which could not deny that its motorman had been grossly in fault, endeavoured to shew that, but for the negligence of the respondent, this fault would not have caused the accident.

I propose to look at the case solely on the basis of the real question which was in issue, that is to say, on the evidence, would a jury, or a judge sitting without a jury, have been justified in finding against both defendants negligence entitling the plaintiff to recover against both of them, or would a verdict or a judgment be justified only against the appellant, so that the respondent would have been entitled to have the plaintiff's action dismissed, as it was, in so far as it was concerned?

And on this basis and in answer to the question so submitted by the agreement of the parties, I have

come to the firm conclusion, with deference, that the plaintiff was entitled to recover damages against both defendants as being jointly liable for the accident.

The plaintiff's wife was a passenger on an electric car of the appellant which had to cross the line of the respondent on the level on Portage Avenue, Winnipeg. At that time a freight train of the respondent was approaching the crossing very slowly, its speed being about two miles per hour. It consisted of four box cars in front, then an engine and some twelve empty cars. A brakesman, named Kenneth Cammell, was on the front car. The electric car, as the rules required, stopped within a few feet of the railway track, and the conductor got off and went ahead to see if the track was clear, and it was the duty of the motorman to wait until the conductor gave the signal to go ahead, which signal he never gave. What happened then is best described in the language of the learned trial judge:—

> When the freight train was within perhaps 75 feet of the crossing the motorman of the electric car suddenly decided to get across in front of the freight train and started forwards. When the electric car was partly on the diamond the brakesman on the freight car saw imminent danger of collision, and as the car seemed to be stopping, shouted to the motorman to "go ahead." The motorman thereupon apparently applied extra power, the car went ahead with a jerk, and three passengers, including the deceased, were either thrown off the rear platform of the car or else in desperation jumped from it and alighted on the diamond where the deceased was run over.

During all the time the brakesman had the electric car in full view, and when it suddenly started to go ahead, the train should have been stopped. The time card of the respondent required the train to stop 100 feet from the crossing, and Cammell says that he gave at that distance the usual stop signal but it was not obeyed. He was, he adds, about 50 feet from the diamond, or crossing of the railway and electric

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car tracks, when the motorman ran his car ahead so that it came right on the diamond, where it seemed to stop and the brakesman gave several violent stop signals which the engine driver either did not see or failed to obey, and the brakesman shouted to the car to go ahead which it did with a kind of jerk and cleared the diamond, but at its sudden jerk forward, the plaintiff's wife who with two other passengers had run to the rear platform of the car, was either thrown off or jumped off and fell on to the diamond where she was run over.

There can be no doubt as to the gross negligence, not to use a much stronger term, of the motorman when he started forward with a moving train coming towards him so close to the crossing. But this does not mean that the railway company was itself free from negligence so that the plaintiff would not have a right of action against it also. The learned trial judge stated that he could find no particular in respect to which the steam railway company was guilty of any negligence conducive to the accident. With deference, I think it was negligence not to have stopped the train, which could have been done, when the electric car first started forward in an attempt to clear the track. If the railway train was then "within perhaps 75 feet" of the crossing, as found by the learned trial judge, or even about 50 feet away, as testified by Cammell, the train, which he says was just crawling, could have been stopped short of the crossing had the stop signals been obeyed.

In view of these circumstances I cannot think for an instant that if the plaintiff had sued the respondent alone he would not have been entitled to a verdict or judgment, and surely the respondent could not have escaped liability by emphasizing—as it does here—

the gross negligence of the Winnipeg Electric Railway Company.

The learned Chief Justice of Manitoba made use of an argument which at first impressed me when it was urged at the hearing by counsel for the respondent. He said:—

> The accident was a natural sequence of the negligent conduct of the motorman: See *Prescott* v. *Connell*, (1). The brakesman on the front of the train had urgently signalled the engine driver to stop and had repeated his signals. There was not sufficient time to do anything further after the deceased fell on the track. The train was stopped as soon as possible. The trainmen were suddenly faced with a new situation of danger, which gave them little, if any, time to think and act. Even if they could have done anything more than was done to avoid the accident, the court ought not to require of them, in the new situation that was created, perfect nerve and presence of mind enabling them to do the best thing possible.

And it was urged that the respondent could not have foreseen that passengers in the electric car would jump out or be thrown out of the car.

With great deference and upon full consideration I am of the opinion that this argument cannot prevail. Before "a new situation of danger was created," there was a situation of danger created by the attempt of the electric car to cross before the train reached the crossing, and as the learned Chief Justice observed, the brakesman had urgently signalled the engine driver to stop and had repeated his signals.

There was then time for the train crew, and especially the engine driver, if he was heeding the signals, to think and to act. Wooden, the engine driver, was examined before the Public Utilities Commissioner, and stated that he could have stopped his engine within 15 feet, and he did not contradict this statement when he was cross-examined at the trial. And as to the argument that it could not have

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been foreseen that passengers would jump out of the car in the dangerous situation created by the joint negligence of the two companies, the learned Chief Justice rightly observes that the passengers did what might have been expected in such a case and rushed to the door and tried to leave the car.

On the whole I am of the opinion, with deference, that the judgment which absolved the respondent of any negligence conducive to the accident cannot stand, and that it should be declared that the plaintiff is entitled to recover against both defendants as being jointly liable for the accident.

The appeal should therefore be allowed with costs here and in the Court of Appeal and the two defendants condemned to pay the plaintiff the amount agreed upon. There should be no costs of the trial as between the defendants.

Appeal allowed with costs.

Solicitors for the appellant: *Moran, Anderson & Guy.*
Solicitors for the respondent: *Clark & Jackson.*

CHARLES ANDERSON (DEFENDANT). APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) RESPONDENT.

M. A. NICKERSON ..... THIRD PARTY.

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*Nov. 5.
*Nov. 10.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Navigation—Obstruction—Removal of wreck—Owner—Liability for cost —Statutory requirements—"Navigable Waters Protection Act" [1906] c. 115, ss. 17 and 18.

By sec. 16 of the "Navigable Waters Protection Act," if navigation is obstructed by a wreck the Minister of Marine may cause same to be destroyed; by sec. 17 he may convey it to a convenient place and sell it at public auction, paying the surplus of proceeds over expenses to the owner who shall be liable for any deficiency. A wreck obstructing navigation was sold by the owner on condition that it be removed. This was not done and the Minister advertised for public tenders, the material after removal to belong to the tenderer. In an action against the original owner for the cost:

Held, per Davies C.J. Brodeur and Mignault JJ. that the owner was liable; that he had received the benefit of the value of the material in the reduced amount of the tender; and that the Minister had exercised a wise discretion.

Per Idington, Duff and Anglin JJ. that as the Minister did not observe the statutory requirement of conveying away the vessel and selling it by public auction the Crown could not recover notwithstanding that the course pursued may have been equally beneficial to the owner.

Judgment of the Exchequer Court (18 Ex. C.R. 401; 46 D.L.R. 275), affirmed, the court being equally divided.

APPEAL from the judgment of the Exchequer Court of Canada (1), in favour of the Crown.

The necessary facts and the question raised for decision are stated in the above head-note.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 18 Ex. C.R. 401; 46 D.L.R. 275.

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J. McG. Stewart for the appellant.

R. V. Sinclair K.C. for the respondent.

The Chief Justice.

THE CHIEF JUSTICE.—I am of the opinion that the judgment of the Exchequer Court was right and that this appeal should be dismissed and such judgment confirmed.

As there is an equal division of opinion in this court, in accordance with our usual practice there will be no costs of the appeal.

The action was brought by the Crown under the "Navigable Waters Protection Act" to recover expenses incurred by the Crown in removing a wreck from Barrington Passage, Nova Scotia, on the ground that the passage was a public harbour of Canada and that the wreck constituted an obstruction to navigation.

The facts necessary for the decision of the appeal are clearly and concisely stated in the written reasons of Mr. Justice Brodeur with which I concur.

I base my judgment upon the fact that the evidence shews such a full and substantial compliance with section 17 of the "Navigable Waters Protection Act" (R.S.C. ch. 115) as entitles the Crown to maintain this action under section 18 of that Act.

No injustice whatever was, in my opinion, sustained by the appellant.

If a reservation of property rights in the debris of the vessel after being blown up had been made, the amount of the tender would have been necessarily increased by such a problematical value as the tenderer might put upon such debris and the owner obliged to pay the increased amount.

The circumstances of the case were such as called for the exercise by the Minister of a wise and prudent

discretion and I think in accepting the tender with the provision that the property in the debris of the wreck in question when blown up should belong to the tenderer, the Minister exercised, under the circumstances, such discretion and one in the interests of the owner Anderson.

IDINGTON J.—This is an appeal in an action brought by the respondent in the Exchequer Court to recover the expenses of removing a wreck, under and by virtue of the "Navigable Waters Protection Act," ch. 115 R.S.C. 1906. At common law there could be no such relief. The rights and remedies in question are entirely the creature of the said statute which has given a new remedy.

Section 16 provides that:—

The Minister may * * * if, in his opinion:

(a) the navigation of any such navigable water is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck * * * cause such wreck, vessel or part thereof or other thing, if the same continues for more than twenty-four hours, to be removed or destroyed in such manner and by such means as he thinks fit, and may use gunpowder and other explosive substance for that purpose if he deems it advisable.

Section 17 is as follows:

17. The Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable; and may apply the proceeds of such sale to make good the expenses incurred by him in placing and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing.

2. He shall pay over any surplus of such proceeds or portion thereof to the owner of the vessel, cargo or thing sold, or to such other persons as shall be entitled to the same respectively.

The Minister did not direct anything to be conveyed to any place, or to be sold by auction. What happened was that he advertised for tenders for the

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execution of the work and in the advertisement expressly provided as follows:—

> the materials in the obstruction, when the removal is satisfactorily completed, but not before, to become the property of the contractor.

The contract for removal was let to the firm which made the lowest tender based on specifications thus providing for the disposition of the property. Upon the execution of the work the contractors took the property as their own and afterwards, it is said, sold a part for some $129, and had still some more left. It is quite evident, I think, that there was not sufficient value in the wreck or the material of which it was composed to leave any balance in favour of the appellant. And inasmuch as he had sold to one Nickerson his rights in the wreck for $5 on the terms of removal, there would not be any grevious wrong done to the appellant by what transpired. That, however, is not the question.

Even if we could find that there was a very trifling sum realized out of the property after its removal, I do not see how that would affect the question involved.

That question is reduced solely to the one question of whether or not in this new remedy given the Crown to recover from the unfortunate owners of a wreck the cost of removing it, the steps laid down in the statute giving the remedy, as a condition precedent thereto, have been observed. I have come to the conclusion that they have not been observed.

So clear a departure from the terms of the Act should not, I submit, be maintained, no matter how well intentioned the modification made by the Minister or his deputy in carrying into effect the provisions of the Act may have been.

I think the appeal should be allowed with costs.

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DUFF J.—The decision of this appeal turns upon the construction to be given to sections 13, 14, 16, 17 and 18 and particularly section 18 of the "Navigable Waters Protection Act," ch. 115, R.S.C. 1906. By the combined operations of sections 13 to 16 inclusive the Minister is authorized in certain circumstances where the navigation of navigable waters is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck, sinking or grounding or any part thereof to

> cause such wreck, vessel or part thereof or other thing, if the same continues for more than 24 hours, to be removed or destroyed in such manner and by such means as he thinks fit, and may use gunpowder or other explosive substance for that purpose, if he deems it advisable.

By section 17

> the Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable; and may apply the proceeds of such sale to make good the expenses incurred by him in placing and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing.

Section 18 provides that where the Minister

> has caused to be removed or destroyed any wreck, vessel or part thereof, or any other thing by reason whereof the navigation of any such navigable waters was or was likely to become obstructed, impeded or rendered more difficult or dangerous * * * and the cost of removing or destroying such vessel or part thereof, wreck or other thing has been defrayed out of the public moneys of Canada; and the net proceeds of the sale under this part of such vessel or its cargo, or the thing which caused or formed part of such obstruction are not sufficient to make good the cost so defrayed out of the public moneys of Canada, the amount by which such net proceeds falls short of the costs so defrayed as aforesaid, or of the whole anount of such cost, if there is nothing which can be sold as aforesaid, shall be recoverable with costs, (a) from the owner of such vessel or other thing, or from the managing owner or from the master or person in charge thereof at the time such obstruction or obstacle was occasioned * * *

The dispute arises in this way: The schooner "Empress" was burned to the water's edge in Barrington

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Passage, a public harbour, and was abandoned to the underwriters as a total loss. By them it was sold at auction for $5.00 to one Nickerson who, after several ineffectual efforts, abandoned the attempt to remove the wreck. The Minister advertised by tender for the execution of the work of removal and in the contract which was let for $750.00, it was stipulated that

> the materials in the obstruction when the removal was satisfactorily completed, but not before,

were to "become the property of the contractor."

By the contractor the wreck was blown up and the pieces were removed to the adjacent shore and eight iron knees weighing over a ton, and about 150 lbs. of copper were taken by the contractors to Yarmouth and sold by them for their own benefit.

In this action the Crown sought to charge the appellant under section 18 with the whole cost of removing the wreck and Mr. Justice Cassels, the judge of the Exchequer Court, has held that the appellant is liable. The appellant contends that the conditions of liability under section 18 have not come into existence.

At common law the owner of a vessel becoming an obstruction to navigation in the absence of negligence or wilful default of the owner or persons in control of her, is not responsible for the consequences of the obstruction, or chargeable with the cost of removing it, and the "Navigable Waters Protection Act" imposes a new liability upon the owners of ships, which comes into existence in certain defined conditions; a liability which it would be difficult in many cases to describe as just or fair or reasonable.

On well-known principles the party who asserts in a particular case that the conditions of a new statu-

tory liability have come into existence, must establish that proposition strictly and in ascertaining whether that is so or not, the inquiry is: Do the facts established clearly fall within the statutory description of those conditions?

Now when section 18 is read in connection with section 17, it becomes apparent that "sale under this part" in section 18 refers to the sale authorized by section 17, and section 18 provides, if not in explicit terms, at least by plain implication, that if there is anything which can be sold, it is only the difference between the net proceeds of the sale of it and the amount of the costs which can be recovered.

It is quite clear that there was something of appreciable value which could be sold; the parts of the vessel, that is to say, which were taken away by the contractors and sold for their own account. And the appellant is entitled to succeed unless the condition of the statute is satisfied that there was a sale of these parts within the meaning of the statute.

On behalf of the Crown it is contended that the provision of the contract transferring the ownership of the materials to the contractor upon the completion of the work of removal, constituted a sale within the meaning of the Act. The consideration for this term of the contract would be found, it is argued, in an appropriate allowance made in the stipulated compensation which would be reduced in consequence of the supposed value of the stipulation in the eyes of the tenderers. The cost of removal being thus diminished and the burden upon the owner correspondingly lightened, the owner, it is argued, would in this way get the equivalent in value of the materials just as if they had been sold as the statute contemplates.

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The answer to this contention is, and I think it is a complete answer, that the statute provides for no such thing. Neither in form nor in substance does this stipulation in this contract fulfil the statutory condition. The statute provides for a sale at auction and section 18 makes it quite plain that what is contemplated is a sale in the ordinary sense, that is to say a sale for an ascertained price which, if less than the cost, can be deducted therefrom in order to determine the amount of the liability under that section.

Moreover, it would be rash to assume that the procedure under consideration would in all cases operate as favourably to the owner as that prescribed by the statute. Under this procedure the competitive bidders are limited to persons who are prepared to tender for the execution of the work of removal. Under the statutory procedure the bidders would include all persons naturally desirous of buying the articles for sale.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J—I was at first inclined to think that there had been substantial compliance with section 17 of the "Navigable Waters Protection Act" (R.S.C. ch. 115) sufficient to entitle the Crown to maintain this action under section 18. But further consideration has led me to the conclusion that this view cannot be sustained—somewhat reluctantly because I incline to think the course adopted may have been quite as beneficial to the appellant as a strict compliance with section 17 would have been.

Tenders were called for by an advertisement for the removal or destruction, under section 16, of the

wreck of the defendant's vessel on the footing that the property in it after removal or destruction should belong to the contractor. It may be surmised that in this case something approximating their saleable value after the ship was blown up had already been allowed to the Crown by the contractor in reduction of the amount of his tender for the destruction of the vessel and that the defendant, therefore, received the benefit of such saleable value. But if that be the fact, and if proof of it would entitle the Crown to maintain this action, such proof is entirely lacking; and in many other cases—perhaps the great majority—little or nothing would be allowed by a tenderer for the value of possible salvage from a submerged wreck to be removed or destroyed by him. On the other hand, after removal to the shore or to some other accessible place portions of the same vessel or cargo might have a very substantial value and be readily saleable.

We are required to place a construction on sections 17 and 18. The latter section confers on the Crown a right which it did not theretofore enjoy. *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (1), at pp. 527-8. It subjects the owner of a vessel which founders in a place where it constitutes an obstruction to navigation, who may be entirely free from blame, to what may be a very serious burden. It is only fair to him that any conditions which Parliament has attached to the imposition of that burden should be fulfilled. Section 17 imposes such a condition. If after the removal or destruction of a vessel by or at the instance of the Crown under section 16 there should be anything left "which can be sold," it must then be "sold by auction or otherwise" under section 17

(1) [1894] A.C. 508.

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before the Minister may invoke the remedy created by section 18 of maintaining an action for the balance of the expenses incurred by the Crown after crediting the proceeds of a sale under section 17. Disposing of what may prove to be of saleable value after removal or destruction by inviting tenders for the removal or destruction on the basis that it shall belong to the contractor may be a convenient, possibly the most convenient, method of dealing with such a situation as was presented in the case at bar. It may under some circumstances even be more advantageous to the owner than the course prescribed by section 17. But it is not that course; nor can it be said that it has been shewn in the present case to have been its substantial equivalent, if that would suffice.

I am for these reasons, with great respect, of the opinion that the appeal must be allowed and the action dismissed.

BRODEUR J.—This is a case where we are called upon to construe certain provisions of the "Navigable Waters Protection Act," ch. 115, R.S.C., concerning the sale, the removal or destruction of the wrecks in navigable waters.

The appellant, Anderson, was the owner of a schooner called *Empress*; and on the 10th November, 1915, while lying at anchor in Barrington Passage, the vessel was burnt to the water's edge and became an obstruction to navigation.

The owner was notified by the Department of Marine and Fisheries that it was his duty, under the provisions of the Act, to remove the schooner and, on the 18th November, Anderson caused the vessel to be sold at public auction to the highest bidder, and he stipulated that the purchaser should assume

all responsibility for its removal. A person offered and paid five dollars ($5) for the vessel, stripped her of everything of value and abandoned the remains after having unsuccessfully tried to remove the vessel.

The Department then advertised for tenders for the removal of the wreck; and, in view of what had happened, stated in the notice calling for tenders that the materials of the vessel, when the removal has been satisfactorily completed, should become the property of the contractor. The successful tenderer, as requested by the notice calling for tenders, stated that he intended to blow the hull into pieces and agreed to do the work for seven hundred and fifty dollars ($750.00). The present action has been instituted by the King to recover the sum of $750 and cost of advertisements, and some other incidental expenses.

The point raised by the appellant is that the sale of the vessel is a condition precedent to the right to recover the expenses of removal and that the Minister did not properly exercise his discretion as to whether the wreck is an obstruction to navigation and as to the manner of its removal.

By the provisions of section 16 of the Act the Minister

> may cause any wreck to be removed or destroyed in such manner and by such means as he thinks fit and may use gunpowder and other explosive substance for that purpose if he deems it advisable.

In the present case, the Minister called for tenders and in the notice the tenderers were asked to state how they would do the work. Different modes were suggested by the different tenderers; and the Minister having decided to accept a tender which provided that the vessel would be destroyed shews that the discretion has been properly exercised by the Minister and that in his view the hull should be destroyed.

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Brodeur J.

It is rather evident in this case that the vessel could not easily be removed in view of the condition in which she had been left after the fire, and in view of the efforts made by the first purchaser. Besides, the Minister was not bound to remove her. It was absolutely within his discretion to remove or to destroy her.

The Minister could then have purely and simply asked for tenders for her destruction. But in this case, in order that the owner could get from the vessel as much benefit as possible, he provided that the successful tenderer should become the owner of the wreck and should consider in his tender the value of such wreck. As I said, it was not necessary for the Minister to provide for that. He could have simply called for tenders for the destruction of the ship without providing at all for setting any value upon the hull. That condition was put in for the benefit of the owner; and he should certainly not now be entitled to complain and say the Minister had no right to do that.

I consider that the Minister substantially complied with the provisions of the law; and if he failed in something, it was in conveying to the owner certain benefits which otherwise the latter could not get.

For these reasons I consider that the action which was maintained by the court below was well founded and the appeal from its judgment should be dismissed with costs.

MIGNAULT J.—The only question that merits serious discussion here is whether the appellant is right in his construction of sections 13, 14, 15, 16, 17 and 18 of the "Navigable Waters Protection Act" (R.S.C. 1906, ch. 115), as amended, so that the wreck not having been sold by auction by the Crown for the

recovery of the cost of its destruction, the respondent cannot recover from the appellant the amount necessarily paid for the removal of the wreck. Otherwise it is obvious that the claim of the Crown is one which the appellant should pay.

The schooner *Empress*, while anchored at Barrington Passage, a public harbour, was burnt to the water's edge, and was abandoned to the underwriters as a total loss and by them, on their account and on account of the owner, sold by auction for $5.00 to one Nickerson, the purchaser obliging himself to remove the wreck. Nickerson swears that he twice tried to remove the remains of the schooner to the shore and failed and so abandoned it where it was, after taking away what could be stripped off. The Minister, after notifying the owner to remove the wreck and this not being done, advertised for tenders to remove it, the materials to belong to the tenderer, and received several tenders, the lowest being $750, and the highest $2,700. The lowest tender was accepted, the wreck blown up with dynamite, and some of the materials were sold by the contractor. The Crown sued the appellant and the latter served a third party notice on Nickerson, but the issue was tried between the Crown and Anderson, and it was agreed that if the plaintiff succeeded against Anderson, the trial between Anderson and Nickerson would come on at a subsequent date.

As I have said, the claim of the Crown is one which Anderson should pay unless, adopting his construction of the "Navigable Waters Protection Act," it be held that the sale of the wreck under section 17 is a condition precedent to the right of the Crown to claim from the owner the cost of removal.

That this question of construction is not free from difficulty is shewn by the division of opinion

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among the members of this court. Section 17 deals with the sale of the obstruction or wreck. In form it is permissive and says that the Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable. The evidence here is that the wreck could not be removed from the place where it formed an obstruction, while certain materials, such as the chains, anchors, etc., could be and were taken away by Nickerson to whom the whole wreck had been sold, on account of the owner and underwriters, with obligation to remove the wreck, before the appellant received the letter from the Government ordering him to remove it. That the appellant bid $3.00 and did not judge it wise to go higher than $5.00, the amount of Nickerson's bid, shews that he considered the game was not worth the candle on account of the obligation incumbent on the purchaser to remove the wreck.

It is true that the contractor was allowed to dispose of the remains of the wreck after blowing it up. But if all these remains had to be brought by him to shore and then sold so as to defray in part the cost of removal, the contractor would no doubt have charged more, so that the appellant gets the benefit of the value of anything remaining after the wreck was blown up.

Coming back now to sections 17 and 18, a not unreasonable construction of section 17 would be that where the wreck or obstruction, or a material part thereof, cannot be conveyed to the shore and sold, there is no obligation (and I think that the word "obligation" is too strong for a provision such as section 17 which is as I have said permissive in form) to sell it by auction, and if in such a case there is

no direction in the statute to sell the wreck, the sale cannot be a condition precedent to the right of the Crown to recover the cost of removal.

Moreover, if the Minister had caused the wreck to be sold where it stood, owing to the impossibility of removing it, there is no reason to suppose that a larger sum would have been realized than that paid by Nickerson for, obviously, if the Minister sold the wreck, a necessary condition would have been that the purchaser should remove it.

But the appellant contends that after the wreck was blown up the remains should have been sold and credited to him. I have already answered that in that event the contractor would no doubt have charged more for removal.

I may add that section 18 contemplates the case where there is *nothing that can be sold* and in that event nothing is to be credited to the owner in deduction of the cost of removal. Here of course there were some iron knees and copper, but the sale of this stuff would not have benefitted Anderson, as I have observed, if the contractor, deprived of these materials, had charged more for removal, and the whole of it is to my mind so insignificant that the maxin *de minimis non curat lex* may be usefully applied.

On the whole, I consider that the appellant has suffered no prejudice, and to allow his technical objection to prevail would deprive the Crown of the right to ever recover what is due by him.

I would dismiss the appeal with costs.

Appeal dismissed without costs.

Solicitor for the appellant: *W. A. Henry.*

Solicitor for the respondent: *F. C. Blanchard.*

Solicitor for third party: *C. J. Burchell.*

1919
*Nov. 6.
*Nov. 10.

G. MARTINELLO AND COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

JOSEPH B. McCORMICK AND FRED. G. MUGGAH (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Constitutional law—"Nova Scotia Temperance Act," 1 Geo. V. c. 33—Seizure of liquor—Intercolonial Railway—Carrier—Statute—Application to Crown.

Sec. 36 of the "Nova Scotia Temperance Act" authorizes the seizure of liquor in transit or course of delivery upon the premises of any carrier etc.

Held, that neither expressly nor by necessary implication did this enactment apply to liquor in custody of the Crown in right of the Dominion as a carrier.

Held, also, Duff J. expressing no opinion, that if it did purport so to apply it would be *ultra vires.*

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment at the trial in favour of the plaintiff.

Liquor shipped from Montreal and consigned to the plaintiff company at Sydney was seized there by an inspector, under the provisions of sec. 36 of the "Nova Scotia Temperance Act, 1911" on the premises of the Dominion Government Railway by which it had been carried from Montreal. The company issued a writ of replevin on the trial of which it was held that the transaction was *bonâ fide* and came within the saving clause, sec. 4, of the Act of 1910. His

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 D.L.R. 364.

judgment for the plaintiff was reversed by the full court and the action dismissed.

J. M. G. Stewart for the appellant referred to *Kelly & Glassey* v. *Scriven* (1); *Ex parte McGrath* (2).

Finlay Macdonald K.C. for the respondents. The liquor was imported for re-sale and the transaction was not *bonâ fide* within the meaning of sec. 4 of the Act of 1910. See *In re Nova Scotia Temperance Act, 1910* (3).

This is a proceeding *in rem*, and the judgment of the court below is final. *McNeil* v. *McGillivray* (4); *Sleeth* v. *Hurlbert* (5), at pages 630-1.

THE CHIEF JUSTICE.—The sole question raised and argued on this appeal was whether a seizure of certain liquor by an inspector under the Provincial Temperance Act of Nova Scotia in the freight sheds of the Intercolonial Railway where it had been carried by the railway and was awaiting delivery to the consignee, was a legal seizure or not. In other words, whether or not the Crown in right of the Dominion was a "carrier" within the meaning of the Provincial Temperance Act. I am of the opinion that the Crown in right of the Dominion was not such a carrier, that the Act in question did not pretend to extend its provisions to the Crown in right of the Dominion and that the legislature of the province had no power to so extend it even if it had tried to do so. I concur with Anglin J. in the reasons stated by him in allowing the appeal and restoring the judgment of the trial judge, and would refer to the case of

(1) 50 N.S. Rep. 96, at pages 106, 109-10; 28 D.L.R. 319 at pages 324, 325-327.
(2) 31 Can. Cr. C. 10.
(3) 51 N.S. Rep. 405; 36 D.L.R. 690.
(4) 42 N.S. Rep. 133.
(5) 25 Can. S.C.R. 620.

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Idington J.

The Queen v. *McLeod* (1), where it was held the Crown was not liable as a common carrier for the safety and security of passengers using its railway.

IDINGTON J.—Counsel for the appellant wisely abstained from pressing many points taken in the courts below and confined this appeal to the single neat point of whether or not by virtue of the Nova Scotia Act which, neither by express words nor by any legal implication in those used, pretended to so extend them as to include the Crown and its possessions when giving the powers of entry and seizure it conferred on inspectors named pursuant to the provisions of said Act, can be held to have given them such powers as asserted by invading in the way in question the premises of the Crown, commonly known as the "Intercolonial Railway" and taking therefrom the cases of liquor in question.

I am of opinion his point is well taken. We have repeatedly held that most beneficent legislation of local legislatures could not give a remedy for grevious wrongs suffered on, or in and by, operations carried on upon said railway, and other like public works vested in the Crown. The like holding has been adhered to in analogous cases.

There is a double difficulty in respondent's way herein, because the Act in question fails to use express language extending it to include the Crown property, and he is invoking it to assert a power to enter that property vested in the Crown on behalf of the Dominion.

The counsel for respondent urged that the point taken here was not taken below, but clearly he is in error for the amended pleadings distinctly raise the issue presented here by appellant.

(1) 8 Can. S.C.R. 1.

It may well be, as so often happens in every court in too many cases, that the one issue upon which the case should turn, gets so befogged by raising irrelevant issues of law or fact, or both, that its import is apt to be overlooked; and possibly this is another of the same to be added to the long list of those which have preceded it.

I think this property now in question never got, except by an illegal act, where respondents had a legal right to deal with it, or by the appellant's own act when he might, if he had taken it there, presumably be held to have rendered it liable to such seizure as made.

The appeal should be allowed with costs and the judgment of the learned trial judge be restored.

DUFF J.—This appeal raises a question under section 59 of the "Nova Scotia Temperance Act," being ch. 8 of the Nova Scotia statutes of 1918. By sub-section 1 of that section:

> Where any inspector, constable or other peace officer finds liquor in transit or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place, and reasonably believes that such liquor is to be sold or kept for sale in contravention of this Act, he may forthwith seize and remove the same.

The section goes on to provide for proceedings before a magistrate for the purpose of hearing and determining the claim of the owner that the liquor is not intended to be sold or kept for sale in violation of the Act and authorizes the destruction of the liquor in the event of the disallowance of this claim by the magistrate or in the event of no person appearing to make such a claim.

Certain liquor in the freight sheds of the Intercolonial Railway and there awaiting delivery to a consignee after carriage on the railway was seized by an inspector professing to act under the authority

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of this enactment. Proceedings having been instituted before a magistrate under the Act, the consignee demanded delivery of the liquor, the property in which in the meantime had passed to him by payment of the vendor's draft attached to the bill of lading; the assignee's demand was refused and the liquor was destroyed.

The proceedings including the destruction of the liquor were taken professedly under the authority of sub-section 1 of section 59 and it is not suggested that the acts, of which the appellant complains as wrongful acts, could be justified under any other provision of the Act and the defence must fail unless the seizure was authorized under sub-section 1. It is contended on behalf of the appellant 1st, that this sub-section does not authorize the seizing and removing of such property from premises which are occupied by the Crown in connection with and for the purpose of the working of a Government railway, and 2nd, that if the scope of the sub-section is broad enough to give such authority it must be restricted in such a way as to exclude from its operation the premises of the Intercolonial Railway as being a railway owned and worked by the Government of Canada on the ground that if such were the effect of the enactment it would be *ultra vires* of the provincial legislature. I think the appeal should be allowed on the first mentioned ground and I desire to say as regards the second ground that questions touching the authority of a provincial legislature purporting to exercise the jurisdiction it possesses concerning civil rights or local and private matters within the province or the administration of justice to pass legislation incidentally giving rights of entry upon property connected with a Dominion railway or Dominion Crown property

for purposes not otherwise affecting any interest of the Crown in the right of the Dominion or in conflict with any Dominion enactment may have to be considered by reference to the Dominion authority respecting the public property of the Dominion or by reference to the Dominion authority in relation to Railways or Trade and Commerce. But such questions can more satisfactorily be considered (presenting as they frequently do difficult and important points) after full argument upon them, and on this second ground we virtually have had no argument. I therefore pass no opinion upon it as I find it unnecessary to do so.

It is quite clear, I think, that section 59 does authorize the taking of goods out of the possession of a carrier in derogation of any possessory lien or other right of possession the carrier may have in relation to them. It is therefore, if applicable to the Crown as carrier, an enactment in derogation of the rights of the Crown and upon settled principles for which it is unnecessary to cite authority it must not be given this application unless (there being no express words requiring it), the Crown is reached by necessary implication. The words of the section are general and there is nothing in it to indicate any intention on the part of the legislature that the authority conferred is to be exercisable in relation to goods in possession of officials of the Government in their capacity as such.

The appeal should be allowed and the judgment of the trial judge *restored.*

ANGLIN J.—The "Nova Scotia Temperance Act" (ch. 33 of the statutes of 1911) by section 36 authorized the seizure by an inspector of liquor in transit

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or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place, if reasonably believed by him to be intended or kept for sale. Liquor of the defendant, consigned to him from Montreal, was seized by an inspector under the Temperance Act in the freight sheds of the Intercolonial Railway at Halifax after property therein had passed to the defendant by the payment of the vendor's draft attached to the bill of lading.

Questions agitated in the provincial courts arising under section 4 of the Temperance Act were not pressed by counsel for the appellant, who rested his appeal solely on the ground that goods in the custody of the Crown (Dom.) as a carrier and awaiting delivery are not within the provisions of section 36, invoking the familiar rule of construction that

> The Crown is not reached (by the statute) except by express words or by necessary implication,

and also contending that it would be *ultra vires* of a provincial legislature to authorize such interference with the undertaking of a Dominion railway and that a construction involving such authorization should not be placed on the statute unless inevitable. I am inclined to think both points well taken. The Crown in right of the Dominion, although a carrier, was not within the purview of the Nova Scotia statute and the impeached seizure on its premises was unlawful.

Authorities on the first branch of the argument are collected in Maxwell on Statutes (5 ed.), at page 220, and Craies Hardcastle (2 ed.), at pages 376 and 386-92. On the second branch reference may be made to *Gauthier* v. *The King* (1).

The original caption of the liquor having been illegal the defendant cannot, in my opinion, success-

(1) 56 Can. S.C.R. 176; 40 D.L.R. 353.

fully set up in answer to the plaintiff's action for replevin that since he might have proceeded rightfully to take it as soon as the plaintiff had removed it from the railway premises, the case may be treated as if he had seized the goods after they had in fact been removed from the railway premises, whether rightfully or wrongly, and the detention of them were thus legal. The inspector in seizing was a mere trespasser *ab initio*. All the acts he did were trespasses. He was in the same position as a mere stranger without any legal authority whatever. The plaintiff is entitled to say:

> Let me be put in the position in which I stood before your illegal act.

Attack v. *Bramwell* (1).

I agree with the view expressed by the majority of the learned judges of the Supreme Court of Nova Scotia, in *Ex parte McGrath* (2).

The appeal should be allowed with costs here and in the court *en banc* and the judgment of the learned trial judge restored.

BRODEUR J.—This is an appeal from the Supreme Court of Nova Scotia *in banco* reversing the judgment of Mr. Justice Chisholm.

In the courts below the question which was mainly discussed was whether or not the sale of liquor was a *bonâ fide* one within the meaning of section 4 of the "Nova Scotia Temperance Act."

The trial judge held that the transaction was a *bonâ fide* one and that therefore the statute did not apply.

Upon appeal this decision was reversed and the court held that the transaction ended in Sydney,

(1) 3 B. & S. 520.

(2) 31 Can. Cr. Cas. 10.

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when the draft was paid at the bank, and that section 4 of the "Nova Scotia Temperance Act" did not apply.

Before this court, the above question was not pressed and the only point which was raised by the appellant for our consideration was whether under the provisions of the "Nova Scotia Temperance Act" authorizing the seizure of liquor in the hands of a common carrier, that seizure can be legally made when the liquor is in the hands of the Crown as owner of the Canadian Government Railways.

It is an elementary principle of law that no legislation can affect the Crown without formal reference to it in the statute. Moveable property in the possession of the Crown cannot be seized or removed without its consent, or without some law being passed to that effect; and the Crown is not bound by statute, unless expressly, or by necessary implication. There is no power or authority in this Dominion capable of binding the Sovereign, save only the Sovereign himself in Parliament, and then only by express mention or clear implication. *Gorton Local Board* v. *Prison Commissioners* (1).

The "Nova Scotia Temperance Act" could very well authorize the seizure of liquor in the hands of an ordinary common carrier; but if the carrier is the Crown itself, I do not think the statute could apply.

In the present case, the officers charged with the carrying out of the "Nova Scotia Temperance Act" thought it advisable to go and seize in the hands of the Crown the liquor in question. That seizure was illegal and the action instituted by the appellant to claim the goods is well founded.

The appeal should be allowed with costs of this

(1) [1904] 2 K.B. 165, n.

court and of the courts below and the judgment of the trial judge restored.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.

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Solicitor for the appellants: *A. D. Gunn.*
Solicitor for the respondents: *Finlay Macdonald.*

1919
*Nov. 5.
*Dec. 22.

THE SHIP "FORT MORGAN" (DEFENDANT)..... APPELLANT;

AND

HANS JACOBSEN (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Master and servant—Wrongful dismissal—Hiring of shipmaster—Change of voyage—Notice.

J. was hired in New York as master of a Norwegian ship for a voyage to Halifax and thence to the West Indies. On arriving at Halifax he found that the ship was to go to Newfoundland and from there to Italy. He was offered $400 a month for the new voyage and agreed to go for $450 or, at all events, more than was paid to the chief engineer. Without further notice the owner engaged a new master and chief engineer paying the latter $400 a month. J. left the ship and, the owner refusing to pay the account he rendered, brought an action claiming damages for wrongful dismissal.

Held, affirming the judgment of the Local Judge (19 Ex. C.R. 165; 49 D.L.R. 123), that he was entitled to recover; that not having been hired for a definite term he was entitled to reasonable notice before being dismissed; and that the assessment of his damages at three months' wages, the arrears due when he was suspended, and expenses of his trip to Norway after dismissal should not be disturbed.

APPEAL from the judgment of the Local Judge of the Nova Scotia Admiralty District (1), in favour of the plaintiff.

The facts of the case are stated in the above headnote.

Rogers K.C. for the appellant.
Kenney for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 19 Ex. C.R. 165; 49 D.L.R. 123.

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Idington J.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—Having regard to the peculiar terms of the hiring, whereby the respondent was always to get a higher wage than the engineer, with which Anderson was conversant, I do not think he was treating respondent fairly in supplanting him by another captain without first telling him he had an engineer duly qualified and willing to go at $400 a month and offering something in excess of that wage.

And none the less is that so, when regard is had to the terms of the telegram to him (Anderson) from appellant's Halifax agents, on which its counsel laid so much stress in argument here, for that clearly indicates respondent was not in accord with the possibly excessive and imperative demands of the rest of the crew whereby the engineer would get $475 a month yet respondent was offering to take $450, but by no means clearly putting it as an ultimatum.

I am clearly of opinion that there was a dismissal and no refusal on the part of respondent to go.

In view of the express concession of the appellant's counsel that the Norwegian law was intended to govern, I see no alternative which entitles us to consider English law as the binding basis of the contract or anything therein relative to the consequences of a breach thereof.

The intention of the parties contracting is in that regard the rule of law however variable and difficult of application may be the general respective presumptions which any given set of circumstances may give rise to.

The appellant and respondent being agreed in that regard herein, we are relieved from any of the difficulties

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that sometimes exist in such cases. The only other question involved is the measure of damages and they must be measured by the terms of the contract made in light of and rendered definite by a reading of the relevant law.

I cannot help having a suspicion that the respondent may have had, and possibly even availed himself of, the opportunity of minimizing his damages by accepting another engagement, but as no such contention is in fact set up I cannot assume that a return to Norway, though for past twenty odd years resident in New York, apparently was not the alternative he chose to abide by when this litigation had ended, if not before.

Primâ facie at least the extreme limit of the statutory provision is what, as he claims, he is entitled to when as here no alternative basis is presented by the evidence.

The appeal should be dismissed with costs.

DUFF J.—I think there is evidence to support the finding that the contract made in New York between Anderson, the representative of the owners, and the respondent as master, was subject to the condition that he should not be bound to serve in any voyage taking him across the Atlantic. The contract appears to have been indefinite as to the duration of hiring. The rule of English law, which in such circumstances would govern the rights of the parties, is that the contract cannot be terminated without reasonable notice. *Creen* v. *Wright* (1). Whether this rule of English law be applied to the present case or the rule of the Norwegian law as explained in the evidence, the judgment of the trial judge seems to be a satisfactory disposition of it. As to the jurisdiction

(1) 1 C.P.D. 591.

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of the Court of Exchequer, a Court of Admiralty in such cases has jurisdiction to award damages; *The Great Eastern* (1); and any difficulty which might otherwise have arisen from the decision in *The Courtney* (2), seems to be met by sec. 10 of the "Admiralty Courts Act" of 1861, 24 Vict. ch. 10.

ANGLIN J.—The learned trial judge, as I read his judgment, found that the plaintiff was employed by the owner of the defendant ship not by the month, as the latter contends, but for a voyage from New York to Halifax and thence to the West Indies. Since the evidence of the plaintiff, corroborated to some extent by that of Martin Marsden, supports this finding we should not disturb it merely because the defendant testifies to the contrary. Another not unreasonable inference from the evidence and all the circumstances might be that the plaintiff was engaged for an indefinite term as master of the "Fort Morgan" to take her wherever ordered subject to the limitation that she would not be sent overseas nor into the war zone.

The contract of employment was made in New York. The evidence also warrants a finding that it was one of its terms that the plaintiff's wages as master of the "Fort Morgan" should be higher than those of any other officer on the ship.

The vessel proceeded to Halifax under the plaintiff's charge and while it lay in that port the owner notified the master that the ship had been chartered to go to Newfoundland and thence to Italy instead of to the West Indies. While the master was willing to assent to this change of route and destination, he and the owner were unable to come to terms as to his wages

(1) 1 Ad. & Eccl. 384. (2) Edw. Ad. R. 239.

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for the new voyage. The owner recognized his right to a substantial increase owing to the fact that the vessel would proceed to the war zone, and offered him $400 a month. The captain's demand was for $450 but not less than should be paid to the chief engineer. The owner engaged new officers in New York agreeing to pay the new chief engineer $400. When the new master and his officers arrived at Halifax the plaintiff, who had never been offered more than $400 a month by the owner, left the ship. The learned trial judge found that he was discharged without notice and

> under the English law * * * would be entitled to compensation for such damages (*sic*).

The facts in evidence I think warrant this conclusion.

There was some discussion at bar as to the law by which the nature of the contract, the question of its breach and the relief to which the plaintiff might be entitled should be determined and as to the jurisdiction of an English Admiralty Court to enforce *in rem* rights based on foreign law in excess of those conferred by the general maritime law. Counsel were agreed that the Norwegian law applied and evidence of it was given by the Norwegian Consul at New York. No evidence of any other foreign law was adduced. The law of the state of New York, should it be applicable, must therefore be deemed to be the same as the law administered by English courts.

In the view I take of the case it is unnecessary to decide to what law the rights of the parties were subject. If they were governed by the Norwegian law the plaintiff's damages appear to have been assessed in accordance with its provisions as proved by the witness Ravn. If they should be determined by English law the amount allowed does not appear to have been excessive—at all events, not sufficiently so to

justify interference. The total judgment was for $1,888.85. The plaintiff's wages when dismissed were $343.75 per month, and there was then due to him for wages earned and unpaid $727.60. His damages for wrongful dismissal were therefore assessed at $1,121.25, or $120 more than three months' wages. I am not prepared to hold that this amount was so excessive for loss of the voyage to the West Indies that the assessment of the local Admiralty Court should be set aside.

There is no evidence that the plaintiff actually obtained, or could by reasonable effort have secured, other employment which he would have been bound to accept in order to minimize his damages.

I would for these reasons dismiss this appeal with costs.

BRODEUR J.—This appeal does not, to my mind, present any serious difficulty.

The engagement of the respondent as master of the "Fort Morgan" was for a trip from New York to Halifax and the West Indies. The "Fort Morgan" is a Norwegian ship and the respondent is also a Norwegian. The contract should be governed by Norwegian law because *primâ facie* the law of the flag governs, unless the parties have provided otherwise in the language of the contract. It was said in *The Johann Friederich* (1), that

> in cases of mariners' wages whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law.

The Leon XIII (2); *The Livietta* (3); *Lloyd* v. *Guibert* (4).

(1) 1 W. Rob. 35 at p. 37.
(2) 8 P.D. 121.
(3) 8 P.D. 209.
(4) L.R. 1 Q.B. 115.

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The law of Norway, as was proved, shewed that the plaintiff was entitled to damages for wrongful dismissal.

The plaintiff having been engaged for a particular voyage could not be forced to go elsewhere; and if on his refusal he was replaced by another master, that constituted on the part of the owners of the ship a breach of contract.

The amount of the damages awarded was not excessive.

The appeal should be dismissed with costs.

MIGNAULT J.—This is by no means a satisfactory case and the reasons for judgment of the learned trial judge are extremely brief. The evidence, as I read it, is contradictory not only as to the salary agreed to be paid to the respondent as master of the ship "Fort Morgan," but also as to the term and the voyage for which he was hired. The learned trial judge finds that when the ship arrived at Halifax, the respondent's salary was $343.75 per month, and this finding I would not disturb as it evidently rests on the credibility of the respondent's evidence as opposed to the statement of Anderson, owner of the ship, that his salary was then only $250.00 per month.

As to the voyage for which the respondent was hired, the finding is that he came to Halifax with a view to a West India charter, but that after remaining there the owner chartered the ship for the war zone, and offered the captain and crew an increase of wages provided they would agree to go to Italy, but that the respondent refused the wages so offered him and was discharged without notice. I do not find in the reasons for judgment any express statement as to the term for which the respondent was employed,

but I take it that the finding was that the respondent, as he testified, was engaged for a voyage from New York to Halifax and thence to the West Indies. Very probably the appellant, in chartering the ship for the war zone, found such a charter much more profitable than the intended voyage to the West Indies.

On the basis of the findings of the learned trial judge there can be no doubt that the respondent was wrongfully dismissed, and the only question is with regard to the amount of the damages to which he is entitled for wrongful dismissal. The judgment appealed from allows him three months' salary and the price of transport to Norway, granting him such compensation "by analogy to the Norwegian Maritime Code," and the amount for which judgment was entered, after a reference to the Registrar, was $1,888.85, being, I take it, $1,031.25 for three months' wages, $302.00 for return to Norway, and the difference, $555.60, for wages due the respondent at the date of his dismissal. Both parties have admitted that the issues in this case are governed by the law of Norway, and proof of this law was made by the Consul General of Norway at New York, Mr. Ravn, who referred to articles 63, 64, 65 and 66 of the Norwegian Code, the effect of which is to give the master wrongfully dismissed in a port outside of Europe, when not engaged for any fixed term, three months' wages, plus his travelling expenses, including subsistence, to the place at which he was engaged in Norway, but otherwise to that port to which the ship belongs.

The respondent had been in the United States for over twenty years and was hired at New York, although he says he belongs to Stavanger in Norway. He was not asked whether he had any intention of returning there. If the Norwegian law governs the matter, as

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both parties admit, the respondent would appear to be entitled to claim the amounts which the learned trial judge allowed, and no special complaint is made in the appellant's factum as to the sum granted for travelling expenses.

As I have said this is far from being a satisfactory case, but I cannot find sufficient ground to justify me in setting aside the judgment of the trial court, and therefore I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. L. Hall.*
Solicitor for the respondent: *L. A. Lovett.*

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THE TORONTO RAILWAY COMPANY (DEFENDANTS)..... } APPELLANTS;

*Nov. 18
*Dec. 22.

AND

ALEXANDER HUTTON (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

"Workmen's Compensation Act," 4 Geo. V. ch. 25 (Ont.)—Injury to employee—Compensation from Board—Election—Right of action.

The Ontario "Workmen's Compensation Act" provides that a workman injured in course of his employment and thereby entitled to bring an action against a person other that his employer, may claim compensation under the Act from the Compensation Board or bring such action. If he elects to claim under the Act, and the compensation is payable out of the accident fund, the Board is subrogated to his rights, and may maintain an action in his name, against the wrongdoer. H., driver of a bread wagon in Toronto, was injured by a collision with a street car and elected to claim, under the Act, compensation payable out of the accident fund which was awarded and paid for a time. He then brought an action against the Toronto Ry. Co. and, after the trial, he obtained an order from the Board allowing him to withdraw his election.

Held, affirming the judgment of the Appellate Division (45 Ont. L.R. 550; 49 D.L.R. 216), that his right of action was not barred.

Per Anglin J.—H. should have obtained an order from the Board authorizing him to bring the action and the proceedings on the appeal should be stayed until such order is filed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), varying the judgment at the trial in favour of the plaintiff by directing that the damages awarded should be paid to the Compensation Board to be dealt with under the Act.

The only question for decision on this appeal is whether or not the plaintiff's right of action was barred

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 550; 49 D.L.R. 216.

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by his election to claim compensation under the "Workmen's Compensation Act." The proceedings on his claim so far as they affect that question are stated in the head-note.

Dewart K.C. and *Hodgson* for the appellants. There is no doubt that the plaintiff elected to claim from the Board. See *Scarf* v. *Jardine* (1), at pages 360-1; *Oliver* v. *Nautilus Steam Shipping Co.* (2).

Having so elected his right of action against the wrongdoer is gone. *Huckle* v. *London County Council* (3); *Codling* v. *Mowlem & Co.* (4).

Proudfoot K.C. for the respondent.

THE CHIEF JUSTICE.—This was an action brought by the plaintiff against the railway company to recover damages for injuries received by him from the negligent running of the defendant's railway and in which the jury assessed $2,500 as the damages and found "excessive speed" of the car as the negligence.

During the trial, it came out in evidence that plaintiff had elected before beginning his common law action to claim compensation under the "Workmen's Compensation Act," whereupon after the jury had been discharged the defendant applied for and obtained leave to add a plea to its other defences that such election had released the defendant from any right of action against it in respect of the injuries he sustained and that his claim for such damages was barred by the provision of the Act.

An appeal from the judgment entered by the trial judge on the jury's findings was taken to the Appellate Division, but the only point raised and argued

(1) 7 App. Cas. 345.
(2) [1903] 2 K.B. 639.
(3) 27 Times L.R. 112.
(4) [1914] 2 K.B. 61; 3 K.B. 1055.

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on the appeal there and afterwards on appeal to this court was as to the effect of the plaintiff's election and whether it barred plaintiff's right to recover in this action.

The Appellate Division based its judgment, the reasons for which were stated by Mr. Justice Hodgins, upon the fact

> that the only right given to the Board by the election is that of subrogation

and when once that has arisen

> the person possessed of the cause of action can do nothing to prejudice the person subrogated.

He further stated that

> the situation created by the election spoken of in the statute and its consequences cast no additional burden upon the wrongdoer nor any which differs in any way from that which he has brought on himself by this wrongful act. He has no concern with the dealings of the Board and the claimant and, unless he is prejudiced, he has no right to complain. In this case the respondent's cause of action is not divested: it exists still in him, but, if enforced by him, it must be for the benefit of the Board if he has signed an election.

As a result, he stated

> that the dismissal of the appeal should be preceded by a direction that the amount of the judgment should be paid to the Board to be dealt with by them in due course.

With these conclusions of the Divisional Court I am in full accord.

I agree with the reasons stated by my brothers Idington and Mignault which I have had the opportunity of reading and considering for dismissing the appeal to this court.

If the plaintiff had obtained the express authority of the Board to bring the action or a ratification subsequently of his having brought it, that, in the view I take of the legal effect of an election under the "Compensation Act," would have been a sufficient answer to defendant's amended plea, because I am

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clearly of the opinion that such an election cannot and does not discharge a wrongdoer whose negligence has caused damage to another or afford any defence to such an action as the plaintiff's.

I cannot, however, accede to the conclusion reached by my brother Anglin that proceedings in the action should be stayed until plaintiff had obtained and filed an authorization of the Board for the bringing and maintenance of the action with the consequence that the plaintiff should be deprived of his costs on this appeal.

There are no merits in the appeal. It rests entirely upon what under the circumstances must be called a technical point, and in my judgment the direction in the judgment appealed from,

> that the amount of the judgment should be paid to the Board to be dealt with by them in due course

amply protects the defendant from any of those injustices which the ingenuity of counsel has conjured up as possible consequences of the absence of express authorization or ratification of the bringing and maintenance of the action by the plaintiff.

I may add that I do not assent to the assumption of the appeal court that the power of the Board to sue in its own name is necessarily given to it by virtue of the subrogation. On the contrary I incline to think that such a suit or action must be in the name of the party injured to whose rights the Board by virtue of his election is subrogated.

IDINGTON J.—The respondent recovered judgment for injuries caused him, whilst in the employment of the Canada Bread Company as a driver, by negligence of the appellant.

For these injuries he would have been entitled to

compensation under the provisions of the "Workmen's Compensation Act," of Ontario.

The appellant discovered at the trial that respondent had signed a document purporting to elect to receive from the Board administering said Act, such compensation as he would be entitled to under the provisions of said Act.

That election, even assuming it to have been operative and effectual, would neither bar nor extinguish the right of action herein in question, but would entitle the Board to continue the action if it so chose.

Sec. 9, sub-sec. 3, of the Act is as follows:—

(3) If the workman or his dependents elect to claim compensation under this Part the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund shall be subrogated to the rights of the workman or his dependents and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund.

The employer concerned herein was not individually liable and hence his rights are eliminated from consideration herein.

The Board under such circumstances became the beneficiary and entitled to proceed in respondent's name to recover the damages for the benefit of the accident fund.

Moreover this sub-section expressly declares that the Board shall be subrogated to the rights of the workman.

The rights of the workman at the time when discovery was made of the alleged election were in law to recover herein and the respondent a mere trustee of the Board.

Instead of adding the Board as a party to the action to make all this clear and instantly effective as I submit might, and perhaps should, have been

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Idington J.

done, there was adopted a rather roundabout series of unnecessary steps, which, however, resulted in the court of appeal modifying the terms of the judgment so as to render it clear that the recovery was on behalf of and for the Board.

The matter should have ended there.

The appellant never had any concern in the question of who was to get the money and was only concerned to have all doubt removed as to the possibility of its being called upon in another action using the respondent's name to re-open the litigation.

This it cannot, in face of its resolution put on record herein, purporting to revoke the election made by the respondent, now by any pretence attempt.

No doubt it was a proper shrinking from the risks of litigation that led to its adopting the course it did, instead of expressly adopting and ratifying the proceedings, as I hold it was entitled to have done.

The election made was something with which appellant had no concern, for that neither helped nor hindered it in any way.

And if those relying upon the doctrine quoted from Lord Blackburn's judgment in the case of *Scarf* v. *Jardine* (1), at pages 360-1, will examine the quotation put forward, they will find not only that that able and accurate judge's accurate expression of the law not only fails to help appellant in the case of such an election as this was, but, even in a proper case, the election only becomes helpful when

> communicated to the other side in such a way as to lead the opposite party to believe that he has made his choice.

The election here in question was something between respondent and the Board which in no way altered the rights or obligations of appellant and never

(1) 7 App. Cas. 345.

was communicated to it, the opposite party in question herein.

And as the delimitation of rights given the Board by the subrogation which the Act expressly gives and defines, requires the application of the proceeds receivable thereby to go to the accident fund, it is to be regretted that through inadvertance the sum of $352.00 was deducted, presumably from what the verdict should have been.

The appeal should be dismissed with costs.

DUFF J.—The decision of this appeal turns upon certain provisions of the Ontario "Workmen's Compensation Act," that is to say, of sub-secs. 1, 2, 3, 4 of sec. 9, 4 Geo. V., ch. 25, and these provisions are in the following words:—

9. (1) Where an accident happens to a workman in the course of his employment under such circumstances as entitle him or his dependents to an action against some person other than his employer the workman or his dependents if entitled to compensation under this Part may claim such compensation or may bring such action.

(2) If an action is brought and less is recovered or collected than the amoun' of the compensation to which the workman or his dependents are entitled under this Part the difference between the amount recovered and collected and the amount of such compensation shall be payable as compensation to such workman or his dependents.

(3) If the workman or his dependents elect to claim compensation under this Part, the employer, if he is individually liable to pay it, and the Board if the compensation is payable out of the accident fund, shall be subrogated to the rights of the workman or his dependents and may maintain an action in his or their names against the person against whom the action lies and any sum recovered from him by the Board shall form part of the accident fund.

(4) The election shall be made and notice of it shall be given within the time and in the manner provided by sec. 7.

The accident in respect of which the action was brought occurred on the 17th April, 1918. On the 12th of May the plaintiff made a claim upon the Workmen's Compensation Board for compensation under the Act and on that day executed a document

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by which he professed to elect to claim compensation from the Board and to forego for the benefit of the Board all rights of action against third parties arising out of the accident. The plaintiff's claim was allowed by the Board and compensation was awarded to him as from the 17th April, the date of the accident, and for some months was paid, the first payment having been made on 22nd May. The present action was brought on 20th June, 1918.

The action was tried in December, 1918, and judgment was given on 18th December against the appellants and after this date certain proceedings were taken by which in effect the Board professed to grant permission to the plaintiff to pursue for his own benefit any right of action he might have against the defendants, notwithstanding his election, and for that purpose giving permission to plaintiff to withdraw his election. It is not disputed that the action was in fact instituted by the plaintiff without the permission of the Board and on his own initiative and for his own benefit.

The appellant company contends that the plaintiff conclusively elected to claim and accept compensation from the Board and that by force of the statutory provisions quoted above the plaintiff's right to recover reparation from the appellant company became beneficially vested in the Compensation Board and that the plaintiff's action (admittedly as already mentioned instituted on his own behalf) cannot be maintained. The Appellate Division has rejected this view of the effect of sec. 9 and I concur with this conclusion.

In sum my view of sec. 9 is this: Its subject matter is the reciprocal rights of the claimant on the one hand and the employer and Compensation Board on the other. The effect of the section may perhaps

be more conveniently considered with reference to the case of the employer. As between the employer and the claimant then, the claimant is entitled to choose one of two alternatives. He may claim compensation or he may elect to pursue his remedy against the third party. If he elects to claim compensation, the employer becomes subrogated to the claimant's rights against the third person; in other words, he becomes entitled to enjoy the benefit of them and may enforce them in the name of the claimant. But all this is intended to be and is a disposition as to the rights of the employer and the claimant *inter se*. A dispute may arise upon the point whether or not an election has taken place within the meaning of the enactment, but that is a matter to be settled as between employer and claimant. No other party is interested except, of course, a party claiming through one of them.

After the claimant has elected to claim compensation and to give the employer the benefit of his action, it is still open to the employer to allow him to withdraw his election and no third party is entitled to intervene.

This view is beset with no difficulties in point of interpretation. The argument advanced on behalf of the appellant rests upon a view of the effect of the word "subrogated" in sub-sec. 3 which makes it equivalent to "transferred." But that is not the necessary meaning of the word "subrogated" which points merely to the enjoyment by the party entitled to the subrogation of the rights affected by it. In this view of sec. 9 the third party is amply protected. The term "subrogation" in one very important field of its application in the law of insurance does not confer upon the person enjoying the benefit of subrogation the right to take proceedings in his own name.

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King v. *Victoria Ins. Co.*(1); *Simpson* v. *Thomson* (2). It seems a reasonable construction to read the words

may maintain an action in his or their names

as explanatory of the preceding phrase, "their names" obviously relating back to "dependents." This construction finds no little support in the circumstance that the notice of election provided for in sub-sec. 4 of sec. 7 is a notice only to the employer or to the Board.

It follows, of course, that the transactions between the Board and the plaintiff are transactions to which for the purpose of this litigation the appellant company is a stranger and that they do not afford any answer to the respondent's claim in the action.

The appeal should be dismissed with costs.

ANGLIN J.—The effect of sec. 9 of the "Workmen's Compensation Act" (4 Geo. V. (Ont.), ch. 25), is neither to extinguish the workman's cause of action upon his making an election to claim compensation under that statute nor to vest his right of action in the Workmen's Compensation Board, but rather to transfer to the Board the right to control any action brought or to be brought in the workman's name. The Board is subrogated to his rights and empowered to use his name for the purposes of suit. I doubt whether it can sue in its own name as appears to have been thought in the Appellate Divisional Court.

While, therefore, an absence of authorization of it by the Board is not a defence to the plaintiff's action, it affords in my opinion a ground upon which that action, carried on without the sanction of the Board, should, upon the application either of the Board itself or of the defendant, be stayed until

(1) [1896] A.C. 250 at p. 254. (2) 3 App. Cas. 279.

such an authorization has been obtained and filed with the court in order to prevent possible abuse of its process. Sub-sec. 1 of sec. 9 gives the workman the right either to claim compensation or to bring his action. Read with sub-sec. 3, in the light of sub-sec. 2, however, the effect of this provision would seem to be not entirely to deprive him of the right to sue when he has claimed compensation, but to suspend his right to prosecute an action until the sanction of the Board to his doing so has been secured.

Both the Board and the defendant are interested in the action of a man who has claimed compensation being under the control of the Board. Although the appellant asks the dismissal of this action on the ground that under the statute the cause of action is vested in the Board, I think we may not unfairly consider an application for a stay as included in the relief it seeks.

Had the Board granted in the terms in which it was made the application of the plaintiff's solicitors of the 8th of January, 1919,

> for a consent by the Board ratifying all proceedings that have been taken or may hereafter be taken in this action by or on behalf of the plaintiffs,

tardy as it would have been, I should have been disposed to accept such an authorization as sufficient to warrant allowing the proceedings to be carried to completion. The defendant would thereby have been given all the protection to which it was entitled. But the Board instead of taking that course sought to put the plaintiff, for the purposes of this action, in the same position as if he had not claimed compensation under the statute, at the same time seeking to reserve under his election to claim such compensation its own right to maintain an action against the present

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defendant should the plaintiff's action fail. I cannot think it was competent for the Board to take that course. But whether it was so or not, the document of the 13th February, 1919, signed on its behalf by its secretary is not an authorization of the plaintiff's action nor a ratification or adoption of it. On the contrary, it is a very plain intimation that the plaintiff's action must be treated as entirely his own and not as authorized by, or under the control of, the Board.

In my opinion proceedings in the action should be stayed to enable the plaintiff to procure and file an authorization of the Board substantially in the terms of his solicitor's application of the 8th of January. Upon such authorization being filed the appeal should be dismissed but without costs.

BRODEUR J.—I concur with the Chief Justice.

MIGNAULT J.—The sole grounds of appeal of the appellant company—which, on the jury's verdict, was condemned to pay $2,500.00 to the respondent—are based on sec. 9 of "The Workmen's Compensation Act" (Ontario), 4 Geo. V. ch. 25.

At the trial it was disclosed that the respondent had elected to claim compensation under the Act, his election being in the following terms:—

> Whereas on or about April 17, 1918, I, Alexander Hutton, employed by Canada Bread Co., of Toronto, received injuries by accident arising out of and in the course of my employment, as follows:—Compound fracture of the leg. And whereas it is alleged that such accident and injuries were caused by the negligence or wrongful act or breach of duty of some person or persons other than my said employer.
>
> Now, therefore, I, the said claimant, do hereby elect to claim compensation for said injuries under the provision of Part I. of "The Workmen's Compensation Act" (4 Geo. V., ch. 25, Ontario), and I hereby forego any and all my right or rights of action whatsoever against such third party or parties in respect of such accident and injuries, it being understood that by this election the Workmen's

Compensation Board is subrogated to all my rights, rights of action and remedies which otherwise I would have against such third party or parties in respect of said accident and injuries.

The appellant contends that this election of the respondent is a complete discharge in its favour. I take it that it does not amount to a discharge, but rather that its effect is that the respondent subrogated the Workmen's Compensation Board to any right which he had against the appellant. Moreover, in my opinion, such an election must be read with sec. 9 in order to determine its legal effect.

There was some discussion as to the construction of sec. 9, but upon full consideration it appears to me that this section has not the meaning which the appellant puts on it, and which would in such a case vest the right of recovery solely in the Board.

In no way can sec. 9 be considered to be enacted for the benefit or protection of the wrongdoer. It starts out by stating that the injured party, who has by law, and independently of the statute, a right of action

against some person other than his employer,

may, if entitled to compensation under the Act claim such compensation or bring such action.

Then if the action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependents are entitled under the Act, the difference, between the amount recovered and collected and the amount of the compensation under the Act, shall be payable as compensation to the workman or his dependents.

If the workman or his dependents elect to claim compensation under the Act, the employer (if individually liable to pay it) and the Board (if the compen-

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sation is payable out of the accident fund) are subrogated to the rights of the workman or his dependents,

and may maintain an action in his or their names against the person against whom the action lies, and any sum recovered from him by the Board shall form part of the accident fund.

While following, although not very closely, the language of the statute, I think I have indicated its meaning. It is clear that the election to claim compensation under the Act does not discharge the wrongdoer, for sub-sec. 3 expressly says that the employer or the Board may maintain an action against him in the name of the workman or of his dependents. And sub-sec. 4, as to the notice of the election to claim compensation under the Act, shews that the election is without any effect *quoad* the defendant, for notice must be given to the employer or to the Board and never to the wrongdoer. The subrogation mentioned in sub-sec. 3—and perhaps a better word than subrogation could have been used, for at first this term gave me some difficulty—gives the employer or the Board the control of the action of the workman or of his dependents, but does not divest him or them of their right of action against the wrongdoer, or give the latter the right to treat the election to claim compensation under the Act as a discharge from liability. This election does not ensure the granting of compensation by the Board, and therefore it cannot have been intended that by itself it would bar any action against the wrongdoer.

So far there appears no serious difficulty, but the appellant having amended its statement of defence at the close of the trial in order to claim that the respondent's election to take compensation under the Act barred his action against the company, the respondent after the judgment applied to the Board to

obtain its consent ratifying all proceedings that had been taken or might be taken in this action by or on behalf of the plaintiff.

The Board thereupon made the following order:—

In the matter of Claim 74319—Alexander Hutton and—

In the matter of an action in the Supreme Court of Ontario, between Alexander Hutton, plaintiff, and the Toronto Railway Company, defendant.

Upon the application of the plaintiff made unto the Workmen's Compensation Board on Tuesday, the 14th day of January, 1919, and upon hearing counsel for both parties.

The Workmen's Compensation Board hereby consents and agrees that, for the purposes of the said action, the said plaintiff be permitted to withdraw his election to claim compensation from the said Board, and for the said purposes the said Board hereby releases and assigns to the said plaintiff as from the date of the said election all its rights and title to proceed against the said defendant for the cause of action involved therein, provided that, in the event of the said plaintiff's action failing by reason of the right to bring such action being vested in the said Board, and not in the said plaintiff, the said Board is to be entitled to bring such action as it would have been entitled to bring if this consent and agreement had not been given.

The Board's consent as given goes beyond the relief applied for, and erroneously assumes that the election to claim compensation under the Act vested in the Board any right of action against the wrongdoer, and it unnecessarily purports to assign to the respondent a right of action which he had not lost, the only effect of his election being that the control of his action passed to the Board. I do not therefore think that the Board's order can in any way help the appellant.

The Appellate Division varied the judgment of the learned trial judge so as to order that the appellant do pay to the Workmen's Compensation Board the damages recovered by the respondent, to be dealt with by it pursuant to the "Workmen's Compensation Act." The respondent has not cross-appealed and the appellant appears to me without interest to com-

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plain of this modification of the judgment. By paying the damages according to the judgment it will be discharged from any possible claim either by the respondent or by the Board. The whole ground of its appeal to this Court was that the election of the respondent to claim compensation under the Act barred his action, and in that the appellant fails, so that in my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Dewart, Harding, Maw & Hodgson.*

Solicitors for the respondent: *Proudfoot, Duncan, Grant & Gilday.*

N. N. MALOOF (PLAINTIFF).....APPELLANT;

AND

J. P. BICKELL AND COMPANY (DEFENDANTS).....RESPONDENTS.

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*Nov. 20.
*Dec. 22.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Principal and agent—Stock broker—Dealing in margins—Failure to Cover—Sale by broker.

Stock brokers bought corn for M. on margin. The price having fallen they wired him for money to cover and receiving no answer they sold the corn at a loss to M.

Held, that according to the evidence M. must be deemed to have known of the rules governing the stock exchange authorizing brokers to sell for their own protection stock carried on margin; that though M., being beyond reach of communication by telegraph, only received the broker's wire two days after it was sent the latter had done all they reasonably could to notify him and he must submit to the loss.

Held, also, Brodeur J. expressing no opinion, that the transaction was *bonâ fide* and not within the prohibitions of sec. 231 of the Criminal Code.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming, for a different reason, the judgment at the trial which dismissed the appellant's action.

The material facts are set out in the above headnote.

McKay K.C. for the appellant.
Dewart K.C. for the respondents.

THE CHIEF JUSTICE:—I think this appeal should be dismissed with costs. I am of the opinion that the carefully reasoned judgment of the Appellate Division

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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delivered by Mr. Justice Ferguson dismissing the plaintiff's action is correct. The learned judge has in that judgment stated fully all the material facts and circumstances necessary to reach a conclusion on the points in controversy and as I am in full accord with his findings alike in law and in fact, I cannot see any useful purpose to be gained in again re-stating them with any fullness. In substance they were that the purchase by the respondents Bickell & Co. of the 50,000 bushels of corn in question on the order given to them by the witness Symmes on the 26th August was fully authorized by the plaintiff and that the subsequent sale by the defendants of that corn on the 28th of August owing to a sudden slump in its market price was justified under the conditions subject to which the brokers transacted the business of buying and selling grain for the plaintiff. One of these conditions was that in marginal business which included the one in question the right was reserved by the brokers of closing the transactions without further notice when margins were unsatisfactory. The other finding, reversing the trial judge, was that the transactions in question were not within the prohibitions of section 231 of the Criminal Code; that they were on the contrary *bonâ fide* transactions made for good consideration on the Chicago Board of Trade; and that there was no evidence of any express, implied or tacit understanding that the contracts so made were not enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences. *Nelson* v. *Baird* (1). In other words, that the purchase and sale of the wheat in question at the times and in the manner in which it was bought and sold were *bonâ fide* trans-

(1) 25 Man. R. 244; 22 D.L.R. 132.

actions authorized by the plaintiff and were not illegal gambling transactions within the provisions of sec. 231 of the Criminal Code. See *Forget* v. *Ostigny* (1).

IDINGTON J.—This appeal depends entirely upon a single question of fact on which the two courts below have concurred.

That question is whether or not appellant authorized Symmes to employ respondents to make on his (appellant's) behalf the purchase of 50,000 bushels of May corn in question.

And its answer depends upon the veracity of Symmes in the circumstances.

If ever there was a case in which the trial judge's opinion on the facts must be held, by reason of his seeing and hearing the witnesses, to have had such superior advantages that his opinion must be accepted, this certainly is one.

Symmes's mode of thought and manner of answering questions give rise to some suspicion of whether he was trifling with the court and counsel, or merely beset by an absent-minded sort of condition which prevented him from concentrating his mind upon the questions put to him. The learned trial judge alone of those having to consider these peculiar features could, from the advantages he had of watching and hearing the witness, rightly appreciate and determine what importance is to be attached thereto.

Sometimes, indeed often, there exists in a case some outstanding undoubted fact or set of circumstances which may enable an appellate court to overrule the trial judge's appreciation of the credibility of the respective witnesses on either side of a case, but herein I am unable to find anything of that kind as a guide to support me in maintaining this appeal.

(1) [1895] A.C. 318.

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Indeed what there is seems to tend the other way. The witness Symmes says, and is not contradicted as he might easily have been if speaking untruly, that though an extensive dealer in the sort of bargaining involved in buying and holding by virtue of margins in and through a broker's office, he had not up to that time in question so dealt in grain but had confined his operations to dealing in stocks.

On the other hand the appellant had been for five months previously constantly dealing, through respond nts, in grain chiefly if not solely.

Why he should not with such an amount as he had lying idle in respondents' hands, and not apparently needed for anything else, respond to the chance presented, I see no reasonable explanation for.

Moreover his conduct and expressions later hardly consist with what he now sets up.

And the transaction does not fit into the only suggestion made in the way of explaining why the witness Symmes should suddenly depart from his accustomed means of enjoying the excitement of the market and enter on a new field therein.

Moreover there is no explanation of why, if he did so, he should have reported such a deal to appellant on returning to his place.

That he did so is corroborated by another witness who could not testify to hearing appellant's answer, yet does confirm the fact of Symmes reporting it as he says he did.

The learned trial judge's judgment having been concurred in by the Appellate Division I think we cannot reverse under such circumstances.

The respondents' right to resell the grain to protect themselves against loss, if it rested upon the elementary

legal right which arises when A. tells B. to go and buy for him and pay so much on account of the purchase and hold it for him might give rise to difficult questions of law and the authorities which appellant's counsel cites as relevant would help perhaps to another solution of the case giving rise to this appeal than that reached by the Appellate Division.

I agree entirely with the view of the facts taken by the judgment of the Appellate Division, and think there is ample evidence from which it may and should be inferred that appellant knew and approved of the usual course of the respondents in conducting such like business as he entrusted to them and the right which they were likely to assert in case of necessity to protect themselves against loss on his account.

That was reduced to writing well known to appellant, according to my view of the evidence (though I admit it might have been better to have gone a step further in making the proof quite conclusive by calling the mailing clerk as to this transaction), which is set forth in Ex. 15, as follows:—

> Purchases or Sales are made subject in all respects to the Rules, By-laws and Customs existing at the time at the Exchange where executed, and also with the distinct understanding that actual delivery is contemplated and that the party giving the orders agrees to these terms. It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon, or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close transactions without further notice when margins are unsatisfactory.

The four or five months of appellant's existence as a "roomer" so called in respondents' office, did not leave him ignorant of this basis of all his dealings with respondents including that in question, and he has not pretended to say he was ignorant or to deny

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the receipt of, I imagine, scores of such notices as governing the contractual relations between him and respondents so far as they concerned the brokerage business done by them on his behalf.

I cannot, therefore, discard that which is therein set forth as forming part and parcel of the understanding existent between these parties, or doubt the efficacy of the last sentence thereof as maintaining respondents' right to do as now complained of by appellant.

The judgment of the Appellate Division sets forth in more detail the facts and circumstances bearing on that issue of fact in such a forcible way that I need not enlarge by repetition of same here.

My view of the question of illegality raised by the learned trial judge, so far as of any moment herein, is briefly this: that the counsel on each side being now agreed that if there was in fact an employment of the respondents, it was to conduct purchases on the Grain Exchange in Chicago; I am, therefore, unable to see how our Criminal Code can have any possible effect on contractual relations formed there.

We have no proof of illegality relative to the contracts of such a nature there.

I adhere to my view expressed in *Beamish* v. *Richardson & Sons* (1), relative to the law applicable thereto in circumstances such as in evidence in that case.

The appeal should be dismissed with costs.

DUFF J.—This appeal turns upon the question whether the unanimous finding of the Appellate Division to the effect that according to the terms

(1) 49 Can. S.C.R. 595.

under which the appellant and the respondents had conducted their dealings the respondents were entitled to close transactions without * * * notice when margins are unsatisfactory.

I think this finding is adequately supported by the evidence and that the contracts acquired for his benefit under the transactions of the 21st and 26th August were held under these terms.

It seems necessary to add a reference to the opinion of the learned trial judge that on the authority of *Beamish* v. *Richardson & Sons* (1), the orders given by the appellant were illegal under sec. 231 of the Criminal Code.

I am by no means certain that the transactions contemplated by the appellant's orders were in any relevant sense distinguishable from the transactions which certain members of this court held to be illegal in *Beamish* v. *Richardson* (1). The purchases authorized by the appellant's orders were to be purchases in the corn pit of the Chicago Board of Trade and in the usual course of business, that is to say, by agents in Chicago; with the consequence that in the absence of agreement to the contrary, the agents would contract as principals and not as representatives, in other words, the purchases and sales would be purchases and sales enforceable only by the agent. *Robinson* v. *Mollett* (2).

The contracts which were the subject of discussion in *Beamish* v. *Richardson* (1), were contracts subject to the "rules, regulations and customs" of the Winnipeg Grain Exchange and the Winnipeg Clearing House Association, and were contracts in which, by virtue of the rules of the Exchange, the brokers were necessarily principals on the one hand as buyers or sellers

(1) 49 Can. S.C.R. 595. (2) L.R. 7 H.L. 802.

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and the Clearing House Association on the other as seller or buyer; and it was made quite clear in the evidence that the vast majority of transactions in grain in Winnipeg at that time took place through the instrumentality of the Grain Exchange and the Clearing House Association, in other words, that the Grain Exchange and the Clearing House Association were not merely conveniences for speculation but together constituted a large market where a great deal of the grain and provision business in Canada were transacted, the brokers, Richardson & Co., being commission merchants trading very largely on their own account on this market. It was made quite clear also that a commission merchant entering into a contract with the Clearing House Association to buy or sell would understand that he must carry out that contract either by actual payment or delivery or by set-off payments against exigible obligations under some other real contract. Such a system of carrying on business of course affords opportunities for speculation and must largely be used for that purpose; and the contracts in question being of the character mentioned, it was held by some members of this Court (in *Beamish* v. *Richardson* (1)), that because the customer's intention was by means of such contracts to speculate in futures merely, with no expectation either of delivering or taking delivery in kind of any commodity, the transactions fell under the ban of the section of the Criminal Code above referred to. *Beamish* v. *Richardson* (1), nevertheless, is not a decision upon any point as to the application of that section. My brother Idington and my brother Brodeur based their judgment, it is true, upon the

(1) 49 Can. S.C.R. 595.

view just explained of the effect of the Code, but my brother Anglin, though expressing an inclination of opinion in the same direction, explicitly stated that he did not rest his judgment upon that ground; while the remaining members of the court (the Chief Justice and myself) took the opposite view.

In these circumstances I should not consider these opinions (which did not form in whole or in part the *ratio decidendi*), to be binding on me judicially and I should not feel at liberty to act as if they relieved me from the responsibility of forming and giving effect to my own view. *Ex parte Willey* (1), at page 127.

I may add that I entirely concur in the opinion expressed in the judgment of Mr. Justice Ferguson that sec. 231 of the Criminal Code does not reach the transactions under consideration on this appeal.

The appeal should be dismissed with costs.

ANGLIN J.—I would dismiss this appeal for the reasons stated by Mr. Justice Ferguson in delivering the unanimous judgment of the Appellate Divisional Court to which I feel that I can usefully add nothing unless it be to supplement *Nelson* v. *Baird*(2), cited by the learned judge on the question of the defendants' right for his and their protection to sell the plaintiff's corn, which they were carrying for him, by a reference to *Foster* v. *Murphy* (3); *Leiter* v. *Thomas* (4), and *Belleau* v. *Lagueux* (5).

BRODEUR J.:—This is a suit between a customer and his broker concerning the purchase of corn on margin.

The transactions between them were very numer-

(1) 23 Ch. D. 118.
(2) 22 D.L.R. 132; 25 Man. R. 244.
(3) 135 Fed. R. 47.
(4) 97 N.Y. Sup. 121.
(5) Q.R. 25 S.C. 91.

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ous and very extensive. It appears that at a certain date, on the 23rd of August, 1916, the plaintiff Maloof had to his credit a balance of about $2,000 and that the respondents, his brokers, were holding for him a corn purchase of 25,000 bushels of December corn. He left Toronto, where these speculations were carried on, on the above date, for the Cobalt district, with some friends amongst whom was a Mr. Symmes who is also an active stock operator.

On the 26th of August, Symmes called on the telephone the respondent firm to inquire about the market conditions; and, receiving a favourable reply, he gave instructions to purchase for Maloof 50,000 bushels of May corn. He claims that he was authorized by Maloof to give such instructions. Maloof denies it; but Symmes' story was accepted by the courts below and I am convinced myself that if Maloof has not given formal authority to Symmes he has at least adopted the order which was given.

That was on a Saturday. On the following Monday the market turned for the worse and the brokers telegraphed to Maloof for margin money. No answer to their request being received, the respondent company sold the 75,000 bushels of corn they were holding for Maloof.

They claim having acted on a well known condition of their stock transactions and which are to be found on their confirmation notices of purchase which contained the following:—

> It is agreed between broker and customer, that all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities either for the sum due thereon or for a greater sum, all without further notice to the customer. It is further understood that on marginal business the right is reserved to close transactions without further notice when margins are unsatisfactory.

The plaintiff cannot very easily deny knowledge of those conditions. He was day by day, and week by week, in the office of the respondent company: in fact, his mail was being received there and undoubtedly he was aware, according to my opinion, of the conditions under which Bickell & Co. were carrying on marginal transactions. According to those conditions Bickell & Co. had the power to sell for the plaintiff the securities which they had in their possession. They asked for money on the 28th August. The market was then in a very bad condition; war had been declared the day before (27th August) by Roumania and on Monday morning corn in Winnipeg and Chicago opened four cents lower than the closing on Saturday. The decline was more than sufficient to wipe out the $2,000 that Maloof had to at his credit the 23rd of August.

Another question has been raised in this case as to whether this transaction was a *bonâ fide* transaction or one in violation of the provisions of the Criminal Code.

I would be inclined to think that this case cannot be distinguished from the case of *Beamish* v. *Richardson* (1); but it is not necessary for me to base my judgment upon this ground.

I am satisfied that the plaintiff has no case and that the judgment of the courts below dismissing his action should be confirmed with costs.

MIGNAULT J.—The litigation here has arisen out of grain transactions on margin carried out by the respondents, who are stock and grain brokers, on behalf of the appellant, on the Chicago market.

As all the facts are fully stated in the judgments appealed from, I may very briefly say that the appel-

(1) 49 Can. S.C.R. 595.

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lant was a large speculator in grain, and for several months—during the greater part of which he spent most of his time in the respondents' office, where he received his mail and was known as a "room trader"—he had bought and sold grain on the Chicago market through the respondents. On August 23rd, 1916, the appellant had a balance of over $2,000.00 in his favour in the respondents' books, and the latter had, on August 21st, purchased for him, on his order, 25,000 bushels of December corn at 74. On the evening of August 23rd, the appellant left Toronto with a party, including Mr. H. D. Symmes, a prominent engineer, for Sesikinika Lake, in Northern Ontario, where he had a house. On the 26th August, a Saturday, Mr. Symmes telephoned to the respondents from Sesikinika, instructing them to purchase at the market price for the appellant 50,000 bushels of May corn, which the respondents bought at 78¾ and 78⅞, and of this purchase the respondents at once advised the appellant by a telegram sent to Sesikinika. On Monday, the 28th August, the news that Roumania had entered the war caused a break in the grain market and the respondents, in the forenoon of Monday, sent the following telegram to the appellant at Sesikinika:—

> Roumania declared war on Austria. Wheat broke nine cents bushel. December corn now seventy-three. May seventy-seven. Please let us have two thousand. Answer.

Receiving no reply, at about the close of the market, in the afternoon of August 28th, Mr. Cashman, of the respondents' firm, gave orders to close out the appellant's account, and to sell his 75,000 bushels of corn. The December corn was sold at 72¼ and the May corn at 75½ and 75⅝, with the result that the balance standing to the appellant's credit on August 23rd, was wiped out, and he became indebted to the respondents in the sum of $156.62.

Two questions are involved on this appeal. 1st. Was Mr. Symmes authorized by the appellant to order the purchase of 50,000 bushels of May corn? 2nd. Had the respondents the right to sell out the appellant's holdings?

The learned trial judge found that Mr. Symmes was authorized by the appellant to purchase the 50,000 bushels of May corn, and in this finding the learned judges of the Appellate Division concur. I would not disturb this finding of fact, the more so as the testimony of the appellant and of Mr. Symmes was directly contradictory on this point, and the learned trial judge believed the latter.

The second question is not free from difficulty. The notice printed on the confirmation form, that on marginal business the right was reserved to close transactions without further notice where margins were unsatisfactory—assuming that the appellant had received several similar notices, which appears to be a fair inference—is printed in very small type and could be easily overlooked. But the appellant for months had been dealing on a large scale with the respondents, entirely on margin, spending most of his time in the respondents' office, and he had from time to time been called on to furnish margins, and I cannot believe that he did not fully understand, when he told Mr. Symmes to purchase 50,000 bushels of May corn, that additional margin, over and above the sum standing to his credit, and on the strength of which he no doubt considered the purchase of 25,000 bushels of December corn fully covered, would be required to carry so large a transaction, especially as he was far away and fluctuations in the market could be expected. For the respondents, the carrying of 75,000 bushels of corn in the sudden collapse of the grain market, meant a liability of $750.00 for each cent of decline,

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and I do not think that they were obliged, not having received an answer to their telegram demanding $2,000.00, to assume such a liability. It is true that the appellant did not receive the respondents' telegrams, including one of August 28th, informing him of the sale of the 75,000 bushels, until the afternoon or evening of Tuesday, August 29th, but that was the appellant's misfortune—being at a place where there was no telegraphic communication, and where telegrams had to be telephoned from Swastika some distance away—and not the respondents' fault. I find that the respondents did what was possible to advise the appellant of the situation that had suddenly developed, and the appellant cannot blame them if their efforts to reach him in time were unavailing.

The learned trial judge dismissed the appellant's action and the respondents' counterclaim for $156.62 on the ground that the transactions in question amounted to gambling transactions, prohibited as such by article 231 of the Criminal Code. The Appellate Division, on the contrary, decided that they were real purchases and sales under the authority of *Forget* v. *Ostigny* (1), and similar cases. In this I agree, but I think, for the reasons stated above, that the appellant's appeal here fails. The counterclaim of the respondents is no longer in question, the latter not having appealed from the judgment of the trial court by which it was dismissed.

The appeal in my opinion should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Johnston, McKay, Dods & Grant.*

Solicitors for the respondents: *Dewart, Harding, Maw & Hodgson.*

(1) [1895] A.C. 318.

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RAYMOND SHILSON AND ANOTHER (PLAINTIFFS)..... APPELLANTS; *Nov. 20, 21. *Dec. 22.

AND

NORTHERN ONTARIO LIGHT AND POWER COMPANY (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Negligence—Power Co.—Use of power—Pipe across ravine on trestle—Wire four feet above pipe—Boy crossing on trestle—Injury from wire.

A pipe conducting compressed air was carried across a ravine on trestles and an electric wire crossed at right angles four feet above it at the centre. Barriers were erected across this pipe-line on both sides of the wire and on each barrier was posted a warning of danger. S., a boy twelve years old, attempted to cross the ravine by the pipe-line and having climbed around a barrier came into contact with the wire and was badly injured. In an action against the power company for damages the jury found that children were not in the habit of going on the pipe-line at the place where the accident occurred.

Held, affirming the judgment of the Appellate Division (45 Ont. L.R. 449), that owing to this finding of the jury, and the fact that the company could have no reason to suppose that any person would get into a position of danger from the wire the action must fail.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial which dismissed the plaintiff's action.

The facts are sufficiently stated in the above headnote.

Aug. Lemieux for the appellant. There should be perfect protection against danger from such an agent

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*PRESENT:—Sir Louis Davis C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 449, 48 D.L.R. 627.

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as electricity. See *Royal Electric Co.* v. *Hévé*(1) at pages 466-7 and 470-1; *Gloster* v. *Toronto Electric Light Co.*(2) at pages 33 and 39.

The defendant company was bound to anticipate contact with the wires and should have had them insulated; *Thomas* v. *Wheeling Electrical Co.*(3).

R. S. Robertson for the respondents referred to *Groves* v. *Wimborne*(4); *Woods* v. *Winskill*(5), at page 309.

THE CHIEF JUSTICE.—I agree with Mr. Justice Anglin.

IDINGTON J.—The appellants in support of very numerous complaints of error on the part of the learned trial judge in directing, or failing to direct, the jury, are unable to point to any objection by counsel at the trial in regard to any of these alleged misdirections or non-directions which are now for the first time as to the greater part of them brought forward as grounds for relief.

Needless to say such grounds are too late and must be discarded. They are, moreover, in substance, so far as I have heard in argument, quite untenable.

There seems no ground upon which relief can be given for the reason that the judgment appealed from is right.

The rather startling proposition that there were regulations expressly applicable which had been overlooked by solicitors in bringing the action, and counsel in conducting it, and the learned judge in trying it, held our attention for a time, but it seems to turn out to be quite unfounded in fact.

The appeal should be dismissed with costs.

(1) 32 Can. S.C.R. 462.
(2) 38 Can. S.C.R. 27.
(3) 54 W. Va. 395.
(4) [1898] 2 Q.B. 402.
(5) [1913] 2 Ch. 303.

DUFF J.—I concur in the view of the Chief Justice of the Appellate Division that an insuperable obstacle to the appellant's success lies in the finding of the jury that boys were not in the habit of frequenting the place where the unfortunate appellant was injured.

Mr. Lemieux contends that the admitted facts give rise to liability under sec. 37 of the "Power Commission Act" of Ontario as amended by ch. 19, sec. 37 of the Ontario statute of 1916. His contention is that the wires from contact with which the appellant received the injuries from which he suffers, were not insulated as required by the regulations under this statute and that the respondents are answerable for the consequences in damages.

I do not find it necessary to consider the construction of sec. 37 with a view to ascertain whether a right of action is given in respect of the harm caused in consequence of the default of companies or individuals in observing any duty arising out of regulations brought into existence under the authority of the enactment. The regulations produced are

printed by order of the Legislative Assembly

are stated in the preface to

have reference only to inside work in ordinary buildings

and moreover, it is explicitly declared that electric work involving potentials exceeding 5,000 volts are not taken into consideration; and further the notes attached to the rules (A) and (B) upon which Mr. Lemieux desires to base his claim, make it quite clear that these rules apply only to conditions obtaining in some place which in ordinary language would be described as a building.

It is quite clear that we should not be justified in granting a new trial to enable Mr. Lemieux's client to put forward a claim based upon these regulations.

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Anglin J.

ANGLIN J.—A perusal of the evidence has satisfied me that the learned trial judge was right in holding that it discloses no duty owing to the plaintiff by the defendant which it failed to perform and therefore dismissing this action. I agree that there was no evidence proper to be submitted to the jury in support of the plaintiff's charge of negligence.

In view of the improbability of even a venturesome and mischievous boy seeking to walk across a ravine 17-19 feet deep and 300 feet wide on a 12 inch pipe carried on trestles, and of the precautions which the defendant had taken by posting conspicuous "danger" notices near the place where the plaintiff's son was injured, which he saw and understood to be such, and making it still more difficult of access by the placing of barricades which any person travelling along the pipe would be obliged either to climb over or to swing around, there was no reason to apprehend that children might find an opportunity of making the company's high voltage wire crossing nearly four feet above its pipe line a source of danger to themselves or others such as led this court to find negligence and consequent liability in the recent cases of *Salter and Geall* v. *The Dominion Creosoting Co.*(1). The principle of the decision in *McDowall* v. *Great Western Rly. Co.*(2), there distinguished, I think governs this case. As put by the learned Chief Justice of Ontario:

> It seems to me that what the respondent company did was just the same as if it had a patrolman who said "don't go over into that enclosure. It is dangerous to go there." And it shocks my common sense to think that a boy or a person who had been warned in that way and does go there and is injured by something he did not anticipate to find, should be entitled to recover.

In this court, however, the plaintiff asks that if he should not be entitled to judgment on the case as

(1) 55 Can. S.C.R. 587; 39 D.L.R. 242. (2) [1903] 2 K.B. 331.

presented at the trial he should be granted a new trial to enable him to bring before a trial court certain rules and regulations of the Hydro-Electric Power Commission made under the authority of sec. 37 of the "Power Commission Act," R.S.O. 1914, ch. 39, as enacted by 6 Geo. V. ch. 19, not adverted to in the courts below, which he maintains either directly impose a duty on the defendant which it failed to fulfil or afford evidence of a standard of due care, omission to observe which would constitute negligence on its part. A copy of these regulations

printed by order of the Legislative Assembly

has been furnished to us.

In the first place sub-sec. 8 of sec. 37 itself provides that

nothing in this Act shall affect the liability of * * * any company, firm or individual for damages caused to any person or property by reason of any defect in any electric works, plant, machinery, apparatus, appliances, device, material or equipment or in the installation or protection thereof.

Secondly, in the preface to the rules and regulations so published we are informed that they

have reference only to inside work in ordinary buildings, *e.g.*, residences, workhouses, factories, etc., and such work may be attached to the outside of such buildings and to the wiring of electric railways, cars and car houses,

and that all electric work involving potentials exceeding 5,000 volts is not taken into consideration. Finally, in the notes appended to the particular rules (a) and (d) found under the heading "High Potential Work, (650-5,000 volts)," which the appellant seeks to invoke it is again made clear that they relate to high potentials in buildings.

We are here concerned with an outside transmission line far distant from any building and carrying a current of 11,000 volts. In my opinion these rules and regu-

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lations could not be successfully invoked by the appellant for any purpose in this case.

The appeal fails and should be dismissed with costs.

Brodeur J.

BRODEUR J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Anglin.

MIGNAULT J.—The appellant, a boy of twelve years, was injured by falling from a pipe line of the respondent crossing a ravine and on which he was walking. At about four feet above the pipe line were high voltage wires, and the appellant having touched these wires received a shock which threw him to the ground, causing his injuries.

The appellant's action having come to trial before Mr. Justice Masten and a jury, the latter answered the questions put to them as follows:

Question 1: Was the plaintiff on the pipe line where the accident occurred with the knowledge or permission of the defendants? Ans.: No.

Question 2: Were children and other persons in the habit of walking on the defendants' pipe lines to the knowledge of the defendants? Ans.: Yes. And if so where? Ans.: Principally on the main line.

Question 3: If so, did the defendants object or seek to prevent that practice? Ans.: No.

Question 4: Were children or others in the habit of walking on the defendants' pipe lines at the place where the accident occurred? Ans.: No.

Question 5: If so, were the defendants aware of the practice? Ans.: No.

Question 6: Was the plaintiff aware that the barricade and notice thereon was intended to warn persons not to walk on the pipe line at that place? Ans.: Yes.

Question 7: In the construction or maintenance of their lines, were the defendants guilty of any negligence which occasioned the accident? Ans.: Yes.

Question 8: If so, in what did such negligence consist? Ans.: In the electric wires being too close to the pipes.

Question 9: If you find that the defendants are liable, at what sum do you assess the damages? Ans.:

To the Infant plaintiff..... $2,500
To the Father..... 410

At the close of the plaintiff's case, the respondent had moved for a non-suit. This motion was reserved until the evidence for the defence had been put in and the case had gone to the jury. The motion was then renewed and the learned trial judge, without determining whether the plaintiff was a trespasser or a licensee when walking on the pipe line of the defendant, found that the evidence did not disclose any duty owing to the plaintiff by the defendant which the latter failed to observe and perform. He also found that there was no evidence proper to be submitted to the jury in support of question No. 7 or upon which they could find as they had. The motion for a non-suit was therefore allowed and the action dismissed with costs. This judgment was upheld, on appeal, by the Appellate Division.

Taking the findings of the jury as they are, the answers to questions 7 and 8, in my opinion, impute no negligence to the respondent on which legal liability can be predicated against it. The jury found that children or others were not in the habit of walking on the defendant's pipe line at the place where the accident occurred, and also, in answer to question 1, that the plaintiff was not on the pipe line where the accident occurred with the knowledge or permission of the defendant. Even if the answer to question 2 could by itself be taken as a finding that children and other persons were in the habit of walking on the defendant's pipe lines generally to the latter's knowledge, the reply given to question 4 shews clearly that the answer to question 2 should not be construed as a finding that children or others were in the habit of

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walking on the branch pipe line where the accident happened. Taking all the answers together, it would seem, although the learned trial judge did not think it necessary to determine the point, that the plaintiff was a trespasser on the pipe line where he was injured, and the jury's answer to question 6 seems to put this beyond any doubt. This would defeat his action under the authority of *Maritime Coal, Railway & Power Co.* v. *Herdman*(1) unless the respondent failed in a duty which it owed him as such trespasser.

I cannot find that the respondent failed in any such duty. At the argument, the appellant's counsel referred to the rules and regulations issued by the Hydro-Electric Power Commission of Ontario, under the authority of the statute 6 Geo. V. (Ont.) ch. 19, sec. 37, and asked this court to order a new trial so as to permit him to file these rules and regulations in the record. But if the rules in force in 1916, and of which he sent us a copy, prohibited the respondent from maintaining the high voltage wires where they are over the pipe lines, effect could probably be given to them without ordering a new trial, unless more testimony than that actually given were required. Unfortunately, however, for the appellant these rules and regulations, which were framed for the purpose of inside electrical installations, do not apply to the respondents' wires or to their installation and maintenance where they are. Moreover, as shewn by sub-sec. 8 of sec. 37, the intention of the statute was not to affect the liability of the company for damages caused by reason of defective installation or protection of electric works or appliances.

The question therefore remains whether it was negligence to have these wires at a distance of four

(1) 59 Can. S.C.R. 127; 49 D.L.R. 90.

feet or thereabouts above the pipe line where the accident occurred. In the absence of any statutory prohibition, and in view of the jury's finding that children or others were not in the habit of walking there, I am clearly of the opinion that this question must be answered in the negative.

The pipe over which the plaintiff attempted to walk was a twelve inch pipe carried on trestles, and in the deepest part of the ravine was seventeen feet above the ground. To walk on it, even without the high voltage transmission wires, was extremely hazardous to say the least. A sign had been placed at this spot with the words "Danger, 11,000 volts" in large letters, and a barricade had been erected to prevent anyone going along the pipe. The defendant certainly could not have anticipated that any one would walk over this pipe and be injured by coming in contact with the wires. Under these circumstances, a verdict of negligence against the defendant is one which the jury, considering the whole of the evidence, could not reasonably find.

In my opinion the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Auguste Lemieux.*
Solicitors for the respondents: *Fasken, Robertson, Chadwick & Sedgewick.*

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*Dec. 22.

JAMES G. RAYMOND (PLAINTIFF) .....APPELLANT;

AND

THE TOWNSHIP OF BOSANQUET (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Municipal corporation—Negligence—Repair of road—Findings of trial judge.

In an action claiming damages for personal injuries from an accident caused, as alleged, by the negligence of the defendant corporation in failing to keep in proper repair the approach to a bridge which was by a curve in the road dangerous for automobiles the trial judge *held*, that the approach was dangerous and awarded damages to the plaintiff (43 Ont. L.R. 434). The Appellate Division reversed his judgment and dismissed the action.

Held, affirming the judgment of the Appellate Division (45 Ont. L.R. 28; 47 D.L.R. 551), that the case is not one depending on the credibility of the witnesses or reliability of their testimony in which great weight is attached to the findings, of the trial judge but is one for weighing the evidence as a whole and of inferences to be drawn therefrom. So dealt with the weight of the evidence is that the approach to the bridge was not dangerous and the judgment at the trial was properly set aside.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2), in favour of the plaintiff.

The facts are fully stated in the above head-note.

J. M. McEvoy and *E. W. Flock* for the appellants.

Hellmuth K.C. and *Weir* for the respondent.

THE CHIEF JUSTICE.—This appeal is from the judgment of the second Appellate Division of the

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 28; 47 D.L.R. 551. (2) 43 Ont. L.R. 434.

Supreme Court of Ontario reversing the judgment of the trial judge which had held the defendant municipality liable in damages for an accident which happened to the plaintiff appellant while travelling in a motor along a highway within the municipal boundaries.

The gist of the action was the alleged want of repair of the road along which the motor was travelling and the want of repair consisted in what was for vehicular traffic an alleged dangerous curve in the road at the point where the accident happened leading up to and across a bridge. I consider that if the curve was so sharp, as contended for, as to be dangerous to vehicular, including motor, travel and was in the case in question the cause of the accident, the appeal should be allowed and the judgment of the trial judge restored.

At the hearing in which we had the assistance of two plans prepared by surveyors, one on each side, shewing the curve, the bridge and the spot where the accident happened, the main question discussed and on which alone our decision must be based was whether or not this curve in the road was so sharp as to constitute a danger to a motor properly driven with necessary and prudent care.

That is the sole and only question we have to decide and whether the accident was caused by excessive speed of the motor or by unskilful driving are ancillary questions we are not necessarily called on to determine.

At the close of the argument I had formed a very strong opinion that the appeal failed and that the judgment of the Divisional Court was right.

In deference, however, to the very strong opinion of the trial judge that the curve in the road was so sharp as to create a "want of repair" which constituted a breach of the duty of the municipality to keep in

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repair I felt myself obliged to consider most carefully the evidence given in this case.

In the first place, I find that the curve in the road and the bridge to which it led had been in the same position and condition as they were when the accident happened for the previous nine years. During all this time they had been constantly traversed by motors, as many as 50 crossing over them on one day. The only change alleged consisted in the fact that some logs had been placed on the grass alongside of the *trita* and some three feet away from its edge with the intention of widening the bridge and were there at the time. These logs, however, did not in any way interfere with or encroach upon the *trita* along which the motors were driven.

After carefully examining and considering the evidence I have without reasonable doubt reached the conclusion that the curve was not a dangerous one to any motor reasonably and with proper care driven over it. Whatever may have been the cause of the accident, whether arising from excessive speed at the curve and approach to the bridge or from unskilful or careless driving of the motor, as to which I say nothing, not being called upon to decide, I remain clearly of the opinion that the curve in question did not constitute a want of repair for which the defendant, respondent, is liable.

I partly agree with the reasons of the Court of Appeal and with its conclusions.

The fact that for some years this curve had been constantly driven over by motors without any accident having happened except perhaps on one very doubtful occasion is a very strong reason, not perhaps a conclusive one, that the curve was not a dangerous one to motors properly driven.

Looking at this curve as shewn on the plans produced and applying such common sense and common knowledge as one possesses from seeing daily motors driven without danger and without accident along the streets of Ottawa, where the streets run at right angles one to the other, giving much sharper curves for motors to take in passing from one street to another street, I cannot reach the conclusion that the curve in question was at all a dangerous one.

It is true two gentlemen did in their evidence, say that they always found it necessary and prudent as a matter of safety in traversing this curve to stop and back up before crossing the bridge. But that these two very cautious persons should have so acted, can by no means in the face of the evidence shewing that another did not find it necessary so to do but always passed by in perfect safety, overcome the mass of evidence shewing that the curve was not at all dangerous to motors properly driven. The conclusion I have reached without reasonable doubt is that the curve was not dangerous and that the accident must be attributed to some other cause or causes for which the defendant, respondent, is not liable.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—The question raised herein is not one that necessarily turns upon the relative credibility of witnesses; in regard to which, save in the exceptional cases I have frequently referred to, the learned trial judge's opinion so far as that is concerned in any given case must be observed.

It should turn, in the ultimate result, upon whether or not the road in question was in such a state of repair as defined by the judgment of the late Chief Justice

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Armour in the case cited below of *Foley* v. *Township of East Flamborough* (1), as follows:—

> I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied.

If it was, then no action will lie even if an accident has resulted in damages in the course of its use; for accidents may happen merely from error of judgment on the part of him injured and he be without remedy.

The right to impute negligence in law to anyone else as the cause must rest upon other relevant facts and cannot be assumed merely from the accident and its consequences.

The question presented is one for the exercise of sound judgment, and I cannot say, though not entirely free from doubt, that the view of the majority of the court below is wrong.

Hence I must agree in dismissing the appeal with costs.

DUFF J.—I have come to the conclusion that this appeal should be dismissed.

The appellant is entitled to succeed only upon shewing that the decision in the Appellate Division to the effect that the accident, out of which the litigation arose, was not due to a failure on the part of the municipality to observe its statutory duty in respect of the repair and maintenance of highways, was an erroneous decision, I think Mr. McEvoy has succeeded in shewing that there was some misapprehension of fact on the part of Mr. Justice Kelly, as to the manner in which the car left the road, but the substance and pith of the judgment of the Appellate

(1) 29 O.R. 139.

Division lies in the weight attributed by the court to the mass of evidence consisting of the testimony of motorists of unimpeachable credit and of competent experience who had motored over this road again and again.

It is arguable, of course, and there is much to be said in support of the view, that all this testimony was before the learned trial judge and that the weight of it is not sufficient to counter-balance his finding that the car was driven with care, and the deductions that would seem almost necessarily to flow from that finding. I am not, however, entirely confident of the soundness of the conclusion reached by looking at the case in this way. I should not feel justified in holding that the Appellate Division was wrong in attaching predominant importance to the general opinion derived from the general experience that motorists were not exposed to such exceptional risks arising from the narrowness of the bridge or the sharpness of the curve in the roadway approaching it, or from the piles of wood flanking the road, as to support a charge against the municipality of neglect of its duty in respect of highway maintenance.

ANGLIN J.—Seldom have I found it as difficult as in this case to determine what upon the evidence should be held to have been the true cause of an accident. The Chief Justice of the Common Pleas, a trial judge of great experience, has attributed the misadventure here in question to the failure of the defendant municipality to maintain at the place where the plaintiff was injured a highway reasonably sufficient for the needs of the traffic over it as required by sec. 460 (1) of the "Municipal Act". (1). The narrow-

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(1) 43 Ont. L.R. 434.

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ness of the bridge over Duffus's creek or drain, the nature of the approach to it and the presence of a pile of bridge timbers or spiles on the road allowance close to the *via trita* are the features emphasized by the learned judge, the combined effect of which, as I understand his judgment, in his opinion rendered the turn on to the bridge unnecessarily and unreasonably dangerous and was a proximate cause of the accident in which the plaintiff was injured. He deals with the driving of the automobile in which the plaintiff was travelling in these terms:—

> The driver of the car and the other persons who were in it testified that in all respects the car was brought to the bridge at a very moderate rate of speed and with due care in all respects. The testimony of the witness Mr. Flock especially, who is the plaintiff's solicitor in this action, seemed to me to be given with much candour and to be worthy of credit in this respect.

On the other hand, an appellate court of five judges, with but a single dissent, has reversed this judgment. (1). Mr. Justice Kelly, who delivered the opinion of the majority, concludes his discussion of the case with this sentence:—

> After a careful analysis of the whole evidence I am convinced that the predicament in which plaintiff and his companions found themselves on July 26th, 1917, must be attributed to some cause other than the width of the bridge, the curve from the roadway leading on to it or the presence of the piles or logs on the right of way.

The force of this conclusion would seem to be somewhat weakened, however, by a summary of the learned appellate judge's reasons which immediately precedes it in these terms:—

> With great respect I am of opinion that the learned trial judge overlooked the inconsistencies in some of the evidence put forward for plaintiff, such as that of Keene, and the effect of the uncontradicted evidence of the actual and continued use of this part of the highway by all kinds of vehicles, some of which, however, witnesses for plaintiff in effect say was impossible, as well as the evidence of McCubbin

(1) 45 Ont. L.R. 28.

that this point presents the ordinary conditions found at a crossing of two roads in a rectangular system of surveys.

His explicit reference to and somewhat disparaging comment upon the evidence adduced by the defendants to prove that the approach to and crossing of the bridge presented no serious obstacle make it clear that this testimony was present to the mind of the learned Chief Justice and I cannot think that he overlooked whatever inconsistencies appear in the evidence put forward for the plaintiff. Neither does Dr. McCallum's testimony seem to be quite open to the criticism of it made by the learned appellate judge in the course of his judgment.

Mr. Justice Kelly took the same view of the duty of the municipal council in regard to the maintenance and repair of highways as that held by the trial judge, expressing it in these terms, in which I respectfully concur:

> The duty imposed by the "Municipal Act" upon municipalities in respect to keeping highways in repair is imperative and requires them to make the roads reasonably safe for the purposes of travel; and motor vehicles being now an ordinary means of tranportation this would include travel by such vehicles; *Davis* v. *Township of Usborne* (1916), (1); In *Foley* v. *Township of East Flamborough* (1898) (2), a judgment of a Divisional Court, Armour C.J. in defining what is meant by "repair" said, "I think that if the particular road is kept in such a reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied." This judgment of the Divisional Court was reversed by the Court of Appeal (3), but on altogether different grounds, the court not dissenting from the opinion of the Divisional Court which is in harmony with other decisions and may properly be applied here.

The learned trial judge based his judgment on the evidence of the plaintiff's witnesses that the narrowness of the bridge in connection with the sharp angle of the immediate approach to it and the adjacent pile

(1) 36 Ont. L.R. 148; 28 D.L.R. 397. (2) 29 O.R. 139.
(3) 26 Ont. App. R. 43.

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of timber made the turn on to it from the south dangerous, if not altogether impracticable; the majority in the appellate court on the other hand placed more reliance on the testimony of numerous witnesses for the defence who deposed that they had made the turn with different motor cars driving at speeds varying from 10 to 18 miles an hour frequently and without experiencing any difficulty.

The question presented is not one of mere credibility—and by that I understand not merely the appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory—in a word, the trustworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence; it is rather a composite matter of credibility as to facts and of inferences to be drawn from and opinions based on facts found to be established that is involved in determining whether the highway provided met the test of reasonable sufficiency which the statute imposes. The duty of an appellate court under such circumstances has been defined in numerous cases. I mention such leading authorities as *Dominion Trust Co.* v. *New York Life Ins. Co.* (1), at page 257; *Montgomerie* v. *Wallace-James* (2), at page 75; *Wood* v *Haines* (3); and *Ruddy* v. *Toronto Eastern Rly. Co.* (4), at page 258, merely to make it clear that I have the governing principles, as indicated by our highest judicial tribunal, in mind in approaching the consideration of the problem with which we are confronted.

Having regard to the nature of the case and to the

(1) [1919] A.C. 254; 44 D.L.R. 12.
(2) [1904] A.C. 73.
(3) 38 Ont. L.R. 583; 33 D.L.R. 166.
(4) 116 L.T. 257.

conflict of opinion in the provincial courts as to the result of the evidence, I have thought it my duty to adopt the course commended by their Lordships of the Judicial Committee in *Syndicat Lyonnais du Klondyke* v. *Barrett* (1), and have made an independent examination and analysis of the evidence bearing on the question at issue. I shall not attempt to set out that analysis in *extenso* but shall merely state the conclusions to which it has led me, indicating the reasons which have influenced me in reaching them.

In the first place, I am by no means satisfied that, if sitting as the trial judge, I should have found that

> the car was brought to the bridge at a very moderate rate of speed and with due care in all respects.

A very moderate rate is a relative term and largely a matter of opinion. The learned Chief Justice does not tell us what in his opinion would have been such a rate of speed under the circumstances. Nor does he find what the actual rate of speed was, although Mr. Flock, on whose candour and credibility he places great reliance, testified that

> when we made the turn I would say he (the driver) was going 5 or 6 miles an hour, not faster than 6 miles an hour.

Raymond, the plaintiff, who would be most unlikely to exaggerate the speed, said on discovery that they were going 12 miles an hour; and at the trial he admitted having so deposed and then places the speed at from 10 to 12 miles. Keene, the driver, was not questioned on this very important point, nor was Routledge, the other passenger who gave evidence. On the other hand, Moody, a defence witness, testified that very shortly after the accident Keene said to him:

> I was going so fast that I thought I would jump right over the ditch and go down the other road,

(1) Cam. Sup. Ct. Practice (2 ed.) p. 385.

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and Keene was not called in rebuttal to contradict that statement. Having regard to all the circumstances —to the fact that Keene had not been over the road before, that the turn was visible to him for 250 or 300 feet before he reached it, that Flock sitting opposite him had warned him at that distance, saying, "that is a very sharp turn," to which he replied "yes, I see"—if the car was running 12 miles an hour when it reached the turn I should scarcely be prepared to find that such a rate of speed was "very moderate" or even moderate, or that the approach to the bridge had been made "with due care in all respects." The evidence as a whole leaves an uncomfortable impression that a speed too great under the circumstances may at least have been a contributing cause of the failure to cross the bridge in safety.

But, as the learned trial judge points out, any negligence in that regard would not be imputable to the plaintiff and as mere contributory negligence is therefore not material. Unless it can be said to have been the sole proximate cause of the accident, excluding any contributing negligence ascribable to the defendants, it cannot serve them as a defence or preclude recovery by the plaintiff. While I am not prepared to find that this has been established, enough in my opinion has been shewn to make it impossible to infer from the mere fact that Keene found himself unable to bring his car on to the bridge that the conditions of the highway constituted a danger amounting to a lack "of reasonable sufficiency for the needs of traffic." That fact, if it existed, must be otherwise established.

If, owing to the narrowness of the bridge and the sharpness of the curve which had to be made in entering upon it, it was necessary for a driver of ordinary

skill in handling an ordinary motor car to stop and back up in order to cross it safely, as three witnesses for the plaintiff have stated, I would unhesitatingly find that the highway at this point was not in a condition reasonably sufficient for the needs of the traffic over it since it could very easily have been improved and it would require more than ordinary care and skill to pass to and fro upon it in safety. Keene, the driver, says he went back and again tried to approach the bridge from the south on the afternoon of the day of the accident and then found he could not make the turn and enter on the bridge without backing up, and making a second turn. I can scarcely credit this statement, of which there is no corroboration, in view of the mass of testimony for the defence as to the facility with which the turn can be made even at comparatively high speeds and in cars having wheel bases of 112, 116 and 130 inches. Keene's Chalmers car had a wheel base of 124 inches. There is no suggestion that the cramping or turning capacity of this car was greatly or at all sub-normal. Of course, if it was unusually limited in that respect, the defendant would not be under an obligation to provide a turn which it could make. On the other hand, I can readily understand Keene's inability to make the turn on the morning in question having regard to what he tells us about the circumstances of his approach to the bridge.

Looking at either of the plans produced, which give somewhat different pictures (that of McCubbin, an engineer called by the defendants, seems to be the more precise and accurate), the making of the turn would appear to present little difficulty for a car following the gravelled roadway at its outer or right-hand side. As shewn on the plan produced by Sur-

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veyor Farncombe, called by the plaintiff, the *via trita* lies 12 feet east of the ditch, which occupies the west side of the road allowance, and the *via trita* is itself 12 feet wide. A reasonably careful driver approaching at a moderate speed and taking full advantage of the roadway thus available should find no serious difficulty in bringing any ordinary car safely on to the bridge. Even Flock admits that

> if he had made a fuller curve and the spiles were not there he (Keene) might have got around.

This leads me to a passage in Keene's evidence to which little attention seems to have been paid, but which I think probably explains why he found himself unable to make the crossing when the plaintiff was injured. He says:—

> Partly down the hill coming towards this bridge, I could see that the road made a turn, at least it came to an end and made a turn somewhere. It was a few hundred feet away, I would say. I saw that there was a turn in the road. I could not say that it was a bridge at that time. When I got close down to it, I came down the hill with the brakes on on the flat part of the road, I watched very closely for how sharp a turn it was, or how I should turn, thinking it was only a common turn in the road. Getting down closer to the bridge *I made a turn out to get past a pile of spiles* which were on my right hand side, with the bridge on the left of me. My first wheel touched the bridge, the left hand wheel touched the bridge.

This pile of timber or spiles, according to the weight of the evidence, lay in the grass on the road allowance just about opposite to where the road began to turn towards the bridge and, at its nearest point, 3 feet to the east or right hand side of the gravelled roadway, Although Flock said on cross-examination that the piles were "on the gravel"—"three or four feet out on the gravel"—this was probably a slip, since he said on examination-in-chief that they were "within three feet from the gravel," and Keene says they were three or four feet off the travelled roadway. George Jones, another witness for the plaintiff, says:

The one end I would judge to be six feet, and the other end three or four feet from the gravel, three feet anyway, away from the road where you turned down.

Neither Flock, Raymond nor Routledge says anything of the swerve to the left to avoid the piles of which Keene tells. They were not asked about it. It is quite probable that they would not have noticed it. Keene would of course know of it and would be more likely to remember it, and I therefore think it is reasonable to assume that it took place as he says—though the necessity for his making it is somewhat more difficult to appreciate since he tells us that the right wheels of his car were, if at all, only very slightly on the grass, and Mr. Flock says:—

He took the turn to the extreme right of the gravel, or possibly a little beyond that.

Coming on this pile of timber as a stranger, however, Keene may on the spur of the moment have imagined that it encroached on the *via trita*, or was closer to it than was actually the case—so much so that, especially if he was travelling, as the plaintiff says, at 12 miles an hour, he may have thought that prudence required him to turn out when passing it. Swerving to the left—probably unnecessarily, or more than was necessary—he had not time or space sufficient to enable him to recover the position at the extreme right of the travelled roadway necessary to enable him to make a proper approach to the bridge and if he tried to do so he probably got too far to the north before beginning to make the turn to the left to enter on the bridge. This seems to me to be the most likely explanation of the predicament in which he found himself when the left front wheel of his car reached the bridge and he realized that he could not cross it—that his right wheels would not be upon it.

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Otherwise, I cannot reconcile his testimony with that of the defence witnesses—and the veracity of many of them there is no reason to doubt.

There remains the question whether the presence of the pile of timber three feet from the gravelled roadway opposite the point where the driver should have begun to turn on to the bridge was a breach of the defendant's statutory duty, as above defined. It undoubtedly was if the timber obstructed the turn and made it dangerous.

It had been there for several weeks and the evidence of the Reeve establishes that the municipality was responsible for its having been placed there. But the great weight of the evidence is that it did not at all interfere with the turn on to the bridge when driving at a moderate speed. The defendant's witnesses all so testified, and Dr. Grant, a witness for the plaintiff, tells us:—

> I believe I have noticed them (the pile of spiles) but not to have them an incumbrance to me when turning.

Such an idea as that they were in a position to be of the least danger to any one never entered his head. George Jones, also called by the plaintiff, says—the stringers or timbers were not so placed as to interfere with the turn. Dr. McCallum, the plaintiff's "star" witness on the danger of the turn, had no recollection of them although he drove over the bridge more than four times a week for six weeks every summer. Important as it is now sought to make them as adding to the danger, Keene tells us that when he returned in the afternoon

> somebody had pulled them around. I was not interested in how the spiles were.

On the whole evidence I find myself unable to reach the conclusion that the presence of the pile of timber

constituted a breach of its statutory duty on the part of the defendant.

No doubt had the bridge been wider—say 22 feet instead of 13 feet, 6 inches—the accident might have been avoided. Had the curve in approaching its east end been the same as that at its west end the turn which Keene had to make would have been easier. But it does not follow that because both the bridge and the road might have been improved the municipality failed to discharge its statutory duty. On the contrary, looking at the plans and taking the evidence as a whole, if dealing with the case as a judge of first instance, I would incline to the view that the highway was in a condition reasonably safe for the passage over it of the traffic to be expected upon it and that a driver of ordinary skill proceeding at moderate speed—*i.e.*, at a speed suitable for making a right angle turn in a country road—and with reasonable care would experience no serious difficulty in making the turn in question and crossing the bridge in safety with such a car as Keene was driving. Neither could I find that the presence of the pile of timber rendered the turn unsafe or dangerous—still less that it prevented its being made at all as Keene would have us believe.

It was suggested by the learned Chief Justice in the course of the trial and by counsel for the plaintiff in argument here that the defendants should at least have set up a notice board or post at some distance warning travellers of the danger of the turn. But the absence of such a notice was not the cause of the accident now under consideration, since Keene was warned of the sharpness of the turn by Flock when several hundred feet away.

I do not place much reliance on the evidence

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given of the location of the tracks of the automobile wheels, nor do I consider it of much moment whether the corner post of the bridge was struck by the right front wheel or by the spring of the car.

On the whole case, although not entirely satisfied that if sitting in the Appellate Division Court I should have been prepared to hold that the judgment of the learned trial judge was so clearly wrong that it should be reversed, neither am I convinced that the majority in the Divisional Court clearly erred in setting it aside and still less that their conclusion upon the evidence is so manifestly wrong that we should restore the judgment of the trial court. The situation somewhat resembles that with which we had recently to deal in *Magill* v. *Township of Moore* (1), and I think the result must be, as in that case, a dismissal of the plaintiff's appeal.

BRODEUR J.—We are called upon to decide in this case whether the accident of which the appellant was a victim was caused by the bad nature of the road of the respondent corporation.

Raymond was driving in an automobile, and, having reached a place where the highway makes a curve to cross a bridge the driver of the automobile claims that he was unable, in view of the sharpness of the curve, to cross the bridge. The car went partly into the ditch and the appellant was injured.

The question is whether the bridge was of a sufficent width and if the nature of the curve did not render this highway a dangerous one for the motor cars to travel upon.

It was claimed by the appellant that piles of logs put on the highway rendered the ordinary condition

(1) 59 Can. S.C.R. 9; 46 D.L.R. 562.

of the highway more dangerous. But these piles do not seem to have been the proximate cause of the accident, and we have then to decide the case on the nature of the highway itself and we have to consider if the accident was not due to some carelessness on the part of the driver.

This road is very much frequented by automobiles. We have the evidence of a large number of persons, some with intimate knowledge of the locality and others who travelled it for the first time, who state they never experienced any difficulty in making the turn and passing the bridge. A few others however stated that they had to take extraordinary precautions to safely pass there.

In that regard, we may consider that the evidence is conflicting; but the weight of evidence is certainly in favour of the respondent.

We have at the same time the uncontradicted expert evidence of the engineer, Mr. McCubbin, to the effect that the curve along the centre of the gravelled roadway is 39 feet long and that the radius of curvature at the centre of the gravelled portion is 25 feet. These figures shew that there was ample space to make the turn for any automobile going at a moderate speed.

It was found by the trial judge that the appellant's car was going at a moderate rate of speed. Then, in view of this expert evidence, the accident must be due to some other cause than the negligence of the corporation. The *onus probandi* was on the plaintiff appellant and as he has not shewn that the decision of the Appellate Division was clearly wrong we should not interfere. The weight of evidence is that the road was kept in such a reasonable state of repair that those requiring to use the road may, using ordinary

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care, pass on the bridge in safety. *Foley* v. *East Flamborough* (1).

The appeal should be dismissed with costs.

MIGNAULT J.—After carefully reading all the evidence I fully agree with the conclusion of His Lordship the Chief Justice of this Court that the curve and the bridge were not dangerous to motors properly driven. That is the only question we have to decide. I do not think that because Keene's car went into the ditch we must conclude that the curve and bridge were dangerous. There is a great preponderance of evidence that a large number of cars crossed the bridge every day in perfect safety. The only accident in several years, outside of a rather doubtful case mentioned by one Murphy, is the one which caused the appellant's injuries. Looking at the condition of the road and bridge objectively—if I may use the term—I find that the appellant has failed to prove, as being the cause of the accident, a "want of repair," which alone could render the respondent liable. Whatever may have brought about the accident, it cannot, in my opinion, be attributed to the failure of the respondent to comply with any obligation incumbent on it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *E. W. M. Flock.*

Solicitor for the respondents: *A. Weir.*

(1) 29 O.R. 139.

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LAWRENCE SCOTLAND (PLAINTIFF) ..... APPELLANT;

*Nov. 27.
*Dec. 22.

AND

THE CANADIAN CARTRIDGE COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Workmen's Compensation Act, 4 Geo. V. c. 25 (Ont.)—Negligence—"Accident"—Injury by poisonous gases.

Injury to the health of a workman in a munition factory through continuously inhaling the fumes of poisonous gases is not injury by "accident" within the meaning of that term in sec. 15 of the Ontario "Workmen's Compensation Act."

Judgment of the Appellate Division (45 Ont. L.R. 586; 48 D.L.R. 655), reversed on the merits as there was evidence on which the Jury could reasonably find for the plaintiff and the Appellate Division should not have disturbed their findings.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial in favour of the plaintiff.

The plaintiff, working in a munition factory, claimed damages from his employers for injury to his health caused, as he alleged, by inhaling gas fumes in doing his work. He claimed compensation under the "Workmen's Compensation Act" but the Board held that the injury was not caused by "accident" and that it therefore was without jurisdiction. He then brought an action in which the jurisdiction of the Board was made an issue. On the trial the evidence was conflicting as to whether or not the

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 586, 48 D.L.R. 655.

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illness of the plaintiff was caused by poisonous gases, some doctors testifying that it was impossible, others that there could be no other cause. The jury found in favour of the plaintiff and judgment was entered for him for $3,500. The Appellate Division reversed this judgment and dismissed the action.

McBrayne for the appellant. There was ample evidence to justify the findings of the jury and the verdict for plaintiff should not have been set aside. *Watt* v. *Watt* (1).

The evidence shews negligence in not providing proper ventilation. See *Butler* v. *Fyfe Coal Co.* (2); *Toronto Power Co.* v. *Paskwan* (3).

Strachan Johnston K.C. and *H. A. Burbidge* for the respondents, referred to *Brintons Co.* v. *Turvey* (4); *Glasgow Coal Co.* v. *Welsh* (5).

THE CHIEF JUSTICE.—This action was one brought by plaintiff appellant, a workman at one time employed by defendant company in operating an annealing bath or process in use in defendant's works in the City of Hamilton for the manufacture of cartridge shells and other war munitions.

It was the duty of the plaintiff who was known as a "dipper" to place the cartridge shells, which were made of brass and were at a high temperature, in what was known as a sulphuric acid bath and after a short time to remove them from this bath and place them in another bath known as the cyanide bath.

On February 12, 1917, plaintiff became ill and unable to continue his work and was removed to the

(1) [1905] A.C. 115.
(2) [1912] A.C. 149.
(3) [1915] A.C. 734, 22 D.L.R. 340.
(4) [1905] A.C. 230.
(5) [1916] 2 A.C. 1.

Hamilton general hospital where he remained under treatment until June, 1918. The contentions on which he based his claims were that his illness was caused by strong, irritating and poisonous gases which were emitted from the baths in which his duty required him to place and remove the cartridge shells and which were inhaled by him in the discharge of his work; and that in addition to these alleged poisonous gases, natural gases of a poisonous character were emitted from and by the natural gas furnaces in close proximity to the baths used in heating the shells and became mingled with the other poisonous gases which he was forced to inhale, and that no system of ventilation of any kind was adopted or furnished by the defendant for the purpose of removing the gases plaintiff was compelled to inhale while at his work, the result being his illness and complete collapse.

The defence of the defendant not only put in issue the facts of the defendant's illness having been caused by irritating and poisonous gases to which his work exposed him and the want of ventilation in the building as charged but also set up as a defence that in any case the plaintiff's remedy was confined to that given by the "Workmen's Compensation Act" and that his remedy had, on plaintiff's application for compensation under the Act, been refused, which refusal was final as to his claim and without appeal.

As to this latter defence, I do not think the plaintiff's common law right of action was taken away by the statute under the circumstances of this case. The Board declined to entertain the claim on the ground that plaintiff's claim was not one which occurred "for or by reason of any accident which happened to him in the course of his employment" and I cannot but think in so deciding they were right. The Board

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therefore had no jurisdiction to award compensation in a case of this kind and the plaintiff was properly left to his common law right of action.

The latest case which I have been able to find on the much debated question of what is an "accident" within the meaning of the term accident in the "English Workmen's Compensation Act," 1906, 6 Edw. VII., ch. 58, sec. 1, sub-sec. 1, is that of *Innes* or *Grant* v. *Kynoch* (1), decided by the House of Lords. Their Lordships, in very lengthy reasoned judgments in which all the previous cases were referred to and analyzed, decided, Lord Atkinson dissenting, that the fortuitous alighting of the noxious bacilli upon an abraded spot of the plaintiff's leg, though it did not appear when or how he received the abrasion and it was impossible to say with certainity when the infection occurred, nevertheless constituted an accident within the Act.

In the case before us, of course, no such point or controlling fact arose and I take it from reading the judgments delivered that in the absence of proof of the abrasion on the plaintiff's leg which became infected by certain noxious bacilli, there would not have been any ground for the holding their Lordships reached.

Leaving that defence and turning to the substantial defences set up by the defendant company to the claim of the plaintiff arising out of the alleged emanation of noxious and poisonous vapours from the baths at which he was working and the absence of proper and efficient ventilation in the factory which would have rendered these gases innocuous, it appears that after a lengthy trial during which a great many witnesses, scientific and otherwise, were examined, the learned trial judge charged the jury on all the disputed ques-

(1) [1919] A.C. 765.

tions with a fullness and clearness which does not seem to have left room for any complaint on either side and submitted to the jury for answers a series of questions covering all the debatable issues or contentions. I venture, even at the risk of unduly prolonging my reasons, to transcribe these questions and answers in full rather than give a simple epitome of them because, if there was evidence to justify the findings on the two main points of the emanation and inhaling of noxious and harmful gases and the absence of proper ventilation, these are sufficiently clear and definite as to justify the judgment entered by the trial judge but set aside by the Court of Appeal.

QUESTIONS FOR THE JURY.

1.—Were harmful gases generated in the defendants' factory while plaintiff worked there? If so, what gases? A.—Yes. The three fumes of gases combined: sulphuric acid, cyanide of potassium and natural gas.

2.—Was defendants' factory in which plaintiff worked ventilated in such a manner as to keep the air reasonably pure and so as to render harmless as far as reasonably practicable all gases, vapours or other impurities, generated in the course of the manufacturing process carried on by the defendant while the plaintiff was in defendants' employment? A.—No.

3.—If you answer no, then what effect did such lack of ventilation have upon the plaintiff; answer fully? A.—The conditions in the factory where the plaintiff worked caused his present and possible future disability.

4.—Was the defendant guilty of negligence that caused the injury to the plaintiff complained of? A.—Yes.

5.—If so, what was the negligence? A.—Sufficient ventilation was not provided while plaintiff worked there.

6.—Might the plaintiff by reasonable care have avoided the injuries complained of? A.—No.

7.—At what sum do you assess the damages? At common law? A.—We assess the damages at $3,500.00 under the common law.

Under the "Factory Act?" A.—$3,664.44.

QUESTIONS SUBMITTED BY MR. JOHNSTON.

1.—Was the risk of inhaling dangerous gases a necessary incident to the employment of the plaintiff? A.—Yes. It was necessary for the plaintiff to breathe, and in so doing he inhaled the fumes of the gases.

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2.—Was the imperfect ventilation, if any, caused by any of the fellow workmen of the plaintiff in keeping the windows and doors closed? A.—No. That the fumes were too heavy to be carried off by natural ventilation in the winter months.

3.—Did the plaintiff, knowing the conditions, assume the risk connected with the employment? A.—Not knowing that it was a dangerous position he did not assume the risk.

4.—If the plaintiff was injured in the course of his employment was the plaintiff injured by accident? (No answer).

I frankly confess that after reading the reasons for judgment of the Divisional Appeal Court delivered by the learned Chief Justice of the Common Pleas, I felt in great doubt whether the judgment entered upon the jury's findings could be sustained.

The question, of course, for our determination is not what we would find as jurymen having heard the evidence and inspected the factory and its means of ventilation in the winter months, but simply and only whether the findings of the jury were such as reasonable men might fairly make on the evidence submitted to them.

Since the argument at bar at the conclusion of which I still retained my previous doubts, I have read over most carefully the evidence given on both sides and parts of it more than once, and I confess that if I had to give the verdict I would most likely hold that the evidence taken as a whole did not justify the finding of the emanation of noxious and harmful gases from the baths at which the defendant worked, especially having regard to the weak solution of sulphuric acid proved to have been in one vat or tank 5 gallons to an 80 gallon tank, and another solution of cyanide of potassium approximately 25 lbs. to a 75 gallon tank, and to the scientific evidence, not contradicted by any other such evidence, respecting the possibility of these solutions throwing off these alleged noxious gases.

I say on this main and controlling issue I would as a juryman probably have found against the plaintiff. But that is not my province. I have only to determine whether in the conflict of evidence we have before us in this case, scientific and practical, we find enough to justify reasonable men in reaching the conclusion these jurymen did. After much consideration and thought I have reached the conclusion, though not without much doubt, that there is such evidence in the record and that I ought not, in view of the extreme jurisdiction which juries are permitted to have over questions of fact, to set aside their findings on mere doubts I may entertain or on my reaching on the reading of the evidence a conclusion different from that the jury reached. Now in this case the jury had the great advantage of seeing and hearing the witnesses and of judging how far and to what extent credit should be given to their statements. They had the whole history of the plaintiff's illness and the facts which preceded and were claimed to have led up to it, given by the plaintiff. They had the evidence very strong and positive of the three medical men who had examined the plaintiff most thoroughly. Dr. Martin was the physician who was consulted by the plaintiff when he first took ill and saw him many times, making, as he stated, a most special examination to determine whether he could exclude from consideration all possible causes, other than poisoning, of the symptoms of illness which plaintiff had and suffered from. In the result he reached the conclusion that poisoning by the inhalation of poisonous gases was the cause of the man's illness. This conclusion was, of course, founded partly on the plaintiff's history of his case, partly on the man's symptoms and partly upon the test of the patient's

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urine and blood made by him, excluding or "ruling out all other possible conditions." He called Dr. Nancekivell in consultation who also seems to have made a very thorough examination of the patient and reached the conclusion that the symptoms which the patient had were those of a man suffering from inhalation of poisonous gases and that those symptoms altogether pointed to nothing else. In cross-examination he expressed himself as willing to pledge his oath that the patient was suffering from gas poisoning and that his opinion was not a matter of conjecture but

> the result of logical analysis, history, and his condition. There is no one disease you will get the inflammation of all the mucous membranes and the symptoms that he produced. No one disease will give you all those symptoms, outside of gas poisoning.

Lastly we have Dr. Holbrook, a medical gentleman in charge of the Hamilton Sanitarium and who was called and examined pursuant to an order made by the court to have an examination of the plaintiff with a view of giving testimony at the trial. The written report of Dr. Holbrook is very full and complete evidencing not a mere casual examination of his patient but a thorough and complete one. The report after describing in detail the history of the man given by himself and the physical examination made by the doctor, of the plaintiff and the conditions in which he found the different parts and functions of the man, winds up by saying:

> In addition to these conditions a serious condition has been set up probably due to the fumes from the cyanide tank and which might be described as the chronic effects from cyanide poisoning. It seems to have set up a debility which has affected the nerves and muscles by causing a peculiar change which might be described as a loss of tone. This is probably the chief factor in the heart lesion, but while the other tissues would probably in time regain their tone, yet I would consider that this condition in the heart had led to physical changes which will remain permanent. Thus, while I consider it absolutely impossible to make definite statements at this stage, I would consider that his

occupation in the munition plant had led to a general debility probably the result of chronic cyanide poisoning; also to an increase of fibrous or scar tissue in the lungs and to some enlargement in the bronchial gland and to a decrease of tone of the heart muscle fibre with dilation of the heart. I would consider that the man is now unfit for any work and that in all probability he will never be able to return to any but very light work for which the remuneration in his case would be small.

The doctor's examination and cross-examination at the trial did not in any way alter or modify the report he had made, indeed it rather accentuated the opinion he had there expressed.

He said:

Now I think that the bronchitis and irritation of bronchial glands was set up by inhalation of the sulphuric acid, and to some extent, cyanide fumes.

Again:

I think the chronic cyanide poisoning is the chief factor. He may have been over working, too long hours and too hard, that may have had something to do with the breakdown, but the symptoms came on and suggested cyanide poisoning more definitely than any other thing. Of course it was a chronic poisoning, more from the inhalation of vapour.

In cross-examination he admitted not being an expert on toxicology or the science of the effect of poisons on the human body but gave with great lucidity the symtoms of cyanide poisoning and left the impression on my mind that, while not professing to be an expert in toxicology, he was well grounded on the subject generally and knew well what he was talking about.

The other two medical men I have spoken of, Drs. Martin and Nancekivell, were even more emphatic than was Dr. Holbrook in ascribing the plaintiff's symptoms to noxious and poisonous vapours. It is true the evidence of these medical men was founded to some extent, possibly to a very large extent, upon the history of his case given to them by the plaintiff and that their conclusions as to these symptoms having

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been caused by noxious and poisonous vapours were most emphatically contradicted by Dr. John A. Oille, a medical gentleman practising for many years past in Toronto and who, at the request of the Workmen's Compensation Board, had made a very full examination of the plaintiff's physical condition. In fact, to my mind it is quite impossible to reconcile Dr. Oille's evidence with that of Drs. Martin, Nancekivell and Holbrook. In substance, Dr. Oille's evidence was that his diagnosis disclosed pleurisy and osteo-arthritis as the diseases from which the plaintiff was suffering when he examined him and he is emphatic in his statement that

> neither of these diseases could have been caused by sulphuric acid or cyanide, as both of these diseases are infective in origin.

By "infection" he explained that it "meant that bacteria get into the body tissues or blood and cause disease."

When to this positive and clear evidence of Dr. Oille is added that of Mr. Fertig, a chemist and chemical engineer, who came to Canada from the United States on Government work and whose duties as inspector for the American Government took him to the factory here in question very often, it will be understood why I entertained doubts as to defendant's liability as to there being evidence to sustain the jury's findings. Mr. Fertig said that a solution of sulphuric acid mixed with water in the proportion of five gallons to an 80 gallon tank, and the water heated to 200 degrees, would not give off any harmful fumes or gases, and that there was no doubt about it; and further that putting 20 pounds of cyanide in the cyanide tank, 20 to 22, containing about 75 gallons, and the water heated to 100 or 110 degrees Fahrenheit,

no harmful gas or fumes would be produced. As he put it:

> No poisonous gases would come off. That bath in itself would be a very dilute bath, 22 pounds to 75 gallons would be a three per cent. solution.

In fact, in cross-examination Mr. Fertig went so far as to say that 24 parts of water standing there in place of these tanks containing sulphuric acid and cyanide, would be just as harmful and as harmless and that the combination of sulphuric acid and cyanide as proved was absolutely harmless and that made it unnecessary to make provision to carry off the fumes.

In addition to these conflicting statements of the medical men and the experts, there was, of course, the positive statements of the plaintiff himself as to the effect upon him at the time he breathed in the exhalations from the vats or tanks, and of such men as House as to their having had similar experiences when so employed, and evidence to the contrary by others equally qualified to speak from personal experience.

The discharge by the jury of their duties was not a light or easy one. I am not able to say that the evidence justifies me or justified the Appellate Division in setting aside their findings. I have discussed the branch of the case made on the noxious exhalations or fumes arising from the tanks, at some length, because probably it is the strongest for the defendant. I think there was sufficient evidence to justify the finding of the absence, under the circumstances as found by them, of efficient ventilation in the winter season.

For these reasons I would allow the appeal with costs and restore the judgment of the trial judge upon the jury's findings.

IDINGTON J—The appellant claims from the respondent damages for injuries received, whilst serving

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as a workman in its factory, at part of the process of making shells for use as war munitions.

He alleges that, instead of making the place in which he was set to work reasonably safe for those performing the part of the service he was engaged in, it allowed the air, especially in that part of the room where he worked, to be contaminated with poisonous gases, resulting from the operations in which he and others were engaged; and that for want of proper ventilation he was compelled to inhale such poisonous gases and thereby suffered in his health.

It is reasonably clear that the building was so constructed that generally speaking in the warmer seasons ample means of ventilation were supplied by means of open windows or doors for all those engaged in the room in question, unless possibly for those few engaged at serving in immediate contact with the source and cause of the noxious gases in question.

But in the cooler and winter months the windows and doors were kept closed.

Obviously if, as now pretended, there were no noxious gases of any kind generated, there might be enough fresh air enter the room through the seams of the metal structure, or round the window frames and doors, to keep the room in a reasonable condition to work in.

In resolving the legal problem now submitted to us it does not seem necessary to follow that branch of the inquiry at greater length.

The appellant was taken ill and submitted the case, which his condition presented, to a physician in Hamilton who seems to give his evidence in a fair and intelligent manner and he attributes the condition of the appellant to the inhalation of just such noxious gases as might arise from the process in which the appellant

was engaged. Indeed he gives a very positive opinion, which, if correct, entitled the appellant to succeed, as he did, with the jury who found, in answer to the appropriate questions submitted, including a number proposed by respondent's counsel, sufficient facts to maintain the action and assessed the damages at $3,500 if based upon the common law or, alternatively, at $3,664.44 if based on the "Factories Act."

The learned trial judge entered judgment for the former sum.

Assuming the appellant told the truth and the whole truth as to his work and condition of his health, and his physical condition, the case is of a very simple and ordinary character so far as the relevant law is concerned, and in the result was necessarily committed to the determination of fact by a jury.

The physician is corroborated in all essentials by a brother practitioner knowing of and being consulted in the case at the time.

At a later time in the course of the proceedings in this suit an order was procured by respondent for the examination of the appellant by an independent physician selected by the judge applied to therefor.

His report is in the case and he was called also by appellant on the trial.

His report and evidence go also a long way to corroborate the view taken by the other physicians called by appellant. He, in view of the examination which he made of appellant having taken place sixteen months or more after his falling ill, properly speaks with caution as to the possibility of something else than the alleged gases producing the results he found. But so far as a skilled physician, not professing to be a profound toxicologist, could properly do so he leaves no doubt on the vital point of, in his opinion, sulphuric

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acid and cyanide having been a possible and probable cause of appellant's condition, and of the gases therefrom having possibly been and indeed probably inhaled in the way testified to by the appellant.

The basis for all that testimony of experts is, of course, what the appellant and his witnesses swore to.

The evidence of Husband, who was foreman in the room and had been discharged evidently for no other reason than that he did not get along with the men under him in a satisfactory way, seems, notwithstanding that incident, to have been given fairly and intelligently. If he and others are to be believed there is abundant evidence corroborative of appellant's story, and especially of the inhalation of noxious gases during the operations of appellant, and attributable thereto.

It would have been, in my opinion, unjustifiable to have granted a non-suit in face of such a case as thus presented, even if it had been moved for.

It is remarkable and indeed, in light of the subsequent development in the Second Appellate Division, amusing to find that able counsel, alert to take properly every possible arguable objection during the course of the trial, never thought of either moving for a non-suit at the close of plaintiff's case, nor at the close of the evidence for defence for a dismissal of the action.

The evidence for the defence apart from that of the expert evidence to which I am about to refer later, does not, to my mind, meet that of the appellant and his witnesses in any satisfactory way, much less overbear it in weight. Indeed much of it impresses me, after a perusal of the whole, given for the defence, with the view that it had better have been left aside and the defence rested upon the expert evidence alone,

coupled perhaps with some few facts testified to by some of the other witnesses for the defence.

Turning to the expert evidence, it consists of the evidence of a physician of sixteen years' standing who laboured under the disadvantage of not having seen the appellant until about two years after he had fallen ill, and of a chemist.

This physician had, I infer, seen but one case of acute cyanide poisoning, and none of the chronic cyanide poisoning from inhalation.

I submit that these facts coupled with the testimony he gives, evidently from reading, in regard to this lastly mentioned possibility, a text book, is not very convincing.

Another physician called gives unimportant evidence and admits that probably he knows little of the subject matter involved herein.

Then we have the evidence of a chemist who in a sentence or two denies that when cyanide is in specific proportions put into water of a certain temperature named, no harmful poison or poisonous gases could arise.

No accurate examination of the conditions of the water actually used was ever pretended to have been made by him or any one else, or of the actual condition of the cyanide used. The water was supposed to be of the limited temperature named.

The evidence discloses a possible cause of the water becoming overheated by reason of the haste of workmen, ignorant of the consequences, plunging into same many of the pieces to be dipped therein before being properly cooled off.

As a basis of scientific investigation, which the Appellate Division lays so much stress upon, I submit it would be difficult to found anything in support of the defence so far as rested thereon.

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To my mind, especially in view of the fact that cyanide was not used by any others engaged in the same process, except one, and that not named, this sort of testimony is next to if not entirely worthless.

I agree in the desirability of the truth revealed by science, being, when possible, duly observed, but the process of scientific investigation requires a thorough investigation of all the facts, conditions and circumstances so far as possible, before proceeding to determine and formulate any definite assertion of any supposed rule of action or scientific fact founded thereon.

It never seems to have occurred to any one concerned to have examined a single specimen of this so-called cyanide and ascertain thereby the quality of that used and then see what results would flow therefrom under such conditions as it was used herein or even approximately so.

Unless we are to overturn our system of jurisprudence and the one rule of reason governing in law the results of a jury's verdict I submit the judgment appealed from cannot be permitted to stand.

There was ample ground upon which the jury's verdict might well have been reached within that rule acting upon the evidence placed before them.

The judge's charge was full, fair and unobjected to, save by suggesting what I am about to refer to, and respondent having let it go at that, ought not to have been heard to complain, unless upon the one question of whether or not the evidence did not disclose a mere case of accident.

I am of the opinion that the ruling of the Workmen's Compensation Board was right in holding that it was not a case of accident, in the sense in which that word is used in the Act in question, but, if any-

thing, the result of a continuous and systematic method of carrying on the works in question, in violation of either common law or statutory law, or of both.

Had, for example, an explosion taken place by reason of the same method, if such a result possibly conceivable, then I can conceive of a case so founded being within the term "accident" in the "Workmen's Compensation Act." Not being so or akin thereto if as I suspect the injuries were the result of months of continuous defiance of nature's laws by respondent, the appellant's right of action is not barred by said Act.

I think the appeal should be allowed with costs here and in the court of appeal, and the judgment of the learned trial judge be restored.

DUFF J.—I have little to add to the reasons given by the Chief Justice with which I concur on the point whether the injuries from which the appellant suffered were due to the inhalation of noxious gases while engaged in the performance of his duties under his employment with the respondents. I find it impossible to concur in the decision of the Appellate Division that the findings of the jury on this point can be set aside or disregarded as without reasonable foundation in the evidence.

A more serious question is raised by Mr. Johnson's contention that there is no evidence justifying the finding that by the negligence of the respondents the appellant was deprived of some protection to which he was entitled and through which he would probably have escaped the harmful action of the gases to which he was exposed.

The evidence on this point is very meagre. After carefully considering the testimony of Mr. Darling,

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who was called on behalf of the respondents, together with the evidence as to the state of the atmosphere in which the appellant was working, I cannot concur in the view that there is not some support for the jury's finding on this point.

I should add a single word upon the effect of sec. 15 and sub-sec. 1 of the "Workmen's Compensation Act." I refrain from expressing any opinion on the question whether a claim for compensation having been rejected by the Board on the ground that the facts out of which the injury arose did not bring the case within the category of accident, it is open to the employer to allege in an action by the employee based upon the charge of negligence that the same facts did constitute an accident bringing the case within the operation of the provisions of the Act, including sub-sec. 1 of sec. 15 which on that hypothesis would afford an answer to the employee's action, if such a contention were open to the employer.

It is unnecessary to pass upon this because, for the reasons given by the Chief Justice, I think the respondents' contention independently of the Board's decision must fail.

ANGLIN J.—Sec. 43 (1) of the "Factory Act" (R.S.O. ch. 229), as amended by 8 Geo. V., ch. 44, sec. 4, requires that

> the employer of every factory or shop shall ventilate the factory or shop in such a manner as to keep the air reasonably pure and so as to render harmless as far as reasonably practicable all gases, vapours, dust or other impurities generated in the course of any manufacturing process or handicraft carried on therein that may be injurious to good health.

At common law an employer is bound to provide so far as practicable a reasonably safe place for his work-

men to work in. *Ainslie Mining and Railway Co.* v. *McDougall* (1).

The plaintiff complains that while engaged in the defendant's munition factory he was unnecessarily exposed to the inhalation of poisonous gases generated in the course of its manufacturing process; that such exposure was due to inadequate ventilation of the annealing room where he worked; and that it resulted in serious and permanent injury to his health. On the trial, before Mr. Justice Clute, a jury found these several allegations to be established. On appeal the judgment based on this verdict was unanimously set aside, the Chief Justice of the Common Pleas delivering the judgment of the Divisional Court and holding that on each of the three issues

> there was no evidence upon which reasonable men could find in the plaintiff's favour (2).

On the plaintiff's appeal to this court the defendant supports this judgment and also contends that if injury to the plaintiff's health was caused as he alleges, the case was one of "accident" within the provisions of the "Workmen's Compensation Act" (4 Geo. V., ch. 25, Ont.) and this action therefore cannot be maintained. It will be convenient to deal first with the latter defence.

The plaintiff duly presented a claim for compensation to the Workmen's Compensation Board and it was twice considered by that body. On the first occasion it was rejected, as the formal certificate says, on the ground that it did not appear that

> the claimant sustained a personal injury by accident arising out of and in the course of his employment;

and on the second, because

(1) 42 Can S.C.R. 420. (2) 45 Ont. L.R. 586; 48 D.L.R. 655.

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the Board is unable to find that the claimant sustained personal injury by accident within the meaning of the Act.

The respondent contends that it is consistent with these certificates that the Board based its rejection of the claim on the view that the plaintiff had not in fact been injured as he avers, and did not determine that if so injured the case would not be one of accident within the meaning of the statute. The second certificate seems to me rather to indicate that the Board meant to hold that any injury the plaintiff sustained was not due to an accident and that it was therefore without jurisdiction. Any possible doubt on this point however is removed by these passages in the evidence given by Mr. Kingstone, one of the Commissioners, who made an investigation on behalf of the Board.

Q. Did you find when you were inspecting that factory that there were sufficient methods provided by that company to remove sulphuric acid fumes from that room? A. Well, let me answer that by making this mention; I had this in my mind, I was naturally looking under the terms of the Act to see whether or not anything had happened which could be considered an accident, because under the terms of sec. 3 of the Act the claim could only be allowed if it could be found that there had been injury to this man by accident.

Q. And you decided ultimately it was not an accident? A. I concluded there had been no injury by accident.

Q. How did you conclude that the injury had been sustained? A. Having excluded the question of accident—

His Lordship: The report is very explicit. (Reading report.) Then they found this case was outside the jurisdiction of the Board?

Witness: Yes, when I found that I did not go so far into the investigation of what was the trouble with the man as I otherwise would have, had I been charged with the responsibility of getting at the whole trouble.

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Mr. MacBrayne: Q. Speaking as a witness on behalf of the defendants, can you say whether there was sufficient ventilation in this room or not? A. I would not want to express an opinion. Because from that point of view I do not know; all I do know it satisfied me there was no accident.

His Lordship: You were not there after September? A. I was just there in connection with another accident on another occasion.

Q. You have no knowledge of the conditions in winter? A. No.

Mr. MacBrayne: Did you inquire whether the conditions you saw in September were the same as in January and February of that year? A. Well now, I don't know that I can say that I did. I inquired sufficient to satisfy me that no accident had happened to this man, within the meaning of our Act.

By sec. 6 (1) of the "Workmen's Compensation Act" the Board is given exclusive jurisdiction to determine all matters and questions arising under Part I. of the Act. That part deals with workmen's rights to compensation. By sec. 64 the Board is empowered to determine, if an action is brought by a workman against the employer in respect of an injury, whether the workman is entitled to maintain the action or only to compensation under the statute.

By an amendment (5 Geo. V., ch. 24, sec. 8 (2)), any party to an action is enabled to apply to the Board for adjudication and determination of the question of the plaintiff's right to compensation or as to whether the action is one the right to bring which is taken away by Part I.; and such adjudication and determination is declared to be final and conclusive. The re-consideration by the Board of the plaintiff's application for compensation was at the instance of the present defendant, and I agree with the learned Chief Justice of the Common Pleas that the Board's conclusion that the plaintiff's claim was not founded on a personal injury by accident within the meaning of the Act is binding on the defendant and not open to review in this action.

If the question were open I should incline to apply and follow the decisions in *Steel* v. *Cammell, Laird & Co.* (1); *Martin* v. *Manchester Corporation* (2); *Broderick* v. *London County Council* (3); and *Eke* v. *Hart-Dyke* (4),

(1) [1905] 2 K.B. 232.
(2) 5 But. W.C.C. 259.
(3) [1908] 2 K.B. 807.
(4) [1910] 2 K.B. 677.

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the authority of which, so far as they require proof of a particular occurrence causing the injury complained of, which happened within some narrow limitation of time has not been materially affected, as I understand it, by the recent judgment of the House of Lords in the readily distinguishable case of *Innes* or *Grant* v. *G. & G. Kynock* (1). I agree with the learned Chief Justice that the "Workmen's Compensation Act" does not stand in the way of this action.

But, I am, with great respect, at a loss to understand how it can be said that there was not any evidence on which the jury could reasonably find as they did in favour of the plaintiff on each of the three issues involved in the question of the defendant's liability. There was, in my opinion, quite sufficient evidence, if the jury saw fit to credit it, to support their verdict on all three issues. This expression of opinion would perhaps suffice to dispose of this appeal, but, in deference to the learned judges of the Divisional Court, I think I should indicate what the evidence is upon which the jury's verdict in my view should have been sustained.

Were there noxious fumes or gases given off from the sulphuric acid and cyanide vats in the defendants' annealing room?

The plaintiff gives this evidence:

Q. What would be the effect on the sulphuric acid and the cyanide as you put these shells in there? A. Gas fumes, the hot shells going into the hot acid.

Q. There were fumes? A. As soon as you put them in the acid there was fumes you could see.

Q. That is steam? A. Yes.

* * * * * * *

Q. Your work took you practically over those vats? A. Yes.

William Husband, formerly a foreman with the defendant, says:

(1) [1919] A.C. 765.

His Lordship: What was the effect of this closing of the windows?

A. Why, it would cause a kind of heavy cloud of steam; pretty hard to see through it.

Q. From where? A. From the steam arising from the vats. The cold air would meet with the steam.

Q. Was there an odour to this steam that came from the vats? A. Yes.

Q. Having regard to the plaintiff's work, and his position during the work, what would you say as to whether or not he might or might not inhale any of the fumes? A. It is possible he may have. I have myself.

Q. You were not working over them? A. No.

Q. What do you say of the plaintiff in regard to his position and his work, whether or not he was in such a position that he would inhale it? A. Oh, yes, he would inhale it. He would inhale it more if the wind was on the west side. In the winter time it would blow up a sort of cloud.

* * * * * * *

Q. Has the cyanide in solution an odour? A. It has.

Q. What is it like? A. It is sickening to the head.

Q. Is it an odour that you can readily distinguish? A. It is.

Q. Then when you were using 20 pounds of this cyanide to 80 gallons of water, was there a perceptible odour? A. There was when we were using the strong stuff.

Q. And the strong stuff is the 20 pounds to the 80 gallons? A. Yes.

Q. Were there any fumes or odours from the sulphuric acid? A. Oh, yes.

Mr. Johnston: That is clearly a leading question.

Mr. MacBrayne: I don't know how I could ask the question in any other way.

His Lordship: Q. Was there an odour from the cyanide? A. Yes.

Q. What was it? A. A kind of sickening smell, and it used to affect my throat and lungs; if I got a good smell of it it would affect my throat.

Mr. MacBrayne: How many cyanide baths were there in that room. A. Two.

Q. And was the other being operated in the same way? A. Yes.

Q. With the same strength of pounds? A. Yes.

Q. Winter and summer? A. Yes.

Q. You said something to His Lordship about the effect of the odour from cyanide; will you tell us what that was? A. It affected in such a way that it was a kind of sickening smell to the head, and also affected my throat and lungs; each time I worked on the cyanide I would have the feeling till such time as I had reduced the quantity of cyanide.

Q. Was Scotland's work such as to keep him in this cyanide odour? A. It was such that there was three sets of vats he had to pass it to; he would be working there most of the time.

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Q. Did he have any other place to work? A. Well, he was changing around from the tanks. In the beginning he worked on sulphuric alone. After he was there a few weeks I put him to the cyanide tanks, because he was a smart man.

The strong mixture of cyanide, 20 or 22 pounds to 75 or 80 gallons of water, was used during most of Scotland's period of work. A harmless soda mixture is generally used for the same purpose.

Husband adds:

His Lordship: What was the difference between the lesser and the larger amount, in regard to its effect?

A. The fumes were stronger in the larger amount, and it left a kind of white substance on the cases.

James House, a fellow employee of the plaintiff, says:

Q. All I want you to tell the jury is what was the condition of that room when you were working there? A. The condition of the room, you mean the air, and in regard to the acid and cyanide?

Q. Yes. A. Well, in the cold weather the air was so thick with the sulphuric acid fumes and the cyanide that you could hardly see one another apart sometimes, and in inhaling the fumes it caused a bitter taste in the mouth, dizziness, headache, pricking of the eyes, and sleeplessness at night, and more tired when I got up in the morning than at night. When I went in I weighed 148, and when I came out I weighed 123 pounds.

Q. During the winter season what method was there for removing these fumes and letting fresh air in? A. There was no method whatever.

Q. Was there a window in the north side? A. No, the cold weather would blow the fumes to you, and you could not see, and it was so warm you would get heated up so over the tanks that you could not stand the least cold draft on you.

Q. What was your particular work? A. Packing the shells as they came out of the tank into the boxes.

Q. They had been pickled or had their bath? A. Yes.

Q. Why did you quit? A. Well, I quit on the doctor's advice.

Juror: Did you notice the fumes much more when the cyanide was being used? A. Well, you could taste it more.

* * * * * * *

His Lordship: What do you say caused the tired feeling?

A. Well, I believe it was the fumes of the sulphuric acid and cyanide, because before I went there I was in perfect health, could eat anything, and after being there three or four months I lost my appetite, and got up so cross and tired in the morning that I hated myself.

Q. Might that be attributed to the hard work? A. No, I worked at harder work before I went there.

Juror: Did you do any vomiting in the morning? A. Yes, shortly after I had eaten my lunch.

Q. What was the cause of that? A. The fumes it must have been, a bitter taste in my mouth, and food would not digest.

John Roberts, another fellow employee, gives this evidence.

Q. That was the only thing that held you up? A. No, I used to be I couldn't eat, take a little milk food.

Q. Did you lose any time during the six weeks except for this finger? A. No. I was not thinking the acid was doing any harm till people told me I was looking bad, and was yellow in the face, and couldn't eat and sleep, so I laid off after Christmas.

Q. Go to the doctor? A. No.

His Lordship: What caused that? A. The work I done before I never felt as I did then, I believe my flesh was yellow, and a nasty taste in my mouth, couldn't eat or sleep, and always tired getting up, wasn't the same man anyhow.

* * * * * * *

Q. That atmosphere is very heavy? A. Yes. Kind of hangs like that. A man inhaling that stuff it makes him sick. I could not eat, no taste of any food, just a little porridge that I had.

Husband also tells of an employee named Stirling who left the factory saying: "I can't stand these fumes and acid"—and went to a hospital.

Ernest Darling, a ventilating expert called for the defence, says:

Q. And so you would expect that these gases that would be in this room should be diluted? A. Yes.

Q. Why? A. If they are injurious to human health they should be diluted.

His Lordship: Do you know whether they are injurious or not?

A. From my knowledge I would know that cyanide gas is injurious, but sulphuric acid gases I don't believe are injurious to the same extent.

No doubt there is evidence from others, officers and employees of the defendant, that there were no perceptible fumes or gases in the annealing room; and one Fertig, a chemist called for the defendant, denied the possibility of fumes or gases arising from vats containing solutions of sulphuric acid and cyanide in the

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proportions and at the temperatures which the defendant company was supposed to maintain. In fact, he said these vats

were just as harmless as 24 pails of water. * * * Therefore why should any provision be made to take off the fumes?

Of course the witness assumed that the solutions were always maintained in the proportions directed and that the temperatures never exceeded those prescribed. Either of these conditions might easily have varied from time to time.

But it was clearly within the province of a jury to determine what credence should be given to the very positive and sweeping testimony of this witness and whether it should or should not be relied upon in view of the actual experience of the presence of such fumes and gases deposed to by men who had worked in the factory. When to their testimony is added the evidence of the doctors who examined the plaintiff (to be more particularly referred to in dealing with the next question) I confess my inability to understand how it can be said that there was no evidence on which a jury could reasonably have found that harmful gases or fumes were given off from the sulphuric acid or cyanide vats.

Was the plaintiff's impairment of health due to the inhalation of these gases—was he a victim of chronic poisoning from them? Dr. Martin, who had the best opportunity of forming a reliable opinion since he saw the man immediately after he was obliged to quit work, is convinced that he was.

My diagnosis was poisoning from the inhalation of poisonous gases—that the man's condition is the result of inhalation of poisonous fumes.

He rests his opinion on the symptoms of his patient and the history of the case. How far the plaintiff

could be depended upon to give a truthful history the jury had an opportunity of judging. They saw him in the witness box. Dr. Martin deposes that tests were made to eliminate the possibility of other diseases. No evidence of any other condition was found which would account for the symptoms as a whole, and while each of them, if taken separately, might be otherwise accounted for, the Doctor says that "the symptoms all together pointed to nothing else" than poisoning by the inhalation of poisonous gases, such as sulphuric acid and cyanide fumes.

Dr. Nancekivell, called by Dr. Martin in consultation, also examined the plaintiff two or three days after he was taken ill. His conclusion was that he had been poisoned by poisonous gases. He adds that if the man had come to him and he had not known that he had been working in a brass foundry he would have pronounced it a case of gas poisoning. Asked to do so he pledged his oath that the man is suffering from gas poisoning; and he adds:

> No one disease will give you all those symptoms (which the plaintiff exhibited) outside of gas poisoning.

Dr. Holbrook, the physician in charge of the Hamilton Sanitarium, who has had experience in gas poisoning cases with a number of returned soldiers, was appointed by the court, at the instance of the defendant, to examine the plaintiff and report upon his condition. He made three examinations, but had not the advantage of seeing the patient soon after he became ill. He found conditions, however, which he ascribes to the inhalation of sulphuric acid and cyanide fumes.

> It seems to me the cyanide fumes, the effect of that accumulated until a toxic effect was produced. * * * I think chronic cyanide poisoning is the chief factor * * * . Of course it was a chronic

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poisoning, more from the inhalation of vapour * * * . I think the conclusion I came to was that the cyanide poisoning was responsible for the different conditions he presented, and there was the general lowering of tone, nervousness, vomiting of food and irritability of the stomach * * * . It might be possible to deny that any of the symptoms he had were due to cyanide poisoning, but I think that the general lowering of tone and the symptoms were caused by that and nothing else.

Q. It might have been caused by one hundred different things? A. Yes, but in fairness to the man I do not think it was.

Dr. Oille, a physician employed by the Workmen's Compensation Board, called by the defendant, on the other hand, found no conditions that could not be fully accounted for by other causes and an absence of some symptoms which, in his opinion, are characteristic of cyanide poisoning. Dr. Oille admitted, of course, that when sulphuric acid and cyanide fumes reach a certain percentage they become dangerous, and will make a man sick if the percentage is great enough. And according to Drs. Martin and Nancekivell, the plaintiff exhibited most of the symptoms which Dr. Oille states to be those of cyanide poisoning.

There is no suggestion that the plaintiff was exposed to the inhalation of poisonous gases anywhere else than in the defendant's annealing room.

The jury found that

the conditions in the factory where the plaintiff worked caused his present and possibly future disability.

But the Chief Justice delivering the judgment of the Appellate Division says:

All the symptoms of illness of the plaintiff deposed to were by *all* the physicians stated to be symptoms of a common everyday character that may arise from any one of many common ailments; they proved nothing.

With deference it would seem that some of the evidence above outlined must have escaped the learned Chief Justice's attention. Otherwise I cannot account for his comment.

He adds:

> No other conclusion can be reached by me than that reasonable men could not find upon the evidence alone that the plaintiff was injured by poisonous vapours arising from these tanks; though reasonable men might be led by their impulses to do so * * *.

With respect, it was clearly competent for the jury to find as they did on this branch of the case. Not only was there evidence to warrant their finding but the weight of the medical testimony supports it. In accepting the evidence of Dr. Oille and rejecting the opinions of the other three physicians because of their lack of "any special knowledge in chemistry or toxicology," the appellate court would seem to have usurped the functions of the jury. The same observation may be made upon their action in treating the evidence of the chemist Fertig ("the proper evidence" the learned Chief Justice terms it) as conclusive against the presence in the annealing room of cyanide and sulphuric acid fumes arising from the tanks, notwithstanding their actual experience deposed to by several men who worked there and the conditions found in the plaintiff by three reputable physicians ascribed by them to the inhalation of these gases and for the existence of which no other cause has been or can be suggested and also as to the effect given to the evidence of the defendant's expert in ventilation notwithstanding the weaknesses in it disclosed on cross-examination and the actual atmospheric conditions in the annealing room deposed to by several witnesses.

The evidence on this latter branch of the case must now be considered. Admittedly there was no artificial ventilation and little attention seems to have been paid to the need for it. Open doors and windows provided excellent ventilation during the summer

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but there is abundant testimony that these were all closed during the cold weather.

The plaintiff worked in the annealing room from October, 1916, to February, 1917.

Ernest Darling, the expert in ventilation called by the defendant, deposed that, owing to the character of the building—a shed with sides and ends of corrugated iron sheeting

> the walls were not tight * * *. The building ventilates itself so to speak * * *. As far as ventilation is concerned it was very well ventilated. I think the trouble is that it is a question of heat and cold.

This expert made no examination of the building when the conditions prevailed under which the plaintiff was working. He never saw the factory in operation. On cross-examination it became apparent that he relied on open windows to take care of any noxious fumes that might arise in the room. The opening or closing of windows was left to the whim of the workmen, and some of them tell us that owing to the heat from the natural gas furnaces in the room—1200° Fahrenheit—and the character of the work they were engaged in they could not stand the draft from open windows during cold weather, working as they did in their shirts or with bare backs, and that consequently windows and doors were kept closed. The witness Darling criticizes their bad judgment in not opening windows on the side of the building on which there was no wind, but gives this significant testimony:—

> Q. Wouldn't the air in this room if there were not sufficient ventilation, become very much vitiated after ten hours' work, with the windows closed, the doors open occasionally? A. Yes.
>
> Q. And are you not trusting to a sort of accidental or providential ventilation when you speak of the doors being open? A. No. I think the men should use their judgment.
>
> Q. Then is it a good system of ventilation that leaves the question of shoving off the entire ventilation to the control of some workman?

A. You would have a great deal of trouble if it is left in the hands of more than one man.

Q. Shouldn't it be left in the hands of the management? A. No, the men should do it themselves.

Q. Is a system which is left to the men themselves and which causes physical injury to a man, a good system of ventilation? A. Not necessarily, no.

Q. It sounds rather bad? A. Yes.

Q. Wasn't that the case here? A. Not necessarily.

Q. These men who felt the cold should close the windows? A. The amount of gas—

Q. I am not talking of that? A. The density of the gas is the main feature.

Q. Is that system of ventilation which is left with workmen, entirely at the whim of any workman, to use or stop using it, a good and sufficient system? A. In that class of building, yes.

Q. In any class of building? A. No.

Q. Then with this building, why this building? A. Merely a shed.

Q. Then the windows don't amount to anything at all? A. Sure they do.

Q. Shut them and they still have good ventilation? A. Not necessarily.

Q. And the ventilators are no good because the cold air is coming in? A. You have to take into consideration the whole operation of the building.

Q. Because that is a shell of a building, built of corrugated iron, therefore the workman can close those windows or not, and it is still an efficient system of ventilation? A. An efficient system if properly used. You have to use your judgment.

Darling also states that

where you have concentration of gases—where they become dense or the air becomes saturated with gases

—forced ventilation is

a necessary part of factory construction

in order to carry those gases off; and, again, that some provision (should be made)

not carrying them off—dilution by supplies of cold air.

He also says that for 90% of the time a building such as that of the defendants' would be satisfactory

and manufacturers find they can afford as a rule to use a building like that rather than go into a brick building, where it would be unsatisfactory in summer, just simply for a few weeks of cold weather in winter.

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Mr. Kingston, a member of the Board, testified to finding satisfactory ventilation when he visited the building. But his visit was paid in the comparatively warm weather of September, when windows and doors would be open.

Some of the evidence on the conditions of the atmosphere in the annealing room and its ventilation during the winter months is as follows:—

William Husband, a former foreman of the annealing department, tells of having complained of the ventilation in the winter of 1916, while Scotland was working there, to the superintendent, Mr. Embree, and suggested the introduction of suction fans. He says the reply was

> the cold shoulder; if the men did not like it, get more men at the gate.
>
> Q. Was there any result from your complaint? A. No, not just then, not till the summer time. When the summer came they knocked off two sheets of galvanized iron on the north and the south and of the roof but not during the winter.
>
> Q. So the condition you complained of remained all that winter? A. Yes.

Embree denies this complaint.

Asked whether the windows were closed entirely during the winter months, Husband said:

> It really depends upon the conditions of the weather. If the men are working in front of a draft they close the window. We could not keep them open in the winter, men working in their shirts or bare backs.

I have already quoted the passage in this witness's evidence where he describes the effect of the closing of the windows in winter and the atmospheric conditions in the building. To complete it I add this extract:

> Speaking of the winter season, that these places were closed, did you, as foreman, have these rooms ventilated in any way? A. I might have opened the windows occasionally myself, but they were soon shut, because the men got cold.
>
> Q. Would the day gang coming in start in with fresh air? A. Not on a cold morning.

Q. And would the night gang start in with fresh air? A. Just come in with the same as the day gang left it.

I have already quoted from the evidence of James House, who was working in the annealing department at the same time as Scotland. To complete what he says I add this passage:

Q. You could have opened the doors or windows at any time to get fresh air? A. Not very well in the winter. Because we could not stand the cold air.

Q. The place was heated? A. It was not so hot, a person when perspiring cannot stand cold air.

Q. You say you could not ventilate the place without getting cold? A. In the winter time.

From the evidence of John Roberts, also employed with Scotland, I extract the following additional questions and answers:

Q. Then I want you to tell the jury what you found the working conditions to be while you were there? A. Well, I found it a very hot place, very unhealthy.

Q. Describe the conditions? A. There was two furnaces there in a very small room, about the size of this room, two annealing furnaces, and lots of vats. Two different sorts of vats, and lots of steam coming out of the vats. I did not stay there very long; I stayed there six weeks.

Q. Was there any method of getting rid of the foul air that might be in the room? A. Yes, I guess there was. There was windows above and all around, and I never seen them open hardly, because we could not very well stand the cold air. It was the winter time, and with the sweat and the hot place the men could not stand the cold air. We were all in short shirts, just pants and boots on. We were so hot that we could not stand any cold air. We were working in just an undershirt.

Q. Were all the men just working with the undershirt on? A. Yes.

* * * * * * *

Q. It was very hot there in winter in the Cartridge Company's factory? A. Yes, very hot.

Q. Why didn't you open the windows? A. I was not the boss.

Q. You would have opened the windows and Husband would not let you? A. If I had opened them you would not very well stand it in the winter time, and a gush of wind, zero weather, and us sweating, and the fumes, you could not stand it, we would be held up in another way.

Q. So you say it was impracticable to open windows? A. Yes. Better if there had been a fan to take the fumes away.

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Q. Who told you about a fan? A. Nobody. I have been in different factories and seen them.

Q. Where would you have put a fan? A. Well, I am not an engineer. Every man has a position. I would not know, but most likely some person would have picked up a place to put a fan.

Q. Can you suggest any way in which the ventilation of that building could have been improved? A. No, sir, I was not getting that deep into it. I knew I had to quit because I was losing my health.

* * * * * * * * *

Juror: Couldn't you have the top windows open in the winter? A. I could not tell you. I have seen them pulling the chain on the side to open them.

Q. Do you know if they were opened; could you feel the draft from up there? A. No. But in the side doors a man could not have the draft at his back. And a man sweating with two furnaces on each side of him.

Q. If the top window was open there was quite a draft to drive up the vapours? A. No, I don't think it would. It seemed to work slowly. * * *

Q. You were not over the tank all the time? A. Not the same kind of a tank as he was. Just on the wash-off tank and cyanide, and I would put it in there ready for the press room.

His Lordship: Would you get as heavy fumes where you were as Scotland? A. No, because he was getting it all the time. I was getting a chance to get away from it. I was putting them in the clean water part of the time; I was not getting as much as him. He was in it all the time.

In view of all this evidence it is not at all surprising that the jury found that the defendant's factory was not

ventilated in such a manner as to keep the air reasonably pure and so as to render harmless as far as reasonably practicable all gases, vapours or other impurities generated in the course of the manufacturing process carried on by the defendant while the plaintiff was in its employment,

that

the conditions in the factory where the plaintiff worked (had) caused his present and possibly future disability

and that the defendant was guilty of negligence which occasioned this injury in that

sufficient ventilation was not provided while the plaintiff worked there.

The finality of a verdict, where it is such as a jury viewing the whole evidence reasonably could properly

find, is too well established to admit of discussion. As Lord Atkinson said in *Toronto Rly. Co.* v. *King* (1), at page 270:

> The jury is the tribunal entrusted by law with the determination of questions of fact and their conclusions on such questions ought not to be disturbed because they are not such as judges sitting in courts of appeal might themselves have arrived at.

In *Commissioner of Railways* v. *Brown* (2), at page 134, Lord Fitzgerald, speaking for the Judicial Committee, said:

> Where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand.

Here no exception is taken to the charge of the learned trial judge.

As put by Lord Macnaghten in *Cooke* v. *Midland Great Western Rly. Co. of Ireland* (3), at page 233:

> The only question before your Lordships is this: Was there evidence of negligence on the part of the company fit to be submitted to the jury? If there was the verdict must stand, although your Lordships might have come to a different conclusion on the same materials.

I reiterate my inability to understand how any answer can be given in the present case to the question presented by Lord Macnaghten other than in the affirmative.

I would allow the appeal with costs here and in the Appellate Division and would restore the judgment of the learned trial judge.

BRODEUR J.—The duty of a master towards his servants is to provide such appliances as are necessary for avoiding accidents and for preserving their health; and where there are special circumstances which are likely to cause injury the degree of care required is

(1) [1908] A.C. 260. (2) 13 App. Cas. 133.
(3) [1909] A.C. 229.

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proportionately higher. Then consummate caution is required. *Dominion Natural Gas Co.* v. *Collins* (1).

The respondent company was using in its manufacture acids which might produce fumes and gases injurious to the health of its employees. At common law, it was bound to see that its building would be properly ventilated in order that those fumes and gases should cause the least injury possible to its employees.

The statutory provisions in force in Ontario under the "Factories Act" and the "Public Health Act" required that the building in which the plaintiff worked should be ventilated in such a manner as to keep the air reasonably pure so as to render harmless vapours generated in the course of work done.

The evidence is rather conflicting as to whether there were harmful gases and proper ventilation. But it was for the jury to decide as to its value. The jury found that there was negligence. There was certainly sufficient evidence to justify such a conclusion. The Appellate Division came to a different conclusion.

The respondent relies upon what it calls the uncontradicted evidence of an expert chemist. It is true that this expert stated positively that no injurious gas emanated from the receptacles in which acids were diluted. But the evidence of the co-employees of the plaintiff and of the doctors who attended him shew conclusively that his health has been injured by gases which evidently poisoned him.

In these circumstances the findings of the jury should not have been disturbed.

It is contended by the respondent that the plaintiff's right of action has been abolished by the "Work-

(1) [1909] A.C. 640.

men's Compensation Act," 4 Geo. V. ch. 25, which established a new code of law respecting compensation for accidents to workmen. The statute provided that all claims for accidents to workmen should be dealt with by a Board and that employers would be required to contribute yearly to a fund which should be administered by the Board.

In this case the appellant applied to the Board for compensation; but the Board decided that it was not an accident which entitled him to compensation from the Board.

The word *accident*, on the construction of which the plaintiff's application was dismissed, has been more discussed than any other word.

It means some unexpected event happening without design and the time of which can be fixed.

The latter condition as to the time cannot be ascertained in the present case.

It has been decided that lead poisoning contracted gradually is not an accident. *Steel* v. *Cammell, Laird & Co.* (1).

The appeal should be allowed with costs of this court and of the court below and the judgment of the trial judge restored.

MIGNAULT J.—For the reasons given by my brother Anglin, I am of opinion that the appeal should be allowed with costs here and in the Appellate Division and that the judgment of the learned trial judge should be restored.

Appeal allowed with costs.

Solicitors for the appellant: *McBrayne & Brandon.*
Solicitors for the respondent: *Mewburn, Ambrose, Burbidge & Marshall.*

(1) [1905] 2 K.B. 232.

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*Nov. 13, 14.
1917
*Feb. 6.

H. HARVEY (DEFENDANT) ..... APPELLANT;

AND

THE DOMINION TEXTILE CO. (PLAINTIFF) ..... } RESPONDENT.

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

Highways — Dedication — User — Prescription — "Chemin de tolérance" —Municipal road—Constitutional law—"Municipal and Road Act of Lower Canada," (C.) 1855, 18 Vict., c. 100, s. 41, ss. 8 and 9—Arts. 749 and 750, Municipal Code.

Per Davies, Idington and Anglin JJ.—The sub-sections 8 and 9 of 18 Vict. c. 100, s. 41, are still in force; but

Per Davies, Anglin and Brodeur JJ.—These sub-sections are applicable only to roads which had been in existence and in public use for ten years before the first of July, 1855. Fitzpatrick C.J. *dubitante.*

Per Fitzpatrick C.J. and Brodeur J.—The road in question in this case, being opened at its extremities and having a fence on one side and a sidewalk on the other, meets all the requirements enumerated in article 749 of the Municipal Code in order to be declared a public road. Davies and Anglin JJ. *contra.*

Per Fitzpatrick C.J. and *Semble, per* Anglin J.—A public right of way may be constituted in the Province of Quebec by direct or indirect dedication. Brodeur J. *dubitante.*

Semble, per Brodeur J., that dedication, presuming a donation of the soil, would be illegal in the absence of a deed. (Art. 776 C.C.). Anglin J. *dubitante.*

Semble, per Anglin J.—Even if the road in this case was a municipal road within articles 749 and 750 of the Municipal Code, the owner, having retained the property of the soil, may exercise the right to close it or to forbid its use as a "chemin de tolérance." Brodeur J. *contra.*

Per Brodeur J.—A road may become the property of the municipal corporation when used by the public and the municipal corporation during thirty years (art. 2242 C.C.); and not only the right of way, but the fee itself in the soil becomes the property of the public (art. 752 C.M.).

Judgment of the Court of King's Bench affirmed on equal division of the court.

APPEAL from a judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the

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

judgment of the Superior Court sitting in review, at Quebec, restoring the judgment of the trial judge, Malouin J. and maintaining the respondent's action.

The material facts of the case are fully stated in the judgments now reported and more specially at the beginning of the reasons of Mr. Justice Anglin.

Alex Taschereau K.C. for the appellant.
A. Rivard K.C. for the respondent.

THE CHIEF JUSTICE.—The action is really for trespass although referred to throughout as an *action négatoire*. No question of servitude arises, the plaintiffs, now respondents, complain that the defendant entered on their land and pulled down some fences. The appellant, defendant below, pleads that there is a road across the plaintiffs' property which he is entitled to use as one of the general public. It is admitted that the road exists and has been for some years used as a thoroughfare by the public on sufferance, as alleged by the plaintiffs and as of right as the defendant contends, and that is the sole issue.

The road was admittedly laid out and built by the plaintiffs, and to succeed the defendant must shew that it became a public highway, either by dedication or by prescriptive user during the statutable time;—assuming the statute of Canada 18 Vict. ch. 100, sec. 41, sub-secs. 8 and 9 to be in force and applicable.

My brother Brodeur discusses so ably and fully the legal effect of articles 749 and 750 M.C. that it will be unnecessary for me to do more than refer to what he says on that aspect of the case.

Were it not for the judgment of the Court of Queen's Bench in *Mignerand dit Myrand* v. *Légaré*(1), I

(1) 6 Q.L.R. 120.

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would be disposed to doubt that the principle of dedication as applied in English law is known to the civil law, and to hold that, in the absence of statute, the right of road in Quebec must be based upon the fact of user by the public, as a matter of right, for the full period of the long prescription, thirty years. Contrary to the rule of the English law when a road became a public highway in Quebec the soil of the road was, before the Municipal Code, vested in the Crown; arts. 400 C.C. and 743 M.C. *De la Chevrotière* v. *La Cité de Montréal*(1); and a deed of gift must under pain of nullity be executed in notarial form (art. 776 C.C.). But the rule in *Mignerand dit Myrand* v. *Légaré*(2) has been adopted and followed in the Quebec Courts so universally and for such a length of time that it must now be accepted as definitely fixing the law and I feel bound to hold that a public right of way may be constituted in Quebec by direct or indirect dedication.

As Dorion C.J. said in *Mignerand dit Myrand* v. *Légaré*(2):

> C'est aux tribunaux à juger si, d'aprés les circonstances, le public a joui d'un chemin assez longtemps pour *faire présumer* que le propriétaire en a fait l'abandon.

There has been considerable diversity of opinion amongst the judges of the courts below. I have perused those opinions with much advantage and have with great care considered the opinions of those from whom I differ. In the result I have come to the conclusion that the judgment of the Court of Review is right and should be restored.

The learned trial judge seems to have assumed that in the absence of evidence of direct dedication made by deed or declaration of the owner the public could

(1) 12 App. Cas. 149, at p. 159. (2) 6 Q.L.R. 120.

acquire no right in the highway. He does not appear to have considered the possibility of an implied dedication presumed from an acquiescence by the owners in the use made by the public of the highway which they themselves laid out. The uniformly accepted doctrine is thus expressed in Smith's Leading Cases (1915), volume 2, page 166:—

> Except where it is expressly created by statute, a highway derives its existence from a dedication to the public by the owner of land of a right of passage over it. This dedication, though it be not made in express terms, as it seldom is, may and generally will be presumed from an uninterrupted use by the public of the right of way claimed.

In *Rex* v. *Lloyd*(1), it was held:—

> If the owner of the soil throws open a passage, and neither marks by visible distinction, that he means to preserve his rights over it, nor excludes persons from passing through it by positive prohibition he shall be presumed to have dedicated it to the public.

In *Mann* v. *Brodie*(2), Lord Blackburn quotes the passage in *Poole* v. *Huskinson*(3), where Baron Parke states the principle of the law and then says:—

> But it has always been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.

And in *Folkestone Corporation* v. *Brockman* (4), Lord Atkinson, at page 368, referring to Taylor on Evidence, 9th edition, par. 131, adds:—

> The statement of the law in that paragraph is perfectly accurate, and is supported by the six authorities mentioned in the notes. It is to this effect that the uninterrupted user of a road justifies a presumption in favour of the original *animus dedicandi* even against the Crown.

The doctrine of dedication, as had been recently said, is based in all the decided cases, upon the proposition that a person cannot lead the general public

(1) 1 Camp. 260 at p. 262.
(2) 10 App. Cas. 378, at p. 386.
(3) 11 M. & W. 827, at p. 830.
(4) [1914] A.C. 338.

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or a local public, to base their action, and build up their fabric of life upon the theory of permission of a certain kind, on his part, in respect of his land, and when they have thus accommodated their affairs to this expectation, violate the confidence thus invited. I admit, of course, with my brother Anglin, that theoretically there must be intention on the part of the private owner, but such intention may be and in almost every instance is, shewn exclusively by his physical acts; and the requirements of intent on his part is hardly more than theory. Indeed, the private owner's action is ordinarily such that he would be estopped to deny the existence of an intention on his part.

In that view of the law, are we, in presence of the conflicting findings of fact in the courts below, in a position to say, that the defendant, upon whom lay the burden of proving dedication, has satisfied his obligation? As Sir Montague Smith said in *Turner* v. *Walsh*(1):—

> The proper way * * * is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses.

Considering the whole evidence in the light of that doctrine and with great deference for the opinions of those who differ from me, I am driven irresistibly to the conclusion that the defendant has made out his defence.

The facts proved and as to which there is practically no dispute are: that the plaintiff company, owners of large cotton mills, for their own benefit and incidentally for the convenience of their employees, built upon the lot of land known in these proceedings under the

(1) 6 App. Cas. 636, at p. 642.

No. 59 (a), and across which the road in question runs, two rows of houses facing the river and separated by a road. To enable the employees, occupants of the houses, to reach the mills situate below, on the shore of the river in the village of Montmorency Falls, a road or way was necessary. But it was equally important that those employees should have a means of access to the public road above known as "Côte à Courville" which winding down the hillside led from the village known as St. Louis de Courville to Montmorency village. Otherwise they would be cut off from communication with the centres upon which they were dependent for the daily needs of themselves and their families. All their purveyors, such as the baker, butcher, etc. lived in those villages. To provide those necessary conveniences, a macadamized road 36 feet wide was built. This road started from the "Côte à Courville" to the north and continued down below the houses built for the employees where it was connected with a plank boardwalk which in turn opened into a stairway leading down the steep hillside to the public road below. So that the company built a continuous way leading from one public road to another and which is proved to have been travelled for 14 or 15 years openly, freely and without objection during all seasons and at all hours of the day and night, not only by those who had business with the company's employees but also as a way of access to the villages of Montmorency Falls and St. Louis de Courville.

The plaintiffs, respondents, in their factum say that as originally built the road did not extend to the brink of the hill and that up to June, 1905, it terminated at

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a grassy ground where the children of the employees could play and amuse themselves at ease and that that construction of the stairs is posterior to 14th June, 1905.

Admitting this to be the fact, there may be a highway through a place which is no thoroughfare, as Campbell C.J. said in *Bateman* v. *Bluck*(1). Take the case of a large square with only one entrance, the owner of which has, for many years, permitted all persons to go into and round it; it would be strange if he could afterwards treat all persons entering it, except the inhabitants, as trespassers. That case seems to be on all fours with the case which the plaintiff company present in their factum. But in fact it appears by the plans filed and from the description of the locality given by the witnesses that without the stairs the road would not give the employees the convenience of access to the mills; which was the chief object of the company. And one rather expects to hear such witnesses as Mailloux, the superintendent of the mill, Coté who actually built the stairs for the company, and Curé Ruelle who sold them the land, frankly say, when examined as witnesses, that the stairs were built at the same time as the houses, that is to say, 14 or 15 years before the suit was brought.

We have therefore a road built by the plaintiffs admittedly to connect the "Côte à Courville" with another public road at Montmorency village having all the outward physical characteristics of a public highway, without a gate, barrier, sign-post or anything to indicate an intention on the part of the proprietor to limit its use. It is also in evidence that the road was used from the very beginning not only by the local public for their convenience but also by those who travelled by the electric railway to and from

(1) 18 Q.B. 870, at p. 876.

the City of Quebec. Leclerc, the instigator of this suit says, in answer to a question:

Il vient des voitures de tout bord et de côté.

Curé Ruelle says in effect, when examined for the plaintiffs, that this road is used by the public in preference to the "Côte à Courville," because it is a short cut, and without objection until these proceedings were started. It is also worthy of notice, as evidence of the intention of the owners of the land to dedicate to the public the highway they had opened, that they did not reserve the use of all the lodgings in the buildings for their employees. One of the tenements was rented to a grocer named Vachon, who did business with all those from the outside that he could reach, and it is proved that scores of people, who had no connection whatever with the company or its employees, used the road to come to his store. To the east of the highway in question, an hospital and a laundry had been built with access to the road, and those who had business with either used the road at will. The appellant Harvey had a blacksmith shop on the land he still occupies and he tells us that the public used this road without let or hindrance to reach that shop which was afterwards rented to Vachon, the company's tenant, and he, Vachon, used it as a storehouse to which his customers from the outside had access. It would be difficult to find a case in which a highway had been used more universally and for more varied purposes by the people of the neighbourhood. If, as the evidence establishes, the company built a road of the regulation width, of the material usually employed in the construction of public thoroughfares to connect two public municipal roads and permitted the general public to use it as of right for over 12 years,

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the presumption of dedication is in my opinion irresistible. In *Dovaston* v. *Payne*(1), eight years' user was held to shew sufficient acceptance and in the much litigated case to which I have already referred of *Bateman* v. *Bluck*(2), six years sufficed. The creation of a public lane in private land by informal dealings of the land owner with the public over as short a period as eighteen months, was held sufficient. In *North London Rly. Co.* v. *Vestry of St. Mary*(3), and in *Reg.* v. *Petrie* (4), the Court permitted a jury to find an instantaneous dedication. Mere occasional use had been held to support a title in the public, *Mildred* v. *Weaver*(5).

There is no evidence here that the company ever seriously objected to the use of the road by the public as of right. It is on the contrary established that this whole difficulty has arisen out of a conflict between one of the tenants of the company, not an employee, who complained of the business competition the defendant gave him.

I am of opinion that there has been such evidence of user by the public of the right of way with the acquiescence of the owner as to justify the defendant's plea and that this appeal should be allowed with costs.

DAVIES J.—The substantial question between the parties to this appeal is whether a certain roadway running through plaintiffs' land was a public road or not.

There was much difference of judicial opinion in the courts below, the trial judge holding the roadway not to be a public way, the Court of Review reversing that judgment and holding it to be a public

(1) 2 Sm. L.C. 154.
(2) 18 Q.B. 870.
(3) 27 L.T. 672.
(4) 4 El. & Bl. 737.
(5) 3 F. & F. 30.

way and the Court of King's Bench (Pelletier J. dissenting) in turn reversing the latter judgment and restoring that of the trial judge.

The appellant relied largely upon the statute of Canada 18 Vict., ch. 100, sec. 41, sub-sec. 9, which he held applicable to the road in question and contained the law on the subject.

That section and the preceding one, which must be read with it, are as follows:—

8. Every road declared a Public Highway by any *Procès-Verbal*, By-law or Order of any Grand Voyer, Warden, Commissioner or Municipal Council, legally made, and in force when this Act shall commence, shall be held to be a Road within the meaning of this Act, until it be otherwise ordered by competent authority.

9. And any road left open to and used as such by the public, without contestation of their right, during a period of ten years or upwards, shall be held to have been legally declared a Public Highway by some competent authority as aforesaid, and to be a Road within the meaning of this Act.

The question which immediately arises is not whether those sub-sections are in force for the purposes and objects for which they were passed but whether they were intended as a general law and operative as such until repealed expressly or impliedly.

As a fact they have not been expressly repealed but they do not appear in the later statute of 1860 which was an Act to consolidate the Act 18 Vict. ch. 100 and its amendments, or in any later Act as one would suppose they would if they were not merely temporary provisions but general ones.

They are both sub-sections of section 41 of the "Municipal Road Act" of 1855, and are connected together by the conjunction "and." They deal with the same subject matter, *roads*, and, it seems to me, must be read and construed together.

Sub-section 8 enacted that every road declared a public highway by any procès-verbal, by-law, etc.,

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legally made, *and in force when this Act shall commence,* shall be held to be a road, etc.

Sub-section 9 enacts that any road left open to and used as such by the public without contestation of their rights during a period of ten years shall be held to *have been legally declared* a public highway by some competent authority *as aforesaid.* These last words "as aforesaid" clearly refer to the authorities expressly mentioned in sub-section 8. Under the one subsection the declaration of the *procès-verbal in force when the Act began* to run declaring a road to be a public highway was sufficient. Under the other sub-section (9) after ten years uncontested user by the public of any road it

> shall be held to have been legally declared a public highway by some competent authority *as* aforesaid.

Sub-section 8 was clearly a temporary provision having reference only to roads in existence at the date of the coming into force of the Act and, as I have said, I think subsection 9 should be read with it and construed as limited to roads which had on the 1st July, 1855, been left open and used as such by the public without contestation of their right for ten years and upwards. That view of the scope of their provisions would account for their non-appearance in subsequent revisions of the statute as also for their not having been expressly repealed. This was the view expressed by Mr. Justice Burbidge in the case of *Bourget* v. *The Queen*(1).

Several Quebec authorities were cited as shewing that a contrary view was held as to the scope of sub-section 9 of several judges. But I do not think that in any of the cases cited the express question I am

(1) 2 Ex. C.R. 1, at pp. 7, 8.

now dealing with had been raised. The general character of the sub-section was assumed. Of course, if there had been decisions establishing a jurisprudence on the point in the province, I would not venture to challenge it. Mr. Taschereau, however, also relied upon arts. 749 and 750 of the Municipal Code of Quebec as a second string to his bow. He contended that these articles did not abrogate the 8th and 9th sub-sections of section 41 of the "Municipal Act" of 18 Vict., although they contain no limit as to time.

He was obliged however to concede that for the greater part of its length this road in question was not "fenced on each side or otherwise divided from the adjoining land," as required by the statute to make it a statutory road. As I understood him, however, he contended that for the comparatively short distance it was so divided, the road would be held to be a public road. I cannot agree with such an interpretation and can see that it might if adopted lead to great injustice. It was suggested, but I do not think pressed, that the sidewalk would be such a division as the statute contemplates. I cannot accept the suggestion. The "otherwise divided" in the article means by fences, as expressed, or something equivalent to fences and having the same effect, such as buildings, etc.

I will not labour this branch of the case further than to say that upon it I fully concur with the reasons stated by Mr. Justice Cross in his judgment in the Court of King's Bench.

For the foregoing reasons, I would dismiss the appeal with costs.

IDINGTON J.—I am of opinion that 18 Vict., ch. 100, sec. 41, sub-sec. 9, was not intended to be merely retrospective and is still in force and operative as each

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occasion or situation created by the development of facts fitting its terms arises; of which those bearing upon the existence of the road in question for the prescribed term of ten years seem to be such as to establish at least the greater part of the road now in question as a public road.

The law relative to dedication has always been somewhat difficult of application by reason of its requiring evidence of the intention in the mind of the owner to dedicate, and again of an acceptance thereof by some authority representing the public to establish dedication.

The said section seems designed to simplify the means of proof and by such an enactment to establish by way of prescription a road when it has been used by the public for ten years without contestation by the owner.

Is it possible that the simplicity of the enactment so perplexed those judicially or legislatively concerned in its application as to render its efficacy a matter of doubt?

However that may be, I think the enactment is not in conflict with articles 749 and 750 of the Municipal Code, and both standing together render the road in question a public highway.

The difficulty about it not being throughout a road over which teams can pass seems imaginary, for a public road may be a cul-de-sac, or its width capacity or utility be measured by that kind of traffic for which it has been used by the public without contestation for ten years and upwards.

I think the appeal should be allowed with costs and the judgment of the Court of Review be restored.

DUFF J.—This appeal should be dismissed with costs.

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ANGLIN J.—The question to be determined in this action is whether a road opened in 1900 by the Montmorency Cotton Company, the predecessors in title of the plaintiff company, on cadastral lot 59a, owned by them, is now of such a public character that the plaintiff company cannot control its use or exclude the public therefrom.

The Montmorency Cotton Company acquired lot 59a from Joseph Cauchon on the 23rd December, 1899, for the purpose of constructing dwellings thereon for the employees of its mills. It proceeded immediately to carry out that purpose and erected two blocks of apartments each facing on a cross road laid out by it. Each of these cross-roads debouches at its eastern end into the road in question. This latter road is 36 feet wide and runs southerly some 283 feet, along the eastern side of lot 59a, from the "Côte à Courville," a public highway, out of which it opens at its northern end. To the south it terminates in a field, part of lot 59a, about 125 feet north of the edge of a precipitous cliff. Beneath this cliff are situated the mills of the company, the church of the Parish of St. Grégoire, the electric railway station and the "Côte à Courville," which descends from the point at which the road in question leads from it, sweeping in a semi-circle first easterly, then southerly and finally westerly. At some later date not distinctly shewn, but apparently shortly after its purchase from Cauchon, the Montmorency Cotton Company, in order to establish more direct communication for its employees between their dwellings on lot 59a and the company's mills, acquired from the Catholic Episcopal Corporation a right of way, together with the right of constructing a stairway down the face of the cliff. In June, 1905, the Montmorency Cotton Company sold its undertaking, including lot 59a, to the plaintiff company.

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To the north of the plaintiff's property and above the "Côte à Courville" was the village of St. Louis de Courville, which had a population of some 200 to 300 families, and the Beauport Road. To the east of the road now in question and between it and the "Côte à Courville" lay private property from which it was separated by a fence maintained with indifferent care.

The defendant Harvey is the proprietor of a grocery shop built facing the east side of the road in question on property purchased by him in 1907 from M. le Curé Ruel. With this property he acquired a lane or passage giving him access to the "Côte à Courville" to the east. Used for a short time as a forge, Harvey's building was afterwards rented as a storehouse for several years to one Vachon, who kept a grocery shop on the plaintiffs' property on the opposite side of the road in question. Harvey resumed possession of his premises and opened a grocery business there during the fall of 1913. The entrance to his shop was from the road in question through a break in the fence between it and the plaintiff's property. One Leclerc subsequently leased the Vachon shop from the plaintiffs for a similar business. Wishing to destroy the competition of Harvey, through Paul Leclerc, his brother, one of its employees, he urged the plaintiff company to take steps to exclude Harvey from access to the road in question. The company first formally contested the right of user of the road by the public on the 30th May, 1914, by placing at its entrance in the "Côte à Courville" a notice, "Chemin Privé," and about the same time it caused a barrier to be erected closing the opening in the fence opposite Harvey's shop. This action *négatoire* was begun on

the 15th June, 1914, and the trial took place in October, 1914

Such, in outline, are the essential facts. While other facts which appear to be material will be noticed in dealing with the several aspects in which the defence is presented, for a more detailed and complete statement, reference may be had to the opinions in the courts below.

The plaintiffs having shewn that the property covered by the road was conveyed to them as part of cadastral lot 59a, the burden is on the defendant to establish his right to use it. Not alleging anything in the nature of a private right of way over it, he has undertaken to prove that the public has had from the time of its opening, or has since acquired, rights in the road of such a nature that the plaintiffs cannot now prevent their exercise. This he has endeavoured to do on three distinct grounds:

(a) That dedication to the public has been shewn;

(b) That under arts. 749 and 750 of the Municipal Code the road has become a municipal road;

(c) That under art. 9 of sec. 41 of 18 Vict., ch. 100, (hereinafter referred to as art. 9) it has become a public road.

Assuming that under the law of Quebec, notwithstanding the provisions of arts. 549 and 776 C.C., dedication of a road to the public may be proved by evidence of conduct and acquiescence, as some authorities entitled to great weight indicate, I need only refer to *Chavigny de la Chevrotière* v. *Cité de Montréal* (1); *Mignerand dit Myrand* v. *Légaré*(2); and *Rhodes* v. *Pérusse*(3), any intention on the part of the respondent

(1) 12 App. Cas. 149, at p. 157. (2) 6 Q.L.R. 120, at pp. 122 *et seq.*
(3) 41 Can. S.C.R. 264, at p. 273.

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company or its predecessor to dedicate the road in question as a highway is, in my opinion, rebutted by the circumstances in evidence before us—notably by the facts that the purpose of the company in opening the road was to afford to its employees for whom it had constructed dwellings on lot 59a direct and convenient access to and from the "Côte à Courville" above and that its purpose in acquiring a right of way and constructing a stairway down the cliff on the property of the Episcopal Corporation was to afford the same employees a direct and convenient means of communication between their dwellings and the company's works; that the company constructed and has since maintained and cared for the road and the sidewalk upon it as well as the stairway down the cliffside at its own expense; and that a fence was erected and maintained shutting off the property on the east side of the road from access to it except where breaks were from time to time made, *Roberts* v. *Karr*(1), whereas it was left open and directly accessible from the remainder of lot 59a. There is in addition the cogent evidence of the appellant himself and of M. le Curé Ruel that until quite recently, when the idea was spread abroad that ten years' user had made of it a public road, the road in question was regarded by them as a private road, the property of the company, to which the one had not the right to take, or the other the right to give, an exit from the lot bought by Harvey from M. le Curé, and the further important fact, not contested, that Harvey himself, as recently as 1914, took part with an official of the plaintiff company in defining the line between properties lying to the east of it, including his own, and the roadway in question for the purpose of having the fence separating

(1) 1 Camp. 262n.

them from the roadway rebuilt on the correct line of the eastern limit of the company's lands.

We have the authority of the Privy Council for the proposition that, although the law of Quebec as to the ownership of the soil of a road differs from the law of England (p. 159), in the matter of dedication to be presumed from long continued public user and absence of contestation evidencing an abandonment of right by those who might have disputed that user "there seems to be no difference between the law of Lower Canada and the law of England and Scotland. *Chavigny de la Chevrotière* v. *Cité de Montréal*(1). Long continued user by the public is only evidence of the intention to dedicate. Its value depends on the circumstances. *Folkestone Corporation* v. *Brockman*(2); *McGinnis* v. *Letourneau*(3). Abandonment or dedication to the public will not be lightly presumed. *Chamberland* v. *Fortier*(4); *Peters* v. *Sinclair*(5); affirmed in the Privy Council(6); *Corporation of St. Martin* v. *Cantin*(7).

Viewed most favourably to the defendant, the facts here in evidence are as consistent with an intention not to dedicate as with an intention to dedicate: and that will not suffice. *Piggott* v. *Goldstraw*(8). But, as I have already said, the circumstances under which, and the manner in which the road was opened, I think, actually rebut an intention to dedicate it to the public, and the presumption to be drawn from long continued user is of "a complete dedication coëval with the early user," *Turner* v. *Walsh*(9).

(1) 12 App. Cas. 149, at p. 157.
(2) [1914] A.C. 338, at pp. 352, 363-6.
(3) 14 Leg. N. 314.
(4) 23 Can. S.C.R. 371.
(5) 48 Can. S.C.R. 57; 13 D.L.R. 468.
(6) 49 Can. S.C.R. VII.; 18 D.L.R. 754.
(7) 2 L.N. 14.
(8) 84 L.T. 94, at p. 96.
(9) 6 App. Cas. 636, at p. 642.

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It must always be remembered that we are here dealing with a question of presumed intention, not with one of prescription. Dedication must rest upon intention. The clear and unequivocal proof from which intention to dedicate might properly be presumed in my opinion is not found in the record. Upon this aspect of the case I therefore agree with the views expressed in the Court of King's Bench by Mr. Justice Carroll and Mr. Justice Cross.

Nor does the evidence bring the case within arts. 749 and 750 of the Municipal Code. I find no difference, such as Mr. Justice Flynn suggested in the Court of Review, between the English and the French versions of those articles. "Fenced on either side" means not on one side or the other, but on each side, *i.e.*, on both sides, and is the equivalent of "clôturés de chaque côté." While the road in question was not habitually kept closed at its extremities," it was, in my opinion, not "fenced on either side or otherwise divided off from the remaining land" within the meaning of the articles under consideration. The fence on the east side of the road, though merely a line fence between adjoining properties of different proprietors, and not meant to define or separate it as a road from the adjoining lands but rather to exclude the owners of those lands from access to it, was possibly sufficient to meet the requirement of arts. 749 and 750 as to that side of the road. But on the west side, except possibly for a few feet at the extreme north end, there was no fence at all. The sidewalk was built on the roadway. The line of the buildings was not continuous, nor does it appear that they came out to the street line. There is no evidence of a ditch or other boundary mark. The road on this side was not "fenced or otherwise divided off from the (company's)

remaining land" in any manner which met the requirements of arts. 749 and 750. On the contrary, it was enclosed as part of one property or holding with the remainder of lot 59a by the fence which separated it from the properties to the east. There is no suggestion of any separation of the southerly 25 feet, where a footpath or walk led across a field from the end of the defined roadway to the head of the stairway. Moreover, although those articles declare that lands or passages used as roads by the mere permission of the owner or occupant (*chemins de tolérance*) are 'municipal roads" if they fulfil the prescribed conditions it may not follow that the owners have lost all control over them or the right to close them. They retain the property in the soil and are subject to the obligation to maintain them. (Arts. 749 and 750 M.C.; compare arts. 748 and 752 M.C.) The municipality is liable for injuries sustained through defects in such roads (arts. 757 and 793 M.C.) and is, no doubt for that reason, empowered, not to close them itself, as it would probably have been authorized to do had they ceased to be "chemins de tolérance," but to order the owners or occupants to do so. Without further consideration I am not prepared to disagree with the view of Mr. Justice Malouin, Mr. Justice Carroll and Mr. Justice Cross that if the road in question was a municipal road within arts. 749 and 750 M.C., that fact would not prevent the owner exercising the right to close it or to forbid its use as a "*chemin de tolérance.*"

The defence chiefly relied on, however, is that a prescriptive public right has arisen under 18 Vict. ch. 100, sec. 41, art. 9. The English and French texts of arts. 8 and 9 of sec. 41 of this statute are as follows:—

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8. Every road declared a Public Highway by any Procés Verbal, By-law or Order of any Grand Voyer, Warden, Commissioner or Municipal Council, legally made, and in force when this Act shall commence, shall be held to be a Road within the meaning of this Act, until it be otherwise ordered by competent authority.

9. And any road left open to and used as such by the public, without contestation of their right, during a period of ten years or upwards, shall be held to have been legally declared a Public Highway by some competent authority as aforesaid, and to be a Road within the meaning of this Act.

8. Tout chemin déclaré grand chemin public par un procès-verbal règlement ou ordre d'un grand-voyer, préfet, commissaire, ou conseil municipal, légalement dressé et en vigueur au moment où cet acte entrera en opération, sera considéré comme chemin suivant l'esprit de cet acte, jusqu'à ce qu'il en soit autrement ordonné par l'autorité compétente;

9. Et tout chemin ouvert et fréquenté comme tel par le public, sans contestation de son droit, pendant l'espace de dix années ou plus, sera censé avoir été légalement reconnu comme grand chemin public par quelque autorité compétente comme susdit, et être un chemin suivant l'esprit de cet acte.

Three questions are involved in this branch of the case:

(1) Is art. 9 still in force?

(2) Does it apply to roads not already in existence for ten years when it was enacted?

(3) Does the evidence establish a user by the public of the road as such for ten years prior to the 30th May, 1914?

Art. 9 has not been expressly repealed and I find nothing in the Municipal Code or in any other Act to which our attention has been directed so repugnant to it or so inconsistent with it that repeal by implication would follow therefrom. I accept without hesitation the unanimous opinion of all the judges of the provincial courts who have dealt with this question in the present case, that art. 9 is still in force, which follows a practically uniform line of decisions extending from

Parent v. *Daigle*(1), to *Nolin* v. *Gosselin*(2), if we except doubts expressed by Ramsay J. in *Guy* v. *Cité de Montréal*(3), and by Bossé J. in *Fortin* v. *Truchon*(4).

The other two questions cannot be so easily disposed of. For convenience I propose to deal with them in inverse order.

I am, with deference, unable to accede to the "*considérant*" in the judgment of the Court of Appeal expressed in the following terms:

> Considérant que le public ne peut prescrire un chemin par l'usage qu'il en fait, en vertu de la loi 18 Vict. ch. 100, sec. 9, à moins que cet usage ne soit exclusif de celui du propriétaire qui possède à l'encontre du public.

We are now dealing not with a question of intention to dedicate, but with one of prescription. The statute does not exact a user exclusive of that of the owner of the soil and of his tenants as members of the public. For aught that appears there was nothing to distinguish their user of the road in the present case from the user by other members of the public. It did not amount to a contestation of the public right. All that the statute requires is a user of the road as such by the public without contestation of its right during ten years. I am, with great respect for the Court of King's Bench, in which the contrary view prevailed, of the opinion that the evidence fully establishes such a user.

Had the traffic on the road been solely to and from the dwellings of the company's employees it might be urged with much force, notwithstanding its extent, that it was throughout a private user by permission of the company. I am not certain that traffic to and from Vachon's shop, since he was a tenant of the company, might not be viewed in the same light.

(1) (1877), 4 Q.L.R. 154.
(2) (1912), Q.R. 24 K.B. 289.
(3) 3 L. N. 402.
(4) 15 Q.L.R. 186.

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But the traffic of the residents of St. Louis de Courville to and from the railway station and to and from the church was certainly not of that character. It was undoubtedly a user of the road as such by the public. There is a mass of evidence that this user has been very extensive and has been going on without let or hindrance for over fourteen years.

From the wording of the transfer of the right of way down the face of the cliff in the deed from the Montmorency Cotton Company to the Dominion Textile Company Mr. Justice Carroll has drawn the inference that the stairway down the cliffside was built after that deed was executed (June 15th, 1905) and that the traffic to and from St. Louis de Courville therefore began within ten years before the present action was instituted. But, although if that were the fact it could have been readily established, there is not a tittle of actual evidence to that effect. The deed of the right of way from the Episcopal Corporation to the Montmorency Cotton Company is not in evidence. Even its date has not been given. The description of the right of way in the deed of June, 1905, was not improbably copied from the deed given by the Episcopal Corporation. It bears some internal evidence that it was. The words "by the said company," if in the earlier deed, would there refer only to the purchasers, the Montmorency Cotton Company. No other company was a party to that deed. In the deed of 1905 the reference is ambiguous. It may be either to the vendor company or to the purchaser company. Both were parties to it. If the description was copied from the earlier deed the use of these words is accounted for and the presence of the words

by a flight of steps or footpath *to be made,* placed and maintained thereon,

in the deed of 1905, notwithstanding that the stairway had already been constructed, is also explained.

But any inference from the language of that deed cannot weigh for a moment against such positive and uncontradicted testimony as that of Philippe Côté who says that he has used the stairway for fourteen or fifteen years, that it was built at the same time as the block of dwellings, and that it was he who arranged the foot of the stairway where it joins the "Côte à Courville." Antoine Mailloux, the plaintiff company's superintendent, though he cannot say just when the stairway was built—a little after the block he thinks—says the public has made use of the road and stairway for fifteen years. M. le Curé Ruel says the road has been built as it now is for about fifteen years and has been used by the public with the stairway during that period in coming to and going from his church. There was no church at St. Louis de Courville until recently. The road and stairway were also used in going to and from a hospital which was situated for a couple of years on its east side near the north end. Vital Giroux says many people arriving by the electric cars used the stairs and road for fifteen years past and that they were also used by the public in going to church. J. W. St. Pierre says everybody (tout le monde) has used the road like any other public road since the stairway was built—for fifteen years—and he refers specially to the traffic of residents of St. Louis de Courville to and from the electric cars. Adelard Lortie, Mayor of the Village of Montmorency, says that for fifteen years the public has treated the road as a public road without any hindrance. Even Paul Leclerc admits that the road was used for traffic of

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all kinds publicly, openly and without obstruction, and that it was regarded as a public road.

These are all witnesses called for the company. Taken with the evidence given for the defendant their testimony puts beyond doubt the character and the extent of the user by the public of the road as a public road, without any contestation of its right, for a period upwards of ten years. On this point I find myself in accord with the conclusion of Mr. Justice Pelletier and the learned judges who sat in the Court of Review.

It therefore becomes necessary to decide whether art. 9 of sec. 41 of the 18 Vict., ch. 100, applies to a road first opened, as was that here in question, in 1899 or 1900. The appellant insists that it should be held that it does both upon the proper construction of its terms and because, as he maintains, that view has been taken of it in a long and unbroken series of decisions in the Quebec courts and has thus become a recognized rule in regard to public rights and property which should not lightly be broken in upon or disturbed.

Without questioning our right to review and, if thought proper, to overrule even a long series of provincial decisions based on an erroneous construction of a statute, *Hamilton* v. *Baker*, *"The Sara"*(1); *Maddison* v. *Emmerson*(2): having regard to the nature of the subject and to practical results, although the doctrine of *stare decisis* has not been accepted under the French system to the same extent as in English jurisprudence, I should probably have thought it the better course not to interfere with a uniform and unquestioned line of decisions which people had considered as having settled the law on a particular subject and had acted on for a long period. *London*

(1) 14 App. Cas. 209. (2) 34 Can. S.C.R. 533; [1906] A.C. 569, at p. 580.

County Council v. *Churchwardens etc. of Erith*(1); *Morgan* v. *Fear*(2); *Cohen* v. *Bayley-Worthington*(3). But it is necessary to examine with some care the line of cases alleged to be numerous and uniform, because a decision, though followed, if it has been often questioned and doubted is clearly open for reconsideration in a court of superior jurisdiction. *The "Bernina"*(4); *Pearson* v. *Pearson*(5); (overruled on other grounds); *The Queen* v. *Edwards*(6). I shall therefore briefly refer in chronological order to the cases cited in the judgments below and in the factums.

In *Johnson* v. *Archambault*(7), the Court of Queen's Bench dealt with a lane which it held to have been a public street long before 1834. No reference is made to art. 9.

In *Parent* v. *Daigle*(8), Meredith C.J. and Stuart J. treated art. 9 as in force and applicable to the road there in question, which, however,

had been used * * * as a public road for thirty years and upwards, in fact as long ago as the time to which the memory of the oldest witnesses examined in the case can extend.

In *Théoret* v. *Ouimet*(9), the road dealt with had always served the purposes of the neighbouring proprietors and the court held that the defendant had obstructed this road without any right or title. No allusion is made to art. 9.

In *Mignerand dit Myrand* v. *Légaré*(10), the Court of King's Bench, Dorion C.J. presiding, again applied the same statute (pp. 127, 128); but the road dealt with had been open and in public use for over sixty years and both the learned Chief Justice and Mr.

(1) [1893] A.C. 562, at p. 599.
(2) [1907] A.C. 425, at p. 429.
(3) [1908] A.C. 97, at p. 99.
(4) 13 App. Cas. 1, at p. 9.
(5) 27 Ch. D. 145, at p. 158.
(6) 13 Q.B.D. 586, at pp. 590-1, 593, 595.
(7) (1864), 8 L.C.J. 317.
(8) (1877), 4 Q.L.R. 154.
(9) (1878), M.L.R. 1 S.C. 275.
(10) (1879), 6 Q.L.R. 120.

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Justice Tessier, who alone delivered judgments, upheld the public right as having been acquired by prescription "de droit commun."

In *Guy* v. *Cité de Montréal*(1), the decision rests on dedication and Dorion C.J. refers to *Myrand* v. *Légaré* (2), as an authority that for dedication a title in writing is not necessary. The street in question had been referred to as a highway in a petition made in 1831. In this case Ramsay J. who had sat in *Myrand* v. *Légaré*(2), questions whether art. 9 is in force, and is not prepared to say that he "feels bound by the dictum in *Myrand* v. *Légaré*(2).'

In *Chavigny de la Chevrotière* v. *Cité de Montréal*(3), the statutory provision dealt with is not art. 9 of sec. 41 of the 18 Vict., ch. 100, which does not apply to Montreal, but a somewhat similar provision of 23 Vict., ch. 72, which is the charter of the City of Montreal and applies to it alone. As such its non-inclusion in th revised statutes of course lacks the significance which attaches to the omission therefrom of art. 9 of sec. 41 of the 18 Vict., ch. 100. Their Lordships held that there was

> evidence of long user and an abandonment of right by those who could have disputed that user sufficient to sustain at common law the public right.

This case affords no assistance in the construction of art. 9.

In *Bourget* v. *The Queen*(4), Burbidge J. having held that dedication was established, added, at page 7, that in his opinion art. 9 was a temporary provision having reference to roads in existence at the date when it came into force and in public use for ten years theretofore.

(1) (1880), 3 L.N. 402.
(2) (1879), 6 Q.L.R. 120.
(3) (1886), 12 App. Cas. 149.
(4) (1888), 2 Ex. R. 1.

In *Fortin* v. *Truchon*(1), the Court of King's Bench held that the evidence did not establish a ten years' user without contestation of right. But Mr. Justice Bossé, who alone appears to have delivered reasons for the judgment, said, in the course of his opinion,

C'est une question fort douteuse que de savoir si la section citée de la 18 V., à été en vigueur sous notre code municipal.

In *Childs* v. *Cité de Montréal*(2), Pagnuelo J. although he disposed of the case on the ground of dedication, refers incidentally, at page 398, to art. 9 as being in force and as having been reproduced in the charter of Montreal, 23 Vict., ch. 72.

In *Leveillé* v. *Cité de Montréal*(3), Mathieu J. at pages 419-20, makes a similar passing reference to the statute.

In *Lavertu* v. *Corporation de St. Romuald*(4), Andrews J. at page 260, cites *Myrand* v. *Légaré*(5); *Guy* v. *Cité de Montréal*(6), and *Childs* v. *Cité de Montréal*(7), as authorities on the effect of user of a road opened in 1870—a question, he adds, not before him.

Town of Westmount v. *Warminton*(8), was also a case of dedication (destination). Blanchet J. who alone delivered reasons for the judgment of the Court of Queen's Bench, said, at page 114, that in his opinion art. 9, though not repealed, is restricted in its application to roads existing before the 1st of July, 1855, the date of its adoption.

In *Banque Jacques Cartier* v. *Gauthier*(9), Ouimet J. in giving the judgment of the Superior Court, at page 251, refers to art. 9 as applicable to a modern street on the authority of *Mignerand dit Myrand* v. *Légaré*(10);

(1) (1888), 15 Q.L.R. 186.
(2) (1890), M.L.R. 6 S.C. 393.
(3) (1892), Q.R. 1 S.C. 410.
(4) (1896), Q.R. 11 S.C. 254.
(5) (1879), 6 Q.L.R. 120.
(6) (1880), 3 L.N. 402.
(7) (1890), M.L.R. 6 S.C. 393.
(8) (1898), Q.R. 9 Q.B. 101.
(9) (1900), Q.R. 10 Q.B. 245.
(10) (1879), 6 Q.L.R. 120.

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Childs v. *Cité de Montréal*(1); *Bourget* v. *The Queen*(2); *Johnson* v. *Archambault*(3); *Guy* v. *Cité de Montréal*(4) and *Town of Westmount* v. *Warminton*(5). His judgment was reversed, however, in the Court of Appeal on other grounds, and no allusion is there made to art. 9.

In *Jones* v. *Village of Asbestos*(6), Mr. Justice (now Chief Justice Sir Francis) Lemieux refers to art. 9 as not abrogated and an existing means by which the public may acquire a highway. The learned judge, however, held that dedication was established and the report does not shew when the user of the highway in question had begun

In *Shorey* v. *Cook*(7), Dunlop J. held a road to be established as a highway by dedication. He also expressed the view that art. 9 was in force and applicable to a street in use since 1892.

The King v. *Leclaire*(8), Lavergne J. says, at p. 219:

> The prescription established by 18 V., c. 100, art. 9 of s. 41, as to possession during ten years by a municipal corporation must be restricted to roads existing before the 1st July, 1855.

In *Rhodes* v. *Pérusse*(9), this Court held that there was complete, clear and unequivocal evidence of dedication, and there had been public user for over thirty years. No reference is made to art. 9.

In *Nolin* v. *Gosselin*(10), a road in public use for ten years after an attempt had been made in 1856 by the council of the municipality to abolish it was held by the Court of King's Bench to be a public highway, presumably under art. 9. But the Court also held that the road had not been in fact abolished within the meaning of art. 753 M.C. Mr. Justice Carroll

(1) (1890), M.L.R. 6 S.C. 393.
(2) (1888), 2 Ex. R. 1.
(3) (1864), 8 L.C. Jurist. 317.
(4) (1880), 3 L.N. 402.
(5) (1898), Q.R. 9 Q.B. 101.
(6) (1901), Q.R. 19 S.C. 168.
(7) (1904), Q.R. 26 S.C. 203.
(8) (1906), Q.R. 15 K.B. 214.
(9) (1908), 41 Can. S.C.R. 264.
(10) (1912), Q.B. 24 K.B. 289.

was of the opinion that art. 9 was inapplicable, but agreed in holding that the road had not been abolished.

In applying the doctrine of *stare decisis* it must always be borne in mind that only that part of a judicial decision is binding as authority which enunciates the principle on which the question before the court has been actually determined, *Kreglinger (G. & C.)* v. *New Patagonia Meat & Cold Storage Co. Ltd.*(1), and that mere dicta, even in speeches of individaul members of the House of Lords, while no doubt entitled to the greatest respect, do not bind even the lowest courts. *Latham* v. *Johnson* (2).

An analysis of the Quebec cases in which art. 9 has been referred to shews that in only one instance—and that as late as 1912—(*Nolin* v. *Gosselin*(3)), has the Court of Appeal held it applicable to a road opened after it was enacted. In two other Court of Appeal cases, *Fortin* v. *Truchon*(4) and *Town of Westmount* v. *Warminton*(5), the sole opinion delivered in each casts doubt on the point, Bossé J. in the former questioning whether the provision is in force and Blanchet J. in the latter expressing the view that it applies only to roads existing before its enactment. In one of the two remaining cases referred to, *Mignerand dit Myrand* v. *Légaré*(6), the question now under consideration did not arise, and in the other, *Guy* v. *Cité de Montréal*(7), Ramsay J. referring to the view expressed in *Mignerand dit Myrand* v. *Légaré*(6), that the article in question is in force, as a dictum, was not prepared to say he felt bound by it.

In four cases in the Superior Court, art. 9 has been treated as applicable to roads opened since 1855—

(1) (1914), A.C. 25, at pp. 39-40.
(2) (1913), 1 K.B. 398, at p. 408.
(3) (1912), Q.B. 24 K.B. 289.
(4) (1888), 15 Q.L.R. 186.
(5) (1898), Q.R. 9 Q.B. 101.
(6) (1879), 6 Q.L.R. 120.
(7) (1880), 3 L.N. 402.

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Turning to the consideration of the statute itself, we find art. 9 connected with art. 8 by the conjunction "and," which affords at least an indication that the legislature understood that in these two articles it was dealing with cognate matters, viz., road conditions existing at the time when the statute was passed, to which art. 8 is explicitly restricted. The use in the descriptive terms of art. 9 of the past instead of the future-perfect tense ("left open to and used," not "which shall have been left open to and used") points in the same direction, though not at all conclusively in view of the rule of interpretation that a statute is to be regarded as always speaking. In the Municipal and Road Act," 18 Vict., ch. 100, revised and

(1) (1896), Q.R. 11 S.C. 254.
(2) (1900), 10 Q.B. 245.
(3) (1904), Q.R. 26 S.C. 203.
(4) (1901), Q.R. 19 S.C. 168.
(5) (1890), M.L.R. 6 S.C. 393.
(6) (1892), Q.R. 1 S.C. 410.
(7) (1888), 2 Ex. R. 1.
(8) (1906), Q.R. 15 K.B. 214.
(9) 12 App. Cas. 149.
(10) (1877), 4 Q.L.R. 154.

consolidated by 23 Vict., ch. 61, and embodied in the Consolidated Statutes of 1860 as ch. 24, sec. 41 became sec. 40. Arts. 8 and 9 were entirely omitted therefrom and are not found elsewhere in these statutes. The Consolidating Act, 23 Vict., ch. 61, contained no repealing provision and the two articles, 8 and 9 of sec. 41 of the Act of 1855, were omitted, no doubt because the revisors and the legislature deemed them applicable only to roads which had been in existence and in public use for ten years before the 1st July, 1855. By the 34 Vict., ch. 68, the municipal laws of the Province of Quebec were consolidated in the Municipal Code. The repealing section (No. 1086) has, I think properly, been held not to have affected art. 9 of sec. 41 of the 18 Vict., ch. 100. Neither in the revision of the statutes of 1888 nor in that of 1909 has that article been reproduced, however, although it may fairly be assumed that the legislature was apprised of the conflict of judicial opinion as to its scope and application. If applicable to roads coming into existence since the 1st July, 1845, and if the prescriptive period which it provides is still current, the article should be found either in the Municipal Code or in the revised statutes. Its absence from both under the circumstances affords almost conclusive proof that the legislature has thrice recognized that the article was properly omitted from the 23 Vict., ch. 61, as spent or effete because applicable only to conditions existing on the 1st July, 1855. I agree with the view expressed by the late Mr. Justice Burbidge in *Bourget* v. *The Queen*(1).

For these reasons, expressed, I fear, at inordinate length, I would dismiss this appeal.

(1) 2 Ex. R. 1, at pp. 7-8.

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BRODEUR J.—Il s'agit d'une action négatoire de servitude instituée par l'intimée contre le défendeur-appelant dans les circonstances suivantes:

L'intimée, la "Dominion Textile Company," possède une usine près des chûtes Montmorency, dans le village de St. Grégoire de Montmorency. Désireuse évidemment d'améliorer le sort de ses employés, elle a bâti sur un terrain qu'elle avait acheté en 1899, deux pâtés de maisons pouvant donner logement à environ une cinquantaine de familles; et elle a ouvert en face de ces maisons de magnifiques rues qu'elle a macadamisées et sur lesquelles elle a fait construire des trottoirs. Elle a en même temps ouvert et empierré une rue transversale pour communiquer avec un chemin public appelé la "Côte à Courville"; et, en outre de cela, comme ces maisons se trouvent sur un terrain élevé, elle a construit, sur la pente de la falaise, un escalier qui conduit de cette rue transversale au village situé dans le bas, de sorte que les fournisseurs, les visiteurs et les amis des employés peuvent communiquer librement avec eux.

Ces rues servent non-seulement à l'usage des employés de l'usine et de leurs visiteurs mais sont aussi utilisées par les personnes qui demeurent plus haut sur la Côte à Courville et sur le chemin de Beauport et qui désirent aller au village en bas de la falaise. Elles sont devenues des rues publiques utilisées par tout le monde sans aucune objection de la part de la compagnie et sans aucun indice qu'elles ne sont pas publiques.

Il y avait à l'est de cette rue transversale un terrain qui appartenait autrefois à M. l'abbé Ruel. Ce terrain connu sous le no. 63 du cadastre de Beauport fut vendu pour partie au défendeur en la présente

cause qui s'y est bâti une maison privée et une boutique de forge.

Cette boutique donnait sur la rue transversale en question et il y avait communication constante de cette rue à la boutique, à pied et en voiture. Ily avait eu là autrefois une clôture qui a été démolie afin de pouvoir faciliter cette communication.

C'est en 1907 que Harvey a acquis ce terrain-là et a construit cette boutique. Aucune objection dans le temps n'a été faite par l'intimée à ce que Harvey fasse cette ouverture et sorte directement sur la rue.

Deux ans après, cette boutique fut louée pour servir d'entrepôt à un marchand qui était l'un des locataires de la compagnie intimée dans le pâté de maisons qu'elle avait construites sur son terrain. Ce marchand nécessairement communiquait également de son magasin à la rue sans aucune objection et sans aucune difficulté.

Plus tard, Harvey a repris possession de sa boutique qui avait été convertie en magasin et commença à y faire commerce: et la compagnie, pour des raisons qui ne paraissent pas bien claires dans cette cause, a fermé la clôture qui séparait la rue de la propriété de Harvey, et lui a enlevé sa sortie. Ce dernier a de suite démoli cette clôture et de là action par la compagnie contre Harvey.

Le défendeur a plaidé:

1. la prescription décennale édictée par la loi 18 Vict., ch. 100, sec. 41, sub-sec. 9;

2. qu'il y avait eu abandon (*dedication*) de la rue en question en faveur du public.

Il plaide, en outre, que sous les dispositions de l'article 749 du Code Municipal cette rue est devenue un chemin municipal auquel il peut avoir accès comme toute autre personne.

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La première question qui se présente est de savoir si cette disposition de la loi 18 Victoria est encore en force et si elle s'applique aux chemins ouverts depuis 1855.

La portée de cette législation a été considérée par la Cour d'Appel en 1879, dans la cause de *Mignerand dit Myrand* v. *Légaré*(1), et il a été déclaré par l'honorable juge Dorion, qui a rendu le jugement de la cour, que

> Cette disposition détermine la période après laquelle un chemin ouvert au public devient un chemin public * * * .
>
> L'on a prétendu, que cette disposition avait été abrogée par le Code Municipal. Il est possible que l'on ait eu l'intention de le faire, mais je ne trouve rien dans le Code Municipal qui, soit expressément ou par inférence, ait eu l'effet de l'abroger. C'est aussi ce qu'a jugé la Cour de Revision dans la cause de *Parent* v. *Daigle* (2).

Cette opinion n'a pas été acceptée par tous les juges: mais elle a été généralement suivie, ainsi qu'on peut le voir en consultant les causes suivantes: 1880. *Guy* v. *Montréal*(3): 1887. *Lachevrotière* v. *Cité de Montréal*(4): 1888. *Fortin* v. *Truchon*(5): 1890. *Childs* v. *Montréal*(6): 1890. *Léveillé* v. *Cité de Montréal*(7): 1898. *Town of Westmount* v. *Warminton*(8): 1900. *Banque Jacques-Cartier* v. *Gauthier*(9): 1901. *Jones* v. *Village of Asbestos*(10): 1912. *Nolin* v. *Gosselin*(11). Mais dans cette cause de *Mignerand dit Myrand* v. *Légaré*(1), la seule question qui se présentait était de savoir si la loi n'avait pas été implicitement rappelée. On n'était pas appelé à décider si un chemin établi depuis 1855 était régi par cette loi: car le chemin dont il était question dans cette cause existait bien avant 1855.

(1) 6 Q.L.R. 120.
(2) 4 Q.L.R. 154.
(3) 1 D.C.A., 51.
(4) 10 L.N. 41.
(5) 12 L.N. 280.
(6) M.L.R. 6 S.C. 393.
(7) Q.R. 1 S.C., p. 140.
(8) Q.R. 9 Q.B., 101.
(9) Q.R. 10 Q.B. 245.
(10) Q.R. 19 S.C. 168.
(11) Q.R. 24 Q.B. 289.

Dans le cas actuel, nous avons à décider non-seulement si la loi 18 Vict. est encore en force, mais même si elle s'applique à un chemin ouvert dans les vingt dernières années.

Je suis d'opinion que les chemins ouverts depuis 1855 ne sont pas régis par la loi de 18 Victoria.

Quant à la question d'abandon ou de destination, que les auteurs anglais appellent "common law dedication," j'ai aussi des doutes tellement sérieux que je préfère ne pas exprimer d'opinion.

La "common law dedication" fait supposer la donation du terrain sur lequel est assis le chemin. Or, peut-on faire une donation d'immeuble sans titre? L'article 776 du Code Civil déclare que les actes portant donations entrevifs doivent être notariés à peine de nullité. Il me semble que cette disposition formelle du Code Civil rendrait illégale la donation d'une route dans le cas où il n'y aurait pas de titre. Mais cela n'empêcherait pas cependant ce chemin de devenir la propriété de la corporation municipale si pendant 30 ans elle en avait eu l'usage par l'entremise du public et par elle-même, car dans ce cas les relations légales des parties seraient régies par la prescription trentenaire édictée par l'article 2242 du même Code, qui n'oblige pas alors le donataire de montrer titre. Quant à la prescription trentenaire, elle ne saurait être invoquée dans la présente cause, vu que la possession du public ne remonte qu'à 15 années au plus.

Reste la question de savoir si la rue en question en cette cause-ci est un chemin municipal sous l'article 749 du Code Municipal et si elle peut être fermée.

Les chemins se divisent en chemins publics et en chemins privés. Les premiers sont sous la surveillance de l'autorité municipale ou gouvernementale,

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tandis que les chemins privés sont ceux utilisés par des particuliers et ne sont pas fréquentés par le public. On appelle aussi chemins privés des chemins de tolérance parce qu'ils sont ouverts par la volonté du propriétaire sur le terrain duquel ils passent.

Le chemin public est d'ordinaire ouvert par un pouvoir souverain, comme le conseil municipal. Il peut cependant devenir un chemin public par la prescription trentenaire, sous les dispositions de l'article 2242 du Code Civil qui déclare que

> Toutes choses, droits et actions dont la prescription n'est pas autrement réglée par la loi se prescrivent par trente ans sans que celui qui prescrit soit obligé de rapporter titre et sans qu'on puisse lui opposer l'exception déduite de mauvaise foi.

Dans le cas d'usage, pendant trente ans, d'un chemin non-seulement le droit de passage sur ce chemin est acquis au public, mais même la propri été du chemin lui-même appartient à l'autorité municipale (art. 752 C.M.).

Cette question de prescription trentenaire est admise généralement par la doctrine et la jurisprudence.

Proudhon, Domaine public, vol. 2, p. 372, dit:

> Quand un chemin qui sert de communication entre plusieurs lieux habités a été publiquement ouvert et librement pratiqué, c'est-à-dire paisiblement possédé par l'être moral et collectif que nous appelons le public, pendant plus de trente ans qui comportent aujour d'hui le terme extrême de notre prescription la plus longue, le droit en est acquis à ceux qui se trouvent à portée de s'en servir.

Les chemins deviennent donc chemins publics par l'action des autorités municipales ou par la prescription. Peuvent-ils le devenir autrement? Certainement: et c'est ce qu'édicte l'article 749 du code municipal quand il déclare que

> Les terrains ou passages occupés comme chemins par simple tolérance du propriétaire ou de l'occupant sont des chemins municipaux, s'ils sont clôturés de chaque côté ou autrement séparés du reste

du terrain et ne sont pas habituellement fermés à leurs extrémités: mais la propriété du terrain et l'obligation d'entretenir ces chemins continuent à appartenir dans tous les cas au propriétaire ou à l'occupant.

Le chemin de tolérance est un terme assez vague et assez indéfini dans la loi. Mais cette expression a rapport évidemment aux chemins ouverts par la volonté du propriétaire sur le terrain duquel ils passent. C'est un chemin privé sur lequel l'autorité municipale n'a aucun droit de propriété ni aucun contrôle. Mais ce chemin peut perdre son caractère de chemin privé s'il réunit les conditions édictées par l'article 749 du Code Municipal, c'est-à-dire s'il est ouvert aux deux extrémités et s'il est clôturé ou autrement séparé du reste de la propriété.

Proudhon, loc. cit., p. 373, nous dit que la solution de la question de savoir si un chemin peut être caractérisé comme chemin public présente beaucoup de difficultés et il ajoute qu'on devra examiner, en tr'autres choses,

s'il a été ferré ou recouvert en pierres, ce qui le mettrait hors de la catégorie des simples chemins de tolérance.

Le Nouveau Denisart, vo. Chemin, a tout un paragraphe sur les chemins de tolérance. C'est un des rares auteurs qui traite la question à fond. Les autres ne font que peu de commentaires et ce en passant, sans paraître approfondir le sujet. En parlant de ces chemins, Denisart nous dit que les chemins de tolérance peuvent être ouverts et fermés à la volonté du propriétaire et il base son opinion sur une décision du 10 juillet 1782, qu'il rapporte à la page 527 de son volume 4, où il a été jugé qu'un *chemin de tolérance entre des grilles* qui traversait le parc du château de Champigny et allait du Pont de St Maur au port de Chenevières, bien qu'il fût pavé, bien qu'il existât

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depuis très longtemps, pouvait être supprimé à la volonté du propriétaire.

Le principal moyen que M. de Champigny invoquait était que selon l'article 186 de la Coutume de Paris nulle servitude ne pouvait s'établir sans titre et que la possession même immémoriale ne suffit pas.

Il est évident par la doctrine et la jurisprudence moderne que le chemin sur une propriété ne constitue pas une servitude.

Proudhon, dans son traité du Domaine public publié en 1833, dit au no. 631, p. 368, que si un chemin s'est formé à travers un fonds, qu'il serve de communication entre des lieux habités ou d'un village à un autre village, il y a prescription acquisitive du chemin par la possession trenteñaire et que l'article 691 du Code Napoléon, qui correspond à l'article 186 de la coutume, ne s'applique pas, que les chemins publics sont subordonnés à un tout autre régime que celui des servitudes.

Cette opinion est également enseignée par Massé et Vergé sur Zachariae, vol. 2, par. 336, note 2, et par Demolombe, vol. 2, no. 792.

La doctrine énoncée dans la décision rapportée dans Denisart n'a donc pas été acceptée par les auteurs qui ont écrit au commencement ou au milieu du siècle dernier.

Il n'est pas étonnant que nos rédacteurs du code municipal aient jugé à propos de trancher la question en déclarant dans l'article 749 quand un chemin privé pourra devenir un chemin public ou un chemin municipal. Cette législation me paraît d'ailleurs basée sur un jugement rendu en 1832 par la Cour d'Appel dans deux causes de *Porteous* v. *Eno*, non rapportées, mais citées dans les notes du juge en chef, Sir A. A. Dorion, dans la cause de *Mignerand dit Myrand* v. *Légaré*(1) où

(1) 6 Q.L.R. 125.

il a été déclaré qu'un chemin qui paraissait n'avoir été d'abord qu'un chemin privé fermé à ses extrémités par des barrières, mais dans lequel le public avait été de temps immémorial dans l'habitude de passer, ne pouvait plus être fermé au public parce que depuis neuf ans les barrières avaient disparu et que le propriétaire avait fait une clôture pour séparer ce chemin du reste de sa propriété(1).

Cet article me paraît aussi conforme à une décision rendue en 1864 par la cour d'appel dans une cause de *Johnson* v. *Archambault*(1).

En déclarant ces chemins de tolérance des chemins municipaux, le Code municipal se trouve à les mettre sous le contrôle de la municipalité (art. 757 C.M.) et rend cette dernière responsable des accidents qui peuvent y survenir par manque d'entretien. C'est le devoir des corporations municipales de voir à faire entretenir tous les chemins municipaux, qu'elles en soient propriétaires ou non et que ces chemins soient des chemins ouverts par la tolérance du propriétaire ou par ordonnance municipale. C'est le devoir, dis-je, des corporations municipales de faire tenir ces chemins en bon ordre (art. 793 C.M.): et si elles négligent de remplir cette obligation, elles sont passibles de pénalités et de dommages. Dans le cas du chemin de l'article 749 C.M., ces corporations auront alors un recours en garantie contre le propriétaire: mais elles n'en sont pas moins directement responsables envers celui qui a éprouvé des dommages. Si elles trouvent cette obligation trop, onéreuse, elles peuvent faire fermer le chemin (art. 749 C.M. et arts. 525-527 C.M.).

Ces dispositions de la loi s'appliquent également aux rues des villages (art. 765 C.M.).

Il ne faut pas oublier non plus que d'après les

(1) 8 L.C.J. 317.

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dispositions de la loi, les rues des villages sont entretenues, dans le cas d'absence de règlements, par le propriétaire du lot qui a front sur ces rues (art. 824 C.M.). Et alors il ne faut donc pas trouver exorbitante cette disposition qui met les chemins de l'article 749 C.M. à la charge de celui qui les établit sur sa propriété.

Dans le cas actuel, le chemin est ouvert à ses extrémités. D'un bout il communique à la Côte de Courville, qui est un chemin municipal, et à l'autre bout, au moyen d'un escalier, il rejoint une rue publique.

Personne ne prétendra que cela ne constitue pas une sortie conforme à la loi.

Les auteurs du Nouveau Denisart, vo. Chemin, par. 3, no. 4, disent que

> les simples sentiers * * * doivent aussi être au rang des chemins publics quand le public est en possession de s'en servir depuis longtemps.

Que la sortie ne puisse être utilisée que par les piétons, cela ne fait aucune différence. Il n'est donc pas nécessaire que les voitures y passent.

La rue est clôturée d'un côté: et de l'autre il y a un trottoir qui la sépare du reste de la propriété.

Elle a donc toutes les conditions exigées par la loi pour devenir une rue publique.

Je puis ajouter que notre article 749 du Code municipal est dans notre loi ce qu'est la "statutory dedication" dans le droit anglais. Alors, comme toute "statutory dedication," elle est irrévocable, le chemin doit rester chemin public et le propriétaire ne peut faire quoi que ce soit qui puisse restreindre un propriétaire riverain dans le droit qu'il a de se servir de ce chemin.

Pour ces raisons, je suis d'opinion que l'action négatoire de servitude instituée par l'intimée est mal

fondée et que l'appel du demandeur doit être maintenu avec dépens de cette Cour et des Cours inférieures.

Appeal dismissed without costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon and Parent.*

Solicitors for the respondent: *Bédard, Prévost and Taschereau.*

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*Oct. 21.
*Nov. 10.

JANET McBRATNEY (DEFENDANT) . . APPELLANT;

AND

SADIE McBRATNEY (PLAINTIFF) . . . . RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Husband and wife—Will by husband—Relief to wife—Discretion of the court—Intestacy—"The Married Women's Relief Act," Alta. S. 1910, 2nd sess., c. 18, ss. 2 & 8.

The discretion conferred on the court in favour of the widow, who applies for relief under "The Married Women's Relief Act," is restricted, by implication, to the portion of her deceased husband's estate which she would have received on an intestacy. Idington J., contra.

Judgment of the Appellate Division (1919), 48 D.L.R. 29; [1919] 2 W.W.R. 685, reversed

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), affirming upon an equal division of the court, the judgment of the trial Judge, Stuart J.(2), and awarding the respondent a sum of $10,198 by way of relief.

The material facts of the case are fully stated in the judgments now reported.

C. T. Jones K.C. for the appellant.
M. B. Peacock for the respondent.

THE CHIEF JUSTICE.—I have no doubt as to the intent and meaning of the statute in question on this appeal. It reads as follows:—

1. This act may be cited as "The Married Women's Relief Act."

2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the judge before whom

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) (1919), 48 D.L.R. 29; [1919] 2 W.W.R. 685, at p. 690.
(2) (1919) 45 D.L.R. 738; [1919] 2 W.W.R. 685.

the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief.

* * * * *

8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

The legislature of Alberta had decided that under the conditions with which it was dealing in that Province the widow of a man dying intestate was entitled to receive as her share of the distributable estate of her husband one half. The statute now before us for construction seems to me simply to mean that the widow shall not be deprived of this statutory right but that if the husband by his will has attempted so to deprive her she may apply for relief to one of the Justices of the Supreme Court who may grant her such relief as he may determine is "just and equitable in the circumstances."

On such application the question immediately arises whether there is any and what limitation on this power given to the judge. Is he limited in its exercise by the amount of the statutory provision made for the widow in cases of intestacy, namely one half of the distributable estate of the husband or not; may he allow her without any limitation what he determines is "just and equitable in the circumstances" up to the full amount of the husband's distributable estate.

I think the legislature in determining the widow's share of her husband's estate in cases of intestacy has, in this new statute quoted above, imposed that limitation upon the judge's discretion and that he cannot allow her more than this statutory provision in cases of intestacy.

I cannot put the point more clearly or concisely than it is stated by Chief Justice Harvey in the Court of Appeal where he says:—

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Then again it is clear that if the husband die intestate, under no circumstances can the wife have more than the share fixed by law as her share on intestacy. Similarly, if the will give her that much she can have no more. Then can it be intended that, if the will give her any less, no matter how small the difference, this fact gives the Court the right to set aside the total disposition of the testator of any part of his property. I agree with Mr. Justice Walsh that such an anomaly could scarcely have been intended.

I fully concur with this conclusion of the Chief Justice and am of the opinion the order of the trial judge on this application must be set aside because it ignores the statutory limitation of the widow's rights in cases of intestacy and is in excess of the jurisdiction given to the judge by the statute.

Then the question arises what proportion of the half of the husband's distributable estate should be allowed the applicant. Should she be allowed up to the full amount of her rights in cases of intestacy or a smaller amount and if so what. The trial judge under a mistaken construction of his powers allowed her more than the full amount she would be entitled to in case of intestacy. Two of the learned judges of the Court of Appeal agreed with him alike as to his powers and as to the amount he allowed. In these circumstances I think, without attempting to deal with the evidence and fix the allowance in this Court, full justice will be done by reducing the amount allowed by the trial judge to the statutory provision in cases of intestacy, namely one half of the distributable estate; that being the full amount I conclude the Court is entitled to give under the statute.

I would therefore allow the appeal, set aside the judgment below and allow the widow one half of the distributable surplus of her husband's estate and would refer the case back to the Appellate Division of Alberta to give effect to our judgment.

Appellant's costs throughout should be paid out of the estate.

IDINGTON J.—The Legislature of Alberta in 1910, by an Act entitled "The Married Women's Relief Act" sections 2 and 8 thereof, enacted as follows:—

2. The widow of a man who dies leaving a will by the terms of which his said widow would, in the opinion of the judge before whom the application is made, receive less than if he had died intestate may apply to the Supreme Court for relief.

* * * * *

8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

The respondent is the widow of the late Robert Thomas McBratney who by his last will and testament devised and bequeathed unto the appellant Janet McGregor McBratney, all his real and personal estate and declared therein that he had made ample provision for his wife by transferring to her certain real properties in the City of Calgary.

The respondent, after a fruitless and expensive suit instituted by her to set aside the will, made an application under said section 2, quoted above, for such relief as the Act provides may be given.

Mr. Justice Stuart who heard the application, found that the properties held by the said widow produce about $25.00 a month, after deducting expenses; that she got about $1,000 insurance on her husband's life; and that the estate devised and bequeathed was probably worth $18,000. Out of this estimated value of the estate would have to be paid succession duties, the costs of the litigation brought about by respondent alone at least $2,000 and debts and expenses of administration.

Inasmuch as there was only one child, issue of the marriage, surviving, the widow would, in case of intestacy, have received half of the estate.

There is therefore ground for the application under

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the Act even if property held by the widow is to be reckoned with.

On the application the learned judge allowed the respondent $10,198 as a first charge on the estate.

He seemed to estimate she should have an annuity of $720 a year payable half yearly in addition to the revenue from the property and insurance monies she had got.

He proceeded on the theory that she should get a lump sum that would produce such an annuity—being what he says looking at the annuity tables it would cost. I think if we use common knowledge of the rate of interest in that province she thus gets an income of more than the husband's earnings in health, and income from real estate, at the time of the death combined, which had been found sufficient for the support of both of them.

With great respect, that does not seem to me to be the exercise of a reasonable discretion such as we are pressed with by the argument of respondent's counsel that it was.

Nor do I think, if regard is had to the position of the sister who is devisee of the estate and whose earning capacity may terminate ere long and she be left penniless, or nearly so, that such a disposition would, in the language of the statute, be "just and equitable in the circumstances."

If an equal division between those concerned of the estate left after paying all costs and all other expenses and charges, which would be what the widow would have got if her husband had died intestate, had been made, I do not think there would have been much room for successful argument on this appeal.

Or even if the annuity, which the learned judge suggested, had been given the respondent for life, as

a charge upon the estate, I should not have felt disposed to interfere, though possibly I might not, if trial judge, have given respondent as much.

In the first named alternative she would have got what the law has held for ages to be just under any circumstances; and hence, in the circumstances to be dealt with herein, possibly *primâ facie* just and equitable.

That is only after all perhaps a rough measure of justice but it has stood so long as being according to the conscience of our English race just and equitable that I do not think it should be discarded entirely in a case that presents such circumstances as this case does, and protects respondent thereunder in a way that seems ample seeing what she has already got.

I am not prepared to hold as two of the learned judges of the Appellate Division do that the line so drawn is one limiting the jurisdiction.

It is a line that should be given due weight and possibly be adhered to as not inconsistent with what is "just and equitable" when the circumstances are such as exist here, for our consideration.

But in many cases from conceivably an innumerable variety of circumstances such a line would neither be just nor equitable. It would give in many too little and in many more too much. I am not prepared to sanction any such doctrine, as being what the legislature intended as either the limit of this new jurisdiction or a *primâ facie* rule to be adopted.

The far reaching evil consequences of such a doctrine being established as law would, both in a social and economic sense, transcend what I would submit any of us can correctly appreciate.

I doubt if any one possessed of the necessary intelligence and of calm judgment, and the results of

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profound study of the problem, has ever proposed what is now seriously contended to be the established rule.

I say "established rule" for if we hold it is implied in the statute as a limit of the jurisdiction it may be said with equal force by others that it must be held an implication of what is just and equitable in the circumstances in any given case. If that was what the legislature intended it was manifestly easy to have said so. But it has not.

Is the reprobate husband of very small or moderate means entitled to give two thirds, or say a dollar more than the one half of his estate to some undeserving object and leave his wife practically penniless, a widow with children of tender years? Half of such an estate might leave the widow and children in poverty and distress when the circumstances might clearly demand that the entire estate should be given the widow to keep herself and children who depended on her alone. Yet in such a case the judge, according to the pretension put forward could not do that which would be "just and equitable."

Or is the millionaire who may have had the misfortune of being wedded to a dissolute wife bound to leave her half of his estate, or anything, or alternatively to be debarred from bestowing his fortune, on those deserving to receive his bounties, or giving it to public charities to promote the welfare of his fellow men?

I merely suggest these extreme cases to illustrate the possible consequences of interpreting the statute, as furnishing an intention of fixing a hard and fast line as to jurisdiction, and thereby possibly suggesting the implication goes much further than a jurisdictional limit which is not given.

The implication so found for one purpose can be

so easily found for another if the judicial sense would so lean in some case that did not disclose any repulsive features in adopting that innocent looking view.

Any one who has studied how legislation of the simplest and most reasonable character has become by slow steps the instrument of injustice, must feel how dangerous it is to depart from the plain ordinary meaning of the language used in this enactment. Can there be a doubt that the legislature when confronted with the problem of protecting the wife against the harsh conduct of a husband by his will leaving her unprovided for, had decided first to let her abide by the limits laid down in the Statute of Distribution, if the husband died intestate, or if by his will he had given her what she might have got in such a case, and then default either such event to give her means of relief? A husband who made no will or made one that was in accord with what the law as the exponent of the public conscience on the subject, had long held reasonable or the embodiment of the wife's reasonable expectations, clearly was deemed to have so acted in accord therewith as not to permit his conduct being reviewed.

A failure in that regard was evidently deemed by the Legislature such *primâ facie* evidence of ill feeling and evil conduct on the part of a deceased husband as to entitle the wife to apply to the court.

In such a case the entire burden was cast upon the court without restriction, if plain language means anything, of deciding whether or not she had reason to complain; and next if she had, how far she was entitled to the rectification of any wrong done her, by taking out of the husband's estate for her benefit so much as might be "just and equitable in the circumstances."

The burden so cast on the court was one of the

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heaviest conceivable, I imagine, and must be faced in each case as the plain language indicates.

The suggestion that such a complicated subject matter as the distribution of a man's estate "in the circumstances" is to depend wholly on the peculiar views of the learned judge who happens to hear the case and his decision is to be final, would lead to curious results.

I cannot imagine that such was ever the intention of the legislature.

The amount in controversy in this case gives us jurisdiction, in my opinion, freed from any difficulties such as have arisen in other cases as to some orders made, merely as a matter of discretion.

I think the appeal should be allowed with appellant's costs out of the estate and that the appellants may elect and determine whether or not the relief will take the form of an annuity to the widow for her life to be charged on the estate and that form of security to be changed if need be from time to time by leave of the Supreme Court of Alberta, in case in the administration of the estate such a course is desirable; or that the line of relief be the half of the nett residue of the estate after all costs heretofore incurred, or to be incurred, and all other expenses and outgoings in the administration of the estate have been satisfied.

DUFF J.—This appeal turns upon the construction of certain clauses in an Act entitled "The Married Women's Relief Act" which is ch. 18 of the statutes of 1910 of the Province of Alberta. The material clauses are these:—

2. The widow of a man who dies leaving a will by the terms of which his said widow would in the opinion of the Judge before whom the application is made receive less than if he had died intestate may apply to the Supreme Court for relief.

* * * * *

8. On any such application the Court may make such allowance to the applicant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances.

9. Any such allowance may be by way of an amount payable annually or otherwise, or of a lump sum to be paid * * *

Two interpretations of this enactment are proposed. According to the first the Act leaves unfettered the discretion of the court as regards the share of the estate to be allotted to the applicant provided the condition of jurisdiction is satisfied by which the authority of the court to intervene only arises when in the opinion of the judge the widow receives under the will less than she would have received if the deceased husband had died intestate. According to the second, assuming jurisdiction to be established, the court is not invested with power to deal with the whole of the estate but only with such aliquot part of it as the applicant would be entitled to in a case of intestacy and to making provision in her relief limited in amount to the value of such part.

The second of these views was adopted by the Chief Justice and Mr. Justice Scott, the first prevailing with Mr. Justice Stuart who presided at the hearing of the application and Mr. Justice McCarthy and Mr. Justice Simmons in the Appellate Division. On the whole I think the weight of argument favours the view of the Chief Justice and Mr. Justice Scott.

The consideration that was most emphatically pressed in favour of the construction which leaves it in the discretion of the court to apply the whole or any part of the estate in satisfaction of the widow's claim, according as justice and equity may appear to dictate, rests upon the words of section 8 which empowers the court to

make such allowance * * * out of the estate * * * disposed of by will as may be just and equitable.

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These words it is said are unambiguous and have the effect of placing the whole of the deceased husband's estate at the disposition of the court for the purpose of providing for the widow in such a manner as the court may think right—leaving it to the court, as regards the property affected by the testamentary disposition, to remake the testator's will.

I am not in agreement with the view that this is the only construction of which section 8 is capable. Section 8 must, I think, be read with section 2 which is imported by the phrase "on any such application"—defined by section 2 as an application to the Supreme Court "for relief." Relief in respect of what? Relief obviously in respect of a greviance of the applicant arising out of the fact that by the will of her husband she has received less than she would have received under a division of his estate resulting from intestacy. The function of the court, therefore, under this statute is to grant relief in respect of this state of facts in such manner and degree as may be just and equitable and that function of the court is restricted to granting relief to the widow. This authority—by its own implications — seems to be one which necessarily becomes exhausted the moment the ground of the widow's complaint is removed, that is to say when the share to which the widow would have been entitled under an intestacy is given to her. Consequently I am, as I have already remarked, unable to agree that the words of section 8 are incapable of a meaning supporting the construction of the act which ascribes to the court the more restricted authority.

It is nevertheless not to be disputed that the rival construction is also a construction of which these provisions are reasonably capable and the point for determination is which of these two is the preferable?

Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or the principle of it can be collected from its language; and if one find there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it; for as Lord Selborne pointed out in *Caledonian Railway Co.* v. *North British Railway Co.*(1), that which is within the spirit of the statute where it can be collected from the words of it is the law, and not the very letter of the statute where the letter does not carry out the object of it. See *Cox* v. *Hakes*(2); *Eastman Co.* v. *Comptroller General* (3).

Now the second section appears to me to express sufficiently the object of these provisions. That object is clearly implied, I think, in the condition which is laid down as the very basis of the jurisdiction which enables the court to intervene, the condition requiring that the judge who hears the application must be satisfied, that the share of the widow under the husband's will falls short of the share she would have been entitled to under an intestacy. This condition failing, the machinery for relief provided for by the statute does not come into operation and the implication appears to be that, according to the theory of the legislator, where the share under the will does not fall short in value of the share under the rules governing intestacy, justice is satisfied, so far as it is within the function of the legislator to see that justice is satisfied; this

(1) 6 App. Cas. 114. (2) 15 App. Cas. 506 at p. 517.
(3) [1898] A.C. 571, at p. 575.

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condition being observed, further interposition as between the testator and the natural objects of his bounty would be according to the theory of the legislator unwarranted or undesirable. It follows that the allowance made by Mr. Justice Stuart exceeded the limits set by the statute to the power of disposition conferred upon the court.

In deciding what disposition ought to be made pursuant to the statutory direction to make just and equitable provision for the widow, I have discovered no reason for thinking that the respondent should not receive an allowance equivalent to that to which she would be entitled had her husband died intestate; and accordingly I think an order should be made directing that she is entitled to one half of the distributable surplus of the estate.

The case should be referred back to the Supreme Court of Alberta to carry this declaration into effect.

ANGLIN J.—Section 2 of "The Married Women's Relief Act," I think makes it reasonably clear that the intent of the legislature in passing this remarkable statute was to enable the court to relieve a widow from the consequences of her deceased husband having by his will attempted to deprive her, in whole or in part, of the rights she would have had in his estate had he died intestate. That being the mischief to be remedied, I am not prepared to place on the language of section 8—broad and general as it undoubtedly is—a construction which would vest in the courts the extraordinary power of disposing of the deceased husband's estate to any greater extent than is necessary to set right whatever wrong or injustice to his widow would otherwise result from his having made a will instead of allowing the law to effect the distribution of his estate.

In re *Standard Manufacturing Co.*(1); *In re Boaler*(2); *Watney Co.* v. *Berners*(3). As the learned Chief Justice of Alberta says:

> Then again it is clear that if the husband die intestate, under no circumstances can the wife have more than the share fixed by law as her share on intestacy. Similarly, if the will give her that much she can have no more. Then can it be intended that, if the will give her any less, no matter how small the difference, this fact gives the Court the right to set aside the total disposition of the testator of any part of his property? I agree with Mr. Justice Walsh that such an anomaly could scarcely have been intended.

The discretion conferred on the court in favour of the widow, in my opinion, is restricted to the proportion of her deceased husband's estate which she would have received on an intestacy. The court may, where the circumstances render it just and equitable to do so, give her less: it cannot, in my opinion, give her more.

While I should have preferred to send this case back to the provincial courts to determine what sum, not exceeding one half of the value of the estate, it may be "just and equitable in the circumstances" that the applicant should receive, in order to put an end to this deplorable and wasteful litigation I accede to what I understand to be the view of the majority of my learned brothers that we should now determine this question as best we can upon the material in the present record. Three judges of the Alberta Supreme Court, proceeding under the impression that the discretion of the court was unfettered and unlimited, have determined that it would be just and equitable in the circumstances that the widow should receive an amount exceeding one half of the value of the estate. It is therefore quite apparent that if they had understood the power of the court to be restricted as I incline

(1) [1891] 1 Ch. 627, at p. 646. (2) [1915] 1 K.B. 21.
(3) [1915] A.C. 885, at p. 891.

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to think it is, these learned judges would have exercised that power to its fullest extent and have allowed to the applicant one half of her husband's net estate—the full amount to which she should have been entitled to on an intestacy. We are without any expression of opinion on this aspect of the case from the two members of the Appellate Division who took the view of the construction of the statute which, in my opinion, should prevail. I think our duty will be best discharged by treating what has been done by the learned trial judge and the two judges of the Appellate Division who agreed with him as a determination that in the exercise of a sound judicial discretion it is just and equitable that the applicant should receive one half of her husband's estate. Had the provincial courts actually so determined, under the view of the statute which I take upon the evidence in the record I would not have been disposed to interfere with the discretion so exercised.

I would therefore allow the appeal and direct a judgment declaring the widow entitled to receive one half of her husband's net estate. What that will amount to can best be determined after the administration has been completed and all questions as to the extent of the assets and liabilities have been disposed of.

MIGNAULT J.—I think what I may call the policy of the Alberta statute, "The Married Women's Relief Act," chapter 18 of the statutes of 1910, is that the relief which the court may grant to the widow should not put her in a better position than if she had taken a share in her husband's estate under an intestacy. No doubt the language of section 8 is extremely broad, but I think that section 2 is the controlling section and that in the exercise of a sound judicial discretion

the court should not grant to the widow an allowance exceeding the share she would have taken if her husband had died intestate. In this case, had there been an intestacy, the respondent would have received one half of the net proceeds of her husband's estate, and in my opinion she should not be granted more.

I feel some doubt whether or not the respondent has in fact been allowed more than a half share of her husband's estate. The learned trial judge, who granted the respondent $10,198.00 or an annuity of $720.00, stated that the estate was valued in the probate papers at $25,740.00 including a disputed and still undecided claim of $7,000.00, the value of a number of horses which the testator's daughter pretends belong to her under a bill of sale. He thought that the value of the undisputed estate was probably as much as $18,000.00, probably less than that. This creates a state of uncertainty, and there has been a division of opinion among the learned judges whether or not the court could grant to the widow more than she should receive under an intestacy.

The learned trial judge, however, stated that the general principle which he always felt disposed to adopt was to so decide the matter as to leave the widow in at least as good a position as she was with respect to her maintenance and comfort when her husband was alive, as far as this can be done without unduly interfering with the rights given by will to other persons who may also have strong moral or legal claims upon the testator with respect to maintenance. I think, with deference, that this is not the principle that should govern the exercise of sound judicial discretion under this somewhat extraordinary statute. The principle stated by the learned trial judge would put the court in the position of the testator and permit it to review

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the discretion he exercised when he determined what provision should be made for his wife and other persons having moral or legal claims on him. The statute certainly does not go so far, and merely entitles the wife to relief when she receives less under her husband's will than she would have obtained had there been no will. At the most therefore the measure of relief would seem to be the share she would have received in the case of intestacy, but I do not wish to be understood as holding that that share and no lesser amount should be allowed her. But she certainly should not obtain more.

Under the circumstances, having stated what I deem to be the policy of the Act, and being unable to concur in the principle laid down by the learned trial judge, I think the case should be remitted to the trial court so that the respondent may be allowed one half of the net proceeds of the estate, appellant's costs to be charged against the estate.

Appeal allowed with costs.

Solicitors for the appellant: *Jones, Pescod & Hayden.*
Solicitors for the respondent: *Peacock & Skene.*

THE CALGARY AND EDMONTON RWAY CO. (PLAINTIFF)..... APPELLANT;

AND

THE SASKATCHEWAN LAND AND HOMESTEAD CO. (DEFENDANT). RESPONDENT.

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*Oct. 27.
*Nov. 10.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Railways—Arbitration—Costs—Award less than costs—Limitation—"Railway Act," R.S.C. 1906, c. 37, s. 199.

The taxable costs, incurred on an arbitration pursuant to the "Railway Act," are constituted by section 199 a debt recoverable by action; and the liability for these costs of the expropriated party is not limited to the amount of the compensation. Idington and Duff JJ. dissenting.

Per Anglin, Brodeur and Mignault JJ.—The judge, when taxing the costs under the statute, acts as *persona designata* and no appeal lies from his decision.

Per Anglin J.—So far as the right of the appellant to certain items allowed depended upon findings of fact, it was within the jurisdiction of the learned judge to make such findings and they cannot be reviewed for the purpose of establishing that in making the allowances he exceeded his jurisdiction. Brodeur J. dubitante and Mignault J. expressing no opinion.

Judgment of the Appellate Division (14 Alta. L.R. 416; 46 D.L.R. 357; [1919] 2 W.W.R. 297) reversed, Idington and Duff JJ. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J. (2), and dismissing the appellant's, plaintiff's, action with costs.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

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

(1) 14 Alta. L.R. 416; 46 D.L.R. 357; [1919] 2 W.W.R. 297.
(2) 44 D.L.R. 133; [1919] 1 W.W.R. 1.

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Idington J.

W. N. Tilley K.C. for the appellant.
Frank Ford K.C. for the respondent.

IDINGTON J. (dissenting)—This appeal must depend on the construction of section 199 of the "Railway Act" which reads as follows:—

199. If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

2. The amount of the costs, if not agreed upon, may be taxed by the judge.

Had the intention been to give unlimited costs there was no object or sense in adding to what would have given that, subject to taxation, the words "and be deducted from the compensation."

When using language which would without these words have given the right of action insisted upon some meaning must be given thereto.

The most reasonable interpretation seems to imply a limitation of the amount of costs and the most direct method of asserting the method and right of recovery.

It is an illustration of the rule that "where the Legislature has passed a new statute giving a new remedy that remedy alone can be followed."

Of course the judge taxing the costs can only allow such as can be so recovered.

The appeal should be dismissed with costs.

DUFF J. (dissenting)—The compensation awarded the respondents is much less than the amount of the taxed costs. In these circumstances the question arises whether the appellant company has a right of action against the respondents for the amount by which the costs exceed the compensation.

The proceedings for determining compensation are prescribed in sections 192 *et seq.* of the "Railway Act." By section 193, the notice to treat is, among other things, to contain a declaration of readiness to pay a named sum as compensation; and by section 195, if the "opposite party" is absent from the county or district in which the lands lie or if he cannot be found, authority is given to a judge to order that the notice to treat may be delivered by publication in a newspaper published in the district or county or, if no newspaper is published therein, then in a newspaper published in some adjacent district or county. Then by section 196, if within ten days after the service of the notice to treat or within one month after the first publication of it, the "opposite party" does not give notice to the company that he accepts the sum offered, the judge shall, on the application of the company or of the "opposite party," appoint an arbitrator for determining the compensation. Section 199, upon which the point in dispute turns, is in the following words:—

199. If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

2. The amount of the costs, if not agreed upon, may be taxed by the judge.

The effect of this enactment, according to the construction for which the appellant company contends, is that any person whose lands have been taken by a railway company and who does not within the time mentioned in section 195, as above mentioned, give notice to the railway company accepting the company's offer of compensation, becomes, if that offer prove to have been sufficient, liable to pay the

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whole of the costs of the proceedings for determining the amount of compensation, even though the costs should exceed the compensation itself; and this although the person whose lands are taken may never have heard of the proceedings.

The penalty seems an extreme one. Cases must not infrequently happen in which some investigation is required in order to determine within reasonable limits the extent of the damage the owner is likely to suffer and it truly is a little difficult to understand even in cases where the notice is actually served upon the owner personally why his failure to notify acceptance of compensation should expose him, however reasonable his conduct may have been not only to the penalty of having his compensation applied in payment of costs but should subject him to personal liability as well. I repeat, it seems an extreme penalty.

And in the case where the owner has never heard of the proceedings and through no fault of his own the proceedings are taken behind his back such a penalty could hardly be characterized otherwise than as a palpable injustice.

There are two principles of construction which may properly be applied. 1st.—The principle resting on the presumption that Parliament will not impose a palpably unjust burden upon the subject, the best example, perhaps, of the application of this principle being *The River Wear Commissioners* v. *Adamson*(1), where the Court of Appeal and the House of Lords agreed that unqualified language must be qualified in order to give effect to this presumption. The second is that the enactment to be construed should be read as a whole.

(1) 1 Q.B.D. 546; 2 App. Cas. 743.

It is quite true that section 199 plainly evinces an intention that, in some degree at all events, the owner may have the compensation awarded him, however reasonable his conduct may have been, applied towards payment of the costs incurred by the railway company in connection with the arbitration. The justice of this may well be doubted; but up to this point the language is clear. Is it quite clear also that the section not only appropriates the compensation in payment of costs but may further subject the owner who has heard nothing of the proceedings and through no fault of his own, to a personal liability?

Coming to the language of section 199—it is clearly enough an admissible view of this section that it does not contemplate cases in which the costs exigible at the instance of the company exceed the amount of the compensation awarded; it is possible that is to say, to read the phrase "borne by the opposite party" as explained by what follows; and, having regard to the considerations just mentioned, I think that it is the better construction.

It is not a satisfactory mode of arriving at the meaning of a compound phrase to sever it into its several parts and to construe it by the separate meaning of each of such parts when severed. *Mersey Docks & Harbour Board* v. *Henderson* (1).

I have not overlooked Mr. Tilley's argument that this construction has the effect of deleting the words "shall be borne by the opposite party." As the section stands in its present form this is perhaps so but I incline to think an explanation of these words is afforded by the history of the section, an explanation which would meet the objection. I will not go into that but merely say that redundancy even tautology of expression is so common in Dominion statutes and especially in railway legislation as to

(1) 13 App. Cas. 595, at pp. 599, 600.

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deprive this argument of much of the weight it otherwise might have.

The appeal should be dismissed.

ANGLIN J.—I am, with great respect, of the opinion that section 199 of the "Railway Act" created a debt on the part of the respondent for the taxable costs incurred by the appellant on the arbitration. I can attach no other meaning to the words "shall be borne by the opposite party." They must have a purport and effect corresponding to that of the preceeding words "shall be borne by the company."

The ordinary remedy when Parliament creates an obligation to pay is by action. *The Queen* v. *The Hull & Selby Railway Co.*(1); *Booth* v. *Trail*(2). That remedy is open unless it is taken away or some other exclusive remedy is given. *Hutchinson* v. *Gillespie*(3), per Martin B. Do the added words "and be deducted from the compensation" provide such an exclusive remedy? If they do the statute is to be construed either as if the words

they shall be borne by the opposite party

were deleted from it, or as if it read—

they shall be borne by the opposite party (to the extent of) and be deducted from the compensation,

Is there justification either for such deletion or for the interpolation of the bracketted words? I think not, having regard to "the provisions and object of the enactment." *Vallance* v. *Falle*(4).

The general rule certainly is that

where an Act of Parliament creates a right and points out a remedy, no other remedy exists.

But is the provision for deduction from the compensation intended as a remedy? I doubt it. Its purpose

(1) 13 L.J.Q.B. 257.
(2) 12 Q.B.D. 8.
(3) 25 L.J. Ex. 103, at p. 109.
(4) 13 Q.B.D. 109, at p. 110.

may well have been to require the company to resort to the compensation money as the fund for payment of its costs until exhausted and to restrict its right to maintain suit and to levy execution to any balance of the costs not thus satisfied. As a remedy for the realization of the debt expressly created by the preceeding clause it would sometimes, as in the present case, prove grossly inadequate. It does not cover the whole right. The fact affords a *primâ facie* indication that it was not intended to be exclusive or substitutional. *Shepherd* v. *Hills*(1); *Vestry of St. Pancras* v. *Batterbury*(2); *Atkinson* v. *Newcastle Waterworks*(3). The giving of a special remedy does not always take away the remedy by action. *Batt* v. *Price*(4), per Lush J. I agree with the learned trial judge and McCarthy J. that in this case the right of action is not taken away either expressly or by implication as to so much of the taxed costs as cannot be satisfied out of the compensation.

I am also of the opinion that the learned judge who approved the taxation acted as *persona designata* and that we cannot review the allowances made on the grounds pressed by Mr. Ford without in fact entertaining an appeal from the taxation. So far as the right of the appellant to certain items allowed depended upon findings of fact, it was within the jurisdiction of the learned judge to make such findings and they cannot be reviwed for the purpose of establishing that in making the allowances he exceeded his jurisdiction.

I would allow the appeal and restore the judgment of the learned trial judge with costs here and in the Appellate Division.

(1) 11 Exch. 55.
(2) 2 C.B.N.S. 477, at p. 487.
(3) 2 Ex. D. 441, at p. 449.
(4) 1 Q.B.D. 264, at p. 269.

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Brodeur J.

BRODEUR J.—We have to construe in this case section 199 of the "Railway Act," which reads as follows:

199. If, by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company, but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

Several years ago, the appellant railway company desired to expropriate a piece of land belonging to the respondent company. An offer of $733.05 was made by the railway company; but the offer was not accepted by the Saskatchewan Land Company which, on the other hand made a claim of $339,000.00. The award was for $733.05 only and what appears to be the exorbitant claim of the Saskatchewan Land Company was dismissed. Now the Railway Company sues for its costs, which have been taxed by Mr. Justice Simmons at $5,116.20.

The trial judge maintained the action(1); but the Appellate Division(2), Mr. Justice McCarthy dissenting, reversed this judgment and dismissed the action on the grounds that the company could not recover more costs than the amount which had been awarded.

In view of the large amount which was claimed by the respondent company on the arbitration proceedings, it is no wonder that the costs incurred by the railway company were much larger than the amount awarded. But it is no concern of ours since, as required by sections 2 of section 199, those costs have been duly taxed. The provisions of section 199 seem to me to be clear as enunciating that the railway, company having offered a certain sum of money, if the offer is not accepted, the company will be bound to pay the costs if the amount which is later on granted

exceeds the sum offered; but if otherwise, if the amount which is granted is not in excess of the amount offered, then the costs shall be borne by the opposite party, with the additional right however for the railway company to deduct the costs from the award. In such a case, the railway company might, of course, not avail itself of the privilege of deducting those costs and take an independent action to recover the whole amount. But if the railway company wants to deduct those costs from the award, the statute entitles it to make such deduction; but such a deduction will not affect its right to recover by a direct action the balance which might be due.

There is no doubt, I think, in view of the decision in *Metropolitan Railway Company* v. *Sharpe*(1) that the provision that the costs shall be borne by one or the other of the parties creates a debt recoverable by action.

It has been contended by the respondent in this case that the decision of the judge who is *persona designata* taxing the costs is subject to review in a case where he would have exceeded his jurisdiction. I could have understood such a contention; but it cannot be said that in the present case the judge has exceeded his jurisdiction in taxing the costs but he has simply exercised a discretion which he had under the statute.

For these reasons, I am of the opinion that the appeal should be allowed with costs of this court and of the court below and the judgment of the trial judge restored.

MIGNAULT J.—Two questions arise on this appeal:

1. Can the costs of an arbitration under the "Railway Act" to fix compensation for the taking of land

(1) 5 App. Cas. 425.

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exceed the amount of the arbitrators' award where the costs are borne by the owner?

2. Can the taxation of such costs by a judge be revised?

The first question involves the construction of section 199 of the "Railway Act," which is as follows:

199. If by any award of the arbitrators or of the sole arbitrator made under this Act, the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company; but if otherwise they shall be borne by the opposite party and be deducted from the compensation.

2. The amount of the costs, if not agreed upon, may be taxed by the judge.

The whole question is as to the meaning of the words:

but if otherwise they (the costs) shall be borne by the opposite party and be deducted from the compensation.

I think it is impossible to deny that when the statute says that the costs shall be "borne" by a party a right of action exists against that party to recover the same, and obviously the whole of the costs can be recovered in such an action.

The construction which the respondent places on section 199 is equivalent to striking out the words "shall be borne by the opposite party."

For if the costs can only be deducted from the compensation, all that would be necessary would be to say "but if otherwise they (the costs) shall be deducted from the compensation."

I cannot think that the intention of Parliament was to render the company liable for all costs when its offer was below the amount awarded, and to limit the liability for costs of the opposite party to an amount not exceeding the compensation, when the offer of the company equalled or was higher than the award. Were that the case, the costs would not be borne by the opposite party, or only indirectly so, but would be borne or paid out of the amount awarded.

Giving therefore to each word in this section its proper and natural meaning, my opinion is that the liability for costs of the opposite party is not restricted to the amount of the compensation.

It follows that the judgment of the Appellate Division cannot be sustained on this part of the case, and that the judgment of the learned trial judge should be restored.

The second question should, in my opinion, be answered in the negative. The judge under section 199 acts as *persona designata* when he taxes costs, and no appeal lies from his decision; *Canadian Pacific Rly. Co.* v. *Little Seminary of Ste. Thérèse*(1).

This rule was not disputed by the learned counsel for the respondent, but he contended that, although there was no appeal, when the judge in taxing the costs acted according to a wrong principle of law, his order could and should be set aside by the court.

On due consideration of the reasons adduced by the respondent as constituting a wrong principle of law for the taxation of the costs of the arbitration, I think that while they might be proper grounds of appeal, they would not come under the rule which the respondent asks us to apply, and as to which it is unnecessary to express an opinion.

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *G. A. Walker.*
Solicitors for the respondent: *Emery, Newell, Ford & Lindsay.*

(1) 16 Can. S.C.R. 606.

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*Oct. 23, 24.
*Dec. 22.

C. & E. TOWNSITES LIMITED (DEFENDANT)..... APPELLANT;

AND

CITY OF WETASKIWIN (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Assessment and taxation—Designation of owner—Description of land—Sufficiency—Estoppel by conduct—Appeal to the Court of Revision—Decision as to defect or error in the assessment roll—"Municipal Ordinance of the N.W.T.," Consolidated Ordinances of 1898, ch. 70, secs. 122, 123, 126, 134, 135, 136, 144, 147, 152, 182 et seq.—"Wetaskiwin Charter," Alta. S. 1906, ch. 41, sec. 8.

The action is for arrears of taxes upon lands owned by the appellant and situate within the municipality-respondent. When the property was assessed, the name "Townsite Trustees" was given in the column with the heading "name" opposite the first parcel, and a blank was left in that column opposite the other parcels, without any sign indicating the ownership of these parcels until another name appeared in the column. A general assessment was also made for "179.60 acres unsubdivided," which was the aggregate area of several separate and distinct parcels. The appellant appealed from the assessment "on grounds of excessive valuation," to the Court of Revision which made some reduction, Section 134 of "The Municipal Ordinance" gives to that court jurisdiction to correct the roll in respect of any failure to observe the "provisions and requirements of" the statute; and section 136 provides that the roll, "as finally passed by the court and certified * * * shall * * * be valid and binding on all parties concerned notwithstanding any defect or error committed in or with regard to such roll."

Held, Idington J. dissenting, that, in the circumstances of the case, the assessments were sufficient to render the appellant liable for the payment of the taxes.

Per Davies C.J., Duff and Anglin JJ.:—Inasmuch as there was jurisdiction to make the assessments in question, the essential constituents of an assessment, though defective and erroneous, were present in each case and the appellant had notice of them as assessments in respect of which it was intended to demand taxes from it, and since the matters now urged were all proper subjects of "complaints in regard to persons wrongfully placed on the

*PRESENT: Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

roll or omitted therefrom or * * * in regard to property * * * which has been misdescribed" to the Court of Revision, where they might have been easily rectified (sec. 134), section 136 of "The Municipal Ordinance" precludes the appellant urging them in this action as objections to the validity of its assessments; and the appellant, being "one of the parties concerned," is bound by the assessment rolls "notwithstanding (these) defect (s) or error (s) committed in, or with regard to such rolls."

Per Davies C.J. and Mignault J.:—Upon the evidence, the appellant, by its conduct and actions, estopped itself from urging the points raised by it before this court.

Judgment of the Appellate Division (14 Alta. L.R. 307, 45 D.L.R. 482, [1919] 1 W.W.R. 515), affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta(1), affirming the judgment of the trial(2), in favour of the respondent. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

F. H. Chrysler K.C. and *S. B. Woods K.C.* for the appellant.

Frank Ford K.C. for the respondent.

THE CHIEF JUSTICE.—In concurring, as I fully do, in the reasons stated by my brother Duff for dismissing this appeal, I desire to emphasize how greatly the conduct and actions of the appellants have operated on my mind not only as shewing that no possible injustice has been done them in the judgment appealed from but that they have by their conduct and actions estopped themselves from raising in this court the points on which Mr. Chrysler relied.

That learned counsel based his argument for the allowance of the appeal upon the contention, as I understood him, that the lands of the appellants had never been legally assessed for the years for which the

(1) 14 Alta. L.R. 307; 45 D.L.R. 482; [1919] 1 W.W.R. 515.

(2) [1918] 3 W.W.R. 145.

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taxes were sued, first because the proper name of the appellants had not been entered upon the assessment roll, as required by the statute, opposite each lot of land assessed, and secondly because the unsubdivided lands assessed had not been described so as to be identified or capable of being identified. His contention, therefore, was that their assessment was utterly void and that the correspondence, negotiations, appeals to the Court of Revision and District Court judge and general conduct and actions of the appellant could not be invoked to sustain such assessments.

I cannot accept or accede to this argument and desire to add a few lines to my brother Duff's reasons to shew that in my judgment at least the conduct and actions of the appellants have been such, and the judicial action to which they appealed such, as to preclude them from raising these points in this court at this stage of the controversy.

These appeals to the Court of Revision and District Court judge stand on an entirely different footing from the negotiations for time for payment of the taxes and for release from the statutory penalties their non-payment involved and any admissions which might be drawn from the correspondence.

The appeals, limited as they were specifically to the one point of "excessive valuation of the lands," necessarily involved a decision by the judge appealed to, having full jurisdiction over the subject matter, of the location and description of the lands he was called upon to value. How else, indeed, could he have reached a decision as to whether and to what extent they had been overvalued?

The appeal to the District Court judge succeeded to the extent that the assessment was reduced from $500 per acre to $300 per acre, or from $89,800 to $53,880.

The slightest reflection must, therefore, satisfy one that in making such a substantial reduction in the assessment the learned District Court judge must, either from the evidence brought before him or from the admissions of the parties, have been informed of and have adjudicated upon, the location and description of the unsubdivided lands assessed and now in question.

This adjudication not having been further appealed from seems to me conclusive against the appellants not only as to the value of the lands as found by the District Court judge, but as to all the essential questions necessary for him to have determined before making that valuation and reduction in the assessment, one of them being the fact that the lands had been properly and legally assessed as against the now appellants, defendants.

No question was raised at the trial or here of the ownership at all material times by the appellant company of the lands in question and the strictly limited appeal of the appellants to the District Court judge on the one question of overvaluation and their acquiescence in the judgment of that court precludes appellants from now raising any questions as to the validity of the assessments which were necessarily involved in the adjudication of the District Court judge, as I submit the questions raised by Mr. Chrysler were.

IDINGTON J. (dissenting).—The respondent got judgment at the trial before Mr. Justice Scott for taxes alleged to be due by appellant by virtue of assessments made for the years 1916 and 1917 and that has been maintained by the Appellate Division for Alberta from which this appeal is made.

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The chief items in question are founded upon an alleged assessment in each of said years for "179.60 acres unsubdivided."

These are spoken of by the learned trial judge as follows:—

> The form of assessment roll given by "The Municipal Ordinance" requires that it shall describe the lands in full and the extent thereof shewing the section, township and range or lot or block or other local description. It is shewn that the 179.60 acres intended to be assessed is not one parcel alone but is the aggregate area of several separate and distinct parcels, I may here point out that it would require about thirty folios to give such a description of the several parcels as would enable a surveyor to locate the boundaries thereof.

The question raised in respect of them is that this is not such an efficient description as required by "The Municipal Ordinance" providing for the assessment of lands in sec. 122, as follows:—

> 122. The assessor or assessors shall prepare an assessment roll after revision by the assessment committee as in form F in the schedule to this Ordinance setting down in each column as accurately as may be after diligent inquiry the information called for by the heading thereof, No. 8 of 1897, sec. 159.

The only heading in the assessment roll to which this item of the assessment can be attributed is "Lot" or "Lot, Block, Plan."

How, I submit with respect, such a description embracing several parcels of undivided lands, as the learned trial judge states it is, can be held to be anything approaching the requirements of the section just quoted, passes my understanding.

And when we pursue the inquiry of what uses the assessment roll and assessments so made are intended to lay the foundation for, we find, as is usual in such cases, a provision by sec. 147, for distress being made, not only upon the goods of the party assessed, but also the goods, if found on the premises, the property of or in the possession of any other occupant of the premises.

How could there be by any possibility a legal distress made upon the goods of such occupant when each lot or parcel might be occupied by a different person? Then how could the provisions of sec. 182 and following sections for proceedings to sell the lands for the taxes be complied with?

Each section relevant to the definition or description of the land provides for a specification of each lot and the arrears of taxes due in respect thereof to be set out.

Under this group assessment, of many parcels, that would be simply impossible.

Are we to hold the assessment roll good for one purpose or mode of recovery and absolutely null for another?

Can the curative sec. 136, to which we are referred, be, by any mode of interpretation and construction, extended so far? I think not.

We are referred to a number of cases wherein the curative sections in or supplementary to the "Assessment Act," have been held to furnish an effective validating remedy, but not one of them has gone so far as we are asked to go herein.

We are also referred to the recent case of *Hagman* v. *The Merchants Bank*(1), upheld on appeal here. It is sufficient to say that was under "The Town Act" which is differently worded and left it open to say that what was described therein was ascertainable by the facts the description presented, and in other aspects of the case it is easily distinguishable from this.

I fail to ee what *The Municipality of the Town of MacLeod* v. *Campbell*(2), has in it to support any such contention as set up herein.

(1) [1918] 2 W.W.R. 377.

(2) 57 Can. S.C.R. 517: 44 D.L.R. 210.

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The gross overvaluation against which the party assessed appealed to the Court of Revision and failed, and then failed to pursue her appropriate statutory remedy of appeal to the district judge against such an assessment was all that was involved therein.

If it could be applied at all, it would be against respondent according to my reasoning. It certainly was open for the municipal authorities and the appropriate remedy on the appeal to the district judge in 1917 by present appellants either to have asked on that appeal being heard to rectify the roll or to have directed an appeal by the assessor or any one else qualified to do so, to rectify the same and cure a blunder. Indeed, I incline to think, it was not only the right but also the duty of those representing the respondent on the appeal so taken, to have asked the judge to rectify in respect of the blunder now complained of and set down opposite to each parcel the assessment settled by the learned judge.

I cannot find any legal duty resting upon the appellant to have done so against its own interest.

I must conclude that the assessments in question of the "179.60 acres unsubdivided" were null.

City of Toronto v. *Russell*(1), in the Privy Council, decided the neat point of whether or not the respondent could waive the notice which the statute in question required to be personally given him. He having been one of the governing body directing the proceedings and knowing his lands were involved, was held not entitled thereafter to complain.

All else in that case is mere dicta.

Coming to the collector's roll, I cannot see how the secretary-treasurer was at all justified in adopting a

(1) [1908] A.C. 493.

novel plan of framing such a roll without the slightest authority in law.

As the learned Chief Justice points out in the Appellate Division (1), the amendment of "The Town Act" permitting such a novel experiment did not apply to respondent city.

The duty imposed by the statute here in question in sec. 144 was very plain.

It reads as follows:—

144. The secretary-treasurer shall on or before the first day of September in each year prepare a tax roll containing columns for all information required by this Ordinance to be entered therein in which he shall set down in full the name of every person assessed, his post office address and the assessed value of his real and personal property and taxable income as ascertained from the assessment roll as finally revised; he shall calculate and set down opposite each such entry in columns headed "General Fund," "Debenture Fund," "School Fund," "Statute Labour Fund," as the case may be, the sum for which such person or property is chargeable on account of each rate and under the column headed, "Arrears of Taxes" the sum which may appear on the books of the municipality as arrears on such parcel of land at that date; and in the column headed "Total" the total amount of taxes for which each parcel of land is liable.

Such a collector's roll as he made omitting all names of those liable and the description of each parcel of land and its liability, ought not to be held a compliance with the Act. Yet it is on a certified copy of this nullity that the action rests in virtue of sec. 152 of the Act.

Town of Trenton v. *Dyer*(2), cited by appellant, is worth looking at in this aspect of the case.

That, to my mind, disposes of the other items in the claim made herein.

Had there been a proper collector's roll I should, under the authorities and curative section coupled with the response of the appellant's agent to the notice of

(1) 14 Alta. L.R. 307. (2) 24 Can. S.C.R. 474.

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its assessment indicating a recognition of the name, have been inclined to examine more closely than I have done the question of whether the mere mistake of name was not overcome so far as other items were concerned. In the view I have expressed, it does not seem to me necessary to do so.

The taxes are imposed by a by-law striking the rate and thereby a valid debt is created, if and so far as, founded upon a valid assessment roll. It is not the collector's roll that constitutes the debt. Sec. 152 declares the taxes to be a debt and proceeds to declare that as a piece of evidence which entitles to recover, a certified copy of the collector's roll will suffice. I submit proof of a valid assessment and valid by-law fixing and imposing the rate, would be equally efficient. Hence if that proof had been properly adduced the respondent should, perhaps, have succeeded as to the minor items if as fairly arguable on the decided cases the name could be held sufficient. I would reserve that right if worth pursuing.

Nor need I enter at length upon the question of the doubtful possibility hinted at the argument of holding independently of the roll that a debt was created by means of the imposition of rates by by-law and conduct of the parties, for that was not attempted below or seriously here, though I imagine had the case been so directed at the trial as to establish such a proposition, possibly something more arguable might have been produced than the support of this assessment roll as to the main items.

I think the appeal should be allowed with costs throughout without prejudice to a recovery hereafter in respect of minor items.

DUFF J.—This appeal arises out of an action brought by the respondent municipality against the

appellant company for the recovery of taxes alleged to be payable for the years 1916 and 1917 in respect of certain real property owned by the company.

The defence is that owing to non-compliance by the municipality with the procedure laid down in the statutes of Alberta in relation to the assessment of property and the levying of taxes, the taxes demanded never became lawfully collectable.

1. It is alleged that there was no lawful assessment of the company's property and 2nd, there was no collector's roll within the meaning of the law, and 3rd, the by-law levying the taxes was invalid because the rate was in excess of that which the corporation was entitled by law to exact.

As to the last mentioned point, the by-law was not produced and I concur with the learned Chief Justice of the court below in the view that in the absence of the by-law it cannot be assumed that no part of the rate levied was for defraying the cost of local improvements.

The assessor in assessing the property of the company did not enter the name of the company in the column provided for the name of the owner but used the name "Townsite Trustees," which has been accepted as sufficiently descriptive. In the case of the great majority of parcels, moreover, the assessor did not—and this is one of the points relied upon as vitiating the assessment—actually write the name "Townsite Trustees" in the owner column opposite the number of the parcel, his practice being where there was a sequence of parcels assessed to the company to write down the name "Townsite Trustees" in the "owner" column for the first member of the sequence leaving blank the space provided in that column for each of the other parcels. The law, it is said, specifically requires that the name of the owner shall be

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actually written in the "owner" column in a space assigned for that purpose for each parcel.

A special objection relates to the assessment of parcel 1562, sheet No. 63; and summarily stated, the objection is that the entries in the roll in relation of that parcel do not include what is alleged to be an essential element of a valid assessment, a description of the property conforming to the provisions hereafter quoted.

The law governing the decisions of the questions raised is to be found in "The Municipal Ordinance of the N.W.T." (ch. 70 of the Consolidated Ordinances of 1898). By the provisions upon which the appellant relies, the assessor is required to prepare an assessment roll as in form "F,"

setting down in each column as accurately as may be after diligent inquiry the information called for by the heading thereof,

the heading of the second column in form "F" being in these words:—

The name in full if the same can be ascertained, of all taxable persons who have taxable property or income within the municipality, and the name of the owner when the occupant is not the owner;

and that of the 5th column being this:—

The description in full or extent and amount of property against each taxable person or any interest which is liable to assessment, township and range, or lot and block, or other local description.

The word "taxable person" in the heading of the second column is defined by sub-sec. 12 of the interpretation section as:—

(a) any person receiving an annual income or the owner of any personal property not exempted from taxation;

(b) the owner of lands not exempted from taxation where the same are occupied by the owner or unoccupied, otherwise the occupant.

The appellant company contends that as regards those parcels in relation to which the entries do not include some actually written name or description in the second column professing to designate the owner, there is therein a departure from the directions of form

"F" that invalidates the assessment of those parcels. As regards parcel No. 1562 there is, it is said, no description of property in compliance with the requirements of form "F," and that this again is a fatal defect nullifying the assessment of that parcel.

Before entering upon the discussion of the points raised by these contentions it will be necessary to refer briefly to other provisions of the statute.

By sec. 126 every person assessable is required to give all information to the assessor and it is provided that he may deliver to the assessor a statement in writing setting forth the particulars of the property for which he should be assessed. Sec. 123 provides for the appointment of an assessment committee whose duty it is, on completion of the assessment roll, to check over the roll and to make such corrections as they may decide upon, and then a right of appeal is given to a Court of Revision. The right of appeal may be exercised not only by the person assessed but also by any ratepayer as well as by the municipality. The jurisdiction of this court is defined by sec. 134, which is in the following words:—

> The court shall try all complaints in regard to persons wrongfully placed upon the roll or omitted therefrom or assessed too high or too low in regard to any property of any person which has been misdescribed or omitted from the roll or in regard to any assessment which has not been performed in accordance with the provisions and requirements of this Ordinance as the case may be.

And by sec. 136:—

> The roll as finally passed by the court and certified by the secretary-treasurer as passed shall, except insofar as the same may be further amended on appeal to a judge, be valid and binding on all parties concerned notwithstanding any defect or error committed in or with regard to such roll or any defect or error or mis-statement in the notice required by sub-sections 4 and 5 of the foregoing section of this Ordinance or the omission to deliver or transmit such notice.

The enactments of the statute prescribing the method of preparing the assessment roll and the duties

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of the assessor in relation to the preparation of it must be read, of course, and applied in the light of secs. 134-5-6. The first of these sections we have seen gives to the Court of Revision jurisdiction to correct the roll in respect of overvaluation or undervaluation, the omission of property from the roll or misdescription of property entered in the roll; and further in respect of any failure to observe in the assessment the "provisions and requirements" of the statute; by sec. 135 this jurisdiction may be invoked by the person assessed or by the municipality, and then there is sec. 136 which, as appears above, enacts that after the roll has passed the Court of Revision and been certified as prescribed, it shall be

valid and binding on all persons concerned notwithstanding any defect or error committed in or with regard to such roll.

Now, I do not at all dissent from the argument forcibly presented by Mr. Chrysler, that it is a "roll" which by virtue of sec. 136 is to be "valid and binding upon all parties" and that it is an "assessment" which is the subject of appeal by virtue of sec. 134; and that in order to bring these two sections into play, you must have something which, within the intendment of them, is an "assessment" and a "roll."

But it is one thing to say as regards a given state of facts: Here is no assessment—here is no roll. It is another thing to say: Here are a roll *de facto* and an assessment *de facto*, but a roll and an assessment which because some essential requirement of the law has been neglected in preparing and effecting them are, from the point of view of the law, invalid.

Secs. 134 and 136 both contemplate such departure from the provisions of the Act as would but for these sections make the assessment invalid. On this point, the meaning of the language is unmistakable and the

combined effect of these sections is that if the property is assessable and if the person is a taxable person, then an assessment which contains the elements of a *de facto* "assessment" within the meaning of sec. 134, may be appealed against and corrected by the Court of Revision and that notwithstanding the departures from the requirements of the statute "in or with regard to the roll" such an assessment once the roll has passed the Court of Revision and been certified in the manner provided for, shall be valid.

The lurking fallacy in the argument presented in support of the appeal resides in the confusion between an assessment inoperative in law because of the failure to observe some legal requirement and something which cannot be described as an "assessment" in fact, within the contemplation of sec. 134.

The questions before us in this appeal must be distinguished from the questions which arose in *Toronto Railway Co.* v. *City of Toronto*(1), and in other cases in the Ontario courts which preceded that decision. In the *Toronto Rly. Co.'s Case*(1), the assessor had professed to assess property which by law was exempt from assessment. In *Nickle* v. *Douglas* (2), the property that the municipality was endeavoring to tax was held to fall within the scope of an exemption clause. In the *City of London* v. *Watt & Son* (3), a similar question arose and the Supreme Court of Canada held that the assessor having professed to assess property which was not subject to taxation in the municipality where it was assessed, the validity of the assessment was not a question cognizable by the Court of Revision, and the assessment roll in consequence not binding upon the defendant.

(1) [1904] A. C. 809. (2) 37 U.C.Q.B. 51.
(3) 22 Can. S.C.R. 300.

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It is, of course, not disputed in the case before us that the lands assessed were subject to taxation and it was accordingly the duty of the assessor to assess them and if through neglect of the assessor the owners were to escape taxation in respect of these lands, it would, of course, be manifestly unjust to the taxpaying community as a whole. Where property is taxable, justice and convenience seem to require that mere errors or deficiencies in procedure shall, so long at all events, as no substantial injustice arises, not have the effect of conferring an exemption contrary to law. This is the principle of secs. 134, 135 and 136, and the scope of 136 is indicated by the last sentence which makes the roll valid and binding notwithstanding the failure to give notice under sub-secs. 4 and 5 of sec. 135.

The argument pressed upon us by the appellant is that sec. 136 has no application where some requirement of the statutory procedure has been omitted or departed from and the requirement and omission or departure are of such a character that in the absence of secs. 134, 135 and 136 the assessment must have been held to be of no legal validity. The argument proves too much. The result of its rigorous application would be to deprive of all effect the declaration in sec. 136 which makes the roll "valid" notwithstanding defects in it. Sec. 136 obviously contemplates proceedings which otherwise would be invalid; indeed all the enactments of the statute prescribing what is to be done in respect of the assessment roll, including those provisions which are alleged to have been disregarded in the assessments now in question, must be read subject to and qualified by the provisions of secs. 134, 135 and 136.

Coming now to the question whether in the years 1916 and 1917 this property was in fact assessed so that

in those years there was something which could properly be described as an assessment within the language of secs. 134, 135 and 136, and 1st, as to those cases in which the name or description of the owner is not actually written in the "owner" column opposite the number of the parcel, I have no doubt that for the present purpose one is not obliged to treat each parcel as a water-tight compartment; one must look at this assessment roll and consider it as a whole. When that is done, one finds abundant evidence that the assessor has done what people frequently do, that is to say, instead of repeating the same name or the same description through a long list of items he has simply written the description at the head of the list and left spaces blank where a more meticulous or more fussy person would have rewritten the entry. No person looking at the document and forming a practical judgment upon it could doubt the intention or the meaning of these entries and blank spaces.

Then as to the description of the property included in item 1562. It is difficult to suppose that anybody reading this could have any doubt that a parcel of acres of unsubdivided land was intended to be assessed and when the roll is looked at as a whole and it is seen that all the other property assessed in the names of the same owners is subdivided land it seems to be reasonably clear from the roll itself that this parcel included all the assessable unsubdivided property of these owners in the municipality and I think this is not seriously disputed. But the description "all the unsubdivided land" owned by a given person within a named area is a good description, even for the purposes of formal conveyancing. The citation of authorities in such a point should be superfluous but *Miller* v. *Travers*(1), may be referred to; see also Halsbury,

(1) 8 Bing. 244.

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Laws of England, "Deeds," vol. 10, at page 465. We have therefore as regards all these impeached assessments abundant evidence of an attempt on the part of the assessor to make an assessment, an attempt carried out in conformity with his practice and an attempt which has at least resulted in this, that he has, for the purposes of the assessment, identified the owners and that he has also identified the property.

And continuing the history of the assessment roll we have an examination by an assessment committee and the acceptance of these entries as sufficient. We have, moreover, the notice sent to the company, we have in one year, 1917, an appeal to the Court of Revision by the appellants on the ground of overvaluation in the case of item 1562 and a reduction of the valuation by the Court of Revision. This appeal to the Court of Revision I shall refer to again in another aspect; in the meantime I mention it as one of the facts bearing upon the question whether or not there is here something which can fairly be described as an "assessment" *de facto* within the meaning of these sections. But in this connection the acts of the appellants themselves are not without significance. *Russell* v. *City of Toronto* (1).

In the year 1915 communications took place between the company and the assessor and the company furnished the assessor with some information. The letter written by the appellant to the assessor was excluded by the learned trial judge, upon what principle I do not quite understand, but there is plenty of ground for the inference that what the company furnished was the aggregate number of acres comprised in all the "unsubdivided" land in respect of which it was taxable. The assessor purporting to assess this property made the

(1) [1908] A.C. 493.

entry quoted above (the entry relating to parcel 1562) and this entry was copied first in the roll for 1916 and then in the roll for 1917.

The demand for taxes addressed to the appellants in 1916 is in evidence and through that the appellants were informed that this land was described in the roll in the manner mentioned. The notice of assessment for 1916 is in precisely the same form and so also as regards the notices and demands for 1917. The appellants, moreover, in prosecuting their appeal from the assessment of 1917 described this property as "our unsubdivided property." I have already called attention to the fact that in 1917 not only was the appeal prosecuted but a reduction of the assessment, that is to say, a reduction of the valuation was obtained. It might very plausibly be argued on the principle of *Roe* v. *Mutual Loan Fund Limited*(1), and *Smith* v. *Baker*(2) that as this appeal proceeded on the basis of there being at least a real assessment within the meaning of sec. 134 and that on this basis they got a judgment of the Court of Revision reducing the assessment the appellants are now precluded from setting up the contention now relied upon.

But I prefer to treat this proceeding as very important in the light it throws upon the question of fact, whether there was or was not a *de facto* assessment of the property and in this view the proceeding is just as significant in its bearing upon the question raised with regard to the assessment of 1916 as with reference to that of 1917.

I conclude that the impeached assessments were real assessments, assessments within the purview of secs. 134, 135 and 136.

(1) 19 Q.B.D. 347. (2) L.R. 8 C.P. 350.

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The last question is whether the tax roll was fatally defective. I concur with the Chief Justice of Alberta in the view that there is nothing in the Act prohibiting the course taken by the assessor, who also is the collector and the treasurer, in making use of the assessment roll so far as it went for the purpose of compiling his tax roll. I think "The Towns Act" and the practice under "The Towns Act" affords sufficient evidence that there is nothing in this procedure inconsistent with legislative policy.

Of course it does not necessarily follow that the defects in the assessment cured by secs. 134, 135 and 136 might not be fatal in the case of a tax roll to which these last mentioned sections do not apply. But when the roll is looked at as a whole, I think there is a substantial and sufficient compliance. The statute does not require literal conformity with the directions of form "F" in the case of a tax roll.

ANGLIN J.—The material facts of this case and most of the statutory provisions bearing upon them appear in the judgments delivered in the courts below (1) and in the opinions of my learned brothers.

The exigibility as debts of the taxes sought to be recovered from the defendants is attacked on several grounds which can best be dealt with separately.

(1) It is urged that the name of the defendants does not appear in the assessment rolls and collector's rolls at all—that some of the parcels on which taxes are demanded from them are entered on the rolls in the name of "Townsite Trustees" and that as to others no name whatever appears in the column of the roll headed "Owner or Occupant."

Upon the evidence I am satisfied that "Townsite Trustees" was, under the circumstances of this case, a

(1) 14 Alta. L.R. 307.

sufficient designation of the defendant company. It is clear that it had notice of all the assessments and it saw fit to allow them to stand in that name, which it might readily have had changed on appeal to the Court of Revision (sec. 134). On this point I desire to add nothing further to what has been said by the learned Chief Justice of Alberta.

In most instances the parcels in question, in respect of which no name appears in the "Owners," column of the assessment roll, immediately follow in sequence other parcels assessed to the "Townsite Trustees." A more painstaking and exact assessor would, no doubt, have entered the name of the owner opposite each of the succeeding parcels in the several groups or would at least have placed the word "ditto," or its abbreviation "do," or dots commonly used as signifying that word, in the owners' column, or would have bracketed the numbers of the separate assessments or the descriptions of the parcels comprised in each group.

But I have no doubt that the blanks left in the rolls before us would be readily understood by any person reading them as implying the assessment of the lots opposite which they occur to the persons whose names respectively appear in the owners' column opposite the first member of each group or sequence of assessments.

As put by Mr. Justice Scott:—

> An inspection of the rolls shews that the practice followed by the assessor was that where a number of lots of the defendant in the same locality were entered the name "Townsite Trustees" would be entered in the owner column opposite the first one only. The plain inference is that the name was intended to apply to all subsequent lots until the name of another person appeared in that column in the same manner as if the word "ditto" had been entered opposite each lot.

The extracts from the rolls in evidence shew, however, that the application of this method of dealing with a consecutive series of assessments of properties

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belonging to the same owner was not confined to properties owned by the appellant. It extended to other ratepayers as well. In fact it appears to have been general. This objection is thus disposed of except as to the assessment numbers 1535, 1536 and 1537 on the roll of 1916, and No. 1212 on the roll of 1917, which upon the facts cannot be so dealt with. I shall reserve them for special consideration towards the close of this opinion.

(2) The sufficiency of the description of the property included in assessments numbered 1562 of 1916 and No. 1251 of 1917—"179.60 acres unsubdivided"—is challenged. I strongly incline to the view that this description is *in se* inadequate. *Re Jenkins and Township of Enniskillen*(1); *Blakey* v. *Smith*(2), *Wildman* v. *Tait*(3); *Carter* v. *Hunter*(4); *Whitemouth* v. *Robinson*(5); *Clive School District* v. *Northern Crown Bank*(6); *Rural Municipality of Minto* v. *Morrice*(7). It is certainly not the "accurate and sufficient" description which the "Assessment Acts" require; *Toronto* v. *Russell*(8). When it is borne in mind that these two assessments covered several parcels of land scattered over the town area, its insufficiency becomes more obvious. It is argued that taking the assessment roll as a whole the description was equivalent to

all the taxable unsubdivided property held by the Townsite Trustees,

and that such a description would be good. But this argument, if sound, would justify an assessment (embracing numerous scattered parcels owned by one

(1) 25 O. R. 399.
(2) 20 Ont. L.R. 279 at p. 283.
(3) 32 Ont. R. 274 at p. 280; 2 Ont. L.R. 307.
(4) 13 Ont. L.R. 310 at pp. 319-20.
(5) 26 Man. R. 139 at pp. 144, 154.
(6) 34 D.L.R. 16; [1917] 2 W.W.R. 549 at p. 552.
(7) 22 Man. R. 391 at p. 393; 4 D.L.R. 435.
(8) [1908] A.C. 493 at p. 500.

person not named elsewhere in the roll) in which the owner's name is followed merely by the words

all (his) assessable real property in the municipality.

I cannot accept the view that this would be a sufficient description to render such an assessment valid.

It may be that such a description would suffice to enable the owner to identify his property. But others than the owner are interested. Every taxpayer is entitled to find in the assessment roll information by which he can identify any other owner's property in order to satisfy himself that it is fairly assessed. He has a right of appeal if he thinks it is not. As Mr. Justice Beck says in *Clive School District* v. *Northern Crown Bank*(1), at page 552, the provision of the "Assessment Act" requiring that the roll shall contain a description of the property assessed is one of those

intended for the security of the citizen, or to ensure equality of taxation, or for certainty as to the nature and amount of each person's taxes.

Here again, however, the appellant had notice that all its unsubdivided land in the municipality was assessed under the description "179.60 acres unsubdivided" and it did not see fit to avail itself of its right of appeal to have it rectified and made more accurate and precise.

As remedial of all "defects and errors" in the assessment rolls the respondent invokes sec. 136 of the "Assessment Act," which reads as follows:—

136. The roll as finally passed by the court and certified by the secretary-treasurer as passed shall, except in so far as the same may be further amended on appeal to a judge, be valid and bind all parties concerned notwithstanding any error committed in or with regard to such roll or any defect or error or misstatement in the notice required by subsections 4 and 5 of the foregoing section of this Ordinance or the omission to deliver or transmit such notice.

After some hesitation I have reached the conclusion that, inasmuch as there was jurisdiction to make the

(1) 34 D.L.R. 16; [1917] 2 W.W.R. 549.

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assessments in question, the essential constituents of an assessment, though defective and erroneous, were present in each case and the appellant had notice of them as assessments in respect of which it was intended to demand taxes from it, and since the matters now urged were all proper subjects of

> complaints in regard to persons wrongfully placed on the roll or omitted therefrom or * * * in regard to property * * * which has been misdescribed

to the Court of Revision, where they might have been easily rectified (sec. 134); sec. 136 precludes the appellant urging them elsewhere as objections to the validity of its assessments. As "one of the parties concerned" it is bound by the assessment rolls,

> notwithstanding (these) defect (s) or error (s) committed in, or with regard to such rolls.

I agree with Mr. Chrysler's contention that sec. 136 cannot be invoked to validate and give efficacy as an assessment to that which can in no sense be said to be an assessment. But we are here dealing with what purport to be assessments and they contain the essential constituents of assessments—designation of owners and descriptions of properties—imperfect no doubt, and perhaps so much so as to invalidate the assessments. But sec. 136 was not needed to remedy mere irregularities. It must have been to rectify and overcome the consequences of defects otherwise fatal that it was enacted, and we have before us in this case, in my opinion, just such defective assessments as it was designed to cure and render unexceptionable.

The appellant's conduct in seeking a remission of penalties for default added to the 1916 taxes and its appeal to the Court of Revision against the valuation of its unsubdivided property in 1917, if they fall short of what would be necessary to raise an estoppel against

it, at least cast grave suspicion on the good faith of its present attempt to escape payment of these taxes.

(3) I agree with the disposition made by Harvey C.J. of the objection taken to the collector's roll or tax roll.

(4) I also agree with the learned Chief Justice that the constitution of the assessment committee is not open to the objection taken.

(5) If the appellant meant seriously to contest the legality of the rate for 1917, under sec. 8 of the "Wetaskiwin Charter" (statutes of 1906, ch. 41), because in excess of 20 mills, it should have shewn that no part of the rate was levied

for the purposes of meeting the cost of any public work, or works under the provisions of an "Act to incorporate the City of Wetaskiwin."

In the absence of such evidence it cannot be presumed that the rate of 21¼ mills did not include such costs.

(6) As already stated, assessments Nos. 1535, 1536 and 1537 of 1916, and No. 1212 of 1917, call for special attention. No name appears in the owner's column in these assessments. Assessments Nos. 1535, 1536 and 1537 immediately follow 1533 and 1534, which are assessments of properties in the name of Alex. Hinchburger, in the roll of 1916; in that of 1917, No. 1212 follows No. 1211, which is an assessment in the name of the City of Wetaskiwin itself. Taking the same view of these assessments as indicated above in regard to others where blanks occur in the owners' column, the lots covered by them, although belonging to the appellant, were wrongfully assessed to Alex. Hinchburger and the City of Wetaskiwin respectively. It is said, however, that these errors were manifestly proper subjects of

complaints in regard to persons wrongfully placed on the roll or omitted therefrom,

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for the correction of which the Court of Revision had appellate jurisdiction, and since the appellant had notice of the intention to assess it for the properties covered by these assessments and failed to avail itself of its right of appeal, the rolls are valid and binding upon it as one of the parties concerned (sec. 136). But as to what are they valid and binding? The assessments stand as to numbers 1535, 1536 and 1537 of 1916 as assessments to Alex. Hinchburger, and as to No. 1212 of 1917 to the City of Wetaskiwin; and the appellant and "all (other) parties concerned" are bound, as to all matters dependent on those assessments, to treat them as rightfully so made. There is not—there never was—an assessment in Nos. 1535, 1536 and 1537 of 1916 and in No. 1212 of 1917 of the appellant, and making the rolls valid and binding upon it cannot convert the Hinchburger and Wetaskiwin assessments into assessments of C. & E. Townsites Limited. The effect of sec. 136 in this view of the matter is merely to preclude the appellant and the respondent alike from averring that the properties covered by these assessments were not rightly made to Alex. Hinchburger and the City of Wetaskiwin respectively.

On the other hand, if the blank in the "owners'" column in each of the three assessments for 1916 should not be treated as filled in with the name "Alex. Hinchburger" and that in assessment No. 1212 for 1917 with the name "City of Wetaskiwin," they must all be dealt with as omissions of the name of a known owner in contravention of sec. 122. From each an essential constituent of an assessment is entirely lacking—with the result that there was not merely a defective or erroneous assessment which might be cured by sec. 136, but no assessment at all and therefore no subject matter for the remedial operation of that section.

Now taxes are recoverable as debts only by virtue of statutory authority. *Lynch* v. *The Canada North West Land Co.*(1), at pages 208 *et seq.*, *per* Ritchie C.J. and *Pipestone* v. *Hunter*(2). Sec. 152 of the Municipal Ordinance (ch. 70 Con. Ord. N.W.T., 1898) reads as follows:—

> 152. Taxes may be recovered with interest and costs as a debt due to the municipality in which case the production of a copy of so much of the tax roll as relates to the taxes payable by such person purporting to be certified as a true copy by the secretary-treasurer of the municipality shall be *primâ facie* evidence of the debt.

The certified extracts from the tax rolls on their production afford *primâ facie* evidence either that Alex. Hinchburger is the person liable to pay the taxes levied under assessments Nos. 1535, 1536 and 1537 of 1916, and of the like liability of the City of Wetaskiwin as to the assessment of No. 1212 of 1917, or that no person was assessed for any of the properties covered by these four alleged assessments. The debts, if any, evidenced by the rolls in respect of these assessments, are those of Hinchburger and the city respectively and not of the appellant. Sec. 152 does not make the taxes in respect of these assessments recoverable as debts from a person or body not in any way named in respect of them in the tax rolls. The appellant is in this position. As to these assessments therefore, were it not for what I am about to say, I would have inclined to the view that the appeal should succeed and that the judgment should accordingly be modified by reducing the amount recoverable for 1916 taxes by $18.04, and that for 1917 by $6.99, with corresponding reductions in interest.

But there is no plea specially directed to these items, and the points in regard to them, which I have been

(1) 19 Can. S.C.R. 204.

(2) 28 Man. R. 570 at p. 572; 28 D.L.R. 776.

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considering, though made in this court, do not seem to have been discussed at the trial or in the Appellate Divisional Court. At least, I find nothing in the record to indicate that they were. Moreover, they would seem almost to fall within the ancient maxim *de minimis non curat lex*. I am therefore not disposed to dissent in respect of these comparatively trifling items from the judgment of the majority of my learned brothers, especially since, even had I done so, my inclination would have been, subject to a modification of the judgment as indicated, to dismiss the appeal, and with costs because, in view of the comparative triviality of the variation effected, it would have substantially failed.

MIGNAULT J.—The question here is as to the validity of the assessment made by the respondent against different parcels of land belonging to the appellant for the years 1916 and 1917, the amount of which is claimed in this action by the respondent from the appellant. Many objections to the validity of the assessment were made by the latter in its plea, but I propose to discuss only two objections, which appeared to be the only ones really insisted on, being content as to the others to rely upon the reasons given by the learned judges in the courts below for deeming them unfounded.

These two objections are serious if they are true in fact and if, in the circumstances of this case, it is open to the appellant to urge them as a reason for escaping liability for the taxes claimed from it in this action. I will consider these objections only in connection with the assessment of the unsubdivided property belonging to the appellant.

The first objection is that there is no name of owner on the assessment roll in connection with these proper-

ties (as well as in connection with many other parcels bearing subdivision numbers), and the second, as I understand it, is that no properties are indicated as being assessed. If these objections are well founded there would be no assessment, and the question would not be of an informality or irregularity covered by the curative provisions of the Municipal Ordinance, but of the total absence of any assessment whatever.

That the proceedings of the assessor in preparing the assessment rolls were very informal cannot be denied. The appellant was a large property owner, and its name appears frequently in the assessment rolls. But when several properties of the appellant were assessed, its name as "Townsite Trustees" was given in the column with the heading "name" opposite the first parcel, and a blank was left in that column opposite the other parcels, without a "ditto" or any sign indicating that the appellant was the owner of the following parcels, until another name appeared in this column. With regard to the unsubdivided property, which is under number 1562 of the roll for 1916, there is a blank in the "name" column opposite that number, and opposite the preceding numbers up to No. 1558, where the name "Townsite Trustees" is inserted. Similarly in the roll for 1917, also in connection with the unsubdivided property, under No. 1251, there is a blank in the "name" column at that number and opposite Nos. 1250, 1249, and 1248, while at No. 1247 we find the name Townsite Trustees.

The 1916 and 1917 rolls are even more informal in so far as any description of the unsubdivided property to be assessed is concerned. Both rolls, as required by the statute, have a column for "description of the property," and in the case of subdivided property belonging to the appellant the subdivision number is

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given, but in both rolls, as regards the unsubdivided property, there is a blank in the column for description of the property. In each roll, however, in the "address" column, there is the entry "179.60 acres unsubdivided," and further on, on the same line in the 1917 roll, covering the four columns entitled respectively "description of personalty or business floor space," "No. of acres assessed," "No. of acres under cultivation," "remarks and court of revision notes," is the entry; "reduced on appeal to $53,880 being $300 per acre" and below the signature "W. A. D. Lees, J.D.C.", being the signature of Judge W. A. D. Lees of the District Court. I may add, always with regard to this unsubdivided property, that the assessed value is $89,800 in the 1916 roll and $53,880 in the 1917 roll, being the correction made after the reduction above referred to.

The secretary-treasurer of the respondent, Mr, Roberts, who also acted as assessor on appointment by the latter, was the only witness examined. He filed some correspondence to which I shall refer, and stated that the description "179.60 acres unsubdivided" was taken from the 1915 assessment roll, adding, however. that the city had come to an agreement with the Townsite (meaning, I presume, the appellant), as to the acreage, this agreement being on the occasion of an appeal taken in 1917 against the valuation of the subdivided property.

It appears by the statement of Mr. Knox, counsel for the respondent before the trial court, that the unsubdivided land described as "179.60 acres unsubdivided" is made up of several parcels, one portion in one part of the city and another portion in another part of the city, and so on. Certificates of title of the unsubdivided land belonging to the appellant were

filed, but the total acreage is not given, but I presume could be calculated, although it would be no doubt a complicated process. But Mr. Roberts testified that the acreage had been adjusted between the appellant and the city, and no contradiction of this statement was made by the former.

The correspondence filed is important. On February 8th, 1917, Mr. Roberts wrote to Messrs. Osler, Hammond & Nanton, agents of the appellant, calling their attention to the fact that two years' taxes were then due and threatening action if the same were not paid. To this letter, Messrs. Osler, Hammond & Nanton replied on March 3rd, 1917, enclosing a cheque for $600 on account of the 1915 taxes, and asking for time to make financial arrangements in order that they might pay the taxes of 1915 in full and at least pay something on account of the 1916 taxes. On April 2nd, 1917, they wrote to Mr. Roberts that they had a limited amount of funds on hand for paying taxes and would like very much to know if the city council would deduct all penalties charged against their property provided all arrears were paid in three instalments, say on the 30th April, May and June. The request for deduction of penalties was not granted and the secretary-treasurer again wrote demanding payment. It appears that the balance of the 1915 taxes, however, was paid and this action is only for the 1916 and 1917 taxes.

It is to be observed, and this was brought out by the learned counsel for the appellant in his cross-examination of Mr. Roberts, that the description of the unsubdivided land as "179.60 acres unsubdivided" was taken from the 1915 roll, taxes under which were paid by the appellant without it appearing that it objected to this description. The same description was repeated in the 1916 roll and the appellant's agents applied for

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time to pay the 1916 taxes without complaining of the description. When the 1917 roll with the same description was made and an assessment notice was sent to the appellant, the latter appealed to the Court of Revision, composed, I understand, of the city council, which rejected its appeal, and then the appellant, on the 14th July, 1917 (the notice of appeal is dated the 14th June, but this is an obvious error), appealed from the Court of Revision to the district judge against

> the assessment of their unsubdivided property within the City of Wetaskiwin in so far as the same refers to the land therein without buildings or improvements, and in particular against the lands mentioned in assessment notice as number 1251.
>
> The grounds of said appeal are that said assessment is excessive, and on other grounds sufficient in law to support this appeal.

It is on this appeal that Mr. Roberts testifies that the acreage of the unsubdivided property was fixed by an agreement between the parties, and this must be so because the district judge reduced the valuation of the unsubdivided property to $300 per acre, which, for the 179.60 acres, would give the total valuation of $53,880 certified by the signature of the district judge on the 1917 assessment roll.

It is under these circumstances that when sued for the 1916 and 1917 taxes, the appellant complains of the insufficient description of the unsubdivided property and of the fact that no name is inserted in the two rolls as owner of the same.

I am of opinion that the appellant cannot now be heard to urge these two objections. Although no name was inserted in the roll opposite the assessment of the unsubdivided property, the appellant received the assessment notice containing the entry of the unsubdivided land, and it never complained that this assessment was not against it, but on the contrary asked for delay to pay the 1916 taxes, and appealed from the 1917

assessment on the ground of excessive valuation and actually succeeded in having the valuation reduced. The appellant clearly understood that it was the party assessed and had no doubt as to the identity of the unsubdivided land referred to, and this being so, how can it now pretend that no name of owner was given in the roll and that the description of the unsubdivided land was insufficient? If insufficient, to transpose the words of Lord Atkinson in the case of *Toronto Corporation* v. *Russell*(1), at page 499, its alleged insufficiency was not shewn to have misled anybody, least of all the appellant.

In the case just referred to the description was: $8\frac{57}{100}$ acres 1240 x 300 east side Carlaw Avenue, north of Queen street. I am free to admit that this might have been better as a local description than "179.60 acres unsubdivided," referring as it did to parcels situated in different parts of the city, and if no question of acquiescence in this description arose I would have great difficulty in coming to the conclusion that it satisfied the statute, but the appellant, in its notice of appeal against the 1917 assessment, adopted this description as referring to its unsubdivided property within the City of Wetaskiwin, and actually claimed and obtained a reduction in its valuation. On that ground my opinion is that the appellant cannot now attack the assessment roll of 1917 for misdescription or rather want of description of its unsubdivided property, and the objection, however serious it appears at first sight, cannot now be entertained.

As to the assessment of 1916, there is the fact that the description was taken from the 1915 roll, and the appellant paid the 1915 taxes. Moreover, by their

(1) [1908] A.C. 493.

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letter of March 3, 1917, the appellant's agents asked for delay in order that they might pay the 1915 taxes in full and at least something on account of 1916 taxes. There was here no complaint against the assessment of the unsubdivided property, and more, there was an unquestioned assumption of liability for the assessment as made. So in my opinion the objection also fails as to the 1916 roll.

I base my decision on this ground of complete acquiescence and assumption of liability, and do not require to consider whether the curative provisions of the municipal ordinance dispose of the appellant's objections. I may perhaps add that municipal authorities place themselves in a rather perilous position when they proceed in the loose manner which characterized the preparation of these rolls. The assessment is here sustained but it owes its success to the conduct of the appellant rather than to its own merits.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *E. D. H. Wilkins.*
Solicitor for the respondent: *Alexander Knox.*

W. T. RAWLINGS AND G. BALL (DEFENDANTS)..... APPELLANTS;

AND

PAUL GALIBERT (PLAINTIFF)..... RESPONDENT.

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*May 21
*June 17
*Nov. 10
*Dec. 22

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, SITTING IN REVIEW AT MONTREAL.

Suretyship—Accommodation notes—Representations by payee to maker—Parol evidence—Commercial matter—Arts. 1233 (1) and 1955 C.C.

The appellants and the respondent were shareholders in the Star Films company. In order to help the company to discount its note of $15,000, one Lubin, the president of the company, obtained from the respondent his own note for $10,000 made payable to the company and to be used as collateral security. According to evidence adduced by the appellants, although objected to by the respondent, Lubin afterwards approached the appellants, informed them that the company held respondent's note for $10,000 and agreed with them that, if they would indorse the company's note for $15,000 to enable him to discount it with the bank, he would pledge the respondent's note as collateral and they would thus be liable only for $5,000; and, on this understanding, the appellants indorsed the company's note. The company went into liquidation before its note of $15,000 became due. The appellants paid the bank $5,000, but refused to pay more. The bank then sued the respondent for $10,000 which he paid; but he called the appellants in warranty asking to be reimbursed in full of his payment to the bank.

Held, Brodeur and Mignault JJ. dissenting, that the respondent, by giving his note to Lubin without any limitation placed on its use, had given him authority to use it as collateral in any manner he might deem advisable to enable the company to discount its own note, and that such authority was lawfully exercised by Lubin to impose on the respondent the obligation of indemnifying the appellants against their indorsement to the extent of $10,000.

Held also, Brodeur and Mignault JJ. dissenting, that, as the appellants as to $5,000 were sole sureties and as to $10,000 were sureties to the bank but not co.-sureties with the respondent, such arrangement takes this case out of article 1955 C.C. as the parties did not "become sureties for the same debtor and the same debt."

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Held also, Brodeur and Mignault JJ. dissenting, that parol evidence as to the understanding between Lubin and the appellants, although the civil contract of suretyship was the subject matter of the testimony, was admissible under art. 1233 (1) C.C., as it concerns liability on promissory notes discounted with a bank in the carrying out of what was undoubtedly a commercial transaction.

Judgment of the Court of Review (Q.R. 55 S.C. 516), reversed, Brodeur and Mignault JJ. dissenting.

APPEAL from a judgment of the Superior Court sitting in review at Montreal(1), affirming the judgment of the trial judge(2), and maintaining the respondent's action in warranty.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

Falconer K.C. and *Ogden K.C.* for the appellant.

Perron K.C. and *Vallée K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—This action was brought by respondent to recover from appellants contribution as alleged co-securities with him for a debt due by Star Films Limited, a corporation carrying on a moving picture show in Montreal.

Appellants and respondent were respectively shareholders in said company. The respondent by reason of his holding of shares for a much larger amount than either of the others, as well as by reason of liabilities he had undertaken on behalf of the company prior to that now in question, was far more deeply interested in the company's success than either of the appellants, or indeed both together.

(1) Q.R. 55 S.C, 516; sub nom. *Banque Provinciale du Canada* v. *Galibert.*

(2) Q.R. 55 S.C. 516, at p. 518

The pith of his story as to the transaction in question is told in the following passage from his evidence:—

M. Lubin voulait d'abord escompter un billet de vingt mille piastres ($20,000). Je me suis rendu au bureau de la compagnie, en compagnie de M. Ecrément et d'une autre personne. Il voulait me faire endosser le billet. J'ai refusé. J'ai dit: "Je n'endosserai jamais le billet. Ce que je suis prêt à faire, pour aider la compagnie, je suis prêt à donner un billet en sureté collatérale à la banque, engageriez-vous votre billet pour dix mille piastres ($10,000) à la banque?"

J'ai dit: "Pour aider l'affaire, je ferai cela."

Nous avions à la banque les cent cinquante mille piastres de débentures et je me pensais parfaitement garanti.

At another part of his story he speaks as follows:—

Q.—You have already stated in your examination on discovery that you did not see either Mr. Ball, or Mr. Rawlings in connection with this transaction? A.—I never saw them.

Q.—You also stated in your examination on discovery that you had received one hundred and fifty thousand dollars ($150,000) worth of the capital stock of the Star Films, Limited, in consideration of lending the company your name to the extent of ten thousand dollars ($10,000)? A.—I received ten thousand dollars ($10,000) of bonds first of all, and fifteen hundred shares of the company's stock.

Q.—That is one hundred and fifty thousand dollars ($150,000) worth of the capital stock of the company? A.—Yes.

By the Court. Q.—You obtained ten thousand dollars ($10,000) worth of bonds? A.—Yes.

By the Court. Q.—How many shares? A.—Fifteen hundred shares, amounting to par value one hundred and fifty thousand dollars ($150,000) which I took as collateral to guarantee me in signing the note.

By defendant's counsel. Q.—Did you not get that stock in consideration of indorsing this note? A.—Yes.

Q.—But you were not to give those shares back to Mr. Lubin if the company paid its notes? A.—No.

Q.—You were to keep the shares? A.—Yes.

Q.—Did you receive those shares previous to the discount of the company's note of the 4th of March, nineteen hundred and sixteen (1916)? A.—Yes, I had some shares of the Allied Features and some shares of the Star Films Company Limited, and Mr. Lubin bonded them all in one certificate of fifteen hundred shares.

Q.—You had already eighteen hundred and thirty-three (1,833) shares. A.—Yes.

Q.—Of which fifteen hundred (1,500) shares came to you on this transaction? A.—I had some before.

Q.—You had eighteen hundred and thirty-three (1,833) before? A.—Yes.

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Q.—Fifteen hundred (1,500) came to you from this transaction under your letter Exhibit D-4 on discovery. A.—Yes.

Q.—According to that letter you were to get fifteen hundred shares (1,500) on account of this transaction? A.—Yes, but I still maintain that those fifteen hundred (1,500) shares comprised previous shares, but my book-keeper can tell you that.

Q.—Anyway, some of the fifteen hundred (1,500) shares came to you in connection with this transaction? A.—Yes, most of them.

Q.—Were those shares delivered to you before the 4th of March, nineteen hundred and sixteen (1916)? A.—I could not say. I do not remember that.

Q.—In any event you obtained them? A.—Yes.

Q.—Did not you get those shares delivered to you almost immediately after you signed the note? A.—I do not remember, but I know I got bonds and these shares came after, as far as I can remember. In fact I attached very little importance to those shares as I knew the company was on the rocks, if we did not help them along.

Q.—That money you gave them to help them along. A.—Yes.

Q.—And you got consideration for doing so? A.—Yes, as they were insolvent.

Lubin was president and general manager of the company. He having thus got the $10,000 note which reads as follows

Montreal, Feb. 17th, 1916.

$10,000.

Four months after date I promise to pay to order of Star Films Limited, Ten Thousand Dollars at 26 Wellington Street, Montreal. Value received.

PAUL GALIBERT.

from respondent, moved by said several considerations to give same, approached each of the appellants and by shewing them said ten thousand dollar note of respondent, a man well able to pay it, and assuring them that it was given for good consideration and would stand between them and loss to the extent of $10,000, induced them to agree to indorse, merely as sureties, a fifteen thousand dollar note of the company.

Both notes were used at the bank to obtain the desired loan.

The parties hereto never met each other, nor did any of them go to the banker, who discounted said note, until at a later date when the company failed and

the bank looked, of necessity, to these parties hereto for payment. As none of them seemed prepared to produce the cash, the bank dropped the company and took by way of renewals from the appellants their note for $15,000 and from respondent a renewal of his note concurrent therewith. And so the business was continued till appellants has paid the $5,000, which they had agreed to go surety for, and refused to pay more as the respondent's turn had come to meet the balance. Of course that could have been no answer in law to the bank.

The bank, however, no doubt recognizing from its knowledge of the transaction, and as I should say any business man would from looking at the face of the transaction, and noting the original dates and being told how all these parties came to be co-sureties for $15,000, the justice of the appellant's contention, demanded payment from the respondent who refused until sued by the bank. Then he paid up and claimed to recover from the appellant.

The learned trial judge allowed such recovery to the extent of one-third of eight thousand dollars from each of the appellants.

In that regard he was upheld by the Court of Review. From that this appeal was taken and, I think, should be allowed.

I cannot understand upon what principle the judgment is founded.

The learned judge, who writes the only notes of reasons appearing in the case, quotes largely from English authorities and indeed cites no other except article 1955 of the Civil Code of Quebec.

I have no doubt that the law is identical, whether English law or French law as presented in said article

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is proceeded upon and that both are derivable from the same source.

The first puzzle is: Why, if the doctrine of common suretyship for the same debt (which was one of $15,000) is to prevail in enforcing contributions, the judgment did not proceed upon the recognition of these men becoming surety for the same debt, and why that debt was not assumed to be as it is contended the facts demonstrate a debt of $15,000, and each allotted an equal share of the burden to be borne which would have resulted in each being called upon to contribute $5,000?

Instead of that the result of the judgment appealed from is that whilst appellants each pay $5,166, the respondent only pays the sum of $4,666.33 of which he had got out of the said original joint transaction, $2,000, by being relieved to that extent of $20,000 for which he had become liable, long before appellants had anything to do with the liabilities of the company, save indirectly as shareholders.

That $2,000 item, and all involved therein, presents us with our next puzzle. As between the parties hereto it was respondents' debt, existent when they became indirectly in appearance concurrent sureties for the $15,000. The theory of concurrent suretyship for the payment of the said $2,000 part thereof is indefensible, if good faith is to be observed, and it should be eliminated. Then the debt for which each must be held to have become, though separately liable, yet joint sureties, would be $13,000.

In any event, on that theory of the total being the same debt, the third of $13,000 would be what each shou'd have borne, and the respondent have paid $3,333.33 and become entitled to call upon each of the appellants for the like sum.

But they had each by paying their share of the $5,000 already discharged their respective shares of the whole debt to the extent of $2,500 as against respondent's nothing.

The courts below appropriate that $2,000 in the reduction of $10,000 which they seem to assume was "the same debt" for which in the language of the Code all the parties had become liable.

But why so assume? For surely "the debt of the same debtor" was $15,000, if anything is clear in this case. Of course the reply is: Oh, no, for respondent only agreed to go surety for $10,000.

Quite so; and appellants only agreed to go surety for $15,000 if and when, or so far as, the respondent should fail to meet the $10,000 he had agreed for good consideration prior to their assuming any responsibility to pay.

As the old saying has it: That is a poor rule that won't work both ways.

If the court can examine the facts behind the appearances and take upon itself to appropriate that $2,000 to do justice in one way of looking at the situation, I most respectfully submit, it must go further and examine all the facts and thus find that the real situation involved not only the appropriation of that $2,000, but the application of the entire actual facts, and they demonstrate beyond peradventure that the parties never in fact intended to become or were sureties for the same debts of the same debtor but that the respondent was surety previously for $10,000 of the debt incurred and the appellants for $5,000 of it and no more unless and until he had failed to meet his prior obligation.

Moreover, when we bear in mind that Lubin had induced the appellants, by shewing them the note

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which respondent had given, and assuring them it was for good consideration, and their protection against the payment of more than $5,000, I fail to understand why the man who put the power in Lubin's hands of so misleading them, can thus be permitted to escape from the natural consequences of his placing it in Lubin's power to so mislead these others.

It seems to me respondent was thereby estopped from claiming relief against those his conduct had so misled.

This is in effect a suit to recover, at the call of him who had so misled, from those he induced to incur a responsibility which, as regards him, they were assured he had assumed and would bear for himself.

It seems to me, with due respect to others, a very plain violation of the principles of justice which are what constitute the relevant law governing parties so concerned.

Article 1955 of the Quebec Civil Code relied upon is as follows:—

> 1955. When several persons become sureties for the same debtor and the same debt, the surety who discharges the debt has his remedy against the other sureties, each for an equal share.
>
> But he can only exercise this remedy when his payment has been made in one of the cases specified in article 1953.

The obvious intention of each set of sureties was that respondent should be surety for the ten thousand and appellants for the balance of five thousand which they have discharged leaving respondent to bear that burden he faced and was paid for facing.

In other words, I repeat that on the true interpretation of the facts, these parties never were to become sureties for the same debt, and hence the claim does not fall within the provisions in said article.

I fail to see how the case of *The Oriental Financial Corporation* v. *Overend Gurney & Co.*(1), which decided

(1) 7 Ch. App. 142.

only the question of a surety being discharged by an agreement to give time, can help herein.

Possibly it was argued before the court below that because the surety was paid for his suretyship that he had not the ordinary rights of a surety to contribution.

To prevent misapprehension I may say that in my opinion the fact of being paid to act as surety does not of itself necessarily so affect the rights of the surety. But when we have to determine whether or not the sureties were such jointly for the same debt or only each to bear a relative part of the total debt, then it becomes a very weighty matter in order to ascertain clearly whether or not the sureties stood upon the same footing or not, to learn all that passed.

In this case the incidents of payment and other advantages which the prior surety had, and especially the significant fact that there was given respondent a corresponding amount of bonds equivalent to the sum guaranteed, ought, I submit, to go a long way in supporting the conclusion of facts I have reached. That is that as between the sureties respondent became alone surety for the last $10,000, and appellants alone co-sureties for the balance of the total of $15,000.

As I read Lord Blackburn's judgment in *Duncan Fox & Co.* v. *North and South Wales Bank*(1), at page 19, cited by the learned judge below, I think it supports what I have been urging against the non-observance of the principle there enunciated that

each shall bear no more than its due proportion.

What was the due proportion? Certainly not what has been allotted to each herein.

Moreover, the partner there, as the shareholder here, deposited security to answer the debt. And the consequences of such act, in Lord Blackburn's view, appears on page 20 of the report (1), where he says:—

(1) 6 App. Cas. 1.

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And if the bank had applied the whole of the proceeds of the security, as far as they went, to the payment of those bills, it seems quite clear that Samuel Collins Radford could not have come to the indorsers to repay him part of the debt which he had thus paid. The answer would have been that he was, as between him and the indorsers, bound to pay the whole.

It seems to me that the bank having chosen to call upon respondent on his general security up to the sum of $10,000 and make him pay, he has no more recourse than said Samuel Collins Radford in Lord Blackburn's opinion might have had.

It has been clear ever since *Dering* v. *Earl of Winchelsea* (1), that the sureties whether known to each other or not are in equity bound to contribute and it has been equally clear ever since *Craythorne* v. *Swinburne*(2), that a surety may contract himself out of such a liability by limiting his share.

The doctrine in each case rests not upon contract but upon the equities of the case.

Here it is quite clear upon the facts that it would be most inequitable to permit the respondent to call upon the appellants for that which they distinctly contracted against.

The cases upon the liabilities of co-sureties are collected in the notes to the *Dering Case*(1), in White & Tudor's Leading Cases in Equity, vol. 1, part 1, and on this branch now in question at page 123 *et seq.* of the American edition in 1888.

The principle in its application to suretyship arising from accommodation indorsement presumes that the first of such indorsers has no recourse over against the later indorsers. And why? Simply that the acts of the persons so indorsing shew the relation they stand without any oral evidence.

(1) 1 Cox Eq. 318. (2) 14 Ves. 160.

The English law permits oral evidence in other cases to shew what the parties intended. Here the written evidence properly read shews that.

Of course it goes without saying that the relation as established at the origin of the transaction is what must govern and cannot be affected by what happens later unless there is an express contract changing the relationship for which latter case there is no foundation herein.

I think, notwithstanding second argument, the appeal should be allowed with costs and the respondent's action in warranty dismissed with costs.

DUFF J.—I concur with Mr. Justice Anglin.

ANGLIN J.—While they appear to have acceded to the admissibility of the parol testimony given at the hearing of this action and to have credited it, the learned trial judge and the learned judges of the Court of Review seem to me, with great respect, to have failed to give effect to it. The respondent objected at the trial to the reception of the oral evidence given by the appellants as to the understanding in regard to the respondent's liability upon which their indorsement of the company's note for $15,000 was procured, and he now strenuously contests its admissibility. That evidence had relation to the respective obligations *inter se* of the appellants and the respondent. It was, in my opinion, testimony upon "facts concerning a commercial matter" admissible under article 1233 (1) C.C. It is neither contradictory of, nor inconsistent with, the obligations which the signatures of the parties to the promissory notes in question evidence, but is merely explanatory of the relations which existed between them, on which their respective rights and obligations depend. It established the authority given

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by Galibert, the maker of a promissory note for $10,000 in favour of Star Films Limited, to one Lubin, the president of the company, in regard to the use to be made of that note; and it shewed what took place between Lubin—both in his capacity of president of Star Films and as the quasi-mandatory of Galibert—and the appellants, Rawlings and Ball (indorsers of a note of the company for $15,000, for which the $10,000 note was pledged as collateral on its discount with the Provincial Bank) in regard to the manner in which the Galibert note would be dealt with and as to the rights and liabilities *inter se* of Galibert and of Rawlings and Ball.

So far as it goes to establish the nature and the scope of Lubin's authority from Galibert and what he did in execution of it *Forget* v. *Baxter*(1) would seem to afford conclusive authority for its admissibility. See, too, *Desrosiers* v. *Brown*(2), Although the civil contract of suretyship is, no doubt, the subject matter of the testimony in question, yet since it concerns liability on promissory notes discounted with a bank in the carrying out of what was undoubtedly a commercial transaction of a company engaged in commerce (Une entreprise de spectacles publics; 6 Mignault, Droit Civil, p. 64) I cannot entertain any doubt of its admissibility. *Ibid*, note (e): *Ville de Maisonneuve* v. *Chartier*(3); *Hamilton* v. *Perry*(4); *Hébert* v. *Poirier*(5); *Banque d'Hochelaga* v. *Macduff*(6); *Scott* v. *Turnbull*(7).

What does the testimony establish? In the first place it shews that having refused to indorse Star Films' note for the $20,000, Galibert, for certain

(1) [1900] A.C. 467, at pp. 476 et seq.
(2) Q.R.17 K.B.55.
(3) Q.R. 20 S.C. 518.
(4) Q.R. 5 S.C. 76.
(5) Q.R. 40 S.C. 405.
(6) Q.R. 14 K.B. 390.
(7) 6 L.N. 397.

valuable consideration, gave to Lubin his own note for $10,000, made payable to that company, to be used to help them (the company) finance the note of $20,000 (afterwards reduced by agreement with Galibert to $15,000), to help discount Star Films' note.

These are Galibert's admissions on discovery. There was no limitation placed on the use that Lubin might make of the Galibert note for the purpose indicated, except that Galibert's liability was to be collateral to that of the company.

Armed with this authority, Lubin approached the appellants (who had likewise refused to endorse the company's note for $20,000), informed them that the company held Galibert's note for $10,000 for valuable consideration, assured them that it was good for this amount, and agreed with them that, if they would indorse Star Films' note for $15,000 to enable him to discount it with the bank, he would pledge the Galibert note as collateral and they would thus be liable only for $5,000 as Galibert's note would protect them as to the other $10,000. On this footing the appellants agreed to indorse the company's note which was duly discounted by the Provincial Bank, Galibert's note being pledged as collateral. While the appellants no doubt assumed liability for the entire $15,000 to the bank, the basis of their obligation as between themselves and Galibert was that, on Star Films' default, he should pay $10,000 and they $5,000. It was within the scope not merely of the ostensible, but of the actual, authority given by Galibert to Lubin that the latter might so use the $10,000 note as to commit Galibert to such an engagement and what took place between Lubin and the appellants should, I think, be regarded as having effected a contract between Galibert and them that he would indemnify them against their indorsement of the company's $15,000 note to the extent of

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$10,000. That I take to be within the intendment of the 7th paragraph of the plea of the defendants in warranty. If not, the facts having been fully gone into at the trial, I would allow whatever amendment may be necessary to raise that defence formally as equity would seem to require. "Supreme Court Act," secs. 54, 55. This arrangement of the sureties' liability *inter se* in my opinion takes the present case entirely out of article 1955 C.C. They did not "become sureties for the same debtor and the same debt." As to $5,000 the appellants were sole sureties. As to the other $10,000 they were sureties to the bank, but not co-sureties with Galibert. They were rather sureties to the bank for him, *i.e.*, their obligation was to pay the bank on his default, while his obligation was to pay the bank in the first instance on the default of Star Films and to indemnify Rawlings and Ball should they be compelled to do so. This also accords with the English law applicable to a case such as this. See *Craythorne* v. *Swinburne*(1); *Re Denton's Estate*(2); *Macdonald* v. *Whitfield*(3).

The courts below, with respect, would seem to have overlooked the unlimited scope of the authority given by Galibert to Lubin to use the $10,000 note as collateral in any manner he might find necessary or deem advisable to enable the company to obtain the discount of its $15,000 note and the fact that the authority was lawfully exercised by Lubin to impose on Galibert the obligation of indemnifying Rawlings and Ball against their indorsement to the extent of $10,000.

What took place subsequent to the commencement of the liquidation of Star Films was not intended to alter or affect the existing rights and liabilities of the

(1) 14 Ves. 160. (2) [1904] 2 Ch. 178.
(3) 8 App. Cas. 733.

appellants and respondent *inter se.* Rawlings and Ball did not by signing the renewal note then required by the bank assume the position of principal debtors or otherwise increase their liability.

These were my views after the first argument of this appeal. Nothing advanced on the re-hearing, in my opinion, warrants modification of them.

I would allow the appeal with costs here and in the Court of Review and would dismiss the action in warranty with costs to be paid by the plaintiff to the defendants.

BRODEUR J. (dissenting).—Il s'agit de savoir si les dispositions de l'article 1955 du Code Civil de Québec doivent être appliquées dans la présente cause.

Les cours inférieures ont été unanimes à dire que cet article devait régir le litige.

Voici ce qu'il dit:—

> Lorsque plusieurs personnes ont cautionné un même débiteur pour une même dette, la caution qui a acquitté la dette a recours contre les autres cautions chacune pour sa part et portion.

Les faits de la cause sont les suivants:—

Les appelants, Rawlings et Ball, et l'intimé Galibert étaient actionnaires d'une compagnie appelée "Star Films" qui, en février 1916, s'est trouvée dans un pressant besoin d'argent. Le gérant de la compagnie, Lubin, s'est adressé à Galibert et, après certaines négociations, il a obtenu la signature de ce dernier sur un billet de $10,000.00, qui ne devait pas être escompté mais déposé à la Banque Provinciale en garantie collatérale d'une somme de $15,000.00 que la compagnie devait emprunter de cette banque.

Lubin s'est alors adressé aux appelants Rawlings et Ball et, ayant obtenu leur endossement, sur un billet de la compagnie, de $15,000.00, va le faire escompter

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à la Banque Provinciale et il dépose en garantie collatérale du prêt que la banque faisait le billet de Galibert.

Il paraît bien évident que, dans toutes les négociations de Lubin avec Galibert et de Lubin avec Ball et Rawlings, il s'agissait pour la compagnie de trouver une somme de $15,000.00 dont elle avait absolument besoin pour continuer ses opérations. Comme Galibert, Ball et Rawlings étaient des actionnaires, il était assez naturel que son gérant essayât de les induire à l'aider. L'emprunt qu'il s'agissait de faire ne constituait qu'une seule et même dette dont Rawlings et Ball étaient les cautions pour le tout, vu qu'ils avaient endossé le billet de $15,000.00 et que Galibert avait également cautionné jusqu'au montant de $10,000.00.

La compagnie n'a pas pu être sauvée du naufrage et elle est tombée en faillite. Il s'agit de savoir si cette somme de $10,000.00 doit être partagée entre les cofidéjusseurs en portions égales, ou bien si elle doit être payée intégralement par Galibert.

Rawlings et Ball allèguent dans leur plaidoyer que Lubin, en leur demandant d'endosser le billet de $15,000.00, leur a déclaré qu'il avait l'endossement de Galibert pour $10,000.00 et qu'alors, pour me servir de l'expression de leur défense

> the liability of the pleading defendant in warranty in any event would not exceed the sum of $5,000.00 inasmuch as if the Company Star Films Limited did not pay its note or retire the same that pleading defendant in warranty would be protected by the note of the said Paul Galibert for $10,000.00 to the extent thereof.

Ces déclarations de Lubin changent-elles la nature des relations des cofidéjusseurs? Je dis que ces déclarations ne pourraient exempter les défendeurs d'être condamnés à payer sous les dispositions de l'article 1955 du Code Civil. Lubin, en recevant le billet de

Galibert, aurait pu facilement le transférer à Rawlings et Ball et ces derniers, en l'endossant et en le payant, auraient eu un recours plus tard, comme porteurs de bonne foi, contre Galibert, en vertu de l'acte des lettres de change.

Mais malheureusement pour les défendeurs ce n'est pas ce qui a été fait. Ils ne sont pas devenus porteurs du billet promissoire endossé par Galibert. Ils ont eux-mêmes endossé un billet pour l'accommodation de la compagnie Star Films. Ce billet devait être escompté à la Banque Provinciale, comme de fait il l'a été: et en garantie collatérale de ce billet de $15,000 on y a déposé le billet de Galibert.

Plus tard, même quand la compagnie est devenue insolvable, Rawlings et Ball ont renouvelé le billet de $15,000.00 non pas en l'endossant mais en le signant eux-mêmes: et Galibert renouvela lui aussi son billet, mais en déclarant que ce renouvellement était donné en garantie collatérale du billet de Rawlings et Ball.

En admettant que Lubin ait dit à Rawlings et Ball, quand il a obtenu leur endossement sur le billet de $15,000.00, que leur responsabilité ne serait que de $5,000.00, vu la garantie collatérale donnée par Galibert, cela constituait de la part de Lubin une opinion légale qu'il a donnée sur la portée et la nature de leurs obligations respectives: mais s'il a erré, s'il a fait des représentations qu'il n'était pas autorisé par Galibert de faire, alors ils ne sont pas déchargés de la responsabilité que la loi leur impose comme cautions, c'est-à-dire de payer leur part de la dette cautionnée.

Mais on dit: Lubin, en faisant ces représentations agissait comme mandataire de Galibert et la portée de ces représentations de Lubin constituait Galibert responsable de toute la dette vis-à-vis ses cofidéjusseurs.

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Naturellement une des cautions peut par son acte de cautionnement stipuler à l'égard de ses cofidéjusseurs une plus grande responsabilité que celle édictée par la loi. Ce contrat ne serait pas contraire à l'ordre public et serait par conséquent valable. Son mandataire pourrait également le faire pour lui. Mais le mandat étant un contrat civil, il ne pourrait être prouvé que par écrit ou par l'aveu du mandant. La preuve testimoniale ne pourrait pas être faite. Dans la cause actuelle, où est la preuve légale du mandat donné à Lubin par Galibert de modifier son obligation à l'égard de ses cofidéjusseurs? La preuve testimoniale qui a été faite ne nous dit pas que Galibert lui-même sût qu'il devait y avoir d'autres cautions. Il n'a donc pas pu donner mandat à Lubin de modifier la portés de son obligation. Il remet simplement son endossement à Lubin sur un billet de $10,000.00. Comme porteur de ce billet, Lubin pouvait le transporter à un tiers et alors Galibert serait devenu responsable pour tout le montant (article 40, acte des lettres de change). Mais Lubin dépose ce billet en garantie collatérale d'une dette qu'il contracte à la banque, dette que Rawlings et Galibert ont cautionnée. Alors les relations qui s'établissent entre les parties sont celles de cofidéjusseurs et nous devons déterminer leur responsabilité entr'eux suivant les dispositions de l'article 1955 du code civil.

Le cautionnement est un contrat civil et il conserve ce caractère lors même que l'opération principale est commerciale; telle est du moins l'opinion généralement admise en doctrine et en jurisprudence. Laurent, vol. 28, no. 165; Massé & Vergé sur Zachariae, vol. 5, p. 759, note 55. Pardessus, vol. 6, p. 24; Pont, vol. 2, no. 88; Dalloz, 1907-1-90; Dalloz, Répertoire Pratique, verbo cautionnement, no. 7.

On a cité, lors des auditions dans la présente cause, certaines décisions rendues en Angleterre mais qui ne sauraient être invoquées sous les dispositions du code civil. Nous ne devons pas sortir d'un système juridique pour chercher des décisions dans un autre système, même dans le cas où les deux textes sont apparemment semblables. Il est toujours dangereux d'aller chercher dans le droit anglais des autorités ou des décisions qui se seront inspirées d'une système propre à ce corps de loi mais qui seraient absolument étrangères aux principes généralement suivis dans le droit civil.

Pour ces raisons l'appel devrait être renvoyé avec dépens.

MIGNAULT J. (dissenting)—Les appelants nous demandent d'infirmer le jugement de la cour de revision à Montréal qui a unanimement confirmé celui de la cour supérieure.

Cette cause avait été plaidée au terme de mai dernier et une question s'étant présentée au cours du délibéré sur laquelle les parties n'avaient pas été entendues, la cour a ordonné une réaudition et a formulé cette nouvelle question comme suit:—

Whether upon the facts in evidence it was within the authority as to the use to be made of his note given by Galibert to Lubin to so use it that he, Galibert, should be liable to indemnify any indorser for Star Films in respect of his endorsement of that company's note to the extent of $10,000.00.

Avant d'exprimer mon opinion sur le jugement qu'il convient de rendre sur la contestation mue entre les parties comme sur cette nouvelle question, il sera utile d'exposer les faits de la cause qui sont peu compliqués.

Les appelants, Rawlings et Ball, et l'intimé, Galibert, étaient actionnaires d'une compagnie connue sous le nom de Star Films, Limited, et partant

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intéressés à son succès. Pour étendre les opérations de cette compagnie, le nommé Herbert Lubin, son président, cherchait à obtenir de l'escompte de la Banque Provinciale du Canada. Il voulait d'abord escompter un billet de $20,000.00 et avait obtenu de l'intimé Galibert un billet de $10,000.00 dont il devait se servir comme garantie collatérale, et en retour il promettait de donner à Galibert $150,000.00 d'obligations de cette compagnie et $150,000.00 de ses actions et un chèque de $5,000.00 en paiement d'une dette antérieure. Cependant la banque ne voulant avancer que $15,000.00, Lubin fit un billet de ce montant, et s'adressa aux appelants. Rawlings et Ball, pour obtenir leur endossement, leur représentant qu'il avait déjà un billet de Galibert pour $10,000.00 et que le plus qu'ils pourraient être appelés à payer serait $5,000.00.

Cette conversation entre Lubin et Rawlings prend de l'importance surtout en vue de la question qui a donné lieu à la réaudition, et je vais citer la version de Rawlings lui-même, que ce dernier a donnée sous réserve de l'objection à la preuve testimoniale faite par l'intimé:—

> Mr. Lubin came to me with a note for fifteen thousand dollars ($15,000.00), and wanted me to endorse it: I refused. I said "I will not," he tried a second time and I refused: then he came back some time after that, and asked me to do it again. I said: No; he said "It will be allright, I have a note from Mr. Galibert for ten thousand dollars made out in favour of Star Films Limited, now this note of Galibert's for $10,000 and this other note of fifteen thousand dollars ($15,000.00) which I want Mr. Ball and yourself to endorse will be handed over to the bank, and the only liability that you would have would be the difference between your fifteen thousand dollars ($15,000.00) and Mr. Galibert's ten thousand dollars ($10,000.00) which is five thousand dollars ($5,000.00), and that five thousand dollars ($5,000.00) would be between you and Mr. Ball: I said "Well, if you have Mr. Galibert's note in favour of the company and as Mr. Galibert's note would come before my note, I would be agreeable to sign it or endorse the company's note."

La date de cette conversation n'a pas été précisée, mais le billet de $10,000.00 de Galibert en faveur de Star Films et le billet de cette compagnie pour $15,000.00, endossé par Rawlings et Ball, sont datés tous deux du 17 février 1916, et le billet de $15,000.00 garanti par le billet de $10,000.00 a été escompté par la Banque Provinciale le 4 mars 1916.

Pour revenir à la conversation entre Lubin et Rawlings et aux représentations qu'on prétend que Lubin aurait faites, Rawlings et Ball, au lieu d'exiger que Galibert confirmât ces représentations—ce qui eût été de prudence élémentaire—consentirent à endosser le billet de $15,000.00 préparé par Lubin. Ce billet fut escompté par la banque, et le billet de $10,000.00 de Galibert, fait par celui-ci à l'ordre de la compagnie Star Films, Limited, fut transporté à la banque en garantie collatérale. Galibert ne reçut pas de la compagnie les $5,000.00 qu'il s'attendait à avoir à même le produit de l'escompte, mais seulement $2,000.00 en argent. La banque ayant exigé les obligations de la compagnie que Galibert devait recevoir, celui-ci paraît n'en avoir eu que pour $10,000.00, mais il reçut $150,000.00 d'actions. Dans toutes ces négociations, les appelants d'une part et l'intimé de l'autre restèrent étrangers les uns aux autres, et il n'est intervenu entre eux aucune convention quelconque.

La compagnie Star Films, Limited, fut mise en liquidation avant l'échéance du billet de $15,000.00, et ce billet fut renouvelé pour un montant moindre (les appelants ayant fait un paiement à compte), en par Rawlings et Ball signant eux-mêmes le billet de renouvellement et déposant le billet de Galibert en garantie, ce billet, dès ce moment, comportant à sa face être donné en garantie collatérale du billet de Rawlings et Ball.

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Après plusieurs renouvellements, Galibert refusa de renouveler davantage son billet en garantie, et la créance de la banque ayant été réduite à $10,000.00 par des paiements effectués par Rawlings et Ball, la banque poursuivit Galibert pour ce montant, et celui-ci appela en garantie Rawlings et Ball, leur demandant de le garantir pour le plein montant de la poursuite. C'est sur cette instance en garantie que les jugements *a quo* sont intervenus. Il appert par la preuve que la banque ayant obtenu jugement contre Galibert, celui-ci acquitta la dette en capital, intérêt et frais.

Ainsi que je l'ai dit, l'action en garantie de Galibert demande aux appelants de l'indemniser en plein de toute condamnation qui serait portée contre lui à la poursuite de la banque. Cependant, la cour supérieure, envisageant les parties comme étant toutes des cautions de la compagnie Star Films, Limited, et tenant compte des $2,000.00 reçus par Galibert, condamna chacun des appelants à garantir Galibert pour le tiers de $8,000.00 et cela en appliquant les principles du cautionnement, et notamment l'article 1955 du code civil, qui dit que

> Lorsque plusieurs personnes ont cautionné un même débiteur pour une même dette, la caution qui a acquitté la dette a recours contre les autres cautions chacune pour sa part et portion.
>
> Mais ce recours n'a lieu que lorsque la caution a payé dans l'un des cas énoncés en l'article 1953.

Il est possible que la cour supérieure ait adopté une solution que ni l'une ni l'autre des parties ne désirait, en transformant l'action en garantie de Galibert en une action en indemnité partielle, et en traitant toutes les parties comme étant les cautions du même débiteur et pour la même dette. Galibert cependant accepta le jugement, et Rawlings et Ball

cherchèrent en vain à le faire infirmer par la cour de revision.

Les prétentions que Rawlings et Ball font valoir devant cette cour sont que Galibert, avant qu'il fût question pour eux d'endosser le billet de la compagnie Star Films, avait donné à cette dernière son billet de $10,000.00; que faisant état de ce billet, Lubin, le président de la compagnie, avait obtenu l'endossement de Rawlings et Ball, en leur représentant que leur responsabilité se limiterait en tout à $5,000.00; que l'arrangement effectué entre Galibert et la compagnie était distinct de celui que cette compagnie avait fait avec Rawlings et Ball et était complété avant que ces derniers consentissent à endosser pour la compagnie; que partant Rawlings et Ball se trouvaient dans la même position que s'ils avaient eux-mêmes avancé $15,000.00 à la compagnie Star Films, et s'étaient ensuite servis du billet de Galibert et de leur propre billet pour obtenir de l'escompte de la banque au montant des $15,000.00 ainsi avancés.

J'écarte immédiatement cette dernière prétention en disant que ce n'est pas là l'espèce que nous avons à juger. Si Rawlings et Ball avaient eux-mêmes avancé $15,000.00 à la compagnie, sur la garantie du billet de Galibert, ils seraient devenus porteurs de ce dernier billet pour valeur, et partant Galibert aurait été leur débiteur personnel, et il va sans dire qu'il n'aurait pas eu de recours contre eux. Telle n'est cependant pas la transaction qui est intervenue entre les parties.

Le débiteur principal, les parties l'admettent, c'était la compagnie Star Films. Si l'intimé et les appelants ont accédé à l'obligation de cette dernière ce ne peut être que comme cautions. Le créancier de l'obligation principale et des obligations accessoires et distinctes des cautions était la banque; et les parties

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ont cautionné la même dette, c'est-à-dire les $15,000.00 empruntés de la banque par la compagnie Star Films.

Or le contrat de cautionnement se fait entre le créancier et les cautions, et non pas entre celles-ci et le débiteur principal (Paul Pont, *Cautionnement*, no. 10). L'erreur fondamentale des appelants, c'est de croire que, par un arrangement avec le débiteur principal, ils peuvent restreindre leur responsabilité à l'égard d'une autre caution qui les a libérés par son paiement. Les représentations que Lubin a pu faire à Rawlings et Ball qu'ils ne répondraient que de $5,000.00 peuvent bien l'engager personnellement, mais ne peuvent être opposées à la banque ni à Galibert, pour lesquels elles sont *res inter alios acta*. Dans l'espèce, Rawlings et Ball ont cautionné l'obligation du débiteur principal pour le tout, $15,000.00, et Galibert jusqu'à concurrence de $10,000.00. Peu importe que Galibert ait donné son cautionnement sans compter sur Rawlings et Ball comme endosseurs futurs du billet de $15,000.00, et que son cautionnement soit entièrement distinct de celui qu'ils ont subséquemment donné. Car une caution peut exercer, en cas de paiement, le recours de l'article 1955 C.C., malgré que son cautionnement ait précédé le cautionnement des autres cautions, et il n'est pas du tout nécessaire que la caution première en date ait compté sur le cautionnement des cautions subséquentes, ni qu'elle l'ait même connu (Paul Pont, *Cautionnement*, no. 316). Il suffit que son paiement ait libéré les autres cautions, et alors celles-ci, par application d'une règle d'équité (ce qu'on appelait autrefois une *action utile*) maintenant consacrée par un texte formel, doivent l'indemniser jusqu'à concurrence de leur part de la dette cautionnée, ou, comme disent les auteurs, ainsi que l'article 1955 C.C. lui-même, pour leur part et portion virile (Paul Pont, *Cautionnement*, no. 321; Guillouard, *Cautionnement*, no. 213).

Lors de la réaudition, M. Falconer, conseil des appelants, s'est appuyé moins sur un mandat donné par Galibert à Lubin par la remise à ce dernier du billet de $10,000.00, que sur ce qu'il a appelé "the constructive delivery" de ce billet par Lubin à Rawlings et Ball, rendant ces derniers en un sens porteurs de ce billet, ou du moins limitant leur responsabilité à l'égard de Galibert, à la somme supérieure à $10,000.00, pour laquelle ils endosseraient le billet de la compagnie Star Films.

Le savant conseil des appelants a cité à l'audition deux décisions anglaises, *Craythorne* v. *Swinburne*(1), et *Brocklesby* v. *Temperance Permanent Building Society* (2), qu'il soutient être favorables à ses prétentions, et à la réaudition il a cité une autre décision anglaise, *London Joint Stock Bank* v. *Simmons*(3).

Bien que je sois d'avis que le droit civil de la province de Québec est assez riche en précédents et en jurisprudence pour qu'il ne soit pas nécessaire d'en chercher ailleurs—et du reste ces jugements ne font pas autorité en cette province—j'ai examiné ces trois décisions.

La seconde ne s'applique pas(2). Il s'agissait d'un père qui avait remis à son fils des titres sur lesquels le fils avait emprunté d'un tiers de bonne foi une somme plus élevée que celle que son père l'avait autorisé à prélever; et on a donné raison au prêteur, qui réclamait la somme entière. Il n'y a aucune difficulté sur ce point.

Il en est de même de la cause de *London Joint Stock Bank* v. *Simmons*(3). Là on avait déposé entre les mains d'un courtier des obligations négotiables sur la garantie et sur la remise desquelles la banque avait de

(1) 14 Ves. 160.
(2) [1895] A.C. 173.
(3) [1892] A.C. 201.

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bonne foi avancé des fonds au courtier. La règle qu'on a appliqué en cette cause était (p. 212 du rapport),

that whoever is the holder of a negotiable instrument has power to give title to any person honestly acquiring it.

Il est clair que cette cause ne s'applique pas. Lubin était détenteur du billet de Galibert, mais il n'en a pas disposé en faveur de Rawlings et Ball. S'il l'avait fait et si Rawlings et Ball avaient acquis de bonne foi et pour valeur la propriété de ce billet, nul doute qu'ils auraient pu réclamer les $10,000.00 de Galibert. Mais encore une fois ce n'est pas là l'espèce que nous avons à juger.

La cause de *Craythorne* v. *Swinburne*(1), à première vue, présente une certaine analogie avec celle qui nous occupe; mais il y a cette différence essentielle que la caution Craythorne, qui réclamait la contribution à Swinburne, avait été elle-même cautionnée par ce dernier auprès de la banque, de sorte qu'elle se trouvait être la débitrice principale à l'égard de Swinburne. Si Galibert avait été cautionné par Rawlings et Ball, je renverrais son action contre ceux-ci, mais rien de tel n'existe dans l'espèce, et les appelants ne le prétendent pas.

La proposition que soumettent les appelants équivaut à dire que Lubin, qui était porteur du billet de Galibert—lequel billet, à la connaissance de Rawlings et Ball, lui était donné pour servir de garantie de l'emprunt que Lubin voulait faire à la banque—aurait pu formellement promettre à Rawlings et Ball, au nom de Galibert, que si eux aussi consentaient à garantir cet emprunt, en d'autres termes si avec Galibert ils devenaient les cautions de Lubin ou de sa compagnie, et que Galibert payait le montant de son cautionne-

(1) 14 Ves. 160.

ment, il n'aurait pas contre eux le recours contributoire de l'article 1955 C.C. Pour faire cette promesse au nom de Galibert il faudrait certainement un mandat de celui-ci, et ce mandat n'existe pas. Peut-on inférer un tel mandat de la simple remise du billet de $10,000.00 par Galibert à Lubin, ou, pour poser cette question dans les termes mêmes de la question qui a donné lieu à la réaudition,

was it within the authority as to the use to be made of his note given by Galibert to Lubin to so use it that he, Galibert, *should be liable to indemnify* any indorser for Star Films in respect of his endorsement of that company's note to the extent of $10,000.00?

Je réponds non, et j'ajoute qu'on n'a cité aucune autorité, anglaise ou française, en faveur de cette prétention.

Du reste, d'après la version même de Rawlings, Lubin n'a fait autre chose que d'exprimer son opinion et cette opinion était mal fondée en loi. Lubin ne parlait pas au nom de Galibert, mais en son propre nom, et dans mon humble opinion ce serait le renversement de tous les principes qui régissent les contrats, que de prétendre qu'il a fait avec Rawlings une convention liant Galibert.

Et quant au "constructive delivery" invoqué par le savant avocat des appelants, il n'y a jamais eu livraison, réelle, feinte ou "constructive," du billet de Galibert à Rawlings et Ball, mais à la connaissance de ces derniers ce billet devait être remis à la banque pour assurer à celle-ci le paiement du billet que Rawlings et Ball endossaient. Et dans les renouvellements subséquents, le billet de Galibert porte expressément qu'il est donné en garantie du billet de Rawlings et Ball.

Pour revenir maintenant à l'exposé de la doctrine du code civil sur le cautionnement, je puis ajouter que le fait que la caution a donné son cautionnement en

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considération d'une valeur reçue par elle du débiteur, n'empêche pas le contrat d'être un véritable cautionnement. (Paul Pont, *Cautionnement*, no. 16.) Dans l'espèce, la cour supérieure a tenu compte de la somme de $2,000.00 que Galibert avait reçue de la compagnie Star Films. Toutefois, comme Galibert ne s'en plaint pas, nous n'avons pas à nous prononcer sur la question de savoir si cette déduction aurait dû être faite, et je me contenterai d'exprimer mes réserves sur ce point.

Cette cause présente toutefois cette particularité que Rawlings et Ball ont cautionné toute la dette de $15,000.00 et que Galibert ne l'a garantie que pour $10,000.00, c'est-à-dire pour les deux tiers. Il n'y a aucune difficulté à décider que la contribution entre cautions qui répondent de toute la dette doit être égale, car l'article 1955 C.C. paraît envisager ce cas qui sera le plus fréquent. Mais l'article 1955 C.C. n'exclut pas l'hypothèse de cautions qui s'engagent d'une manière inégale, et elles ne contribueraient pas au paiement fait par l'une d'elles "chacune pour sa part et portion," si on ne tenait pas compte, dans la contribution au paiement de la dette, de la proportion dans laquelle elles l'ont respectivement cautionnée.

On peut donc dire qu'en payant à la banque $5,000.00 sur le billet de $15,000.00, Rawlings et Ball ont payé la partie de la dette qu'ils avaient seuls cautionnée et ce paiement n'a apporté aucun bénéfice à Galibert qui restait responsable de sa garantie de $10,000.00. Ayant payé cette dernière somme, Galibert a recours contre Rawlings et Ball suivant la proportion de leurs cautionnements respectifs, ou, pour poser la question autrement mais avec le même résultat, on peut dire que les appelants et l'intimé se trouvant sur un pied d'égalité quant aux deux tiers de la dette restée due après que les appelants eussent payé $5,000.00

à la banque, ils devraient contribuer également au paiement de cette somme de $10,000.00.

La cour supérieure ne les fait contribuer également que pour la somme de $8,000.00, donnant ainsi à Rawlings et Ball le bénéfice de la somme reçue par Galibert de la compagnie Star Films comme le prix de son cautionnement. L'intimé cependant ne se plaint pas de cela. Ayant fait mes réserves sur ce point, je crois que la cour supérieure et la cour de revision ont fait une application de l'article 1955 C.C. dont les appelants sont mal fondés à se plaindre. Leur appel doit donc être renvoyé avec dépens.

Je n'ai pas cru nécessaire de discuter la question de la preuve testimoniale des représentations de Lubin, car dans mon opinion ces représentations ne peuvent affecter Galibert. Mais si on veut prouver un contrat fait par Lubin, comme mandataire de Galibert, comportant renonciation au recours contributoire de l'article 1955 C.C., je suis d'avis que la preuve testimoniale est inadmissible. Un tel contrat n'est à aucuns égards commercial alors même qu'il aurait été fait pour obtenir l'endossement d'un tiers sur un billet qu'on se proposait d'escompter.

L'appel devrait donc être renvoyé avec dépens.

Appeal allowed with costs.

Solicitors for the appellants: *Fleet, Falconer, Phelan, Bovey and Ogden.*

Solicitors for the respondent: *Perron, Taschereau Rinfret, Vallée and Genest.*

1919
*Mar. 10
*Mar. 17.

ACKLES v. BEATTY.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Principal and agent—Sale of land—Lapsed option—Commission—Quantum meruit.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), reversing the judgment at the trial in favour of the plaintiff.

A. held an option for the sale of land, his remuneration to be the excess of the price obtained over $29,000. After the option had lapsed he introduced to the owner a purchaser of the land at $35,000, on terms different from those set out in the option and claimed the excess over $29,000 as his commission. He brought action for this amount which he recovered at the trial, but the full court held that he could only recover *quantum meruit*.

The Supreme Court of Canada after hearing counsel reserved judgment and afterwards dismissed the appeal.

Appeal dismissed with costs.

Paton K.C. and *Burchell K.C.* for the appellant.
Milner K.C. for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 52 N.S. Rep. 134; 40 D.L.R. 130.

CANADIAN GENERAL SECURITIES CO. v. GEORGE.

1919
*Apr 1
*May 6

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Sale of land—Re-sale by vendors—Collateral agreement—Evidence.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment for the appellant at the trial.

One George, a cousin of respondent, was employed by the appellant company to sell lots in a proposed town. He wrote to the respondent urging him to buy and stating that he could re-sell within a short time at double the price he would pay. He afterwards telephoned repeating his solicitations and told respondent that the company would re-sell at the advance, and within the time, mentioned in his letter. The manager of the company heard the telephone message and reproved his agent, but did not repudiate the representation made. Respondent bought two lots, paid the initial sum demanded, and made other payments from time to time but made no claim on the company for re-sale. In an action by the company for an unpaid balance on the purchase, respondent set up the alleged agreement for re-sale.

The trial judge held that no such agreement binding on the company was proved. The Appellate Division reversed his judgment and dismissed the action.

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*PRESENT:—Idington, Anglin, Brodeur and Mignault JJ. and Cassels J. *ad hoc*.

(1) 42 Ont. L.R. 560; 43 D.L.R. 20.

1919

CANADIAN GENERAL SECURITIES CO. v. GEORGE.

The Supreme Court of Canada, after argument and judgment reserved, allowed the appeal and restored the judgment at the trial.

Appeal allowed with costs.

Lindsay K.C. for the appellant.

G. F. Henderson K.C. and *McLarty* for the respondents.

CANADIAN S.S. LINES v. GRAIN GROWERS EXPORT CO.

1919
*Mar. 25, 26
*May 6

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Shipping—Carriage of goods—Injury to cargo—Seaworthiness of ship—"Canada Shipping Act," R.S.C., [1906] c. 113, s. 964.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment at the trial by which the respondent's action was dismissed.

The plaintiffs claimed damages for injury to grain shipped in a barge belonging to defendants. The defence was that defendants were not in fault and were relieved by the provisions of sec. 964 of the "Shipping Act." They claimed that the barge struck a corner of the dock in going out of port, but the evidence given was not very clear.

The trial judge exonerated the defendants and dismissed the action. The Appellate Division held that the evidence established that the barge was not seaworthy at the outset and sec. 964 did not apply.

The Supreme Court of Canada affirmed the latter decision and dismissed the appeal.

Appeal dismissed with costs.

Tilley K.C. and *S.C. Wood* for the appellant.

J. H. Moss K.C. and *C.C. Robinson* for the respondent.

PRESENT:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Masten J. *ad hoc.*

(1) 43 Ont. L.R. 330.

1919
*Mar. 11, 13
*May 19

LA COMPAGNIE GENERALE TRANSATLANTIQUE (PLAINTIFFS) } APPELLANTS.

AND

THE SHIP "IMO" (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DISTRICT.

Admiralty law—Collision—Manoeuvres—Signals—Agony of collision.

APPEAL from the judgment of the Local Judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada(1), in favour of the respondent.

The owners of the steamer "Mont Blanc" brought action in the Admiralty Court claiming damages from the owners of the "Imo" for loss in the collision which caused such great damage to life and property in Halifax on Dec. 6th, 1917.

The "Mont Blanc" loaded with high explosives was going north on the Dartmouth side of the channel between Halifax and Dartmouth, and the "Imo" going south on the Halifax side. Signals by whistle were exchanged and the "Mont Blanc" turned to port towards the "Imo's" water. The "Imo" also turned to port and the ships were parallel for a time until the "Imo" went to starboard and the collision occurred.

The trial judge, assisted by nautical assessors, found the "Mont Blanc" solely to blame; that the collision occurred either in mid-channel or on the Halifax side and the "Mont Blanc" was out of her own waters.

In the Supreme Court of Canada the Chief Justice and Idington J. held the "Mont Blanc" alone at fault; Brodeur and Mignault JJ. the "Imo" alone to blame; and Anglin J. that both ships were negligent. Brodeur

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 19 Ex. C.R. 48; 47 D.L.R. 462..

and Mignault JJ. then agreed to judgment condemning both.

Appeal allowed with costs.

McInnes K.C. and *Nolan* (of the New York bar) for the appellants.

Newcombe K.C. and *Burchell K.C.* for the respondent

1919
*May 26
*June 17

DOMINION REDUCTION CO. v. PETERSON LAKE SILVER COBALT MINING CO.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Personal property—Title—Mining Co.—Deposit of tailings.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial(2), in favour of the respondents.

The respondent company owns Peterson Lake and a strip of the land all around it. The Nova Scotia Mining Co. operated a reduction mill near the lake from 1910 to 1912 and deposited the tailings in the lake apparently without any authority, but no objection was made by the respondents. In 1912 the Nova Scotia Company made an assignment and the appellants became possessed of its assets and rights. In 1914, on application by letter appellants were allowed to continue the deposit of tailings. In 1915 they wrote asking leave to deposit in a certain part of the lake and to remove the tailings if they became valuable, which was acceded on July 2nd. In an action by respondents, for an injunction against removal, they claimed nothing in respect to deposits made after the date last mentioned.

The trial judge found that as to deposits, prior to that date, there had never been an agreement therefor; that the deposits were evidently considered to be of no value and were merely the throwing away of refuse; and that the tailings had become the property of the

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 44 Ont. L.R. 177; 46 D.L.R. 724.

(2) 41 Ont. L.R. 182.

respondent company. His judgment for the latter was affirmed by the Appellate Division.

The Supreme Court of Canada heard counsel for both parties and reserved judgment. On a later day the appeal was dismissed.

Appeal dismissed with costs.

Nesbitt K.C. and *McKay K.C.* for the appellants.
Hellmuth K.C. and *Young K.C.* for the respondents.

1918
*Nov. 6
*Nov. 18

DAVIE v. NOVA SCOTIA TRAMWAYS AND POWER CO.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Tramway—Driving team across track—Contributory negligence.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), reversing the judgment at the trial in favour of the plaintiff.

The plaintiff's teamster was driving a load up a hill at the top of which was a street railway track. On reaching this track he attempted to cross when a car was approaching and one of his horses was struck and had to be shot. In an action for the value of the horse the evidence was that the teamster had an assistant and material for blocking the wagon on the hill; that the motorman had thrown on the reverse power but the car skidded, which could have been prevented by sand but it could not have been applied without losing control for a time of the driving apparatus.

The trial judge held the Electric Company liable. His judgment was reversed by the full court and the action dismissed.

The Supreme Court of Canada, after hearing counsel, reserved judgment and, on a subsequent day, dismissed the appeal, Anglin J. dissenting.

Appeal dismissed with costs.

G. F. Macdonnell for the appellant.
Jenks K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 52 N.S. Rep. 316; 41 D.L.R. 350.

ETTINGER v. ATLANTIC LUMBER CO.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

1919
*Mar. 3, 4
*Apr. 9

Trespass—Title to land—Onus—Proof of title.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), reversing the judgment at the trial in favour of the plaintiff.

The appellant brought action for trespass on his land and cutting and hauling away of timber. The lots of the two parties are adjoining and both claim title through different grantees under grants made in 1817. In the grants the lands are described by reference to marks on the ground which have disappeared.

The plaintiff failed to establish the northern line of his lot, but the trial judge found that the southern line was proved and with that he was able to identify the whole lot. His judgment for the plaintiff was, however, reversed by the full court which held that he was in error as to the starting point of the southern line and dismissed the action.

The Supreme Court of Canada after hearing counsel and reserving judgment dismissed the appeal.

Appeal dismissed with costs.

Henry K.C. and *Sangster* for the appellant.
Paton K.C. and *Hanway* for the respondents.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 51 N.S. Rep. 523; 36 D.L.R. 788.

1919
*Mar. 14
*May 6

HALIFAX ELECTRIC RAILWAY CO. v. THE KING.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Award—Special value.

APPEAL from the judgment of the Exchequer Court of Canada(1), awarding compensation for expropriation of the appellants' land.

The land expropriated was used as a plant for generating gas and electricity. The appellants appealed from the award of the Exchequer Court claiming that it had a special value greatly exceeding the amount allowed.

The Supreme Court of Canada held that the award was liberal if not generous and affirmed the judgment appealed against.

Appeal dismissed with costs.

Jenks K.C. for the appellants.
Rogers K.C. for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 17 Ex. C.R. 47; 40 D.L.R. 184.

THE KING v. BRITISH AMERICAN FISH CORPORATION.

1919
*Mar. 25
*May 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Lease—Fishing rights—Void option for renewal—Severance.

APPEAL from the judgment of the Exchequer Court of Canada(1), in favour of the plaintiff (respondent).

The respondent was given a lease for twenty-one years of fishing rights in the Nelson River and other waters with an option of renewal at the expiration of the term on fulfillment of certain conditions. After the rights under the lease were exercised for nine years respondent was notified by the Department of Marine and Fisheries that it was *ultra vires* and void *ab initio* and the fishing rights were withdrawn. In an action against the Crown for loss of the balance of the term it was conceded that the option for renewal was void and contended by the Crown that it vitiated the whole lease. The judgment of the Exchequer Court was that the option was severable and the lease good.

The Supreme Court of Canada heard counsel and reserved judgment. Later the judgment of the Exchequer Court was affirmed.

Appeal dismissed with costs.

C. C. Robinson for the appellant.
Anglin K.C. for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Masten J. *ad hoc*.

(1) 18 Ex. C.R. 230; 44 D.L.R. 750.

1919
*Mar. 6, 10
*June 2

THE KING v. LEE.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Identity of land—Metes and bounds—Plan.

APPEAL from the judgment of the Exchequer Court of Canada(1), in favour of the defendant (respondent).

The Crown filed an information in the Exchequer Court claiming title to land near Windsor Junction as part of the Intercolonial Railway. The County of Halifax, represented by the respondent, claimed the land as a public way.

By a statute of Nova Scotia the Commissioners appointed to expropriate land for the railway were required "to lay off the same by metes and bounds and record a description and plan thereof." The dedication filed did not contain such description, and the Exchequer Court Judge held that the plan attached thereto did not so describe it. He also held that if it did a written description was still necessary.

The Supreme Court of Canada, while deciding that identification of the land by metes and bounds by reference to the plan would be sufficient, agreed with the Judge of the Exchequer Court, the Chief Justice dissenting, that it could not be so identified.

Appeal dismissed with costs.

Henry K.C. and *Sangster* for the appellant.
Jenks K.C. and *McIlreith K.C.* for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 16 Ex. C.R. 424; 38 D.L.R. 695.

THE KING v. THE "HARLEM."

1919
*May 15, 16
*June 2

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NOVA SCOTIA ADMIRALTY DIVISION.

Admiralty law—Collision—Crossing ships—Keeping course—Evidence.

APPEAL from the judgment of the Local Judge of the Nova Scotia Admiralty District of the Exchequer Court(1), in favour of the defendant (respondent).

The Government of Canada brought action against the ship "Harlem," claiming damages for the loss of its ship the "Durley Chine" in a collision between the two vessels.

The ships were "crossing ships," and the local judge held that the "Durley Chine" having the "Harlem" on her starboard side was obliged to keep out of her way, and that not having done so she was wholly to blame for the collision.

The Supreme Court of Canada, having heard counsel and reserved judgment, dismissed the appeal.

Appeal dismissed with costs.

Henry K.C. for the appellant.
Jenks K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 19 Ex. C.R. 41; 47 D.L.R. 471.

1917
*Nov. 2.

KRAUSS v. MICHAUD.

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

Appeal—Jurisdiction—Abandonment of property— Fraudulent bilan— Imprisonment.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal, and maintaining the respondent's contestation.

The appellant, an insolvent trader, made a judicial abandonment of his property. The respondent, a curator to the estate duly authorized, fyled a contestation of the statement or "bilan" produced by the appellant.

The trial court maintained the contestation and condemned the appellant to be imprisoned for a term of six months.

The appellant appealed to the Court of King's Bench on two grounds: first, that the evidence did not justify the condemnation and, secondly, that this evidence had not been taken within the delays fixed by the Code of Civil Procedure.

On appeal to the Supreme Court of Canada, the case was called and, on the date of the hearing of the case, after hearing counsel on behalf of both parties, the court quashed the appeal for want of jurisdiction, no costs to either party as the question had not been raised by the respondent.

Appeal quashed.

Henry Weinfield K.C. and *M. Sperber* for the appellant.

Peter Bercovitch K.C. for the respondent.

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

(1) Q.R. 26 K.B. 504.

ALBION MOTOR EXPRESS CO. v. CITY OF NEW WESTMINSTER.

1918
*Oct. 10.
*Oct. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Highway—Repairs—Oiling.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Murphy J. (2), and dismissing the appellant's (plaintiff's) action.

The appellant's motor truck, heavily laden with goods, skidded on a steep street in the city respondent and was overturned and damage sustained, owing to the roadway having been oiled but not sanded.

The trial judge held that the driver of the truck might, had he exercised ordinary care and driven in a certain way, have avoided the danger; and this judgment was affirmed by the Court of Appeal.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was affirmed.

Appeal dismissed with costs.

Parmenter for the appellant.
G. E. Martin for the respondent.

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

(1) [1918] 3 W.W.R. 19.
(2) [1918] 1 W.W.R. 493.

1918
Oct. 10.

RICHARDS v. BAKER.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Practice and procedure — Seizure — Assignment — Notice to sheriff — Refusal to withdraw—Poundage.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Clement J. and maintaining the respondent's (plaintiff's) action.

The sheriff of Victoria seized certain goods on the premises of one Neston, and on the same day Neston made an assignment for the benefit of his creditors under the "Creditors' Trust Deeds Act." Notice in writing of this assignment was served upon the sheriff shortly after the seizure. The sheriff agreed to withdraw on payment of his bill including an item for poundage, which item the respondent refused to pay. The sheriff remained in possession until ordered to withdraw by an order of Clement J. The question in issue was whether or not the sheriff was entitled to poundage.

The defendant appealed to the Supreme Court of Canada which, after hearing counsel on its behalf, and without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed with costs.

Chrysler K.C. for the appellant.
Bethune for the respondent.

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

(1) 40 D.L.R. 351; [1918] 2 W.W.R. 902.

ASHWELL v. CANADIAN FINANCIERS TRUST CO.

1918
*May 9, 10.
*May 13.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Practice and procedure—Jury trial—Charge—Misdirection.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), maintaining the verdict at the trial in favour of the plaintiff (respondent).

To an action brought to recover money payable on allotments of shares and for calls, the respondent, executors of a deceased shareholder, pleaded the invalidity of his subscriptions because of his mental incompetence when they were procured and because of alleged misrepresentations then made to him. On the trial both issues were submitted to a jury. In charging the jury the trial judge said: "One or both of these defences may be true, but they cannot both be true. If he were mentally incompetent, then the question of misrepresentation would not arise at all." The jury returned a general verdict for the plaintiff. The defendant moved to set aside the verdict and for judgment dismissing the action, and alternatively for a new trial on grounds of misdirection. The trial judge gave judgment in accordance with the verdict and the Court of Appeal affirmed this judgment.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was reversed and a new trial was ordered, with costs of this court and of the Court of Appeal, the costs of the trial to abide by the result.

Appeal allowed with costs.

C. W. Craig for the appellant.

G. H. Dorrell and *J. A. Ritchie* for the respondent.

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

(1) [1918] 1 W.W.R. 207.

1918
*May 8, 9.
*May 13.

RUTTER v. ORDE.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Timber licences — Application — Description — Sufficiency of — "Forest Act", B.C.S. [1912] c. 17, s. 17.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, on an equal division of the court, the judgment of the trial judge, Clement J. and maintaining the respondent's (plaintiff's) action.

The question in issue turns upon the construction of section 17 of the "Forest Act" of British Columbia. The representative of the appellant was the first locator of certain timber claims; and having found on a tree the words "Clyde River," he made his application for a timber license on that river. Later on, the respondent staked the same timber limits, calling the same river as "Swede River," the name under which it was known in the locality. The provincial authorities dealt with these applications as covering different localities. The licence applied for by the respondent was first issued, and later on the one in favour of the appellant was issued.

The trial judge held that the respondent's licence, being first issued, vested in him all rights of property in the timber limits against any claim of the appellant.

On appeal to the Supreme Court, the judgment of the Court of Appeal, affirming on equal division the judgment of the trial Court, was affirmed.

Appeal dismissed with costs.

O. C. Bass for the appellant.

A. H. Macneill K.C. and *R. M. MacDonald* for the respondent.

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

(1) 39 D.L.R. 456; [1918] 1 W.W.R. 735.

THE "WAKENA" v. THE UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA.

1918
*May 7.
*May 14.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT.

Admiralty law—Collision—Narrow channel—Fog.

APPEAL from the judgment of the Exchequer Court of Canada (1), reversing the decision of Martin L.J.A. (2), in the British Columbia Admiralty Division of the Exchequer Court of Canada and maintaining the respondent's action.

This is an action brought by the respondent, owner of the steamship "Venture," against the motor vessel "Wakena" for damages caused by the collision of the two vessels near the entrance to Burrard Inlet, in the First Narrows. The "Venture" was then on the south or proper side of the channel; the "Wakena" had got away to the north side and was trying to get back to the south which was also her proper side. It was common ground that the collision happened in a narrow channel and that the weather was calm but foggy at the time of the collision.

The Vice-Admiralty judge of British Columbia held the "Wakena" to be without fault; but on appeal to the Exchequer Court, Admiralty side, Audette J. with the assistance of a nautical adviser, held that the "Wakena" was the sole cause of the collision.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal with costs, Idington J. dissenting.

Appeal dismissed with costs.

Aimé Geoffrion K.C. for the appellant.

R. C. Holden K.C. for the respondent.

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

(1) 37 D.L.R. 579; [1918] 1 W.W.R. 57.

(2) 24 B.C.Rep. 156; 35 D.L.R. 644.

1918
*Feb. 27.
*Mar. 5.

BERG v. CARR.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Breach of—Performance—Impossibility.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Morrison J. (2), and maintaining the respondent's (plaintiff's) action.

The appellant was general manager of the Hudson Bay Insurance Co. with head office in Vancouver. The respondent was the company's general agent in Alberta, where he wrote up "hail" insurance policies. The premiums on these policies were paid partly in cash and partly by notes. Another firm, Anderson & Sheppard Co., entered into an option with appellant to sell him $50,000 worth of notes at a discount. Later on the appellant asked the respondent to resign; and as an inducement he offered to take up the above option and hand over the notes to respondent for collection at half the profit he was to obtain. The respondent accepted the offer and resigned. But only $10,000 odd of unpaid notes were in the hands of Anderson & Sheppard Co. on the date of their delivery. The respondent brought action for the amount he would have received in profits if the agreement had been carried out, or in the alternative, damages for breach of contract.

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

(1) 24 B.C. Rep. 422; 38 D.L.R. 176; [1917] 3 W.W.R. 1037.

(2) [1917] 2 W.W.R. 94.

1918

BERG
v.
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The trial judge found in favour of the respondent for $5,500 damages; and the Court of Appeal affirmed this judgment, McPhillips J.A. dissenting in part.

On an appeal by the defendant to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

H. S. Wood for the appellant.

Lafleur K.C. and *Charman* for the respondent.

1918
*Oct. 10.
*Oct. 21.

THE MERCHANTS BANK OF CANADA v. HAGMAN.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Assessment and taxation—Co-owners—Notice of assessment to one only—Sufficiency—"Town Act," Alta. S. 1911-12, c. 2, ss. 301, 302, 317.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Hyndman J. at the trial (2), and maintaining the respondent's (plaintiff's) claim on an interpleader issue.

The respondent claimed to be the owner of certain goods in the Queen's Hotel, Vegreville, as purchaser from the town at a sale on a distress for taxes, and the appellant, as chattel mortgagee and as execution creditor of the owners of the goods, contested the respondent's claim on grounds of irregularity in the assessment and tax proceedings. The Queen's Hotel was the property of three persons, only one of them, one Cyre, the manager, living in Vegreville. The assessment and tax notices were addressed to the Queen's Hotel only and were received by Cyre only. The taxes being unpaid, the town under a distress seized and sold the contents of the hotel to the respondent.

The trial judge was of opinion that the notice given was not in accordance with the "Town Act" but his judgment was reversed by the Appellate Division.

On the appeal by the defendant to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

N. D. Maclean for the appellant.

W. L. Scott for the respondent.

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

(1) 13 Alta. L.R. 293; [1918] 2 W.W.R. 377.

(2) [1918] 1 W.W.R. 257.

OCEAN ACCIDENT AND GUARANTEE CORPORATION v. LAROSE AND OTHERS.

1918
*Oct. 17, 18.
*Nov. 18.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Debtor and creditor—Judgment—Release—Bond.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Ives J. at the trial and maintaining the respondents' (plaintiffs') action.

The respondents, three in number, obtained a judgment against two defendants; and two of the joint judgment creditors entered into an agreement with one of the judgment debtors in settlement of the amount of the judgment. The third judgment creditor obtained, on the face of the document, no interest in such agreement, following which an appeal by the judgment debtors was discontinued. The present action was subsequently brought by the judgment creditors, the present respondents, against the appellant upon a bond given as security for the judgment in the first action and the appellant relied upon the above agreement as a release.

The trial judge held that the execution of this agreement by two of the three joint judgment creditors or partners constituted a release at law and he dismissed the action with costs. The Appellate Division held that, although there was no allegation or evidence of intent to defraud, it would be unjust and inequitable to hold the third joint creditor bound by such agreement.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 13 Alta. L.R. 187; [1918] 1 W.W.R. 616.

1918

OCEAN ACCIDENT AND GUARANTEE CORPORATION v. LAROSE

On the appeal by the defendant to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

Chrysler K.C. for the appellant.
Woods K.C. for the respondent.

STOWE v. THE GRAND TRUNK PACIFIC RAILWAY CO.

1918
*Oct. 11.
*Oct. 21.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Railways—Animals killed by train—Negligence of owner—Evidence—Hearsay—Admissibility.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Scott J. at the trial and dismissing the appellant's (plaintiff's) action.

The appellant, living in the same house with his parents and brothers, was the owner of several horses which were accustomed to run and were looked after in conjunction with the animals of his father and brothers within the boundaries of his own and his father's and brothers' land, there being openings between the sections. Four animals of the appellant got upon the right of way of the respondent company and were killed by a passenger train. The appellant knew nothing of the accident except from what was told him by his brother. In his evidence, the appellant stated that his brother told him that he had "left the gate open." The trial judge held that this statement was merely hearsay and not admissible; and it being the only account of the accident, the court held the respondent liable. The Appellate Division held that this testimony should be regarded as an admission or declaration by the appellant himself and therefore entirely proper evidence; and it reversed the judgment of the trial judge and dismissed the action.

On the appeal by the plaintiff to the Supreme Court of Canada, the court, after hearing counsel for

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

(1) [1918] 1 W.W.R. 546.

1918

STOWE v. GRAND TRUNK PACIFIC RWAY. CO.

both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs, Idington J. dissenting.

Appeal dismissed with costs.

C. H. Grant for the appellant.

D. L. McCarthy K.C. and *N. D. Maclean* for the respondent.

McCORD v. THE ALBERTA AND GREAT WATERWAYS RAILWAY CO.

1918
*Oct. 11.
*Oct. 21.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Negligence—Construction of ditch—Surface water—Draining of higher land—Liability of owner.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Simmons J. at the trial and dismissing the appellant's (plaintiff's) action with costs.

The appellant claimed that the respondent, by its servants or agents, wrongfully dug or caused to be dug a drainage ditch from its right of way through certain lands and thereby wrongfully flooded the appellant's lands, causing him damages. The respondent, amongst other defences, denies that it constructed the ditch.

The trial judge gave judgment in favour of the appellant for $480; but this judgment was reversed by the Appellate Division, Hyndman J. dissenting.

On the appeal by the plaintiff to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, allowed the appeal with costs, Davies J. dissenting.

Appeal allowed with costs.

W. N. Tilley K.C. for the appellant.
N. D. Maclean for the respondent.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idginton, Anglin and Brodeur JJ.

(1) 13 Alta. L.R. 476; 41 D.L.R. 722; [1918] 2 W.W.R. 708.

1918
*Mar. 1.
*Mar. 11.

JONES & LYTTLE v. MACKIE.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Contract—Stoppage of work—Owner's lack of funds—Contractor's claim for damages—Guarantee as to cost not exceeding estimate—Fraud—Practice and procedure—Pleading—Amendment of defence on appeal—Allowance of.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Stuart J. at the trial and dismissing the appellant's (plaintiff's) action with costs.

The respondent, desiring to erect a large business building, made an agreement in writing with the appellant that the cost would be $189,000, with the condition that if the estimate was exceeded the appellant would pay to the respondent 20% of the excess and if the cost fell below the estimate, the appellant should be paid 20% of the sum thus saved, it being agreed that $15,000 would be paid at all events. After the appellant had done about $50,000 worth of work, the construction was suspended owing to the respondent's lack of funds, and $5,000 had then been paid to the appellant by the respondent. Later on the respondent advertised for tenders for the continuation of the works according to new plans and specifications; and the new contract was not given to the appellant.

The appellant claimed damages for breach of contract; and the respondent contended that the contract had been rescinded. The trial judge awarded the appellant $10,000 subject to a reference to the

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

(1) [1917] 3 W.W.R. 1021.

Master to ascertain whether the costs of completing the contract would have exceeded or been less than $189,000. The Appellate Division reversed this judgment and found there had been fraud on appellant's part which vitiated the contract, although there had never been any such defence pleaded or alleged during the trial or in the notice of appeal.

On the appeal by the plaintiff to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, allowed the appeal with costs.

Appeal allowed with costs.

G. F. Henderson K.C. and *J. A. Wright* for the appellant.

A. H. Clarke K.C. for the respondent.

1918
*Mar. 4.
*Mar. 25.

FERRING v. TARRABAIN.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Landlord and tenant—Agreement to build suitable house—Damages—Cancellation of lease.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Harvey C.J. at the trial and maintaining the respondent's (plaintiff's) action with costs.

The respondent prayed by his action for a declaration that a certain building occupied by them was not the building called for by the agreement and lease entered into by him and the appellant; and he claimed damages.

The trial judge found in favour of the defendant appellant; but the Appellate Division maintained the respondent's claims, with the right to the appellant to elect for a new trial.

On appeal by the defendant to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date dismissed the appeal with costs.

Appeal dismissed with costs.

C. H. Grant for the appellant.
J. R. Lavell for the respondent.

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

(1) 12 Alta. L.R. 47; [1917] 2 W.W.R. 381.

STEWART v. THORP AND OTHERS.

1918
*May 13, 14, 15.
*June 10.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Criminal law—Contract—Restraint of trade—Unduly lessening competition—Sec. 498 Cr. C.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the judgment of Walsh J. at the trial (2), and dismissing the appellant's (plaintiff's) action with costs.

The defendant, respondent, the Canadian Anthracite Coal Company, Limited, was the owner of large coal areas in the Canmore District in this province, of which the defendant the Canmore Coal Company, Limited, was the lessee. The plaintiff, appellant, was a shareholder in both of these companies. The individual defendants, respondents, were directors, some of them, of one of these companies, and some of them, of the other, and some of them of both. By agreement dated the 15th of September, 1916, the former company agreed to buy from the defendant, respondent, the Georgetown Collieries, Limited, a rival concern operating in the same district, all of the assets of that company, for the sum of $100,000 plus the cost price of all its supplies and stock in trade. This agreement has been executed by the Anthracite Coal Company, but the execution of it by the Georgetown company was prevented by an injunction in this action restraining it from doing so, and it is for that reason still unexecuted by it. $2,500 has been paid for the supplies, but the payment of anything further

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

(1) 11 Alta. L.R. 473; 36 D.L.R. 752; [1917] 2 W.W.R. 700.

(2) [1917] 1 W.W.R. 896.

1918
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under the contract was stopped by the same injunction. The plaintiff, appellant, sought a declaration that this agreement was "unlawful, illegal and *ultra vires*," an injunction restraining each of the defendant, respondent, companies from entering into "any other agreement, arrangement, conspiracy or combine with the defendant the Georgetown Collieries, Limited, forbidden by section 498 of the Criminal Code," from paying over any moneys under the impeached agreement or from doing any further act or thing in the carrying out of the same, and an accounting by the individual defendants for any moneys of either the Anthracite company or the Canmore company, paid to the Georgetown company under the same and judgment against them for all moneys so paid.

The action was tried by Mr. Justice Walsh, who dismissed the action at the close of the plaintiff's case as against the defendants, respondents, the Georgetown Collieries, Limited. He, however, after hearing the evidence of the defence, directed judgment to be entered and a formal judgment was entered accordingly, declaring that the arrangements between the other two companies for the purchase by them of the coal deposits of the Georgetown Collieries, Limited, are illegal, tending to unduly prevent or lessen competition in the production, sale and supply of an article which may be the subject of trade or commerce as provided in section 498 of the Criminal Code, but not otherwise in contravention of the said section, and also declaring that the directors of the Canmore Coal Company, Limited, are liable to the said company for any moneys paid by that company in respect of the agreement in question. A reference was ordered to ascertain the amounts and the judgment ordered the defendants, Thorp, Neale, Thorne, Weyerhaeuser, and

Ingram, to repay the amount so found, to the said company; otherwise the action was dismissed and no injunction was granted.

From this judgment the plaintiff appealed and the defendants, Thorp, Ingram, and Neale, and the two first-mentioned companies cross-appealed. The Appellate Division held that the provisions of section 498 of the Criminal Code are clearly intended to apply to agreements among persons who remain in a particular business as to the method and plan by which they will carry it on and as to regulations and rules among themselves so as to lessen competition in the sale, etc., of any article of commerce, and not to an arrangement to buy out and out the property of a competitor, consequently the Appellate Division dismissed the appeal of the present appellant, allowed the cross-appeal of the present respondent and dismissed the action with costs.

On appeal by the plaintiff to the Supreme Court of Canada, the court, after hearing counsel for all parties, reserved judgment, and, at a subsequent date dismissed the appeal with costs.

Appeal dismissed with costs.

Chrysler K.C. and *Bennett K.C.* for the appellant.

A. H. Clarke K.C. and *M. Macleod* for the respondent, the Canmore Coal Company and other respondents.

O. M. Biggar K.C. for the respondent the Georgetown Collieries Company.

1918
*Oct. 22, 23.
*Nov. 18.

CURRIE v. RURAL MUNICIPALITY OF WREFORD AND LASHER.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Principal and agent—Contract—Municipal Corporation—Agent's signature followed by "councilman"—Personal liability.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), reversing the judgment of Newlands J. at the trial (2), and dismissing the action of the plaintiff (appellant).

The appellant sued for $6,986.90 for work done on the roads of the municipality respondent under a written agreement entered into between him and respondent Lasher, a councillor of said municipality. The agreement was signed: "J. T. Lasher, councilman." The appellant made alternate claims against the municipality on the ground that the contract was their contract and against Lasher on the ground that he was personally liable.

The trial judge held that the municipality was not liable but that Lasher was. Lasher appealed from this decision and Currie cross-appealed against the municipality. The Supreme Court of Saskatchewan allowed the appeal and dismissed the action against Lasher; it also allowed the cross-appeal and entered judgment against the municipality for $374.34.

The plaintiff, now appellant, appealed to the Supreme Court of Canada, and the municipality, now respondent, also cross-appealed. After hearing counsel for the respective parties, the Supreme Court of

*PRESENT:—Sir Louis Davies, C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 38 D.L.R. 516; [1918] 1 W.W.R. 315.

(2) 10 Sask. L.R. 117; [1917] 2 W.W.R. 823.

Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs, Brodeur J. dissenting, and allowed the cross-appeal with costs, Idington and Brodeur JJ. dissenting.

Appeal dismissed with costs.
Cross-appeal allowed with costs.

P. M. Anderson for the appellant.
J. F. Frame K.C. for the respondent municipality
J. A. Allan K.C. for the respondent Lasher.

1917
*Oct. 9.
*Oct. 15.

THE UNITED STATES FIDELITY & GUARANTY CO. v. DEISLER.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Suretyship—Principal and surety—Bond—"To pay all damages"—Costs.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), varying a judgment of Murphy J. at the trial and maintaining the respondent's (plaintiff's) action.

The respondent having applied for an *interim* injunction, an order was made that the Spruce Creek Company, sued by him, should give security to cover any damages that might be awarded him. That company with the appellant became parties to a bond to pay such damages. The judgment in the damage action gave the respondent $14,490 damages, $3,025.08 costs and $1,532.57 interest. The trial judge, in the present action, gave judgment on the bond, against the appellant in favour of the respondent for the full amount. The Court of Appeal, Martin J. dissenting, varied this judgment and held that the bond was not covering the costs.

On the appeal by the defendant to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

Farris K.C. for the appellant.
Chrysler K.C. for the respondent.

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

(1) 24 B.C. Rep. 278; 36 D.L.R. 29; [1917] 3 W.W.R. 214.

HIS MAJESTY THE KING v. THE QUEBEC GAS CO. AND THE QUEBEC RAILWAY, LIGHT, HEAT & POWER CO.

1918
*Apr. 15, 16.
*May 7.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Compensation—Market value.

APPEAL from the judgment of the Exchequer Court of Canada (1), in favour of the defendants (respondents).

It is an information by the Attorney-General of Canada, whereby certain lands, belonging to the defendants, were taken and expropriated for the purposes of the National Transcontinental Railway. The Crown offered $144,400 and the defendants claimed $1,682,880.90. The Exchequer Court awarded the sum of $219,675.00, of which $32,000 represented the value of the buildings and $187,675 the value of the land at $3.00 a foot. The Crown appealed, asking that the last amount should be reduced to $2.25 and the respondent cross-appealed asking a sum of $800,000.

The Supreme Court of Canada, after argument, reserved judgment, and, at a subsequent date, rendered the following judgment: appeal dismissed with costs to the Quebec Gas Co. and no costs to the Quebec R.L.H. & P. Co., Davies and Idington JJ. dissenting; and the cross-appeal dismissed with costs.

Appeal dismissed with costs.
Cross-appeal dismissed with costs.

Gibsone K.C. for the appellant.

Lafleur K.C. and *Morgan K.C.* for the respondent the Quebec Gas Co.

Belley K.C. for the respondent the Quebec R.L.H. & P. Co.

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

(1) 17 Ex. C.R. 386; 42 D.L.R. 61.

1919
*Mar. 19.
*Apr. 9.

MALONE v. HIS MAJESTY THE KING.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Public lands—Provincial grants—Right of way—Timber —License—Compensation.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining the appellant's (suppliant's) action.

The appellant, by his petition of right, seeks to recover the sum of $40,080 and, at the conclusion of the evidence, reduced his claim to $29,466, as representing the value of timber alleged to have been cut by the respondent's officers and servants while engaged in the construction of the National Transcontinental Railway. In 1907, the Quebec Government granted to the commissioners of this railway the Crown land they required for their right of way, and later on the Crown Lands Department of that province sold to the appellant the timber limits which comprised this right of way. The appellant took action against the respondent for the value of the trees cut by it for the construction of the railway on the right of way and on each side of it.

The Exchequer Court disallowed any claim as to the trees on the right of way and awarded $1,000 for the trees cut outside of it.

The Supreme Court of Canada, after argument, reserved judgment and eventually affirmed this judgment.

Appeal dismissed with costs.

St. Laurent K.C. for the appellant.

Lafleur K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 18 Ex. C.R. 1.

HIS MAJESTY THE KING v. BONHOMME.

1918
*May 28.
*June 10.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown grant—Indian lands—Adverse possession.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing the action of the plaintiff appellant.

This is an information of intrusion exhibited by the Attorney-General of Canada, whereby it is claimed that the Island of St. Nicholas, situate in navigable waters of the River St. Lawrence, in Lake St. Louis, be declared a portion of the Caughnawaga Indian Reserve and that the possession of the island be given the Indians. On the other hand, the Province of Quebec, claiming the ownership of the island, sold it in 1906 to the respondent.

The Supreme Court of Canada, after argument, reserved judgment and eventually affirmed the judgment of the Exchequer Court.

Appeal dismissed with costs.

F. J. Bisaillon K.C. and *P. St. Germain K.C.* for the appellant.

F. L. Beïque K.C. and *N. A. Belcourt K.C.* for the respondent.

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

(1) 16 Ex. C.R. 437; 38 D.L.R. 647.

1917
*Nov. 5, 6.
1918
*Mar. 11.

SHARP CONSTRUCTION CO. v. BEGIN.

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

Negligence—Master and servant—Faulty machinery—Skilled engineer.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the trial judge and maintaining the respondent's (plaintiff's) action with costs.

The appellant was in the employ of the company appellant as engineer. The engine was operating a certain number of cog-wheels. These cog-wheels were not covered. It was proved that the appellant was a skilled engineer who was looked to to have the machine in proper order. The accident occurred when the appellant tried to clean a friction pulley near the cog-wheels, while in motion, by holding a rag against it.

The trial court dismissed the action with costs. The Court of King's Bench reversed this judgment, Cross J. dissenting, holding that there was contributory negligence and condemning the appellant to pay $2,400 to the respondent.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment, and, on a subsequent day, allowed the appeal with costs, Idington J. dissenting.

Appeal allowed with costs.

F. Roy K.C. and *G. H. Montgomery K.C.* for the appellant.

Belleau K.C. and *Alleyn Taschereau K.C.* for the respondent.

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

(1) Q.R. 26 K.B. 345.

MONTREAL ABATTOIRS LTD. v. THE CITY OF MONTREAL.

1917
*Nov. 5.
*Nov. 28.
1918
*Nov. 14.

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

Appeal—Jurisdiction—Prohibition.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal (2), and quashing the writ of prohibition issued at the request of the appellant.

The appellant was condemned by the Recorder's Court in Montreal of having caused illegally a public nuisance on its property by operating rendering houses. He then took proceedings by way of the issuance of a writ of prohibition, alleging that the Recorder's Court had no jurisdiction to hear the case.

The trial judge dismissed the action and this judgment was affirmed by the Court of King's Bench, appeal side.

On appeal to the Supreme Court of Canada, the respondent moved to quash the appeal for want of jurisdiction. After hearing counsel on behalf of both parties, the court reserved judgment, and, on a subsequent date, ordered that the motion should stand until the hearing on the merits. On the date of the hearing, the court granted the motion to quash for want of jurisdiction.

Motion granted with costs.

Laurendeau K.C. for the motion.
Buchanan K.C. and *Monty K.C.* *contra.*

(1) Q.R. 27 K.B. 162. (2) 23 Rev. de Jur. 470.

1918
*Apr. 16, 17.
*May 8.

RAYMOND v. HIS MAJESTY THE KING.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Compensation—Water-lot—Compulsory taking.

APPEAL from the judgment of the Exchequer Court of Canada (1), awarding the sum of $23,560 to the suppliant, appellant.

A petition of right was brought by the appellant to recover the sum of $390,000 as representing the value of certain land or part of a beach-lot, expropriated by the Crown, and the damages resulting from such expropriation.

The Exchequer Court awarded the sum of $23,560, being four cents a square foot for 589,000 square feet of land expropriated. The suppliant appealed asking that the amount of compensation should be declared insufficient; and the Crown cross-appealed urging that this amount should be decreased.

The Supreme Court of Canada, after argument, reserved judgment, and, at a subsequent date, dismissed the appeal with costs; and the cross-appeal was allowed with costs, the Chief Justice dissenting.

Appeal dismissed with costs.
Cross-appeal allowed with costs.

Belleau K.C. and *St. Laurent K.C.* for the appellant.
Holden K.C. for the respondent.

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

(1) 16 Ex. C.R. 1; 29 D.L.R. 574.

LEFEBVRE v. HIS MAJESTY THE KING.

1919
*Mar. 21.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Contract—Sale of land—Option—Privity.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing the appellant's, suppliant's, action with costs.

It is a petition of right to recover compensation, under an option, with respect to certain land taken by the Crown for the construction of a barrier or dam on the River St. Charles, P.Q.

The Exchequer Court held that, under the circumstances of the case, the suppliant was not entitled to any portion of the relief sought by his petition of right.

The suppliant appealed to the Supreme Court of Canada, which, after hearing counsel on his behalf, and without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed with costs.

E. A. D. Morgan K.C. for the appellant.
Bernier K.C. and *Billy* for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 16 Ex. C.R. 241; 38 D.L.R. 674.

1918
*Nov. 27.
*Dec. 23.

DE FELICE v. O BRIEN.

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

Sale—Acceptance—Defects—Destruction of the goods.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal, and dismissing the appellant's, plaintiff's, action.

The appellant is a manufacturer of cigars and ordered from the respondent the delivery of tobacco which was accepted. The appellant then made 70,000 cigars. Later on his clients complained that the tobacco did not burn and a certain part of these cigars were returned to the appellant, of which fact he advised the respondent. On the 26 May, 1916, the appellant offered to return to respondent 40,000 out of the 70,000. On the 17th June, the appellant advised the respondent that these cigars had been destroyed. On the 18th July, the appellant took this action in damages for $4,879.

The trial court dismissed the action; and the Court of King's Bench affirmed this judgment.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment, and, on a subsequent date, dismissed the appeal with costs, the Chief Justice and Mignault J. dissenting.

Appeal dismissed with costs.

Edmond Brossard K.C. for the appellant.

Kavanagh K.C. and *J. H. Gérin-Lajoie* for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 27 K.B. 192.

KEYSTONE LOGGING & MERCANTILE CO. v. WILSON.

1919
*Feb. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Trespass—Damages—Cutting of timber—Licence.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing the appeal from the judgment of the trial court (2), and maintaining the respondent's, plaintiff's, action.

The respondent is the owner of certain lands on which are merchantable timber and brought action against the appellant for trespass to lands and the taking of timber and other trees, injury to the soil and destruction of boundary posts. The respondent pleaded leave and licence and did not dispute liability to make due compensation for trees taken and damage done; and he paid into court $600 to cover this compensation.

The trial court held that the offer was sufficient to cover the damages suffered by the respondent; but the Court of Appeal awarded to the respondent the sum of $1,860.

On the appeal to the Supreme Court of Canada, the court heard counsel for the appellant and, without calling upon counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed with costs.

R. Cassidy K.C. for the appellant.
Eug. Lafleur K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 25 B.C. Rep. 569, at p. 573. (2) 25 B.C. Rep. 569.

1919
*Feb. 6, 7.

ISITT v. GRAND TRUNK PACIFIC RLY. CO.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Railways—Trespass—Taking gravel—Consent of owner.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, on equal division of the court, the judgment of the trial court (2), and maintaining the appellant's, plaintiff's, action for $755.30.

The appellant is the owner of certain land situate near the townsite of Prince George. The respondent was then constructing its main transcontinental line and had a right of way through the above property of the appellant. While a steam shovel, operated by the respondent, was removing gravel on its right of way, the appellant's agent visited the property. Later on, the respondent removed some gravel from the appellant's property. The appellant, by his action, claimed damages, alleging trespass by the respondent on his land and taking away gravel.

The trial court held that that had been no trespass and condemned the respondent to pay $755.30, value of the gravel removed.

On the appeal to the Supreme Court of Canada the court heard counsel for the appellant and, without calling upon counsel for the respondent, dismissed the appeal with costs.

Appeal dismissed with costs.

A. Bull for the appellant.

A. Alexander for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) [1918] 3 W.W.R. 500.

(2) [1918] 3 W.W.R. 500.

LEBRUN v. GRUNINGER.

1918
*June 4.
*June 25.

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

Contract—Transfer of shares—Specific performance.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), varying the judgment of the Superior Court, District of Three Rivers, and maintaining the respondent's, plaintiff's, action.

The respondent entered into an agreement with the appellant whereby, in consideration of $5,000, the former undertook to sell and deliver to the latter 27,450 shares in the "Gold Mine Huronia" company. The appellant, who is a notary and also secretary-treasurer of this company, was acting on behalf of parties who were desirous of obtaining control of the company. Later on, the appellant, having asked the respondent to agree to cancel the agreement, which he refused to do, wrote across his copy of the agreement: "This contract is cancelled." Then the respondent served on the appellant a notarial protest to carry out his obligations under the contract and later brought this action for specific performance.

The trial court gave judgment against the appellant for $5,000 with interest and costs; and this judgment was affirmed by the Court of King's Bench, though with some modifications.

The defendant appealed to the Supreme Court of Canada, which, after hearing counsel for the respective parties, reserved judgment, and, on a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

Surveyer K.C. and *St. Laurent K.C.* for the appellant.

Belcourt K.C. and *Bigué K.C.* for the respondent.

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

(1) Q.R. 27 K.B. 210.

1919
*May 22, 23.
*June 17.

PULOS v. KLADIS AND LERIKOS.

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

Partnership—Parol evidence—Husband and wife.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the trial court and dismissing the intervention fyled by the appellant.

The appellant Pulos sought to recover payment of a debt due to him by Denis Lazanis, the husband of the intervenant Mary Kladis, out of the one-third interest in a theatrical business carried on in Maisonneuve, which, according to the documentary evidence produced, belonged to Mary Kladis, but which appellant alleged was in truth the property of her husband using her name to shield him from his creditors.

The trial judge maintained the allegations of the appellant and dismissed the intervention fyled by Mary Kladis. The Court of King's Bench reversed this judgment.

The plaintiff appealed to the Supreme Court of Canada, which, after hearing counsel on behalf of both parties, reserved judgment, and, at a subsequent date, dismissed the appeal.

Appeal dismissed with costs.

Aimé Geoffrion K.C. and *Thomas Walsh K.C.* for the appellant.

J. O. Lacroix K.C. for the respondent, Lerikos.

O. Sénécal K.C. for the respondent, Kladis.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Brodeur and Mignault JJ.

(1) 24 R.L.N.S. 482.

CITY OF MONTREAL-NORD v. GUILMETTE.

1919
*May 19.
*June 2.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, SITTING IN REVIEW AT MONTREAL.

Municipal corporation—Promissory note—Practice and procedure—Evidence.

APPEAL from a decision of the Court of Review, at Montreal (1), affirming the judgment of the trial court and maintaining the respondent's, plaintiff's, action.

The action is brought for the payment of a promissory note signed: "Ville Montréal-Nord, Joseph Boyer, maire, J. A. Cadieux, sec.-trés." The municipality appellant fyled a general denial to the statement of claim; and the appellant having made default to answer to interrogatories on *faits et articles*, these were declared by the court *pro confessis*. No other evidence was adduced by either party.

The trial court gave judgment against the appellant for the amount of the note; and the Court of Review held the evidence, the interrogatories declared *pro confessis*, sufficient to enable the respondent to obtain judgment on his action.

The defendant appealed to the Supreme Court of Canada, which, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

L. E. Beaulieu K.C. for the appellant.
Perron K.C. and *Gustave Monette* for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 55 S.C. 53.

1919
*Feb. 14, 17.

MILLER v. STEPHEN.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Trustees—Remuneration—Estate—Disbursement.

APPEAL from a judgment of the Court of Appeal for British Columbia (1), varying the judgment of the trial court.

The appellant was appointed trustee of the estate of William Stephen, deceased. The court, upon application, settled an allowance for administration of 5% of the gross value of the estate. On a petition by the beneficiaries upon coming of age, the appellant was discharged from trusteeship and accounts were ordered to be taken. The registrar by his report allowed two items in the accounts to which the respondent objected.

The trial judge affirmed the registrar's report, from which judgment both appellant and defendant appealed. The Court of Appeal dismissed the appellant's appeal and allowed the respondent's appeal.

The Supreme Court of Canada, after hearing counsel for the appellant and, without calling on counsel for the respondent, dismissed the appeal.

Appeal dismissed with costs.

R. Cassidy K.C. for the appellant.
Wallace Nesbitt K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 25 B.C. Rep. 388; 40 D.L.R. 418; [1918] 2 W.W.R. 1042.

MACPHERSON v. BOYCE.

1919
*May 7.
*May 19.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Company—Winding-up—Assets transferred to new company—Petition —Status of petitioner.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial court (2), and confirming the order for the winding-up of the Dominion Trust Co.

Under an agreement, ratified by legislation, between two companies called "The Dominion Trust Co.," the "old" and the "new," the assets of the "old" company were vested in the "new;" the shareholders in the "old" were entitled to exchange their shares for shares in the "new." A shareholder in the "old" company, who had not made such application, was placed upon the list of contributories on the assumption that he had exchanged his shares. The shares of that shareholder were not fully paid up and he petitioned, under the B.C. "Companies Act," for the winding-up of the "old" company.

The trial court and the Court of Appeal held that, even if the "old" company had no assets, it was "just and equitable" within the meaning of the Act that the "old" company should be wound up and that the petitioner had a status to present the petition.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal.

Appeal dismissed with costs.

Geo. F. Henderson K.C. for the appellant.
Eug. Lafleur K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 43 D.L.R. 538; [1918] 3 W.W.R. 751.

(2) [1918] 1 W.W.R. 648.

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