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 J., K.C.M.G.

" JOHN IDINGTON J.

" LYMAN POORE DUFF J.

" FRANCIS ALEXANDER ANGLIN J.

" LOUIS PHILIPPE BRODEUR J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. CHARLES JOSEPH DOHERTY K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ARTHUR MEIGHEN K.C.

ERRATA ET ADDENDA.

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

Page 284, line 23, for "4 & 5 Geo. V.," read "3 & 4 Geo. V."

" 552, line 4, for "third," read "second."

" 622, line 11, insert "cent" after "cinq."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 50 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Canadian Pacific Railway Co. v. *McDonald* (49 Can. S.C..R 163). Appeal to Privy Council dismissed with costs, 22nd July, 1915.

Hughes v. *Northern Electric and Manufacturing Co.* (50 Can. S.C.R. 626). Leave to appeal to Privy Council refused, 26th July, 1915.

Robertson v. *City of Montreal and Canadian Autobus Co.* (not yet reported). Leave to appeal to Privy Council refused, 18th December, 1915.

Smith v. *Rural Municipality of Vermilion Hills* (49 Can. S.C.R. 563). Leave to appeal to Privy Council granted, 16th July, 1914.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

C.

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Y.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE SASKATCHEWAN LAND AND HOMESTEAD COMPANY AND THE TRUSTS AND GUARANTEE COMPANY (CLAIMANTS) ..... APPELLANTS;

AND

THE CALGARY AND EDMONTON RAILWAY COMPANY (CONTESTANTS) ..... RESPONDENTS.

1914
*Oct. 30.
1915
*Feb. 2.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Railways — Expropriation — Materials for construction — Notice to treat—Statute—"Railway Act," R.S.C., 1906. c. 37, ss. 180, 191, 192, 193, 194, 196—Compensation—Date for ascertainment of value—Order for possession—Deposit of plans—Approval of Board of Railway Commissioners.

With regard to obtaining materials for the construction of railways, the effect of sub-section 2 of section 180 of the "Railway Act," R.S.C. 1906, ch. 37, merely requires the general provisions of the Act relating to the using and taking of lands to be observed in so far as they are appropriate to the expropriation of the lands and settling the compensation to be paid therefor; section 192 of the Act has no application to such a case.

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

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Notices were given, in compliance with sections 180, 193 and 194 of the "Railway Act," and, before any change had taken place in respect to the value of the lands to be taken, the railway company obtained an order of a judge permitting it to do so and took possession of the lands in question.

Held, that the title of the company to the lands, when consummated, must be considered as relating back to the date when possession was taken and that the compensation payable therefor should be ascertained with reference to that time.

Judgment appealed from (6 Alta. L.R. 471) affirmed.

APPEAL from the judgment of the Supreme Court of Alberta(1), dismissing an appeal from an award of arbitrators appointed under the "Railway Act," R.S.C. 1906, ch. 37, to ascertain the amount of the compensation payable by the railway company upon the expropriation of lands for railway purposes.

In June, 1908, the Saskatchewan Land and Homestead Company and certain other persons were interested in lands in the Province of Alberta which were required by the railway company for the purposes of obtaining stone, gravel, earth, sand, water and other material to be used in the construction and operation of the railway. Notices were served upon the parties interested in the lands by the railway company, under the provisions of sections 180, 193, and 194 of the "Railway Act." Shortly afterwards, the company obtained an order from a judge for immediate possession of the lands, under section 217 of the Act (upon depositing $1,150), and, thereupon, it entered into possession of the property. The parties were unable to agree as to the amount of compensation to be paid for the taking and using of the lands, but arbitrators were not appointed until the year 1912 and the arbitration did not take place until the month of September of that year. Attached to the notice to treat was a

(1) 6 Alta. L.R. 471.

certificate by a land surveyor, as required by section 194 of the Act, fixing the value of the property and the compensation to be offered at $733.05, and, in making their award, the majority of the arbitrators adopted that amount as the proper compensation payable by the railway company. On an appeal from the award to the Supreme Court of Alberta, the decision of the arbitrators was affirmed by the judgment now appealed from.

Whiting K.C. and *A. B. Cunningham* for the appellants.

The court and the arbitrators erred in fixing the amount of the compensation at $733.05; in finding that the date with reference to which compensation or damages should be ascertained was the date of the order for immediate possession, viz., 24th July, 1908, and in making no allowance for the value of the land for gravel purposes.

We rely upon the following authorities :—

Vezina v. *The Queen*(1) ; *Trent-Stoughton* v. *Barbadoes Water Supply Co.*(2) ; *Ripley* v. *Great Northern Railway Co.*(3) ; *In re Gough and Aspatria, Silloth and District Joint Water Board*(4) ; *Bailey* v. *Isle of Thanet Light Railways Co.*(5) ; *In re Tyneworth and the Duke of Northumberland*(6) ; *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(7).

The actual value in 1912 is the proper measure of the prospective value in 1908. *Bwllfa and Merthyr*

(1) 2 Ex. C.R. 11; 17 Can. S.C.R. 1.
(2) [1893] A.C. 502.
(3) 10 Ch. App. 435.
(4) [1904] 1 K.B. 417.
(5) [1900] 1 Q.B. 722.
(6) 89 L.T. 557.
(7) [1914] A.C. 569.

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Dare Steam Collieries v. *Pontypridd Waterworks Co.* (1). The burden is not imposed upon a person whose land is taken from him against his will of proving by costly experiments the mineral contents of his land as a condition precedent to obtaining compensation. *Brown* v. *Commissioner for Railways* (2). The land owner is entitled to more than an ordinary vendor, because he is a vendor who is compelled to sell. *The Queen* v. *Essex* (3), at page 451.

O. M. Biggar K.C. for the respondents. The respondents, by their conduct, are estopped from making any claim for extraordinary damages; they consented to possession being taken, on the deposit of $1,150 by the railway company, which then proceeded to make use of the material and it was not until several years afterwards that the owners first suggested any extraordinary value; this claim was not based upon the value at the time of the consent, but upon a value alleged to have been acquired by the property long after the removal of the material.

Section 192, with regard to the date by reference to which the value of lands is to be ascertained in the case or arbitrations, can by no possibility have any application to arbitrations with regard to lands taken under section 180. Section 192 depends for its operation upon there being a necessity to deposit a plan with the registrar of deeds, and there is no provision authorizing the registrar to receive any plan not certified by the Board of Railway Commissioners. As section 180 expressly relieves the railway company from the necessity of obtaining any approval of a plan

(1) [1903] A.C. 426. (2) 15 App. Cas. 240.
(3) 17 Q.B.D. 447.

required under that section, there is no way in which any plan can be deposited with the registrar of deeds so as to make section 192 apply.

The rule adopted under the English "Lands Clauses Consolidation Act," 1845, must be resorted to, viz., that the value is to be ascertained as of the date upon which the notice to treat is given. Hudson on Compensation, vol. 1, p. 161; *Penny* v. *Penny*(1); *Tyson* v. *Mayor of London*(2). Possession having been taken with the consent of the owners, the railway company must be deemed to have become equitably entitled to the lands when they entered into possession, subject to the ascertainment of the proper value as of that date. *Carnochan* v. *Norwich and Spalding Railway Co.*(3); *Mercer* v. *Liverpool, St. Helen's and South Lancashire Railway Co.*(4).

The order for possession having been made, and the company having gone into possession pursuant to it, there was no right of withdrawal. See "Railway Act," section 207; *Canadian Pacific Railway* v. *Little Seminary of Ste. Thérèse*(5); *Re Haskill and Grand Trunk Railway Co.*(6); *Atwood* v. *Kettle River Valley Railway Co.*(7).

THE CHIEF JUSTICE.—With some hesitation I agree that this appeal should be dismissed with costs.

IDINGTON J.—The respondent acting under section 180 of the "Railway Act," sought to expropriate a

(1) L.R. 5 Eq. 227.
(2) L.R. 7 C.P. 18.
(3) 26 Beav. 169.
(4) (1903) 1 K.B. 652; [1904] A.C. 461.
(5) 16 Can. S.C.R. 606.
(6) 3 Can. Ry. Cas. 389; 7 Ont. L.R. 429.
(7) 14 West. L.R. 429.

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piece of gravel-bearing land which belonged to the appellants and, accordingly, by notice of the 30th of June, 1908, served pursuant to said section on appellant and others concerned therein informed them of such intention and tendered the sum of $733.05 as compensation for said land and for any damages to be suffered by the exercise of the powers conferred by said section and notified them that if the said offer was not accepted within ten days after service of said notice the appellant would apply to a judge for the appointment of an arbitrator or arbitrators as provided by section 196 of the said Act. Attached to said notice was a plan and certificate of a Dominion land-surveyor such as required in such cases by section 194 of said Act.

The then Chief Justice of Alberta on the 24th July, 1908, made, under section 217, an order upon consent of all parties interested that upon payment into court of $1,150 the respondent might enter into immediate possession of said lands.

The respondents, accordingly, shortly thereafter entered into possession and from time to time removed a very large quantity of gravel. No steps towards arbitration seem to have been taken until the year 1911, when a board of arbitrators was named, but for some reason failed to act and a new one was constituted in the year 1912, which proceeded with the reference and heard a great deal of evidence directed by both sides almost entirely to the then marketable value of the gravel according to the quality thereof about which there was much conflict of opinion.

The majority of the arbitrators held that the value of the property expropriated must be taken to be that

which it was worth in 1908, when possession was taken, and awarded the amount tendered then. One of the arbitrators dissented from this view, holding that by section 192, as amended in 1909, its value at the time of the hearing was what ought to govern.

The appellant asked the court of appeal to set the award aside, but that court dismissed that appeal and hence this appeal.

The first and chief question thus raised is whether or not the said section 192, as so amended, is applicable.

Section 191, sub-section 1, is as follows:—

191. After the expiration of ten days from the deposit of the plan, profile and book of reference in the office of the registrar of deeds, and after notice thereof has been given in at least one newspaper, if any published, in each of the districts and counties through which the railway is intended to pass, application may be made to the owners of lands, or to persons empowered to convey lands, or interested in lands, which may be taken, or which suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway; and, thereupon, such agreements and contracts as seem expedient to both parties may be made with such persons, touching the said lands or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained.

The second sub-section provides in case of disagreement that all questions shall be settled as thereinafter in said Act is provided. Then follows under the caption of "Compensation and Damages," section 192, as unamended, as follows:—

192. The deposit of a plan, profile and book of reference, and the notice of such deposit, shall be deemed a general notice to all parties of the lands which will be required for the railway and works.

2. The date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained.

It is to be observed in the first place that the deposit of plans in the registry office is constituted by this section notice to all concerned and that service

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thereof on those concerned is not required until proceedings taken for arbitration.

In the next place it may be observed that, for what is done under and by virtue of section 180, no plans are required to be deposited or approved of as are other plans by some appointed authority before deposit.

Now let us turn to section 180 and see what it provides. It is as follows:—

> Whenever—
>
> (*a*) any stone, etc., or other material is required, etc.; or (*b*) (as therein appears); and (*c*) (as therein appears) * * * the company may, if it cannot agree with the owner of the lands for the purchase thereof, cause a land surveyor, duly licensed to act in the province, or an engineer, to make a plan and description of the property or right-of-way, and shall serve upon each of the owners or occupiers of the lands affected a copy of such plan and description, or of so much thereof as relates to the lands owned or occupied by them respectively, duly certified by such surveyor or engineer.

Contrast this with the mode of service by deposit in the registry office and we see at a glance how radically different the two modes of procedure are as framed by this section 180 and the section 192. I, with respect, submit the latter is dragged in needlessly to aid section 180, which, in that which section 192 has regard to, needs no aid, but is a self-contained section and power in that regard.

True, sub-section 2 of section 180 provides as follows:—

> 2. All the provisions of this Act shall, in so far as applicable, apply, and the powers thereby granted may be used and exercised to obtain the materials or water so required, or the right-of-way to the same, irrespective of the distance thereof: Provided that the company shall not be required to submit any such plan for the sanction of the Board.

And it is urged that it expressly relates to such

powers being exercised to obtain material and it is pointed out that section 191 in express terms refers to lands which may be taken,

or which may suffer damage from the taking of materials.

Surely there are conceivable manifold possibilities of situations or conditions being opened up or created by or for the planning of a railway, and its construction, whereon this taking of materials might operate without going outside the obvious purposes of this all comprehensive section relative thereto.

Even if it could not be made operative as clearly as it can be shewn, in every word thereof, by a little effort of the imagination, applied to railway building, without making it apply to section 180, which even in its express language it does not fit, that would not render it necessary to pervert the obvious meaning of section 180.

In short, what was to be done under section 180 never required the deposit of a plan or profile in the registry office or elsewhere, but substituted therefor, and the publication thereof in a newspaper as required by section 191, service on those concerned, and to avoid any misapprehension as to the sanction of the board being required that was expressly dispensed with. Section 192 seems, therefore, as it originally stood, entirely inapplicable to what was to be done by virtue of section 180 providing a very common-place power such as municipalities have to enable them to execute or repair works they possess.

Such being my conclusion I need not follow up the amendment of 1909 and its possible effect; yet I may be permitted to point out that it was no doubt enacted to put an end to the serious wrong done by railway companies filing plans in the registry office and keep-

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ing them there for an unreasonable length of time, to the detriment of the proprietors of lands affected thereby, without taking any steps to expropriate any part of such lands or indeed, as has been known, never proceeding with the construction of the railway.

Such proprietors of land had no remedy unless by making an application to the Railway Board. They had no powers of initiative to force an arbitration unless and until something more was done. The company alone was given the right to serve a notice to treat and often left that off till executing the work.

And reading the amendment it seems to me that the language hardly fits a case such as this in the way appellant suggests. On the other hand it does suggest, that it might well be argued, that it could not apply where the work was done and presumably an agreement had been reached or arbitration had taken place within a more reasonable time than, as in this case, three years before the amendment.

To give effect to the contention would be in this case to make the amendment retrospective over a period of three years. I need not come to any opinion on this phase of the case and express none beyond this that it is one of the curious phases of a rather peculiar case.

Passing all that and agreeing in the contention acted upon by the arbitrators, must we set aside the award simply because there was no evidence presented by the appellant applicable to its claim ?

It is rather a novel situation that is thus presented and, so far as I can find, barren of express authority to guide us.

The parties proceeded, by the respondents present-

ing to the arbitrators the notice required by section 193 of the "Railway Act," accompanied by the certificate of a sworn surveyor, required by the 194th section thereof, stating as therein required his opinion that the sum offered is a fair compensation for the land and damages thereto; the appellant tendering a mass of evidence which shewed how much, at the time of the hearing, gravel existed on the premises in question, and how much had been taken, and its value for a variety of purposes at that time; without directly giving evidence of the market value of the land at any time, and by the respondents meeting that case by similar evidence.

Hardly any of this, it is admitted, touched in truth the correct issue.

It is, therefore, claimed by appellant that there was no evidence upon which the arbitrators could act and that, hence, the award ought to be set aside. On principle it does not seem to me to lie in the mouth of appellant to set up such a contention. The only semblance of authority I can find is such cases as *Craven* v. *Craven*(1), and *Grazebrook* v. *Davis*(2).

The former was a motion to set aside an award for the reason that the arbitrator had refused to hear evidence. But it was shewn that none was in fact tendered; after hearing the arbitrator had expressed an adverse opinion as to the possibility of its being applicable.

The latter was an action on a bond of submission where on demurrer it was held a plea which failed to allege the tender of evidence could not be maintained.

These cases seem to proceed upon the theory that

(1) 7 Taunt. 644. (2) 5 B. & C. 535.

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it was the duty of the party complaining of the award to have expressly tendered evidence that would be relevant.

In this case in hand we must, I think, look at the nature and scope of the reference which seems by the Act to be designed to try the issue of whether or not the offer made is fair, and to lay the foundation for such a trial by requiring the tender of such a specific sum and *primâ facie* proof, in the shape of a surveyor's certificate, that it is so.

That presents an issue upon which the burden of proof to displace the certificate rests upon the party who claims a greater sum.

In this case the appellant failed to do so by tendering what, on the view I hold of the Act, was admittedly entirely irrelevant evidence.

This mode of presenting the issue is in marked contrast with the proceedings under the "Lands Clauses Consolidation Act" of 1845, under which the offer cannot be brought before the court trying the question of compensation.

I, therefore, think the award made was justifiable and must be upheld. The appeal should be dismissed with costs.

It certainly is to be regretted that so much expense was incurred for so little. Let us hope when dismissing this appeal with costs, that in taxing costs of the reference, if attempted, justice may be so far done that respondents reap nothing from the useless expenditure of putting forward irrelevant evidence.

DUFF J.—I concur in the conclusion at which the appellate court of Alberta has arrived. Section 180

of the "Railway Act," under which the proceedings were taken, is in the following terms:—

180. Whenever—

(*a*) any stone, gravel, earth, sand, water or other material is required for the construction, maintenance or operation of the railway, or any part thereof; or,

(*b*) such materials or water, so required, are situate or have been brought to a place at a distance from the line of railway; and,

(*c*) the company desires to lay down the necessary tracks, spurs or branch lines, water pipes or conduits, over or through any lands intervening between the railway and the land on which such materials or water are situate, or to which they have been brought;

The company may, if it cannot agree with the owner of the lands for the purchase thereof, cause a land surveyor, duly licensed to act in the province, or an engineer, to make a plan and description of the property or right-of-way, and shall serve upon each of the owners or occupiers of the lands affected a copy of such plan and description, or of so much thereof as relates to the lands owned or occupied by them respectively, duly certified by such surveyor or engineer.

2. All the provisions of this Act shall, in so far as applicable, apply, and the powers thereby granted may be used and exercised to obtain the materials or water, so required, or the right-of-way to the same, irrespective of the distance thereof; provided that the company shall not be required to submit any such plan for the sanction of the Board.

3. The company may, at its discretion, acquire the lands from which such materials or water are taken, or upon which the right-of-way thereto is located, for a term of years or permanently.

4. The notice of arbitration, if arbitration is resorted to, shall state the extent of the privilege and title required.

5. The tracks, spurs or branch lines constructed or laid by the company under this section shall not be used for any purpose other than in this section mentioned, except by leave of the Board, and subject to such terms and conditions as the Board sees fit to impose.

This section obviously provides for two distinct cases: First, the case in which the company desires to take land adjoining the railway containing the material required and no necessity exists for constructing a spur or branch line through any property except that owned by the company and that intended to be taken Secondly, the case in which the plan of the railway company involves the construction of a spur or branch

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line through lands intervening between the railway and that where the material is situated. The effect of sub-section 2, in my opinion, is that in the first case the provisions of the Act are to be followed in so far only as they are appropriate to the taking of and compensation for land not required in the construction or working of the railway itself: and in my judgment section 192 has no application in such a case.

It is not necessary to determine for the purposes of this case the exact stage of the proceedings with reference to which the amount of compensation or damages payable by the railway company is to be determined. On the 30th of June, 1908, notices were served on the persons interested in the land in question together with a plan and description of the properties in compliance with section 180 and containing the description and declaration mentioned in section 193, together with a notice of an application for possession to be made under section 196 in the event of the railway company's offer not being accepted. On the 24th of July, 1908, an order was made by the Chief Justice of Alberta giving the railway company leave to enter into possession of the lands and this order appears to have been acted upon without delay. Whether, therefore, the amount of compensation and damages falls to be determined under the statute, first, by reference to the date when the plan and description under section 180 was served upon the owners, or, secondly, when notice to treat was given under section 193, or, thirdly, when the right to take possession became consummated by the order referred to it appears to be unnecessary to decide. It is not suggested that any change took place in the relevant circumstances be-

tween the 30th of June, 1908, when the notices were served and the 24th of July, 1908, when the order for possession was obtained.

The company at that date came, in my opinion, under an enforceable obligation to take the property and to proceed with the ascertainment of the amount of compensation. It seems reasonable, therefore, as it is strictly in accordance with legal analogy to hold that the company's title once consummated relates back at least to this date; and the appellant cannot complain of having the compensation ascertained with reference to it.

The relation of vendor and purchaser was, I think, constituted completely when the right of possession was obtained. Only the ascertainment of the price remained.

ANGLIN J.—Not, I confess, without some lingering misgivings I have reached the conclusion that this appeal should be dismissed.

The mention in section 191 of the "Railway Act" of lands "which suffer damage from the taking of materials" no doubt affords some ground for the appellants' contention that the group of sections in which section 191 is found, dealing with the preparation, filing with the Board, approval and deposit for registration of plan, profile and book of reference, applies to expropriations under section 180 — the only section of the Act which deals with the acquisition of lands required for the purpose of taking materials from them. But I am, nevertheless, of the opinion that the group of sections to which I have referred does not apply to cases under section 180. That section itself provides for the making of a plan and de-

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scription by a surveyor, and requires the company to serve a copy thereof on the owners whose lands are to be taken. Submission of this plan to the Board of Railway Commissioners is expressly dispensed with. Registration of it is not provided for. Having regard to these special provisions and to the nature of the subject-matter, I am satisfied that the application of the sections dealing with the plan, profile and book of reference to expropriations under section 180 is inferentially excluded by sub-section 2 of that section, which declares that

> all the provisions of this Act shall, so far as applicable, apply.

If the statute required that a plan, profile and book of reference should be prepared, etc., in cases under section 180, as in the case of lands to be acquired for the ordinary right-of-way, there would be no reason for the requirement of a special plan and description or for the service of copies of them on the owners to be affected, as section 180 prescribes.

It follows that the provisions of section 192 and the amendment thereto of 1909 (8 & 9 Edw. VII. ch. 37, sec. 3), relied upon by the appellants, do not govern this case, no provision being made for the deposit in the registry offices of copies of the plan and description prescribed by section 180, similar to that made for the deposit of copies of the plan, profile and book of reference in the case of lands taken for the ordinary right-of-way.

In the absence of any provision in the statute fixing a different date, I agree that the valuation of land taken under section 180 must be made either as of the date when the copy of the plan, profile and book of reference is served upon the owner (treating that as

the equivalent of service of notice to treat under the English statute) or as of the date when actual possession is taken, whether by consent or under the authority of a warrant or order of the court. In the present case possession by consent having closely followed upon the service of the copy of the plan and description, it is immaterial which date is taken. Unless some explicit statutory provision should render such a course inevitable, it would seem to be unreasonable to require a railway company to pay, for land which had been taken possession of by consent and materials of which a considerable part had been used four years before, their value at the date of the arbitration hearing, which had been then greatly enhanced by adventitious circumstances. The fact that, since the amendment of section 196 of the "Railway Act" in 1907 (6 & 7 Edw. VII. ch. 37), owners have the same opportunity as the company to apply for the appointment of arbitrators, removes any hardship to which the former state of the law may have subjected them.

I agree with Harvey C.J. that there was some evidence before the arbitrators which entitled them to fix the value of the land taken in 1908 at the figure which they have allowed, although it would have been much more satisfactory, to me at all events, had the attention of all parties been more clearly directed during the proceedings before the arbitrators, to the fact that the value was to be fixed as of that date.

The appeal fails and should be dismissed with costs.

BRODEUR J.—The gravel land that a railway company desires to expropriate may be taken without any

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Brodeur J.

plans being submitted to the Board of Railway Commissioners. The procedure is different in the other cases of expropriation. The railway company is then bound by the law to have its plans approved by the Board. In the former case the company proceeds under section 180 of the "Railway Act," that says:—

Whenever—

(*a*) any stone, gravel, earth, sand, water or other material is required for the construction, maintenance or operation of the railway, or any part thereof; or,

* * * * *

(*c*) the company desires to lay down the necessary tracks, spurs or branch lines, water pipes or conduits, over or through any lands intervening between the railway and the land on which such materials or water are situate, or to which they may have been brought;

The company may, if it cannot agree with the owner of the lands for the purchase thereof, cause a land surveyor, duly licensed to act in the province, or an engineer, to make a plan and description of the property or right-of-way, and shall serve upon each of the owners or occupiers of the lands affected a copy of such plan and description, or of so much thereof as relates to the lands owned or occupied by them respectively, duly certified by such surveyor or engineer.

2. All the provisions of this Act shall, in so far as applicable, apply, and the powers thereby granted may be used and exercised to obtain the materials or water, so required, or the right-of-way to the same, irrespective of the distance thereof; provided that the company shall not be required to submit any such plan for the sanction of the Board.

In the present case a certified copy of a plan of the lands required was served with the notice to treat and, later on, the railway company was, with the consent of the owners, put in possession (section 218) under a warrant given by a judge.

The appellants contend that the expropriation of a gravel pit would require virtually the same procedure as regards the location of the line and the proceedings in expropriation, that section 192 should govern in this case and that the date with reference to which compensation is to be ascertained should be the time

at which the hearing of the witnesses should take place.

I cannot concur in such a view.

It seems to me reasonable that the damages or compensation should be determined according to the value that the land taken had when the company took possession of it.

In the ordinary cases of expropriation the "Railway Act" states (section 215) that the value shall be ascertained as of the date of the deposit of the plan. Now, with regard to gravel pits, no such deposit is provided for. But the plan duly certified by a surveyor will be served upon the owner.

Then the value could be ascertained from the date on which such a notice would be given, or it could be ascertained from the date at which the expropriated party has given consent for possession.

There is no difference as to the value of the gravel pit at those two dates.

But it would be certainly unfair and illegal to have this value determined by the date at which the case was heard a long time after.

For those reasons the judgment of the Supreme Court *en banc*, confirming the award of the majority of the arbitrators, should be confirmed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Emery, Newell, Ford, Boulton & Mount.*

Solicitor for the respondents: *George A. Walker.*

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JOHN R. BOOTH (SUPPLIANT) ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

License to cut timber—Indian lands—R.S.C. [1886] *c.* 43, *ss.* 54 *and* 55—*License for twelve months—Regulations—Renewal of license.*

Section 54 of R.S.C. [1886] ch. 43 (now R.S.C. [1906] ch. 81) enacted that licences might be issued to cut timber on Indian lands and sec. 55 that "no licence shall be so granted for a longer period than twelve months from the date thereof." By a regulation made by the Governor-General in Council and sanctioned by Parliament it was provided that licence holders who had complied with all existing regulations should be entitled to renewal on application.

Held, affirming the judgment of the Exchequer Court (14 Ex. C.R. 115) that a licence holder who has complied with the regulations has no absolute right to a renewal as a regulation making perpetual renewal obligatory would be inconsistent with the statutory limitation of twelve months and, therefore, non-operative.

APPEAL from a judgment of the Exchequer Court of Canada(1), dismissing the suppliant's petition of right with costs.

The suppliant has for many years past carried on and continues to carry on the business of a lumberman in the City of Ottawa in the County of Carleton and on the 5th day of October, A.D. 1891, a licence to cut timber on Indian lands was issued to him by the Superintendent General of Indian Affairs. The said licence purports to have been issued by authority of

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

(1) 14 Ex. C.R. 115.

the 43rd chapter of the Revised Statutes of Canada and amendments thereto and bears the date aforesaid, and gives full power and licence to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump upon Indian Reserve No. 10 on the northerly side of Lake Nipissing containing 108 square miles, exempting, however, from the operation of the licence an Indian village and certain Indian improvements in said licence mentioned. The said Act under the authority of which the licence was issued, authorized the said Superintendent General to grant licences to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as from time to time might be established by the Governor-in-Council.

On the recommendation of the Superintendent General, to whom was given by the said Act the control and management of the said Indian lands, an order in council was passed on the 15th day of September, 1888, making regulations for the sale of timber on Indian lands in the Provinces of Ontario and Quebec. The said regulations were in force at and prior to the date when said licence was issued, and the suppliant acquired the said licence under the authority of said Act and subject to and upon the terms contained in said regulations.

Section 11 of said regulations provides that "all timber licences are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for before the 1st of July following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as *de facto* forfeited." Section 5 provides "that licence holders, who

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shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent General of Indian Affairs."

The said licence has since that date thereof been renewed from year to year, the last renewal expiring on the 30th day of April, 1909. The suppliant has made due application for a renewal of said licence for the year ending on the 30th day of April, 1910, and has duly complied with the said regulations, which has been refused by the Superintendent General and the said limits and the timber aforesaid, have been advertised for sale by his authority.

Shepley K.C. and *Lafleur K.C.* for the appellant cited *Bulmer* v. *The Queen*(1); *Lakefield Lumber and Mfg. Co.* v. *Shairp*(2); *McPherson* v. *Temiskaming Lumber Co.*(3).

Chrysler K.C. for the respondent referred to *Smylie* v. *The Queen*(4).

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

IDINGTON J.—The appellant obtained in 1891 from the Superintendent of Indian Affairs a licence to cut timber on certain Indian lands.

This licence was granted under the "Indian Act," chapter 43 of the Revised Statutes of Canada, 1886, section 54 of which is as follows:—

54. The Superintendent General or any officer or agent authorized by him to that effect, may grant licences to cut trees on reserves and ungranted Indian lands, at such rates, and subject to such conditions, regulations and restrictions, as are, from time to time, estab-

(1) 23 Can. S.C.R. 488.
(2) 19 Can. S.C.R. 657.
(3) [1913] A.C. 145.
(4) 31 O.R. 202; 27 Ont. R. App. R. 172, at p. 176.

lished by the Governor-in-Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situated.

Section 55 provides, amongst other things, as follows:—

No licence shall be so granted for a longer period than twelve months from the date thereof.

Section 56 provides that:—

56. Every licence shall describe the lands upon which the trees may be cut, and the kind of trees which may be cut, and shall confer, for the time being, on the licensee the right to take and keep exclusive possession of the land so described, subject to such regulations as are made: * * *

and proceeds to declare that every licence shall vest in the holder thereof the property in all trees of the kind specified

cut within the limits of the licence during the term thereof

and to give a right of action against any trespassers and to recover damages, if any, and

all proceedings pending at the expiration of any licence may be continued to final termination, as if the licence had not expired.

The licence in question was in conformity with these provisions and upon a number of conditions expressed therein and further upon condition that the said licensee or his representatives must comply with all regulations that are or may be established by order in council, etc., on pain of forfeiture of the licence.

There is not a word express or implied therein looking to a renewal thereof, much less expressive of any obligation to renew.

In fact from year to year there was indorsed on this licence for many years a renewal of said licence and each renewal as such accepted by appellant.

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Idington J.

It is certainly difficult to understand how under such a statute and such an instrument there can be claimed a right of another renewal; yet that is what is insisted upon herein, though the term "renewal" used throughout by the department and the regulations to be referred to hereafter, is in argument disclaimed.

It is conceded that the respondent at the expiration of any single year could insist upon raising the amount of stumpage dues to become payable in future.

One might suppose that this alone should end all argument.

Yet it does not, for the appellant relies upon the fact that amongst the regulations made, which the Governor in Council is alleged to have been acting under the powers in the said statutes to make, are the following:—

> Sec. 5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent General of Indian Affairs.
>
> Sec. 11. All timber licences are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for before the 1st of July following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as *de facto* forfeited.

It seems almost too clear for argument that in face of the absolute restriction in the statute limiting the duration of a licence to twelve months, that the Governor in Council could make any regulation which would in fact nullify the statute.

And if the said regulation, section 5, means what appellant urges, then it exceeds the power given in the statute.

This is not a regulation which by publication as in some cases is provided by statute shall after the lapse of a certain period of time within the next en-

suing session of Parliament become law unless revoked by Parliament.

Its publication is simply for the enlightenment of those concerned, including members of Parliament. If *ultra vires* it goes for nothing. Its frame may be misleading, but in no sense can it create any legal right. If it did mislead in fact, and thereby do the appellant any damage that might form ground for an appeal to the proper consideration of Parliament, but no such case is made here, nor if attempted could the court, without Parliamentary sanction, entertain such a claim.

It cannot rest on contract, for it is not within the terms of the contract.

It cannot rest upon statute, for the regulation is not a statute in itself or to be deemed as having statutory force and so far as exceeding the statutory power is non-operative.

The only regulations pointed to in the contract are of an entirely different character and for an entirely different purpose. Indeed the word "regulation" as used in the statute is of an entirely different meaning and for an entirely different purpose from what is sought herein to be imparted to it.

In short it seems to me that to give any legal effect to this section 5 of the regulations in the way the appellant claims would be to give him a licence in perpetuity which certainly would be quite inadmissible, even for Parliament to attempt if regard is had to the trust reposed in it by the transactions leading to Canadian control over the subject-matter of these Indians and their lands so called.

Counsel tried to disclaim this by suggesting a

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general regulation could be passed annulling the section. The annulling regulation then could be passed the day before the expiration of any renewal of the license.

It is idle to say that it could not be made so as to apply to the territory over which the licence prevails, for the very terms of the section 54 looking to such regulations expressly preserves the right to deal with that which shall be adapted to the locality.

That is almost exactly what did happen. An order in council was passed dealing with the tract of Indian lands over which the licence in whole or chief part prevailed.

Instead of taking the form of a regulation it took the form of an order in council.

If the argument is good it would seem that all that is to be complained of is matter of form, having no substance.

It is not necessary that I should try and give the section 5 relied upon either the meaning and purpose counsel for the Crown suggested, or any meaning.

But I do not think it would be very difficult to make a reasonable surmise of its purpose which would shew it never necessarily conveyed to the minds of those concerned the idea of its containing either a contractual or statutory obligation upon which they had a right to seek a remedy at law.

I think the appeal should be dismissed with costs.

DUFF J.—The licence in question in this case was issued on the 5th day of October, 1891, under the authority of sections 54, 55, 56 and 57 of R.S.C., 1886, ch. 43. The legislation is still in force, being now con-

tained in chapter 81, R.S.C., 1906, secs. 73-76. These sections are as follows:—

54. The Superintendent General or any officer or agent authorized by him to that effect, may grant licences to cut trees on reserves and ungranted Indian lands, at such rates, and subject to such conditions, regulations and restrictions, as are, from time to time, established by the Governor in Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situated.

55. No licence shall be so granted for a longer period than twelve months from the date thereof: and if, in consequence of any incorrectness of survey or other error, or cause whatsoever, a licence is found to comprise land included in a licence of a prior date, not being reserve, or ungranted Indian lands, the licence granted shall be void in so far as it comprises such land, and the holder or proprietor of the licence so rendered void shall have no claim upon the Crown for indemnity or compensation by reason of such avoidance.

56. Every licence shall describe the lands upon which the trees may be cut, and the kind of trees which may be cut, and shall confer, for the time being, on the licensee the right to take and keep exclusive possession of the land so described subject to such regulations as are made; and every licence shall vest in the holder thereof all rights of property whatsoever in all trees of the kind specified, cut within the limits of the licence, during the term thereof, whether such trees are cut by the authority of the holder of such licence or by any other person, with or without his consent; and every licence shall entitle the holder thereof to seize in revendication or otherwise, such trees and the logs, timber or other product thereof, if the same are found in the possession of any unauthorized person, and also to institute any action or suit against any wrongful possessor or trespasser, and to prosecute all trespassers and other offenders to punishment, and to recover damages, if any, and all proceedings pending at the expiration of any licence may be continued to final termination, as if the licence had not expired.

57. Every person who obtains a licence shall, at the expiration thereof, make to the officer or agent granting the same, or to the Superintendent General, a return of the number and kinds of trees cut, and of the quantity and description of saw-logs, or of the number and description of sticks or square or other timber, manufactured and carried away under such licence; and such statement shall be sworn to by the holder of the licence, or his agent, or by his foreman; and every person who refuses or neglects to furnish such statement, or who evades or attempts to evade any regulation made by the Governor in Council, shall be held to have cut without authority, and the timber or other product made shall be dealt with accordingly.

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Duff J.

The appellant alleges that by virtue of certain regulations dated the 15th September, 1888, and professedly made in pursuance of section 54, chapter 43, R.S.C., 1886, now section 73, chapter 81, R.S.C, 1906, and reproduced above, which regulations are still in force he became entitled and is still entitled to have his licence annually renewed at the expiration of the term thereof on the condition that during each term he should have complied with all the existing regulations affecting his licence. This contention is based upon sections 5, 11, and 12 of the regulation. Sections 5 and 11 are as follows:—

5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licenses renewed on application to the Superintendent General of Indian Affairs.

11. All timber licences are to expire on the 30th day of April next after the date thereof, and all renewals are to be applied for before the 1st day of July, following the expiration of the last preceding licence; in default whereof the berth or berths may be treated as forfeited.

The original licence granted to the appellant in October, 1891, expired on the 30th of April, 1892. But the Superintendent of Indian Affairs for the time being granted renewals down to the year 1909, the last expiring on the 30th of April, 1909, the grant of the renewal in each case being recorded in a simple memorandum declaring that the licence was renewed. At the expiration of the last mentioned licence the Government refused to grant any further renewals. Interpreting the regulations in accordance with the natural meaning of the words there could hardly be a serious answer to the appellant's contention in the absence of any dispute touching their legal validity when construed in that sense. The only question in debate, as I understand the controversy be-

tween the parties, is whether the regulations so read were beyond the competence of the Governor in Council exercising the powers conferred by section 54, or, to put the question in another way, whether assuming the regulations to have been validly made, we are not constrained by the provisions of the statute from which they derive their force to construe them in a way which necessarily defeats the appellant's claim. This question must be considered under two heads. First, what is the true construction of the Act of 1886, reading it as it stands, without reference to the course of legislation or judicial or administrative interpretation before and since the statute was passed; secondly, if, as I am constrained to hold that the view of the regulations upon which the appellant's claim necessarily rests is incompatible with the statute when effect is given to its language construed apart from the course of legislation and interpretation just referred to, does this course of legislation and interpretation justify another construction and one which will support the appellant's claim? As to the first point. The enactment of section 55, "No licence shall be so granted for a longer period than twelve months from the date thereof" appears to me to import a prohibition which disables the Governor in Council when exercising authority conferred by section 54 from validly passing any regulations having for their effect, (1) the constituting of a contract for renewal such as that alleged between the Crown and the licensee as one of the incidents of a licence granted under section 54, or (2) the vesting in a licensee as such of a right whether contractual or not to have a fresh licence issued to him on the expira-

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tion of the term of the licence upon the sole condition that the stipulations of the original licence have been fulfilled. It may be assumed that if the word "licence" in the enactment of section 55 quoted ought to be read as merely descriptive of the instrument there would be no necessary incompatibility between that section and such a regulation. But if it were the instrument as such that was contemplated by that section one would naturally expect to find some other form of expression than the words "shall be so granted" which words seem more appropriate as making provision for the duration of the right than as merely dictating the form of the instrument; and, I think, reading these sections as a whole, that it is the duration of the right which is being provided for. If that is the true construction it would follow that the Governor in Council is powerless to attach to the grant of a licence any incident by regulation or otherwise having the effect of entitling the grantee as such to exercise the rights of a licensee for a longer term than a single year.

As to the second point. Regulations in the form in question were, as pointed out by Mr. Justice Osler and Mr. Justice Maclennan in the passages quoted from their judgments in *Smylie* v. *The Queen*(1), promulgated under the Ontario Act of 1868, and these regulations had been in force for more than twenty years when the regulations now in question were framed in professed exercise of authority conferred in terms identical in effect with those of the Act of 1868.

The statute of 1886 was re-enacted in 1906 and if one had to consider the statute and the regulations alone one would, I think, be driven to the conclusion

(1) 27 Ont. App. R. 172.

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that there had been an administrative interpretation of the statute in accordance with the view contended for by the appellant, and it would have been necessary then to consider whether there had not been a legislative adoption of that interpretation. I am disposed to think, however, in view of the course of judicial opinion, that this administrative interpretation is not entitled to very much weight. Questions as to the proper effect of these or identical enactments and regulations have many times come before the courts during the last forty years and have been the subject of many expressions of judicial opinion, and these expressions have been overwhelmingly against the appellant's view; it is unnecessary to specify the decisions, which are referred to in the judgments in *Smylie* v. *The Queen*(1). In these circumstances, we are, I think, compelled to give effect to the statute in accordance with what appears to us to be the proper reading of the language of the sections themselves.

ANGLIN J.—The facts of this case are sufficiently set forth in the judgment of the learned judge of the Exchequer Court. By his petition the suppliant prays that he may be declared entitled to the renewal of a timber licence held by him over Indian lands, which the Crown refuses to grant, and he asks consequential relief.

The material parts of the relevant sections of the Revised Statutes of Canada of 1886, ch. 43, are as follows:—

54. The Superintendent General or any officer or agent authorized by him to that effect may grant licences to cut trees on reserves and ungranted Indian lands * * * subject to such * * * regula-

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tions * * * as are from time to time established by the Governor-in-Council. * * *

55. No licence shall be so granted for a longer period than twelve months from the date thereof. * * *

Sections 73 and 74 of chapter 81, R.S.C, 1906, are in terms similar to sections 54 and 55 of the Act of 1886.

The original provisions, which these sections reproduce, were consolidated as sections 1 and 2 of the "Public Lands Timber Licences Act," chapter 23 in the C.S.C., 1859, which were made applicable to Indian lands by 31 Vict. ch. 42, sec. 35.

Pursuant to the provisions of section 54 of the Revised Statutes of 1886 the following regulations *inter alia* were duly enacted and promulgated on Sept. 5th, 1888:—

5. Licence holders who shall have complied with all existing regulations, shall be entitled to have their licences renewed on application to the Superintendent of Indian Affairs.

11. All timber licences are to expire on the 30th day of April next after the date thereof and all renewals are to be applied for before the first day of July following the expiration of the last preceding licence, in default whereof the berth or berths may be treated as forfeited.

A number of other provisions in the regulations contain references to the renewal of licences.

The suppliant, appealing from an adverse judgment of the Exchequer Court, contends that the statute, properly construed, does not prohibit the issue of a renewable licence; that the regulations expressly authorize the issue of such licences and that, having been laid before Parliament, they must be taken to have received its sanction; and that, having paid a large sum of money for his licence on the faith of obtaining a right to a renewal under the statute and

regulations, he is either contractually or equitably entitled to such renewal as of right.

On the construction of the statute the appellant's contention is, in my opinion, hopeless. The language of section 55 is too plain to admit of any doubt. To interpret it as authorizing the issue of a licence renewable as of right after the lapse of the year for which it was granted, and so on from year to year, would defeat its obvious intent. There is no real distinction between a perpetual licence and a licence perpetually renewable. Both are equally obnoxious to a provision which forbids the granting of a licence for a longer period than twelve months.

Nor is the appellant's position improved by invoking regulation No. 5. The early history of that regulation is given by Maclennan J.A., in *Smylie* v. *The Queen*(1), at pp. 183-4, as follows:—

> Regulation 5 provides that licence holders who have complied with all existing regulations shall be entitled to have their licences renewed on application, and regulation 11, that all licences shall expire on the 30th of April next after the date thereof, and that renewals are to be applied for and issued before the 1st of July following the expiration, on default whereof the right to renewal shall cease, and the berth shall be treated as forfeited. The original regulations of the 5th of September, 1849, *Canada Gazette*, vol. 8, p. 6999, are expressed differently. Regulation 8 declares that licensees who have complied, etc., will be considered as having a claim to the renewal of their licences in preference to all others on application, etc., failing which the limits are to be considered vacant, etc. A change was made on the 23rd of June, 1866, since which the regulation relating to renewal has continued to be in the form approved of on the 16th of April, 1869.

The learned judge continues in language which I respectfully adopt:—

> The question is whether these two regulations were intended or can be held to weaken or qualify the clear terms of the statute, and

(1) 27 Ont. App. R. 172.

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to confer a right not expressed in the licence itself, and I think it impossible so to hold. In the first place it was not so intended. The second clause of the order in council expressly refers to the *requirements of the statute,* as matters which were to govern licences and renewals thereof, as well as the regulations, conditions and restrictions, which were then being ordained. Again by regulation 24, the exact form of the licence is prescribed, and in the form the term is expressed to be from its date to the 30th of April *and no longer;* and there is not a word in it about renewal. I think, therefore, the intention of the regulations is to comply with, and not to qualify, the statute. But if the regulation is not in accordance with the statute, if it assumes to confer a right of renewal, it must give way to the statute, and can confer no right beyond what the statute authorized the Land Commissioner to grant, and that is a licence for a term not exceeding twelve months. The regulations which the Lieutenant-Governor in Council was authorized to establish were in respect of licences which were not to exceed twelve months in duration. So far as they go beyond that they cannot bind the Crown.

That the holder of a licence, subject to a regulation identical with that now relied upon, was not entitled to a renewal as of right had been held in a series of Ontario cases. *Contois* v. *Bonfield,* in 1875-6(1); *McArthur* v. *Northern and Pacific Junction Railway Co.,* in 1890(2); *Shairp* v. *Lakefield Lumber Company,* in 1890-1(3); and *Muskoka Mill and Lumber Co.* v. *McDermott,* in 1894(4).

As put by Moss J.A. in *Smylie* v. *The Queen,* in 1900(5), at pp. 190-191:—

> It is enough to say that an agreement for a renewal is something which the law has not empowered the Commissioner of Crown Lands or the Department of Crown Lands to enter into. It is not within the statute, which authorizes no more than the giving of a right to cut timber, and even that for a period not longer than twelve months.
>
> The regulations must be construed as not intending to enlarge the rights of persons dealing in respect of timber beyond such as the statute authorizes, and no greater effect has been attributed to them

(1) 25 U.C.C.P. 39; 27 U.C.C.P. 84.
(2) 17 Ont. App. R. 86.
(3) 17 Ont. A.R. 322; 19 Can. S.C.R. 657.
(4) 21 Ont. App. R. 129.
(5) 27 Ont. App. R. 172.

by the courts of the province whenever it has become necessary to consider them.

The term "renewal" seems to be applied to licences issued after the first. But in reality this is not an accurate description. They are not in the nature of a restoration or revival of a right. Each is a new grant. It bears no necessary relation to the preceding licence It may or not be couched in the same language and subject to the same conditions, regulations and restrictions, as the former. It is not the continuance of an old or existing right, but the creation of a new original right.

It is probably now quite too late to contend that regulation No. 5 should be given a construction which, assuming its validity, would confer on timber licensees, complying with the regulations, an absolute right to renewal; but, if the 5th regulation should be so construed, it is still more hopeless to contend for its validity in the face of the explicit language of section 55 of the statute.

It was conceded at bar that regulation No. 5 might be revoked or altered at any time by the Governor-in-Council and that the suppliant's rights as licensee would be subject to such revocation or alteration. But it is maintained that, in the absence of such revocation or alteration, the regulation is binding upon the Crown. In so far as it is authorized and subject to proper construction, this is no doubt the case. But the fact that it may be so revoked or altered does not warrant a construction of an existing regulation in conflict with the prohibition of the statute. Nor does it render it valid while it stands unrepealed or unchanged, if only such a construction can be put upon it.

Although the statute requiring regulations passed under the "Indian Act" to be laid before Parliament appears to have been enacted only in the year 1894

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(57 & 58 Vict. (D.), ch. 32, sec. 12), if it may be assumed in favour of the appellant that the regulation in question was duly laid before both Houses of Parliament that would not materially affect his case. Parliament may be taken to have known the construction which the courts had put upon this regulation and to have allowed it to remain unchallenged in the expectation that that construction would be adhered to. Moreover, although the fact that a regulation which has been laid before Parliament remains in force unchanged is, no doubt, a circumstance entitled to weight as raising a probability of its being valid and in conformity with the intention of Parliament, it does not suffice to render the regulation effectual and unimpeachable, if, on the only construction of which it is susceptible, it contravenes an express statutory provision. On the other hand, it affords a very strong ground for giving to the regulation a construction not obnoxious to the statute.

Nor has the suppliant any such right as he asserts to the favourable consideration of a Court of Equity.

His original licence in 1891 was expressly limited to the term "from 5th October, 1891, to 30th April, 1892, and no longer." It contained no provision for renewal. Each of the so-called renewals in like manner extends only to the ensuing 30th April and contains no allusion to further renewal. There is no evidence of any contract for renewal, and, if there were, no such contract which its officers might purport to make could bind the Crown in the face of the statutory prohibition. But whether the suppliant bases his claim upon contract or upon the effect of the regulation, he must be assumed to have known the law ap-

plicable to the licence which he sought and obtained, and to have taken it subject to that law.

There is no evidence before us as to the value of the timber limits in question when the appellant became licensee or of their subsequent appreciation. But it is common knowledge, which we cannot disregard, that this appreciation has been very great of recent years. Whether the sum paid by the suppliant for his licence, by way of bonus, premium or otherwise, should be deemed large or small would necessarily depend upon these considerations. Whatever sum he paid to obtain the licence was, no doubt, paid in the expectation that it would probably be renewed from year to year, as is ordinarily the case with Crown timber licences, but always subject to the right of the Crown, in its discretion, to refuse such renewal. Of an adverse exercise of that discretion at any time he took the risk and he cannot be heard to complain. Under such circumstances there can be no ground for curial intervention in his behalf.

A construction of the regulations which would give to licensees who have complied with them an absolute right to renewals not only directly conflicts with the prohibition of the 55th section of the statute, but would also do grave injustice to the bands of Indians for whom the Crown holds the Indian lands in trust.

The appeal, in my opinion, fails and must be dismissed with costs.

BRODEUR J.—The appellant claims that he was entitled to have a renewal of his licence to cut timber on Indian lands.

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Brodeur J.

The licence itself, which embodies the rights and obligations of the department, on one side, and of the licensee on the other, does not contain any such right on the part of the licensee.

He relies on certain regulations passed by the Governor in Council.

It would not be necessary for me to examine if those regulations could bear such a construction, because, then, they would be in violation of the statute, which declares that no licences should be granted for a longer period than twelve months, and the Governor in Council could not make any regulations that would be in contravention with a statutory enactment so explicit.

It could be stated also that the Indians are the wards of the state and no policy should be adopted that would deprive the Indians of the fruits that their reserves could procure for them. It may be that at one time their lands could be more advantageously exploited as timber lands but at some other time they should be converted into farm lands in the interest of the Indians. Then it would be a pity that through some previous concessions to timber licence holders that beneficial change could not take place.

For those reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Christie, Greene & Hill.*
Solicitors for the respondent: *Chrysler, Bethune & Larmonth.*

THE SHIPS "A. L. SMITH" AND "CHINOOK" (DEFENDANTS) ..... APPELLANTS;

AND

THE ONTARIO GRAVEL FREIGHTING COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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*Dec. 21.

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*Feb. 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, TORONTO ADMIRALTY DIVISION.

Maritime law—Tug and tow—Contract of navigation—Collision of tug — Liability of tow — Foreign ship — Proceedings in foreign court—Jurisdiction in Canada.

The American tug "A. L. Smith" was ascending the River St. Clair having in tow the barge "Chinook," the two being engaged in the business of their common owner. The "Chinook" having no propelling power nor steering apparatus the navigation was controlled by the officers and crew of the tug, the tow being attached by a line fifteen feet long. They kept on the American side and the "Smith" sheered and collided with a barge being towed down, causing it to sink.

Held, affirming the judgment of the Exchequer Court (15 Ex C.R. 111), Davies and Anglin JJ. dissenting, that the tug and tow must be regarded as one ship and each was liable for the consequences of the collision. *The "American" and the "Syria"* (L.R. 6 P.C. 127) discussed and distinguished.

Per Davies and Anglin JJ. dissenting, that as the "Chinook" took no part in the navigation, and there being no master and servant relationship between her and the "Smith," she should not be held liable.

Shortly after the collision the owner brought action in a United States court to limit the liability of the "Smith" and the extent of her liability was fixed at $1,500. Later the two ships were seized in Canadian waters, taken into a Canadian port and released on receipt of a bond by a guarantee company conditioned to pay any amount awarded against either or both. The action *in rem* was then proceeded with, resulting in both ships being condemned.

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

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Held, that the proceedings in the United States did not oust the Canadian court of jurisdiction.

Held, per Idington J.—The defendants are not entitled to limitation of the damages under United States or Canadian statutes, the same not having been pleaded nor any evidence of it produced.

Per Davies and Anglin JJ.—As the collision occurred in the domestic waters of the foreign ship held at fault the extent of her liability must be determined by the *lex loci commissi delicti*, and the damages should be limited to the value of the "Smith" immediately after the collision.

Held per Duff J. following the *"Dictator"* ([1892] P. 304) and the *"Gemma"* ([1899] P. 285), that as the owners appeared and contested the liability of the ships they became parties to the action and subject to have personal judgment pronounced against them for the amount of damages properly recoverable for the negligence of their servants. The trial judge having held, on the sole issue of fact raised at the trial, that the "Smith," as between her and the "Moyles," was solely to blame, the appellant owners were *primâ facie* liable for the full amount of damages suffered. Assuming, however, that if the "Chinook" was free from blame, they were entitled to the benefit of the United States laws limiting their liability to the value of the offending *res*, then, as this issue was not raised or tried in the Exchequer Court, they could only succeed if the facts in evidence conclusively demonstrated the innocence of the "Chinook" or, in other words, that the "Smith" and "Chinook" were not identified for the purpose of assigning liability, the question of identification being a question of fact depending upon the particular circumstances.

APPEAL from the judgment of the Exchequer Court of Canada, Toronto Admiralty District(1), in favour of the plaintiffs.

The questions raised for decision on the appeal were — Whether or not the Exchequer Court was competent to try the case in view of proceedings previously taken in the United States where the defendant ships were registered; if there was jurisdiction whether or not the defendants were entitled to limitation of liability under the Canadian or British "Shipping Act"; and, the liability of the "A. L. Smith" not being disputed whether or not the "Chinook" was

(1) 15 Ex. C.R. 111.

also liable. The facts on which the decision of these several questions depend are stated in the head-note.

A. R. Bartlett for the appellants.
Rodd for the respondents.

THE CHIEF JUSTICE.—Mr. Justice Anglin in his judgment deals so fully and learnedly with the facts and the law of this case that I shall be content to say briefly why, much to my regret, it is impossible for me to agree in his conclusions.

All the cases will be found conveniently collected in Halsbury, vol. 26, page 527, and following.

It seems now to be accepted as settled law that for all purposes of their joint navigation a tug and tow are one ship in contemplation of law (*Vide The "Niobe"*(1)) and that in an ordinary contract of towage a tug is under the control of the tow and must usually obey the direction given her by those in charge of the tow (*The "Robert Dixon,"* 1879(2)), but no general rule can be laid down on the subject. Each case must be decided upon its own facts (*The "Quickstep,"* 1890(3), at page 200). It would appear, however, that where the governing power and the navigation are wholly in the vessel towing, the tow is not responsible for the tug's negligence. Compare *Steamer "Devonshire"* v. *Barge Leslie*(4); *The W. H. No. 1, and the "Knight Errant"*(5).

There can be no doubt that the circumstances of this case are quite exceptional. This is not a case of

(1) [1891] A.C. 401.
(2) 5 P.D. 54.
(3) 15 P.D. 196.
(4) [1912] A.C. 634.
(5) [1911] A.C. 30.

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towage for hire nor is it a salvage case. Both the defendant ships belong to the same owners and were at the time of the collision being jointly navigated for their benefit by the same crew. The servants of the owners on board the tug had possession and control of the tow by their authority. It is true that the governing power and the navigation were in the hands of the tug, but the carrying capacity upon which the profit of their joint exploitation depended was in the tow.

For the purpose of economy or expediency the tow was fastened to the tug in such a way as to constitute both a danger to other vessels navigating the same waters. Upon what principle of law or reason can the owner of the tow escape liability in the case of a collision attributable immediately to the tug and mediately to the tow? The tug came directly into contact with the barge "Hustler" and caused the damage. And we are all agreed that she is liable. But I think it is very satisfactorily established on the evidence that the collision is attributable to the defective steering of the "Smith" due (*a*) to the condition in which the barge was by reason of the absence of proper ballast; (*b*) the absence of a bridle and the short tow line used to keep the boats together. There was a steering gear on board the tow, but it was not in use and her movements were directed by the tug, hence the necessity for the short tow line, which latter embarrassed the movements of the tug and caused the sheering which in part at least contributed to the collision. In those facts we have the defective steering of the tug—due to the tow—and the collision in the relation of cause and effect. Captain Allen, of the "Smith," explains that the steering apparatus of the "Chinook"

was not in use and that the short tow line was preferable to a bridle for steering purposes. He also admits that the tow would affect the steering of the tug, not to the extent proved by the witnesses on the other side, but sufficiently to cause her to sheer four or five feet. On the other hand the libellant's witnesses say (Heddrich) the sheer might be about twenty feet. Hunter says

> that the tug was tripped with the scow, that the bow of the scow was holding the stern of the tug,

and he also says at other places in his examination and cross-examination that this was the result of using the short line, and in that condition may be found the explanation, in part at least, of the collision. I cannot on the facts come to any other conclusion than that the tug must be considered as being in the service of the tow and identified with her for many purposes. It is quite true that the trial judge finds the "Smith" solely to blame, but that finding must be read in connection with his previous statement, as to the way in which the sheering of the "Smith" was affected by the "Chinook."

I have not, of course, overlooked the observation made in *The "American" and The "Syria"* (1), that the question of liability is not affected because the tug and tow are the property of the same owners. But that case is on the facts so clearly distinguishable from this that I do not think undue importance should be attached to what their Lordships said in that connection. To create in a case of collision a maritime lien enforceable by a proceeding *in rem* the damage must be done mediately or immediately by the ship proceeded against; *Currie* v. *M'Knight* (2); otherwise the

(1) L.R. 6 P.C. 127. (2) [1897] A.C. 97.

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fact of mere physical connection or of joint ownership does not create or affect liability and that is all that is decided in *The "American" and The "Syria"* (1). In that case the master of the "American" appears to have undertaken to tow the "Syria" under circumstances quite exceptional which are fully explained in the report at page 133. Here we have two vessels necessarily connected for the purpose of the particular business in which both were engaged for the benefit of their common owner and both in the possession and under the control of the same crew for all the purposes of their navigation. As a result of the way in which that navigation was carried on, a collision occurred to which both vessels contributed. I fail to see how we can distinguish between the vessels.

A question arises out of the proceedings taken in the courts of the United States to limit liability which, in view of the conclusion to which I have come, I am relieved from the necessity of deciding. I may, however, observe that the proceeding instituted in the foreign court was not a bar to the jurisdiction of the courts of this country, nor did it operate as a stay of the proceedings unless based on an admission of liability. It is not necessary, of course, in this country, that the owner should admit liability before beginning the limitation proceedings, but liability must be admitted before a decree can be obtained (26 Halsbury, page 616, No. 971, and cases there cited). Those who are interested in this branch of the case will find *Jenkins* v. *Great Central Railway Co.* (2) instructive (26 Halsbury, 614, note). See also Albany Law Journal.

(1) L.R. 6 P.C. 127.

(2) (1912) Shipping Gazette, 13 January, C.A.

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DAVIES J. (dissenting).—I agree with the opinion stated by Anglin J. which I have had an opportunity of carefully reading and with his proposed disposition of this appeal.

I cannot, however, concur with him in his understanding of the decision of this court in the case of *The "Wandrian"* v. *Hatfield*(1). That case was decided on its own special facts and the tow was held liable for the damage caused by the negligence of the tug because the evidence shewed the control to have been in the tow and failure on the part of its captain to exercise such control.

The Chief Justice, whose judgment was concurred in by Girouard and Duff JJ., said, at p. 440:—

> There is no evidence to shew that the manœuvre which resulted in the collision was adopted without the concurrence of the tow. The contrary would appear to be the case.

I was one of the court at the time and rested my opinion, in which Mr. Justice Maclennan concurred, upon the special circumstances of the case. At p. 446, I said that the rule to be deduced from the authorities was

> that under an ordinary contract of towage, the tow has control over the tug and the latter is bound to accept the directions and orders of the former. There are exceptions to this rule, notably in the cases of dumb barges and canal boats having little or no control over their own movements *and where by custom, contract or necessity* the control of the tow is in the tug.

I then stated (p. 449) that the circumstances of the case before us shewed the case not to be within the exceptions to the ordinary rule, but, on the contrary, shewed

> the exercise of the control by the tow to have been both practical and possible and to some extent, at least, to have been exercised,

and so held the tow liable.

(1) 38 Can. S.C.R. 431.

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I am not able to see that this decision is at variance with the recent decision of the House of Lords in the case of *S.S. "Devonshire" (Owners)* v. *Barge "Leslie" (Owners)* (1).

As to the question whether the fact of the tow and the tug being owned by the same person makes in actions *in rem* any difference in the liability of the tow in cases where the sole control or the "governing power" was in the tug and her negligence alone caused the damages complained of I feel myself bound by the judgment of the Judicial Committee in the case of *The "American" and The "Syria"* (2).

The two ships in that case belonged to the same owner and the "American," which was towing the "Syria" home, was held to blame for the collision. The "governing power" was wholly with the "American" and their Lordships held that

> the "Syria" could not be deemed in intendment of law one vessel with the "American" or liable for her negligence. Nor do they think that the fact of the "American" and "Syria" belonging to the same owners affects the question whether or not the "Syria" was to blame.

IDINGTON J.—The appellant tug "Smith" and tow "Chinook" both belonged to the same owners and by the fault of the "Smith" damage was done to the respondent. Both were arrested at Windsor and released upon a bond to answer for one or either to the amount of $12,000, which if not paid by the owners would be paid by the guarantor.

The defence set up in the pleadings does not seem to have contemplated raising any other question than, first, that of the fact as to which of the two parties in litigation was to blame for the accident, and

(1) [1912] A.C. 634. (2) L.R. 6 P.C. 127.

secondly, that the court by reason of the proceedings which had been taken in the American court (and are still pending) was ousted of its jurisdiction.

The latter contention seems in law quite untenable. And the former and only other question raised seems rightly disposed of by the judgment unless there is room for discriminating between the tug and tow.

But again, is that discrimination now open to the appellant? As already pointed out no such question was raised at the trial. So little attention was paid to it that the mate of the tug in giving evidence said he did not know whether they had any steering apparatus on the "Chinook" or not.

Another witness, the chief engineer, refers to his having passed from the tug to the tow a few minutes before the collision, to do some work in the engine room of the "Chinook" where there evidently were a number of others.

The effect of the manner in which the tug and tow were connected and the possible bearing thereof on the navigation of either was referred to by more than one witness.

But as to the actual relations at the time in question of the crew on the tow or part of the crew on either vessel to the other or to the management (if there was any) of the navigation of the tug and tow the evidence presented gives us nothing tangible upon which to form any judgment whereby to discriminate in law between the vessels in relation to the liability for the collision. We find the mate of the tug seems to have been in charge till he called the captain from his bed just five seconds before the collision.

The truth would seem to be that the parties con-

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cerned for the defence, seemed to have made up their minds that unless the excuses furnished by the mate or blame sought to be imputed to the plaintiff relieved defendant from all liability, the inevitable consequences of meeting the damages must be faced.

In such a case does the doctrine as expounded in *The "Devonian"*(1), for example, that tug and tow must be considered as one ship, apply ?

The principle that the tow has charge of the governing power would (*primâ facie* as it were) in the absence of countervailing facts or circumstances seem to render that doctrine applicable and both liable as found by the learned trial judge.

There are numerous cases where the facts and circumstances have enabled the courts to see their way to set aside the operation of this principle or that doctrine and treat either vessel as solely to blame.

I can, however, find no case where the tug and tow belonged to same parties and as here no facts or circumstances countervailing the operation of the said principles where a collision took place with a third vessel. The case of the *"American" and The "Syria"* (2) relied upon is clearly distinguishable.

The case of *The "American" and The "Syria"*(2) was a case of salvage and rested upon the principle that must govern such a case, and besides the question of the salvage of the cargo so bore thereon as to prevent the identification. In *The "Quickstep"*(3) the tug and tow were each respectively owned by different owners and otherwise distinguishable.

The mere act or neglect of duty which was primarily the cause of the collision no doubt was as clearly

(1) [1901] P. 221. (2) L.R. 6 P.C. 127.
(3) 15 P.D. 196.

traceable here to the man in charge of the tug as it was in the case of the tug towing the "Sinquisi," which was held merely because a tow liable for the mistake made by the tug.

That case seems a stronger application of the doctrine than this because the tow was in fact in that case in charge of a pilot.

Then in the case of *The "Englishman" and The "Australia"*(1), the sole fault of the tow was negative in its neglect to assert its authority and insist on a reduction of the rate of speed in a fog which led to the accident.

That and other cases shew how on the trial, when tug or tow desire to sever the presumed joint responsibility, it is done by issues in the way of pleading, or otherwise raising the question, and evidence being directed thereby to enable the court to distinguish on the facts that which is thus presented from that which in principle must, at least *primâ facie,* be presumed to render tug and tow identical.

The "Niobe"(2) is another illustration of how this is brought about and shews that the want of a look-out on the tow was held a fault.

The case of the tow being an absolutely dead barge without men or machinery on board, or possibility thereof, any more than on a dead log, might be distinguishable from the general rule of presumed liability of the tow.

Even that must depend upon evidence if not pleading and evidence. Here we have mere accidental glimpses of the condition of things which shew this

(1) [1894] P. 239. (2) 13 P.D. 55.

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tow was very far from being that sort of thing whatever she was.

The absence of the operative facts of hirer and hired upon which the principles I have adverted to were originally founded and acted upon may make the doctrine look here like a fiction of law. Yet I think it has so much more of common sense to support it than many such useful fictions of law that I must abide by it.

And as to the measure of damages being limited by statute either of the United States or in force in this country I do not see how that question can be raised here without pleading or evidence to let it in and without having been raised in the court below.

It certainly seems a remarkably bold attempt.

The evidence of the foreign law is all that was presented to the court which gives the slightest indication of such a question being raised, and that does not, for it was very properly directed and confined to what would enable the question of jurisdiction raised in the pleadings to be tried out and disposed of.

And curiously enough in light of present argument no evidence was directed as to what the foreign law is as to the relation between tug and tow in reference to joint responsibility.

When it came to a question of what was to be the measure of damages or limitation thereof there was no evidence offered.

And as I conceive the situation that was quite proper.

When it comes to be a question under the formal judgment directing a reference of how much damages are to be assessed the rule of law, whatever it is, will possibly have to be observed.

It may be confined to the value of the *res* or it may be found that the form of bail bond, which is not to return the vessels, but to answer for damages which the owners are responsible for and the appearance of the owners thus ensured may have to be considered as enlarging the scope of the inquiry by engrafting upon the suit *in rem* the possible liability of the owners at common law. In the latter case the view taken in *The "Dictator"* (1), where all the authorities are reviewed, may have to be considered.

As to all this I express no opinion beyond this that neither the course of the proceedings below nor the form of judgment of record permits of our interfering therewith.

I have looked into a great many cases besides these I refer to and others that the counsel cited, but I am unable to find anything that would maintain a reversal of the judgment below, under the facts and said course of proceedings and record.

I, therefore, think the appeal should be dismissed with costs.

DUFF J.—I have come to the conclusion that this appeal should be dismissed. In order to explain the reasons which have led me to that conclusion it is necessary to discuss the course of the proceedings in the court below. The collision took place in American territorial waters, that is to say, in the St. Clair River within American territory. The "A. L. Smith" and the "Chinook," the appellant ships, are both American ships. The action out of which this appeal arises was commenced on the 14th day of April, 1913, in the Ex-

(1) [1892] P. 304.

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chequer Court of Canada (Toronto Admiralty District) by writ of summons, the Ontario Gravel Freighting Company, Limited, being plaintiffs, and the ships "A. L. Smith" and "Chinook" being defendants. On the 12th of May the ships were arrested in Canadian waters, and on the 13th of May, 1913, by order of the court the ships were released, on bail by the United States Fidelity and Guaranty Company, the company in its bond submitting itself to the jurisdiction of the court, and consenting

> that if Jacques and Son, owners of the vessels "A. L. Smith" and "Chinook," seized by the sheriff in the County of Essex, in this action, and for whom bail is to be given, shall not pay what may be adjudged against them or said vessels or either of said vessels in the above named action with costs, execution may issue against us, the said United States Fidelity and Guaranty Company its goods and chattels, for a sum not exceeding $12,000.

The owners of the appellant ships appeared and defended the action denying liability and setting up the following special defence (in paragraph 9) :—

> It is submitted that the defendant vessels being American vessels and the accident having occurred wholly in American waters and proper steps having been taken to appraise defendant vessels and fix the amount of liability attaching to them in the District Court of the United States for the Eastern District of Michigan, Southern Division in Admiralty, this honourable court has no jurisdiction to entertain or try this action.

At the trial the parties directed their evidence to a single issue of fact, that namely, whether the collision was due to the fault of the officers of the "A. L. Smith" wholly or in part, who admittedly were also the officers in charge of the "Chinook" and admittedly were the servants of their owners for whose negligence, if any, the owners were responsible personally. That issue of fact was decided by the learned trial judge against the appellants, the collision having been

found to have been wholly due to the fault of the officers in question. It is important to note that the defendants did not by their pleadings allege that they were entitled by law to have their liability limited under any English or Canadian statute. Nor was any suggestion to such effect made at the trial. Neither was it suggested at the trial (and there is no suggestion of this on the pleadings either), that they were entitled in this action to have their liability limited by the putting into effect in these proceedings of certain provisions on the subject of limitation of liability in certain statutes of the United States of which evidence was given, and to which it will be necessary hereafter to refer. The defendants did, however, at the trial rely upon the defence set up in paragraph 9 of the statement of defence above quoted. At the opening of the trial counsel for the appellants addressed the court as follows:—

Mr. Ellis: You will notice we raise the question of jurisdiction. The accident is alleged by us to have happened entirely in American waters, and would undoubtedly be wholly in the jurisdiction of the American courts. They have, as a matter of fact, taken it up over there, and the liability has been limited. Two deaths occurred as a result of this accident. Now, the amount may be limited, and it has been fixed, I believe, at $1,500, and that is available for all American creditors, and it seems to me it is in direct contravention of the rights of the American courts for these parties to come in here, and seize these boats and claim complete jurisdiction. It means these plaintiffs are claiming that these boats are liable here for a greater amount perhaps than has been fixed by the American courts. Bonds were filed in the American courts holding the boat liable for $1,500 to answer for these deaths and all damages, which would of course be an insufficient amount to meet the damages. Now, under the comity of nations can these creditors step in and take away the assets which are insufficient for the American creditors, and say the boats may be sold and disposed of to answer this damage to these Canadian boats, which when the accident happened were foreign boats?

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Later counsel for the appellants put the point more specifically:—

Mr. Ellis: I submit that it does, for this reason, that if the law is administered over there it will be administered according to the limitation of the vessels in that action. The accident occurred in American waters, and they were American boats, and if they have jurisdiction to limit the amount and divide the funds that are available either by the sale of the vessels or otherwise, then I submit that this court cannot deal with it, that it would interfere with the administration over there. Now, in order to shew it does interefere with the administration over there and that is a law that should not be disregarded by this friendly nation—if, as I say, the law over there would give these people only a limited sum then they cannot take the very assets that are available to those people under the laws of that friendly nation, take that vessel away and distribute the funds amongst the foreign creditors. Now, that is a reason why the question of jurisdiction should be decided, and why we should not attempt to take out of the other jurisdiction such an action as this.

I reproduce these extracts from the record to make it clear beyond dispute that not only in the statement of defence (see paragraph 9 quoted above), but orally at the trial the appellants put forward the proceedings in United States courts for the sole purpose of supporting an exception to the jurisdiction. To establish the plea to the jurisdiction evidence was given by a gentleman who is a proctor in Admiralty in the United States. In substance his testimony is to the effect that the owners of vessels involved in a collision may limit their liability or prospective liability for the fault of those in charge of the navigation by surrendering the vessels in fault or by having the value of it ascertained in accordance with the proper procedure and paying the amount so ascertained into court or giving security for the payment of it as the court may order. At the trial no evidence was offered of any such proceedings in the American courts. But some time after the trial an exemplification was filed by leave of the

learned trial judge which shews that certain proceedings had been taken. I will discuss those proceedings in a moment. It will be sufficient now to say that in my judgment an inspection of the record of them is enough in itself to dispose of the plea to the jurisdiction in support of which it was put forward.

As to the proceedings at the trial it should further be noted that on behalf of the appellants it does not seem to have been disputed that assuming the plea to jurisdiction to fail and the appellants' servants to be held to have been wholly in fault, full reparation for the damages suffered by reason of the collision was recoverable by the respondents. Having come to the conclusion as I have just mentioned that the plea to jurisdiction fails upon grounds which it would be more convenient to specify later and that the learned judge's conclusion that the collision is solely attributable to the fault of the officers in charge of the navigation of the appellant ships is the right conclusion (the learned judge stating in his judgment that the "A. L. Smith" was solely in fault means that, as between that ship and the tug "Moyles," the fault was solely that of the "A. L. Smith"), it follows that the case must, in my opinion, as regards all the issues and contentions presented at the trial, be decided against the appellants.

Mr. Bartlett, however, who appeared as counsel for the appellants, took up entirely fresh ground. And it is necessary to consider the questions which arise when the case is looked at from the point of view of his able and helpful argument. First, he argues the action being an action *in rem* and the owners having appeared solely for the purpose of contesting the lia-

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bility of the vessels arrested the court could only pronounce judgment against the blame-worthy ship, if one only was blame-worthy. Secondly, since as he contends, it results from the facts appearing upon the record that the "Chinook" cannot be held to be in fault, he argues that the proceeding being a proceeding *in rem* to enforce against the "A. L. Smith" a lien arising out of the negligence of her officers and the consequent harm suffered by the respondents' vessel the proceedings in the American courts are a complete answer to the action on the ground that according to the law of the United States those proceedings had the effect of entirely discharging any such lien and substituting for the "A. L. Smith" the fund (or security) deposited by the owners.

As applicable to these contentions I observe first, that, in my opinion, the effect of the judgment of the Court of Appeal in *The "Gemma"*(1), and of Sir Francis Jeune in *The "Dictator"*(2), is that the owners of the appellant ships, by appearing and contesting the liability of the vessels, became parties to the action and subject to have personal judgment pronounced against them in the action for the full amount of damages for which according to the principles of law appropriate for the decision of the case they are personally liable. I have read the comments upon these decisions in the introduction to Williams and Bruce, Admiralty Practice, but whatever view may be taken by a court competent to reconsider the principles laid down by the Admiralty Courts of England as to Admiralty practice I think a proper deference to the opinions upon the points in question expressed by the eminent judges

(1) [1899] P. 285. (2) [1892] P. 304.

who were responsible for the decisions mentioned requires me to follow them. *Primâ facie,* therefore, the appellants are responsible.

2ndly. As to the American proceedings; the contentions of the appellant rest upon the hypothesis that on the facts before us the "Chinook" is free from fault. I do not think this contention is open to the appellants for the purpose of sustaining the contentions put forward, or rather it is only open in the form of the proposition that the facts proved are so conclusive in favour of the innocence of the "Chinook" that no further available evidence could rebut that conclusion. The "A. L. Smith" and the "Chinook" admittedly had one set of officers, that is to say, the navigation of the "Chinook" was entirely in charge of the officers of the "A. L. Smith." In the pleadings they are referred to as "the officers of the 'Chinook.'" (Paragraphs 1, 6, and 7 of the statement of defence.) The question of the identity of the "Smith" and the "Chinook" for the purpose of assigning fault is primarily a question of fact (see the authorities discussed below), and if the defendants had intended to rely upon the contention now advanced that the "Smith" was alone to blame, that contention ought to have been put forward at the trial when all the facts bearing upon the question of identity could have been threshed out. Not having done so the burden, on appeal, is that just indicated.

Inspection of the proceedings in the United States courts shews that the petition for limitation of liability does not refer to the fact that the "Chinook" was in tow of the "Smith" at the time of the collision; and that none of the special facts bearing distinctively

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upon the culpability of the "Chinook" was disclosed. It is a petition to limit the liabilities of the owners of the "Smith" to the value of the "Smith" upon the hypothesis that the "Smith" alone was delinquent. It seems too clear for argument that such proceedings could be no answer to proceedings in the Exchequer Court against the "Chinook," *or against the owners personally* either as supporting a plea to the jurisdiction or otherwise, unless it now appeared that in fact the "Chinook" was not at fault. In point of fact in the paragraph quoted above from the statement of defence (paragraph 9), it is alleged that the proceedings in the American courts were proceedings taken to appraise both vessels, and the attention of the court below does not appear to have been called during the trial to the fact that this was an error. When some weeks after the trial the exemplification was filed the real facts were for the first time placed upon the record.

But in substance this contention now advanced by Mr. Bartlett for the first time fails in my view for the reason that the facts as disclosed at the trial favour the conclusion of "identity" rather than non-identity of the "Smith" and the "Chinook" for the purpose now in hand. This view is fatal not only to Mr. Bartlett's contention which was that the American proceedings in themselves afford a defence, but it is also a conclusive answer to suggestions not advanced by him as, for instance, that in this court the damages should be limited to the value of the "Smith" or that there should be a stay of proceedings in the Exchequer Court pending the determination of the proceedings in the United States courts or that the case should be re-

ferred back to the trial judge to give the appellant an opportunity to offer further evidence as to the effect of the American law.

I assume in favour of the appellants (without expressing an opinion as to the correctness of the assumptions);

1. That the personal obligation *ex delicto* of the owner of a ship held responsible for a collision is discharged according to the United States law by the surrender of the ship or payment of or deposit of security for the amount of her value in limitation of liability proceedings, and that the inchoate lien on the offending ship is thereby extinguished;

2. That such surrender or payment or deposit in such proceedings in the United States courts would be an answer to this action on the ground that such a discharge would according to the doctrine of *Phillips* v. *Eyre*(1) destroy the obligation springing from the delict under the *lex loci delicti commissi,* as well as the lien based upon that obligation; and

3. If the proceedings in the United States courts had not the effect of discharging the personal obligation — that the obligation *ex delicto* being in substance limited by the law of the *locus delicti commissi* to the payment of the value of the offending *res* the amount of damages recoverable in the Exchequer Court is also limited by that value.

These assumptions made — the respondents being for reasons already given entitled to judgment on the issues and contentions presented and investigated at the trial — the appellant (now suggesting for the first time a defence based upon the allegation of fact that the "Chinook" is not implicated in the fault of the

(1) 10 B. & S. 1004.

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officers in charge) must fail unless it necessarily results that the evidence given at the trial is to exculpate the "Chinook"; and that question I proceed to consider.

I emphasize the special nature of the burden upon the appellants in this issue for the reason that if the issue had been raised at the proper time some circumstances not without relevancy to it would probably have been proved by explicit evidence which, in the actual state of the record, are matter of inference only.

First, as to the relevant facts. The "A. L. Smith" and the "Chinook" were owned by the same owners and by them were employed in their business, the transport of gravel and sand as carriers on the St. Clair River and its tributary waters. The tug having no storage space and the barge neither means of propulsion nor apparatus for steering, each was the necessary complement of the other for performing the function of transport. On the occasion of the collision as usual the barge, which was then light, was attached by a short line, ten or fifteen feet long, to the tug. The men employed on both tug and barge were under the control of the captain of the tug, who, with his crew, had charge of the navigation of both. They were in fact navigated as a single craft by one crew, who were the servants of the owners of both and expressly employed for that purpose.

The "Smith" appears to have been employed in navigating the "Chinook" for several seasons; and there seems no reason to doubt that while loading and unloading, as well as when she was in transit, the "Chinook" and her crew (she was equipped with a derrick and crew for loading and unloading) were,

as is usual in such cases under the control of the officers who also were in charge of the "Smith." In a word, in the freight-earning service of this composite body both component parts tug and tow were for all the purposes of their service under the control and management of the same set of servants acting in the execution of their duties as servants of the common master.

As to the law. In these circumstances I think the tug and barge were according to the principles of law administered in the Court of Admiralty a single vessel in intendment of law for the purpose of assigning responsibility for negligent navigation.

The question of the test to be applied in determining whether in such circumstances there is constructive identity of tug and tow was discussed in the House of Lords in *The "Devonshire"*(1). Lord Ashbourne, at p. 648, and Lord Atkinson, at p. 656, stated that the question is a question of fact not of law to be determined in each case on its own circumstances. Lord Halsbury concurred with Lord Atkinson. The Lord Chancellor adopted the rule which had been laid down by Mr. Justice Butt, in delivering the judgment of himself and Sir Jas. Hannan in *The "Quickstep"*(2), in which the principle was accepted that had been enunciated by Mr. Justice Clifford in the judgment of the Supreme Court of United States; *Sturgis* v. *Boyer*(3), at p. 122. The rule is thus stated by Butt J. at pp. 199 and 200:—

> In all such cases, however, the real question is whether or not the relation of master and servant exists between the defendants, the owners of the vessel towed, and the persons in charge of the navigation

(1) [1912] A.C. 634. (2) 15 P.D. 196.
(3) 24 How. 110.

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of the steam tug. * * * The question whether the crew of the tug are to be regarded as the servants of the owner of the vessel in tow must depend upon the circumstances of each case.

If this could properly be regarded as a quite complete account of the effect of the authorities upon the subject there would be no difficulty in reaching a conclusion on the facts above stated that (to consider the matter from the point of view of Lord Halsbury, Lord Ashbourne and Lord Atkinson) the "Smith" and the "Chinook" were in fact one ship for the purpose of assigning responsibility; and there was indisputably the relationship of master and servant which in the view of the Lord Chancellor appears to be the decisive factor.

It is necessary, however, to consider the decision of the Privy Council in *The "American" and The "Syria"* (1), a decision which was made the foundation of an argument that the liability of the tow only arises where the navigation in the course of which the negligence occurs is under the exclusive control of the tow. I do not think that is the effect of their Lordships' decision. At page 133 Sir Robt. Collier, in delivering their Lordships' judgment, mentions the circumstances in which the master of the "American" undertook to tow the "Syria," both ships having the same owners.

> Their Lordships collect (he says) that he determined to take home the "Syria" partly because he thought it his duty to his employers, who owned both vessels, partly with a view to obtain salvage from the owners of the "Syria's" cargo (which he succeeded in doing). There is no evidence of his having been hired by the captain of the "Syria," or having acted in any way under the captain of the "Syria's" control.

His Lordship adds that their Lordships did not think

(1) L.R. 6 P.C. 127.

that the fact of the "American" and "Syria" belonging to the same owners affects the question whether or not the "Syria" was to blame.

Their Lordships do seem to decide that the fact of common ownership alone is not sufficient to establish identity by construction of law. But, on the other hand, their Lordships expressly leave outside of the scope of their ruling the case in which there being a common owner the actual control is in the towing vessel, and the master of the latter has been hired by the master of the tow for a service which is not a salvage but a towage service. Their Lordships appear to have treated the "American's" service as a salvage rather than as a towage service. No opinion is expressed as to the responsibility of the tow where — as in the case before us — the master of the tug and his crew have entire and exclusive control of both vessels for all purposes and are, as regards the whole operation, acting exclusively in execution of their legal obligations as servants of the common owners, and I think no principle can be deduced from the judgment governing such a case.

The service undertaken by the master of the "American" was a casual service which he was under no legal duty to perform; the captain of the "Smith" was charged with the duty of managing the "Smith" and the "Chinook" for all the purposes of transport; both, I repeat, being under his control as the essential parts of what was in fact a single composite freight-earning body. These circumstances seem to distinguish this case from *The "American" and "Syria"* (1).

To summarize these reasons for the sake of clearness. The appellants by appearing and defending the action became parties, and as such subject to have judgment pronounced against them personally for

(1) L.R. 6 P.C. 127.

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such damages as the respondent should be entitled to recover for the negligence of the appellants' servants, the officers in charge of both the "Smith" and "Chinook." The sole issue of fact to which the evidence at the trial was directed was whether the collision was ascribable to the fault in whole or in part of these officers. The defence was not raised at the trial that the damages should be limited to the value of the "Smith" on the ground that she alone was in fault and that under the *lex loci delicti commissi* the obligation *ex delicto* could be discharged by paying the value of the ship in fault. The question whether or not the "Chinook" was involved in the fault of the officers in charge of both vessels is a question of fact and could only be decided now adversely to respondents if it appeared that all the facts necessary to a decision of it were before us, or, in other words, that from the facts proved the necessary conclusion is that the vessels are not identified for the purposes of legal liability. In my opinion that is not the proper conclusion from the facts brought out at the trial.

The plea to the jurisdiction based upon the limitation of liability proceedings in the United States Courts necessarily fails if for no other reason on the ground that in those proceedings none of the facts bearing on the question of the culpability of the "Chinook" was disclosed and the whole proceedings are on the assumption that the "Smith" was admittedly alone to blame, on which ground also must be rejected the argument that those proceedings in themselves constitute an answer to the action.

As to a stay of proceedings or reference back for further evidence that has never been suggested by any

of the parties; and it is self-evident that in the view above expressed neither of those courses is now admissible.

ANGLIN J. (dissenting).—The evidence fully supports the findings of fact made by the learned trial judge, and the facts so found warranted his conclusion that the fault lay with the "Smith" and that she alone was to blame for the collision.

Her tow, the "Chinook," and the down-going tug and tow were acquitted of blame. The actual collision was between the "Smith" and the down-going tug, which was sunk. There was nobody steering the "Chinook," the entire control of her navigation being in the hands of the men navigating the "Smith." These facts are not in dispute, and the finding, that the negligent navigation of the "Smith" was the sole cause of the collision, was not seriously contested.

But the appellants maintain that, upon the facts found, the "Chinook" should not have been condemned; that judgment should not have been given against the "Smith," because the collision occurred in American waters and the "Smith" is an American ship and had already been the subject of proceedings in an American court in respect of it; and that, if she is answerable in the present proceedings, her liability should be limited under the Canadian "Merchant Shipping Act."

In determining these questions it must, of course, be borne in mind that the present action is *in rem* — not *in personam*. It should also be stated that counsel for the appellants conceded that if the "Chinook" should be held liable, her value being sufficient to

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answer the plaintiffs' claim, it would be unnecessary to deal with the question raised as to recovery against the "Smith."

It has been suggested that under the bond given for the release of the "Smith" and the "Chinook," which were both arrested at Walkerville, the plaintiffs are entitled to judgment for the amount of their loss up to $12,000 (which will fully cover it) if either ship, or its owners, should be held liable, and that it is, therefore, unnecessary to determine the liability of the "Chinook." The form of the bond is relied upon to support this position. By it the sureties became responsible for payment by the owners of the "Smith" and the "Chinook" of

> what may be adjudged against them or said vessels or either of said vessels.

I am unable to accede to this view.

We are not for the moment concerned with the question whether in this proceeding *in rem* the plaintiffs may have judgment *in personam* against the owners for such part of their loss as cannot be recovered out of the defendant ships, as was held in *The "Dictator"* (1). (But see the discussion of this question in the introduction to the third edition of Williams and Bruce on Admiralty Jurisdiction, at p. 18 *et seq.*) It may be that if the plaintiffs have that right and if the owners are not entitled to the benefit of any of the provisions of British, Canadian or American law invoked by them to limit their liability, their sureties may be responsible for the entire loss of the plaintiffs up to $12,000. But only to the extent to which the plaintiffs are entitled to recover in this action against the vessels under arrest, or their owners, can they hold the

(1) [1892] P. 204.

sureties. This is the true intent and substance of the security, of which the sole object was to procure the release of the ships from seizure. We are not now concerned with ascertaining the extent of the responsibility of the sureties. That may have to be considered further should it be determined that the owners are liable in this action for an amount beyond the value of both or either of the vessels which may be held to be responsible. The question under immediate consideration is the liability of the defendant ships, and that the form of the bond taken for their release from arrest cannot affect.

As between tug and tow, where a collision with a third vessel is due to the fault of those in charge of the tug and the tow is herself free from blame, according to the modern authorities the tow is jointly liable with the tug for the resulting damage only where the relation of master and servant exists between them and the principle of the decision in *Quarman* v. *Burnett*(1), applies. As put by Butt J. in *The "Quickstep"*(2), at p. 199:—

> In all such cases, however, the real question is whether or not the relation of master and servant exists between the defendants, the owners of the vessel towed, and the persons in charge of the navigation of the steam-tug. Unless that relation exist, considerations of expediency cannot avail to impose liability on the owners of the vessel in tow.

This decision has been approved of by the House of Lords in *S.S. "Devonshire"* v. *Barge "Leslie"*(3), where Lord Chancellor Haldane, at p. 645, restates the proposition of Butt J. in these words:—

> Where the tug and its tow come into collision with an innocent

(1) 6 M. & W. 499. (2) 15 P.D. 196.
(3) [1912] A.C. 634.

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ship the question whether the owners of the latter can recover damages against the owners of the tow depends on whether the relation of master and servant obtains between *the owners* of the tow and *those* of the tug. Unless this relation is established, he said, that there was no liability on the part of the tow.

The Lord Chancellor continued:—

I think that, as the doctrine of identification, as enunciated in *Thorogood* v. *Bryan*(1) has now been swept away, the principle so laid down was right, and that it is a simple application of the rule established in the well-known case of *Quarman* v. *Burnett*(2).

Lord Ashbourne said:—

There is nothing in the facts of this case to make the tow responsible for the navigation of the tug. This is not a question of law, but a question of fact, to be determined in each case on its own circumstances.

In his judgment, concurred in by Lord Halsbury, Lord Atkinson reviews the authorities, and, accepting the proposition formulated in *The "Quickstep"*(3), concludes at p. 656, that it must

now be taken as conclusively established that the question of the identity of the tow with the tug that tows her is one of fact, not law, to be determined upon the particular facts and circumstances of each case.

The contrary view, enunciated in some earlier cases — see *The "Ticonderoga"*(4) — that whenever a tug is hired by the master of a vessel for the purpose of towing it, the tug is, as a matter of law, to be deemed to be in the service of the tow, cannot now be regarded as law. In many of the cases in which that proposition is supposed to have been laid down, however, it will be found upon examination that the governing or controlling power was as a matter of fact in the tow.

(1) 8 C.B. 115, at p. 129.
(2) 6 M. & W. 499.
(3) 15 P.D. 196.
(4) Sw. 215.

Counsel for the respondent very properly cited *The Ship "Wandrian"* v. *Hatfield*(1), where this court would appear to have accepted the proposition that

> the master and crew of the tug are the agents of the owners of the ship and for damage done to a stranger solely through the fault or incapacity of the crew of the tug both parties are liable (pp. 439-40),

although Mr. Justice Davies points out (p. 449) that the ship in tow in fact exercised at least some control of the navigation. Upon examination it will be found, however, that in *The "Energy"*(2), on which the decision of the case of the "Wandrian" is rested, the ship in tow was in charge of a licensed pilot, and the head-note states that the tug was bound to obey his orders, and it was his duty to give the tug proper directions and to superintend her navigation. Observations somewhat similar may be made as to the facts in *The "Cleadon"*(3); *The "Niobe"*(4); and *The "Devonian"* (5), which are cited in the judgments in *The Ship "Wandrian"* v. *Hatfield*(1).

With respect, so far as it was there laid down that the tow is as a matter of law and of course responsible for the consequences of negligence of the crew of her tug, and that such responsibility does not depend upon whether or not the particular facts and circumstances establish the existence of the relation of master and servant, the *Ship "Wandrian"* v. *Hatfield*(1) cannot, in my opinion, be supported since the decision of the House of Lords in the *S.S. "Devonshire"* v. *The Barge "Leslie"*(6).

It most frequently occurs that the owner of the

(1) 38 Can. S.C.R. 431.
(2) L.R. 3 A. & E. 48.
(3) 14 Moo. P.C. 92.
(4) 13 P.D. 55; [1891] A.C. 401, 404.
(5) [1901] P. 221.
(6) [1912] A.C. 634.

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tug and the owner of the tow are not the same persons. Where they are identical the master of the tug, if he is not the owner himself, is, of course, the servant of the owner of the tow, but it does not follow that in such a case the tow is liable in a proceeding *in rem* for the result of the negligence of those in charge of the tow. Holding that because the "governing power" lay wholly with the "American," the "Syria," her tow, was not liable for a collision with a third vessel caused by the negligent navigation of the "American," Sir R. P. Collier, delivering the judgment of the Judicial Committee, said:—

> Nor do they (their Lordships) think that the fact of the "American" and the "Syria" belonging to the same owners affects the question whether the "Syria" was to blame. L.R. 6 P.C. 127, 133.

In such a case the question of the responsibility of the tow must apparently be dealt with as if she and the tug were owned by different persons. It was perhaps to meet such a situation that in re-stating the proposition formulated by Butt J., in *The "Quickstep"* (1), the Lord Chancellor enunciated it in the *"Devonshire" Case* (2) in the slightly modified terms above quoted.

In determining when the relation of master and servant exists between tug and tow, as put by Butt J.:

> The truth is no general rule can be laid down. The question whether the crew of the tug are to be regarded as the servants of the owners of the vessel in tow must depend upon the circumstances of each case. (*The "Quickstep"* (1), at p. 200.)

Third parties are not affected by the mere contractual relation between the tug and the tow. *The "W. H. No. 1" and The "Knight Errant"* (3).

The consensus of modern opinion seems to estab-

(1) 15 P.D. 196. (2) [1914] A.C. 634.
(3) [1910] P. 199.

lish that where, as here, those in charge of a suitable tug, properly manned and equipped, have the entire control, she must be held responsible for the proper navigation of her tow as well as herself, and the tow is not liable. *Sturgis* v. *Boyer*(1), adopted in *The "Quickstep"*(2), at p. 201. The facts of the present case are more favourable to the tow than were those in the *"W. H. No. 1" and The "Knight Errant"*(3), the dumb barge in tow being there held not liable, although she had a man at the rudder. There was nobody steering the "Chinook." There was nothing in the present case to suggest the existence of the relation of master and servant except the fact that the tow and tug had the same owners and that circumstance has been held by the Judicial Committee to be devoid of significance in considering the question of the responsibility of the tow for the negligent navigation of the tug.

I am, for these reasons, with respect, of the opinion that the judgment condemning the "Chinook" cannot be sustained.

It, therefore, becomes necessary to consider to what limitation of liability, if any, the "Smith" is entitled, and what effect should be given in this suit to the proceedings taken in the American courts so far as they have been produced in evidence.

The "Smith" being an American ship and the collision having occurred in territorial waters of the United States, secs. 920 *et seq.* of the Canadian "Shipping Act" (R.S.C. 1906, ch. 113) cannot be invoked, their application being confined to "the navigation of Canadian waters" (see the heading of Part XIV.).

(1) 24 How. 110. (2) 15 P.D. 196.
(3) [1910] P. 199; [1911] A.C. 30.

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Although the "Merchant Shipping Act" (57 & 58 Vict. (Imp.), ch. 60, sec. 503) applies to foreign vessels when before British courts in respect of collisions which occur either in British territorial waters or on the high seas, it does not determine the liability of a foreign vessel for a wrong committed by her within the territorial limits of the country to which she belongs. The presence of a foreign ship within Canadian waters undoubtedly confers jurisdiction on the Exchequer Court of Canada to arrest and hold her answerable for such claims against her by the owner of an injured British vessel ("Merchant Shipping Act," *supra,* sec. 688; *The "Franconia"*(1); *The Ship "D. C. Whitney"* v. *St. Clair Navigation Co.*(2)), and the submission to the jurisdiction in the bond filed in the present case puts that question out of consideration. But it does not follow that the provisions of our law are alone to be taken account of in considering the existence or the extent of the defendant's liability. On the contrary, an act done in a foreign country is not actionable as a tort in our courts unless it is a wrong by the law of the country where it occurred. *Machado* v. *Fontes*(3); *Phillips* v. *Eyre*(4); *Dobree* v. *Napier* (5). The statutory limitation of a shipowner's liability is not *lex fori. Cope* v. *Doherty*(6); Westlake's International Law, 5th ed., sec. 202; and, where the collision occurs in the domestic waters of the foreign ship held to be at fault, the *lex loci commissi delicti* determines the extent of her liability. Marsden on Col-

(1) 2 P.D. 163, 173.
(2) 38 Can. S.C.R. 303, at p. 309.
(3) [1897] 2 Q.B. 231.
(4) L.R. 4 Q.B. 225; 6 Q.B. 1, at p. 28.
(5) 2 Bing. N.C. 781.
(6) 4 K. & J. 367, 384; 2 DeG. & J. 614.

lisions (6 ed.), pp. 203-4, and cases there cited; Foote's Private International Jurisprudence (4 ed.), pp. 459, 461; *Consequa* v. *Willings,* in 1816(1); Story on Conflict of Laws, sec. 307; Wharton on Conflict of Laws (2 ed.), sec. 512. In dealing with either the ship or her owners, when subject to their jurisdiction, the courts of this country, while they will not condemn for a cause not actionable here, will not, on the other hand, subject her or them to a greater liability than is imposed by the law of the ship's own flag as proved. (*Sed vide Machado* v. *Fontes*(2).) Of course, it would be quite otherwise if the collision had occurred on the high seas. *The "Wild Ranger"*(3).

If, therefore, the defendant is content that the reference directed by the judgment *a quo* should proceed on the basis which I have indicated, namely, that the recovery should be limited to the value of the "Smith" immediately after the collision and her then pending freight, proved by Mr. Harvey to be her right under United States law, that course may be taken, unless, indeed, in the light of this judgment, the parties interested should see the advisability of a settlement of their differences. On that reference, however, unless by consent, the plaintiffs should not be bound by the appraisal of the value of the "Smith" and her pending freight which appears to have been made *ex parte* in the American court; and it should be open to them to shew, if they can, that she is not entitled to the benefit of the United States statute because the collision occurred with the privity or knowledge of her owners. No evidence, however, to that effect has been given, nor has any such suggestion been made. Should the

(1) 1 Peters U.S. Cir. 225, at p. 230.
(2) (1897) 2 Q.B. 231.
(3) Lush. 553.

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defendant now elect to proceed under the judgment, the costs of the reference should be reserved to be disposed of by the learned local judge of the Exchequer Court after it is concluded.

But if the defendant, the "Smith," still insists upon being given in this suit whatever benefit she may be entitled to from the proceedings in the American courts, the extent of any such right that she may have must be further considered.

The exemplification of those proceedings produced shews nothing after the 13th March, 1913, although it was put in some time after the trial of this action, which began on the 14th of April, 1914. The last order of the United States court which is before us was pronounced on the 16th December, 1912. The proceedings are obviously incomplete and it would almost appear that they had been suspended awaiting the outcome of this action. If that be the case, however, it has not been shewn. So far as they are in evidence these proceedings appear to consist of a petition, presented under an American statute, praying for the limitation of the liability of the owners of the "Smith" for damages arising out of the collision in question. An *ex parte* appraisal of the value of the ship was directed and made and a bond for the amount thereof filed. The order directing the giving of this security, or stipulation, as it is called, contains this passage:—

> It is ordered that the several petitioners may and are hereby allowed and directed (*sic*) to give a single bond for the sum of $1,500 with one security for the whole, the individual liability of the several petitioners therein to be only for that proportionate interest of the whole which their interest as hereinbefore shewn bears to the whole and for the amount herein shewn.

By an order of the same date approving the bond

the issue of a monition citing all persons to appear and make claims is directed, service to be made by publication in a Detroit newspaper

and through the post office upon the owners of the barge "Hustler" at Detroit, Michigan.

The petition merely alleged that the petitioners were "not informed as to the ownership of the said barge 'Hustler.'" This was the sole material on which the order for substitutional service was based. Although the present plaintiffs received no formal notice of them, they would appear to have had some knowledge, gleaned from newspapers, that the limitation proceedings were pending in Detroit. (*Robinson* v. *Fenner* (1), at pp. 842-3-4; *Pemberton* v. *Hughes* (2).) Neither an order staying any proceedings in other American courts (although the petition asked for it), nor an order extinguishing the maritime liens upon the "Smith" of persons who had sustained damages by the collision, or declaring such liens to be thereafter unenforceable except against the moneys secured by the stipulation filed in court, appears to have been made. Nor is there anything before us to shew that the proceedings had reached a stage at which such an order would properly be made in the United States District Court. The only evidence as to the American law or as to the effect of the proceedings, given by Mr. Harvey, a proctor in Admiralty practising at Detroit, is very meagre and unsatisfactory. He states the extent of the limitation under the American law (presumably United States Compiled Statutes, 1901, sec. 4283), and that the owners petitioning for limitation may give a bond for the appraised value of the ship (presumably under Admiralty rule, No. 54), in lieu of

(1) [1913] 3 K.B. 835. (2) [1899] 1 Ch. 781.

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conveying her to a trustee (presumably under section 4285 of the same statute) and he adds that "the bond then stands in place of the ship and her freight pending."

Beyond this he says nothing as to the effect of the proceedings which the exemplication produced shews to have been actually taken. He adds that persons having claims may appear before a Commissioner within a fixed time and prove them; the question of the liability of the ship may be determined; and, if she is found to be at fault, a decree may be entered that the amount of the bond be distributed amongst the claimants who have proved claims.

The only formal plea in this action based on these foreign proceedings is in denial of the jurisdiction of the Canadian Exchequer Court. As already stated there is no ground for that contention. There is no plea of *res judicata* and at the stage to which the proceedings had advanced it seems highly probable that they would not have warranted such a plea. Nor is it alleged that the present action is vexatious or contrary to good faith and it is perhaps questionable whether such an allegation, if made, could be sustained. *The "Reinbeck"* (1). It may be that if *lis alibi pendens* had been formally pleaded that defence too could have been met. *The "City of Norwich"* (2); *The "Bold Buccleuch"* (3); but see *Re Morrison* (4); *The "Mali Ivo"* (5); *Law* v. *Hansen"* (6).

At the outset of the trial, however, counsel called attention to what had taken place in the American

(1) 6 Asp. M.C.N.S. 366.
(2) 5 Fed. Cas. No. 2762.
(3) 7 Moo P.C. 267.
(4) 147 U.S.R. 14, at p. 34.
(5) L.R. 2 A. & E. 356, at p. 358.
(6) 25 Can. S.C.R. 69.

court and suggested that the Exchequer Court should not proceed further in this action. But the learned trial judge said that he would "take evidence and consider that as raised in the pleadings." At the conclusion of his judgment disposing of the action, after stating the substance of the proceedings as shewn by the exemplification, he treats the question first as one of jurisdiction and holds that it is concluded against the defendant by her arrest in Canadian waters and by her submission to the jurisdiction contained in the bond given to secure her release. He adds:—

> I have found no case and none was cited to me where the person or ship damaged was restrained from proceeding in the domestic forum because the foreign vessel had instituted proceedings in a foreign court to which the person or ship damaged was not a party. The rule invoked rests upon inconvenience and fair dealing and the plaintiff must be in some way responsible for, or a party to the foreign proceedings before it is applied.

But, with respect, it is at least questionable how far the plaintiffs can set up want of formal notice of proceedings of the pendency of which they had some actual knowledge. See cases noted in Piggott on Foreign Judgments, 3rd ed., pp. 407-411; *Re Morrison* (1), and see Williams & Bruce Admiralty Jur. (1902), p. 86. I am far from being satisfied that, if applied for at an earlier stage of the proceedings and upon proper material shewing that the plaintiffs' interest could be fairly dealt with in the foreign proceedings, a stay of this action, pending the outcome of such proceedings, would not have been granted by the Exchequer Court on grounds analogous to those on which a British court in which a similar proceeding is instituted is empowered by section 504 of the "Merchant Shipping Act" to stay any proceedings in any other court. *The "Christiansborg"* (2); *The "Lanarkshire"*

(1) 147 U.S.R. 14, at p. 34. (2) 10 P.D. 141.

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(1); *The "Griefswald"* (2); *The "Catterina Chiazzare"* (3); *The "Peshawur"* (4).

In these cases the foreign proceedings had been instituted by the same plaintiffs who subsequently invoked the jurisdiction of the English courts. I do not, however, understand the decisions to rest on that fact, but upon the undesirability of entertaining a second litigation while proceedings are pending in a competent tribunal in which the plaintiffs have the right and opportunity to have their claim adjudicated, although, where that tribunal is a court of a foreign country, concurrent proceedings in this country may not be *primâ facie* vexatious. *McHenry* v. *Lewis* (5), at pages 408-9; *Cox* v. *Mitchell* (6). But the reasons for withholding the exercise of jurisdiction are very formidable where the foreign proceeding partakes of the nature of a proceeding *in rem* in which all parties interested are cited to prefer their claims and the *res* is at home in the foreign jurisdiction and the cause of action is a wrong which was committed there. The giving of a stipulation in proceedings for limitation of liability under the United States statute seems to be deemed the equivalent of conveying the ship to a trustee under section 4285 (*The "City of Norwich"* (7)), and where such a surrender is made the proceedings appear to be regarded as *in rem*. *Re Morrison* (8), at pages 34; *The "Mali Ivo"* (9), at pages 358-9.

To grant such a stay now, however, would involve serious considerations which would not have been a

(1) 2 Spinks 189.
(2) Sw. 430, 435.
(3) 1 P.D. 368.
(4) 8 P.D. 32.
(5) 22 Ch. D. 397.
(6) 7 C.B.N.S. 55.
(7) 118 U.S.R. 468, at p. 502.
(8) 147 U.S.R. 14.
(9) L.R. 2 A. & E. 356.

source of anxiety and trouble had the application been made earlier. Heavy costs have been incurred and the defendant has had a full trial of the question of her liability, which it would still be open to her to contest in the United States court. We do not know what has transpired in that court since the 13th March, 1913; we are unaware whether it is still open to the plaintiffs to present their claim there and to have it duly considered; we do not even know that the security put in is still available or whether the amount of the appraisal of the ship's value or the sufficiency of the stipulation may be questioned and further security ordered on cause being shewn, or whether it is open to the present plaintiffs to contest the right of the owners of the "Smith" to limitation of liability. These and other questions as to the nature and effect of proceedings under the United States statute have been considered by the Supreme Court of the United States in *Re Morrison* (1), but as to the effect of the proceedings in an American court and as to American law we are, of course, dependent upon the evidence before us. These questions must be dealt with by us as questions of fact. We may not ourselves examine American statutes and authorities to determine them. In short, the necessary material is not before us to enable us to decide whether it would be equitable now to order a stay of proceedings in this action. For that the defendant is chiefly to blame. It is due to her failure to put in proper evidence that we find ourselves in this manifestly unsatisfactory position. Under these circumstances, I am of the opinion that if a settlement cannot be reached and if the defendant is unwilling to

(1) 147 U.S.R. 14.

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proceed with the reference under the judgment of the Exchequer Court, qualified as above suggested, and should elect to take an order for a further hearing before that court as to the exact nature of the foreign proceedings and the stage which they have reached, and as to what effect, if any, should be given to them in this action, such an order may issue. Of course it should be open to the plaintiffs to resist the defence based on the American proceedings on any ground that they may be advised to raise.

Appeal dismissed with costs.

Solicitors for the appellants: *Ellis & Ellis.*

Solicitors for the respondents: *Rodd, Wigle & McHugh.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA..... } APPELLANTS;

AND.

THE HEPWORTH SILICA PRESSED BRICK COMPANY... } RESPONDENTS.

1914
*Dec. 22.

1915
*Feb. 2.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Construction of statute—"Railway Act"—Spur line to industry—Rebate from tolls—R.S.C. [1906] *c.* 37, *s.* 226.

By section 226 of the "Railway Act" the Railway Board may, on application by the owner of an industry within six miles of a railway order the company to construct and operate a spur line from its railway to such industry, the applicant to provide for the cost of construction and be repaid by a rebate to be fixed by the Board "out of or in proportion to the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line."

Held, Anglin J. dissenting, that such rebate was not restricted to the tolls for carriage of goods over the said spur, but was applicable to the tolls for carriage of traffic over the company's main line to and from the said industry.

APPEAL by way of stated case from the ruling of the Board of Railway Commissioners for Canada in favour of the respondents.

The following case is stated by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada:—

1. This was an application to the Board by the Hepworth Silica Pressed Brick Company under section 226 of the "Railway Act" for an order directing

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

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the Grand Trunk Railway Company to construct a spur or branch line into the applicants' premises.

2. The point at which the spur leaves the main line of the railway is about 700 feet from the nearest station of the railway (Hepworth) and the length of the spur is 4,623 feet.

3. Upon the application which was made to the Board on the 19th day of May, 1914, the Board made the following order:—

"Order No. 21956.

"THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

"Friday, the 22nd day of May, A.D. 1914.

"H. L. Drayton, K.C., *Chief Commissioner.* S. J. McLean, *Commissioner.*

"In the matter of the application of the Hepworth Silica Pressed Brick Company, Limited, of Hepworth, Ontario, hereinafter called the 'applicant company,' under sec. 226 of the 'Railway Act,' for an order directing the Grand Trunk Railway Company of Canada to construct, maintain and operate a spur to the premises of the applicant company at Hepworth, Ontario, and the complaint of the applicant company against the switching charge of $2 per car proposed to be charged by the railway company: File 21428.

"Upon the hearing of the application at the sittings of the Board held in Ottawa, May 19th, 1914, in the presence of counsel for the Grand Trunk Railway Company, the Canadian Manufacturers Association being represented at the hearing, and what was alleged—

"It is ordered—

"1. That the railway company be, and it is hereby directed to construct, maintain and operate a branch

line of railway or spur from a point on its railway to and into the premises of the applicant company at Hepworth, Ontario, as shewn on the plan on file with the Board under file No. 21428.

"2. That the applicant company deposit to the credit of the Board of Railway Commissioners for Canada, in some chartered bank at Hepworth, the sum of $8,884, to await further order, being the sum estimated as being necessary to defray all expenses of constructing and completing the said spur, as provided by section 226 of the 'Railway Act.'

"3. That if any dispute arise as to the construction or operation of the said spur, or as to the expense thereof, the same be referred to the Board.

"4. That in the event of the said work costing more or less than the above sum, such difference be adjusted by the Board.

"5. That the railway company repay or refund to the applicant company, its successors or assigns, by way of rebate, $1 per car from the tolls charged by the railway company in respect of the carriage of traffic for the applicant company over the said spur, until the said sum of $8,884 has been repaid by the railway company to the applicant company, its successors, or assigns.

"6. That the railway company construct and complete the said spur within three months from the date of this order.

"(Signed) D'ARCY SCOTT,

"Assistant Chief Commissioner,

"Board of Railway Commissioners for Canada."

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4. Upon the application the Grand Trunk Railway Company requested that the Board should allow it to impose a charge of $2 a car for the services to be performed by it in taking an empty car from its main line and placing the same on the spur in the premises of the applicant company and in hauling out to its main line the car when loaded. The Board, however, declined to make such an order. In the case, therefore, of traffic to and from the Hepworth Silica Pressed Brick Company's premises handled over the said spur, the Grand Trunk Railway Company will not be paid any additional sum beyond the regular freight rates chargeable under tariffs approved by the Board upon traffic to and from the Hepworth Station.

5. The Board in making the said order interpreted sub-section 3 of section 226 of the "Railway Act" to mean that the Board might direct a rebate to be made as ordered in paragraph 5 of the order even though no toll was collected for services performed in moving cars, loaded or empty, on the said spur.

6. The question which at the request of the Grand Trunk Railway Company is stated by the Board and submitted for determination by the Supreme Court of Canada is:—

Whether the words in sub-section 3 of section 226 of the "Railway Act," "the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line" mean the tolls charged for the transportation on the railway company's line of goods carried to or from the applicant company's premises or mean the tolls charged for the movement of such goods upon the said spur.

Ottawa, September 15th, A.D. 1914.

(Signed) D'ARCY SCOTT,
Assistant Chief Commissioner,
Board of Railway Commissioners for Canada.

The appeal was heard *ex parte.*

W. C. Chisholm K.C. appeared for the appellants.

THE CHIEF JUSTICE.—I am of opinion that the Chief Commissioner has put the proper construction upon the section in question (226 of the "Railway Act") and that the appeal should be dismissed.

DAVIES J.—The question stated by the Board of Railway Commissioners for our opinion as to the meaning of sub-section 3 of section 226 of the "Railway Act" is as follows:—

> Whether the words in sub-section 3 of section 226 of the "Railway Act" "the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line" mean the tolls charged for the transportation on the railway company's line of goods carried to and from the applicant company's premises, or mean the tolls charged for the movement of such goods upon the said spur.

If the language of this sub-section is only capable of one meaning it would, of course, be our duty so to declare, irrespective of whether the effect would be to defeat the object and purpose of the Act or not. Our duty is to construe legislation not to enact it.

If, however, the language used is not clear, but is ambiguous and capable of two meanings, one of which would obviously carry out the purpose and intent of the Act while the other would defeat it, I take it that it is our duty to put the construction upon the language which carries out the object and purpose of Parliament.

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Section 226 vested in the Board power upon the application of the owner of any industry or business within six miles of the railway, to order the railway company to construct, maintain and operate a spur or branch from the railway line to the industry or business and to direct the applicant to deposit in some chartered bank such an amount as the Board might determine sufficient to construct and complete the spur, etc., which amount should be paid to the company from time to time as the work progressed.

The third sub-section now under consideration provided for the repayment by the company to the applicant of such cost "out of or in proportion to the tolls charged by the company in respect of the carriage of traffic over the spur."

The railway company contends that these tolls are such only as are chargeable for the carriage to and from its main line to the industry or business over the spur and has no relation to the carriage to and from the industry or business to the destination of the traffic.

In this view they applied to be allowed as stated in the case to impose a charge of $2 a car for the services to be performed by it in taking an empty car from its main line and placing it on the spur on the premises of the applicant and in hauling out to its main line the car when loaded.

The Board properly declined to make such an order. Its effect would obviously be to make the industry or business pay for the construction of the spur not in the first instance merely as the statute provided, but absolutely, and instead of encouraging and aiding such spur traffic would handicap it. The in-

tent of the legislation was to provide for the repayment of the cost of the spur out of the traffic originating or ending on it and while the language used is capable of being construed so as to sustain the contention of the railway company it is ambiguous and may fairly be construed as the Board has construed it.

I answer the question that the words of sub-section 3 of section 226 mean the tolls charged for the transportation on the railway company's line of goods carried to or from the applicant company's premises.

IDINGTON J.—Section 226 of the "Railway Act" enabled, by its enactment in 1903, the Board to order the construction by a railway company of a branch line to connect any industry or business established, or intended to be established with the railway and provide for the applicant for such connection depositing, under the direction of the Board, of a sum or sums sufficient to cover the cost of such construction.

Sub-section 3 of said section is as follows:—

3. The aggregate amount so paid by the applicant in the construction and completion of the said spur or branch line shall be repaid or refunded to the applicant by the company by way of rebate, to be determined and fixed by the Board, out of or in proportion to the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line.

The Board submits for our opinion a question involving the interpretation of the phrase:—

In proportion to the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line.

It is argued by the appellant that the tolls referred to must be those in respect only of the shunting or moving of the cars over the branch line itself.

No doubt the language used is capable of such a

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Idington J.

construction. But this like every other enactment must be, if possible, so read as not to produce an absurdity in its results. And when the language is ambiguous we must look to the history preceding it and the condition of things existent at the time of the enactment.

So viewed and having regard to what the Chief Commissioner in his judgment sets forth, I think he has interpreted and construed the section aright.

The question submitted should be answered that the tolls in question mean the tolls charged for the transportation on the company's line of goods carried to and from the applicant company's premises.

The appeal should be dismissed but without costs. Respondent filed no factum. Only counsel for appellant appeared, and he, whilst urging all that could be said for appellant, presented the case fairly and properly.

DUFF J.—I have very little to add to the reasons of the learned Chairman of the Board of Railway Commissioners, in which the Assistant Chief Commissioner and Mr. Commissioner McLean concurred. The words of sub-section 3, section 226, are as follows:—

> The aggregate amount so paid by the applicant in the construction and completion of the said spur or branch line shall be repaid or refunded to the applicant by the company by way of rebate, to be determined and fixed by the Board, out of or in proportion to the tolls charged by the company in respect of the carriage or traffic for the applicant over the said spur or branch line.

I think it is permissible to read the phrase "over the said spur or branch line" as an adjectival phrase qualifying the word "traffic," and intended to be descriptive of the "traffic" the earnings of whose "car-

riage" are to be rebatable for refunding the outlay of the shipper. I will not dwell upon this point of verbal construction, but merely note that the words "for the applicant" add nothing to the sense — the idea conveyed by them being necessarily implied in the words "by way of rebate." If this is the right construction, the difficulty disappears; the question is — are there adequate reasons judicially admissible for its adoption ?

One is not concerned to deny that looking to the words alone Mr. Chisholm's is the better reading. That is a consideration which tells with no little force against the conclusion I have reached. But other considerations outweigh it.

This sub-section cannot be read alone. It must be read with the main provisions of the Act relating to facilities as well as with the provisions on the subject of rates. The judgment of the Chief Commissioner seems to shew that the construction now advanced, if put into practice must, at least in a large number of cases, result in discriminations opposed to the spirit of the enactments of the Act on both these subjects, one leading general aim of which is the suppression of reasonably avoidable discriminations; in other words, that the reading proposed is not compatible with the objects of these enactments of the "Railway Act," which are *in pari materiâ* with the provision to be construed — that, indeed, such a reading is calculated to defeat one of the principal of those objects. The uniform administrative interpretation of the sub-section in another sense (by the Board of Railway Commissioners), and the acquiescence in that interpretation

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by the interests chiefly concerned tend to confirm this view.

I should say that, when I speak of the "objects" of these enactments, I mean, of course, objects that are expressed with sufficient definiteness by the enactments themselves.

If these conclusions are sound, as I think they are, then it is legitimate to reject the proposed construction and to adopt that which I have indicated above.

No doubt, in rejecting a construction, which from the point of view of verbal interpretation alone is clearly the better one, on the ground that it is not consistent with the objects of the legislation considered as a whole, one runs the risk of slipping from proper legal interpretation into a region where notions of policy collected from or founded upon extra-judicial considerations hold the field and into methods of interpretation inadmissible in a court of law. In the present case I agree that we do approach the limits of proper legal interpretation; but I am fully convinced that we are, nevertheless, within those limits, because, first, I am satisfied that the sub-section is not incapable of the construction above indicated, and, secondly, I think the reasons given by the Chief Commissioner justify the conclusion that the construction proposed by the railway company cannot be put into general operation consistently with the full maintenance of the governing principle of non-discrimination embodied in the cognate provisions touching the subject of rates and facilities.

ANGLIN J. (dissenting).—By an authorized tariff the Grand Trunk Railway Company is allowed to

charge certain tolls for the carriage of freight to and from its station at Hepworth. It has recently been required by the Railway Board to construct a spur or branch line from Hepworth Station to the respondent company's premises under the provision of section 226 of the "Railway Act." The Board has refused to authorize the railway company to charge any additional tolls for the carriage of freight over such spur or branch line between Hepworth Station and the respondents' premises. They pay for the carriage of freight from their premises the same rates and tolls as are charged to other customers of the railway for the carriage of similar freight from Hepworth Station. It is, therefore, I think, indisputable that the railway company does not, and is not permitted to, charge any tolls,

in respect of the carriage of traffic for the (respondents) over the said branch or spur line.

Nevertheless it has been ordered by the Board under sub-section 3 of section 226, to

repay or refund to the applicant company, its successors or assigns, by way of rebate, $1 per car from the tolls charged by the railway company in respect of the carriage or traffic for the applicant company over the said spur, etc.

In a memorandum of the reasons on which this order was based, the Chief Commissioner states that in his opinion the right to order a rebate under sub-section 3 is not

limited to cases where a toll is charged for the movement on the spur,

but

that the effect of the statute is only to limit rebates to freight charges due on cars which have passed over the spur in question, with the right to the Board to order rebates either in proportion to the amount of the tolls charged or by fixed charge per car.

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Anglin J.

With respect, I am of the opinion that the language of the statute is too plain and explicit to admit of that construction. The rebate is payable only

out of, or in proportion to, the tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line.

I cannot understand how it can be maintained that a toll which is completely earned by carriage on the main line to or from Hepworth Station is

charged in respect of the carriage of traffic over the spur or branch line,

or how such a toll can be said to be

in respect of the carriage of traffic over the spur or branch line,

merely because the cars carrying the freight upon which it is payable have passed over the spur, the company being required to haul them over it gratuitously. For that additional haul the railway company receives no direct remuneration — it is not permitted to charge a toll. There are no tolls in respect of the carriage of traffic over the spur "out of" which the rebate can come. The words "in proportion to" were introduced into sub-section 3, obviously not to extend the right to rebate to cases in which no toll is charged for carriage over the spur, but to make it clear that it was not intended that the railway company should be obliged to segregate tolls so charged from their general revenue and to ear-mark them as a specific fund out of which alone the rebate must be taken.

It is urged that the Board has this matter so entirely in its own hands that it is useless and unnecessary to pass upon the question of law which it has submitted — that it can readily accomplish the result aimed at by reducing the tolls for carriage on the main line to and from Hepworth Station by amounts

which it may then authorize the railway company to charge as tolls for carriage over the spur. But the anti-discrimination provisions of the statute would probably present a serious obstacle to the adoption of this somewhat ingenious suggestion. For the present it is sufficient that no attempt has been made to meet the difficulty in this way. While the tolls out of which the statute allows a rebate to be claimed do not exist, the rebate in my opinion cannot be ordered.

I would for these reasons answer the question submitted by the Board as follows:—

"The tolls charged by the company in respect of the carriage of traffic for the applicant over the said spur or branch line mean * * * the tolls charged for the movement of such (traffic) upon the said spur."

Appeal dismissed with costs.

Solicitor for the appellants: *W. C. Biggar.*

1914
*Dec. 18.
1915
*Feb. 8.

THE CORPORATION OF THE TOWN OF ARNPRIOR (PLAINTIFF) ..... APPELLANT;

AND

THE UNITED STATES FIDELITY AND GUARANTY COMPANY (DEFENDANTS) ..... RESPONDENTS.

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

Insurance — Fidelity bond — Untrue representations—Materiality — R.S.O. [1897] *c.* 203, *s.* 141, *s.-s.* 2.

The tax collector of a town applied to a guarantee company for a bond to secure the corporation against loss by his dishonesty. The company submitted to the Mayor a number of questions which he answered in writing, one being, "what means will you use to ascertain whether his accounts are correct ?" His answer was, "Auditors examine rolls and his vouchers from treasurer yearly." The auditors never examined the rolls during the time the security continued.

Held, per Fitzpatrick C.J. and Idington and Anglin JJ., affirming the judgment of the Appellate Division (30 Ont. L.R. 618), Davies J. dissenting, that this was an untrue representation which avoided the security.

Held, per Duff J.—That the judgment of the court below could be supported on the ground that material representations made upon the application for the contract of renewal upon which the action was brought were untrue and that the effect of sub-section (*a*) is that such misrepresentations avoid the contract *ab initio*.

Per Davies J.—That the answer meant only that the "Municipality Act" required a yearly audit, which would be complied with, and that it was not the Mayor's duty to check such audit and see that it was properly performed.

The bond was renewed without fresh submission of the questions to the Mayor.

Held, that as the renewal referred to the Mayor's answers as incorporated therein, and as the latter had signed an agreement that

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

they should form the basis of the bond or any renewal or continuation of the same the answers and representations made thereby applied to such renewal.

Held, further, that sub-section 2 of section 141 of the Ontario "Insurance Act" (R.S.O. [1897] ch. 203) does not require the policy to state that any particular representation is material to the contract, its effect being only that no misrepresentation shall avoid the policy unless it is material.

Jordan v. *Provincial Provident Institution* (28 Can. S.C.R. 554) followed.

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 plaintiffs.

The questions raised for decision on this appeal are: (1) Do the statements of the mayor, incorporated in the bond of 1904, form part of that issued in 1905 in continuance of the original security? (2) Was there non-compliance with the requirements of section 141, sub-section 2 of the Ontario "Insurance Act," which prevented the defendants relying on said statements to defeat the action? (3) Were the answers of the mayor, as to the safeguards against the employee's dishonesty, misrepresentations which avoided the contract?

The facts on which questions 1 and 3 depend are stated in the head-note and the material provisions of the "Insurance Act" are set out in the opinion of Mr. Justice Duff.

W. M. Douglas K.C. and *J. E. Thompson* for the appellant. The appellant was entitled to rely on the statutory audit, his answer to the question submitted being merely that there would be such an audit and not a warranty of its being correct.

(1) 30 Ont. L.R. 618.

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TOWN OF ARNPRIOR v. UNITED STATES FIDELITY AND GUARANTY CO.

The company cannot invoke the misrepresentation, if any, in the mayor's answer, the bond not stating that it would be material as required by the Ontario "Insurance Act" (R.S.O. [1897] ch. 203, sec. 141, sub-sec. 2). See *Village of London West* v. *London Guarantee and Accident Co.*(1); *Jordan* v. *Provincial Provident Institution*(2), does not overrule this case, but is distinguishable.

Watson K.C. and *R. J. Slattery* for the respondents. The mayor was guilty of misrepresentation, which, independently of statute, avoids the policy. *Venner* v. *Sun Life Ins. Co.*(3); *Anderson* v. *Fitzgerald*(4); *London General Omnibus Co.* v. *Holloway*(5).

And the statute does not save the contract. *Jordan* v. *Provincial Provident Institution*(2).

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Idington and would dismiss the appeal with costs.

DAVIES J. (dissenting).—I am of the opinion that this appeal should be allowed and the judgment of Mr. Justice Britton, the trial judge, restored. I agree in the main in the reasoning by which the trial judge supported his conclusion, holding the respondent liable upon the bond.

The action was one brought upon a bond of the Fidelity and Guarantee Company guaranteeing the honesty in the discharge of his duty of one John Matt-

(1) 26 O.R. 520.
(2) 28 Can. S.C.R. 554.
(3) 17 Can. S.C.R. 394.
(4) 4 H.L. Cas. 484.
(5) [1912] 2 K.B. 72.

son, chief of police and tax collector of the Town of Arnprior.

The official whose honesty in the discharge of his duties was guaranteed proved faithless, and in the years 1909 and 1910 respectively embezzled sums of money received by him as tax collector for arrears of taxes due in 1908 and 1909 respectively, largely exceeding the amount of the bond sued on.

Many defences, as is usual in cases of this kind, were set up by the guarantor company, but the one which the Appellate Division upheld and upon which it based its judgment was that the plaintiff corporation had failed to audit yearly all the outstanding collection rolls as it held that the mayor of the corporation had promised in answer to questions submitted to him before the bond was issued that the auditors would do.

The learned judge who delivered the judgment of the Appellate Division says:—

> The auditors themselves declare that they did not examine the collector's rolls and never even saw them, so that there is no pretence that the promised annual examination of the rolls by the auditors was ever made,

and that

> this neglect was a violation of the promise in the statement on behalf of the corporation that the auditors would examine the rolls yearly

and

> the learned trial judge erred with respect to the failure of the town corporation to keep the promise made on their behalf by the mayor in answer to questions 12 (*a*) and (*b*) that the auditors would examine the collector's rolls yearly.

The question before us resolves itself largely into one of the true meaning and intent of these answers. These answers made by the mayor must, in my judg-

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ment, be read and construed with reference to the parties by whom and to whom they were made and to the subject-matter on which they were made. The mayor of the town was answering questions as to what means were used to ascertain whether the accounts of the city collector were correct, and I construe his answer to mean that there was a yearly audit of those accounts by auditors and that these audits were those provided for by the municipal statutes under which the town was governed.

Further, that the plaintiff municipality did not undertake and was not understood as undertaking or promising any other audit than this yearly statutory one and that there was no undertaking, warranty or promise on the part of the mayor that the yearly statutory audit would be a thorough and efficient one.

The auditors were men appointed presumably because of their knowledge of accounts; their duties were defined by statute. It was no part of the mayor's duty to re-audit the auditors' audit and see that it has been properly performed; he was most probably quite incompetent for such a task and his promise went no further than this, that there was a yearly statutory audit by municipal auditors and that the Act would be complied with and such yearly audit made.

The questions and answers on which the point turns are as follows:—

Q. 6. (*a*) What will be the title of applicant's position ?

A. Chief of Police and Collector of Taxes.

Q. (*b*) Explain fully his duties in connection therewith.

A. To collect all taxes, commutation money and dog taxes.

Q. 9. (*a*) Is he required to make deposits in bank ?

A. He pays direct to Treasurer.

Q. 11. To whom and how frequently will he account for his handling of funds and securities ?

A. He accounts to Treasurer daily, or when he has collected funds.

Q. 12. (*a*) What means will you use to ascertain whether his accounts are correct ?

A. Auditors examine rolls, and his vouchers from Treasurer yearly.

Q. (*b*) How frequently will they be examined ?

A. Yearly.

As I am agreeing with the learned trial judge in his conclusions and reasonings with respect to these questions and answers, I do not think I can do better than quote from his reasons. He says:—

I am of opinion that these answers do not mean more, and that they were not intended to mean more, than that the "Municipal Act" requires a yearly audit, and that there would be such an audit: the Act would be complied with.

Section 295 of the "Consolidated Municipal Act," 1903, provides for the appointment of a collector or collectors; and sub-section 3 of that section provides that the council may prescribe regulations for governing them in the performance of their duty. There is no regulation governing them prescribed by statute, and the matter is left to the fair and reasonable discretion of the council.

The plaintiffs' council, on the 4th October, 1893, passed a by-law requiring all municipal taxes to be paid on or before the 14th day of December in each year. This by-law was amended, in a manner not material in this action, by a by-law dated the 6th October, 1899.

Under the by-law of 1893, five per cent. had to be added to these unpaid taxes. To have that done, and to enable the treasurer to make the return required of him, the collector was obliged to make a return to the treasurer of all persons who had paid taxes on or before the 14th day of December, and at the same time he was required to pay to the treasurer the amount of taxes so paid.

Section 292 provides that the treasurer shall, after the 14th December and on or before the 20th December, prepare and transmit to the clerk of the municipality a list of all persons who have not paid their taxes on or before the 14th day of December. This necessitates the examination of the collector's roll for each year, down to the 14th December; and apparently no statutory duty is put upon the treasurer to examine the collector's rolls other than to that date.

Section 299 provides for the appointment of two auditors by the council of each municipality.

Section 304 defines the duties of these auditors. They shall examine and report upon all accounts affecting the corporation or relating to any matter under its control or within its jurisdiction for the year ending the 31st December, preceding their appointment.

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The treasurer of the Town of Arnprior was a salaried officer, who also gave security to the plaintiffs by a bond of these defendants for the due performance of the duties of his office.

Section 290 prescribes the duties of the treasurer, and section 291 states what books the treasurer is to keep. He must keep a cash book and journal; and in entering receipts of money in the cash book it would seem to be sufficient to enter amount of money received from collector without stating the persons from whom the collector received it, or on account of the taxes of any person. He should enter the date of payment of any tax money to him by the collector.

After the roll goes back to the collector, with the percentage added for collection, there is no statutory provision for any inspection of it.

Mattson saw his opportunity, and began to appropriate the money received by him from the taxes unpaid on the 15th December, 1908, and unpaid on the roll on the 15th December, 1909.

In interpreting the answer of the mayor it should be remembered that the plaintiffs are a municipal corporation. Their work is done as prescribed by statute, and as to which the defendants know as much as the plaintiffs. They are presumed to know the law. The answers were given in perfect good faith.

I am able to find, upon the evidence, that there was no fraud or concealment of any kind, nor was there any wilful misstatement on the part of the mayor, treasurer, or clerk, or any officer of the plaintiff corporation, in obtaining the bond in question. I am of opinion that the answers of the mayor — the statements in writing — are true in the way the mayor understood the questions and in the way he wished the defendants to understand them, and in the way the defendants did understand them.

The company's knowledge of the fact that the examination of the collector's accounts was the yearly examination made by the town auditors under the statute and no other and that the expression "the auditors examine rolls and his vouchers from treasurer yearly" refers to the yearly audit, appears clearly from Mattson's application to the defendant company for their guarantee bond and by the examination of their general agent Kirkpatrick who, in January, 1909, attended at Arnprior to make an inspection in reference to the treasurer of the town and Mattson, the town collector. The auditors' annual reports were shewn to have been in the company's hands and they

knew that the audit which did and would take place was part of the general audit of the corporation accounts.

The same remark as to their knowledge of the meaning of this language applies to the statements signed yearly on behalf of the corporation in reference to the examination of Mattson's books and accounts. It was the statutory audit made by the statutory auditors and none other. The municipality could not audit accounts except through individuals and when they used the expression "examined by us from time to time in the regular course of business" they only meant, and clearly must have been understood to refer to, the statutory examination which it was their duty to make through the auditors. On this point I am quite satisfied the company never was misled in the slightest.

Then again it does seem to me that under any construction of the words of the answer of the mayor to the question of the auditing of the accounts, the default of Mattson for the year 1908 amounting to $3,941.12, is clear and the plaintiff is entitled to recover that sum at least. The Appellate Division apparently assumed that an annual examination of the old rolls would have shewn such default. But that seems impossible under the circumstances. Mattson's defaults for the years 1908 and 1909 did not take place in those years respectively. The taxes paid in 1908 were not in arrear until after the end of that year and Mattson may not have received the arrears for that year till long afterwards. He certainly did not receive them in the year 1908. The rolls for 1908 were examined at the end of that year and there was no

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default on the part of Mattson then. The report of the auditors up to and inclusive of the 31st December, 1908, shews no default. So that when the statement was signed in June, 1909, on which the policy was continued for another year it was quite correct.

The accounts had been examined and everything was not only found correct by the auditors, but it now appears from the evidence to have been correct.

The embezzlement of the arrears of the 1908 taxes took place after the annual audit. The misappropriation by Mattson of the taxes for the year 1908, which was his first embezzlement, did not take place till 1909 when the arrears of 1908 were paid to him and no audit at the end of the year 1908, however complete and searching it might be, could avail to discover a default or misappropriation which had not then taken place. As the collector's default, with respect to the 1908 arrears, could not have been detected or exposed earlier than the audit which would take place in respect of the year 1909, because only then could it have been discovered, it does seem to me that the liability of the defendant for these embezzled arrears of the 1908 taxes is clear.

While I, therefore, think on any construction of the answers of the mayor to the questions of the defendant company, the corporation is entitled to recover, to the extent of the misappropriation of the 1908 arrears, as proved, $3,941.12, I am also of the opinion that on the proper construction of those answers they are entitled to recover for the full amount of the company's bond.

IDINGTON J.—Appellant is a municipal corporation in Ontario. Its tax collector in 1904 applied to

respondent to become his surety to appellant. It did so by its bond upon faith of representations made in answer to some eighteen questions. At foot thereof the then mayor of appellant signed as such the following:—

It is agreed that the above answers are to be taken as conditions precedent and as the basis of the said bond applied for, or any renewal or continuation of the same that may be issued by the United States Fidelity and Guarantee Company to the undersigned, upon the person above named.

Dated at Arnprior, Ont., this 10th day of June, 1904.

Of these questions and answers Nos. 11 and 12 are all that are necessary for us to look at for our present purpose. They are as follows:—

Q. 11. To whom and how frequently will he account for his handlings of funds and securities?

A. He accounts to treasurer daily, or when he has collected funds.

Q. 12. (*a*) What means will you use to ascertain whether his accounts are correct?

A. Auditors examine rolls, and his vouchers from treasurer, yearly.

(*b*) How frequently will they be examined?

A. (*b*) Yearly.

The auditors never had, when these answers were made, in fact examined a single collector's roll and never, in any succeeding year over which by renewals this obligation of respondent extended, was such examination made. The answer was palpably untrue and should not have been made by any one having due regard to his own honour.

It is urged that the mayor was entitled to presume that the auditors had discharged their statutory duty. The mayor had no right to presume any such thing unless and until, as his duty as mayor bound him to do, he had examined and inquired and been in some way misled. It is the duty of the mayor to see that

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every officer of the corporation is doing his duty. And so far as that related to the duties of an auditor it did not involve a re-examination of the work, but to see that the methods laid down in law therefor had been duly observed.

The respondent was entitled to presume that he had discharged that duty and spoke whereof he knew in answering these questions as he did. It was a matter of fact upon which the bond, as it plainly states, must rest as a condition precedent to liability thereon.

It was, moreover, when read in light of the frame of the question and the agreement quoted above from the foot of the memorandum, an undertaking that the auditors would discharge their clear statutory duty.

That undertaking is made, by the memorandum so signed by the mayor, the basis of the said bond, or any renewal or continuation of the same, and by the terms of the bond itself it is shewn that it was upon the faith of the said statements setting forth the nature and character of the office or position to which the employee had been appointed, the nature and character of his duties and responsibility, and the safeguards and checks to be used upon him in the discharge of said duties, and same being warranted to be true, that appellant entered into said bond; and it is stipulated in said bond that if the statement shall be found in any respect untrue the bond shall be void.

Such must be the result of its untruth unless by reason of the statute which I am about to refer to, that stipulation is rendered inoperative.

Then it is said the bond sued upon was given, as in fact it was given, the following year without any re-

petition of that statement of fact and undertaking and, therefore, cannot be made a foundation for respondent to rest its defence thereon.

This bond refers as the other had to the employer (*i.e.*, the appellant) having delivered to the respondent

> a statement in writing setting forth the nature and character of the office or position to which the employee has been elected or appointed, the nature and character of his duties and responsibilities and the safeguards and checks to be used upon the employee in the discharge of the duties of said office or position, and other matters, which statement is made a part hereof.

What statement can be referred to if not that which in fact had been delivered by the employer the year before? No other has been suggested, but its identification does not rest upon that alone, for the memorandum above quoted expressly anticipates its use as basis for "any renewal or continuation" thereof.

I think it is no straining of the language used to say it is a renewal of the bond given in 1904 on faith of such answers as already dealt with.

In all its terms save as to dates it is identical.

I, therefore, hold it is founded upon the answers already referred to as delivered in 1904, and respondent entitled to rely thereupon and the assurance given therein and memorandum at foot thereof; subject to what may be set up by virtue of the statutory provisions contained in section 144 of the "Insurance Act" of 1897.

Turning to a consideration of that section which is the third, if not chief, point relied upon by appellant herein, I think the whole section must be read together and due regard be had to the history thereof if we would correctly interpret and construe any single subsection thereof.

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The words in sub-section 2,

> unless such terms, condition, stipulation, warranty or proviso, is limited to cases in which such statement is material to the contract,

are pressed upon us as the governing part of the sub-section, and as requiring in each insurance contract an express statement that "the statement in the application" to be made a possible ground of avoidance of the contract "is material to the contract."

I am uable to see what good the expression of any such statement in the contract could serve. It is quite clear that the insistance of it might become very embarrassing. In the multiplicity of questions often put and answered, many may be properly put and answered in the way of eliciting information, yet when taken alone may be immaterial. Is it to be supposed that the legislature intended that the insurer must under pain of losing the benefit of such answers, select the material from the immaterial and expressly tell the applicant that those immaterial are of no consequence and may be answered falsely or truly as he pleases, for they are of no consequence?

Again he may think quite properly that a question which he deems to be material should be put and answered: and yet a judge or jury may afterwards take an entirely different view of it and hold it immaterial and then his whole safeguard is gone as to the remaining answers though all may have been found false; for the moment he stipulates by general terms for too much, he loses the benefit of what he would otherwise have been entitled to.

I admit that it would be possible to frame a policy in which each question and answer could be set out and the expressed statement of its materiality be declared, but with an express provision that if found im-

material that would not affect any other, or the stipulation in relation to any other, and so on through the whole complex maze of questions.

I cannot think the insured would benefit much by that sort of a bringing home to his mind which is the only object suggested of expressing in the bond something declaring the materiality of what he was answering. Indeed, taking the words in question literally and trying so to apply them, eventually leads to so many absurdities that I cannot think the object of the legislature was that which is suggested. I, therefore, seek another meaning to the words.

The insured is amply protected by observing the whole scope and purpose of these sections and reading the words relied upon in relation thereto, and so read I see no difficulty. The stipulation, no matter what it is, must only be good or held good so far as it relates to any statement in question which is material and not beyond. In other words I should read it as if the purpose of the sub-section was to limit the operation of such a condition, stipulation, etc., to cases in which it is material. So read the whole sub-section is made operative and to harmonize with the rest of the section and the insured gets the substantial benefit intended. The other way contended for renders the latter part of the sub-section useless and indeed an absurdity.

In any way one can read the curious phrase there are difficulties. Let us choose that presenting the meaning which best accords with the rest of the whole section.

It is said the case of *Jordan* v. *The Provincial Insurance Co.*(1) is distinguishable because the word

(1) 28 Can. S.C.R. 554.

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"material" appeared in some way in the policy there in question. I do not so read the condition in which it did appear as at all complying with the present contention. It does not profess to do so. It does not specify that any particular statement or set of statements were material. It was rather a stipulation quite independent of what the words I have dealt with seem if taken in the literal way argued for here to require. It simply declared that the fraudulent or misleading statement of a fact material to the contract in the application should render the certificate void, which is quite another thing. It does not earmark, as it were, the answers and express anything as to their meaning or import. It does not enlighten the applicant any more than the insured was here.

But it seems quite clear that the principle upon which this court proceeded in that case, rightly or wrongly, forbids the interpretation contended for. Then since that case or rather the facts upon which it is founded took place the legislature expressly added to sub-section 1 the following:—

(*a*) Nothing herein contained shall exclude the proposal or application of the assured from being considered with the contract, and the court shall determine how far the insurer was induced to enter into the contract by any material misrepresentation contained in the said application or proposal.

This is clearly intended to settle the general scope and purpose of these sub-sections in the way of protection of the insurers in the same way as the respondent claims it is protected herein.

The insurers were as a class long ago such gross offenders that the legislature had to step in and protect the insured against themselves and the judicial interpretation of the law of contract.

Let us not by disregarding that presumably considered by all men as settled and so acted upon for many years, start another era giving chances to have another crop of gross offenders in the person of the insured class. If the materiality is left to the courts and juries, as the legislature evidently intended, then both classes of offenders will, it is to be hoped, be kept in such check as equity and good conscience may require.

It is to be further observed that in such cases as presented herein the insured was not in fact the applicant and thus was not brought within the literal terms of the sub-section.

I think the appeal must be dismissed with costs.

DUFF J.—The statutory provisions to be applied are now contained in section 144 of the Ontario "Insurance Act." That section is as follows (pp. 443 and 444, Cameron's Life Insurance) :—

144. (1) Where any insurance contract made by any corporation whatsoever, within the intent of section 2 of this Act is evidenced by a sealed or written instrument, all the terms and conditions of the contract shall be set out by the corporation in full on the face or back of the instrument forming or evidencing the contract, and unless so set out, no term of, or condition, stipulation, warranty or proviso, modifying or impairing the effect of any such contract made or renewed after the commencement of this Act shall be good and valid, or admissible in evidence to the prejudice of the assured or beneficiary.

(*a*) Nothing herein contained shall exclude the proposal or application of the assured from being considered with the contract, and the court shall determine how far the insurer was induced to enter into the contract by any material misrepresentation contained in the said application or proposal.

(*b*) A registered friendly society may instead of setting out the complete contract in the certificate or other instrument of contract, indicate therein by particular references those articles or provisions of the constitution, by-laws or rules which contain all the material terms of the contract not in the instrument of contract itself set

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out, and the society shall at or prior to the delivery over of such instrument of contract deliver also to the assured a copy of the constitution, by-laws and rules therein referred to.

(2) No contract of insurance made or renewed after the commencement of this Act shall contain, or have indorsed upon it, or be made subject to any term, condition, stipulation, warranty or proviso, providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, unless such term, condition, stipulation, warranty or proviso is limited to cases in which such statement is material to the contract, and no contract within the intent of section 2 of this Act, shall be avoided by reason of the inaccuracy of any such statement, unless it be material to the contract.

(3) The question of materiality in any contract of insurance whatsoever shall be a question of fact for the jury, or for the court if there be no jury, and no admission, term, condition, stipulation, warranty or proviso to the contrary, contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto shall have any force or validity.

(4) Nothing in sub-sections 1, 2, and 3 of this section contained shall be deemed to impair the effect of the provisions contained in sections 168 to 173 inclusive, or the effect of the provisions contained in section 55 of *The Act respecting the Insurance of Live Stock.*

Section 144, sub-section 4, amended by 4 Edw. VII. ch. 15, sec. 5:—

Sub-section 4 of section 144 of the Ontario "Insurance Act," is amended by adding at the end thereof the following words:—

"Or the effect of the provisions contained in the Act of Ontario passed in the fourth year of His Majesty's reign and intituled 'An Act respecting Weather Insurance.'"

"Insurance contract" must be read in connection with section 2, sub-sections 37 and 41, and, it may be observed, includes among other things insurance of property against any loss or injury from any cause whatsoever. I have come to the conclusion that the representations made upon the applications for renewal which were contrary to the fact had the effect of invalidating the contract for renewal upon which the action is brought, and that there is nothing in the relevant enactments disentitling the company to set

up such invalidity as a defence. It is unnecessary to consider what would have been the proper construction of sub-section 1 before the enactment of sub-clause (*a*). The effect of sub-section 1 read with sub-clause (*a*) appears to me to be that as regards representations set out in an application or proposal the insurance company is entitled to rely upon the legal rule by virtue of which an insurance contract brought about by misrepresentations of fact material to the contract is thereby invalidated *ab initio*.

I do not think these provisions require that this rule of law should be set out in the contract of insurance. In other words, I do not think that the statute has made this rule of law inoperative unless it is embodied by an express stipulation in the insurance policy. It cannot, I think, be questioned that the representations referred to are made in a document which is properly described as an "application or proposal" within the meaning of the statute. The statements themselves were made by the appellants for the purpose of the application which was made by their officer. That is sufficient to dispose of the appeal.

ANGLIN J.—With not a little reluctance, because not satisfied that the defence which has prevailed is meritorious, I find myself constrained to concur in the dismissal of this appeal.

So far as it deals with the construction of sub-section 2 of section 141, of the "Insurance Act" (R.S.O. 1897, ch. 203), I am, with great respect, convinced that the decision in *Jordan* v. *Provincial Provident Institution*(1), was wrong and that the *Village of*

(1) 28 Can. S.C.R. 554.

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Duff J.

London West v. *London Guarantee and Accident Co.* (1), was rightly decided. But I feel bound to follow the *Jordan Case* (2) until it has been reversed by competent authority. In view of the certificates given on behalf of the municipal corporation when renewals of the policy in question were obtained, it may be that sub-section 2 would not aid it, if construed as it contends it should be.

On the other questions involved in the appeal I have found no reason to differ from the conclusions reached in the Appellate Division of the Supreme Court of Ontario.

Appeal dismissed with costs.

Solicitor for the appellant: *J. E. Thompson.*
Solicitor for the respondents: *R. J. Slattery.*

(1) 26 O.R. 520. (2) 28 Can. S.C.R. 554.

THOMAS PERRY PHELAN (PLAINTIFF) ..... APPELLANT;

AND

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANTS) ..... RESPONDENTS.

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*Feb. 2.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Railways—Operation—Equipment—Coupling apparatus—Duty to provide and maintain—Protection of employees—Inspection—"Inevitable accident"—Negligence—Findings of jury—Evidence—Common employment—Conflict of laws—"Railway Act," R.S.C., 1906, c. 37, s. 264—Construction of statute—Vis major.

A car attached to a fast-freight train arrived at a station on the railway, in Saskatchewan, during a cold night in the winter; it was equipped with an approved coupling device, as required by section 264(*c*) of the "Railway Act," R.S.C., 1906, ch. 37, and, on the arrival of the train, it had been inspected according to the usual practice and no defect was then found. When the train was being moved for the purpose of cutting out the car, the uncoupling mechanism failed to work and, in consequence, the plaintiff, an employee, sustained injuries. Subsequently the coupler was taken apart and it was then discovered that the locking-block was jammed with ice (not visible from the exterior) which had formed inside the chamber and prevented its release by the uncoupling device used to disconnect the car before the train was moved. In an action for damages, instituted in the Province of Manitoba, the jury found that the company had been negligent "through lack of proper inspection," and judgment was entered on their verdict. On appeal from the judgment of the Court of Appeal for Manitoba setting aside the verdict and entering judgment for the defendants:—

Held, per Fitzpatrick C.J. and Davies and Anglin JJ.—The obligation resting upon the company, both under the statute and at common law, was discharged by the customary inspection of the car which had been made according to what was shewn to be good railway practice, and there was no further duty imposed in

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

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regard to unusual conditions not perceivable by the ordinary methods of inspection.

Per Davies and Anglin JJ.—Viewed as a finding upon a question of fact, the verdict of the jury upon the technical question as to the system of inspection should be set aside as being against evidence. *Jackson* v. *Grand Trunk Railway Co.* (32 Can. S.C.R. 245); *Jones* v. *Spencer* (77 L.T. 537); *Metropolitan Asylum District* v. *Hill* (47 L.T. 29); *Jackson* v. *Hyde* (28 U.C.Q.B. 294); and *Field* v. *Rutherford* (29 U.C.C.P. 113), referred to.

Per Anglin J. (Idington J. contra).—The defence of common employment, although taken away by legislation in the Province of Saskatchewan, where the injuries were sustained, was available as a defence in the courts of Manitoba, where the action was brought. *The "Halley"* (L.R. 2 P.C. 193) referred to.

Judgment appealed from (23 Man. R. 435) affirmed, Idington and Duff JJ. dissenting.

Per Idington and Duff JJ, dissenting.—Section 264 of the "Railway Act" imposes upon railway companies the absolute and continuing duty not only to provide, but also to maintain in efficient use the apparatus thereby required; where it is shewn that the apparatus failed to operate, when used, the onus is upon the railway company, in an action under section 386 of the "Railway Act," to shew that there had been a thorough inspection thereof made to ascertain that it was in efficient working order before the train was moved. *Johnson* v. *Southern Pacific Co.* (25 S.C. Repr. 159) referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), setting aside a verdict for the plaintiff and the judgment entered at the trial, by Curran J., and dismissing the plaintiff's action.

The circumstances of the case are sufficiently stated in the head-note and the questions in issue on the present appeal are discussed in the judgments now reported.

F. B. Proctor for the appellant.

C. H. Locke for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

(1) 23 Man. R. 435.

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The Chief Justice.

The car-coupler was of a type which complied in all respects with the requirements of the statute and had been approved of by the Master Car Builders' Association. It did not work on the occasion in question because of an obstacle created by unusual climatic conditions that could not be detected by the ordinary methods of inspection which were reasonably sufficient to ensure the employees of the company against accidents, and there was nothing special in the circumstances which required extra precautions to be taken.

I agree with the Court of Appeal in the conclusion that in fact the car-coupler was effective and the inspection adequate and, therefore, that the company was, in the circumstances, without fault.

DAVIES J.—Two contentions were urged by Mr. Proctor why the judgment of the Court of Appeal, directing judgment to be entered for the defendant, should be reversed. One was that section 264 of the "Railway Act" casts an absolute and unqualified duty upon railway companies to provide and cause to be used on all trains modern and efficient apparatus, appliances and means, *inter alia,*

(*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars;

and the other was that, under the findings of the jury, the plaintiff was entitled at common law, irrespective of the statute, to a judgment for the damages awarded.

The question as to the proper construction of section 264 is a most important and far reaching one. I am, however, not able to accept the suggested interpretation as the true one.

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The statutory duty so far as regards sub-section (*c*), with which only we are concerned, consisted in providing car-couplers which would couple automatically by impact and which would uncouple without the necessity of men going in between the cars.

In all of the cases provided for in the section the statutory duty went beyond that imposed by the common law; but I am not prepared, as at present advised, to hold that it imposed the absolute or unqualified duty contended for, involving obligations which neither skill, care or absence of negligence, could avail to avoid.

In the present case, however, the defendant did not obtain any finding from the jury as to a breach of their statutory duty and, in the absence of such a finding, his contention must fail.

On the common law liability of the company invoked by the plaintiff, the only findings of the jury were that the defendant company was guilty of negligence and that this negligence was "through lack of proper inspection."

This express finding negatives any other negligence on the defendants' part.

I am unable to find any evidence warranting the jury's finding. We have the express evidence of Neill, who at the time of the accident was defendants' car-inspector at Melville, and of Couchman, who was plaintiff's witness, that on the arrival of the train on the night of the accident an inspection was made by them one on each side of the train with a lantern and the couplers of each car were inspected from the outside and that there were no visible signs of snow or ice on the couplers, or other evidence to cause any

suspicion as to their not being all right and in good order.

It must be borne in mind that the jury did not find any defect in the coupler. As a matter of fact, after the accident occurred, the discovery was made that the coupler did not work. It was at once taken off and opened and examined by Neil, who states that he found it nearly filled with ice which, he surmised, had fallen on the outside of the coupler in the shape of snow which had melted and dropped into the coupler and that, after the ice was removed, he found it "worked fine" and was in first-class condition.

The uncontradicted evidence is that the coupler was a standard one approved of by the Master Car Builders' Association and one of the best on the market.

The truth is, that there was nothing the matter with the coupler itself, but that, owing to climatic conditions, it had become partially filled with ice, which prevented its proper working and that its condition was not detected until after the accident happened, when it was taken apart by Neil, and could not be detected by such an outside examination as good railway practice called for and as was made by Neil and Couchman.

The system of inspection as made by Neil and Couchman was approved of by Mr. Cowan, general car foreman of the Canadian Northern Railway Company, and other experts as good railway practice. All the experts agreed that any pulling of the cars apart to inspect the couplers was impracticable, and that the inspection sworn to alike by Neil and Couchman was the only practicable one.

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No witness gave evidence of anything omitted by these inspectors which ought to have been done by them and if the jury, in the absence of evidence, drew inferences as to what should have been done in addition to what was done they should have stated what these inferences were and not put their finding in the vague and unsatisfactory language they used.

There was much discussion as to the meaning and effect of their finding "through lack of proper inspection." There is an air of delightful vagueness and uncertainty about it amply justified by the absence of any evidence.

I am willing to accept the interpretation offered by appellant of its meaning as a possible one and as meaning that a proper inspection would have revealed the unworkable condition of the coupler. But surely that which was wanting in the inspection as made should have been stated in the finding. All the experts agree that it was a good and proper inspection and several suggestions made to them of a possibly better inspection were stated to be impracticable.

Under these circumstances, in the total absence of any evidence to support the finding and because of its vagueness and uncertainty, I would dismiss the appeal and confirm the judgment of the Court of Appeal with costs.

IDINGTON J. (dissenting).—The appellant acting as a brakesman and switchman in respondent's yard in Melville, in Saskatchewan, on the 19th January, 1912, in a shunting operation conducted after dark, when on top of a car to be cut out of the train and kicked into a siding, was thrown to the ground by rea-

son of the car, instead of responding to the intended kick and moving onward, remaining attached to the train. The violent unexpected jerk which appellant thus got and brought him to the ground was, he alleges, the result of another man who was assisting in the intended operation having failed to raise the coupling pin of the car and thereby disconnect it from the moving train when brought to a halt. The man detailed to raise said pin did his duty by pulling upon the lever which was intended to uncouple the cars at the given signal, but he failed because the pin was so jammed in from some cause or other that his pull produced no effect.

It is not seriously denied that all this happened and was in truth the cause of appellant's fall to the ground when the cars ran over his arm and resulted in it having to be cut off at the shoulder.

The jury found a verdict of negligence against respondent by answering questions submitted by the learned trial judge and assessed the damages at six thousand dollars. One of these questions was: "If so in what did this negligence consist"? The answer was: "Through lack of proper inspection."

The learned trial judge upon this and other answers entered judgment for the appellant. The respondent herein then appealed to the Court of Appeal for Manitoba which, by a majority of three to two, reversed said judgment and dismissed the action.

The meaning of this verdict is, to my mind, the only serious difficulty in appellant's way to success, and to understand it we must, as in all such cases of an enigmatical sort of verdict, look at the proceedings at the trial and the course thereof and especially the

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learned trial judge's charge and other indications of what the parties, in truth, were engaged in trying.

When we do that in this case there cannot be much doubt of the meaning of the jury's verdict.

The respondent's counsel at the close of the case moved for a nonsuit. In doing so he said:—

> I suppose the most my learned friend could wish to shew is that this man was injured by reason of a coupler failing to work. There is no question that is the reason this accident occurred. The plaintiff expected it to open and it did not open, and he charges that we are liable in damages because it did not open. Now, he has to go farther than that.

Then he proceeded to argue on the evidence as to the inspection of the coupler in question and urged that no more could be desired and hence no actionable negligence shewn.

Thereupon the learned trial judge asked: "What about the statutory duty ? To which counsel replied thus:—

> The statutory duty is met by this Climax Coupler, which is a standard coupler. The statute was never intended to insure workmen against any latent defect.

Next morning, the court having adjourned, the learned judge ruled that the common law duty and the duty cast upon the defendant by the "Railway Act" were sufficient to satisfy the present onus and that they ought to take into consideration the whole case.

In charging the jury he dealt with every phase of the case and directed the jury that there was a common law duty of the employer to provide proper materials and a proper place to work in, and after enlarging upon that, pointed out the requirements of the "Railway Act" in respect of automatic couplers at length.

He then said:—

The next question for you to consider is, have they maintained that coupler in a satisfactory working condition so as to ensure the highest degree of efficiency from it in order to carry out in actual practice the protection to life and limb as defined by the statute; in order to avoid the necessity of men going in between the cars to couple and uncouple them and when men are operating on the cars the levers can be drawn by some one on the ground? There is no question about it on the evidence here that that coupler did not work when Ault attempted to cut off the car on that night.

And, thereupon, he proceeded with some detail to deal with the evidence bearing thereupon and the kind of inspection it presented.

It seems to me that the return of the jury to this charge and the questions submitted must be read as assuming that the facts admitted by every one are to be taken for granted and that if the law imposes the duty upon respondent of maintaining the coupler in efficiency, whether inspected or not, then, regardless of inspection, there was negligence, but if there was anything further needed they found that there had been no proper inspection.

The first question thus raised is as to the nature and extent of the obligation imposed by section 264 of the "Railway Act" upon respondent.

This section is under the caption "Operation, Equipment and Appliances for Cars and Locomotives."

It enacts:—

264. Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means —

and then follow (*a*) and (*b*), not concerning us, and (*c*), which is as follows:—

(*c*) To securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

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Is this rigid requirement observed by supplying a coupler that in fact was, and had been, no one knows how long, absolutely useless for any purpose?

We are not told when it was last fit for use. The counsel for respondent at the trial seemed to assume that having furnished a coupler of an approved type its duty ended, and that the onus rested upon the appellant to demonstrate all else relative thereto and its inefficiency if so in fact and, above all, the negligence that had produced such inefficiency.

I do not think such is the law to be found in this enactment. We must look at section 386 of the "Railway Act," which gives the right of action in express terms as well as imposing penalties.

I incline to the opinion that the statute, in light thereof, is to be read just as the plain language of these sections expresses and clearly implies. No excuses are permitted. No exception is expressed. Why should we read something of that kind into the Act when not there?

In the view I thus suggest of the meaning of this statute there is an end of all the many contentions of the respondent. But it is not necessary to adhere to such view to maintain the judgment of the trial judge.

Taking much lower ground and, for argument's sake, assuming the rule applicable to cases resting upon the common law obligations of the employer or, indeed, upon some statutes by their provisions implying analogous modifications of the rigid rule (which I suggest this one lays down) that upon the careful and prudent inspection of a competent officer, reasonably finding the requirements of the law had been observed, yet an accident might occur for which the

master could not be held liable, how far does that carry the defence herein ?

This car formed part of a train made up at Fort William, in Ontario, but how long before the nineteenth of January, on the evening of which it came into the Melville yard, no one seems to know, or, indeed, to have cared.

It travelled in its last stages at least through weather conditions that shewed a temperature of twenty to twenty-five degrees below zero. The coupler was filled with ice and snow. It was so solidly frozen that it was only after the man responsible for its inspection at the Melville yard had taken it apart that he was able to discover what was the matter.

It is suggested by some of the witnesses that it probably was next to the engine, though apparently not there at its coming into the yard.

It appears such a situation, or where steam might reach it and get frozen, or dropping of water from eaves of a building or car, or in other ways such as by a snow storm and snow melting, the condition found might have been produced. It is admitted by the witnesses who ought to know that such things do happen.

There was ample evidence before the jury from which men of sense exercising common local knowledge might well have said all these things might, from its history, have happened to this car since it had got placed in train No. 91 at Fort William. And how much further east it had travelled from, without any inspection, no one knows.

Are we to say, as matter of law, that the most cursory sort of examination, under such circumstances, of Mr. Neill by the aid of his lantern watching, I infer,

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only for breakages, not for the workability of this coupler and failing to test it by hammer or otherwise, is the sort of examination a jury are debarred from finding fault with ? Are we to tell men of sense who do condemn it, that they are expressing an opinion which nine out of twelve reasonable men cannot properly pronounce ?

I cannot think such is the law or that the excuses given, I care not by whom, in regard to the use and inspection of a piece of mechanism which the jurors possibly understood quite as well as the witnesses and, under the circumstances, could appreciate better than lawyers, must be held valid.

The excuses given for not making a better inspection seem to me most frivolous. And there is evidence from which the jury might well have discarded some of the evidence upon which respondent must rely to establish this defence.

The radical error, I repeat, in what has been put forward is the assumption that the burden rested upon the appellant, when in law the burden rested on respondent, to shew some reasonable grounds for being discharged from its statutory obligation.

There is a case of *Johnson* v. *Southern Pacific Co.*(1), upon a similar statute in which it was contended that because on the engine and the dining car, respectively there in question, which needed coupling, there was a good coupler affixed, but the two couplers were not of the same make or kind, though each in its way was excellent. They could not be made to work automatically or together without a man going in between the engine and the car to make

(1) 25 S.C. Repr. 158.

them couple. It was argued even up to the Supreme Court of the United States that the statute had been fully complied with.

The argument there failed and this contention ought equally to fail.

I quite agree with the Chief Justice in the Court of Appeal when he answers all the exaggerated consequences suggested by some to frighten others, as to making a more thorough inspection, that all that was needed was to see that before an operation such as involved herein was attempted the car to be dealt with should be so thoroughly examined as to make sure that the coupler would work and that there existed no need for severing each car in a whole train.

I may add that the kind of inspection supposed to be made by men like Mr. Neill, doing what he was doing, was no doubt for the purpose of seeing that nothing was broken and hence make sure that the car would not uncouple and become a source of danger to the train or other trains by such uncoupling.

The operation in question was of an entirely different character and for another purpose and needed the full assurance that the coupler would uncouple.

Again it is urged that the statute is only for the protection of the man operating the coupler. I do not think so. It was designed, whatever its origin, to provide for the safety of all concerned in working on a train on which that might come into play, and it is in this connection that a distinction may be possibly drawn between the degrees of obligation imposed in relation to those directly and indirectly concerned, that induces me to put the disposition of this case upon the lower ground I have taken.

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I may say the case just cited furnishes a contention somewhat analogous to that made here, but which failed there.

Another contention was set up herein before us, though not presented in the courts below, and that was that the law of Manitoba must govern and, by that, the negligence involved in failing to inspect was that of a fellow-servant and, hence, the doctrine of common employment applied and as the action rests upon the common law or statute, must fail.

Unfortunately for the argument the accident took place in Saskatchewan where the doctrine was abrogated in 1900 by an ordinance, chapter 13, section 2, which is copied into the "Judicature Act" of 1907, now found in R.S. Sask. of 1909, and is in section 31 thereof, which is as follows:—

> 31. The law to be administered in this province as to the matters next hereinafter mentioned shall be as follows:—

and of its numerous declarations of the law, one is this:—

> 14. It shall not be a good defence in law to any action against an employer or the successor or legal representative of an employer for damages for the injury or death of an employee of such employer that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee any contract or agreement to the contrary notwithstanding.

The objection that it only applies to actions in the Supreme Court is not tenable, indeed is neither justified by the terms or implications of the enactment.

This objection in any event, even had the law not been changed, would only apply to the common law aspect.

The statute that imposes the duty in question herein rests it upon such express ground that its non-observance can in any aspect only be excused by something which defendant must set up and prove.

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

DUFF J. (dissenting). — This was an action in which the respondent, the Grand Trunk Pacific Railway Company, was charged with the violation of section 264 of the "Railway Act" in respect of which reparation was claimed under sub-section 2 of section 386 of the same Act. The first mentioned section provided in so far as relevant to this case:—

> Every company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means—
>
> * * * * *
>
> (*c*) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact, and which can be uncoupled without the necessity of men going in between the ends of the cars.

The material parts of section 386 are as follows:—

> 386. Every company required by this Act—
>
> (*a*) to provide and cause to be used on its trains modern and efficient apparatus, appliances and means, for the secure coupling and connecting of the cars and the engine composing the train,
>
> * * * * *
>
> which fails to comply with any requirement of this Act in that behalf shall forfeit to His Majesty a sum not exceeding two hundred dollars for every day during which such default continues.
>
> 2. Every such company shall also be liable to pay to all such persons as are injured by reason of the non-compliance with such requirements * * * such damages as they are legally entitled to.

For the purposes of this appeal it must be taken as having been established that the appellant was injured by reason of the fact that the coupler connecting two of the members of one of the trains of the respondent company on which the appellant was working at the time was not in such a condition that it could be "uncoupled without the necessity of men going in between the ends of the cars."

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On the questions of law involved the conclusions I have reached are as follows.

I think the duty imposed by section 264 "to provide and cause to be used" modern and efficient apparatus, appliances and means is a continuing duty. I also think that the clause,

> with couplers that couple automatically by impact and which can be uncoupled without necessity, etc.,

while it grammatically qualifies the verbs "couple" and "connect," designates an essential attribute of the "apparatus, appliances and means" to be employed for connecting the different members of the train, and that it is a requirement of the statute that the apparatus so employed shall fall within the description contained in that clause. It follows, I think, that the duty to "provide and cause to be used" efficient apparatus, etc., whether it is to be regarded as absolute or qualified duty, involves the duty to maintain the coupling apparatus in such a state that it will fulfil the condition of being capable of being uncoupled as provided by sub-section (*c*).

The next point is whether the duty imposed by this section is an absolute or qualified duty, and if qualified, what is the nature of the qualification ? In the first place it seems to me to be too clear for argument that the common law doctrine of common employment cannot be imported as a qualification. I think that does not require discussion.

In the next place I do not think the absolute language of the statute can be read as importing only a duty to see that ordinary care is taken for the providing and maintaining the apparatus required. I think it may be assumed that the legislature was satis-

fied that the requirements of the section were not impracticable or, at all events, that any suggestion to the contrary had been fully met by the provision contained in sub-section 7. On the other hand I think there is sufficient ground, having regard to the fact that section 386 provides for a penalty for non-compliance, for thinking the legislature did not intend to punish every case of non-compliance, then the circumstances bring it within the category of those cases which, in the language of lawyers, fall under the head "inevitable accident." That is my view of the construction of the section. I may add, however, that what I am about to say with regard to the evidence would be equally conclusive in favour of the appeal if the proper view were that the duty imposed was a duty that the company could discharge by seeing that all ordinary measures had been taken to provide and maintain the appliances mentioned.

In either view it seems clear that the failure of the coupler to work cast the burden of explanation upon the defendant company; and in this view, which appears to have been the view of the learned trial judge himself, the jury ought to have been told that the fact that the coupler failed to work cast upon the company the onus of proving in fact such circumstances as would support a defence of "inevitable accident," or at least the burden of shewing that ordinary care had been taken in the providing and maintaining of the coupling apparatus. The jury might have awarded a verdict in favour of the appellant because they were not satisfied with the company's explanation of the accident, as, for example, being doubtful on proper judicial grounds whether the facts were being fairly and fully disclosed to them; or, on the other hand, they

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might have found that in some particular there had been a failure to perform the duty to exercise due care. The jury have found plainly enough that there was negligence. There was, they say, a negligent failure to inspect. I do not see how (subject to the point I am about to mention) it is possible on the evidence before us to refuse to give effect to this verdict. The learned trial judge was obviously dissatisfied with the evidence of several of the witnesses called on behalf of the company, and I do not think we can possibly say that the jury were not entitled to reject that evidence. The only point upon which I have had any doubt is whether or not there ought to be a new trial. The objection taken by Mr. Dennison that the learned trial judge did not in his charge bring to the attention of the jury the elements in the company's case which it would be their duty to consider was certainly not without substance; but in view of the opinion of the majority of the court that the appeal should be dismissed it is unnecessary to consider that point.

ANGLIN J. — Although I was unavoidably prevented from hearing the conclusion of the argument in this case, I understand that it is the desire of the parties that I should take part in the judgment.

In my opinion this appeal should not succeed. In answer to the question, "In what did the negligence of the defendants consist?" the only finding of the jury is "Through lack of proper inspection." All other charges of negligence preferred by the plaintiff have thus been negatived. *Andreas* v. *Canadian Pacific Railway Co.*(1).

As is pointed out by Perdue J.A.:—

(1) 37 Can. S.C.R. 1.

Failure to inspect was not in itself the direct cause of the accident. There must have been something wrong with the coupler which caused it to fail and the jury have made no finding as to this.

As put by Osler J.A. in *Schwoob* v. *Michigan Central Railroad Co.*(1) :—

Want of inspection, unless there was some existing defect which inspection would have disclosed, is not defect, or, by itself, negligence.

Three suggestions are made in regard to the cause of the failure of the coupler to operate — that there was a defect in it due either to original vice, or to a state of disrepair, or that the failure was due to the presence of ice in the cup or chamber.

The finding of lack of proper inspection is consistent with the existence of any one of these conditions. It is impossible to say which of them the jury had in mind. Indeed, the appellant himself suggests that the jury may have had in view some defect in the engine, which, it is said, was leaking steam. This possibility only serves to shew how inconclusive and unsatisfactory the finding really is.

There is not a tittle of direct evidence either of original defect or of a state of disrepair. The coupler is shewn to have been one of the best on the market — a standard appliance and such as admittedly met the requirements of section 264(*c*) of the "Railway Act." The only indirect evidence of anything being wrong with it is that afforded by the fact of its failure to work. That might be due either to a defect of the mechanism or to the presence of ice or snow, and does not, therefore, in itself, afford any proof of the existence of either condition. The only direct evidence in the record upon this point is that of Neill, who says that, on subsequent examination made by him, ice was found in the cup or chamber in quantity sufficient

(1) 13 Ont. L.R. 548, at p. 553.

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to account fully for its failure to operate and that on the removal of this ice the coupler "worked fine." He also says that it was not worn and that every part of it was in first-class condition. This evidence is uncontradicted. If it may be assumed that in this particular the jury dealt with the case upon the evidence, it may perhaps be inferred that they meant to find that a "proper inspection," before the accident occurred, would, if made, have disclosed the presence of the ice afterwards found by Neill. They have not so found, however, and their finding is consistent with their having proceeded on an assumption of some entirely different defect which, on inspection, would have been discovered.

But assuming that the presence of the ice in the coupler is what they thought "proper inspection" would have detected, there are other serious difficulties in the way of sustaining their verdict. There is no evidence as to the "history" of the car carrying the refractory coupler for any period preceding the accident — nothing to shew when it was coupled to the adjoining car — nothing to enable us to say when the coupler had last been operated — nothing to inform us to what weather conditions it had been exposed — nothing to exclude the view that on the last occasion when the car should have been inspected, prior to its arrival at Melville, the coupler was free from ice and in perfect order. The car had arrived in the Melville yards forming part of a fast freight train only a short time before the accident and had been inspected. It is, therefore, against the sufficiency of this inspection that the jury must be taken to have pronounced.

The evidence as to the inspection actually made at Melville is given by the men who made it — Neill and Couchman. Their evidence is that they inspected the cars forming the train according to instructions. They and a number of other fully qualified railway men in the employment of the defendants and in that of other railway companies testify that the inspection which is sworn to have been made is the only kind of inspection that is practicable in the case of a train stopping *en route*. This evidence is uncontradicted. It is not within the province of jurymen to constitute themselves experts on such a technical question of proper railway practice and, without any evidence to warrant such a course and against all the evidence before them, to find that the method of inspection prescribed is improper. *Jackson* v. *Grand Trunk Railway Co.*(1). If the verdict means that the system of inspection was improper, viewed as a finding upon an ordinary question of fact it should be set aside, not as being against the weight of evidence, but as being against the evidence; *Jones* v. *Spencer*(2). As Lord Herschell puts it, at page 538:—

> I cannot myself say * * * that the jury have found their verdict upon the evidence.

Viewed as a finding upon a matter of technical knowledge it is still less defensible. *Managers of Metropolitan Asylum District* v. *Hill*(3); *Jackson* v. *Hyde*(4); *Fields* v. *Rutherford*(5).

But it is contended that the jury may have meant that the inspectors were negligent and did not carry out their instructions. It is admitted by every witness

(1) 32 Can. S.C.R. 245.
(2) 77 L.T. 536.
(3) 47 L.T. 29.
(4) 28 U.C.Q.B. 294.
(5) 29 U.C.C.P. 113.

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who gave evidence on the subject — although they say that it is of rare occurrence — that ice such as is said to have been found in the coupler in question might be there without any trace of its presence being visible on the outside of the coupler. The men who made the inspection both say:—

> There were no visible signs to shew that there was anything wrong with that coupler.

They examined it again after the accident and by visual inspection could still see nothing wrong. The yard foreman, Taylor, corroborates them on this point. Ault, the plaintiff's fellow-workman, called by him as a witness, says the same thing. The evidence of these witnesses is uncontradicted. Neill swears that the condition afterwards found by taking the coupler apart could not have been discovered by the inspection which it was his duty to make and which he and Couchman both say they actually made.

But negligence of Neill and Couchman in the actual inspection, if found, and properly found, would not have sufficed to sustain the verdict at common law, because the defence of common employment, although taken away by legislation of the Province of Saskatchewan, in which the accident happened, is available in the Province of Manitoba in which the action has been brought. *The "Halley"*(1). The findings are insufficient to warrant a judgment under the "Workmen's Compensation Act."

The Court of Appeal for Manitoba has deemed it a proper exercise of their discretion and within their power to direct the entry of judgment for the defendant dismissing the action instead of ordering a new

(1) L.R. 2 P.C. 193.

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trial. No objection to this course is taken by the appellant. Upon this question of practice I am not disposed to interfere.

I am, for these reasons, of the opinion that the verdict for the plaintiff was properly set aside and that the judgment dismissing the action should be affirmed.

Appeal dismissed with costs.

Solicitor for the appellant: *Geo. A. Elliott.*
Solicitor for the respondents: *Alex. Hutcheon.*

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*Feb. 5.
*Feb. 10.

THE CANADIAN NORTHERN QUEBEC RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

GILBERT GIGNAC (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, PROVINCE OF QUEBEC.

Appeal—Jurisdiction—Judgment of Court of Review—Modification of trial judgment—Affirmance—"Supreme Court Act," R.S.C., 1906, *c.* 139, *s.* 40.

An action to restrain the flooding of the plaintiff's land from the defendants' railway ditch, was maintained by the Superior Court and an order made directing the railway company to construct the necessary works to cause the trouble to cease within a time mentioned, failing which the plaintiff was authorised to do the works at the company's expense. On an appeal from this judgment, the Court of Review, of its own motion, added more specific directions as to the works to be done and, instead of authorizing the plaintiff to construct the works, in case of default, reserved his recourse for future damages and dismissed the appeal.

Held, that the judgment of the Court of Review had confirmed that of the court of first instance and, therefore, an appeal therefrom would lie to the Supreme Court of Canada under the provisions of section 40 of the "Supreme Court Act," R.S.C. 1906, ch. 139. *Hull Electric Co.* v. *Clement* (41 Can. S.C.R. 419), followed.

MOTIONS to set aside the judgment of the registrar, acting as a judge in chambers, affirming the jurisdiction of the Supreme Court of Canada to entertain an appeal from the Superior Court, sitting in review, at Quebec, and also to quash the appeal for want of jurisdiction.

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

The respondent moved to set aside the judgment of the registrar and also to quash the appeal for want of jurisdiction on the grounds that, as the judgment of the Court of Review had modified the judgment of the Superior Court, an appeal lay to the Court of King's Bench, appeal side, and, consequently, that an appeal would not lie from that judgment to the Supreme Court of Canada. The circumstances of the case are stated in the judgment of the registrar, as follows:—

THE REGISTRAR:—This is a motion to affirm jurisdiction of the court.

Cannon K.C. for motion.
Belleau K.C. contra.

It would appear from the pleadings that the lands of the plaintiff, having been by the works of the defendants compelled to receive more water than they were by nature called upon to carry, the plaintiff brought an action in 1911 for redress. The parties came to an agreement on October 28th, 1911, set out in the statement of claim, which provided for the construction by the defendants of certain drainage works which would relieve the plaintiff from the injuries complained of and the action was thereupon dropped, the defendants paying the costs and damages.

Subsequently the defendants altered the drainage system with the result that the plaintiff's land was again subjected to an overflow of water and the present action was taken in which the plaintiff by the 10th paragraph of his pleadings, declared himself to

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be the proprietor of the lands in question and, by the 11th, declared that he was not subjected to any servitude with respect to the water now being brought upon his property by the defendants. He also asked that it be declared that the defendants should make the works necessary to relieve him from the injuries complained of and in default of so doing that he, the plaintiff, be authorized to make these works at the cost and charges of the defendants and that the defendants be ordered to pay damages to the amount of $250.

The defendants denied generally the allegations of the plaintiff and also alleged that the works subsequently made by them and which the plaintiff now complains of were so made at his express request and that the result of the works was to carry the water in its natural channel as it existed before the construction of the railway.

The case was tried before the Hon. Mr. Justice Letellier, who gave judgment as follows:—

Nous maintenons l'action et déclarons que la défenderesse n'a aucun droit d'exercer sur la propriété du demandeur la servitude d'écoulement des eaux qui résulte des travaux de la construction de son chemin de fer; et nous lui ordonnons de cesser l'exercice de cette servitude et de cesser de faire couler dans le fossé de ligne et la décharge du demandeur, les eaux qu'elle lui envoie venant dans le fossé de ligne et conduite par le talus et le fossé du chemin de fer; et nous lui ordonnons de faire les travaux nécessaires à cette fin, et qu'à son défaut de la faire avant le mois d'octobre, 1914, le demandeur soit autorisé à faire ces travaux aux frais de la défenderesse et à ses dépens, en par lui donnant avis du temps où il fera ces travaux; et nous condamnons de plus la défenderesse à payer au demandeur la somme de $250 de dommages avec intérêt et dépens de l'action.

The defendants thereupon inscribed in review where the judgment was confirmed in the following language:—

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Confirme le dit jugement avec dépens, sujet à la modification suivante du dispositif qui se lira comme suit:—

Nous maintenons l'action et déclarons que la défenderesse n'a aucun droit d'exercer sur la propriété du demandeur la servitude d'écoulement des eaux, lequel résulte des travaux de construction du chemin de fer:—Nous ordonnons de plus à la défenderesse de discontinuer l'exercice de telle servitude et de cesser de faire se déverser dans le fossé de ligne et les décharges du demandeur les eaux qui s'y écoulent par suite du talus et du fossé du chemin de fer; et nous ordonnons à la défenderesse de faire les travaux nécessaires pour mettre fin au dit trouble conformément à la transaction intervenue entre les parties le vingt-huit octobre 1911, et à défaut par elle de ce faire d'hui au premier mai prochain, la Cour réserve au demandeur tout recours pour dommages ultérieurs, et nous condamnons de plus la défenderesse à payer au demandeur la somme de deux cent cinquante piastres de dommages avec intérêt et les dépens de l'action.

The defendants now desire to appeal from the judgment of the Court of Review, claiming that no appeal lies to the Court of King's Bench and that an appeal lies to the Supreme Court of Canada under section 40 of the "Supreme Court Act," which reads as follows:—

In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that court confirms the judgment of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council. 54-55 V. c. 25, s. 2.

It will be perceived that, substantially, the only modifications made by the Court of Review of the judgment of the Superior Court are two:—

1. That while the earlier judgment simply orders that the necessary works be done to put an end to the cause of complaint, the subsequent judgment provides that the manner of doing these works shall be that provided for in the agreement between the parties above referred to and,—

2. That in case of default instead of authorizing the plaintiff to make the works himself, it reserves to him the right of further recourse by action in the

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event of future damages. The question between the parties in the present motion, therefore, resolves itself shortly into this: Has the judgment in the Court of Review confirmed, although modifying, the judgment below, or has it rectified an error in that judgment? It is to be noted that the Court of Review expressly uses the words "confirme le dit jugement" and that the modification in question which the plaintiff now claims to be so material to his interests, was not asked for by him by way of a cross-appeal, but was of its own motion granted to him by the court as a result of the defendants' appeal.

Two cases are cited by the defendants in favour of their motion. The first is *Beauchêne* v. *Labaie*(1), a decision of the Court of Queen's Bench of Quebec, which is very much in point. The judgment turned upon the interpretation which should be placed upon what now appears as article 43(4) of the Code of Civil Procedure of Quebec, which provides that an appeal shall lie to the Court of King's Bench sitting in appeal, except:—

> At the suit of the party who has inscribed in review a cause in which the sum demanded or the value of the thing claimed amounts to or exceeds five hundred dollars, and who has proceeded to judgment on such inscription, when the judgment confirms that rendered in the first instance.

In that case upon an appeal by the defendant from a judgment of the Superior Court the Court of Review said:—

> Considérant que le dit jugement est correct quant au droit du demandeur Labbé au pétitoire, c'est à dire, à la propriété de l'immeuble qu'il réclame, maintient cette partie du jugement, mais quant à la condemnation pour deux années de fruits et revenus, considérant que le demandeur n'a acquis l'immeuble que le 4 février, 1874, et qu'il n'a pas eu cession de fruits et revenus précédant cette

(1) 10 R.L. 115.

date, la cour ici présente revise et renverse cette partie du dit jugement avec dépens de la cause en Cour Supérieure à Arthabaska contre le défendeur.

Notwithstanding this modification of the judgment of the Superior Court, it was held by the Court of Queen's Bench that the judgment of the court below was confirmed by the judgment of the Court of Review and that no further appeal lay.

The defendant also relies on the case of *Hull Electric Railway Co.* v. *Clément* (1), where a judgment for the plaintiff in the Superior Court for $6,000 was, upon appeal by the defendant to the Court of Review, reduced to $3,500. The defendant, dissatisfied with this, appealed to the Court of King's Bench, where it was held that no appeal lay, because the judgment in review had confirmed the judgment below. The judgment of the Court of King's Bench was affirmed by the Supreme Court, this court holding that the defendant, when dissatisfied with the judgment of the Court of Review, should have appealed directly to the Supreme Court, it being a case in which no appeal lay to the Court of King's Bench because the Court of Review had confirmed the judgment of the Superior Court.

The plaintiff relies on the case of *Fraser* v. *Burnette* (2), but in that case the Court of Review expressly and in terms reversed the judgment of the Superior Court. He also relies upon *Simpson* v. *Palliser* (3), but in that case also the Court of Review in terms declared that there was error in the judgment of the Superior Court, and this is the ground upon which the Supreme Court said that no appeal lay from the

(1) 41 Can. S.C.R. 419. (2) M.L.R. 3 Q.B. 310.
(3) 29 Can. S.C.R. 6.

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judgment of the Court of Review to this court, but only to the Court of King's Bench.

It appears to me that a review of these decisions justifies it being held that where the judgment in review confirms the judgment below in favour of the plaintiff, although some additional or other relief is also given to the plaintiff, not as a result of a cross-appeal by him, but by the court of its own motion for the purpose of more effectively carrying out the judgment of the trial judge, no appeal lies to the Court of King's Bench by the defendant, and, therefore, an appeal may be taken to the Supreme Court of Canada, if the judgment would have been the subject of a further appeal to the Privy Council, had the case been a proper subject for an appeal to the Court of King's Bench. In the present case it is admitted that had the judgment in review simply confirmed the judgment below, the case would have been appealable to the King in His Privy Council. This is an action *négatoire* raising an issue with regard to a servitude which under the jurisprudence of the Supreme Court is a matter concerning "titles to land" and is, therefore, appealable to the Privy Council under article 68, sub-section 2, of the Code of Civil Procedure, and is also appealable to the Supreme Court, where substantially the same language is used in section 46, sub-section (*b*), of the "Supreme Court Act."

I am, therefore, of the opinion that the jurisdiction of the court should be affirmed.

A motion is now pending returnable on the 1st day of the February session to quash this appeal for want of jurisdiction. I would have refused to entertain the present motion until the court had dealt with the

motion to quash were it not that both parties were desirous of having the present motion disposed of because, if I were against the jurisdiction of the court, the defendant would be within the delays provided by the Code of Civil Procedure for launching an appeal from the judgment of the Court of Review to the Court of King's Bench, but the time for taking such proceedings will expire before the 2nd of February. My order as to costs, therefore, will be that the costs of this motion be costs to the defendant in any event of the cause unless the motion to quash is granted, in which event my order affirming jurisdiction will, of course, fall.

E. Belleau K.C. for the respondent, supported the motions.

L. A. Cannon K.C. for the appellants, *contra.*

DAVIES J.—I concurred with the judgment of this court in the case of *Hull Electric Co.* v. *Clément*(1) only because, as I stated, the settled jurisprudence of the Province of Quebec upon the meaning of sub-section 4 of article 43 of the Code of Civil Procedure of Quebec was that a judgment of the Court of Review confirming one of the Superior Court and affirming the right of the plaintiff to recover in the action, but reducing the amount of damages awarded to plaintiff was a confirmation of the judgment of the Court of Review within the meaning of the article of the Code referred to and was not appealable to the Court of King's Bench.

I think the registrar was right in affirming our jurisdiction to hear this appeal direct from the judg-

(1) 41 Can. S.C.R. 419.

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ment of the Court of Review which confirmed, but modified, that of the Superior Court; and that the appeal from his judgment should be dismissed with costs and the motion to quash the appeal should be refused with costs.

No absolute rule can, in my opinion, be laid down. The question in each case must be not simply whether there was a formal confirmation of the Superior Court, but whether the modification was a substantial modification of the judgment of the lower court. Here the substantial question in controversy was decided by both courts in respondent's favour; the modification related merely to the manner in which effect should be given to that judgment.

I think, therefore, that no appeal would, under the jurisprudence of that court, lie to the Court of King's Bench; but, as it is conceded one would lie to the Privy Council, the appeal will lie here.

IDINGTON J.—This appeal seems to me within the principle affirmed by the judgment of this court in *Hull Electric Co.* v. *Clément*(1), and, hence, the motion to quash must be refused and the counter motion of appellant against the ruling of the registrar dismissed, each with costs of motion.

DUFF J.—I concur in the result.

ANGLIN J.—In my opinion the jurisdiction of this court to entertain this appeal is settled by *Hull Electric Co.* v. *Clément*(1). The Court of Review *pro tanto* affirmed the judgment of the Superior Court against the defendant, and from the judgment so

(1) 41 Can. S.C.R. 419.

affirmed it has a right of appeal to this court. Unless the plaintiff should launch and maintain a cross-appeal the variation of the judgment made by the Court of Review will not be a subject for consideration in this court.

The appellant is entitled to the costs of the motions before us to quash and by way of appeal from the order of the registrar affirming jurisdiction.

BRODEUR J.—Il s'agit de savoir si nous avons juridiction pour entendre cette cause.

Le demandeur intimé, Gignac, avait, en 1911, institué une action négatoire contre l'appelante en alléguant que cette dernière laissait écouler sur son terrain des eaux qu'il n'était pas tenu de recevoir. Une transaction était intervenue le 28 octobre, 1911, et la compagnie appelante avait reconnu comme bien fondées les plaintes du demandeur, Gignac, et s'était engagée de faire certains travaux.

Les travaux convenus auraient été exécutés mais ils furent subséquemment démolis par la compagnie et alors la présente action négatoire a été instituée. Cette action a été maintenue par la Cour Supérieure dans les termes suivants:—

Nous maintenons l'action et déclarons que la défenderesse n'a aucun droit d'exercer sur la propriété du demandeur la servitude d'écoulement des eaux qui résulte des travaux de la construction de son chemin de fer; et nous lui ordonnons de cesser l'exercice de cette servitude et de cesser de faire couler dans le fossé de ligne et la décharge du demandeur, les eaux qu'elle lui envoie venant dans le fossé de ligne et conduite par le talus et le fossé du chemin de fer; et nous lui ordonnons de faire les travaux nécessaires à cette fin, et qu'à son défaut de les faire avant le mois d'octobre 1914, le demandeur soit autorisé à faire ces travaux aux frais de la défenderesse et à ses dépens, en par lui donnant avis du temps où il fera ces travaux; et nous condamnons de plus la défenderesse

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à payer au demandeur la somme de $250. de dommages avec intérêt et dépens de l'action.

La défenderesse a porté la cause devant la Cour de Revision, où le jugement fut confirmé dans les termes suivants:—

La Cour * * *

Confirme le dit jugement. avec dépens, sujet à la modification suivante du dispositif qui se lira comme suit:—

Nous maintenons l'action et déclarons que la défenderesse n'a aucun droit d'exercer sur la propriété du demandeur la servitude d'écoulement des eaux, lequel résulte des travaux de construction du chemin de fer: Nous ordonnons de plus à la défenderesse de discontinuer l'exercice de telle servitude et de cesser de faire se déverser dans le fossé de ligne et les décharges du demandeur les eaux qui s'y écoulent par suite du talus et du fossé du chemin de fer; et nous ordonnons à la défenderesse de faire les travaux nécessaires pour mettre fin au dit trouble conformément à la transaction intervenue entre les parties le vingt-huit octobre, 1911, et à défaut par elle de ce faire d'hui au premier mai prochain, la Cour réserve au demandeur tout recours pour dommages ultérieurs, et nous condamnons de plus la défenderesse à payer au demandeur la somme de deux cent cinquante piastres de dommages avec intérêt et les dépens de l'action.

L'appelante appelle à cette cour du jugement de la Cour de Revision.

En vertu de la section 40 de l'acte de la Cour Suprême, il y a appel devant cette cour de tout jugement de la Cour de Revision confirmant celui de la Cour supérieure.

Je dois dire que par contre, en vertu de l'article 43 du Code de Procédure Civile, les jugements de la Cour Supérieure confirmés par la Cour de Revision ne sont pas susceptibles d'appels à la Cour du Banc du Roi.

Nous avons donc à décider si dans la présente cause le jugement *a quo* a confirmé celui de la Cour Supérieure.

Comme on le voit, l'action négatoire a été main-

tenue en Cour Supérieure et en Cour de Revision. Suivant la demande qui en avait été faite par l'action, la défenderesse fut condamnée, en outre, à faire certains travaux.

En Cour Supérieure on avait ordonné *de faire les travaux nécessaires.*

En Cour de Revision on a spécifié que les travaux *devraient être faits suivant la convention des parties.* Mais dans son principe le jugement de la Cour Supérieure est le même; on a simplement spécifié plus clairement la nature des travaux à faire.

Il n'y a pas de doute que la partie du jugement qui maintenait l'action négatoire puisse être portée devant cette cour. En effet, la Cour de Revision sur ce point a confirmé simplement le jugement de la Cour Supérieure et la compagnie appelante n'aurait pas le droit d'aller devant la Cour du Banc du Roi pour faire renverser cette partie du jugement.

C'est du moins la pratique suivie par la Cour du Banc du Roi depuis la décision rendue en 1876 dans la cause de *Beauchêne* v. *LaBaie*(1). Et la Cour Suprême a décidé dans le même sens dans la cause de *Hull Electric Co.* v. *Clément*(2).

L'autre partie du jugement qui détermine comment les travaux devront être exécutés n'est que la conséquence de l'action négatoire elle-même. Elle ne touche pas à la substance du litige, mais elle rend plus explicite l'ordonnance de la Cour Supérieure.

Elle enlève, il est vrai, au demandeur la faculté d'exécuter lui-même les travaux. Mais il ne se plaint pas de cela. Le jugement *a quo* d'ailleurs déclare formellement que l'on confirme celui de la Cour Supérieure.

(1) 10 R.L. 115.

(2) 41 Can. S.C.R. 419.

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Dans le cas où un jugement de la Cour Supérieure est partiellement confirmé ou infirmé par la Cour de Revision, la Cour Suprême devra exercer sa discrétion pour décider si l'appel doit être porté directement devant elle, ou bien s'il doit au préalable être soumis à la Cour de Banc du Roi.

Garsonnet, Procédure Civile, vol. 5, p. 328.

Le législateur a voulu évidemment éviter les appels trop nombreux et alors il a décrété que les jugements confirmés par la Cour de Revision seraient immédiatement portés au Conseil Privé ou à la Cour Suprême. Dans les jugements partiellement confirmés, la Cour Suprême rencontrera certainement mieux les vues du législateur en permettant de suite l'appel qu'en ordonnant aux parties de passer par la Cour de Banc du Roi.

Les motions doivent être renvoyées avec dépens.

Motions refused with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon, Parent & Fitzpatrick.*

Solicitors for the respondent: *Belleau, Baillargeon & Belleau.*

EUGÈNE PREVOST, CURATOR OF THE PHOENIX LAND IMPROVEMENT COMPANY (PETITIONER AND DEFENDANT). } APPELLANT;

AND

LOUIS BEDARD (PLAINTIFF) ..... RESPONDENT.

1914
*Nov. 17.
1915
*Feb. 15.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Illicit contract — Lottery — Sale of land — Subsequent purchaser — Action pétitoire—Right of recovery—Ultra vires—Legal maxim —Notary.

D. sold lands to an incorporated company for the purpose of assisting in carrying on a lottery scheme and, subsequently, conveyed the same lands to the plaintiff, who brought an action, *au pétitoire*, claiming the lands and to have the deed to the company set aside.

Held, per Fitzpatrick C.J. and Anglin and Brodeur JJ., that the conveyance to the company was void for illegality and that the plaintiff had the right of action to be declared owner of the lands subsequently conveyed to him and to have the prior conveyance to the company set aside as having been granted for illicit consideration. *Lapointe* v. *Messier* (49 Can. S.C.R. 271) followed.

Per Duff J.—In the circumstances of the case the pretended contract was *ultra vires* and void and no right of property passed to the company. *Ashbury Railway Carriage and Iron Co.* v. *Riche* (L.R. 7 H.L. 653) followed. And, further, as the notary before whom the deed in question was executed was, at the time of its execution, an official of the company assuming to purchase the lands, the deed was without validity as an authentic conveyance of the lands to the company.

Per Idington J., dissenting.—As the plaintiff obtained his conveyance in circumstances which placed him in the same position as the vendor, who had knowingly entered into the illicit contract with the company and to whom the right of recovery was not open, there could be no relief given by the courts as prayed in the action.

Judgment appealed from (Q.R. 43 S.C. 50) affirmed, Idington J. dissenting.

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*PRESENT:—Sir Charles Fitpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Superior Court, sitting in review(1), affirming the judgment of St. Pierre J., in the Superior Court, District of Montreal (2), by which the plaintiff's action was maintained with costs.

The plaintiff, respondent, acquired certain lands in the District of Montreal, from one Drolet, in November, 1907, by notarial deed, duly registered. The Phœnix Land Improvement Company, a company incorporated under the statutes of the Province of Quebec, and empowered to deal in real estate, had, in June, 1905, acquired the same lands from Drolet, by virtue of a deed of conveyance executed before a notary who was, at the time of the execution of the deed, president of the company. To the knowledge of Drolet, the lands had been acquired by the company for the purpose of enabling it to carry on a lottery scheme and a portion of them was, in fact, made use of for that purpose. In these circumstances the plaintiff brought the action against the company which, after the institution of the action, was dissolved on proceedings by *scire facias* instituted by the Attorney-General for the Province of Quebec. The appellant was appointed curator for the purpose of the liquidation of the company and took the place of the original defendant in the action. At the trial in the Superior Court the plaintiff's action was maintained, he was declared to be the lawful owner of the property in dispute and the deed to the company was set aside as null and void. This judgment was affirmed by the judgment now appealed from.

(1) Q.R. 43 S.C. 50, *sub nom. Bédard* v. *Phœnix Land and Improvement Co.*

(2) Q.R. 42 S.C. 1.

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The questions in issue on the present appeal are stated in the judgments now reported.

Lamarche K.C. for the appellant.
St. Germain K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The appellant is the curator of the estate of a company which has been dissolved on account of its carrying on the illegal business of a lottery.

Certain lands had been conveyed to it by one Drolet, as he says (and the courts below find as a fact), for the express purpose of promoting said lottery business. This deed of conveyance was registered. Drolet wants his property back and to get the benefit of it after having thus used it.

Eighteen months after instituting proceedings in the way of prosecuting officers of the company for carrying on the lottery, Drolet conveyed the lands in question to respondent Bedard, who would seem thereby to stand in no higher position in law than Drolet himself.

The appellant contests the finding of fact by the courts below. Though there is a good deal to be said for his contention, especially as the learned judges were not unanimous in such finding and it largely turns upon the inferences to be drawn from a *contre lettre* which is capable of a double meaning, I do not find it necessary, in the view I take of the rights of the respondent in law to maintain the action, to express

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an opinion upon the correctness of this finding of fact. I assume, therefore, for argument's sake, that these findings were quite correct and that Drolet, and the company which the appellant, as curator, represents, entered upon a lottery scheme clearly contrary to law, and that he, to enable the illegal scheme (indeed, most fraudulent as he presents it) to become operative, contributed these lands and got nothing in return therefor but some evidence of promises to be fulfilled in the devious ways that he and some of the company's officers had designed and contrived might have worked out to their mutual benefit as, to put it plainly, a set of rascals.

It does not occur to me that in law our courts of justice are either bound or permitted to help such a man, when seeing his venture is likely to prove unprofitable for him, to retire therefrom unscathed with all his property.

It is a pretty strong proposition in itself, but when it is made to operate (as presumably it does here, or may, if we dismiss this appeal, in the like case any day) to the detriment of creditors, who must be presumed innocent, I cannot assent thereto.

The articles 989 and 990 of the Civil Code are relied upon by respondent to shew that the contract was without effect. But how far does that carry him ?

The contract was completely executed and there was a consideration. That consideration may be said to be tainted with illegality. The question in such case is whether or not the respondent can rely upon articles 1047 and 1048 of the Civil Code, or otherwise be enabled to recover back what he has given, with his eyes open, not ignorantly, or induced thereto by false

pretences, by another party, but as the result of his own planning.

Counsel referred to the case of the *Consumers' Cordage Company* v. *Connelly*(1), and the authorities collected therein so laboriously by the late Mr. Justice Girouard.

Unfortunately for the respondent the result of that rather unsatisfactory case was that the judgment was ultimately set aside in the Privy Council and a new trial ordered (see note on front page iv. of 33 Can. S.C.R.), and in itself, therefore, as well as for other reasons, cannot be held a binding authority for the proposition he has to maintain herein.

The facts of that case, so far as seen from different points of view by the judges taking part in it, seemed to entitle the plaintiff to a recovery quite independently of the view maintained by Mr. Justice Girouard. In short, the point here involved was not necessary to be decided by the court for the determination of that case, or any part of it.

The decision in the case of *L'Association St. Jean-Baptiste de Montréal* v. *Brault*(2), seems much more in point. It was a case arising out of a lottery held, in violation of the Criminal Code, as this was according to the finding of fact, which I assume for the present to be correct, and to recover a sum of over $2,000 interest earned by a deposit which it was arranged should be made in a bank and, barring the law rendering the transaction illegal, that earning of interest certainly, as Mr. Justice Girouard put it, at page 617, might be said in common honesty to belong to the plaintiff.

(1) 31 Can. S.C.R. 244. (2) 30 Can. S.C.R. 598.

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The appeal, however, was allowed in that case and the action dismissed.

It is to be observed this was decided a few months before the *Consumers' Cordage Case*(1), and that Mr. Justice Sedgewick assented to the judgment which, certainly of necessity, decides the neat point of the right to recover back entirely the other way from what in the *Consumers' Cordage Case*(1), Mr. Justice Girouard argued for. I take it that Mr. Justice Sedgewick in the later case was not changing his mind, but merely concurred in the result. That result might have been reached quite independently of the reasons which Mr. Justice Girouard proceeded upon by the application of the law relative to allowing or disallowing interest which was all that was involved.

So far, therefore, as this court is concerned that would seem decisive of this case unless it can be distinguished in the way some authorities seem to make by a distinction between the principal and interest or fruits of that sought to be recovered back.

In that case amongst many other cases relied upon by counsel for appellant, was the case of *McKibbin* v. *McCone*(2), wherein Mr. Justice Routhier not only denied the right to recover back the moneys paid under an illegal contract, but supported his views by an elaborate collection of authorities and a vigorous judgment wherein he maintained the law which has been so well expressed by the Roman maxim *"ex turpi causâ non oritur actio"* and has stood, as good law, so long and in so many countries.

I do not intend going into a review of the authori-

(1) 31 Can. S.C.R. 244. (2) Q.R. 16 S.C. 126.

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ties. I merely desire to point out that the provisions of articles 1047 and 1048 of the Civil Code do not seem to me to extend to an action of this kind under such circumstances as exist here.

I think the line may be drawn where the opinion judgment of Bossé J. speaking for the majority in the case of *Rolland* v. *La Caisse D'Economie Notre-Dame de Québec*(1) puts it. That case, like *Langlais* v. *La Caisse D'Economie Notre-Dame de Québec*(2), decided by Andrews J., in truth revolves round consequences of corporate acts done *ultra vires*. In this latter the learned judge seems to recognize the same line as Bossé J.

I would put contracts for promoting lotteries and other criminal acts (distinguishable from those merely invalid) amongst those which are contrary to good morals.

There are no doubt many cases of another character such as acts *ultra vires* and possibly mere municipal regulations, or enactments imposing a penalty in cases involving hardly (if any) moral turpitude, which might give rise to other considerations though in a sense illegal. Counsel on each side put in since argument, a supplementary factum, and I have given attention to the cases therein referred to.

I am surprised to see myself quoted in the case of *Lapointe* v. *Messier*(3), as countenancing the doctrine respondent contends for. Certainly nothing was further from my thoughts. I thought I was, as I generally try to be, careful to avoid any unnecessary expression of opinion, and certainly expressed none on the point raised herein. I was well aware then, as now, of the divergent views that were held on the sub-

(1) Q.R. 3 Q.B. 315. (2) Q.R. 4 S.C. 65.
(3) 49 Can. S.C.R. 271.

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ject. The facts in that case, as I viewed them, and the conduct of appellant aided me to view them, did not permit the question being raised, and I expressly said:—

> There is no room left for arguing that this is a suit to recover back that already paid. If there were I should have to consider the effect of 58 Vict. ch. 42, sec. 11, cited in the appellant's factum.

That section 11 is as follows and differs from the provisions of the Civil Code.

> Every person who has paid any money, commission, fee or reward, to any member of a municipal council for services performed or to be performed by such member of the municipal council, in his official capacity, whether it be service rendered by himself, directly or indirectly, or through a third party, or for the prosecution of any business before the council or before any committee thereof, may recover the same, at any time, by suit at law, in any court of competent jurisdiction.

It seems to have escaped the attention of the courts in some other cases as well as the counsel in this case.

And, with great respect, I still think that it was not necessary to the decision of the *Lapointe Case* (1) to decide the question raised herein.

Notwithstanding the conflict of authorities and of opinion, I think public morality is best served by an adherence to the principle expressed in the Roman maxim already cited.

And as to the cases in which, under articles 1047 and 1048 of the Civil Code, the recovery back may be allowed, this court is on record in the case of *Petry* v. *La Caisse D'Economie de Notre Dame de Québec*(2), against it where, in the view of the court, there was no error but clear intention. In principle that case seems to me though involving many different considerations from what we are presented with herein, adverse to respondent.

(1) 49 Can. S.C.R. 271. (2) 19 Can. S.C.R. 713.

The efficacy of illegality as an answer to the action has been recognized in Quebec in many cases, for example, in *Ferguson* v. *Scott*(1), where purchase money stipulated in a transaction arising out of a lottery was held to be non-recoverable. Are we to say the converse is correct and that a man who got his price can recover back his land and keep the price?

In *LeBlanc* v. *Beaudoin et Bédard*(2), where a convicted felon could not recover an immovable given in way of compromise of the felony, and *Massue* v. *Dansereau*(3), where held money paid for excessive interest when usury laws in force could not be recovered back, with others, shew the jurisprudence of Quebec is not, to say the least, unanimously established in respondent's favour.

I, therefore, think this appeal should be allowed with costs.

DUFF J.—I express no opinion upon the question which was discussed whether according to the law of Quebec (art. 989 C.C.), in the circumstances of this case, the respondent was entitled in strict law to the judgment prayed, without regard to possible equities affecting creditors and others interested in the company.

I think the appeal should be dismissed upon the ground that the pretended contract of purchase was in the circumstances *ultra vires* of the company; and that under this pretended contract (the notarial *acte de vente* has, in my opinion, no validity as an authentic deed by reason of the fact that the notary being an

(1) 2 Rev. de Leg. 305. (2) 2 R.L. 625.
(3) 10 C.L. Jur. 179.

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officer of the company purchaser and lacking, therefore, the essential quality of indifference between the parties was incompetent) no right of property passed to the company.

The doctrine of *ultra vires* I have no doubt applies to the contract of the Phœnix Land Improvement Company. That doctrine is not a principle of the English common law and does not rest upon any theory as to the nature of corporations or as to the legal relationship subsisting between a corporation and its governing body. (See the judgments of Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1), of Lord Haldane in *Sinclair* v. *Brougham* (2), and *Bonanza Creek Gold Mining Co.* v. *The King* (3).) It is a rule resting upon the interpretation of the legislative enactments through which the companies to which it applies derive their corporate existence and capacity. The Phœnix Land Improvement Company, while created through the instrumentality of letters patent, exists as a corporation and enjoys such capacity as it possesses in virtue of the Quebec statute in pursuance of which the letters patent were granted, and I think the reasoning of Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1) applies to that statute.

ANGLIN J.—I would dismiss this appeal on the ground that the deed from Drolet to the land company was void for illegality and that property transferred for an illicit consideration may be recovered back. Article 989 C.C. *Lapointe* v. *Messier*(4).

(1) L.R. 7 H.L. 653.
(2) [1914] A.C. 398.
(3) 50 Can. S.C.R. 534.
(4) 49 Can. S.C.R. 271.

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BRODEUR J.—Le contrat qui a été fait entre la compagnie Phœnix Land Improvement et Drolet le 28 juin, 1905, a été évidemment fait dans le but d'exploiter une loterie. La preuve sur ce point est, il est vrai, un peu contradictoire, mais les termes de la contre-lettre qui a été donnée à Drolet doivent faire disparaître tout doute à ce sujet.

D'ailleurs il s'agirait là d'une question de fait et, les cours inférieures s'étant prononcées sur ce point contre les prétentions de l'appelant, il n'y a pas lieu pour nous de renverser cette opinion.

L'exploitation d'une loterie ne pouvait facilement se faire par cette compagnie sans avoir certains lots de terrain et alors Drolet, qui était actionnaire de la compagnie et bien au courant de ses affaires, a consenti par cet acte du 28 juin, 1905, à lui passer un titre pour ces lots de terre. C'était de sa part et de la part de la compagnie une participation à une violation de la loi et à une fraude que l'on voulait pratiquer sur un public crédule.

Toute considération d'un contrat est illégale si elle est prohibée par la loi ou contraire à l'ordre public (art. 990 C.C.), et ce contrat est sans effet. (Art. 989 C.C.; *Association St. Jean-Baptiste* v. *Brault*(1).)

Sirey (1869-2-53), nous rapporte une décision où il a été jugé que

les loteries étant prohibées par la loi française, toutes conventions ou obligations relatives à leur organisation sont nulles comme ayant une cause illicite et ne peuvent donner lieu à une action devant les tribunaux.

Il y a eu en France beaucoup de divergence d'opinion sur la question de savoir si la personne qui avait fait un acte illégal comme celui-ci pourrait répéter

(1) 30 Can. S.C.R. 598.

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l'argent qu'elle aurait donné en exécution de ce contrat illégal. Cette divergence d'opinion s'est manifestée surtout parmi les premiers commentateurs du Code Napoléon; mais par la suite on s'est quelque peu départi de cette rigidité et les auteurs les plus modernes sont généralement d'opinion que l'action en répétition existe.

Voir Marcadé, vol. 4, no. 458; Huc (ed. 1895), vol. 8, no. 392; Demolombe, vol. 24, no. 382; Laurent, vol. 16, no. 164; Colmet de Santerre (ed. 1883), vol. 5, no. 49 *bis* IV.; Pont, Explications du Code Civil (ed. 1884), vol. 7, no. 53, au titre des Sociétés; Guillouard, Sociétés (ed. 1892), no. 58.

Nous avons dans cette cour appliqué le même principe dans la cause de *Lapointe* v. *Messier*(1).

On peut donc dire que l'action en répétition existe en faveur de celui qui veut se servir de sa propre turpitude pour faire mettre de côté le contrat illégal qu'il a fait.

Dans le cas actuel le contrat était de plus fictif ou simulé.

Il n'y a jamais eu intention de la part des parties contractantes que Drolet cessât d'être propriétaire des lots de terre en question. Les opérations subséquentes qui ont été faites avec les gagnants de lots l'ont été de façon à laisser subsister cette simulation.

Je n'ai donc pas de doute que ce contrat est sans effet et doit être aussi déclaré simulé.

Il peut se faire que des créanciers de bonne foi aient transigé avec la compagnie en se basant sur le fait qu'elle était propriétaire des terrains en litige

(1) 49 Can. S.C.R. 271.

dans cette cause. Les droits de ces créanciers ne sauraient être affectés par le maintien de l'action pétitoire du demandeur intimé.

Le jugement *a quo* doit être confirmé avec dépens.

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Appeal dismissed with costs.

Solicitors for the appellant: *Beaubien & Lamarche.*

Solicitors for the respondent: *St. Germain, Guerin & Raymond.*

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*Feb. 15.

ALEXANDER WHYTE (PLAINTIFF)...APPELLANT;

AND

THE NATIONAL PAPER COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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

Principal and agent—Commission on sales—"Accepted orders"—Contract for sale—Construction.

A paper manufacturing company in Quebec agreed to give W. a commission of five per cent. on all "accepted orders" obtained by him in Ontario to be payable as soon as an order was shipped. Through W.'s agency a contract was entered into whereby a company in Toronto agreed to purchase from the Quebec company during one year paper of a specified kind to the extent of not less than $35,000 to be furnished from time to time on receipt of specifications and directions as to destination. When paper to the value of over $5,000 had been shipped under this contract the Toronto company refused to furnish further specifications on the ground that said paper was not satisfactory and the contract was not further performed.

Held, per Fitzpatrick C.J. and Idington J. (Duff J. contra), that the contract with the Toronto company constituted an "accepted order" within the terms of the agreement with W. who, as it was through the fault of his principals that the contract was not performed, was entitled to the balance of his commission on the contract price of $35,000.

Per Davies and Anglin JJ.—If under the contract the only "accepted orders" were those filled from time to time on receipt of specifications and directions from the purchasers the discontinuance of their sending in the same was due to the failure of the vendors to furnish satisfactory paper and W. was entitled to damages for being prevented by such failure from earning his commission. As the evidence shewed that he had done all that could be incumbent upon him to have the contract performed the measure of his damages would be his commission on the contract price.

Per Duff J. dissenting.—The only "accepted orders" under the con-

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

tract were those to be filled from time to time on receipt of specifications. As his case under the pleadings was confined to recovery of the commission on the basis of the contract with the Ontario company being an "accepted order" and as no claim was put forward (or investigated) at the trial on the basis of the appellant having wrongfully been prevented earning his commission by procuring "accepted orders" or advanced by the appellant at any stage of the proceedings, the judgment could not be sustained on that basis unless it was clear that all the evidence bearing upon such a claim was to be found in the record.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the plaintiff.

The material facts are stated in the above headnote.

Hamilton Cassels K.C. for the appellant.
Masten K.C. for the respondents.

THE CHIEF JUSTICE.—The appellant's case is that he was entitled under the agreement with the respondent company to a commission "on all accepted orders," which is in the circumstances the equivalent of "all sales, whether followed by delivery or not," and that the contract with the Buntin, Reid Co. is a sale within the meaning of that commission agreement.

The whole case, therefore, depends upon the nature of the latter contract. I have no doubt that for the reasons given by Mr. Justice Middleton, the Buntin, Reid order once accepted constituted an agreement binding upon both parties to it. It contains the essential elements of a contract of sale, the thing sold is properly described and the respondents were thereafter entitled to the benefit of that contract if they

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wished to enforce it. That agreement should, in my opinion, be treated as an accepted order.

The trial judge found, and that finding is not disturbed, that the Buntin, Reid Co. was able to pay for the goods and that the default in carrying out the agreement was wholly attributable to the respondent company. The appellant is, therefore, entitled to his commission.

It is urged that with the concurrence of the appellant a rebate of 10c. a hundred pounds on paper to be supplied under the contract was to be allowed the Buntin, Reid Co. There is no doubt that such an arrangement was made, and the only question is:—Who was to pay the rebate ?

I would be disposed to hold that the evidence is not sufficient to justify the deduction of that rebate out of the appellant's commission, but out of deference to the opinions of my brother judges, I agree that the deduction should be made.

I would allow the appeal for the balance with costs.

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

IDINGTON J.—The respondent by a letter dated 15th January, 1912, agreed to pay appellant a commission of five per cent. on all accepted orders.

He acting thereunder procured a binding contract duly executed between the Buntin Reid Company and respondent whereby the former bound themselves to purchase from the latter during a period of one year, not less than thirty-five thousand dollars worth of paper at a price named, and of a kind specified, to be

fully up to the standard of samples submitted, and to be shipped as directed, from time to time to points named in Ontario.

It is contended that contract was not, though duly executed and binding upon the purchaser, an order within the meaning of the said obligation.

The learned trial judge held it was such an order and entered judgment accordingly but the Appellate Division, holding it was not such an order, reversed the judgment.

The first, and as Mr. Justice Middleton appropriately calls it the dominating and controlling, clause of the letter of the contract is followed by a paragraph therein which is relied upon by the Appellate Division. It provides that

> this commission shall be payable immediately the order is shipped and failing the customer paying the account, we shall deduct from the first settlement with you the commission paid on said order.

If this term "shipped" is to be construed as the Appellate Division seems to hold, it would have been quite competent for the respondent to have dishonoured every order got, no matter how much labour or expense appellant may have been put to in obtaining same. I cannot think that ever could have been contemplated by the parties; so the term "shipped" must be given a more reasonable meaning and not as applicable to what might but for the default of the respondent have been shipped.

Then the provision that the commission might have been deducted in the event of the customer failing to pay, certainly cannot apply to the case of non-shipment. It seems clearly pointed to the sensible meaning of the case of the customer through want of means or failure to meet his obligations making de-

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fault in payment. It certainly, even in such a case does not extend to a time when the customer had ultimately paid. It is not necessary to solve all the riddles within the expression, but as I read that, it was designed, merely to secure orders being got from first-class customers, of good financial standing, and thus to enlist the assistance of appellant in securing the easy collection of accounts.

It does not seem to me that either of these terms of that clause were designed to cover the case which has arisen.

The Buntin, Reid Company's firm admittedly stands high in the commercial world and no question can arise as to their financial responsibility.

It seems they refrained from giving specifications for further deliveries because of respondent having failed to live up to its contract. If so the appellant is not to be deprived of his commission on their accepted order, any more than the real estate agent, whose commission has been earned by a mere introduction or actual sale, no matter how little may come of the transaction later through any one of a multiplicity of causes likely to arise in such dealings.

If this order failed through no fault of respondent to produce the specifications enabling delivery within its terms, then a right of action accrued to the respondent against the Buntin, Reid Company for damages which would include (not in terms but incidentally by reason of the legal measure of damages in such a case) this very commission.

It would be somewhat anomalous if after defeating appellant here, respondent sued and got such damages. How could Buntin, Reid & Company an-

swer their default and ask any consideration for what had happened in this action?

If respondent failed by reason of its own default then it surely cannot be excused herein.

It seems to me that it never was intended the provision in this second clause meant any more than that on the one hand the time of shipment was a convenient term for payments, and to be read as if shipped or ought to be shipped, and on the other hand a spur to stimulate appellant and not a means of depriving him ultimately of all compensation.

The third clause seems to put that beyond doubt. It is as follows:—

> You shall have the exclusive agency for the Province of Ontario with the above exception and at any time this agreement should cease we shall pay you on all accepted orders up to the termination of this agreement.

His engagement ceased before this action and this term of the contract thus came into operation.

I think the appeal should be allowed with costs here and below and the trial judgment be restored.

Since writing the foregoing I find some of my brother judges proceeding upon a ground neither taken in the pleadings nor in the notice of appeal to the Appellate Division nor in the factums here, to cut down the amount claimed. Indeed, the factum of respondent signed by able and experienced counsel puts the matter in dispute in appeal neatly thus:—

> So that the issue is narrowed to the question whether or not the respondents are bound under the terms of the documents hereinafter set forth to pay to the appellant a commission on paper which has never been supplied because orders specifying the necessary particulars of same were never received. In other words, the question in dispute is narrowed to whether or not the respondents should pay the said sum of $1,491.36.

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I most respectfully dissent from such a departure from the grounds upon which the case has heretofore proceeded.

DUFF J. (dissenting).—I concur in the construction put upon the phrase "accepted order," in the letter of the 15th January, 1912, by the first appellate division.

That seems to be sufficient to dispose of the appellant's claim as presented in the statement of claim. It was suggested, however, during the course of the argument, from the bench, and after some hesitation the appellant's counsel, who had not taken the ground in his factum, accepted the suggestion, that there was evidence sufficient to support a claim on the ground that the respondents had by their conduct wrongfully prevented the appellant earning his commission by procuring "accepted orders" on the principle expressed by Mr. Justice Willes in *Inchbald* v. *Western Neilgherry Coffee, T. and C. Plantation Co.*(1), in a passage adopted by the Judicial Committee in *Burchell* v. *Gowrie and Blockhouse Collieries*(2), at page 626, as follows:—

> I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it.

It is true that there is some evidence and perhaps on the case as it stands sufficient evidence can be collected to justify (standing by itself) the inference that it was the failure of the respondents to live up to the terms of their contract with the Buntin Reid Co. of the 4th June, 1912, which the appellant had

(1) 17 C.B., N.S., 733. (2) [1910] A.C. 614.

procured that led to a discontinuance of the sending of orders by the Buntin Reid Co. under the terms of that contract, and thereby prevented the earning of commissions which would have been earned if orders had been sent and filled as contemplated by the contract.

That, however, was not the case made by the plaintiff on the pleadings and I do not think it can fairly be said that any such case was investigated at the trial. In order to understand exactly what did happen at the trial it is perhaps necessary to glance at the pleadings. In paragraph 6 of the statement of claim it is alleged that the plaintiff obtained many orders for the defendants which were accepted by the defendants. In paragraph 7 particulars of the orders obtained by the plaintiff and accepted by the defendants in respect of which the defendants have not paid to the plaintiff the stipulated remuneration, are given; and amongst the orders specified there is this:—June 4th, 1912, order of Buntin Reid Co., $35,000. The statement of defence in paragraph 3 meets this claim as follows:—

> Save and except the orders as hereinafter mentioned none of the orders referred to in the statement of claim were accepted, shipped and paid for to or by customers in the plaintiff's district in the province of Ontario

the exceptions comprising a number of orders amounting to $1,444.63. Then in paragraph 5, the defendant company says that the commission on the whole of the Buntin Reid contract never became payable on the following grounds: (*a*) The paper was not sufficiently specified in the contract to make it possible to ship the goods without further instructions;

(*b*) The particulars necessary were not stated in the contract;

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(c) Orders were never given *nor were goods ever* shipped or paid for except those on which the plaintiff has received commission.

Besides joining issue, the plaintiff meets this defence by alleging that the non-delivery of the goods to the Buntin Reid Co. to the value of $35,000 was occasioned entirely by the defendants' default, "the Buntin Reid Co. being at all times ready to take delivery if the defendant company on its part had been ready and able to deliver the same."

The plaintiff's case on the pleadings therefore was that the agreement with the Buntin Reid Company was an "accepted order" within the meaning of the letter of the 15th of Jan., 1912, and that the condition that the commission should be payable "immediately the order is shipped" in the second paragraph of the letter had become inoperative because the non-shipment of goods was due to the default of the defendant company.

That was the plaintiff's case on the pleadings. At the trial that case was supported by evidence put forward to shew that the Buntin Reid Company had discontinued sending orders because of the difficulty of getting their orders filled; in short because of the failure of the defendants to fulfil their contract. It is important to emphasize the point for the purposes of the question now under discussion that the foundation of the plaintiff's claim here is the proposition that the contract with Buntin Reid was an "accepted order" within the first paragraph of the letter referred to.

The alleged default of the respondents in the performance of their contract is not put forward as the

substantive ground of the plaintiff's alleged right of recovery as shewing, in other words, that the respondents had by their conduct wrongfully prevented the appellant obtaining "accepted orders," but for the purpose, as I have already mentioned, of shewing that the condition comprised in paragraph 2 had become inoperative. The learned trial judge held that the plaintiff had established his right to recover on this basis his judgment shewing very clearly that he was not passing upon any claim of the character now suggested.

The contract in the first place provides for payment of commission on all accepted orders, and this, I think, is the dominating and controlling clause, to which all other provisions are subsidiary. This general provision is followed by a clause providing that the commission is to be payable "immediately the order is shipped, and failing the customer paying the account we shall deduct from the first settlement with you the commission paid on said order."

It is contended by defendant that this limits the generality of the primary obligation and shews that the commission is not to be paid unless the order is actually shipped.

I do not think that this is the true construction of the clause. The parties were contracting upon the assumption that each would perform its obligations. The commission was to be paid upon all orders accepted. Some of these orders would be for immediate delivery, some for future delivery. The commission was not to be paid until the goods were shipped, that is, until the time provided for shipment. The defendants cannot free themselves from liability to pay commission, by breach of contract.

The Buntin, Reid Company are undoubtedly of good financial standing, and, if they are in default, can readily be made answerable for damages. I think the defendant is in this dilemma: If the failure to complete the Buntin, Reid contract arose from its own fault, then it must pay the plaintiff's commission. If the failure arises from the fault of the Buntin Reid Company, the defendant has an adequate right of action against them for damages, and this does not relieve them from payment of commission.

If driven to determine the issue as to whose fault it was that the contract was not completed, I should find that the defendant and not the Buntin Reid Company were to blame. In every aspect of the case the plaintiff, I think, is entitled to succeed.

The basis of all this is, of course, the proposition

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upon which the learned judge's judgment is founded, namely, that the Buntin Reid contract constituted an "accepted order" within the letter to the plaintiff.

The result is that the ground of relief now suggested that the respondents' conduct by preventing the appellant from obtaining orders precludes them from denying that "accepted orders" were obtained for the amount of $35,000, was never investigated at the trial. While a good deal of the evidence that was given would have been quite relevant to that issue the respondents were not called upon to meet it and judgment cannot be given against them upon an issue which they were never called upon to meet, by reason of evidence put forward *alio intuitu* unless indeed we could be satisfied that we have all the evidence that could be produced before us now. The respondents were entitled to go into court meeting the claim of the appellant which was based upon the proposition that the Buntin Reid contract was an "accepted order" within the meaning of the letter, by simply denying that proposition. Succeeding in this the appellant's case as put forward is destroyed at its foundation. In these circumstances as has been pointed out again and again in the judgments of this court as well as of other courts of appeal, we should be running the gravest risk of doing injustice by allowing a case now to be made on another foundation at this stage. Rudimentary fair play forbids it.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed and the judgment of the learned trial judge restored, subject, however, to a reduction in the amount of the plaintiff's recovery as stated below.

On one possible construction of the agreement between the plaintiff and defendants his commission was earned when the defendants saw fit to accept the offer, or order, which he had procured for them from The Buntin Reid Company. In that view his right to payment would arise when the order was shipped, or, in the event of the order not being filled, when the time for filling it according to its terms had elapsed. The defendants might have declined to accept the order in the form in which it was procured. They might have insisted upon its being in such form that further specification by the purchasers would not be necessary. They saw fit to accept it, and it may be that it was an "accepted order" within the meaning of that term in their agreement with the plaintiff. But I am not altogether satisfied that the construction put upon the correspondence by the Appellate Division was not correct, namely, that "accepted orders" meant orders upon which, without further specification of the goods to be supplied, the defendants should be entitled to make delivery and thereupon to sue for the price. I proceed to deal with the case on this footing.

The order, if it may be so termed, obtained by the plaintiff from the Buntin Reid Company was subsequently filled in part. That it was not wholly filled was, on the evidence, due to the failure of the defendants to furnish, upon the specifications which were sent them by the Buntin Reid Company, goods of a satisfactory quality and in compliance with their obligations. It may be that the defendants' failure to supply satisfactory goods upon these early specifications did not relieve the Buntin Reid Company from

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their obligation to send in further specifications to the extent stipulated in their contract. But if the failure of the defendants to obtain such further specifications and directions for shipment was ascribable to their own default in supplying goods of a merchantable quality and in compliance with the contract, whatever may have been the effect upon the legal rights of the defendants and the Buntin Reid Company *inter se,* the plaintiff was thereby prevented from becoming entitled to payment of his commission, if, in order that he should become so entitled it was necessary that the Buntin Reid Company should send in specifications and directions for shipment. Under these circumstances the plaintiff would be entitled to recover damages from his principals. If he had done all that was incumbent upon him in order to earn his commission on the Buntin Reid order, and if the sole reason why the contract made through him was not fully carried out was the default of the defendants, his damages would be the amount of the commission itself. If there was still something to be done by him in the discharge of his duty to the defendants—for instance, if it was part of his obligation to procure the actual specifications and shipping directions from the Buntin Reid Company and he had not taken the steps necessary for that purpose, although he had omitted to do so solely because he knew it would be labour wasted in view of the refusal of that company to take further shipments—his damages would be somewhat less than the full amount of his commission. I am not satisfied that it was part of the plaintiff's obligation to procure such specifications and shipping directions. Had it not been for the de-

faults of the defendants in regard to the early shipments, further specifications and shipping directions would, in all probability, have come to them from The Buntin Reid Company without any further solicitation or intervention on the part of the plaintiff. But upon the evidence it appears that the plaintiff in fact did his utmost to obtain such further specifications and directions and that his efforts proved unavailing solely because The Buntin Reid Company declined to take chances of incurring liability for damages to their own customers through supplying to them such defective and unmerchantable goods as the defendants had furnished upon the first specifications sent to them. These defaults of the defendants were beyond any reasonable doubt the real cause why The Buntin Reid Company did not take from them goods in quantity greater than the minimum of $35,000 worth stipulated for in their order or contract. But for those defaults the defendants would, in all human probability, have had from The Buntin Reid Company demands for paper in excess of the minimum quantity specified in their contract. In point of fact The Buntin Reid Company purchased, during the currency of their contract with the defendants, from other paper mills, at a price materially higher than that which they had agreed to give to the defendants, $46,940.23 worth of paper of the class and quality covered by their contract with the defendants. If, therefore, the plaintiff did not fully earn his commission by procuring an order which the defendants accepted, and if in order to fully earn it he was further obliged to obtain specifications and shipping directions from the Buntin Reid Company, he was prevented by the default of the de-

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fendants themselves from obtaining such specifications and directions although he made the necessary efforts to do so, and in that view of the case he is entitled by way of damages to a sum equivalent to the commission which he was thus prevented from earning.

The respondent objects that in his statement of claim the plaintiff confines his demand to the recovery of commission *eo nomine* and does not prefer an alternative claim for damages on the footing that the defendants had prevented his earning his commission, and that he should not now be allowed to recover on such an alternative claim. In his reply, however, the defendant alleges the facts necessary to support such an alternative claim, and at the trial these facts, which could be relevant only if a claim for damages on the basis indicated was to be considered, were fully gone into in evidence. Under these circumstances there is no difficulty in dealing with the case as if a prayer for the alternative relief had been formally included in the statement of claim. Nor can the defendants very well object to this being done, since it was pressed at bar on their behalf that a matter of defence presently to be dealt with, which they did not plead and to which I find no allusion in the judgment of the trial judge, in their reasons of appeal to the Appellate Division, or in their factum in this court, should now be taken into consideration.

The defendants allege that when the bargain with The Buntin Reid Company was made it was arranged, with the concurrence of the plaintiff, that the purchasers should be allowed a rebate of ten cents a hundred pounds on paper to be supplied under the contract, and that this rebate should be paid by the plain-

tiff out of his commission. That an arrangement for such a rebate was made is common ground. The plaintiff, however, denies that he was to pay it. Although this arrangement is not pleaded in the statement of defence, nor alluded to in the Appellate Division, nor in the respondents' factum, it was investigated at the trial. The evidence upon it of the plaintiff and that of the defendants' manager is in direct conflict. The question, however, is concluded against the plaintiff, in my opinion, by two letters written by him to the defendants on April 19th 1913, and April 30th, 1913, in the first of which he says:—

> I refuse to further continue allowing them (The Buntin, Reid Company) a rebate on my portion of that commission,

and in the second, alluding to this former letter, he speaks of

> the continuance of allowing them a rebate of a portion of the commission paid me.

These letters are not satisfactorily explained. While the agreement for the rebate was discreditable to the defendants, it was not of such an illegal or illicit character that they are precluded from claiming the benefit of it as against the plaintiff. Calculated on the basis of the price mentioned in the contract, the plaintiff's full commission of 5 per cent. would amount to 32½ cents on every hundred pounds of paper to be supplied. Deducting from this ten cents per hundred pounds would leave his net commission 22½ cents per hundred pounds. His recovery for commission at the trial, where this partial defence was not given effect to, was $1,596.43 of which $1,491.36 represented commission on the Buntin Reid order. This would be at the rate of 32½ cents per hundred

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pounds. The ten cents a hundred pounds rebate would amount to $458.88. Deducting this sum from the total recovery $1,596.43 there is a balance of $1,137.55 and that is the sum for which the plaintiff is, in my opinion, entitled to judgment.

I think the plaintiff should have his costs of the appeals to this court and the Appellate Division, as well as his costs of the action.

Appeal allowed with costs.

Solicitors for the appellant: *Cassels, Brock, Kelley & Falconbridge.*

Solicitors for the respondents: *Masten, Starr & Spence.*

WILLIAM PRICE (DEFENDANT).....APPELLANT; 1914
AND *Nov. 11, 12.
THE CHICOUTIMI PULP COMPANY (PLAINTIFFS).....RESPONDENTS. 1915 *March 15.

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

Libel—Business reputation—Action by incorporated company—Truth of facts alleged—Fair comment—Justification—Public interest—Qualified privilege—Charge to jury—Misdirection—Misleading statements—Practice—Evidence of special damage—New trial.

There being a dispute between the parties as to the ownership of certain lands, the plaintiffs, a commercial corporation, obtained special legislation vesting the lands in question in the company. On becoming aware of this legislation, the defendant published letters in several newspapers accusing the company of obtaining it by political influence and preventing him vindicating his title in the courts. In an action to recover damages for libel, the trial judge told the jury that the defendant's defence of justification would be established if they were satisfied that, although in fact untrue, the defamatory statements had been made in honest belief of their truth, and that, if the publications were an honest comment on the facts as stated, that, in itself, would be sufficient to establish the defence of fair comment. On the findings of the jury, judgment was entered for the defendant, but this judgment was set aside, on the ground of misdirection, by the judgment appealed from and a new trial ordered.

Held, per curiam, that where a libel conveys imputations calculated to injure a trading corporation in respect of its business the corporation can maintain an action for damages.

Per Duff J.—The publication complained of was capable of being read as charging the company with having used political influence for the purpose of procuring legislation giving it possession of property in derogation of what, to its knowledge, were the defendant's rights, and this was an imputation calculated to injure the commercial corporation in its business.

Held, per Idington, Duff, Anglin and Brodeur JJ., Davies J. dissenting.—That the directions by the trial judge as to the defences of justification and fair comment were erroneous and misleading.

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

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Per Davies J. dissenting.—Taken as a whole, the charge of the trial judge was clear and explicit and placed the material issues fairly before the jury, and, consequently, the judgment entered at the trial on the findings of the jury ought not to be disturbed.

Per Anglin J. dissenting.—That, as a judge could not properly rule or a jury reasonably find that the defendant's letters were calculated to injure the property of the plaintiff's or their business reputation, as a commercial corporation, they could not recover without proof of special damage.

Judgment appealed from (Q.R. 22 K.B. 393) affirmed, Davies and Anglin JJ. dissenting.

APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side(1), setting aside the judgment entered in the Superior Court, District of Quebec, on the findings of the jury, by which the plaintiffs' action was dismissed with costs, and ordering a new trial without costs.

The trial took place before His Lordship Mr. Justice Dorion and a jury and, in answer to questions submitted to them, the jury found that the allegations in the letters published by the defendant, as mentioned in the head-note, were substantially true, that the matter therein referred to was one of public interest, that the defendant had made the publications in the interest of the public and in good faith, and that no damage had been thereby caused to the plaintiffs. On these findings the learned trial judge entered judgment for the defendant. On an appeal to the Court of King's Bench, the judgment entered by the trial judge was set aside on the ground of misdirections in the charge to the jury and a new trial was ordered, Trenholm J. dissenting. From this judgment the defendant appealed to the Supreme Court of Canada, asking to have the judgment in the Superior Court restored, and the de-

(1) Q.R. 22 K.B. 393.

fendants cross-appealed on the ground that the Court of King's Bench erred in refusing to allow them their costs on the appeal to that court.

G. G. Stuart K.C. and *L. St. Laurent* for the appellant and cross-respondent.

E. Belleau K.C. and *A. Taschereau K.C.* for the respondents and cross-appellants.

DAVIES J. (dissenting). — This was an action brought by the respondents, an incorporated company, against the appellant for an alleged libel contained in a letter published by him in the public newspapers charging the company with having promoted the passage of a bill through the Legislature of the Province of Quebec transferring to them certain property which the plaintiff claimed as his, and characterizing it as an act of spoliation and theft. The alleged libel charged that

> the intention of the promoters was to obtain a legislative title to property which the Chicoutimi Pulp Company pretended to own but its title to which was manifestly so insufficient that it was afraid to submit it to the test of a legal decision;

and, after saying he was advised that though the intention of the promoters was clear, it was doubtful whether the object had been obtained, he goes on to say:—

> Should I find that my property really has been transferred to the Chicoutimi Pulp Company I shall come back to the legislature to undo the injustice done and *return the property stolen.*

The trial of the action took place before Mr. Justice Dorion and resulted in certain findings of the jury in answer to questions submitted to them upon

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which findings the trial judge directed judgment to be entered for the defendant.

The Court of King's Bench set aside this judgment and directed a new trial to be had on the ground that the trial judge had misdirected the jury. With great respect, however, I think that they were wrong and that their error arose from the fact which seems to have entirely escaped their attention that the proceedings of the legislature and its Private Bills Committee with respect to which the alleged libel was written was, at any rate so far as defendant was concerned whose legal rights as claimed by him were being dealt with, what is known as an occasion of qualified privilege. Such an occasion is one on which public comment and observation might properly be made in the absence of malice such comment being such as a jury would find to be fair and reasonable.

The letter complained of sets out the text of the clause proposed and added to the bill introduced in the Legislative Assembly for amending the plaintiff company's charter the latter words of which clause contain the words of enactment which the defendant so bitterly complained of, namely,

> and all the said lands are declared to have been and to be the property of the Chicoutimi Pulp Company.

"The said lands" included those to which the plaintiff claimed title and which he declared were by this legislative enactment sought to be transferred to and vested in the company.

The letter also sets out the amendment proposed by the Attorney-General when the bill reached the Private Bills Committee of the Legislative Council and accepted by that committee, which amendment

omitted the objectionable words above quoted. The letter also states the proceedings in the council, when the bill was reported to them, restoring the clause with the objectionable words which had been elided by the committee and giving the names of those who voted pro and con.

The alleged libellous comment upon this action of the legislature and upon the company and such of its officers as were members of the legislature I have already given.

The questions for submission to the jury were in accordance with the practice of the Province of Quebec decided on and fixed by one of the judges after issue had been joined on the pleadings and before the action went down to trial.

Two important questions there were, it seems to me, which directly arose out of the action and on the determination of which it should be disposed of; one was whether the occasion was one of qualified privilege and the other whether defendant's comments were fair and legitimate criticism upon the facts.

The first question was for the trial judge to determine and, in my opinion, he did so correctly when he held the occasion one of qualified privilege.

In the case of *Stuart* v. *Bell*(1), at page 345, Lindley L.J. says:—

> A privileged communication is one made on a privileged occasion, and fairly warranted by it, and not proved to have been made maliciously. A privileged occasion is one which is held in point of law to rebut the legal implication of malice which would otherwise be made from the utterance of untrue defamatory language. This is the effect, in a few words, of the leading cases on the subject.

Ever since the case of *Wason* v. *Walter*(2) was

(1) [1891] 2 Q.B. 341. (2) L.R. 4 Q.B. 73.

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decided it has been held that fair reports of proceedings in Parliament, although disparaging to the character of individuals, have a common law immunity similar to reports of proceedings in courts of justice.

Whether or not the subject matter of the comment or criticism is a matter of public interest is a question of law for the judge, but the matter defended as comment must be comment and not mere assertion of fact. A man cannot, under the pretence that what he is publishing is comment only, misrepresent the facts. But whether he has or has not misrepresented them comes within the province of the jury to determine and not the judge.

The other question, whether the comment was fair or not, it is much to be regretted, was not specifically submitted to the jury to answer.

The learned judge, however, was most careful in his charge to tell the jury that the criticism on such a qualified privileged occasion must be fair, reasonable and legitimate and that unless they found it to be so they should find a verdict for the plaintiffs and condemn the defendant.

As to what is fair and reasonable comment, I quote the opinion of Bowen L.J. in *Merivale* v. *Carson*(1), at page 283:—

> This leaves unsettled the inquiry, and perhaps it was intended in *Campbell* v. *Spottiswoode*(2) (a case which has never been questioned) to leave it unsettled, what is the standard for the jury of *fair criticism?* The criticism is to be *fair*, that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls *fair*, and, although, we cannot find in any decided case an exact and rigid definition of the word

(1) 20 Q.B.D. 275. (2) 3 B. & S. 769.

fair, this is because the judges have always preferred to leave the question what is "fair" to the jury.

In the case above referred to of *Wason* v. *Walter* (1), Lord Chief Justice Cockburn delivering the judgment of the Court of Queen's Bench after holding the publication of the reports of Parliamentary privilege as coming within the rules applicable to occasions of qualified privileges went on to say, at page 96:—

> The publication of the debate having been justifiable, the jury were properly told the subject was, for the reasons we have already adverted to, pre-eminently one of public interest and, therefore, one on which public comment and observation might properly be made, and that. consequently, the occasion was privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts — in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticize and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.

The charge of the learned judge was very lengthy and was signed and fyled by him in the records of the court, as required by the procedure in Quebec. We had the original record with this charge before us and I must say that, taken as a whole, it is a correct explanation of the law and a fair and clear charge and direction to the jury as to what they should find in order to bring in a verdict one way or the other.

Their answers to the questions which had been settled and which were put to them (neither party asking for an additional question) must be read in the light of this charge.

(1) L.R. 4 Q.B. 73.

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Dealing with the question of fair comment, the learned trial judge said:—

> The law gives every citizen the right to discuss public affairs in the newspapers, in public meetings, *et cetera*, to express opinions; in short, to comment on public affairs. Such comments are necessary in a country like ours where there is constitutional government, in order that public opinion may be enlightened. In the present case, the question that arises is one of public order, that is, whether it is right that the legislative power should invade the judicial power. But these comments when made must be fair; they must not go beyond the limits of a fair and reasonable criticism of the facts, whether true or false. The comment has to be considered separately from the question of fact. The report of the facts may be false and malicious, and the comment fair. In the same way, the report of the facts may be true and made without malice, but the comment may be unfair.
>
> The defendant must be condemned, where he has maliciously reported facts, which are not true, without unjustly commenting on them, and where he has commented unfairly on facts reported, even if true.
>
> On the other hand, if he has reported without malice what he thought to be true and if he has expressed reasonable opinions, justified by the facts as reported he must be exonerated, however severe may have been his comments, however damaging may have been the publication of the facts and comments.

No doubt sentences may be found in different parts of the charge which, divorced from their context, may be said not to correctly state the whole law. But taken as a whole, and that is the only way a judge's charge should be passed upon, I think this charge is not open to the objections respondents make.

Bramwell L.J., in *Clark* v. *Molyneux*(1), says, at page 243:—

> I certainly think that a summing up is not to be rigorously criticized; and it would not be right to set aside the verdict of a jury because in the course of a long and elaborate summing up the judge has used inaccurate language; the whole of the summing up must be considered in order to determine whether it afforded a fair guide to the jury and too much weight must not be allowed to isolated and detached expressions.

(1) 3 Q.B.D. 237.

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The jury found amongst other things that the article complained of was "substantially true," that "it dealt with questions which interest the public," that "it was published in the public interest and in good faith" and that "it did not cause any damage to the plaintiff."

Now these findings could not have been made unless, as the judge charged them, the jury reached the conclusion that the comments of the defendant upon the qualified privileged occasion were fair, legitimate and reasonable.

There does not seem to be any doubt that the president and vice-president of the company who were members of the legislature, and who respectively moved, in the assembly and in the council, the clause complained of, acted in good faith in promoting and carrying it because they believed that the defendant was a party to an all round understanding or agreement made between the two litigants and representatives of the Provincial Government whereby defendant was to relinquish his claims to the lands in dispute in return for other lands he was to get from the Crown.

On the other hand, the defendant from the first bitterly denied being a party to or consenting to any such agreement and much of the evidence taken at the trial had reference to these two divergent claims.

The charge went very fully into this evidence and submitted it fairly to the jury as an important factor for them to consider in determining whether the defendant was or was not guilty of malice.

The contention on the part of the respondents, defendants, as I understood it, was that the absence of

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any reference in his letter to this contention of the respondent company shewed malice on his part. It was not perhaps an unfair argument to present and it was urged with force not only here but before the court and jury that tried the case. But it could not be denied that it was purely a question for the jury, one of the factors which they had to consider in deciding upon the answers they gave to the questions asked them and, therefore, not one with which the courts ought to interfere if there was any evidence on which the jury could find as they did. That there was ample evidence for the jury so to find I think is clear.

On the whole, I have reached the conclusion that the appeal should be allowed with costs here and in the Court of King's Bench and that the judgment of the trial judge should be restored.

Having reached this conclusion, it is perhaps not necessary for me to express an opinion upon another important question which might well have arisen but which does not seem to have been discussed at the trial or in the Court of King's Bench, namely, whether an action by an incorporated company, such as the plaintiff, will lie at all for such an alleged libel as the one in question or whether it must be brought by the individuals acting for the company or composing it.

The question was considered in the case of the *South Hetton Coal Company* v. *North-Eastern News Association*(1), by the Court of Appeal in England, where it was held that an action of libel will lie at the suit of an incorporated trading company in respect of a libel *calculated to injure its reputation in the way of its business.*

(1) (1894) 1 Q.B. 133.

In that case, Lord Esher, at pages 138-139, says:—

Although the law is the same with regard to libel on a firm or company as with regard to libel on a person, the conditions under which the particular statement can be libellous may not exist with regard to them. There are other statements which would have the same effect, whether they were made with regard to a person, or a firm, or a company; as, for instance, statements with regard to conduct of business. It may be published of a man in business that he conducts his business in a manner which shews him to be a foolish or incapable man of business. That would be a libel on him in the way of his business, as it is called — that is to say, with regard to his conduct of his business. If what is stated relates to the goods in which he deals, the jury would have to consider whether the statement is such as to import a statement as to his conduct in business.

On the same page he says that while an exhaustive rule cannot be laid down as to what would be a libel on a company,

statements may be made with regard to *their mode of carrying on business*, such as to lead people of ordinary sense to the opinion that they conduct their business badly and inefficiently.

At page 141, Lopes L.J. says:—

With regard to the first point I am of opinion that, although a corporation cannot maintain an action for libel in respect of any thing reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage. The words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals who compose it. A corporation or company could not sue in regard of a charge of murder, or incest, or adultery, because it could not commit these crimes. Nor could it sue in respect of a charge of corruption or of an assault, because a corporation cannot be guilty of corruption or of an assault, although the individuals composing it may be. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position.

He then adopts the limits of a corporation's rights suggested by Pollock C.B. in *Metropolitan Saloon*

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Omnibus Co. v. *Hawkins*(1), at page 90, where he says:—

> That a corporation at common law can sue in respect of a libel, there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, * * * although the individuals composing it may. But it would be very odd if a corporation had no means of protecting itself against wrong and, if its property is injured by slander, it has no means of redress, except by action. Therefore, it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured.

Kay L.J. gives judgment to same effect.

In the case before us, while in the view I take of the facts, the qualified privileged occasion, the trial judge's charge and the findings of the jury, it is not necessary for me to decide whether this action would lie at all, I may say that I entertain very grave doubts whether, under the authorities, it would, and my inclination is towards the view that it would not. I prefer, however, to base my judgment upon the grounds previously stated that the occasion was one of qualified privilege and that the findings of the jury read in connection with the judge's charge really mean that the language complained of was fair and legitimate criticism.

IDINGTON J.—This is an action of libel brought by the respondent against the appellant founded upon the publication by the latter in three newspapers published in the Province of Quebec of a letter written by him.

There was a private bill pending before the Legislature of Quebec promoted by the Town of Chicoutimi.

(1) 4 H. & N. 87.

This bill was so amended as to incorporate therein a declaration confirming the respondent's title to some grants made by the Crown.

The appellant in said letter recited the proceedings in the legislature which I need not dwell upon at length.

In the course of his statements therein referring to this amendment he said:—

> Now a portion of the lands described in this paragraph never has been and is not now the property of the Chicoutimi Pulp Company, but is my property.

And then he proceeded to state the history of the amendment and commented thereupon as follows:—

> The intention of the promoters was to obtain a legislative title to property which the Chicoutimi Pulp Company pretended to own, but its title to which was manifestly so insufficient that it was afraid to submit it to the test of a legal decision.
>
> I think the public must conclude that the Chicoutimi Pulp Company had no confidence in their pretended title, otherwise the unheard of recourse to a declaratory law with respect to private property would have been unnecessary.
>
> While the value of the land at issue may not be very great the principle involved in legislation of this character is of supreme importance to the public; not alone to those persons whose property the Chicoutimi Pulp Company may covet, but to all people whose property may be coveted by others having sufficient influence to obtain legislation of this kind.
>
> I may, however, add that I am advised that though the intention of the promoters is clear, it is doubtful whether the object has been attained, and I propose forthwith to test the question and if necessary carry it to the Privy Council; should I find that my property really has been transferred to the Chicoutimi Pulp Company, I shall come back to the legislature and ask that body to undo the injustice done and return the property stolen.
>
> I suggest for the consideration of the public whether legislation of this character is not calculated to prove injurious to Canadian enterprise seeking capital on the English or foreign money markets. If companies can promote and carry legislation transferring to them other people's property, they can also promote and carry legislation by which creditors will be deprived of their security, or, if desired, of their recourse against their debtors. Is it reasonable under these cir-

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cumstances to expect that capitalists will invest money in this province.

The respondent's action is founded upon the letter as a whole, but must rest upon these quotations.

Amongst many other things pleaded in defence the appellant alleged as follows:—

14. The letter published under his signature in the *Chronicle*, the *Montreal Star*, and the *Gazette*, was written and signed by him and was published at his request.

15. The statements of fact contained in the said letter are true in substance and in fact.

* * * * *

18. This amendment was introduced without notice of any kind to the defendant or to the public and contrary to all Parliamentary rules, regulations and usages concerning private bills, and the persons who so introduced it intended thereby and the object of such amendment was to endeavour to obtain a statutory or legislative title to certain lands which did not belong to the plaintiff, but did belong to the defendant and which were in question at that time and with respect to which litigation was threatened.

* * * * *

47. The defendant's letter was a fair statement of true facts referring to a matter of public interest and was a fair and *bonâ fide* comment, not only with respect to matters which the defendant had a right and an interest to make public, but a fair and *bonâ fide* comment on matters of public interest.

On the issues so joined the respondent as plaintiff was entitled to have the jury pass.

It is claimed, and I think with reason, that the learned trial judge so misdirected the jury that the verdict obtained ought not to stand.

The court of appeal has set aside the verdict and directed a new trial. From that judgment this appeal is taken.

I am, with great respect, afraid that there was much misconception of law involved in the charge of the learned trial judge on the trial of this simple issue

and hence that the complaint of misdirection which has been pressed is well founded.

I do not propose to enter in detail upon the manifold issues presented and the various misdirections of the learned trial judge.

Speaking generally thereof, however, he seems to me, I submit with great respect, to have confused the issues which ought to have been presented to the jury and has thus been led into error.

If any doubt existed as to the defamatory character of these statements a further question should have been submitted to the jury whose province it is to pass thereon.

Then if the issues presented by the pleadings justifying as true the parts which I have quoted of the letter complained of, and assumed to be defamatory, had been well and truly tried out and the truth or falsity thereof, or of material statements therein, first ascertained, matters would have been very much simplified.

The action was launched some ten years ago and the pleadings I quote from filed shortly thereafter.

The appellant instituted, as threatened in said letter, proceedings to establish his title and followed same to the Privy Council and in these proceedings he failed entirely to establish the title he asserted. The trial of this action seems to have stood over awaiting the result of that litigation.

It surprises one to find, in face of such a result (unless something new turned up afterwards which does not appear), the pleading of the defence of justification which I quote, still adhered to, instead of that assertion of title being withdrawn. A defence of justification involving the truth in substance and in fact

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of an alleged libel is often a perilous sort of proceeding.

The appellant no where in his long pleading sets up specifically a claim of privilege but in law contends that what he does set up constitutes a privilege of some kind.

So far as reporting what actually transpired in the legislature or before its committees is concerned that clearly is privileged. And so far as a fair and reasonable comment thereon is concerned that also was permissible; for to speak the thought we will is the very life blood of our freedom and free institutions. In doing so, however, no one has the right to invent statement of fact and present it for truth. Nor has he the right in his comment to put forward what others may have invented, and publish that or aught else as fact which is false. No belief, on the part of one publishing any such comment, in such falsehood can justify its publication as part of his comment.

The reasoning used may be grossly fallacious and thus, in effect, a falsehood in itself, but of that the law will take no notice. In thus appealing to mankind they are supposed to be able to discriminate the true from the false if only the fundamental facts upon which the comment proceeds are shewn to be true.

It has been said by high authority that this right to comment should not be called a privilege. And as a matter of expediency it may be as well when we see how confused people get over the meaning of the term "privileged" to bear that observation in mind.

The comment must be fair, but much latitude has in practice been permitted, for wise men treat with silent contempt that which fair minded men can, when

nothing but facts are presented, adjust and correct for themselves. And thus the appellant, in dealing with the matter he had in hand, might have gone very far in his strictures upon private legislation of the character of that he was assailing. But he was bound in doing so to adhere to the truth so that such fair minded men as he was appealing to might not be led astray.

He could have presented to the public just exactly the nature of the claim he put before the legislative committee with the answer made thereto and asked his readers to decide relative to his appeal.

Such, as I have tried to set forth, I conceive was the law that ought to have been observed. Instead of that it seems to have been thought and, indeed, is urged before us that it mattered not in such circumstances whether what was stated was true or not, so long as it was honestly believed by appellant, and published by him in good faith.

I am unable to hold that view of the law.

There are many situations in the commerce of mankind when it becomes the legal, social, or moral, duty to speak, and in doing so to give honest utterance to that which when it comes to be investigated may prove absolutely false, and in many cases he so speaking is privileged and protected unless he can be shewn to have been actuated by malice.

But this is not such a case. And to confuse it with that class of cases in their various shades of absolute and qualified privilege is to mislead, and, when doing so in charging a jury, is to misdirect them.

The law is so well expounded by Lord Blackburn

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and others in the case of *Campbell* v. *Spottiswoode* (1), and many cases following it, that I may refer those concerned to said exposition, and to other cases collected in Fraser on Libel and Slander, pp. 90-95.

For the purpose, therefore, of furnishing a bar to the action the investigation of the belief or good faith of appellant is of no avail.

As, however, in many other libel actions, there is in this an aspect of it which gives rise to the consideration of the question of the appellant's good faith and his reason for believing that he had a right to assert that he had a title to the lands he claimed as his. And that, if he thinks it worth while, he has a right to insist on the court and jury hearing him in mitigation of damages. It cannot form in itself in such a case as this a defence barring the action.

I can imagine a man, wishing to justify himself before the public, using this right as means thereof even if only nominal damages asked at the opening of the trial, though I should doubt its expediency in a ten year old case.

In dealing with such investigation as was made on the trial relative to this question of the good faith and belief of the appellant there seems also to have been much confusion of thought. And that was carried into the charge of the learned trial judge to the jury. He seems to have treated the matter as if it were necessary to prove a contract in writing and to have held that, as there was no commencement of proof in writing, what was adduced of an oral character must fall to the ground. I submit, with deference, that it was the conduct of the appellant for years preceding his letter in relation to these matters alleged against him so far as shewn to be inconsistent with an honest belief

(1) 3 B. & S. 769.

in his assertions of a title possessed by him that bore upon the issues relative to such belief and good faith.

From that course of conduct inducing, as it was alleged, reciprocal conduct on the part of those he assails, even an agreement or understanding might have been inferred or submitted as a fair ground for an inference which forbade his honestly asserting such title as he set up.

I am by no means to be taken as asserting that such is the fair inference or conclusion to be reached. That was and is for the jury to consider. And it was for the learned judge trying the case to have directed their minds to a fair consideration of such evidence of any kind shewing his conduct in its bearing upon this subsidiary question of the good faith of the appellant.

Again I may point out that the last paragraph of the defence, being also the last of the three which I have quoted, couples together two or three matters which ought to be kept for consideration in the first place, quite independent of each other. The first part of the paragraph is apparently a repetition of paragraph fifteen, which must stand or fall by itself; and if it fall, then in my view of the law which governs the case, that defence fails; and if that fails there cannot be maintained the further proposition of a defence of fair comment.

There has in such a case been a failure to maintain what the law recognizes as fair comment and imposes as a fundamental part of what constitutes fair comment.

Counsel for appellant submitted that no case had been made out and that the case should have been withdrawn from the jury and the action dismissed.

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In my view of the law I need hardly say that I cannot assent to such a proposition.

He also took the objection, which is not set up in the statement of defence, that the respondent being a corporation cannot maintain such an action as this, under the existing circumstances attendant thereon, and resting upon such a basis as the appellant's letter furnishes.

I do not think there is anything in any of the decisions in the cases to which he has referred which can be held to maintain the objection. And I may frankly say that some *obiter dicta* I have observed therein do not seem to me maintainable.

It would be short-sighted policy to try and so mould the law as needlessly to restrict the right of corporations to bring an action for libel.

In these days when corporations engage so much of the business activities of mankind and are daily assailed in the press, I think any one of them so attacked ought to have the power to assure the public on whom it relies for business that its conduct has not been that imputed in any such attack as this, for example.

Bringing an action for libel and putting him defaming any such entity to the proof is its only means of defence. To deprive any one of them of such right would be sure to tend to make their conduct worse instead of better. It is the public's highest interest to have as much publicity given to corporate dealings with the public as possibly can be brought about.

I think this appeal should be dismissed with costs.

As to the cross-appeal I think to allow it, even if good ground of complaint, which I do not find, would

be to infringe on the settled jurisprudence of this court relative to mere questions of costs.

The cross-appeal should also be dismissed with costs to be set off against the other costs of the appeal herein.

DUFF J.—In this case I regret to say that I see no escape from the conclusion that there must be a new trial. I regret it because all the facts were before the jury to enable them to pass upon the issues raised by the action and the mistrial arises only because in certain vital matters they were not properly instructed by the learned trial judge. The defences were justification, privilege and fair comment. It was not disputed on the argument that in an action for libel where, as here, the publication complained of deals with matters admittedly of public interest the rules of law applicable in the Province of Quebec do not sensibly differ from the rules of the law of England except in so far as they may be affected by statute, and there is no question of the application of any statute in this case. In effect, the learned trial judge directed the jury that the defence of justification would be established if they were satisfied that the defamatory statements of fact were made with an honest belief in their truth, even though in fact untrue. He further directed them that if the publication was an honest comment that, in itself, would be sufficient to establish the defence of fair comment. As the learned judges of the Court of King's Bench have pointed out in their judgments these directions were erroneous. The defence of justification fails unless the defendant justifies every injurious imputation which the jury

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find to be conveyed by the publication. The defence of fair comment fails unless the jury find that the imputation, although defamatory and not proved to be true, was made *fairly* and *bonâ fide* as the honest expression of the opinion held by the defendant and is in the opinion of the jury warranted by the facts in the sense that a fair-minded man might, on those facts, hold that opinion. It is also essential to this defence (as regards imputations which the defendant fails to prove to be warranted in fact) that he must have stated them not as facts but as inferences from other facts.

As there is to be a new trial I think it is undesirable to enter upon any discussion of the facts. But I think it is important to say this: The plaintiff is only entitled to succeed if the publication in question could convey to the mind of a reasonable person imputations calculated to damage the plaintiffs in their business. I think the publication is capable of such a meaning, that is to say, I think it is capable of being read as charging the plaintiffs with making use of their political influence in the legislature to procure the passing of legislation with the object of depriving the appellant of rights which they either knew to be vested in him, or believed might be vested in him, in respect of property which they desired to get for themselves; in other words, that they were unscrupulous enough to make use of their political influence to benefit themselves at the expense of the appellant's rights, or what, if his recourse to the courts were not taken from him, might prove to be his rights. I think that would be an imputation calculated to damage them in their business. But it is a question for the

jury whether or not the publication in fact bears that interpretation in the sense that that is the meaning which a reasonable person would attribute to it.

There is one further observation arising out of the course of the argument in this court which it seems right to make and that is that the defendant is only bound to justify the publication (as regards his defence of justification) or support the publication as fair comment (as regards his defence of fair comment) in the sense in which the publication would be actionable; that is to say, in the sense in which it would convey an imputation prejudicially affecting the plaintiffs in their business. Failure to prove, for example, as a fact that the defendant was the owner of the property, while relevant, no doubt, could not be conclusive as regards either defence. Even assuming the jury should construe the publication as declaring absolutely that the appellant was the owner of the property, the gist of the imputation in the only sense in which it is actionable is that the plaintiffs oppressively or dishonestly made use of their political influence with the legislature to deprive the appellant of rights which they knew to be his, or his title to which, at all events, they did not think it safe to leave to the judgment of the courts. If the appellant fails to justify that imputation in fact there is still open the defence of fair comment, the coëfficients of which I have indicated above. But first of all, it is a condition of the plaintiffs' success that it should appear that the publication contains actionable imputations, that is, I repeat, imputations calculated to prejudice the plaintiffs in their business.

ANGLIN J. (dissenting).—Upon the verdict of the jury judgment was entered dismissing this action.

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On appeal that judgment was set aside on the ground of misdirection by the learned trial judge in instructing the jury that what matters is not the truth of the facts but that they should be reported without malice, or wicked intent, and that, if the defendant believed what he had written to be true and published it without malice or evil intent, they should find that what he had said was substantially true.

The defences were justification, privilege and fair comment.

No doubt, as applied to the plea of justification, the passages of the charge above referred to would be indefensible under English law. They are at least equally so under Quebec law, whether the truth of the alleged libel should be regarded as in itself a complete defence (*Leduc* v. *Graham*(1)), or, as would seem to be the better opinion, should be deemed a defence only if the publication is also alleged and proved to have been made in the public interest and concerning matters of public moment (*Trudel* v. *La Compagnie d'Imprimerie et de Publication du Canada*(2)), and may even then be shewn only in mitigation of damages. (*Gazette Printing Co.* v. *Shallow*(3), at page 343; *Trudel* v. *Beemer*(4).) In its bearing on the defence of fair comment the direction condemned by the court of appeal is equally erroneous. The learned judge indicated that it bore on this defence when he said:—

> If he (the defendant) has reported without malice what he thought to be true and if he has expressed reasonable opinions justified by the facts *as reported*, he must be exonerated.

I understand that in the Province of Quebec Eng-

(1) M.L.R. 5 Q.B. 511.
(2) M.L.R. 5 Q.B. 510.
(3) 41 Can. S.C.R. 339.
(4) 19 R.L. 600.

lish law governs defences to actions for libel in newspapers founded on privilege or fair comment. *Marcotte* v. *Bolduc*(1).

As I read his charge the learned judge did not intend to submit to the jury the defence of qualified privilege in the strict sense as understood by English lawyers, but rather the defence of fair comment in the public interest upon a report of proceedings in the legislature — sometimes called privilege in a broader sense. The duty of communication to or an interest in the persons to whom the alleged libel was published necessary to support a plea of qualified privilege in the strict sense was probably lacking. Upon the defence of fair comment the attention of the jury was scarcely sufficiently directed to the all-important distinction between statements or accusations of fact, the truth of which must be proven, and statements by way of inference or expressions of opinion, upon which the issue is their reasonableness and fairness. The only direction given as to the burden of proof in regard to malice was that it lay with the plaintiff — a proper direction when the judge has ruled that the occasion is one of qualified privilege in the strict sense, but incorrect where the defence is fair comment. The eighth question (whether the article dealt with matters of public interest) was improperly left to the jury. That is a question of law for the judge. But this error was probably innocuous as the learned judge distinctly charged that the question was one of public order and properly a subject of fair public discussion and criticism within reasonable limits.

Although in most respects an able presentment of a

(1) Q.R. 30 S.C. 222.

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difficult and complicated case, the charge contains several errors so vital in their character that I fear the order for a new trial could not properly be set aside, if to do so it were necessary to find that there had been no misdirection or that the case falls within the saving grace of article 500 C.P.Q.

But I have reached the conclusion that a commercial corporation, such as the plaintiff company is, cannot maintain an action for libel, without proof of special damage, for the publication of a letter such as that before us, which, as I read it, reflects rather upon members or officers of the corporation than upon the corporate body itself, and, in so far as it may impute misconduct, charges something of which the corporation itself could not be guilty. *Metropolitan Saloon and Omnibus Co.* v. *Hawkins*(1); *South Hetton Coal Co.* v. *North Eastern News Association* (2); *Mayor of Manchester* v. *Williams*(3); 18 Halsbury's Laws of England, 612.

It was suggested to us that the rights of a corporation under Quebec law differ in this respect from those which it would have under English law, and we were referred to articles 352 and 358 of the Civil Code. I find nothing in these articles warranting the suggestion made, and I can conceive of no sound reason in support of it. The only authority to which we were referred was *L'Institut Canadien* v. *Le Nouveau Monde* (4), in which the plaintiff was not a commercial corporation. Whatever may be thought of the judgment in that case, the libel there before the court directly

(1) 4 H. & N. 87, at p. 90.
(2) (1894) 1 Q.B. 133, at p. 142.
(3) (1891) 1 Q.B. 94.
(4) 17 L.C. Jur. 296.

affected the carrying on of an important part of the work of the institute.

I think a judge could not properly rule or a jury reasonably find that the defendant's letter was calculated to injure the property of the plaintiff, or its business reputation or character, as distinguished from the personal reputations or characters of its officers or members. In the absence of proof of special damage such a finding was essential to the plaintiff. The questions submitted did not cover this issue, nor did the charge present it to the jury. No objection was taken on this ground nor was any request made that a question should be put to elicit such a finding. Under these circumstances article 499 C.P.Q. appears to disentitle the plaintiff to a new trial.

On the whole I think it is in the interests of justice that this litigation, regrettable from every point of view, should be brought to an end, especially in view of the obvious fact that the plaintiff company has sustained no substantial injury.

I would allow this appeal with costs and restore the judgment of the learned trial judge dismissing the action.

BRODEUR J.—Nous avons à considerer dans cette cause-ci si la bonne foi du défendeur appelant peut justifier les propos diffamatoires qu'il a tenus sur le compte de la demanderesse intimée.

La législature de Québec, à sa session de 1904, avait, à la demande de l'intimée, déclaré qu'un certain terrain, qui avait été concédé à cette dernière par la Couronne était la propriété indiscutable de l'intimée.

L'appellant, Price, avait combattu ce projet de loi, en alléguant que ce terrain lui appartenait: mais la

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législature confirma le titre donné par la Couronne à l'intimée.

L'appelant jugea à propos alors d'écrire dans les journaux une lettre où non-seulement il critiquait la demande de la compagnie à la législature mais il alléguait que l'intimé l'avait spolié de son terrain et qu'il allait instituer des procédures devant les tribunaux pour arriver à se faire remetter en possession de ce terrain volé (return the property stolen).

Poursuivi pour libelle, le defendeur appelant a voulu se justifier en disant que de fait il avait, depuis la publication de sa lettre, pris une poursuite devant les tribunaux pour revendiquer ses droits au terrain en litige et il plaida la vérité des accusations qu'il avait portées et la justesse des commentaires qu'il avait fait.

Voici d'ailleurs le texte même des paragraphes 15 et 47 de la défense où il affirme ces deux moyens de défense:—

15. The statements of fact contained in the said letter are true in substance and in fact.

47. The defendant's letter was a fair statement of true facts referring to a matter of public interest and was a fair and *bonâ fide* comment, not only with respect to matters which the defendant had a right and an interest to make public, but a fair and *bonâ fide* comment on matters of public interest.

La présente cause est restée en suspens pendant plusieurs années afin de permettre évidemment au demandeur de faire décider l'action pétitoire qu'il avait instituée et à laquelle il référait dans sa défense. Cette action pétitoire est allée jusqu'au Conseil Privé et il a été décidé que le demandeur n'a pas prouvé qu'il était propriétaire du terrain en litige.

On a ensuite procédé sur la présente poursuite et un procès par jury eut lieu.

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L'honorable juge qui présidait au procès a déclaré à différentes reprises au cours de son adresse aux jurés que le défendeur n'était pas tenu de prouver la vérité des accusation qu'il avait portées, mais d'établir simplement qu'il croyait bien fondé ce qu'il avait dit.

En d'autres termes, il a déclaré que la bonne foi du défendeur pouvait l'exempter de toute responsabilité civile pour toutes les injures que contenait sa lettre.

Le verdict du juré a été en faveur de l'appelant; mais la cour d'appel, saisie de la cause, a ordonné un nouveau procès.

J'en suis venu à la conclusion que le jugement *a quo* doit être confirmé.

Je suis d'opinion que la défendeur devait prouver la vérité de son accusation et que la critique qu'il a faite de la conduite de la demanderesse n'était pas judicieuse (unfair comment).

Je suis d'opinion également que les paroles injurieuses dont il s'est servi ne pourraient lui permettre de réclamer l'immunité reconnue en faveur des communications privilégiées (qualified privilege).

La preuve de la vérité des propos diffamatoires est permise dans le droit anglais quelque soit la condition des parties intéressées, soit qu'il s'agisse de particuliers ou d'hommes publics, soit qu'ils aient été proférés au sujet d'une affaire privée ou d'une affaire publique.

Dans notre droit au contraire la calomnie et la médisance donnent lieu dans la rapports ordinaires de la vie a des recours en dommages.

Que les propros diffamatoires soient vrais ou faux, celui qui les a tenus engage sa responsabilité.

Sous le droit romain on disait qu'il n'était ni juste

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ni équitable que celui qui a diffamé un coupable fut condamné pour ce fait, car il est utile et nécessaire que les fautes des coupables soient connues.

Eum qui nocentem infamavit non esse bonum et æquum ob eam rem condemnari; peccata enim nocentium nota esse et oportere et expedire.

Cette législation fut implantée en France dans les pays de droit écrit. Mais dans les pays de coutume on adopta la jurisprudence canonique qui avait pour règle: "*Veritas convicii non excusat*" (Grellet Demazeau, vol. 1er, p. 340 et 345).

Dareau, qui est le guide le plus sûr que nous puissions suivre quant aux injures entre particuliers, nous dit (vol. 1er, p. 60), qu'il y a un surcroît d'injure d'offrir la preuve de la vérité du mal que l'on dit, parce que

si cette verité pouvait servir d'excuse, tous les jours ce pretexte donnerait ouverture à de nouvelles injures qu'il est toujours prudent d'éviter.

Cette doctrine de l'ancien droit français a passé dans le droit moderne français (Fuzier Herman, Vo. Diffamation, No. 59) et a été adoptée par notre jurisprudence dans Québec. *Trudel* v. *Beemer,* cour d'appel(1); *Moquin* v. *Brassard*(2).

Cette dernière cause a été décidée par la cour d'appel composée de jurisconsultes de grande distinction, comme Sir Antoine-Aimé Dorion et les honorables juges Monk, Taschereau, Ramsay et Sanborn et le jugé a été:—

Que le défendur dans une action en dommages pour injures verbales ne peut plaider la vérité des imputations contenues dans ces injures.

Cette jurisprudence fait loi dans la province. On

(1) 19 R.L. 600. (2) 20 R.L. 111.

faisait exception dans l'ancien droit au cas ou des accusations étaient consignées dans les requêtes envoyées aux ministres pour faire cesser des désordres, ou aux procureurs-généraux pour faire punir des délits. Dans ces cas, la vérité de l'imputation pouvait excuser. (Dareau, vol. 2, pp. 402-403.)

Il est donc bien important en discutant la responsabilité résultant des injures de ne pas oublier cette différence entre notre droit et le droit anglais sur ce point.

La question en la présente cause n'offrirait donc pas de difficulté si nous nous trouvions en présence d'un particulier qui en aurait diffamé un autre. Mais les paroles injurieuses proférées contre la compagnie intimée l'ont été au sujet d'une législation qu'elle a sollicitée et alors ses actes perdent de leur caractère privé et sont susceptibles d'être critiqués et commentés.

L'appelant a prétendu devant cette cour que les circonstances qui ont donné lieu au libelle constituent une occasion où le privilège, connu dans le droit anglais sous le nom de "qualified privilege," peut être invoqué.

Il n'est pas nécessaire pour les fins de cette cause que je décide si le "qualified privilege" existe dans notre province ou non, car j'en suis venu à la conclusion que le défendeur ne peut l'invoquer.

Sa défense, en effet, repose sur la vérité des faits (justification) et sur son droit de critique (fair comment). Il est trop tard, maintenant que le procès a eu lieu sur ces deux moyens de défense d'en soulever un nouveau.

D'ailleurs, les faits qui sont prouvés dans la cause

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ne démontrent pas que le défendeur appellant fût obligé de publier la lettre dont l'intimée se plaint, ou qu'il eut intérêt à diffamer cette dernière. Il pouvait y avoir une obligation ou un intérêt de sa part de faire connaître à ses concitoyens la conduite de leurs mandataires; mais quel intérêt public avait-il de voir la défenderesse-intimée diffamée ?

Or, pour que le *privilège qualifié* soit invoqué, il faut que ces conditions soient réunies, obligation ou intérêt du défendeur d'un coté et devoir et intérêt de la part de la personne ou du public a qui la communication est faite de recevoir cette information.

Halsbury, Laws of England, No. 1263, *vo.* Libel.

Il faut de plus qu'il n'y ait pas d'abus de ce privilège et il y aurait abus dans le cas ou l'écrit est inutilement diffamatoire du demandeur et contiendrait des déclarations fausses et mensongères et des motifs inavouables. Cyc., *vo.* Libel and Slander, p. 402.

La cour de revision en confirmant unanimement un jugement de la cour supérieure a décidé tout récemment dans une cause de *Fontaine* v. *Potvin*(1), que:—

Dans une action de dommages-intérêts pour libelle le privilège, même lorsque l'occasion est privilégiée n'existe pas si des actes malhonnêtes sont reprochés au demandeur sans utilité pour les fins que veut atteindre le défendeur.

La jurisprudence anglaise nous enseigne aussi que l'occasion ne serait pas privilégiée parce que le défendeur agirait de bonne foi. (Halsbury, *loc. cit.* No. 1262). *Benner* v. *Edmonds*(2).

Odgers, Libel (5th ed.), pp. 250-251, dit:—

The defendant's *bona fides* is never an element in the question whether a particular occasion is or is not privileged.

Dans la cause de *Campbell* v. *Spottiswoode*(3), Cockburn C.J. dit:—

(1) Q.R. 46 S.C. 495. (2) 30 O.R. 676.
(3) 32 L.J.Q.B. 185, at p. 199.

Mr. Bovil is obliged to say that because the writer of this article had a *bonâ fide* belief that the statement he made were true he is privileged. I cannot assent to that doctrine.

Quant à la vérité des faits, il ne peut pas y avoir de doute. Le jury a déclaré dans son verdict qu'ils étaient substantiellement vrais, mais ce verdict est en tout contraire à la preuve.

Il est bien évident que les jurés en sont venus à cette conclusion parce que l'honorable juge, en leur adressant la parole, leur aurait dit:—

Si vous arrivez à la conclusion que la défendeur a rapporté les faites tels qu'il les connaissait, tels qu'il les croyait vrais, vous devez déclarer que ce qu'il a dit était substantiellement vrai; car en disant qu'il était propriétaire il ne faisait qu'affirmer sa croyance et son droit.

Je ne puis adopter une telle doctrine. D'ailleurs, non-seulement le défendeur a affirmé son droit de propriété mais il a même jugé à propos de déclarer qu'on lui avait volé son bien, qu'il avait été spolié. Or, bien loin d'avoir été dépouillé de sa propriété, le Conseil Privé a décidé que son action pétitoire était mal fondée et qu'il n'était pas le propriétaire du terrain en litige.

Il avait donc affirmé en termes diffamatoires une chose fausee et alors il doit en subir la responsabilité.

Quant aux commentaires qu'il a faits sur la conduite de l'intimée, ils sont absolument injustes et basés de plus sur une assertion fausse.

A l'origine, sous l'ancien droit français, sous l'empire de l'ordonnance de janvier, 1629, défense était faite aux sujets du royaume de publier des libelles contre le roi, ses conseillers, magistrats et officiers ou contre les affaires publiques et le gouvernement. Dareau, vol. 1er, p. 108.

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Cette ordonnance était la loi du Canada lors de la cession du pays. Elle n'a jamais été formellement révoquée, que je sache, ici. Mais l'établissement des institutions représentatives et démocratiques comme partie de notre droit public a implicitement eu pour effet de mettre à néant ce vestige d'une monarchie absolue. Les hommes public, en acceptant d'être mandataires du peuple, se soummettent à la critique du public et les questions d'intérêt public doivent être nécessairement débattues pour que le peuple, qui est maintenant le maître de ces destinées, puisse juger en connaissance de cause.

Je crois alors que nous ne pouvons sur ce sujet trouver de guide plus sûr que le droit anglais. Or, il est le principe incontestable en droit anglais que la critique doit être juste et raisonnable et qu'elle ne soit pas basée sur un fait faux et mensonger. Halsbury, *loco citato,* No. 1288, dit:—

> The comment must not misstate facts because a comment cannot be fair which is built upon facts not truly stated and if a defendant cannot shew that his comments contain no misstatements of fact he cannot prove a defence of fair comment.

Aux Etats-Unis le même principe est suivi. Cyc, sous le mot "comment" (Libel and Slander, p. 402) dit:—

> But the privilege is limited strictly to comment and criticize and does not intend to protect *false statements,* unjust inferences, *imputations of evil motives* or criminal conduct, and attacks upon private character, *the publisher being responsible for the truth of what he alleges to be facts.*

En France, sous la loi de 1881, il est pourvu que la vérité du fait diffamatoire pourra être établie dans le cas d'imputations contre les administrations publi-

ques, les députés, les sénateurs, les fonctionnaires publics, les jurés et les témoins.

Fuzier Herman, au mot "Diffamation," No. 261, nous dit:—

> Les hommes politiques peuvent évidemment en raison de leur rôle et du caractère de la mission qu'ils s'attribuent être librement discutés. Mais ce droit de discussion et de censure n'est pas absolu. D'abord, il ne saurait permettre de s'attaquer à l'honneur de l'homme. Ensuite, toute imputation calomnieuse, *toute allégation d'un fait* que l'on sait faux et de nature à atteindre la considération est évidemment prohibé.

Dans la province de Québec, la jurisprudence est à l'effet que la conduite d'un homme public, d'un candidat, d'un député, ou d'un employé public puisse être soumise à une critique d'intérêt public, mais des accusations fausses pourront donner lieu à une réparation civile.

Beauchamp v. *Champagne*(1); *Wickham* v. *Hunt* (2); *Marchand* v. *Molleur*(3); *Marcotte* v. *Bolduc* (4); Voir Mignault, vol. 5, p. 359.

Comme les commentaires faits par l'appelant contenaient l'assertion qu'il était propriétaire du terrain en question et comme ce fait etait faux, il a engagé sa responsabilité et le juge n'avait pas le droit de dire aux jurés que sa bonne foi pouvait le soustraire à cette responsabilité. Avec la cour d'appel je suis d'opinion qu'il doit y avoir un nouveau procès.

L'appelant a prétendu devant cette cour que l'intimée, comme compagnie, n'avait pas droit de poursuite pour le libelle en question.

Ce point n'a pas été soulevé par les plaidoiries, ni devant les cours inférieures, et je n'en suis pas étonné,

(1) M.L.R. 6 Q.B. 19.
(2) M.L.R. 6 S.C. 28.
(3) Q.R. 4 S.C. 120.
(4) Q.R. 30 S.C. 222.

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car si cette prétention peut avoir quelque consistance sous les dispositions du droit anglais elle ne saurait être maintenue sous l'empire du Code Civil.

Les corporations sont des personnes morales qui ont les mêmes droit que les individus. Tout propos diffamatoire est susceptible d'engager la responsabilité de celui qui le profère et a la même conséquence que la personne diffamée soit une personne réelle ou une corporation. L'article 1053 du Code Civil ne fait pas de distinction.

Fuzier Herman, *vo.* "Diffamation," No 239 dit:—

> Les sociétes financières, commerciales et industrielles sont des personnes morales protégées par conséquent contre les diffamations comme les particuliers eux-memes.

La jurisprudence de la province confirme la doctrine énoncee par Fuzier Herman. Dans la cause de *L'Institut Canadien* v. *Le Nouveau Monde*(1), il a été décidé

> that an action for libel may be brought by one corporation against another corporation.

Dans cette cause il n'y avait pas eu de dommages spéciaux de prouvés et, cependant, des dommages nominaux furent accordés.

Et récemment, dans une cause de *Fontaine* v. *Potvin*(2), la cour de revision a implicitement décidé la même chose en déclarant qu'un officer d'une association spécialement mais non nommément visé par le libelle a personnellement le droit de réclamer des dommages-intérêts de l'auteur du libelle et qu'il n'est pas nécessaire que la poursuite soit instituée au nom de l'association.

(1) 17 L.C. Jur. 296. (2) Q.R. 46 S.C. 495.

L'appel doit etre renvoyé avec dépens. Le contre-appel doit être également renvoyé avec dépens.

Appeal dismissed with costs; Cross-appeal dismissed with costs.

Solicitors for the appellant: *Pentland, Stuart, Gravel & Thomson.*

Solicitors for the respondents: *Pelletier, Belleau, Baillargeon & Belleau.*

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*Feb. 2.
*March 15.

PETER CREVELING (PLAINTIFF) ....APPELLANT;

AND

THE CANADIAN BRIDGE COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Defective system—Injury to employee—Evidence—Verdict—Practice—Exception to judge's charge—New points on appeal—New trial.

During bridge construction a travelling crane was operated on elevated tracks under a system which did not provide of signals on every occasion when it was set in motion and it was not provided with guards for the protection of workmen employed upon the elevated stagings. A signal was given, on starting the crane, at some distance from the workmen; shortly afterwards it came to a momentary stop and moved on again towards the workmen without any further signal and plaintiff was injured. In his action for damages, the plaintiff charged want of proper system and guards. The Court of Appeal set aside a judgment in favour of plaintiff, upon a general verdict by the jury, and ordered a new trial for the purpose of assessing damages under the British Columbia "Employers' Liability Act," on the ground that it had been admitted that there was a system in existence which, if properly carried out, would have been sufficient for the protection of the workmen.

Held, that, on a proper appreciation of the evidence, having regard to the course of the trial, the directions of the trial judge had presented the issues fully to the jury, and, there being evidence to support it, their verdict ought not to have been disturbed. Davies and Anglin JJ. dissented.

Per Duff and Brodeur JJ.—Where exception to the directions of the judge has not been taken at the trial or in the first court of appeal, it is, in the absence of special circumstances, too late to urge such objections upon a subsequent appeal to a higher court. *White* v. *Victoria Lumber and Manufacturing Co.* ((1910) A.C. 606) followed.

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

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APPEAL from the judgment of the Court of Appeal for British Columbia by which the judgment entered at the trial, on a general verdict by the jury in favour of the plaintiff, was set aside and a new trial ordered.

The circumstances of the case are stated in the head-note and the issues raised on the present appeal are set out in the judgments now reported.

S. S. Taylor K.C. for the appellant.
W. N. Tilley for the respondents.

THE CHIEF JUSTICE.—It appears to me quite obvious, after reading the pleadings and evidence, that both parties to this litigation assumed at the outset that the accident to the plaintiff was mainly attributable to the absence of a guard on the traveller and that little, if any, fault was chargeable to the system under which that traveller was operated. There is no suggestion in plaintiff's evidence on discovery or in his examination in chief at the trial that his injury was caused as the result of a failure on the part of those in charge of the traveller to give the proper signals to notify the workmen of its approach. His whole evidence is directed to prove that the construction of the traveller was defective in that there was no guard on the wheels. He says that when he was coming up from under the platform of the bridge he saw the traveller stop at a short distance, two or three feet, from the the place where he put his hand on the rail to steady himself, and he does not suggest, as he would naturally have done had the thought been present to his mind, that the traveller then moved forward and crushed his hand without giving him warning. His only griev-

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ance is that there was nothing in front of the wheels to attract his attention by physical contact with his hand to the danger to which he was exposed. It is only after the engineer, who controlled in part the working of the traveller, had testified to the practice of omitting signals after the momentary stop and the subsequent setting in motion of the traveller without sounding a whistle, and the divided control over the movements of the traveller which moved forward as much under the direction of the man under the lower platform at the spool as of the engineer above came out in the evidence that it occurred, if at all, to counsel to suggest this ground of negligence or defect in the system under which the traveller was operated. I am much impressed by what the judge said in his charge, in the extract quoted by Mr. Justice Anglin, and no attempt was then made to correct him. But, on the whole record, it appears that there was no proper system of signals such as it was the duty of the employers to provide for the due protection of their employees, and, in the alternative, if there was a proper system originally adopted it was negligently departed from to the knowledge of those in charge of the work. It is apparent on the whole evidence, as the case stood when it went to the jury, that the system of signals was, by reason of the divided control of the traveller, imperfect. All the engineer can say is that his engine did not stop at the time when the plaintiff says it was at a standstill, but under the system under which the traveller was operated the engine may have been revolving and the wheels of the traveller at a standstill if the clutch was off the rope or if the rope was not tight on the drum.

It is, therefore, apparent that there may have been

and probably was a misunderstanding between the man at the engine and the man on the platform below, who co-operated in the control of the movements of the traveller, and to this the accident may be attributable. There also seems to have been a complete misunderstanding as to the system adopted for the proper warning of employees of approaching danger. The engineer, over and over again, affirms that the system did not require a signal to be given for what he calls "momentary stops," whereas all the workmen examined agree that each time the traveller started after having been at rest they expected to receive a signal and this undoubtedly seems to be a very reasonable view to take if the system was really intended to be effective.

How, indeed, could a workman, in the circumstances in which the plaintiff was placed, seeing the traveller at a standstill, decide whether it was stopped for a moment or for a lengthened period of time? If to this we add the divided control over the movements of the traveller, the conclusion that the system was defective would appear to be irresistible.

It is now argued, however, that this ground of liability was not properly put to the jury. I certainly am of opinion that it was put in issue by the pleadings. In plaintiff's statement of particulars it is alleged that his personal injuries were sustained by reason of the negligence of the defendants in respect to paragraph F 1. It is quite true, as forcibly urged by my brother Anglin, that the judge's charge was not as full or as complete on this ground of liability as it should have been. After full consideration I adopt the view of Mr. Justice Duff as to the duty of counsel and the powers of this court in such a case as we have now

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under consideration. We have the whole record before us. The issues may not have been very logically put to the court, the evidence may not have been skillfully marshalled, and the jury may not have been very clearly or fully directed, but, if on the pleadings and evidence we are satisfied that substantial justice has been done, that both parties have had their day in court, it is not only our right but our duty to say so and avoid further costly litigation and no less ruinous delay. The old Latin maxim still has its place in our system, *"interest reipublicæ ut sit finis litium."*

I would allow the appeal with costs.

DAVIES J. (dissenting).—I would allow this appeal but would direct a new trial alike on the common law claim and the statutory claim under "Employers' Liability Act" with costs to abide the event.

IDINGTON J.—The appellant's hand was crushed by a machine, called a traveller, used in bridge building whilst he was necessarily holding on to the rail over which the traveller ran.

He tells what he was doing. Before putting his hand on the rail for support he says:—

Q. Were you giving any directions to the workmen ?

A. I turned around and saw the traveller was standing still, and I told the bucker up to straighten the needle beam.

* * * * *

Q. And how long were you up in that position before your hand was cut ?

A. I should judge about three seconds, probably a little more than that, five or six seconds; long enough to look down and tell him to go ahead and straighten it.

Q. Before you put your hand on the rail did you see where the traveller was ?

A. Yes, sir.

Q. Where was it ?

A. Standing right back of me, about two feet from me, standing still.

Q. Standing still ?

A. Standing still.

Q. What was it doing — what was the traveller doing ?

A. It was standing still.

* * * * *

Q. Was there any signal given with respect to the — immediately before the car moved on your hand ?

A. When I stepped on the chord I could see the traveller standing there; there was no whistle blown when I got up there.

Q. How long before that had there been any signal ?

A. How long before that ?

A. Yes ?

A. I could not say.

Q. Then up to the time of your being injured, and whilst you were on the bridge you know of no signal ?

A. No signal; no whistle blown.

Q. No whistle blown. Had a whistle blown what would you have done ?

A. Got back on the staging.

Another witness corroborates this as follows:—

Q. What attracted your attention when Creveling was injured ?

A. I heard him holler, and then I came up to see what had happened.

Q. Was he injured ?

A. He was injured.

Q. Before he was injured, right at the time he was injured, and before within a reasonable length of time, was there any signal given by the engineer ?

A. No.

Q. Have you any doubt about it at all ?

A. No.

The man operating the engine alleges he gave two blasts when the traveller started from a point a hundred feet or more to the rear of where appellant and his mate were working, but does not pretend to have given any later.

We have no proof of any rules laid down by the respondent for the protection in this regard of the men who were engaged in the dangerous work in question. All, including appellant, who speak on the sub-

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ject, say the men depended on the warning of the whistle at the starting of the traveller in motion. If that had been rightly observed appellant admits its protection would have sufficed for him though he and others say besides that a guard projecting ahead of the traveller is in common use in many places. No such guard was used by respondent. No statutory provision relative thereto seems to exist except what indirectly bearing thereon exists in the "Employers' Liability Act."

The man in charge of the engine indicates that the only system he had observed was to give a blast or two blasts when he started the engine to propel the traveller on its way, and that if through any cause the traveller had to be stopped, neither he nor any one else had any duty imposed by the respondent to take steps to give further warning when starting up again to proceed further forward.

I cannot think that was such an adequate system as would discharge the respondent from its common law liability. A trap seems to have been set instead of an effectively protective system.

There seems to have been an absence of such protective measures as indicated to be necessary by the principle applied in *Smith* v. *Baker & Sons*(1), and many other cases since.

Three charges of neglect of that kind were set out in the statement of claim, and a good deal more attention was paid at the trial to the want of a guard than to that involved in the said system or want of system, but that does not, when all were plainly before the court, help respondent, yet its counsel urges for that reason the verdict should not stand.

(1) [1891] A.C. 325.

A plaintiff is entitled to hold the judgment awarded him as result of a general verdict when there is evidence upon which the jury could properly find such verdict; and that even though the learned trial judge had overlooked the evidence and its possible application in law and the counsel had been warring about something else, possibly having only a remote relation to the common sense view of the case; always provided, however, that the judge has not misdirected the jury.

The evidence quoted above was such and I see no misdirection.

If there had been a proper guard then the question might have arisen if that should not be held sufficient in itself.

I think the appeal should be allowed with costs.

DUFF J.—In his statement of claim the plaintiff charges negligence as follows:—

3. The said personal injuries, which the plaintiff sustained as aforesaid, were caused by reason of the negligence of the defendant, particulars of which are as follows:—

(*a*) In not having any system, or in the alternative any proper and sufficient system of signals to carry on the work of construction in safety to the plaintiff.

(*d*) In not having guards or other protection on or in front of the wheels of the said traveller.

The jury found a general verdict in favour of the plaintiff on his claim for damages in respect of the respondents' alleged liability at common law. The Court of Appeal set aside this verdict and ordered a new trial for the purpose of assessing damages under the "Employers' Liability Act." This judgment of the Court of Appeal was based on the view taken by all the members of the court that the plaintiff had ad-

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mitted the existence of a "system" of signals which, if properly carried out, would afford sufficient protection.

With respect, I think the Court of Appeal misapprehended the effect of the evidence. There was evidence no doubt given on behalf of the plaintiff and the plaintiff himself stated in his own testimony in so many words, that there was a "system" of signals which, if carried out, would have been satisfactory. But it is quite obvious that all the witnesses while using the word "system" were speaking of the practice of signalling as they had observed it. From this practice, as they saw it, they naturally enough inferred that it was the duty of the engineer to see that a signal was given by a blast of his whistle whenever (the travelling derrick having stopped) it was about to be set in motion again. But the engineer himself was called as a witness. He was the only witness who was competent to give evidence at first hand of anything which could properly be described as a "system" in any relevant sense, that is to say, of a practice which under his instructions, express or implied, it was obligatory upon him to observe in the execution of the duties of his service. He explicitly denies that there was any such obligatory practice requiring him to give any signal after what he described as "a momentary stop." And he gives evidence which is intended to convey the impression, and may very well have convinced the jury that (owing to the manner of construction of the travelling derrick and the fact that the control of the locomotive apparatus was not in the hands of the engineer himself, but in the hands of others who were not within his view while working

the apparatus) it was quite possible for the derrick to be brought to a stand still and set in motion very shortly afterwards without any signal being given; and that in the circumstances it was not practicable to provide, and the "system" such as there was, did not in fact provide for the giving of a signal in such cases.

This evidence appears to have been overlooked in the court below; and having regard to it, it seems impossible to sustain the judgment setting aside the verdict on the ground on which that judgment was placed by the learned judges who took part in it. Mr. Tilley now argues, however, that the negligence charged in paragraph 3 (*d*), namely, the absence of a guard, is a charge which cannot be sustained on the evidence. And he contends that as the charge put forward in paragraph 3 (*d*) was the only charge the plaintiff attempted to establish in his own case in chief and the only ground of negligence submitted to the jury, the action must be dismissed, unless it should be thought just that as an indulgence to the plaintiff there should be a new trial for the purpose of enabling the plaintiff to establish a case reposing on the ground of negligence charged in paragraph 3 (*a*) — absence of a sufficient system of signals. I think this ingenious analysis quite fails to do justice to the significance of the evidence in its bearing upon the case advanced by the appellant at the trial. The plaintiff offered evidence to shew that the dangers arising from the operation of such machines were commonly avoided by mechanical protection consisting of a guard which (sweeping the rails upon which the derrick moves) automatically gives warning (by physical contact with his person) to any workman exposed to the peril

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of such mishaps as that from which the appellant suffered. It was not denied by the plaintiff's witnesses, as I have already indicated, that the giving of signals by blasts after all stops, would, if faithfully observed, be a practice affording sufficient protection; but it was contended that the faithful carrying out of any such practice could not be, in the circumstances, implicitly relied upon and that it ought to be supplemented by the mechanical warning suggested. That was the case put forward by the plaintiff, and it may be that it ought to fail if it rested solely upon the testimony offered on his behalf in his case in chief. But the answers of the engineer to which I have referred, brought out in cross-examination on behalf of the plaintiff, affords evidence to the benefit of which the plaintiff is as much entitled as of the evidence given by his own witnesses called by himself. Those answers afford ample grounds, as I have already pointed out, for a finding by the jury that the so-called "system" or the practice in operation was, for the reasons I have above mentioned, as the plaintiff contended it must be, quite valueless as a protection in such circumstances as those which led to the mishap from which the plaintiff suffered. It was, therefore, open to the jury to find that the failure to provide some such additional safeguard as the mechanical provision suggested constituted in the circumstances a default in performance of the obligation of the defendant company to take reasonable measures for the protection of its employees in a situation which in the absence of such precautions constantly exposed them to the risk of injury; the evidence of the respondents' foreman indeed is quite sufficient to support a finding

that a mechanical guard effective for the purpose suggested could be provided without difficulty.

I see no reason whatever to suppose that this issue was not placed before the jury. The evidence upon which the respondents rely and which prevailed with the Court of Appeal as shewing the existence of a satisfactory and sufficient system of warning was brought out by the respondents' counsel in cross-examination of the plaintiff himself deliberately and beyond all doubt with the object of presenting an answer to the complaint of insufficient provision for warning. We are asked by the respondents' counsel now to assume that, as bearing upon the issue whether or not sufficient provision was afforded for warning the workmen of the movement of the crane, counsel for the respondents at the trial failed to bring before the jury this evidence obtained from the plaintiff and his witnesses for that very purpose and to ask the jury to consider whether or not the complaint made by the plaintiff of insufficient means of warning was answered by it.

It is incredible that any such course was in fact pursued. It is incredible indeed, in view of the evidence given on the cross-examination by the engineer, that the question of the adequacy of the alleged "system" should not have been put before the jury as one of the elements governing the determination of the question upon which the learned trial judge specifically asked them to pass, namely, whether in the circumstances the failure to provide a mechanical "guard" constituted in contemplation of law a neglect of the respondents' duty to the appellant. Since there was, as I have said, evidence sufficient to sustain the

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finding of the jury on the issue just mentioned upon which they admittedly did pass, it is unnecessary to say more upon the points argued by counsel in support of the judgment in the court below.

It is suggested, however, from the Bench, that the proper judgment here was not to restore the judgment of the learned trial judge but to direct a new trial. For several reasons, I think such a judgment by this court would be unjust. But it should be sufficient to observe that the suggestion is not based upon any alleged misdirection or want of direction, calculated to mislead the jury, of which any complaint whatever has been made by the defendant company at any stage of the proceedings. Indeed, it is manifest that at no stage of the proceedings has the defendant company suggested the propriety of a new trial. From the beginning the verdict has been attacked by it on the ground, and only on the ground, that the finding on the issue submitted specifically by the learned trial judge is not reasonably supported by the evidence. That contention rejected, the whole attack on the verdict — the question of damages and the question of *volens* apart — entirely fails.

That being the case even if the learned trial judge's charge were open to serious objection, and I think it is not, it is now too late for the defendant company to ask for a new trial in this court.

In *White* v. *Victoria Lumber and Manufacturing Co.*(1), at page 612, Lord Shaw of Dunfermline, in delivering the judgment of the Privy Council, said:—

> For in their judgment it is not open to a party who has not used the opportunity at the trial, nor, either in writing or in argument, used the opportunity in the Court of Appeal, to state for the first

(1) [1910] A.C. 606.

time at their Lordships' Bar an objection to the verdict of a jury on the ground of misdirection. It is, of course, possible that some highly exceptional case might arise, but in general it may be laid down that neither party to proceedings before the Privy Council should be permitted to start fresh points of objection which have been open to him and have been neglected at opportune and convenient stages of the litigation in the Colonial Courts. It is not in accordance with justice to the parties that, after an appeal has been made to the Privy Council, they should for the first time learn what the true nature of the case to be made against them is.

I think this states the rule by which this court has been and ought to be guided.

As to the defence of *volens* it appears to me that it would be a hopeless contention that the jury were bound to find in face of the engineer's evidence that the plaintiff fully understood the danger to which he was exposed by reason of the defects admittedly unknown to the plaintiff in the alleged system of signals. As to damages I do not think any sufficient case has been made out for interfering with the verdict of the jury.

ANGLIN J. (dissenting).—In my opinion there was evidence on which a jury might (I do not say it should) have found the defendants liable at common law either because the system of warning signals provided by them was defective or because, though as perfect as it could reasonably be made, it left the workmen so unnecessarily exposed to danger that it was negligence in the defendants as employers not to have equipped the "traveller" with some guard or mechanical contrivance to give warning, which was said to be practicable and in common use. Although there were some admissions made by the plaintiff that if the system of signals had been properly carried out by the engineer it would have afforded adequate protection,

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the evidence of the engineer himself scarcely pointed to that conclusion. But as the case was left to the jury there was no issue submitted to them as to the sufficiency or insufficiency of the signalling system. The whole direction as to the common law liability of the defendants is contained in this single paragraph of the charge:—

> I will deal with common law first. When a plaintiff comes in court in an action of this kind the onus is on him, in the first place, to prove the negligence of his employer; that means that he must put his finger on something and say to you that the employer failed to live up to the standard which the law imposed upon him, which standard is that the employer must not subject his men to unnecessary risk, or, in other words, that he must give his men a safe place to work under all the circumstances of the occupation that he is employed in. You, gentlemen of the jury, are to use your common sense in determining whether in this particular accident this man was given a safe place to work, and whether subjected to unnecessary risks, remembering it is the duty of the employer not to subject his employees to such risk, or, to put it the other way, he must give his employee a safe place to work; and you will remember also, that the plaintiff must bring before you affirmative evidence that convinces you that the probabilities are, at any rate, on his side that he was not given a safe place to work, or he was subjected to unnecessary risk. This case has been put to you very clearly; more clearly I may say than cases of this nature often are. Here the plaintiff fixed on one thing to found his common law action upon. He says that the machine should have been guarded and he says that in consequence of its not being guarded he was not given a safe place to work under all the circumstances. As I say, it is for you to say whether that is so, or not; if that is so, and if you find affirmatively that he has proven that, then he has made out a case affirmatively and at common law the employer is liable unless he can meet that case with some defence.

Under this direction the jury may have found the defendants liable for not having provided a mechanical warning device, although their signalling system was perfect in itself and adequate as a means of warning, if carried out, and the defendants very fairly argue that it is a reasonable inference that that was

in fact their finding. It is true the plaintiff now contends that the evidence shews that the signalling system was defective in not providing for momentary stops and that it was inadequate because the engineer, who was charged with the duty of signalling, had not complete or immediate control of the movements of the traveller and his particulars of negligence covered these points. But the plaintiff allowed the jury to be instructed that "he fixed on one thing to found his common law action upon," namely, the absence of a guard. In effect the jury were told that there was no case before them of a defective or inadequate signalling system as a ground of action, either because the evidence did not make it, or because the plaintiff did not base his claim upon it. Were they not also, in effect, told that the question as to the necessity for a guard or mechanical warning device did not depend on these considerations ?

They were not told that the duty of the employer did not require him to provide every conceivable protection for the workmen or to take every precaution that could be suggested, but was limited to furnishing such safeguards as were reasonably sufficient to ensure them against injury. They were not instructed that if the system of signals provided was adequate for that purpose the defendants could not properly be found negligent for having failed to do something more. It is true that they were told that it was for them to say whether it was negligent on the part of the defendants not to have guarded the machine "under all the circumstances." But these circumstances included the engineer's failure to give signals, and the jury were not told that if this failure was due merely to the personal fault of the engineer and not

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to a defect in the system of signalling as prescribed by the defendants, that was something which they should not take into account in considering the necessity for a mechanical guarding device or whether the defendants were negligent in not having supplied it. They were not told that the defendants were not answerable at common law if, but for the personal fault of the engineer, the plaintiff would have received sufficient warning.

On the whole I think the charge was inadequate and that the verdict at common law cannot be sustained because of non-direction upon points on which the jury should have been instructed.

I have not overlooked such well-known cases as *Nevill* v. *Fine Art and General Ins. Co.*(1), and *White* v. *Victoria Lumber and Manufacturing Co.*(2), where the necessity of taking with precision and in detail at the trial and in the first Court of Appeal objections to a verdict on grounds of misdirection or non-direction is insisted upon. But I think this is one of those exceptional cases, referred to by Lord Shaw of Dunfermline in the last cited case, in which the omission to take the objection should not prevent the court ordering a new trial. Upon the general verdict rendered, it is, in view of the defective and inadequate charge, quite impossible to know whether the jury based their conclusion on considerations which would justify a finding of liability at common law. For this both parties are to blame — the plaintiff quite as much as the defendants — though the defendants are, of course, alone responsible for the failure to make specific objections to the charge a ground of appeal to the Court of Appeal of British Columbia.

(1) [1897] A.C. 68, at p. 76. (2) [1910] A.C. 606, at p. 612.

This case affords a striking illustration of the mistake of allowing juries by returning a general verdict to evade answering direct questions put to them in order to make their findings of fact certain and definite. Where, as in this case, the charge is meagre and there are several issues presented a general verdict is far from satisfactory and must often result in uncertainty as to the ground on which the jury has proceeded.

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

Appeal allowed with costs.

Solicitors for the appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for the respondents: *Martin, Craig, Parkes & Anderson.*

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*Feb. 11, 12.
*March 15.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) .. } APPELLANTS;

AND

LEOSOPHIE PARENT AND JOSEPH CHALIFOUR (PLAINTIFFS) ..... } RESPONDENTS.

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

Railways—Shipping contract—Carrying person in charge of live stock—Free pass—Release from liability—Approved form—Negligence — Action by dependents — Conflict of laws — "Railway Act," R.S.C., 1906, *c.* 37, *s.* 340.

The shipping bill for live stock, to be carried from Manitoba to its destination in the Province of Quebec, was in a form approved by the Board of Railway Commissioners and provided that, if the person in charge of the stock should be carried at a rate less than full passenger fare on the train by which the stock was transported, the company should be free from liability for death or injury whether caused by the negligence of the company or of its servants. C. travelled by the train in charge of the stock upon a "Live-Stock Transportation Pass" and signed conditions indorsed in English thereon by which he assumed all risks of injury and released the company from liability for damages to person or property while travelling on the pass, whether caused by negligence or otherwise. While the train was passing through the Province of Ontario, an accident happened through the negligence of the company's employees and C. was killed. In an action by his dependents, instituted in the Province of Quebec, it was shewn that C. could neither read nor write, except to sign his name, and that he only understood enough English to comprehend orders in respect of his occupation as a stock-man; there was no evidence that the nature of the conditions was explained to him.

Held (Fitzpatrick C.J. dissenting), that the railway company was liable for damages in the action by the dependents.

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

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Per Davies, Idington, Duff and Brodeur JJ. (Fitzpatrick C.J. and Anglin J. *contra*), that, as C. could not have known the nature of the conditions or that they released the company from liability, and the company had not done what was reasonably sufficient to give him notice of the conditions on which he was being carried, the company was liable in damages either under the law of Ontario or that of Quebec.

Per Anglin J.—Although no action would lie in Ontario unless the deceased would have had a right of action, had he survived, and such an action would have been barred there by the contract signed by him, nevertheless, in Quebec, where there is no such rule of law, the action would lie, though the wrongful act had been committed in Ontario, as it was of a class actionable in Ontario. *Machado* v. *Fontes* ((1897) 2 Q.B. 231) applied.

Section 340 of the "Railway Act," R.S.C., 1906, ch. 37, provides that "no contract, condition, * * * or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall * * * relieve the company from such liability unless such class of contract * * * shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited." The Board of Railway Commissioners made an interim order permitting the use by the company, until otherwise determined, of the shipping form used, but did not expressly authorize the form containing the conditions signed by deceased.

Held, per Fitzpatrick C.J. and Davies and Anglin JJ. (Idington, Duff and Brodeur JJ. *contra*), that the contract signed by deceased was one of a class of contracts authorized by the Board.

Per Duff J.—The contract signed by deceased could not have the effect of limiting the liability of the company in respect of death because it was not in a form authorized or approved by the Board of Railway Commissioners and there had been no order or regulation made by the Board expressly determining the extent to which the company's liability should be impaired, restricted or limited as provided by sub-section 2 of section 340 of the "Railway Act."

Judgment appealed from, affirming the judgment of the Superior Court (Q.R. 46 S.C. 319) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the

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Superior Court, District of Quebec(1), by which the plaintiffs' action was maintained with costs.

In the circumstances stated in the head-note, one Joseph Chalifour was killed while travelling as a stock-man, in charge of live stock, on a train of the company, defendants, in a railway accident which happened at Chapleau, in the Province of Ontario, and the action was brought by his dependents in the Province of Quebec to recover damages as compensation for the injury. The case was tried by a judge, without a jury, and judgment was entered in favour of the plaintiffs for $5,000 damages. This judgment was affirmed by the judgment now appealed from.

G. G. Stuart K.C. for the appellants. The judgment appealed from is erroneous because (1) there was no evidence to justify disregard of the release contained in the pass signed by deceased on which he was travelling; (2) the law of Quebec cannot apply to a right of action resulting from tort committed in Ontario; (3) respondents' rights, if any, were statutory rights accruing under the law of Ontario; (4) the release was equally effective to bar respondents' right of action, whether construed according to the law of Quebec or that of Manitoba, where the contract was signed by deceased; (5) the deceased could not have maintained an action, had he survived, and, consequently, the respondents cannot recover; (6) the contract signed by deceased was a release of all claims whether arising from death or injuries. We rely upon the following authorities: Lafleur, "Conflict of Laws," p. 198, and authorities cited; Storey, "Conflict of Laws," (8 ed.), para. 625, n. (*a*); Dicey, "Conflict of Laws," p. 659, and American notes, specially at p.

(1) Q.R. 46 S.C. 319.

699; 8 Laurent, "Droit Civil International," Nos. 9, 10, 11; *Robinson* v. *Canadian Pacific Railway Co.*(1); *Read* v. *Great Eastern Railway Co.*(2); *Griffiths* v. *Earl of Dudley*(3), at p. 365; *Glasgow and London Ins. Co.* v. *Canadian Pacific Railway Co.*(4); *Conrod* v. *The King*(5), *per* Anglin J., at p. 585; *British Columbia Electric Railway Co.* v. *Turner*(6), *per* Davies J., at p. 479, Idington J., at p. 484, and Duff J., at p. 491; *Williams* v. *Mersey Docks and Harbour Board*(7); *Parker* v. *South Eastern Railway Co.*(8); *Bergevin* v. *Quebec and Lake St. John Railway Co.*(9); *Robertson* v. *Grand Trunk Railway Co.*(10); *Mercer* v. *Canadian Pacific Railway Co.*(11); *Sutherland* v. *Grand Trunk Railway Co.*(12); *Provident Savings Life Assurance Society* v. *Mowat*(13), at p. 155; *The Queen* v. *Grenier* (14), *per* Strong C.J., at p. 51; *Glengoil SS. Co.* v. *Pilkington*(15).

In England, prior to "Lord Campbell's Act," there was no recourse in damages for the death of a human being. In *Baker* v. *Bolton*(16) Lord Ellenborough held: "In a civil court the death of a human being could not be complained of as an injury." And this case was followed and approved in *Osborn* v. *Gillett* (17); *Clark* v. *London General Omnibus Co.*(18); *Jackson* v. *Watson & Sons*(19).

(1) [1892] A.C. 481.
(2) L.R. 3 Q.B. 555.
(3) 9 Q.B.D. 357.
(4) 34 L.C. Jur. 1.
(5) 49 Can. S.C.R. 577.
(6) 49 Can. S.C.R. 470.
(7) [1905] 1 K.B. 804.
(8) 2 C.P.D. 416.
(9) Q.R. 43 S.C. 38.
(10) 24 Can. S.C.R. 611.
(11) 17 Ont. L.R. 585.
(12) 18 Ont. L.R. 139.
(13) 32 Can. S.C.R. 147.
(14) 30 Can. S.C.R. 42.
(15) 28 Can. S.C.R. 146.
(16) 1 Camp. 493.
(17) L.R. 8 Ex. 88.
(18) [1906] 2 K.B. 648.
(19) [1909] 2 K.B. 193.

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R. C. Smith K.C. and *Savard* for the respondents. The form of the contract indorsed on the pass in question was never authorized or approved by the Board of Railway Commissioners pursuant to section 340 of the "Railway Act." The form of the shipping bill, which had been so approved, was a separate and distinct contract from that which was signed by deceased, the parties were not the same and there was no consideration for the agreement between deceased and the company; it was *nullum pactum,* according to the law of Quebec; arts. 982 to 989 C.C.; the reduction in the fare benefited only the shippers; *Robinson* v. *Grand Trunk Railway Co.*(1), *per* Latchford J., upheld by the Supreme Court of Canada(2). Deceased was an illiterate man and signed the conditions on the pass in circumstances in which he did not give a full and valid consent to the release; the effect of the conditions was not explained to him. The shipping bill was never seen or signed by him nor was it read to him. The case of "death" is not mentioned in the conditions of the pass, it merely refers to accident or damage to person or property. The separate and distinct right of action of the widow and children, under article 1056 C.C. cannot be barred by an act of deceased: *Robinson* v. *Canadian Pacific Railway Co.*(3); *Miller* v. *Grand Trunk Railway Co.*(4); 1 Laurent, 89-91; 1 Migneault, 80; Félix, "Droit International," p. 53; Bullenois, vol. 2, p. 467; and the law of the domicile governs. See *The Queen* v. *Doutre*(5).

THE CHIEF JUSTICE (dissenting).—This is an appeal from the Court of King's Bench, Quebec,

(1) 26 Ont. L.R. 437; 14 Can. Ry. Cas. 441.
(2) 47 Can. S.C.R. 622.
(3) [1892] A.C. 481.
(4) [1906] A.C. 187.
(5) 28 L.C. Jur. 209.

affirming the judgment of the Superior Court by which the widow and children of one Jos. Chalifour recovered $5,000 from the railway company for his death. The accident occurred at Chapleau, in the Province of Ontario. The deceased was travelling on a pass issued by the defendant company to the plaintiff's employer, the Gordon Ironsides Co. He was engaged in the shipment of cattle; the train upon which he was being carried met with an accident through the negligence of the company's servants which resulted in his death. The defence turns in large measure upon the effect of the contract between the Gordon Ironsides Co. and the railway company which provided that, where a pass was issued, the company should be freed from all liability whether caused by the negligence of its servants or otherwise.

The contract was made in Manitoba and the court below held that as no evidence was given respecting the law in Manitoba, it must be assumed to be the same as in the Province of Quebec and the case was, therefore, governed by the Quebec law.

In Quebec the wife and children have an independent cause of action (art. 1055 C.C.). But the death of the husband and father must be caused by an "offence or quasi-offence" committed by the party proceeded against. In other words, delict is the foundation of the right of action.

It has been recently said that negligence, to be negligence, must be a breach of duty and unless there was a breach of duty to take care, there was no negligence. Here the deceased was, at the time of the accident, travelling on the railway on a pass issued by the company respondent under statutory authority,

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and a condition of that pass was, that the deceased assumed

all risk of accident or damage to person or property and that the company should be free from all liability in respect of any damage, injury or loss caused by the negligence of the company, or its servants or employees or otherwise howsoever.

This pass was issued by the company in connection with a "special live stock" contract approved of by the Board of Railway Commissioners and entered into by the employers of the deceased, containing this clause:—

> In case of the company granting to the shipper or any nominee or nominees of the shipper, a pass or privilege less than full fare, to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit, and at the owner's risk as aforesaid, then as to every person so travelling on such pass, or privilege less than full fare, the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever.

The legislation giving the Board of Railway Commissioners power to order and approve of such a contract was fully referred to and discussed in the case of *Robinson* v. *Grand Trunk Railway Co.*(1), disposed of by this court a short time ago and in which I had the misfortune to differ from the majority of my colleagues (*vide* secs. 26, 30, 31, 284, 340, R.S.C. ch. 37). The following sections of the same chapter should also be considered: 55, 322, 327, 339.

The order of the Board authorizing the railway companies to use the form of "live stock contract" above referred to was duly published as required by the "Railway Act" (sec. 339), and thereafter had a like effect as if enacted in that Act (sec. 31).

(1) 47 Can. S.C.R. 622.

The terms of the pass on which the deceased was travelling were binding on all the parties who presumed to avail themselves of the privileges which that pass conferred.

This case is, in my opinion, distinguishable on other grounds from such cases as *Henderson* v. *Stevenson* (1), and *Parker* v. *South Eastern Railway Co.* (2), to which we were referred by respondent at the argument. In those cases the conditions relied upon were contained in an ordinary transportation ticket in common form, and it did not appear that the party receiving the ticket knew or had any reason to suspect that there were any special or exceptional conditions attached to it.

I agree with Mr. Justice Anglin that the deceased had notice of the conditions subject to which the pass was issued to him, or at least had reasonable notice and opportunity to have these conditions explained to him, and he did not choose to take advantage of that opportunity. It should not be lightly assumed that any man in this country is so ignorant as to believe that he may travel on a railway without a contract of some sort.

It is quite true, as Lord Watson pointed out in *Robinson* v. *Canadian Pacific Railway Co.* (3), that the provision as to duelling in article 1056 shews, that cases were intended to be comprised in which there could be no right of action in the deceased. But the death must have been caused by the commission of an offence or quasi-offence, and if there was no duty owing to the deceased by the company there could be

(1) L.R. 2 H.L. (Sc.) 470. (2) 2 C.P.D. 416.
(3) [1892] A.C. 481.

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no breach of duty and, therefore, no negligence which could give rise to this action.

I am of opinion this appeal should be allowed with costs.

Davies J.

DAVIES J.—This appeal is from the judgment of the Court of King's Bench (appeal side) of Quebec, affirming a judgment of the Superior Court holding the appellant liable in damages for the death of one Joseph Chalifour, the husband and father of the widow and children bringing the action.

Chalifour's death occurred in the Province of Ontario in a collision between a locomotive of appellants' railway and a car of appellants in which deceased was travelling in charge of cattle belonging to his employers, the shippers of the cattle.

The contract to carry the cattle from Winnipeg, Manitoba, to Montreal, Quebec, was made in the former city, and the accident occurred in the Province of Ontario.

Both courts below held that the rights of the parties under the contract were to be determined by the law of Quebec, where the carriage of the cattle ended, and that the rights of the widow and children to recover damages for the death of the deceased caused by the admitted fault of the company was under that law an independent right and could not be barred or destroyed by a contract or covenant made with the company by Chalifour before his death.

As establishing such a covenant, the appellant relied upon a contract between itself and the shippers of the cattle, the form of which had the approval of the Board of Railway Commissioners and also upon a condition printed upon the back of what was called a

pass, under which the deceased, as one of the men in charge of the cattle, was travelling.

These conditions were signed by one Addshead, who appeared to be the principal man in charge of the cattle, and also by Chalifour, the deceased.

The contentions of the company were first that the law of Ontario, where the accident occurred and of Manitoba where the contract was made were the same and that the rights of the plaintiffs and the company's liabilities were to be determined by that law and not by the law of Quebec; and, secondly, that the conditions of the contract or pass absolved them from all liability for damages arising out of the accident causing Chalifour's death, whether in the words of the condition,

> such accident, injury, damage or loss is caused by the negligence of the company or of its servants or employees or otherwise howsoever.

In other words, the company contended that it had with the sanction of the Railway Board, contracted itself out of any liability whatever, even if caused by gross negligence or otherwise arising out of the carriage of Chalifour as man in charge of the cattle from Winnipeg to Montreal.

In the view I take of the proved facts and the liability of the company under them, it is not necessary that I should express any opinion upon the important question as to whether the law of Quebec or that of Ontario or Manitoba is to be the governing law in this case.

Mr. Smith contended for the respondents that while the Railway Board had sanctioned the form of contract between the shippers of the cattle and the company exempting the latter from liability in respect

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of the death, injury or damage of the men in charge of the cattle whether caused by negligence or otherwise, it had not expressly sanctioned the form of pass or contract which the company had made or contended it had made with the man himself and that such latter contract was still within the provisions of section 340 of the "Railway Act" prohibiting contracts impairing carriers' liabilities unless authorized or approved of by the Board.

I am of opinion that the class of contract to be made between the railway company and its shippers approved of by the Board is quite sufficient to cover the pass or contract made with Chalifour, if that is binding, and the omission of the word "death" in this latter contract or pass does not affect its real meaning or limit that meaning.

The question, however, remains to be determined whether any binding contract with conditions as those contended for, was made between Chalifour and the company, and that must be determined upon a consideration of all the facts and circumstances.

Chalifour was a French Canadian who resided with his family in the Province of Quebec. He could neither read nor write French or English, but he could write his name. He was quite an illiterate man and as proved could not even read the newspapers in his own language. He spoke and understood a little English, enough to enable him to understand orders or instructions respecting his duties or employment as a cattle drover or caretaker. He is one of a large class in Quebec well known in Canada.

Before the train started from Winnipeg he and his co-employee, Addshead, signed a paper or rather certain "conditions" on the back of a paper on the front

of which headed in large capitals were the words "Live Stock Transportation Pass."

It was signed in the presence of two employees of the company, one Devillers, who witnessed it and was an interpreter of foreign languages and understood French, and one Anderson, another employee, who did not understand or speak French.

The evidence they gave is somewhat meagre. Anderson says he does not understand French, but stood beside Devillers while he filled in the pass, that there was some conversation between Devillers and Chalifour in French, but he did not understand it. All he seemed to be clear about was that if any questions were asked with respect to the conditions they were explained. Devillers does not remember what the circumstances were or if he had any conversation with Chalifour or whether he explained the conditions.

It seems quite certain that the live stock contract itself was not shewn to Addshead or Chalifour and that the only paper they saw at all was one on which was printed on the front in large type, "Live Stock Transportation Pass," and on the back "conditions" which they signed. My conclusion is that all they saw was the back of this paper headed "conditions" and that they asked no questions, received no explanations and really did not have any idea what the paper was, except that it had something to do with the cattle which they were in charge of and their carriage, and that they as men in charge had to sign it.

To draw an inference that this illiterate French Canadian, who only spoke or knew enough English to take and carry out orders connected with his work in taking care of cattle and tending them; who could not read in either language nor write anything beyond

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his own name, knew or could have known the nature of the document he was signing, is something I must decline to do.

Whether he did so know or must be held to have known is more an inference of fact to be drawn from all the circumstances than a presumption of law.

Chalifour's signature under the facts and circumstances proved, if it carries us as far certainly does not carry us any further than his acceptance of the pass if handed to him would have done without his signature.

All he knew was that he was one of the men in charge of the cattle to take care of them and tend them to Montreal: If the heading of the pass itself "Live Stock Transportation Pass," had been read to him it would not have conveyed the slightest idea to his mind, in my humble judgment, that he was agreeing with the company to take all the chances of the trip and that in case he was injured the company were not to be liable to him even for the grossest negligence.

I think the cases clearly establish that there is no rule or presumption of law that a person is necessarily bound by the conditions contained in a document delivered to him as a transportation ticket, and I do not think that the mere signature itself under the circumstances and facts proved in this case changes the law with respect to such rule or presumption. *Henderson* v. *Stevenson* (1); *VanToll* v. *South Eastern Railway Co.* (2).

My position is that Chalifour did not know it was a ticket or pass at all he was signing. It was not handed to him, but to Addshead, his co-worker, and,

(1) L.R. 2 H.L. (Sc.) 470. (2) 12 C.B.N.S. 75.

after the accident, was produced by Addshead, who evidently had retained possession of it all along. It does not appear ever to have been in the hands or possession of Chalifour.

In the case of *Parker* v. *South Eastern Railway Co.*(1), Mellish L.J., after reviewing several of the cases, at page 422, says:—

> Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions.

And at page 423:—

> I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

The real and proper question seems to be whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition under which they seek to be released from liability.

The well known case of *Watkins* v. *Rymill*(2), in 1883, may seem somewhat at variance with that statement. It was there held that

> if a document in a common form is delivered by one of two contracting parties to and accepted without objection by the other, it is binding upon him, whether he informs himself of its contents or not.

This decision made no allowance for the special circumstances under which the document was de-

(1) 2 C.P.D. 416. (2) 10 Q.B.D. 178.

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livered or the capacities or experience and knowledge of the parties.

The later decision of the House of Lords, however, in *Richardson, Spence & Co.* v. *Rowntree*(1), is that the question is one of fact and whether the carrier did what was reasonably sufficient to give the plaintiff notice of the condition under which they claimed exemption from liability.

The jury in that case found in answer to the question put to them that the company did not do so and, as the Lord Chancellor says, at page 220:—

> The only facts proved were that the plaintiff paid the money for the voyage in question, and that she received the ticket handed to her folded up by the ticket clerk so that no writing was visible unless she opened and read it. There are no facts beyond those. Nothing was said to draw her attention to the fact that this ticket contained any conditions and the argument is that where there are no facts beyond these the defendants are entitled, as a matter of law, to say that the plaintiff is bound by those conditions. That, my Lords, seems to me to be absolutely in the teeth of the judgment of the Court of Appeal in the case of *Parker* v. *South Eastern Railway Company*(2), with which I entirely agree.

Lord Ashbourne in concurring with the Lord Chancellor, remarked:—

> The ticket in question in this case was for a steerage passenger — a class of people of the humblest description, many of whom have little education and some of them none.

Lord Watson and Lord Morris concurred.

In a still later case, *Marriott* v. *Yeoward Bros.*(3), Pickford J., in delivering a judgment as to the effect of conditions on the ticket of a passenger said at page 992:—

> For the purpose of the judgment I am about to deliver I assume that the loss was occasioned by the felonious act of the defendants'

(1) [1894] A.C. 217. (2) 2 C.P.D. 416.
(3) [1909] 2 K.B. 987.

servants. Under those circumstances the first point that I have to determine is whether the conditions on the ticket did or did not form part of the contract. That question is one of fact. I was, indeed, invited by the defendants' counsel to hold as matter of law, upon the authority of the well-known case of *Watkins* v. *Rymill*(1), that the mere delivery and acceptance of the ticket with the conditions upon it was sufficient to make the conditions part of the contract. But that I am not at liberty to do. The case of *Richardson* v. *Rowntree*(2), in the House of Lords, clearly decided that the acceptance of the ticket does not of itself necessarily make all the conditions upon that ticket a part of the contract. It decided that the proper questions to be left to the jury were those which were formulated by the majority of the Court of Appeal in *Parker* v. *South Eastern Railway Co.*(3), namely, (1) whether the plaintiff knew that there was writing or printing on the ticket; (2) whether the plaintiff knew that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage; and (3) whether the defendants did what was reasonably sufficient to give the plaintiff notice of the conditions. For the purpose of determining the answer to the third of those questions I think that the cases of *Richardson* v. *Rowntree*(2), and *Acton* v. *Castle Mail Packets Co.* (4), shew that the jury must take into consideration the class of persons with whom the contract is made. In *Richardson's Case*(2) stress was laid upon the fact that the ticket was for a steerage passenger, a class of persons of whom many, as Lord Ashbourne observed, have little or no education. In *Acton's Case*(4) stress was equally laid by Lord Russell of Killowen in his judgment on the fact that the plaintiff was a business man.

In a late case of *Carlisle and Cumberland Banking Co.* v. *Bragg*(5), Buckley L.J. in speaking of the effect which ought to be given to documents signed by a party whose signature was really obtained by fraud and who ought not, therefore, to be bound, says, at page 496:—

I do not think myself that cases of this kind are to be confined to the blind and illiterate. Blindness and illiteracy constitute a state of things of which the equivalent for this purpose may under certain circumstances be predicated of persons who are neither blind nor illiterate. If a document were presented to me written in

(1) 10 Q.B.D. 178.
(2) [1894] A.C. 217.
(3) 2 C.P.D. 416.
(4) 73 L.T. 158.
(5) [1911] 1 K.B. 489.

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Hebrew or Syriac, I should for the purposes of that document be both blind and illiterate — blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it. It seems to me that the same doctrine applies to every person who is so placed as that he is incapable by the use of such means as are open to him of ascertaining, or is by false information deceived in a material respect as to the contents of the document which he is asked to sign.

My conclusion is that Chalifour's signature to the conditions indorsed upon the "Live Stock Transportation Pass" on which the company rely to relieve themselves from liability was obtained under conditions and circumstances which do not permit of any inference or presumption of fact that he knew or could have known what he was signing or that they were conditions of his transportation as man in charge of the cattle and that the company did not do what was reasonably sufficient to give him notice and knowledge of those conditions.

I would, therefore, dismiss the appeal.

IDINGTON J.—The late Joseph Chalifour, travelling as a servant in the employment of a firm of cattle dealers, shipping cattle from the west over appellant's railway, was killed near Chapleau in Ontario in an accident due to the negligence of appellant. This action was brought by his widow for herself and family to recover damages arising therefrom. She has since died and the action is continued by the surviving members of the family.

The defence is that he was travelling upon a pass issued to him as said servant engaged in taking care of the cattle shipped by said firm and that the conditions of said pass contained a limitation that the deceased assumed all risk of damage to person and property

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and hence there can exist no claim on part of the respondents.

By section 544 of the Criminal Code, the appellant is prohibited from carrying cattle, under such circumstances as existed in this case, unless in charge of men engaged to see that the cattle are properly cared for.

The section 340 of the "Railway Act" prohibiting appellant from limiting its liability is as follows:—

No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

This is substantially the same as section 275 of the "Railway Act" of 1903 under which the Railway Commissioners, in 1904, ordered as follows:—

That the above mentioned applicants do severally have power to use the forms submitted, and they are hereby legally authorized so to do until this Board shall hereafter otherwise order and determine.

The shipping firm, in whose employment the deceased was, admittedly shipped their said cattle under a form of contract thus approved.

The questions raised herein are thus far the same as raised in the case of *Robinson* v. *The Grand Trunk Railway Co.*(1), where this court held that the servant of the shipper who had signed a similar form of contract for the shipment of a horse and given the duplicate thereof to said servant, put in charge of the

(1) 47 Can. S.C.R. 622.

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horse there in question, was entitled to damages arising from the negligence of the company. But in this case the matter of contract was carried a step further by the appellant's officers at Winnipeg issuing a pass worded, so far as bearing upon this case, as follows:—

To conductors: Winnipeg, 18th Sept., 1911.

The two men whose signatures are subscribed on back hereof are the only persons entitled to pass in charge of thirteen cars of live stock (here follow the numbers of the cars, etc.).

On the back of this there was printed in smaller type than appears in the case herein, the following:—

CONDITIONS.

Each of us, the undersigned, having charge of live stock mentioned on face hereof, in consideration of the conditions of the Canadian Pacific Railway Company's Live Stock Transportation Contract, agree with the company, while travelling on this pass to assume all risk of accident or damage to person or property, and that the company shall be entirely free from all liability in respect of any damage, injury or loss to any of us or the property of any of us whether such accident, injury, damage or loss is caused by the negligence of the company, or its servants or employees or otherwise howsoever.

Signatures: Witness:
F. ADDSHEAD. H. DEVILLERS.
JOSEPH CHALIFOUR.
Countersigned:
H. W. DICKSON.
Local Freight Agent.

It is contended by appellant this is a contract by virtue of which the respondents are debarred from maintaining this action.

The respondents first deny the right of the company to impose such limitation of liability and next shew by evidence justifying the finding of the learned trial judge that deceased could read neither English nor French and understood but little English — only enough to understand the orders of his superior, rela-

tive to his usual duties as a cattle man, if I understand what she speaking is testifying to.

The attesting witness Devillers does not help much by what he says. At the utmost it seems to be that if deceased asked for any explanation it was given him, but he has no recollection of the man or circumstances. Dickson seems to remember that Devillers said something to the deceased in French, but what passed he cannot tell for he understands no French.

The other cattleman, Addshead, who seems to have signed first and to have escaped from the accident uninjured, was not called. It seems to be fairly demonstrated from the circumstances put in evidence and relied upon by respondents that he was the bearer of this pass. We are not enlightened in any way unless by the name and the fact that he was first to sign and carried the pass, whether he could speak English or not. If I were pressed to answer I should say he was of English stock and likely knew as little French as Dickson.

All such minor details are usually of little consequence, but as bearing upon the probability of deceased understanding what he was about in signing his name to this alleged contract, I should have liked to have known all such details and have been the better able to realize whether or not the deceased knew and understood what he was doing when he signed his name to the said paper.

In some of the cases elucidating the law we have to deal with, it is suggested in England a man signing or even accepting a like conditional pass might be presumed to know how to read English. But if we would do justice here in Canada we cannot proceed

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upon any such hypothesis. Men of the race of the deceased may by nature be as bright and intelligent as any Englishman yet be so handicapped by their want of knowledge of either English or (for that matter as the evidence here discloses) French when it has to be read, that we must be careful to observe that not unusual condition of things in coming to a conclusion in a matter of this kind.

And I may add that in Canada they are not the only persons to whom the like considerations must be extended if justice is to be done.

To my mind the question above all others to be determined herein is whether or not the appellant has produced evidence, upon which we can safely rely, enabling it to claim that deceased contracted himself and thereby respondents out of all right to complain of the grossest kind of negligence on appellant's part.

No one who has that general knowledge of the world, and this little part of it, and of the class and kind the deceased belonged to, and the usual mode in which such transactions as involved herein are gone about, but must feel loath to hold that deceased knowingly and understanding what he was about intended to contract as appellant contends he did contract. The onus rested on appellant to shew that he did.

I cannot hold on the evidence before us that it satisfies me.

And as to any implication from the service in which deceased was engaged, we are bound for the present at all events by our decision in the *Robinson Case*(1).

(1) 47 Can. S.C.R. 622.

There is, moreover, in this case a feature that has impressed me very much and renders the position of appellant weaker than in the *Robinson Case*(1).

It is this:—That in that case the entire contract of the shipper, if read, was before the plaintiff and for a time in his possession and it contained the following clause:—

> In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare, to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit, and at the owner's risk as aforesaid, then as to every person so travelling on such such a pass or privilege less than full fare the company is to be entirely free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever.

What right had appellant to convert the clear explicit language of this clause

> free from liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever,

into the dubious sort of terms contained and used in the above quoted conditions? It seems to me it had none. Such contract as it has any right to impose in such a case must fall within the order of the Board or be null. The word "traffic" in said section 275 is by the interpretation clause made to cover passengers as well as freight. In the first place there is a great deal to be said for the argument that this limitation was never in law applicable to the case of the servant himself for his loss, but only to the interest of the master in his servant and such right of action as he might have for injury to him and hence never in law intended to extend to the rights of the servant himself.

(1) 47 Can. S.C.R. 622.

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It is clear to my mind the order is capable of such a construction. And unless the order must be construed as covering and enabling such a limitation of liability there is nothing upon which the appellant can rest, unless upon the said conditions being construed as a clear contract on part of deceased whereby his widow and children would be deprived of any right to complain herein.

And applying such a test to this ambiguous thing called "conditions" we are face to face with the interpretation put thereupon by Mr. Justice Cross in the Court of Appeal holding it did not cover the case of death resulting from the injury.

That is not my own interpretation of the terms used in the conditions, but clearly they can be so read.

And yet in face of that view held by a careful and able judge we are asked to impute to the poor deceased —ignorant of the language—a clear understanding that the condition applied to his death and that in such event though caused by the grossest negligence on the part of appellant, his family could have no claim.

I cannot think such a result would be either law or justice.

I, therefore, need not enter upon the very wide field of international law and other law into which the argument so well and ably invites us.

I think the appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed with costs. The action is brought in the Province of Quebec by the respondent as the widow of one Joseph Chalifour, who was killed in a railway accident while on one of the appellant company's trains in the Pro-

vince of Ontario, due to the negligence of the appellant company's servants. The respondent bases her claim on article 1056, Civil Code of the Province of Quebec, and on the "Fatal Accidents Act," 1 Geo. V., ch. 33, sec. 33, in force in Ontario. The appellant company sets up in defence, first, a contract with the employers of the deceased Joseph Chalifour, and secondly, a contract alleged to have been entered into with Chalifour himself relieving it from responsibility for the negligence of its servants.

It is not, as I understand it, disputed that if these alleged contracts would be no answer to the respondent's action in Ontario she is entitled to recover in these proceedings; and as in my opinion the defence based on these contracts fails, it will not be necessary to consider the possible rights of the respondents on the opposite hypothesis. I will only observe that to me it is not obvious that the decision of the Court of Appeal in *Machado* v. *Fontes*(1) furnishes the rule of decision governing the courts of Quebec in similar cases; or that article 1056 C.C. has any application where the wrong from which death results as well as the death itself occur outside the Province of Quebec.

Under the "Fatal Accidents Act" it is now settled that it is a condition of the respondents' right to recover that the victim of the accident would have had a right of action arising out of the wrong complained of if he had lived. The appellant company alleges that the right of action which otherwise would have arisen in favour of Chalifour, would in fact, have been defeated by force of one or both of the agreements above mentioned.

(1) [1897] 2 Q.B. 231.

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I think this defence of the appellant company fails for these reasons: first, the agreement between the appellant company and the employers of Chalifour could not nullify the *primâ facie* obligation of the appellant company to use due care to carry him safely arising out of their acceptance of him in fact, as a passenger on their railway unless it were shewn that he expressly or impliedly assented to the terms of that agreement as modifying the obligation. No such assent is in fact proved; and in any event section 340 of the "Railway Act" applies and, not having been complied with, would deprive any such assent of any effect it might otherwise have had. Secondly, as to the alleged agreement with Chalifour:—Chalifour's assent to the terms of the alleged agreement has not been established in fact; and, assuming the alleged agreement to be established in fact, the section referred to, section 340, deprives it also of any force as a defence. It will be convenient to deal first with the effect of section 340.

The appellant company relies upon first an agreement entered into between the Gordon Ironsides Company, the shipper (Chalifour's employer), and the appellant company, providing for the carriage and delivery of certain cattle shipped at Winnipeg for Hochelaga. And the contract contained certain restrictions of the company's liability, not material to the present discussion. There is also the following paragraph upon which the appellant company relies:

> In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare, to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit, and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or privilege less than full fare the company is to be entirely free from

liability in respect of his death, injury or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever.

The alleged contract with Chalifour is contained in certain conditions printed on the back of a document described as a "Live Stock Transportation Pass" of the same date. Section 340 of the "Railway Act" is as follows:—

340. No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

3. The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.

This enactment deprives the agreement just referred to, and any notice of the terms of the agreements, of any effect in restricting or modifying the *primâ facie* obligation of the company except in so far as the agreements and notice have been authorized or approved by order or regulation of the Board of Railway Commissioners or in so far as they come within and are made effective by some order or regulation made under sub-section 2.

The appellant company produces an order of the Board, bearing date the 17th of October, 1904, which is in the following terms:—

IN THE MATTER OF

The application of the Grand Trunk Railway Company, the Canadian Pacific Railway Company, the Canadian Northern Railway, and the Père Marquette Railway Company, for approval by the Board of Railway Commissioners of their forms of bills of lading

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and other traffic forms, in compliance with section 275, sub-sections 1 and 2 of the "Railway Act."

The above named companies are the only railway companies in Canada which have, up to the present moment, complied with the requirements of section 275; and in respect of these so far received it may be remarked that there is much diversity in the forms of the several railways. The whole subject is of very great importance and will require that much circumspection should be exercised in examining into the contracts and forms which the Board hereafter has to approve; and also into the question of limitation of liability on the part of carriers.

In view of these facts, and that the railways generally have not submitted their forms for approval, the Board does not deem it advisable to make any final or definite order upon the subject at present, but is of opinion that an interim order might properly be made permitting such railways as have made application therefor to continue the use of their present forms until the Board shall otherwise prescribe and order.

IT IS THEREFORE ORDERED

That the above mentioned applicants do severally have power to use the forms submitted, and they are hereby legally authorized so to do until this Board hereafter otherwise order and determine.

And the Board further requires that a select committee be formed of the legal and traffic officers of the several railway companies named, and others who may hereafter submit their applications, to meet the Board at Ottawa, on a date to be hereafter announced, for the discussion of the said forms and contracts, both freight and passenger, at a session of the Board to be called for such purpose.

(Sgd.) ANDREW G. BLAIR,
Chief Commissioner, Board of Railway Commissioners for Canada.

This is the order upon which the appellant company relies as giving force to the two agreements now under consideration.

It appears from the certificate of the Secretary of the Board that the only *"form"* having any relevancy to the present case coming within the operation of this order is a form of "Contract for Carriage of Live Stock" which seems to be identical in its terms with that between the appellant company and the shippers above referred to.

The form of contract thus approved is a contract

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between the railway company and the shipper; and it contains the paragraph, upon which the railway company relies, above set out. No form of notice to the shipper's nominee or form of contract between the railway company and the shipper's nominee is approved in express terms. And after very full consideration I have come to the conclusion that Mr. Smith's contention is sound and that the order does not imply any approval or authorization of any contract between the railway company and the shipper's nominee or of notice to the shipper's nominee within the meaning of the first sub-section of section 340.

I think that is so for these reasons. The order itself shews that it was passed as a temporary provision only pending a fuller examination of important questions touching the approval of contracts and notices affected by section 340; and I think that the operation of the order must be confined strictly by the effect of the language used which appears to me to be simply this; that the *"forms"* specified (which were understood to be the forms then in use) were approved for what they were worth. The company is authorized to enter into a contract in the form produced. That is the whole effect of the order.

This interpretation of the order is, no doubt, open to the observation that in view of the decision of this court in *Robinson* v. *Grand Trunk Railway Co.*(1), the paragraph quoted above, would afford no protection to the railway company in the case of action by nominees. But it is to be observed that the Court of Appeal for On-

(1) 47 Can. S.C.R. 622.

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tario and the Chief Justice of this court took the view that this same clause was (even in the absence of notice of it to the shipper's nominee) sufficient to preclude action against the company by the nominee, on the ground that the nominee being on the railway by a consent which was expressed in the contract, and only in the contract, was bound by the conditions of that consent. It is quite possible that this was the view of the law upon which the contract was framed. However that may be the order expressly approves the contract with the shipper and nothing else. I see no ground for implying an approval of a contract with the nominee of the shipper or notice to the nominee. The order is a general approval of a large number of forms containing no doubt many clauses and it would be going altogether too far to read it as an approval not only of the "forms" produced, but any other forms which might be necessary to accomplish the object of the companies.

A similar reason compels the conclusion, I think, that there is nothing in the order "determining" the extent to which the "liability of the company" to the shipper's nominee "may be impaired, restricted or limited" within the meaning of sub-section 2.

This is a complete answer to the appeal. But I think the appeal fails on the ground also that the evidence does not sufficiently shew an assent by Chalifour to the conditions by which he is alleged to have been bound or any notice to him that he was being carried under a contract with his employers absolving the appellant company from responsibility from injuries caused by the negligence of its servants. The paper on which the company relies is a document called a "Live Stock Transportation Pass." On its

face, partly in print and partly in handwriting, is the following words:—

CANADIAN PACIFIC RAILWAY.

Western Division.

LIVE STOCK TRANSPORTATION PASS.

To Conductors:— Winnipeg, 18th Sept., 1911.

The two men whose signatures are subscribed on back hereof are the only persons entitled to pass in charge of thirteen cars live stock 170922, 167196, 166252, 165346, 169796, 168794, 167934, 166496, 167128, 135054, 350130, 164574, 165058.

Billed from Cardston * * * to Montreal.

As men in charge of live stock are now only passed to Winnipeg on stock contracts Conductors east of Winnipeg will not honour stock contracts for passage.

Conductors in charge of train making last run will take up this pass and turn it to agent at destination of live stock.

Valid only when countersigned by

R. E. LARMOUR,
General Freight Agent.

No. 7512.

Countersigned:
H. W. DICKSON.

It is endorsed as follows:—

CONDITIONS.

Each of us, the undersigned, having charge of live stock mentioned on face hereof in consideration of the conditions of the Canadian Pacific Railway Company's Live Stock Transportation Contract, agree with the company, while travelling on this pass to assume all risk of accident or damage to person or property, and that the company shall be entirely free from all liability in respect to any damage, injury or loss to any of us or the property of any of us whether such accident, injury, damage, or loss is caused by the negligence of the company, or its servants or employees or otherwise howsoever.

Signatures: Witness:
F. ADDSHEAD. H. DEVILLERS.
JOSEPH CHALIFOUR.

Countersigned:
H. W. DICKSON,
Local Freight Agent.

The evidence of Devillers, whose name appears as witness, shews that the signature professing to be that

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of Chalifour was in fact his, although he does not actually recall the circumstances. Chalifour was a stable hand, a French Canadian, living in Beauport, unable, as the evidence of his wife shews, to read a word of either French or English (testimony undisputed and, according to common experience, not at all incompatible with the fact that he was able to sign his name) and speaking and understanding spoken English, very little — enough only, as his wife explained, to apprehend the directions of his superiors in his work of cattlehand.

The evidence of Devillers and of Dickson shews — the evidence of Dickson indeed was quite explicit upon the point — that no explanations of the nature of the document would be given to the signatories unless an explanation were asked for. Devillers is unable to recollect, as I have mentioned, the actual signing of the document or the circumstances of it.

What then is the significance of Chalifour's attaching his name to the pass in these circumstances? Does it shew or create any presumption of assent on his part to the conditions? Did the fact that he was asked to sign amount in the circumstances to reasonable notice to him that the company was proposing some modification of their *primâ facie* legal obligation as carriers? Did the fact of signing amount to a representation to the company, either that he understood the nature of the document or that he was willing to be bound by anything it might contain?

It is not open to dispute that, if Chalifour, although unable to read the conditions on the back of the pass, had understood that in presenting the paper for his signature the officials of the company were proposing conditions affecting the terms upon which

he was to be received as a passenger on the railway — then having given his signature and having acted on the assent of the company given in consequence he would be bound by what he had signed in the absence of fraud or some other equitable ground of relief. But as Chalifour could not read the conditions then unless in fact he knew that the paper contained conditions or the fact of signing amounted in the circumstances to a representation by him that he was prepared to be bound by anything the paper might contain, or in other words, as I think the two questions are in substance identical, unless the fact of being required to place his signature on the pass was reasonable notice to him that it did contain conditions, his signature cannot affect his rights.

The burden of the affirmative of the issue raised by the company's allegation that Chalifour assented to a modification of the *primâ facie* obligation of the company rests, I think, upon the company throughout, unless some presumption of law arises shifting that burden by the fact of the signing alone. I pass for the moment the question as to whether any presumption of law does arise, and I consider the questions first, of Chalifour's knowledge, and, secondly, of the significance to him of the fact that his signature was required and the significance to the company of the fact that he gave his signature in the circumstances as questions of fact.

First, then, as to Chalifour's knowledge. The evidence of Dickson is explicit, as I have mentioned, that no explanation would be given unless asked. Dickson says that Chalifour had a conversation with Devillers which Devillers does not remember. The purport of the conversation is not given. Whether

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Chalifour asked for an explanation, and if so, what answer was given, are matters of speculation merely. I have no difficulty in holding that the company has failed to shew knowledge in fact or facts from which knowledge can be judicially inferred.

Secondly, as to the significance of Chalifour being required to sign and the act of signing. The question to be considered is whether in the circumstances, assuming him to have exercised the normal judgment of a person of his class and circumstances as known to the company through Dickson and Devillers he ought to have understood that the paper he was asked to sign contained conditions affecting his rights; or correlatively whether the company, having regard to all the circumstances, was entitled to assume from Chalifour's conduct that he did know that there were conditions to which he was assenting.

The question is one upon which people will naturally differ, but I have come to the conclusion that giving their proper weight to all the facts they do not justify a conclusion that Chalifour would or that Dickson, who was the agent of the company for delivering the pass, would or would be entitled to regard Chalifour's act of signing as meaning anything more than the giving a signature for the purpose of identification. The evidence sufficiently shews that in September, 1911, when the pass in question was issued, the practice of the Canadian Pacific Railway Co. with regard to cattle shipments over its lines west of Winnipeg provided for the passing of attendants by having them place their names on the back of the transportation contract itself for the purpose of identification, the possession of the contract being the conductor's warrant for passing attendants whose names

were so indorsed. Down to some time prior to September, 1911, this practice seems to have been general. The indorsement on the transportation contracts in evidence is as follows:—

Form 18.

CANADIAN PACIFIC RAILWAY COMPANY.

Live Stock.

Transportation Contract.

From .....

To .....

Date ....., 19....

Shipper .....

Names of persons entitled to a free pass in charge of this consignment.

.....

.....

.....

.....

..... Agent.

NOTE.—Agents must require those entitled to free passage, in charge of live stock under this contract, to write their own names on the lines above.

Conductors may, in cases where they have reason to believe contracts have been transferred, require the holders to write their names hereon to compare signatures. This contract must be punched by the conductors of each division.

The same indorsement is to be found upon the form of contract approved by the Board of Railway Commissioners, in 1904, now in evidence. The direction on the pass in question shews that for shipments east of Winnipeg a change took place some time before the date of the pass, and the system of issuing passes was substituted. We do not know when this change took place. But we do know that under the earlier system which apparently at the time in question still continued to obtain on the Canadian Pacific Railway west of Winnipeg the cattle men were obliged to sign their names on the back of the transportation contract for the purpose of identification, and that

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under that system each signed his name for identification only and not as evidencing assent to any agreement with the company. That is very obvious from an inspection of the contracts in evidence. If the signatures are evidencing assent, then it must be that indorsement is an essential part of the form as approved and the attaching of his signature to the indorsement, in accordance with the direction, is a condition of the valid assent of the bearer of a pass to the contract as affecting him.

As I have said we do not know when the change was made. We are not told that the agents were instructed when that took place to inform cattle-men who were unable to read of the fact that the pass to which they were asked to attach their signatures contained conditions affecting their rights as against the company which these signatures, once affixed, would purport to evidence. The only evidence we have touching the point is the evidence which I have already mentioned of Devillers and Dickson, which makes it plain that the duty and practice of the agent were limited to giving explanations where explanations were asked. When one looks at the direction to the conductors on the face of the pass itself it is made clear that one purpose of the signatures on the back of the pass was the purpose of identification, and Dickson expressly admits in his evidence, that the signatures were required for that purpose. A cattle man accustomed under the other system to sign his name on the back of the transportation contract along with the other attendants would be most unlikely, especially if he was unable to read, to attach any significance to the act of signing except that he was complying with the usual rule and for the usual purpose. As I have said, we have no evidence

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when this system of passes was adopted. It may have been in operation no longer than a week. We are left to speculate on that point.

In these circumstances I think it is impossible to affirm that Chalifour's act of signing had either for himself or for the company any significance as affecting their mutual rights unless it can be said that by signing he affirmed that he was sufficiently capable of comprehending the document to understand that there were conditions.

I think this cannot be affirmed. In the first place, it must be remembered that the pass was delivered to Addshead, who was the employee in charge. It is quite evident that it never came into Chalifour's possession. Addshead signed first, Chalifour afterwards. As the original pass shews, the conditions are printed in small type, not likely to attract the attention of a man of Chalifour's class. But to my mind the most weighty consideration applying to this point is that Devillers, Chalifour being the utterly ignorant man that he was, according to the evidence of the respondent, must in the short conversation he had with him have had his attention attracted to the fact that it was most unlikely in the first place that Chalifour could read English at all, and in the second place that he would be capable of comprehending even in the most general way the significance of the printing below which his signature was placed.

I conclude that treating the questions above stated as questions of fact simply, respecting which the onus is on the appellant company, the company has failed to acquit itself of that onus.

It is argued, however, that the presence of Chalifour's name there creates a presumption of law that

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he understood the contents of the document to which he attached it. I think there is no such presumption of law. In *In re Cooper*(1), it is said by Sir George Jessel, that when a man signs a deed

> there is a presumption of law that he knows its contents.

But I have just pointed out that there is here no evidence of anything amounting to the execution of a legal instrument or intentional taking part in a juridical act a condition implied in Sir George Jessel's language when reading the context. I repeat that if it had been shewn that Chalifour had placed his name on this document in circumstances which amounted to an affirmation on his part that he was entering into a contract with the railway company respecting the terms on which the company was to carry him then in the absence of fraud or some other special ground of relief his knowledge or his ignorance of the contents of the document would have been quite immaterial. Such principles have no application whatever in the state of the evidence in this case; the evidence does not bring us to the point at which they come into operation. All observations, therefore, in decided cases and in text books as to the effect of signing a document which is understood or represented to contain some disposition of property or to form some part of a business transaction are quite beside the point.

I have seen no case either in the English or American courts holding that a presumption of knowledge of the contents of a document signed arises in which it did not appear by direct evidence or manifestly from the circumstances of the case that the signer

(1) 20 Ch. D. 611.

knew, at least in a general way, the nature of the document. Nor have I seen any case which affirms as a broad principle that every person signing a document purporting to be of a character to have legal effect, if operative, is deemed by a *presumption of law* to have a knowledge of its contents. On the contrary it is not so in the case of wills in respect of which the rule is, I think, correctly stated in Taylor on Evidence, paragraph 160. The testator is presumed to know and approve the contents of a will which he is proved to have signed, but the presumption is not a presumption of law, that is to say, it is not a presumption which acquits the proponent of the will of the burden of the issue resting on him as to the deceased's knowledge and approval of the contents of the document. If it is shewn that the deceased was unable to read or if doubts are cast upon his capacity or if there are suggestions of undue influence in the circumstances, the proponent must remove these. The burden of establishing the affirmative of the issue remains to the end.

I think there is no rule or law that requires us to hold that the attaching of Chalifour's signature in the circumstances disclosed by the evidence had the effect of shifting the burden which rested upon the appellant company of establishing the affirmative of the issue raised by their allegation that Chalifour was received by them as a passenger on the condition that they should be relieved of their *primâ facie* obligation to exercise due care in carrying him.

That the presence of Chalifour's signature is in itself without evidentiary value or is itself of inconsiderable weight nobody would affirm. But when the circumstances are all considered the force of that fact seems to me to be entirely neutralized.

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For these reasons this appeal should be dismissed with costs.

ANGLIN J.—Joseph Chalifour, the husband of the plaintiff (by original action) lost his life in consequence of a collision, at Chapleau, Ontario, between a locomotive on the defendants' railway and a car in which he was travelling in charge of cattle, on a pass issued to him pursuant to an agreement made by the defendants with his employers, the shippers of the cattle. Before leaving Winnipeg, Manitoba, Chalifour, on the demand of the defendants' agent, placed his signature on the pass, issued to himself and another servant of the shippers, who accompanied him, beneath the following condition, which was printed upon it:—

> Each of us, the undersigned, having charge of live stock mentioned on face hereof in consideration of the conditions of the Canadian Pacific Railway Company's Live Stock Transportation Contract, agree with the company, while travelling on this pass to assume all risk of accident or damage to person or property, and that the company shall be entirely free from all liability in respect of any damage, injury or loss to any of us or the property of any of us whether such accident, injury, damage or loss is caused by the negligence of the company, or its servants or employees or otherwise howsoever.

The collision was found at the trial to have been attributable to the fault of the defendants and against that finding no appeal has been taken. Indeed, the negligence which caused the accident appears to have been gross and inexcusable.

The defence relied upon is that by the law of Ontario, to the benefit of which the defendant company claims to be entitled, it is not liable to the plaintiff because the conditions of the pass on which her husband travelled exempted it from liability to him for

any personal injuries he might sustain in transit. In answer to this plea the plaintiff alleges:—

(1) That the relieving condition signed by Chalifour had not been approved by the Board of Railway Commissioners, as is required by section 340 of the "Railway Act."

(2) That it should be held that Chalifour himself was not bound by the condition which he signed because it was not established by the defendants that he knew what it was or that they had taken reasonably sufficient means to bring its nature and purport to his knowledge.

(3) That the plaintiff has a right of action in the courts of the Province of Quebec, although she should be unable to maintain a similar action in the Province of Ontario, where the accident happened.

(1) The condition on the pass exempting the railway company from liability, which Chalifour signed, is couched in terms not materially dissimilar to those of a clause in a form of shipping contract approved by the Railway Board. The difference, if any, would tell rather against the company than in its favour. If the clause of the shipping contract bears the construction which the defendants maintain it should receive, the condition upon the pass is, I think, of the class authorized by the approval of the form of shipping contract.

It is perhaps open to question whether the clause in the shipping contract is not susceptible of a construction which would make it inapplicable to the liability of the railway company towards the man in charge of the live stock, and would restrict its opera-

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tion to exempting the company from liability towards the shipper for such damages, if any, as might be occasioned to him through injury to his servant. The form authorized is of a contract which purports to be between the shipper and the company. Provision is made for requiring the signatures of the men to be carried in charge of the live stock to be placed on the back of the contract. But these signatures, when so placed, are not preceded by any words purporting to make the signatories parties to the instrument or to bind them by its terms. On the contrary, it is consistent with the form of the document that the signatures are to be obtained merely for purposes of identification.

On the other hand, the clause providing for exemption is scarcely such as we would expect to find it were it only against liability for the possible loss to the master occasioned by injury to his servant that provision was being made. Nor is it likely that this somewhat illusory right of the master was the subject of such careful attention at the hands of the railway company and of the Board of Railway Commissioners.

Chalifour was not asked to place his signature on the shipping contract, which contained a blank for that purpose, but on the pass issued to him and his fellow drover. This circumstance, however, I regard as immaterial, because section 340 does not require that the specific contract or condition under which the traffic is carried should be itself authorized, but only that it should be of a class which has been authorized. As at present advised I would not be prepared to hold against the defendants on this answer to their plea.

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(2) On the second ground of reply I also entertain an opinion favourable to them. Such authorities as *Robinson* v. *Grand Trunk Railway Co.*(1); *Richardson* v. *Rowntree*(2); *Parker* v. *South Eastern Railway Co.*(3), and *Henderson* v. *Stevenson*(4), relied upon by counsel for the plaintiff, seem to me to differ widely from the case now before us. In none of them had a contract exempting from, or limiting, liability been signed by the passenger or bailor. Conditions printed more or less obscurely on the tickets or contracts issued by the defendants were relied upon as relieving them from their ordinary liability as carriers or bailees. In the *Robinson* and *Richardson* cases the plaintiffs, who were themselves the injured persons, deposed that they had been ignorant of the conditions relied upon and there was no evidence that they were aware of them. Apparently had they been aware that the printing on the tickets which they bought contained conditions relating to the terms of carriage they would have been bound by them, although ignorant of their nature and effect. *Harris* v. *Great Western Railway Co.*(5). Indeed, they would probably have been so bound, although unaware that the printed matter contained such conditions, if the defendants had done what, under the circumstances apparent to them when they sold the tickets, was reasonably sufficient to bring the conditions to the passengers' notice. *Marriott v. Yeoward Bros.*(6), at pages 993-4. In *Parker's Case*(3), and in *Henderson's Case*(4), where limitations of liability in respect

(1) 47 S.C.R. 622.
(2) [1894] A.C. 217.
(3) 2 C.P.D. 416.
(4) L.R. 2 H.L. (Sc.) 470.
(5) 1 Q.B.D. 515.
(6) [1909] 1 K.B. 987.

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of loss of luggage deposited at parcel rooms in railway stations were set up in defence, the plaintiffs gave similar evidence of their ignorance of the limiting conditions. In the present case there is no such evidence of ignorance. In each of the cases cited by Mr. Smith admitted or proven ignorance of the conditions relied upon by the defendants negatived actual consent to them by the plaintiff, and the question was whether the defendants had taken such reasonably sufficient steps to bring those conditions to the notice of the plaintiff that the latter was precluded from setting up such ignorance in reply to the defence based upon them. In the present case the question is whether the presumption of his knowledge of the tenor of the conditions on the pass raised by Chalifour's signature to them has been rebutted—whether presumed knowledge has been disproved. There is no evidence in the record that Chalifour was ignorant of the nature of the conditions on the pass and certainly nothing to warrant an inference that he was unaware that the printing upon it, to which he affixed his signature, contained conditions relating to the terms of the contract of carriage. There is no evidence that the defendants' agent had knowledge of his inability to read English or had any reason to suppose that he did not understand the printed matter, which he appears to have signed without any hesitation upon being asked to do so. Under such circumstances I am not prepared to hold that the agent was not justified in assuming that Chalifour knew what the printed conditions were. He was not bound to inquire into the idiosyncracies of the particular passenger. *Mar-*

riott v. *Yeoward Bros.*(1), at page 993. In the absence of evidence of special circumstances which should have been apparent to the agent, indicating that Chalifour, notwithstanding his readiness to sign the condition on the pass, needed explanation of its nature and effect, I know of no ground upon which it should be held that the agent was under an obligation to proffer such explanations.

The production of the pass with the admitted signature of Chalifour upon it raises a presumption of law that he knew and intended to be bound by the conditions which he had subscribed. *Re Cooper*(2), at pages 628-9. The facts that he was illiterate — being able merely to sign his name — and that his knowledge of the English language, in which the pass was printed, was imperfect, do not, in my opinion, suffice to rebut this presumption. *McDonald* v. *Hancock Mutual Life Ins. Co.*(3); *Harris* v. *Story*(4); *Doran* v. *Mullen*(5).

The presumption arising from the signature is not that Chalifour had read the condition — the evidence perhaps sufficiently disproves that — but that he knew what it was — and that the evidence does not disprove. It is quite uncertain that he was not told the contents of the pass when he signed it. But, assuming that the defendants' agent did not then give him this information, that does not suffice to warrant the conclusion that he did not possess it. He may have acquired it from other sources. He had been in the cattle business for two years, and, although this was

(1) [1909] 1 K.B. 987.
(2) 20 Ch. D. 611.
(3) 44 N.Y. (Sup.) 818.
(4) 2 E. D. Smith (N.Y.) 363, at p. 367.
(5) 78 Ill. 342, at p. 346.

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his first trip to Winnipeg, he had been to Liverpool in charge of cattle and had probably travelled on railways in this country in the same capacity. At all events he was thrown into the company of men whose business it was to make such trips and who were presumably familiar with the conditions of carriage. His companion on the trip in question, who also signed the pass, was English speaking and probably knew its terms. It is not shewn that he did not communicate them to Chalifour, as, indeed, he may well have done. There is not a tittle of evidence to indicate that Chalifour was in any way misled or imposed upon, and there is nothing whatever to warrant the assumption — for such it would certainly be — that he signed the condition on the pass without knowing or ascertaining what it was, or under the belief that it was something other than it was in fact. I think it would be quite too dangerous upon such evidence as we have before us to hold that Chalifour was unaware of the nature and effect of the condition on the pass which he signed and on which he travelled.

Nor would that suffice to relieve him from the provisions of the contract if he was aware that the printed matter which he signed contained conditions relating to the terms on which the pass was issued to him. *Parker* v. *South Eastern Railway Co.*(1); *Harris* v. *Great Western Railway Co.*(2). His signature imports such knowledge, and it would be a pure assumption that he did not have it. Indeed, the only evidence in the record is that he had a conversation on the subject of the condition with Devillers, who issued

(1) 2 C.P.D. 416. (2) 1 Q.B.D. 515.

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the pass. Devillers says of his interview with Chalifour:—

Q. Maintenant, pouvez-vous vous souvenir si vous avez eu aucune conversation avec lui au sujet des conditions ?

R. Il n'y a pas de doute que j'ai eu une conversation avec lui et que j'ai dû lui donner les renseignements qu'il a dû avoir besion.

Q. Pouvez-vous vous souvenir si oui ou non il vous a demandé ce que voulaient dire les conditions et dans ce cas qu'est ce que vous lui avez répondu ?

R. Je ne peux pas dire qu'il m'a demandé les conditions de ce contrat-là, de la passe, mais s'il me les a demandées, je les lui ai données avec les autres renseignements.

Q. Etait-ce la règle générale que vous suiviez ?

R. C'était une pratique qu'on avait chez nous de donner les renseignements.

Q. C'était l'usage ?

R. C'était l'usage du bureau de donner les renseignements autant pour les passes que pour ce qui regarde le live stock sur le chemin.

* * * * *

Q. Vous êtes certain que s'il vous a demandé quelques renseignements, vous lui avez donné des renseignements complets ?

R. Oui, et bien explicites aussi.

The witness was not cross-examined in regard to this evidence. It at least indicates that Chalifour's attention was directed to the condition he was asked to sign, if, indeed, he was not explictly told its nature and contents. I am not prepared to relieve the plaintiff from whatever consequences may ensue upon Chalifour's having taken the pass on which he travelled with knowledge of the condition to which he affixed his signature. The case must, I think, be dealt with on the footing that, had Chalifour survived his injuries, he would not have had a cause of action against the defendants.

(3) But on the third point raised by the plaintiff I think we are bound by the decision in *Machado* v. *Fontes*(1); see, too, *Carr* v. *Fracis Times & Co.*(2);

(1) [1897] 2 Q.B. 231. (2) [1902] A.C. 176, at p. 182.

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to hold that the defendants are liable in this action instituted in the Province of Quebec, although no action could have been maintained by her in the Province of Ontario because of the condition subject to which her husband had accepted carriage by the defendants.

I am, however, with respect, of the opinion, that Mr. Justice Cross has misconceived the ground upon which the liability of the defendants should be placed. He appears to have dealt with the case as if the crucial question were whether, on its proper construction, the contract signed by Chalifour purported to bar any claim that his dependents might have to recover damages sustained by them as a result of his death. That is not the contention of the defendants. Their position is that, in order to succeed, the plaintiff must shew that she has a claim actionable in the Province of Ontario as well as in the Province of Quebec, and that if suing in the Province of Ontario, she would fail, not because her husband had undertaken to contract away her right of action, but because, had his injuries not been fatal, he would have been unable, in view of his contract with the defendants, himself to maintain an action against them for damages, and his having that right is by the "Fatal Accidents Act," 1 Geo. V., ch. 33, sec. 3, made a condition of the statutory right of action thereby given to his dependents. *Conrod* v. *The King*(1). The right of action in the Province of Quebec given in similar circumstances by article 1056 C.C. is not subject to this condition. *Miller* v. *Grand Trunk Railway Co.*(2). If, therefore, the wrong upon which the plaintiff founds her action had occurred in Quebec she would have had a claim

(1) 49 Can. S.C.R. 577. (2) [1906] A.C. 187.

actionable there. Although the wrong committed in Ontario does not give her a right of action in that province, because, had her husband survived his injuries, he would not have had a right of action against the defendants, the negligent act or omission which caused his death was not "authorized, or innocent, or excusable" in Ontario any more than it would have been in the Province of Quebec had it occurred there. There is under the circumstances no civil remedy for that negligence in Ontario, yet even there it entailed responsibility of another character, not, it is true, upon the present defendants, but upon the individual who was guilty of it. Criminal Code, sec. 283. While by no means satisfied that the view expressed by Mr. Westlake in his work on Private International Law (5 ed.), at page 286, that

> it is probably the better opinion that no such independent action would lie where damages were not granted by the *lex loci delicti commissi*,

is not more logical; *Evans & Sons* v. *Stein & Co.*(1); Foote's Private International Jurisprudence (4 ed.), 451, 453, 457-8; in deference to the view expressed by the Judicial Committee in *Trimble* v. *Hill*(2), at page 344, I bow to the authority of *Machado* v. *Fontes*(3), which in principle clearly covers the case at bar. Dicey on Conflict of Laws (2 ed.), 645. Indeed, if it be distinguishable at all, the distinction makes in the plaintiff's favour. In the *Machado Case*(3) the alleged wrongful act on which the suit was based was of a class not actionable in Brazil where it occurred. In the case at bar the wrongful act on which the plaintiff

(1) [1904] 7 Ct. Sess. Cas. (5 Ser. 65, at p. 70.
(2) 5 App. Cas. 342.
(3) [1897] 3 Q.B. 231.

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bases her claim was of a class actionable in Ontario, where it occurred, but the document executed by her deceased husband affords a defence to the defendants.

I understand that the conditions of the right to maintain an action in the Province of Quebec for a wrong committed outside the jurisdiction do not differ materially from those which obtain in territories where English law prevails. *Dupont* v. *Quebec Steamship Co.*(1); *Glasgow and London Ins. Co.* v. *Canadian Pacific Railway Co.*(2); Lafleur on Conflict of Laws, page 199 *et seq.* But see *Grand Trunk Railway Co. v. Marleau*(3).

I would on this ground affirm the judgment against the defendants and dismiss the appeal with costs.

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

Appeal dismissed with costs.

Solicitors for the appellant: *Pentland, Stuart, Gravel & Thomson.*

Solicitors for the respondent: *Morand & Savard.*

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(1) Q.R. 11 S.C. 188. (2) 34 L.C. Jur. 1.
(3) Q.R. 21 K.B. 269.

W. B. WOOD AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE GRAND VALLEY RAILWAY COMPANY AND A. J. PATTISON (DEFENDANTS) ..... RESPONDENTS.

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*Feb. 25, 26.
*March 15.

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

Contract—Purchase of railway bonds—Consideration—Extension of line—Breach of contract—Damages—Personal liability of president of company—Appeal—Jurisdiction.

An agreement in writing provided that in consideration of the purchase of bonds of the Grand Valley Railway Co. by certain manufacturing companies and other citizens of St. George, Ont., P., president of the company, undertook and agreed on his own behalf and on behalf of his company to procure a through traffic arrangement with the Canadian Pacific Co. so as to give St. George the benefit of competitive freight rates; that he would do all things lawful to secure such arrangement; and that the extension of the Grand Valley road to St. George and the securing of said arrangement would be proceeded with at once and with the greatest possible despatch. The agreement was signed "The Grand Valley Ry. Co., A. J. Pattison, Pres't." Some work was done on the extension of the line to St. George, but it was never completed. The purchasers paid for $10,000 worth of bonds on which dividends were paid for five years when payments ceased. The purchasers brought action against the company and P. claiming the return of the money paid or damages for breach of contract. The trial judge held (26 Ont. L.R. 441) that each of the purchasers was entitled to substantial damages and gave them judgment for $10,000 and directed return of the bonds on payment. The Divisional Court (27 Ont. L.R. 556) held that the individual purchasers were only entitled to nominal damages and gave judgment for the corporate pur-

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

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chasers for the amount they paid for the bonds. The Appellate Division (30 Ont. L.R. 44) held that all were entitled to substantial damages, but ordered a reference as the evidence was not sufficient to determine the amount. All held P. personally liable as well as the company. The purchasers appealed to the Supreme Court of Canada, asking that the judgment at the trial be restored. The defendants by cross-appeal claimed dismissal of the action.

Held, Idington J. dissenting, that the judgment of the Appellate Division be affirmed.

Per Davies J., while not formally dissenting from the conclusion to affirm, that the damages might be assessed at $10,000 as at the trial.

Per Idington J.—That the individual purchasers are only entitled to nominal damages; that the maximum to be allowed the corporate purchasers is the amount they subscribed for the bonds; and that the order of reference should be modified accordingly.

Held, per Anglin J.—The substantive right in controversy on the appeal is the quantum of damages; that was not determined adversely to the appellants by the judgment appealed against; they were, therefore, not deprived of a "substantive right in controversy in the action" within the meaning of that phrase in clause (*e*) of 4 & 5 Geo. V. ch. 51, sec. 1, and the appeal should be quashed for want of jurisdiction which would dispose of the cross-appeal as well.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), setting aside the judgment of the Divisional Court(2), and that of the trial Judge(3), and ordering judgment to be entered for the plaintiffs with a reference to a Master to assess the damages.

The facts of the case are stated in the above headnote. The text of the agreement therein mentioned and on which the action was based is as follows:—

In consideration of the purchase of the bonds of the Grand Valley Railway Co. by certain manufacturers and other citizens of St. George, Ont., and the

(1) 30 Ont. L.R. 44. (2) 27 Ont. L.R. 556.
(3) 26 Ont. L.R. 441.

sum of one dollar ($1) now in hand paid, Mr. A. J. Pattison, president of the Grand Valley Co., hereby undertakes and agrees on his own behalf and on the behalf of the said Grand Valley Railway Co., that he will make or cause to be made a through traffic arrangement with the Canadian Pacific Railway Co. making direct connection with the C.P.R. at Galt, in terms of the "Railway Act" of Canada in such a way that the current competitive freight rates will apply continuously from St. George on precisely the same basis as from Galt and other points in this railway district, to all points east and west in Canada.

While not undertaking anything on behalf of the Canadian Pacific Railway Co. it is distinctly provided by this agreement that the said A. J. Pattison will do all things lawful to secure the agreement above mentioned, and further that should it be necessary to do so he will bring the matter before the Railway Commission of Canada with a view to the creation and enforcement of the through traffic arrangement herein mentioned.

It is further agreed that the extension of the Grand Valley Railway to St. George and the securing of the above mentioned agreement with the Canadian Pacific Railway Co. will proceed with at once and with the greatest possible dispatch.

It is further agreed that the Grand Valley Railway Co. will build and construct in a substantial way for the handling of heavy freight, the necessary switches and sidings connecting their system with the various mills and factories of St. George upon such terms as may be agreed upon between the respective parties.

Provided always that the terms, conditions and

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covenants of this agreement shall be binding upon the heirs, executors and assigns of the said A. J. Pattison and the said Grand Valley Railway Co.

Dated at St. George, Ont., June 29, 1906.

(Sgd.) THE GRAND VALLEY RY CO.,
A. J. Pattison, Pres't.

Witness: (Sgd.) S. G. KITCHEN.

Shepley K.C. and *Sweet,* for the appellants, relied on *Chaplin* v. *Hicks*(1).

Holman K.C. for the respondent Pattison. The onus on plaintiffs to establish damages is not satisfied. The amount awarded by the trial judge was a mere guess. The damages must be certain in their nature and in respect of the causes from which they proceed. *Corbet* v. *Johnston*(2). See also *Village of Brighton* v. *Auston*(3).

Chaplin v. *Hicks*(1) turned on its peculiar facts and is of no assistance in this case.

Grayson Smith for the respondent, The Grand Valley Railway Company.

THE CHIEF JUSTICE.—I am of opinion that the appeal and cross-appeal should be dismissed with costs.

DAVIES J.—The substantial questions to be determined in this appeal, beyond Pattison's personal liability, are what damages the plaintiffs are entitled to recover by reason of the failure of the defendant to

(1) [1911] 2 K.B. 786.
(2) 10 Ont. App. R. 564, at p. 575.
(3) 19 Ont. App. R. 305, at p. 311.

continue the construction of the Grand Valley Railway from a point on the line called Blue Lake to the Village of St. George, as contracted for; and, secondly, whether the evidence put in at the trial of the cause was ample enough and supplied sufficient data to enable the court to fix upon and determine the measure of these damages.

The learned trial judge thought sufficient evidence had been given and assessed the damages at $10,000.

The Divisional Court reduced these damages to $3,880, which they divided between the two plaintiff companies, allowing to the individual plaintiffs only nominal damages.

The Appellate Division being of the opinion that there was an

> entire absence of evidence to supply the data upon which the amount of loss sustained by the breach of the agreement could be ascertained,

vacated both judgments and directed a reference to ascertain the amount of the damages.

I understand a majority of my colleagues are of the opinion that this was, under the circumstances, the judgment which should have been given and have agreed to dismiss the appeal and confirm that judgment. While I do not formally dissent from this judgment, I think it fair, however, to say, specially in view of the appeal made to us by counsel at bar, that if we reached a conclusion adverse to the objections against the maintenance of the action altogether we would, if possible, finally dispose of the question of damages, I was personally prepared, after considering the evidence submitted, to have now and on the evidence before us disposed of this question of damages.

The conclusion I finally reached was that the judg-

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ment of the learned trial judge was under all the circumstances and evidence a fair and reasonable one.

The reasoning of the learned judge in the following quotation which I make from his judgment commends itself to my mind not only as fair and reasonable, but as coming quite within the reasoning and the judgment of the Court of Appeal in *Chaplin* v. *Hicks*(1).

The learned trial judge says:—

> In this case the plaintiffs expected to receive great benefit if they could secure the construction of the railway and competition between the Grand Trunk and the Canadian Pacific. In addition they expected great convenience in the carrying on of their business by the ready access to a railway by which incoming and outgoing freight could be handled. They expected additional profit by the increased prosperity of the municipality in which they were interested. All these considerations were present to the minds of both parties at the time of the making of the agreement.
>
> There were many elements of uncertainty. These could not be eliminated. If all that was hoped for came to pass, the advantage to the plaintiffs would far exceed the $10,000 paid. The price was not given for a thing certain, but was given for the chance of obtaining the great advantage hoped for. If I were to attempt to assess damages on the basis of the plaintiffs receiving all that they contemplated, then the damages would be many times the price paid. But, endeavouring to assess in the light of all the uncertainties and contingencies pointed out by counsel, and which were, no doubt, equally present to the minds of both parties at the time the agreement was made, I think I shall not go far wrong if I place the damages at the same sum as that which Pattison and his railway company induced the plaintiffs to give for this chance.

Had it not been for the decision of the above case of *Chaplin* v. *Hicks*(1) and the cogent reasonings of the able judges who constituted the Court of Appeal in explaining the grounds on which they reached their conclusion I would have felt inclined to agree with the judgment appealed from on the ground of the insufficiency of the evidence.

(1) [1911] 2 K.B. 786.

An attempt was made to minimize the extent and meaning of that judgment of *Chaplin* v. *Hicks* (1), but the weight to be attached to it not only consists in the exact point there decided, but also in the *personnel* of the court and the reasoning by which they supported their conclusion.

The head-note or summary of the report reads as follows:—

> Where by contract a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class and is thereby deprived of all chance of obtaining the prize is a breach in respect of which he may be entitled to recover substantial, and not merely nominal, damages.
>
> The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.

See last paragraph of judgment of Vaughan-Williams L.J., pages 792-3.

Fletcher Moulton L.J., at page 795, says, and I quote it because of Mr. Holman's argument in this appeal as to the remoteness of the damages claimed here:—

(1) [1911] 2 K.B. 786.

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It has been contended in the present case that the damages are too remote; that they are not the natural consequences of a breach with regard to which the parties intended to contract. To my mind the contention that they are too remote is unsustainable. The very object and scope of the contract were to give the plaintiff the chance of being selected as a prize-winner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors. In my judgment nothing more directly flowing from the contract and the intention of the parties can well be found.

Again on the same page the same learned judge says, speaking of the difficulties of establishing and fixing the damages:—

But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs.

And again at page 796, speaking of the case he was then dealing with, he says:—

I cannot lay down any rule as to the measure of damages in such a case; this must be left to the good sense of the jury.

Farwell L.J., at page 798, says:—

The two words "chance" and "probability" may be treated as being practically interchangeable, though it may be that the one is somewhat less definite than the other. The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, the loss has accrued to the plaintiff at the time of action. It is obvious, of course, that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages, say one shilling; if they had done so in the present case, it would have been entirely a question for them, and this court could not have interfered.

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Applying this reasoning and these principles to the case before us and our own common sense acting as jurymen I would not have felt much difficulty on the evidence given in accepting the conclusion reached by the trial judge as to the amount of the damages. But as I have said I will not formally dissent from the conclusion reached by my colleagues supporting the judgment of the Appellate Division referring the case back for further evidence.

One word in conclusion as to the personal liability of the defendant. I fully concur with all my colleagues and with all the courts below in maintaining that liability. I think it is hardly open to argument.

IDINGTON J.—Each of the appellants subscribed various sums amounting in all to $10,000 to buy bonds issued by the respondent company and raised by a joint note the money to pay therefor.

The respondents induced them to do this by assuring them that the railway they were promoting and had built in part would by a branch thereof form a connection within a few months with the village of St. George, which was the home or had been the home or place of origin of the individual appellants and of many of those interested in the corporate appellants carrying on their respective business there. This was in June, 1906. The branch line was partly built, but never reached St. George. The company promised by these bonds interest thereon half yearly at the rate of 6% per annum and paid it till defaulting in June, 1911.

The assurance I have referred to as inducing the appellants to subscribe was sued upon in July,

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1911. Some of appellants would have us believe they never thought half so much of the reliance to be placed upon the bonds as they did upon this assurance. It is, however, to be observed that this action was brought immediately the respondent company had defaulted in paying the interest.

No doubt the main purpose of subscribing for bonds was to become assured of the branch line being extended to St. George, yet what I have just observed must not be lost sight of in estimating damages for breach of the contract of assurance that the main purpose would be realized.

This assurance took a novel form. The frame of the instrument drawn up to evidence it, the mode of its execution and the need for invoking a parol agreement by Pattison, are all of such a character as to render it difficult, first, to be sure we have a contract proven and then to feel quite sure of what damages for breach thereof, in the language used in *Hadley* v. *Baxendale*(1),

> may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it.

I am not prepared to dissent from the view taken by the learned trial judge that there is a contract proven as against both respondents, and in this court whatever objection has been made as to the parties or want of parties which is mere matter of procedure we must hold to be covered by our uniform practice of refusing to interfere with what the courts below have unanimously acted upon, unless in the case where that might lead to a denial of natural justice.

(1) 9 Ex. 341.

The Statute of Frauds, relied upon by Pattison, can be of no avail unless we find, contrary to the view of the learned trial judge, as a fact, that he was bound only as a surety or guarantor. It is to avoid any such implication I have advisedly referred to the contract relied upon as an assurance given jointly by respondents. We are thus left with nothing to consider but the measure of damages.

The statement of claim does not make out or specifically ask for a rescission of the contract or contracts involved and the relief properly incidental to such a mode of proceeding, yet curiously enough it tenders a return of the bonds, I assume without the coupons redeemed by the company, and asks repayment of the amount paid for said bonds. This latter relief was granted by the learned trial judge though proceeding, as I understand him, on the ground that there was not a total failure of consideration and that he is only assessing damages in allowing the sum of $10,000. If so, I fail to understand why or how he could depart from the terms of the order for particulars without amending same or amending the pleadings. Neither was suggested or at all events directed.

The order for particulars is most imperative and covers all claims for damages and is not explainable away in any such way as put forward by Mr. Shepley.

I, therefore, assume the individual appellants bound thereby and I see no ground on the facts presented in the case for so amending as to permit of the consideration of any claim by any of them beyond the nominal sum of ten dollars for each. They do not seem to have had any business relation with St. George or any property in St. George which would be so materially affected by the finishing of the

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branch line as to form in law a proper ground for making any tangible claim for more substantial damages. The individual subscriptions of those stock holders in corporate companies stand in such a position in law that the indirect damages they suffer as shareholders are too remote. The truth would seem to be that they were in some cases wholly and in others partly moved by sentimental rather than practical financial results to be got by the promised railway connection with St. George.

Village patriotism is one of the finest traits of mankind. And the man that plays upon it to extract money from the pockets of men moved by such impulses, and fails to give what he has promised in return therefor, may deserve to be reached in an effectual manner.

But after all I am afraid such a substantial exhibition of home affection is but a poor asset in a lawsuit resting upon the principles of our hard hearted common law when dealing with cash and its returns as the only basis for damages.

It seems to me, therefore, that there are only two of appellants who can put their claims on a more substantial basis. If there are others, such as Mr. Kitchen, it is not apparent except in way I have referred to as shareholders, where each can have no claim.

Those who do appear as entitled are the corporate companies of which each had an established business that might have been afforded well recognized facilities enuring to its advantage in the conduct of such business. That advantage seems to me a thing capable of some appreciable estimation within the principles of law governing the assessment of damages.

I agree with the Court of Appeal that evidence

which might easily have been supplied and I may add which the particulars delivered enabled to have been given is not in the record.

These particulars are perhaps not so accurately drawn in relation to the law applicable to the assessment of damages as they might have been. It is the general result, based upon such facts as these particulars outline, that must be appreciated, in the way a business man might estimate such advantage if he had, for example, to buy as a going concern either of said properties and the good will thereof.

I do not think the respondents are liable for all time to make good the difference between the cost of freight without this connection and its facilities and cost thereof with same. Such a method would invoke entirely too remote possibilities.

The advantage must be estimated or appreciated by what a capable business man would honestly arrive at if presented with the commercial situation as a possible purchaser at the time the contract was broken.

The possibilities of the connection being got at an early date would enter into his calculations on the one hand and the disadvantages of doing business in such a place on the other. Then there are possible local advantages in the way of local trade which must not be lost sight of. These there are by reason of there being no connection and thus the business freed from outside competition. The place is small though in a good district. The advantage I thus refer to may, therefore, be small.

Again, I think that the whole scope of the agreement and what led up to it must be borne in mind. Clearly some of the parties never designed that any more should be obtained than the return of their

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money if the project failed. The great misfortune is that the agreement was not drawn up or verbally so framed as to embody this idea which would have saved all this litigation. Yet I think this was so evidently the purpose of what in the language I have quoted from *Hadley* v. *Baxendale*(1), was within

> the contemplation of both parties at the time they made the contract

that I think the damages should not exceed the amount subscribed.

It is quite possible that if the respective capacity of the mill and factory had been given in evidence as outlined in the particulars and some general evidence as to cost and extent of teaming and freight as compared with the expenses involved in the use of sidings and all implied therein (regarding which the interest on outlay and such like charges are to be considered) and the advantages of freighting over a choice of lines, a judgment might have been reached without a reference.

I suggest this because the general reference provided may involve much more than is desirable, I think it might be possible to modify it so as to avoid a needlessly expensive inquiry.

The respondent Pattison has cross-appealed, and under such cross-appeal the reference, if my view should prevail, will have to be modified so as to limit the reference as indicated above to the claim of the two corporate appellants.

I may add that in my view the surrender of the bonds cannot be made a term of any judgment herein. Any such consideration or that of the value of the bonds at any stage ought to be discarded.

(1) 9 Ex. 341.

Moreover, what I have said as to the limitation of the damages not exceeding the amount of the subscription is not to be taken as indicating that to be the measure of damages which ought to be reached.

I think the appeal cannot be allowed, but the cross-appeal must be, to the extent of modifying the judgment in the way indicated. It is not a case of costs to either party as against the other. All that is got by either probably would have been got without either appeal. And both may benefit by the intimated limitation of the inquiry instead of wasting costs on a needlessly expensive inquiry.

ANGLIN J.—Under section 36 and clause (*e*) of section 2 of the "Supreme Court Act" (as enacted by 3 and 4 Geo. V. ch. 51, sec. 1), only those judgments of the highest provincial courts of final resort (rendered in the provinces other than Quebec and in proceedings other than equitable) are appealable to this court which determine adversely to the appellant, in whole or in part, a substantive right in controversy in the action or other judicial proceeding. Such determination must be effected by the judgment appealed from — not by some former or other judgment — and the right must be a substantive right in controversy in the action.

By the judgment now in appeal the question of the liability of the defendants is determined in the appellants' favour. A reference is directed to ascertain the quantum of damages to which they are entitled. Of that direction the appellants complain, asserting that on the evidence in the record, they were entitled to a determination of the amount of their damages by the trial court and that the judgment of that court which

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fixed them at $10,000 should be restored. They insist that the variation of that judgment, by substituting, for the adjudication that they should recover $10,000, a declaration of liability and a reference to ascertain the amount of their damages, deprived them of a "substantive right in controversy in the action" within the meaning of that phrase in clause (*e*). With deference I am unable to accept that view. I cannot see that it makes the slightest difference what disposition of the case was made in the court of first instance. The question as to our jurisdiction would be precisely the same if that court had directed a reference as to damages and its judgment had been affirmed on appeal. By the judgment in appeal the plaintiffs' claim that they had a right to damages is decided in their favour; the quantum of those damages is left to be ascertained in further proceedings. The position would be precisely the same if that had been the judgment at the trial. Can it be said that the quantum of damages to which the plaintiffs are entitled — which is the substantive right in controversy in the action now being dealt with — is determined adversely to the appellants by the judgment now appealed from? I think not. That right now remains undetermined and it is immaterial what disposition of it had been made by the judgment of first instance. I am, for these reasons, of the opinion that this appeal should be quashed for want of jurisdiction; and, if that course were adopted, the cross-appeals would meet a similar fate. *Lindemark* v. *Picard*(1).

But, in deference to the views of my colleagues, who, I understand, are of the opinion that the court

(1) 9th Feb., 1914, unreported.

has jurisdiction to entertain this appeal, I proceed to consider it on the merits.

Dealing first with cross-appeals by both defendants against the finding of their liability, I entertain no doubt that both were properly held to be parties to the contract in question and liable for damages for its breach. As to the company there can be no question that it was intended that it should be bound. Its president, Pattison, executed the instrument on its behalf, and he gives explicit evidence of his authorization to do so by the directors and of ratification of his action by the shareholders, which is uncontradicted. Moreover, it received the moneys paid by the plaintiffs and it acted on the agreement which it would now repudiate. As to Pattison's personal liability the terms of the contract make it clear that that also was intended; and I think the proper inference from the evidence is that his signature to the document, accompanied by the descriptive word "president," which is similarly used in the body of the instrument, was intended to witness his personal obligation as well as that of the company.

Neither can I accede to the contention that the plaintiffs, other than the Jackson Wagon Company and the Brant Milling Company, are restricted to nominal damages by the particulars delivered by them and the terms of the order under which they were delivered. All the plaintiffs claimed the return of the moneys paid by them. The damages of which particulars were ordered and given were claimed in addition to and over and above the refund of the moneys demanded. At the trial it became obvious that the claim to recover the moneys paid as on a total failure of consideration could not be maintained; and the trial

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judge — as he had the power to do — apparently allowed the plaintiffs to substitute for that claim a demand to recover the same amount by way of damages for breach of the agreement; and the further claims for damages, of which particulars had been given, were abandoned. No formal amendment to the statement of claim was made; but the judgment of the learned trial judge proceeds upon the assumption that the case should be dealt with as if that had been done. It cannot be otherwise intelligently explained.

On the main appeal, the case of *Chaplin* v. *Hicks* (1) is chiefly relied upon by the appellants. But all that that case decides is that

> the existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

In such a case the plaintiff

> may be entitled to recover substantial, and not merely nominal, damages.

In that case the plaintiff had given in evidence all the material facts relative to the assessment of damages which were susceptible of proof. She had furnished to the jury all the data which it was in her power to supply. Having done that she was not required to render certain that which was contingent, or to furnish the means of measuring with exactness and precision something essentially indefinite. *Simpson* v. *London and North Western Railway Co.* (2); *Kennedy* v. *American Express Co.* (3), and *Jameson* v. *Midland Railway Co.* (4), are other decisions similar in principle. But *Chaplin* v. *Hicks* (1) is not authority

(1) [1911] 2 K.B. 786.
(2) 1 Q.B.D. 274.
(3) 22 Ont. App. R. 278.
(4) 50 L.T. 426.

for the proposition — for which an analysis of his argument makes it clear that counsel for the appellants really cited it — that, because the realization of the plaintiff's expectations under a contract is subject to contingency, he is not bound to put the jury in possession of information in his power to enable them to appreciate what would have been the advantages to be derived by him from his expectations if realized, as a basis on which to assess the value of the chance of realization of which the breach has deprived him. It is the failure to give such information — to supply such data as were given in *Chaplin* v. *Hicks*(1) —that renders the reference ordered by the Appellate Division necessary, since that court, in the exercise of its discretion, instead of dismissing the action, as it might have done, has seen fit as a matter of grace and indulgence, to allow the appellants another opportunity to adduce the evidence which they should have given at the trial as to relevant and material facts susceptible of proof, knowledge of which is necessary to enable the assessing tribunal to estimate what would have been the value to them of the performance by the defendants of their contract as a long step towards realization of their expectations. The plaintiffs are claiming special damages. No doubt the particularity of proof required varies with the circumstances. (Arnold on Damages, pp. 3, 4, and 12.) The assessing tribunal is, however, entitled to such assistance by proof of material relevant facts as the claimant may under the circumstances reasonably be expected to afford it.

But it is said that such evidence is in the present

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case unnecessary because we have in the consideration given and accepted *primâ facie* proof of the value placed by the parties themselves on the contractual rights acquired by the plaintiffs. That such a measure of damages must, in the circumstances of the case at bar, be illusory seems manifest. For divers reasons a man may be prepared to pay for a thing much more than any real pecuniary value it may have, not only to persons in general, but even to himself. Actuated by patriotic or philanthropic motives he may be willing to expend money for which he expects no return in the way of pecuniary or other material advantage. As to some of the plaintiffs there are circumstances in evidence that rather suggest that they were not pecuniarily interested. Unless in the case of a purely commercial contract, where the circumstances indicate with reasonable certainty that the price paid represents the fair value to the purchaser of the thing he bargained for, that price cannot afford a reliable basis for assessing damages for failure to deliver.

But in the present case, in addition to the contractual rights for the breach of which this action is brought, the plaintiffs for the $9,700 paid by them obtained bonds having a face value of $10,000, on which they were subsequently paid interest for five years. The actual value of these bonds at the time they were so acquired is not shewn, although it is sufficiently apparent that they had some substantial value. It is impossible on the evidence in the record to say how much of the $9,700 was in fact given for them, and what part of it the plaintiffs paid for the advantages likely to accrue to them from the fulfilment of the contract to construct the projected line of railway and to establish through connections. The

value to them of the advantages to be anticipated from the fulfilment of these undertakings may have far exceeded the amount which they paid, or, on the other hand, it may have been materially less. Of that value the payment of $9,700 made to secure such advantages plus the bonds for $10,000 does not afford any criterion.

On the evidence in the record I feel that I should find myself quite incapable of fairly estimating the damages to which the plaintiffs are entitled. The value of the chance they have lost is, without further material, not susceptible of assessment. Unless the action should be dismissed, the reference to enable the plaintiffs to supplement their evidence is necessary. I think we should not interfere with the exercise of discretion by the Appellate Division. In conclusion I cannot do better than quote a well-known passage from the judgment of Bowen L.J., in *Ratcliffe* v. *Evans*(1), at pages 532 and 533:—

> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

I would, for these reasons, dismiss the appeal and the cross-appeals with costs.

BRODEUR J.—I would be of opinion that the judgment of the Appellate Division of the Supreme Court of Ontario should be confirmed.

(1) [1892] 2 Q.B. 524.

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The action was for the recovery by the appellants of a sum of ten thousand dollars ($10,000) for breach of contract.

The appellants were all interested in the welfare of a place called St. George and were anxious that that place should be connected with the line of the Canadian Pacific Railway through the Grand Valley Railway and agreed to take over $10,000 of bonds of the latter company if the respondent Pattison and the company itself would undertake to extend the Grand Valley Railway to St. George and to secure a competitive freight rate from the Canadian Pacific Railway Co.

The bonds were taken over by the appellants and the company started the construction of the branch in question; but, though they had promised that by the fall of 1906 the extension of the railway would have reached St. George, the company failed to carry out their agreement.

In 1911 they instituted the present action against respondent Pattison and the Grand Valley Railway Company for the repayment of their money and for damages for breach of contract.

Pattison denied his personal liability in connection with that agreement. The three courts below, however, have decided against him on that point; and, as it was mostly a question of fact, it is not necessary for me to deal with that phase of the situation.

I think myself that Pattison should be held personally liable under the agreement which was made on the 29th of June, 1906.

The only difficulty remaining is with regard to damages. Particulars had been asked before the trial from the plaintiffs as to those damages. Some

of them stated in answer to the order that was then given that they would claim only nominal damages. The others, namely, the Jackson Wagon Company and the Brant Milling Company gave particulars.

At the trial before Mr. Justice Middleton, in view of the opinion that was then expressed by the judge, no evidence was adduced as to these specific damages claimed.

The plaintiff relied upon the case of *Chaplin* v. *Hicks*(1), and the trial judge proceeded to assess the damages at the same sum as Pattison and the railway company induced the plaintiffs to subscribe.

The judgment was varied by the Divisional Court and nominal damages only were given to all the plaintiffs, with the exception of the Jackson Wagon Company and the Brant Milling Company, in whose favour judgment was entered for $3,880.

An appeal was taken from that judgment to the Appellate Division. The court maintained that the plaintiffs were entitled to recover the damages sustained by them by reason of the breach of the agreement and they ordered that the case be referred to the master to ascertain the amount of such damages.

In view of the expression of opinion at the trial, it is pretty evident that the claim for damages was not gone into as it should have been without that. It is very much to be regretted that the parties, after having gone before four courts will have to go again into this question of evidence as to the extent of those damages, but we have not got sufficient material before us to deal exhaustively with the subject.

I think the judgment of the Appellate Division

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which ordered a reference should be maintained and this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Harley & Sweet.*

Solicitors for the respondent Pattison: *Holman, Bissett & Peine.*

Solicitors for the respondents, The Grand Valley Railway Co.: *Watson, Smoke, Smith & Sinclair.*

JAMES THOMSON (DEFENDANT) .....APPELLANT; 1915

AND *March 1, 2.
*March 15.

PRISCILLA WILLSON (PLAINTIFF) ..RESPONDENT.

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

Mortgage—Payment by instalments—Acceleration clause—Payment of part postponed—Right of foreclosure.

A mortgage provided for payment in three annual sums of $2,500 each. There was a special provision that out of the last instalment the mortgagor could retain $1,000 until he received a conveyance of the interest of an infant who, with the mortgagee, executed an agreement to convey when he became of age. There was also the acceleration clause making the whole amount due on default in paying any part. In an action to foreclose default having been made in payment of the first annual instalment.

Held, affirming the decision of the Appellate Division (31 Ont. L.R. 471), which maintained the judgment at the trial (30 Ont. L.R. 502), that the postponement of the time for payment of the $1,000, part of the last instalment, did not disentitle the mortgagee to his remedy of foreclosing; but

Held, varying the judgment below, that the acceleration clause in the mortgage did not apply to the $1,000, payment of which was postponed; that the personal recovery against the mortgagor should not include this sum; and that the judgment below should be amended by providing that the proceedings should be stayed by payment into court of the balance.

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 are stated in the above head-

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

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note. The only question in dispute was the effect of the provision postponing payment of the $1,000 on the mortgagee's right to foreclose.

Hislop for the appellant referred to *Cameron* v. *McRae*(1), and *Bonham* v. *Newcomb*(2), as authorities for his contention that the mortgagee could not foreclose while any portion of the principal monies was not due.

Choppin, for the respondent.

THE CHIEF JUSTICE.—The judgment should be varied by protecting the mortgagor in regard to the deferred payment of $1,000, the whole in accordance with the note made when judgment was delivered. I agree with Mr. Justice Anglin.

DAVIES J.—I am to allow this appeal, but only to the extent and for the purpose of varying and reducing the judgment appealed from in regard to the one thousand dollars payable on the coming of age of the minor; costs of mortgagor to be allowed except as they have been increased on grounds on which he has failed.

I agree in the opinion of Mr. Justice Anglin.

IDINGTON J.—This is a forclosure suit of a mortgage given for part of the purchase money of the land covered by the mortgage. It seems from the mortgage and affidavit verifying the statement of defence that in order to make a complete title as intended by the parties to the sale and purchase it was necessary that an interest of a minor should be conveyed when

(1) 3 Gr. 311. (2) 1 Vern. 232.

he attained the age of twenty-one years or an order be got from the court.

To avoid the expense of such an order the parties hereto agreed that the appellant should be indemnified against the contingency of failure to procure such infant's conveyance on his attaining his majority.

This was provided for in two ways. A bond was given appellant that said infant would, on attaining his majority, execute the necessary conveyance, and it was further provided by inserting in the mortgage in question immediately after the proviso fixing the terms of payment of the mortgage moneys, the following:—

> Provided always and it is hereby agreed by and between the parties hereto that notwithstanding the times, dates and manner herein fixed for payment of the principal money hereby secured the said mortgagor, his heirs, executors, administrators, or assigns may retain to his or their use the sum of one thousand dollars out of the last instalment of two thousand five hundred dollars payable on the first day of October, 1815, until such time as the said mortgagee, her heirs, executors and administrators shall have performed the terms and conditions of a certain agreement between the parties hereto, which agreement bears date the 30th day of January, 1913, entitling her or them to the due payment of the said sum of one thousand dollars under such agreement.

Instead of protecting the mortgagor in regard thereto, the formal judgment includes the said sum of $1,000 in the sum found due upon the said mortgage and fixes as usual the time for payment thereof and provides for foreclosure unless such sum paid on said date.

That date would seem to be about a year and three months before said infant, if surviving, would attain his majority.

The judgment might by the terms become so oppressive as to work a forfeiture of appellant's rights. He might find it impossible to raise on the security of

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such a defective title the money needed to redeem. He could only offer security on that to which he had got a title. That security might not enable him to raise more thereon than the judgment debt less the $1,000, whereas if he could offer the security he had and the chance of a complete title he might provide, by a mortgage conditional on getting the complete title, for the $1,000 also.

In the court of appeal upholding the said judgment reliance is placed upon the acceleration clause which in an ordinary case might be held to so bind a mortgagor that he must either pay up in full or be foreclosed if making default in a single payment and thus lose the advantage of the terms originally stipulated for unless, as I think, the court could relieve him. It habitually did so.

I cannot think that the parties ever intended to deprive by virtue of the use of the acceleration clause in that way the benefit of the above proviso. And if the respondent mortgagee or any one else ever so intended I think there are several answers thereto. It is not the correct construction of the document, especially when read in light of the collateral agreements. Besides it is not infrequently the case that the consideration for the mortgage fails to be advanced and in such cases no matter what the terms of the mortgage may read the amount spoken of therein is duly cut down to the actual sum advanced. Such seems to me the nature of this interest estimated by those concerned to be worth a thousand dollars for the purpose of this mortgage and to become payable at a date when the infant would have attained his majority and as a charge on the land to be dependent upon his executing a release or other necessary conveyance, or said inter-

est being otherwise, in possible contingencies, conveyed to the mortgagor or his assigns.

In the meantime for convenience sake the agreed upon price of $1,000 is included in the mortgage.

If the mortgagee is determined to foreclose it must for the purpose of this suit meantime be treated as money not advanced and deducted from the main consideration.

Then again, if the general principles upon which courts of equity proceed in foreclosure are involved and the cases relied upon by appellant are reasonably applied, there would be no difficulty in the matter. If the mortgagor fails to pay the sum found due less this $1,000, the mortgagee gets the property that she conveyed and so ends the matter so far as this mortgage is concerned.

If, on the other hand, the mortgagor redeems it can be provided in such case that it shall stand as security for the $1,000 (till such time as she has had the opportunity contemplated by the parties of procuring the conveyance contracted for) with interest in the meantime thereupon.

Then again to do otherwise seems to me to contravene the policy or jurisprudence of the courts of equity relative to the relief to be given against penalties and forfeitures.

I think it is quite possible that the extremely unreasonable contention set up by appellant that no proceedings could be had herein till said interest was got in, caused the courts below to overlook the need for giving the relief indicated above by modifying the judgment accordingly.

The authorities relied upon do not justify the pretension set up by the appellant. The principle some

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of them proceed upon I repeat does justify the application thereof to this sum of $1,000.

If the judgment is amended by the deduction of $1,000 from the sum found due it will be necessary to name a new day for payment.

That need not be the original length of time given, but say a month after the formal judgment issue herein.

If the security is ample, or a payment made so to reduce the amount as to make it ample, the parties would be well advised I imagine to fix the new date at a time that would enable the conveyance to be got and agree to add a term to the judgment anticipating such conveyance and making the whole sum as it now stands be payable in such event on the new date.

In any event the appeal should be allowed and the judgment varied.

The appeal should be allowed with costs but without costs to either party of the appeal to the court of appeal and the original judgment be varied by deducting $1,000 from the amount found due and also by providing as already suggested for the contingency of redemption and the security standing to secure the $1,000 and interest thereon to abide the result of the title being completed within a reasonable time to be agreed upon or, in default thereof, fixed by the registrar, and failing that, the discharge or reassignment to appellant of the mortgage.

I had an impression on the opening of the argument herein that all this might have been easily obtained by an application to the Supreme Court of Ontario, but the judgment of the Appellate Division rather indicates otherwise. Hence I would allow costs of appeal here, because I still think by some such

reasonable course as I suggest the present relief might have been sought for and possibly obtained without coming here if the claim to deprive the respondent of all relief had not been so unreasonably persisted in.

Since writing the foregoing a reading of the full text (from copy since handed in) of the statutory meaning to be given said acceleration clause as it stands in the mortgage, confirms the impression I had relative to the power of the Ontario courts in the premises. An explanation of that by counsel or in the judgment appealed from might have saved some labour. I still prefer that the parties should be left to work out an amendment protecting them both in the way indicated above and in other opinions delivered herein, and possibly save needless expense rather than forcing them to accept the amendment proposed; should they fail, of course, the registrar would have to settle the minutes relative to amendment, etc. The $1,000 in question forms such an unusual part of the consideration and is subject to so many contingencies that it seems to me the usual form of judgment in foreclosure is not quite appropriate. That form by no means bounds the equitable jurisdiction of the court.

The appellant is told he can have a sale if he so elect and I presume pay for. But what a tangle would ensue unless exceptional provision made for such an event. And I do not know whether or not desired and if it is worth while to provide therefor. Leaving it to the parties first to try and frame what would suit is for that as well as many other reasons desirable.

In argument here it was quite clear to my mind neither counsel had anticipated the view we have

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taken and hence we are without their aid in this regard. The case is not one to call for re-argument. It is not desirable to have the whole $1,000 eaten up in costs.

DUFF J.—I agree with Mr. Justice Anglin.

ANGLIN J.—The appellant's contention that his default in payment of interest and of certain principal moneys due upon his mortgage to the respondent did not entitle the latter to the remedy of foreclosure, because, as to $1,000 of the final instalment of $2,500 of principal, the mortgagee had agreed that it should not be payable until a deed of a supposedly outstanding interest in the property in question held by an infant had been furnished to the mortgagor, seems to me to be most unreasonable. *Burrowes* v. *Molloy*(1), on which the appellant relies, was not at all such a case. There the mortgagor had covenanted that the whole principal should not be called in before a certain time, and that time had not arrived. In *Cameron* v. *McRae* (2) there is, no doubt, a passage in the judgment of the Chancellor, at page 314, quoted in *Parker* v. *Vinegrowers' Association*(3), at page 186, which lends some support to the proposition for which Mr. Hislop cites it, that is to say, that when a mortgagee has disabled himself from calling in any part of the principal he is not entitled to the relief of foreclosure in respect of the balance. But the passage relied upon is merely a dictum, and I cannot regard these cases as authorities which require an extension of the rule stated in

(1) 2 Jones & La T. 521. (2) 3 Gr. 311.
(3) 23 Gr. 179.

Burrowes v. *Molloy*(1) to a case where part only of the principal is postponed, as it is here. Indeed, in *Parker's Case*(2), at page 182, Blake, V.-C., says:—

> There is no doubt that the right to redeem implies the right to foreclosure and *vice versâ*, but because these rights are reciprocal it does not follow that the identical conditions attached to the one right are to be attached to the other. * * * Holding as I do that all the terms on which the alternative right of foreclosing or redeeming may be exercised, need not be identical, it is not necessary to consider on what exact conditions under this instrument the defendants could redeem. It is only incumbent on me to decide whether there has been such default on the part of the defendants, as that, *in invitum*, they can be compelled through a foreclosure suit to pay any, and if so what, portion of the money secured by the mortgage.

By the default in payment of interest and of an instalment of principal the mortgagor broke the condition on which the mortgage was to become void and at law forfeited all his rights in the land, thus entitling the mortgagee to bring foreclosure proceedings to extinguish the equity of redemption which the mortgagor still retained. Except as to the $1,000 there was no agreement to defer payment or to postpone the right to foreclosure for default. As put by Meredith, C.J.C.P.:—

> So the case is a simple one of default in payment of the first instalment due on the mortgage, a default which, at law, forfeited all the mortgagor's rights in the land, but in equity left in him a right to redeem.
>
> * * * * *
>
> Nor does foreclosure create any difficulty or work unjustly against any one. If foreclosure takes place, the mortgagee merely gets back that which she conveyed and the mortgagor loses only that which she has paid — the usual case.

The mortgagee by foreclosure will not obtain and cannot make title to the outstanding interest which was not vested in her mortgagor and was not mort-

(1) 2 Jones & La T. 521. (2) 23 Gr. 179.

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gaged to her. She forecloses only on the mortgagor's equity to redeem that which he conveyed as security, *i.e.*, the interest which he had in the lands.

But I am, with respect, unable to accept the view which prevailed in the Appellate Division that the acceleration clause in the mortgage overrides the special provision by which the payment of the final $1,000 of principal moneys was deferred, or that, reading the mortgage as a whole with the incorporated agreement, the right to the postponement of the payment of that sum was "conditional on there being no default in payment of interest." In the first place the agreement to postpone the payment of the $1,000 is not made subject to any such condition. It is an absolute undertaking that the mortgagor may retain this part of the principal until delivery to him of a conveyance of the infant's outstanding interest. Although it will usually be implied without express stipulation that postponement of the payment of principal is conditional on punctual payment of interest; *Seaton* v. *Twyford* (1); *Edwards* v. *Martin* (2); the form in which the stipulation in the present case is couched, I think, prevents any such implication arising as to the $1,000 in question upon default either in payment of interest or in payment of instalments of principal as they fall due. We cannot ignore the fact evidenced by the agreement incorporated in the mortgage that the $1,000, of which payment is deferred, was a part of the purchase money for which the purchaser-mortgagor has not yet received the consideration, and which it was clearly intended should not become payable until the infant's interest in the lands, which it

(1) L.R. 11 Eq. 591. (2) 25 L.J. Ch. 284.

represents, should be vested in him. Having regard to all the circumstances and to the intent of the parties as manifested by the terms of the mortgage and agreement it seems reasonably clear that the acceleration clause in the mortgage cannot have been intended to apply to this $1,000, of which payment was thus specially postponed, but only to other portions of the principal moneys which might not be overdue when default occurred.

It follows that, without affecting any right of the mortgagor under the provisions of Rule No. 485 of the Ontario Supreme Court Rules of 1913, the judgment pronounced in this action should be modified by excluding from the amount for which the mortgagee is given the right of immediate personal recovery against the mortgagor the postponed $1,000. While redemption can only be awarded on payment of the whole sum secured by the mortgage, which includes the $1,000 deferred, the mortgagor is entitled to have this action stayed on payment of the sum secured less that $1,000. This can be accomplished by inserting in the decree, as paragraph 2*a*, the following:—

> And upon the defendants paying into the said head office of the Canadian Bank of Commerce to the joint credit aforesaid and at the time aforesaid the sum of $6,287.15 this court doth order and adjudge that all further proceedings in this action, except an application for payment of said moneys over to the plaintiff, be stayed;

by inserting in clause 3 after the word "payment" the words,

> either under paragraph 2 or under paragraph 2*a* hereof,

and by substituting in clause 4 for the figures "$7,080.90" the figures $6,080.90" — all this, of course, as of the date of the judgment as originally pronounced. In view of the delay occasioned by the ap-

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peals to the Appellate Division and to this court the figures and dates in that judgment will require to be altered. That can be done by the registrar in settling the minutes of judgment.

The appellant having succeeded, though only on a minor point, should have his costs in this court, except in so far as they have been increased by his having taken grounds on which he has failed.

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

Appeal allowed with costs.

Solicitor for the appellant: *Thomas Hislop.*

Solicitor for the respondent: *H. E. Choppin.*

GEORGE S. PEACOCK (PLAINTIFF) . . . APPELLANT; 1915

AND *Feb. 8.
*March 15.

THOMAS WILKINSON AND ROBERT TINCK (DEFENDANTS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Broker—"Real estate agent"—Sale of land—"Listing" on broker's books—Principal and agent—Authority to make contract.

Where the principal has merely instructed a broker to place lands on his list of properties for sale, such "listing" does not of itself constitute an authorization to the broker to enter into a contract for the sale of the lands on behalf of his principal.

Judgment appealed from (7 West. W.R. 85) affirmed.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), reversing the judgment of Johnstone J., at the trial (2), and dismissing the plaintiff's action with costs.

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

J. F. Frame K.C. for the appellant.

W. M. Martin for the respondents.

THE CHIEF JUSTICE.—I am disposed to agree with the trial judge because I am satisfied that the reckless statements made about the title by the defendants

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

(1) 7 West. W.R. 85. (2) 5 West. W.R. 1012.

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cannot be reconciled with that good faith which should exist in cases like this, but I defer to the opinion of the court below and of the majority here.

The appeal is dismissed with costs

DAVIES J. concurred with Duff J.

IDINGTON J. — This somewhat remarkable case seems to require before dealing with the contentions made by appellant a concise, but full and accurate statement of the facts upon which they are founded.

One Carrothers on the 18th or 19th of March, 1912, listed for sale two lots in Regina, Sask., with respondents, who were real estate agents in that city. The usual index-card specifying the lots to be offered and the price and terms he was willing to accept was signed by him. On the said 19th of March appellant (formerly in the real estate business) called at respondents' office and offered a listing of other properties for which he wanted a purchaser and, whilst so there, was offered the Carrothers properties and verbally accepted the proposal and made a deposit of $100 on account of the purchase.

Next day respondent Tinck waited upon the appellant at his office to procure his signature to the agreement for the purchase by him of the said Carrothers properties and he signed same in duplicate and gave his cheque for the balance of the cash payment.

That agreement was not signed by any one for Carrothers as respondents never pretended to have authority to sign such an agreement and had only been retained to find a purchaser. They sent this agreement to Carrothers, in care of King Edward

Hotel, Toronto, Ont., where he had said he was going, to be executed by him and returned.

The agreement was returned about a month later as uncalled-for. Thereupon the agreement was forwarded by respondents to Carrothers, at Edmonton, Alta., where he lived, but it never came back and, presumably, never was executed by him.

Some correspondence is alleged to have taken place later between him and respondents but that, though tendered in evidence by them, was rejected.

All we have of it is a copy of the letter from respondents enclosing the agreement from which it appears they asked him to sign and return one copy so duly executed attached to a bank sight-draft for the sum of $450, being the cash payment less respondents' commission.

On the 1st of June appellant says he called upon the respondents for a receipt for the money he had paid and got the following:—

March 20th, 1912.

Received of George S. Peacock $500, first payment on lots 1 and 2, block 108, Old City, bought from us at $1,000; one-half cash and the balance 6 and 12 months at 8 per cent. and listed by A. F. Carrothers.

(Sgd.) DAD LAND COMPANY,
R. Tinck.

The appellant meantime, on the 28th March, resold the property to Wright and Boyle, real estate agents, and, pursuant thereto, he and they signed an agreement for the sale and purchase thereof at the price of $2,000, of which $767 was to be paid in cash and balance spread over two years bearing interest at eight per cent. per annum.

They re-sold to one Seller at the price of $2,500 and assigned the said contract to him by an assign-

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ment which is not amongst the documents before this court. A recital in the later agreement of August, hereafter referred to, indicates the assignment was executed on the 1st of April.

On the 3rd of June appellant concluded he could not get title to the property and "immediately took steps to re-purchase the property" from William Seller and succeeded in doing so at the price of $3,100. The exact date of that purchase is not given in evidence. And Seller was not called as a witness.

On the 4th of June respondents wrote appellant explaining that they had failed to get delivery of the lots and, to repay the cash payment, enclosed a cheque for $500, which was returned by appellant on the 30th of July.

Meantime some meetings of the parties hereto were held relative to the matter and, on one occasion, Boyle and Seller were both present to state what they had done, but the respondents on every occasion repudiated liability for damages appellant was then and there claiming from them. On one of these occasions respondents offered to give the cash if any doubt existed about the cheque being, as such, satisfactory, but appellant refused and seems to have insisted on these occasions on damages for the loss of profits and those differences in price which he said he had paid these sub-purchasers which seemed, in his view, to be his measure of damages.

On one or more of these occasions the appellant stated his grievances in the matter, omitting, however, the one most essential part of his story to which I am about to refer.

On the 5th of August an agreement was made in

writing between Wright and Boyle of the first part, Seller of the second part and appellant of the third part, for rescinding and releasing said sub-sale and amongst other recitals therein was the following:—

And whereas it has been discovered by all the parties hereto that the party of the third part did not have the right to call for a title to the said lots nor any contract with the registered owner thereof and is unable to furnish any title nor will he be able to furnish any title to said lots, and it has been deemed expedient by all the parties hereto that, instead of the said respective purchasers under the said agreement and assignment insisting upon title being given according to the terms of said agreement and assignment, that the said agreement and assignment should be abandoned, and the moneys paid thereunder returned and the parties thereto compensated for their loss as hereinafter set forth.

The appellant says that when Tinck came to him with the agreement of sale by Carrothers and before he (the appellant) signed as above set forth the following conversation took place:—

Q. Now just state slowly what the conversation was?

A. As soon as I saw the name of the vendor was A. F. Carrothers, I asked the defendant Tinck if he was sure that these lots could be delivered by Carrothers. He assured me that they could. I asked him if he had searched the title of these lots. He told me that the defendant Wilkinson had searched the title and that Carrothers was registered owner. I then referred to the matter that I knew that Carrothers had been in business here, and I wanted to know if there had been any execution against him. I understood that he had been in business difficulties. And he stated positively that there were no executions against him; the title was clear. He also said, "If you want any further protection in the matter we will have a caveat put on these lots for you."

In regard to this statement he is corroborated by his bookkeeper, Blenkhorn, to whose remarkable memory I may advert to later. Meantime I assume, for argument's sake, the truth of appellant's story and will therefore consider in light first thereof, standing alone, what (if any) claim appellant can found thereupon and next how in light of his own conduct he can make any claim.

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Counsel for appellant puts his claim in a variety of ways. One of these is put in a two-fold sort of way of an assurance that the respondents undertook to sell the property or that it would be sold and delivered to the appellant so that he would have the title conveyed to him.

In either of these ways of presenting the matter it simply, when stripped of needless verbiage, means a contract of sale by respondents and the facts do not bear out any such contention. The respondents never professed to sell the property in any other capacity than as agents. The documentary evidence seems conclusive in this regard.

Then it seems to have been presented below as, in fact, an agent professing to sell and selling property he had no authority to sell. Again the facts are against appellant for the agents had authority to procure a purchaser and never signed any contract of sale. Their principal never signed any either. There cannot be found anything upon which an action for breach of warranty as agents can lie.

Indeed, it is difficult to grasp any of these elusive theories put forward and apply them in light of the evidence to any principle of law that would found an action for breach of contract. The suggestion is also made of a collateral warranty, but that must fail also as there was no contract to which it could be collateral.

The fifth and only ground which can be made to wear a plausible appearance in law is stated in the factum as follows:—

5. Alternatively to all the foregoing grounds because, by reason of the false and fraudulent statements of defendants, the plaintiff was led into and suffered damage.

The general statements as to producing title are of no material consequence for they are nothing more than any real estate agent might properly use affirming his belief in his client being ready to perform that which he had authorized to be done on his behalf.

No action can lie for any such thing so long as the agent confines himself to what he has been authorized to carry out and has no reason to believe the principal is acting dishonestly.

The only serious matter, in what appellant states he was told by Tinck, is that relative to Wilkinson having searched the title and found Carrothers to be the registered owner and that there were no executions against him.

Tinck positively denies these allegations and Wilkinson says he had never till August searched the title. And it puzzles me to understand how or why any sane man should tell such a senseless falsehood liable to be discovered at any moment at an expense of twenty-five cents for a search.

But appellant says more; that the man telling him offered to protect him further by filing a caveat. And apparently that very every-day proposal in such cases led to the discovery, as it was sure to do, that Carrothers never was registered owner.

He did not file any caveat, but appellant did at an expense, he says, of five dollars, on 10th of April. The caveat is produced and therewith the affidavit of appellant sworn on the 4th of April just fifteen days after he had been told, if a word of truth in his story, that Wilkinson, the respondent, had searched and found Carrothers to be the registered owner.

The caveat consists of a notice to the registrar of

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which the part essential to our present inquiry is as follows:—

> Take notice, that I, George S. Peacock, of Regina, in the Province of Saskatchewan, claiming an equitable interest under and by virtue of an agreement of sale between A. F. Carrothers, of the City of Edmonton, as vendor, and myself, George S. Peacock, of the City of Regina, in the Province of Saskatchewan, as purchaser, and dated on or about the 20th day of March 1912, the said Carrothers holding the said land under and by virtue of an agreement of sale therefor made with Arthur Tyzack, the registered owner, in all that certain piece or parcel of land being lots numbers one, * * * etc.

describing the lands in question.

The appellant as such caveator, verifying said statement, swears amongst other things, as follows:—

> 1. That the allegations in the above named caveat are true in substance, and, in fact, to the best of my knowledge, information and belief.

And this man, thus swearing, is asking damages from a court of justice for having been fraudulently induced by the statement that the said registered owner was Carrothers. Need I say that in law, unless in fact a false statement induces a man to act upon it to his damage, he has no right of action; and that unless he has taken the means a prudent man would be expected to take when so acting upon a false statement, he has no action of deceit?

Can any one, in face of such an unfounded affidavit by appellant, so inconsistent with the story of a belief in Carrothers being registered owner, believe he, appellant, was so induced by the alleged fraudulent statement?

But that is not all, for Wilkinson was called as a witness and testified as to what transpired at one of the meetings I have referred to above as follows:—

> Q. Then do you remember any other important conversations that you had with him?

A. I remember him coming to the office on Cornwall street and bringing two gentlemen with him, Mr. Boyle and another gentleman.

Q. Your office was on Cornwall street?

A. Yes.

Q. And you had a conversation at that time ?

A. Yes.

Q. There was Mr. Peacock and Mr. Boyle, and this other gentleman, and yourself ?

A. Mr. Tinck was there also.

Q. And what took place at that time ?

A. Mr. Peacock made a demand for compensation for some loss that he alleged he had sustained.

Q. And did you agree to give him compensation ?

A. We did not.

Q. Did he at that time charge that you had told him that you would search the title to this property ?

A. He did not.

Q. Did he say in the presence of Mr. Boyle or Mr. Tinck or anybody else that you had guaranteed to deliver this property to him ?

A. He did not.

Appellant nowhere states that he had ever made it a matter of reproach to these respondents, or either of them, when claiming damages that he had been told such a palpable falsehood as he now charges against Tinck, and founds this action upon. If he had been told what he says and trusted it, then was the time respondents and others should and doubtless would have heard of it.

Wilkinson swears he never searched till August, (and he could easily have been contradicted if he had or could have been proven to have known or been told of this discovery,) yet no one appears to say so except what appellant says, and then only inferentially.

Appellant was recalled after Wilkinson had testified as above, but did not venture to contradict his very material statement.

How could a man misled by such a story as he now puts forward forbear from charging him or his partner or both with the alleged deception he now relies upon ?

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No one ever seems to have heard of it except Blenkhorn.

When, on cross-examination, appellant was brought face to face with the said caveat, he speaks thus:—

Q. Mr. Peacock, at the time you signed the caveat did you know whether Carrothers had bought this property under any agreement of sale from anybody? At the time you signed the caveat you knew that the property was not registered in the name of Carrothers?

A. I did.

Q. Did you have any information that Carrothers had bought from any particular person?

A. After I signed that caveat I called up the defendant Wilkinson——

Q. Never mind after you signed the caveat. At the time you signed the caveat did you know whether Carrothers had bought from anybody — how he held the title?

A. No; I did not.

Later he tries an explanation that does not in the least degree ameliorate his position, but seems to indicate that his solicitors had some telephone conversation with Wilkinson, after their discovery that Carrothers was not the registered owner, in which he alleges Wilkinson had remarked "well he must have it under agreement for sale," all of which is hearsay.

But Wilkinson was recalled and testified thus:—

Q. Did you ever tell Mr. Peacock over the telephone or in any other way that Carrothers held this property under agreement of sale from Arthur Tyzack, the registered owner?

A. No, sir. I wasn't aware that Mr. Tyzack owned the property or was the registered owner,

and was allowed to go without cross-examination or any contradiction from those in the solicitor's office.

Blenkhorn, the corroborator of the appellant, in cross-examination, testifies as follows:—

Q. Have you discussed your evidence with anybody?

A. I have mentioned the matter.

Q. Have you talked it over with Mr. Peacock?

A. Well, very little.

Q. Have you not gone over your story together ?
A. Never gone over my story.
A. And never gone over it with my learned friend ?
A. No.

The improbability of this adds nothing to the strength of his story or to inspire confidence in his corroboration.

Indeed, in one of appellant's answers he says, after being positive, as follows:—

A. When he stated the title was clear of incumbrance and in the name of A. F. Carrothers, I understood him to say that Wilkinson had searched the title.

On the foregoing no court should allow any damages for fraud, even if suffered, when so clearly not relied on, and reliance thereon only supported by the oath of a man who could deliberately take the oath above set forth so inconsistent with his having relied upon the pretended assurance.

Even if the case had been something better than it is there never was, in law, any ground for damages by reason of the re-sale and that being re-assigned.

Appellant could not have been called upon for damages flowing from the failure to make title to Boyle and Wright unless he was deliberately trying to defraud these other gentlemen. Nor in that case could he look to any one else to reimburse him. And the recital above quoted from the agreement of August with said sub-purchasers indicates no such ground was ever taken.

The case of *Bain* v. *Fothergill*(1), within which all such like claims as herein involved fall, is yet good English law as introduced into the North-West. I respectfully submit the case of *O'Neill* v. *Drinkle*(2) cannot

(1) L.R. 7 H.L. 158. (2) 1 Sask. L.R. 402.

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be considered as governing such claims. There are many conceivable cases arising out of land sales in which damages may be recovered, but wherein they fall within *Bain* v. *Fothergill*(1) the claim must fail. Because of simplifying or simplicity of tenure a change in the law governing such cases cannot be presumed to have taken place. On such a ground the various provinces might have different laws, and, in Ontario, for example, one law for the lands held under the old registry system and another for titles under the new system.

Within the said case, short of fraud, respondents if assumed in the position of vendors, as in one way the case is presented, would not be liable, as no fraud is found. And there is no case on which appellant under the circumstances can succeed in treating the action as one of deceit.

I think this appeal should be dismissed with costs.

DUFF J.—The learned trial judge took one view of the facts and the court of appeal took another view. And it appears to me that the crucial question on the appeal is whether or not the full court was right in rejecting the conclusion upon the facts that the trial judge had arrived at.

It is important in appreciating the conduct of the parties to keep in mind the fact that at the time when the transactions and events occurred which have to be considered there was great activity in the buying and selling of real estate in Regina, or in other words, that a "land boom" was in progress.

The respondents were real estate agents in Regina;

(1) L.R. 7 H.L. 158.

and some time prior to the 19th of March, 1912, they had listed with them, by one Carrothers, certain lots which were the subjects of the transactions about to be discussed. On the date mentioned the appellant, who was a man of long experience in business, and who had had previous dealings with the respondents, while in their office in Regina, on business connected with the sale of some property owned by him, had his attention called to the lots in question by the respondent Tinck, and, having been informed of the terms on which they were listed, said that he would take them at $1,000 and pay $100 as deposit. On the following day the appellant executed as purchaser a document intended to be a formal agreement for sale between himself and Carrothers as vendor. The agreement was signed in duplicate, and the duplicates handed to the respondents with a cheque for $400, the residue of the half of the purchase price, which, according to the terms mentioned on the previous day, was to be paid in cash. These documents, together with the cheque, were forwarded by the defendants to Carrothers, at Toronto. They were never executed by Carrothers, and on the 4th of June, 1912, the respondents wrote to the appellant informing him that they had been unable to induce Mr. Carrothers to complete the sale and enclosed a cheque for the sum of $500 paid by the appellant. In the meantime the appellant had entered into an agreement for the sale of these lots at a largely increased price, $2,000, the 28th of March, 1912, being the date of the agreement, by which he covenanted to give a good title to the purchaser. Later finding that the lots were rising in price and that he was unable to obtain a title from Carrothers, he made a composition with his vendee paying him all the sum

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of $1,000 as compensation for the loss of the bargain. The plaintiffs' claim in the pleadings was based alternatively, first, upon an allegation that the defendants had undertaken to procure the transfer of a good title to the lots in question to the appellant; and, upon an alleged fraudulent misrepresentation that Carrothers was the registered owner of the lots. The trial judge decided in favour of the appellant upon the first of these two alternative grounds. The full court reversed the judgment of the trial judge holding that what was done by the defendants was in the ordinary course of their business of finding a purchaser for Carrothers, and that they entered into no agreement either to procure a sale from Carrothers to the appellant or as agent on behalf of Carrothers to sell.

The claim based upon deceit was not, as I think, either in substance or in form passed upon by the learned trial judge. The full court appears to have rejected this claim upon the ground that certain misrepresentations of fact were not shewn to be fraudulent, and that the plaintiff's loss was not due to the respondents' misrepresentations, but to his own recklessness in entering into a binding agreement for the sale of the lots before he had procured a concluded agreement with Carrothers for the purchase of them.

The points in dispute are questions of fact, but the right determination of these questions depends almost entirely upon the proper inference to be drawn from facts which, in themselves, can hardly be said to be the subject of controversy. My opinion, after a full examination of the evidence is that the judgment of the full court was right.

One point ought to be noted at the outset and that

is that the mere listing of property, as it is called, with a real estate agent does not itself involve the grant of any authority to him to enter into a binding contract of sale on behalf of the vendor. Where sales are made in the course of a "land boom" it perhaps most frequently happens that the seller who lists his property with the real estate agent has a title resting upon one or more, sometimes upon a long series, of executory agreements and it is of the greatest importance that the conditions of any contract of sale should be so drawn as to protect him fully, and this, without special instructions, the agent is, of course, not competent to do. Some confusion, no doubt, has arisen from the use of the term "real estate agent" which describes, of course, not the legal relation between the two parties, but merely the nature of the so-called agent's occupation. The mere listing of property with such an agent implies nothing more than a representation that the proprietor is prepared to do business upon those terms and is not in itself an offer to sell which may be accepted and converted into a binding agreement by any purchaser saying to the agent that he will take the property on those terms. The agent's business is to procure a purchaser, that is to say, to bring into contact with the vendor a person willing to purchase on the terms mentioned. Having done that he has performed his function and earned his commission, provided his authority is not in the meantime revoked by the sale of the property by the proprietor. The listing alone gives him no authority to bind the proprietor by a contract of sale. The fact which seems to me to be sufficiently established that the refendants did not profess to sell the lots is, in my

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judgment, the decisive fact in the case. I think that fact is established as a necessary inference, from other facts which are not seriously in dispute. I have already mentioned that the contract signed by the appellant professing to record the transaction formally into which they intended to enter was a proposed contract between himself and Carrothers which he quite well understood was to be executed by Carrothers and not by the defendants as Carrothers's agent. That document must be taken as conclusive evidence of the character of the transaction in respect of which the sum of $400 was paid on that day to the respondents. The contemplated transaction was a contract of sale which was to be completed only when executed by both parties to it. It seems idle, in face of that, to suggest that on the day before an oral agreement of sale had been entered into between the appellant as vendee and the respondents representing Carrothers as the vendor. Any such suggestion, moreover, comes to shipwreck on the hard fact that the terms of listing made known to the appellant required the payment of $500 in cash, that is to say, contemporaneously with the constituting of the relation of vendor and purchaser between the proposed parties to the agreement.

The fact was known to both parties that the agent had no authority to conclude a contract of sale upon any such terms, that is to say, in the absence of such a payment. As no contract of sale was ever entered into professedly by the respondents on behalf of Carrothers it follows that the representations of authority to enter into such an agreement upon the terms mentioned, assuming there were such representations, the authority not having been acted upon, could not give

rise to any right of action. It follows also that any right of action *ex contractû* against the respondents must rest upon some contractual undertaking on their part that Carrothers would execute the agreement signed by the appellant.

The most important evidence in support of this branch of the appellant's case is in his statement made on cross-examination that he was told by the defendant Tinck that he could "rely on getting delivery of the property." It is necessary, however, to read this testimony with the plaintiff's statement that at the same time he was assured that Carrothers had the title and with the statement in his examination-in-chief to the effect that the assurance given by the defendant was a positive assurance that Carrothers could deliver the property. I do not think this evidence is sufficient to establish the existence of an agreement to procure the execution of a contract of sale by Carrothers. The point about which the appellant was concerned, as I think the evidence sufficiently shews, was the question of Carrothers's title. It was to this point that the appellant's questions and respondents' assurances were addressed.

The appellant admits that he is unable to assert that he at any time believed the respondents to be selling the property on their own behalf. Read as a whole the evidence appears to be too doubtful and equivocal to justify a conclusion in the sense contended for by Mr. Frame. It is not a matter in which the conclusion of the trial judge is entitled to that weight which attaches to his opinion on any point of credibility.

I think the conclusion of the full court is to be preferred.

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There remains the question of fraud. This ground of action also obviously fails, I should have thought, once it is plain that the appellant had not a concluded contract with Carrothers for the sale and purchase of the lots; and for this short reason, that, having no contract with Carrothers, the question as to whether Carrothers had or had not a title to the land, whether he was or was not the registered owner, must necessarily have been a matter of no moment. If every representation of fact made by the respondents had been perfectly true the appellant would, in the absence of such a contract, have been in precisely the same position as he found himself in in June, unable to make a title, so far as it appears from the evidence.

It seems to have been assumed that the respondents' failure to procure Carrothers to transfer the property to the appellant was due to Carrothers' want of title, or rather to his lack of any right to call for such transfer. All that is mere speculation. If anything the probabilities are against it. Carrothers admittedly was not the registered owner; but that is entirely consistent with the existence in him of a right to call for a transfer of the property to his nominee.

On the other hand there is the fact that the property was unquestionably listed by Carrothers with the respondents, who, as it appears from the correspondence, entertained no doubt whatever as to Carrothers' power to deal with it. The simple explanation as to Carrothers's refusal to sign the agreement most probably lies in the fact that when the documents reached him he had learned that the property in the meantime had doubled in value. Knowledge of this sudden rise may also explain the haste of the appellant to enter into a contract of sale without having

first ascertained that he was in a position safely to enter into such a contract.

Looking at the transaction broadly, one sees no reason to doubt that it was simply a case of an owner, having listed property, refusing to stand by the terms he had given to his agent, and an intending purchaser acting upon the agent's assurances that the principal would stand by them without satisfying himself by proper inquiries whether, in point of fact, he had any contract at all with the owner of the property and suffering loss in consequence of his rashness. That in this case the assurances of the agents were understood to be contractual in their nature is not asserted in his evidence by the appellant himelf; and as such assurances — that the principal would accept and execute the proposed contract of sale — being assurances as to something which necessarily was a matter of opinion only, the appellant can only found an action upon them by obtaining a finding that they were fraudulent. The learned trial judge has not found as regards these assurances that they were fraudulent. The full court has found that they were not. An independent examination of the record satisfies me that there is no evidence upon which any finding that they were could be properly based.

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

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

Appeal dismissed with costs.

Solicitors for the appellant: *Frame, Secord, Turnbull & Goetz.*

Solicitors for the respondents: *Embury, Scott & McKinnon.*

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*March 2.
*May 4.

JOHN S. GREER (PLAINTIFF).....APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } RESPONDENTS.

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

Railways—Right of way—Clearance of combustible matter—Burning worn-out ties—Injury from spread of fire—Limitation of action —"Operation of the railway"—"Railway Act" (*R.S.C.* [1906] *c.* 37, *ss.* 297, 306).

Held, per Fitzpatrick C.J. and Duff, Anglin and Brodeur JJ., that when worn-out ties are burned by a railway company on its right-of-way in performance of the duty imposed by section 297 of the "Railway Act" to keep the right-of-way free from unnecessary combustible matter any damage or injury resulting therefrom is caused by reason of the "operation of the railway" within the meaning of that phrase in section 306, and the right of action for such damage or injury is prescribed by one year.

Per Duff J.—The injury in such case may be caused by reason of the "operation of the railway" though the company, in burning the ties, was not performing the duty imposed by section 297.

Per Davies and Idington JJ. dissenting.—By sub-section 2 of section 306 the application of the section is limited to cases in which the injury was caused "in pursuance of and by authority of this Act or of the special Act" and as the burning of the ties was not so authorized the prescription could not be relied on.

Held, also, Idington J. dissenting, that sub-section 4 of section 306 did not prevent the application of the provision in sub-section 1 for limiting the time in which action could be brought.

The decision of the Appellate Division (32 Ont. L.R. 104) maintaining the judgment at the trial (31 Ont. L.R. 419) was affirmed.

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 defendant company.

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

(1) 32 Ont. L.R. 104. (2) 31 Ont. L.R. 419.

The company's servants burned a number of worn-out ties on the right-of-way and the fire ran over on plaintiff's land and destroyed his property. In his action for damages the negligence of the defendants was admitted and the only question in dispute was whether or not they were entitled to plead that the action should have been brought within one year from the commission of the injurious act as provided in section 306, sub-section 1, of the "Railway Act." This question was decided in favour of the defendants in both courts below.

Laidlaw K.C. for the appellant. Section 306 of the "Railway Act" does not apply to the case of a breach of a common law duty. *Prendergast* v. *Grand Trunk Railway Co.*(1); *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Railway Co.*(2); *Geddis* v. *Proprietors of Bann Reservoir*(3); *Myers* v. *Bradford Corporation*(4).

The burning of the ties was no part of the operation of the railway. *Canadian Northern Railway Co.* v. *Robinson*(5).

MacMurchy K.C. for the respondents. The words "construction and operation" include everything necessary for maintaining the work of the railway. *Hodinott* v. *Newton, Chambers & Co.*(6); *Sadd* v. *Maldon, Witham and Braintree Railway Co.*(7). See also *Forsythe* v. *Canadian Pacific Railway Co.* (8); *Kennermann* v. *Canadian Northern Railway Co.* (9), at page 76.

(1) 25 U.C.Q.B. 193.
(2) 10 Ont. L.R. 419.
(3) 3 App. Cas. 430.
(4) 31 Times L.R. 44.
(5) 43 Can. S.C.R. 387; [1911] A.C. 739.
(6) [1901] A.C. 49.
(7) 6 Ex. 143.
(8) 10 Ont. L.R. 73.
(9) 3 Sask. L.R. 74.

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The Chief Justice.

THE CHIEF JUSTICE. — Both courts below have found on the admissions of the parties that this claim is for damages arising out of an injury sustained by the plaintiff by reason of something negligently done in the operation of the railway and that the limitation of section 306, sub-section 1, R.S.C., [1906] ch. 37, applies.

For the reasons assigned by the Chief Justice in the court below I am of opinion that the judgment appealed from should be confirmed with costs.

DAVIES J. (dissenting).—This action is one which again directly raises the question of the proper construction of the limitation section 306, chapter 37, of the "Railway Act," R.S.C., 1906. Does that section cover and extend to cases where the damages sought to be recovered were admittedly caused by or proved to have been caused by the negligence of the railway company and its servants ?

In this appeal it is admitted that the fire which was started by the defendants' servants on the defendant company's right-of-way, to consume worn-out or discarded sleepers, escaped from that right-of-way to the plaintiff's property and destroyed it through the negligence of the company's servants. Unless, therefore, section 306 can be invoked by the company as a defence to this action, the appeal should be allowed.

In a late case heard in this court and not yet reported, of *London Street Railway Co.* v. *Kilgour* (not reported), I had occasion to consider the proper construction of a section of the private Act of the street railway company practically the same as the one now before us, and the conclusion I reached in that case

was that the limitation section there in question did not extend to or cover damages caused by the "illegal or negligent running" of the street railway.

Before reaching the conclusion I did in that *London Street Railway Case* (not reported), it became necessary for me carefully to read and consider all the cases decided in Ontario upon the true meaning of similar limitation sections in the public or private Acts of that province relating to railway companies.

These cases and the reasoning of the different judges who from time to time decided them were most conflicting and impossible to reconcile, so much so that in the late case of *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Co.*(1), in 1905, Osler J., when delivering the judgment of the Court of Appeal for Ontario, said:—

> In the present state of the authorities it is to be desired that a clear ruling should be given upon the subject by the Supreme Court.

I agreed in my construction of the section in question with the conclusion of Gwynne J., in *North Shore Railway Co.* v. *McWillie*(2).

It seems to me that sub-section 2 of section 306 in its latter part contains the key to determine the meaning of the words in the first part of the section,

> damages or injury sustained by reason of the construction or operation of the railway,

and limits the application of the section to cases where the company can prove that the injury or damage sued for was done or caused

> in pursuance of and by authority of this Act or of the special Act

or *bonâ fide* assumed by the company to be so.

(1) 10 Ont. L.R. 419.

(2) 17 Can. S.C.R. 511, at p. 514.

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Davies J.

It did seem to me that this sub-section 2 was inconsistent with the contention that the section extended to cases of damages caused by the illegal construction or operation of the railway and equally so with respect to damages caused by the negligent construction or operation of the railway.

In neither case could it be said that the damages were caused

in pursuance of and by the authority of the Act,

and in my judgment it was only to cases which could fairly be said to come within those words that the section could be construed to extend. Many acts and things might be fairly and *bonâ fide* assumed by the company and its servants to be within the powers conferred on them and to be in pursuance of and by the authority of the Act, and such cases might well be held to be within the protection of the section.

But wilful illegal acts or negligence admitted or proved causing damage were outside of the protection the section was intended to give the company.

I have seen no reason to change my opinion that

the section applies and was only intended to apply to cases in which the damage arises from the execution or neglect in the execution of the powers given to or *bonâ fide* assumed by the company for enabling them to construct and maintain their railway, and does not and was not intended to apply to cases where damages have been caused by reason of the default or negligence of the company or its servants in the construction or operation of the road.

IDINGTON J. (dissenting).—One of the questions raised herein is whether or not respondent when, in violation of the "Forest Fires Prevention Act of Ontario," setting out a fire on its right-of-way and thereby causing damage to another is entitled to set up in defence the statutory limitation given by section 306 of the "Railway Act."

If not so entitled then it will be unnecessary to consider the defence in light of the obligation resting upon respondent by virtue of the common law whereby the possessor of land was practically liable for the spreading of fire originating on his land as to be in effect an insurer against loss caused thereby.

I incline to think the result should be held the same in either case, but the frame of section 306 is such that due regard must be had to each and all of its four sub-sections in applying the section to see that in any given case it is not misapplied.

In the first place there is an obvious limitation implied in the words

sustained by reason of the construction or operation of the railway

used in the first sub-section. With regard thereto I shall presently have something to say and authorities to cite.

But meantime let it be observed that by sub-section 2 what the company may prove and rely upon is that the

damages or injury alleged were done in pursuance of and by the authority of this Act or of the special Act.

Can setting out a fire ever be said to be done in pursuance of the Act? For the construction of the railway in a country such as ours I can understand the necessity to be such as to bring the act of setting out fire as within the meaning of some things to be

done in pursuance of * * * this Act.

But this railway had been so long constructed that the ties, or some of them, had got so worn and decayed as to need replacement. There was need for repair which is not mentioned in the provision in question. Hence respondent is driven to place reliance upon the word "operation" and by a strained construction

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thereof to claim that the work in question which was needed to enable the railway to be safely operated is part of the operation.

This does not appear to me to be the plain ordinary meaning of the language, but to be directly in conflict with the interpretation put thereon by this court in the case of *Robinson* v. *The Canadian Northern Railway Co.*(1), and by the Judicial Committee of the Privy Council(2).

That was a case where a siding laid down for the use of the plaintiff in shipping over defendant's railway was torn up and taken away and defendant refused to so operate its railway as to give plaintiff his accustomed facilities.

It seemed to me then as a fairly arguable proposition that in a sense it might fall within the term "operation of the railway." But it did not seem to me then that giving due weight thereto the limitation in question was ever intended to reach and cover such an indirect incident relative to operation as would protect the company if regard was had to the proper application of the Statute of Limitations. Such statutes are never to be read as furnishing protection against anything but what the plain ordinary meaning of the words used will clearly cover.

If there is a doubt in regard thereto it must be resolved in favour of him whose right is sought to be taken away.

This case falls well within the decision in the *Robinson Case*(1).

Then there is the case of the *Canadian Northern Railway Co.* v. *Anderson*(3), not referred to in argu-

(1) 43 Can. S.C.R. 387. (2) [1911] A.C. 739.
(3) 45 Can. S.C.R. 355.

ment or in the courts below, where the railway company sought unsuccessfully to have a similar indirect application made of the section. Leave to appeal was refused by the Judicial Committee of the Privy Council. The work carried on there in question was that of procuring, out of a sand pit the company was possessed of, material for ballasting their railway and which ballast was carried by the gravel trains of the company engaged in executing the work.

It was forcibly argued there that the operation in the sand pit was in fact either for construction of the railway or its repair and hence within the extended meaning of the word "operation." I submit it was quite as much within either term as the illegal conduct of the respondent in setting out a fire in a prohibited district at the time in question.

The setting fire there was entirely unnecessary as a means of clearing the right of way. There is no statutory authority within the meaning of sub-section 2 for doing such an unnecessary act.

That brings us to a consideration of sub-section 4 which in very comprehensive language prevents the company from claiming relief

> from or in any wise diminish or affect any liability or responsibility resting upon it under the laws in force in the province in which such liability or responsibility arises, either towards His Majesty or towards any person, or the wife or husband, parent or child, executor or administrator, tutor or curator, heir or personal representative, of any person, for anything done or admitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance, or non-feasance, of such company.

The "relief" referred to surely must include that which is the very subject-matter of the section as a whole.

It seems expressly designed to withdraw from the

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operation of sub-section 1 of the section anything falling within the meaning of local laws giving a right of action to those suffering from unjustifiable violation by the company of such local laws.

If it does not apply to such a case as this it would be hard to find application for it. The fundamental law constituting the company and endowing it with the rights and privileges it has, cannot be interfered with by any local legislation. Hence I use the phrase "unjustifiable violation" for I can conceive of the case of a legislature enacting that over which it has no power to meddle with.

I read this sub-section as subject to such limitation.

I can find no conflict, however, between that which the Dominion Parliament has enacted and empowered the respondent to do, and that which the legislature has by the Act above referred to expressly rendered illegal.

In other words the plain purpose of this sub-section 4 is to limit the powers conferred by excluding therefrom the possibility of being held to authorize that which a provincial law may in the ordinary course of things have enacted to govern the conduct of all, including railway companies.

Again the fundamental principle upon which this legislation proceeds is that what the law authorizes to be done needs no other defence, but that there are cases in doing that which it has been expressly authorized to do a railway company may act negligently and to meet the incidents of such negligence this statutory limitation is given and to that only.

This is not a case falling within the principle and hence not within the scope or purpose of the enact-

ment. It is a clear case of doing that which was wholly illegal and is by sub-section 4 recognized as such.

Before parting with this I may observe that the case of *Hoddinott* v. *Newton, Chambers & Co.*(1), cited in respondent's factum has deeply impressed me. Unfortunately that impression got from a reading thereof is entirely adverse to the pretensions of the respondent herein.

The language used in the statute there in question and which had to be construed was the phrase,

is either being constructed or repaired by means of a scaffolding.

The scope of the whole was the liability arising out of the use of or need for the use of a scaffolding.

Yet there where the only question was whether a supplementary work could fall within such phraseology there was a remarkable difference of opinion between very able judges.

Seeing what the purpose of the legislation there in question was I can assent to every line of the late Lord Macnaghten's judgment and yet be permitted to surmise what quick work he would have made of such pretensions as set up here by respondent. And evidently the dissenting judges would have been astonished at such a proposition as there put forward and herein.

I think the appeal should be allowed with costs throughout and judgment be entered for the damages agreed on with costs.

DUFF J.—I concur with the Court of Appeal in the conclusion that the direct and effective cause of the damages in respect of which the action is brought was

(1) [1901] A.C. 49.

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the conduct of the company's servants in the "operation of the railway." I do not think it is wise to attempt to lay down any criterion other than that supplied in the clause itself for determining what cases are within the words "construction or operation of the railway." The present case I think is near the line but within it. I think counsel for the railway company was right in the opinion he expressed that nothing in section 297 or in the accompanying sections does in any way modify the common law responsibility of the company in making use of fire for the purpose of clearing its right-of-way.

And I am far from satisfied that there is any evidence in the record which would justify the conclusion that what was done by the company's servants was done in the intended exercise of any power impliedly conferred by that section. I do not think, however, that this necessarily excludes the application of sub-section 1 of section 306.

As to sub-section 4 of this section, this sub-section read literally would deprive sub-section 1 of all effect except in those cases in which the cause of action is not given under provincial law. That result would follow because it is obvious that the obligation (*ex delicto*) created by the company's wrong whether you look at it from the point of view of the person of incidence or of the person of inherence is "affected" by limiting the time within which the accessory right of action vested in the person of inherence may be exercised even in Canada alone. It is therefore impossible to deny that if you are to give the words of sub-section 4 their full value, when literally read, you must limit the operation of sub-section 1 to causes of action which do not arise under the provincial law.

But sub-section 4 is one of those sweeping general sections that one finds in the "Railway Act," which must be applied cautiously and with reasonable regard to the broad canon of construction that such sweeping provisions are not generally to be read as displacing particular provisions with regard to particular subjects to which when literally read they are repugnant. That is the view of the earlier enactment (which for all relevant purposes was the equivalent of sub-section 4) that was taken in the *Canadian Pacific Railway Co.* v. *Roy*(1). Sub-section 4 and sub-section 1 must be read together, and sub-section 4 given such effect as leaves it open to us to give a reasonable construction to subsection 1. I may add that it does not appear to me to help us very much to say that sub-section 1 only affects the remedy and not the right. It seems indeed improbable that Parliament should have contemplated limiting the exercise of the plaintiff's right of action in Canadian courts while leaving subsisting the obligation — capable of enforcement, of course, in other courts; yet such would be the effect of holding that sub-section 1 is a provision relating only to the procedure. An injured passenger, who by lapse of time had lost his right to sue in the Canadian courts, might sue in New York or in Chicago, and in the case of Dominion railways that course might present very little inconvenience.

Moreover, as regards causes of action given by provincial law only, it appears to me that it would be arguable that a Dominion enactment relating only to procedure would be *ultra vires*.

(1) [1902] A.C. 220.

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Anglin J.

ANGLIN J.—The only question which arises on this appeal is whether the defendant company is entitled to the benefit of the limitation afforded by sub-section 1 of section 306 of the "Railway Act," R.S.C., [1906] ch. 37. The plaintiff's property was damaged by fire which escaped from the defendants' right-of-way. The fire was started by the defendants' servants to consume worn out and discarded ties or sleepers and it is admitted that its escape to the plaintiff's property was attributable to their negligence. Subject to what is to be said as to the effect of sub-section 4, I am of the opinion, for the reasons assigned by the learned Chief Justice of Ontario and Middleton J., that sub-section 1 of section 306 affords a defence to the plaintiff's action. It should, I think, be presumed that the purpose in view in burning the ties was to discharge the duty of freeing the right-of-way from combustible material imposed on the company by section 297 of the "Railway Act." No evidence was given at the trial, the facts being admitted. The learned trial judge proceeded without objection on the assumption that the burning of the ties was in intended fulfilment of the statutory duty of the defendants — with

an intention to carry on the railway in good faith.

In the Appellate Division the judgment proceeds on the same basis of fact and it should not now be departed from. The resultant damages sued for were, therefore, in my opinion, sustained

by reason of the construction or operation of the railway.

Although the use of fire for the destruction of inflammable material on the right-of-way is not expressly authorized by the "Railway Act," it is common knowledge that it is a means which is most effici-

ent and which it is customary to employ, and I cannot think that its use for that purpose entails liability unless accompanied by negligence which causes injury. No doubt there are other methods of fulfilling the duty imposed by section 297; and it may be that, under some circumstances, the use of fire would be so highly and so obviously dangerous that it would in itself afford *primâ facie* evidence of negligence. But I am unable to accede to the view that for that reason a railway company in burning old ties on its right-of-way is not discharging a duty imposed by section 297, or that it thereby assumes responsibility of the kind and degree to which the defendant in *Rylands* v. *Fletcher*(1) was held to be subject.

Nor does sub-section 4 exclude the application of sub-section 1, of section 306 to the present case as the plaintiff contends. First enacted by 20 Vict. ch. 12, sec. 17, as part of

An Act for the Better Prevention of Accidents on Railways,

the prototype of sub-section 4 was, of course, confined in its application to the several sections of that statute. They provided for the inspection of railways and reports thereupon to the then Board of Railway Commissioners. The words "under this Act" and "anything in this Act contained" in section 17 had thus a restricted reference. It is scarcely necessary to state that the limitation provision now found in sub-section 1 of section 306 was not a part of chapter 12 of 20 Vict. When the "Railway Act" was consolidated in 1859, as chapter 69 of the Consolidated Statutes of Canada, section 17 of chapter 12 of 20 Vict. was brought into it as section 190, the words "under

(1) L.R. 3 H. L. 330.

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this Act" and "in this Act" being retained, perhaps inadvertently, with the result, if they should be given full effect, that the scope and application of the section was enormously extended. But it still remained one of a group of sections relating to inspections and reports of accidents, and it was so continued through 31 Vict. ch. 68, sec. 40; 42 Vict. ch. 9, sec. 52, and R.S.C., [1886] ch. 109, sec. 80, until the revision of 1888, when it first appears, in chapter 29 of 51 Vict., in proximity to the limitation section, No. 287, yet as a separate section, No. 288, and under the heading,

Company not relieved from legal liability by inspection or anything done hereunder.

As originally enacted and (substantially) as it stood until 1906 the language of the section was:—

No inspection had under this Act nor anything in this Act contained or done or ordered or omitted to be done or ordered under or by virtue of the provisions of this Act shall relieve or be construed to relieve any railway company of or from any liability or responsibility resting upon it by law * * * for anything done or omitted to be done by such company, or for any wrongful act, neglect or default, misfeasance, malfeasance or non-feasance of such company, or in any manner or way to lessen such liability or responsibility or in any way to weaken or diminish the liability or responsibilty of any such company under the existing laws of the province.

When so worded it was still reasonably clear, notwithstanding its presence in the general "Railway Act," that the section had no reference to the limitation provision, which neither relieved from, lessened, weakened, or diminished any liability or responsibility of the railway company. While it stood as a separate section in the "Railway Act" of 1888, this provision was relied upon before the Judicial Committee in *Canadian Pacific Railway Co.* v. *Roy*(1), for

(1) [1902] A.C. 220, at p. 228.

the proposition that, although Parliament had authorized the use of steam locomotives by railway companies, this section expressly maintained the liability of the company, which it was claimed existed under provincial law, for damages caused by employing such locomotives

in the ordinary and normal use of the railway

and without negligence.

Dealing with this argument the Lord Chancellor said (at p. 231) :—

Section 288 is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at the heading under which that section is placed, and the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what it made an actionable wrong in another. It would reduce the legislation to an absurdity, and their Lordships are of opinion that it cannot be so construed.

It was not until 1903 that what is now sub-section 4 was appended to the limitation section as sub-section 3 (3 Edw. VII., ch. 58, sec. 2). It, however, still substantially retained its original form. It was only in the revision of 1906 that it assumed the form in which we now find it:—

No inspection had under this Act, and nothing in this Act contained, and nothing done or ordered or omitted to be done or ordered, under or by virtue of the provisions of this Act shall relieve or be construed to relieve, any company of or from, or in anywise diminish or affect any liability resting upon it under the laws in force in the province in which such liability or responsibility arises, etc.

The substitution of the word "affect" for the former words "lessen or in any way weaken" in my opinion does not alter the applicability or effect of the sub-section. It remains a provision dealing with lia-

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bility or responsibility. Sub-section 1, on the other hand, does not deal with, or in any way "diminish or affect" liability or responsibility. Unlike the "Real Property Limitation Act," but like the "Limitation Act" of King James I. it only bars the remedy by action or suit. The liability remains intact and unaffected and may be made available by the person having a right to indemnity for any damages or injuries sustained if he should have an opportunity to set it up without resort to an action or suit. *Wainford* v. *Barker,* 1697(1); *Curwen* v. *Milburn*(2). With due respect for the draftsmen of 1903 and 1906, sub-section 4 should not be found in the same section with sub-section 1 of section 306. Historically there is no connection between the two; they have no bearing one upon the other; and there collocation is misleading.

Moreover, having regard to its history and to the view taken of it in *Canadian Pacific Railway Co.* v. *Roy* (3), I think sub-section 4 cannot be construed as maintaining or re-establishing a responsibility or liability against which the authorization conferred by section 297, in respect of acts done in the *bonâ fide* discharge of the duty which it imposes, affords immunity. Of course the liability for negligence remains; but to that the limitation of sub-section 1 of section 306 must apply unless we should treat sub-section 4 as rendering it nugatory and thus "reduce the legislation to an absurdity."

The plaintiff also invoked section 4 of the Ontario "Forest Fires' Prevention Act" (R.S.O., [1897] ch. 267). It was admitted that the fire which caused the

(1) 1 Ld. Raymond 232. (2) 42 Ch. D. 424, at p. 434.
(3) [1902] A.C. 220.

damage was set out on or about the 15th of July and that a proclamation had been issued under sub-section 1 declaring the district to be a fire district under the statute. Assuming, in the plaintiff's favour, that in the burning of ties in the discharge of their duty under section 297 of the "Railway Act," the defendant company was subject to this provincial legislation (*Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(1), and *Grant* v. *Canadian Pacific Railway Co.*(2)), it does not help him. Section 15 of the "Forest Fires' Prevention Act" was as follows:—

> Nothing in this Act shall be held to limit or interfere with the right of a person to bring and maintain a civil action for damages occasioned by fire, *and such right shall remain and exist as though this Act had not been passed.*

The only effect which this legislation could have would be to render it unnecessary for the plaintiff to prove negligence, breach of statutory duty causing damage being his cause of action. But, although the starting of the fire contrary to the provisions of section 4 of the "Forest Fires' Prevention Act" should entail civil responsibility for any injurious consequences, notwithstanding that the defendants were acting in the discharge of their duty under section 297 of the "Railway Act," the damages suffered by the plaintiff were nevertheless sustained

> by reason of the construction or operation of the railway,

and would, therefore, come within sub-section 1 of section 306, which, as already pointed out, does not "in any wise diminish or affect any liability or responsibility under" the provincial statute.

I am, for these reasons of the opinion that this appeal fails and should be dismissed with costs.

(1) [1899] A.C. 367. (2) 36 N.B. Rep. 528, at pp. 533, 545.

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Brodeur J.

BRODEUR J.—This is an action where we have to construe section 306 of the "Railway Act," which provides that an action or suit for indemnity for any damage or injury sustained by reason of the construction or operation of a railway shall be commenced within one year next after the time such supposed damage is sustained.

Some old ties had been removed from respondents' railway and had been piled to be burned. When they were so burned the fire started over the land of the appellant and he has taken an action for damages more than a year after the damage had been sustained.

The respondents claim that this destruction of the ties was, under section 297 of the "Railway Act," the fulfilment of a duty imposed by that section.

That section 297 provides that the company shall maintain its right-of-way free of dead dried grass, weeds and other unnecessary combustible matter.

There is no doubt that those old ties were combustible matter and that they had to be removed from the right-of-way. Was it necessary, however, to burn them, or should they not have been removed in some other way ?

On that point the evidence is not given, as to the way the track should be kept clear, but the trial judge stated that it was found that it was a custom of the railway company that decayed ties were burned upon the right-of-way. Then if the company was fulfilling a duty which was imposed on it by the "Railway Act" it might be stated that the burning of those ties was part of the operation of the railway and the damage which might be caused as a consequence of the carrying out of that duty should be claimed within one year after the damage had been sustained.

It is not, after all, a very serious hardship for those who might claim those damages. The liability of the company under the common law is not restricted because in one case as in the other they are bound to pay the damages which their negligence might cause. The only difference is that in one case it is provided that those damages should be claimed within one year after the damage had been sustained.

For these reasons, the judgments of the courts below which applied the Statute of Limitations as enacted by section 306 of the "Railway Act" should be confirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *William Laidlaw.*
Solicitors for the respondents: *MacMurchy & Spence.*

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*March 3, 4.
*May 18.

ELIZA JANE IRWIN (DEFENDANT) ... APPELLANT;

AND

FRANK ALEXANDER CAMPBELL (PLAINTIFF) ..... RESPONDENT.

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

Lessor and lessee—Lease of adjoining lots—Separate demises—Assignment to one person—Termination of lease—Valuation of improvements—Valuation as a whole—Consent of counsel.

Two leases of adjoining lots were, by assignment, vested in C. Each lease provided that if, on its expiration, the lessor refused to renew he should give notice thereof to the lessee and that valuators should be appointed to value the buildings on the land. Notice was given under each lease and valuators were appointed who, without objection by the lessor's counsel valued the buildings on the two lots as a whole and fixed $35,000 as the value of them all. In an action by the lessee to recover this amount,

Held, reversing the judgment of the Appellate Division (32 Ont. L.R. 48), Davies and Anglin JJ. dissenting, that the valuation must be set aside, that the value of the buildings on the lots should have been ascertained separately.

Held, also, applying the principle of *Cameron* v. *Cuddy* ([1914] A.C. 651) that the action should not be dismissed, but that the same or other valuators should be appointed to ascertain the value in a proper manner.

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

The material facts are set out in the above headnote.

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

(1) 32 Ont. L.R. 48.

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W. N. Tilley for the appellant.

Rowell K.C. and *George Kerr* for the respondent.

THE CHIEF JUSTICE.—I concur with Mr. Justice Idington. The Chief Justice.

DAVIES J. (dissenting) concurred with Anglin J.

IDINGTON J.—This is an action brought upon two covenants in two separate leases of which respondent is the assignee. The covenant in each was as follows:

> And the lessor shall pay or cause to be paid to the lessee the amount so found to be proper to be paid for the said buildings not less than two months before the end of the then expiring term, and in the event of the said value of the said buildings not being paid as aforesaid within the time limited as aforesaid, or in the event of the lessor not having given six months' notice in writing as aforesaid of his desire that no further term should be granted, and of the lessee having given, five months' previous to the end of the term hereby granted, notice in writing of his desire that such further term should be granted, it is hereby agreed that the lessee shall be entitled to a renewal of the lease of the said premises for a further term of twenty-one years to be computed from the expiry of the previous term, at the annual rent which shall have been ascertained by the valuators as aforesaid as the proper sum to be paid as the ground rent of the said premises for the following term of twenty-one years, if such term should be granted.

Each lease had provided by what preceded said covenant that the lessor might give notice of his desire instead of renewal of lease to terminate at the end of the term the relationship of landlord and tenant and then the value of the buildings on the property leased should be valued by a board of valuators.

It is in respect of such value of buildings to be so determined that the foregoing covenant was entered into.

Due notice was given under each of said leases by appellant, the representative of the estate of the orig-

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inal lessor, and a board was duly constituted under each lease. That board was composed of the same men in each case but the proceedings to constitute the board had of necessity to be separate and independent.

The lessor held each parcel covered by said leases under leases from two different estates and his leases had similar though not identical provisions relative to the termination thereof and of repayment for buildings.

Every consideration, therefore, bearing upon the questions involved herein, required that though the board might be composed of the same men yet the proceedings under each lease here in question should have been carefully preserved independent of each other.

By some remarkable oversight this was not done by the board of valuators, but an award was made by them that treated these separate properties, independent in origin and the personalities concerned therein, as if they had always been one whole. And one sum of $35,000 was found by said award.

It so happened that at the time when it became necessary to proceed the persons interested as lessor and lessee respectively of each were the same. But that was not any justification for departing from the frame of the separate notices and other proceedings separating what the board (or rather boards composed of same men) were constituted to determine.

Had they found separate values and sums due in respect of the buildings upon each parcel and then added them together there might, seeing the party to pay and the party to receive were same, have been no insurmountable objection to the award.

But as it stands there clearly was on the face of

it no separate valuation upon which the covenant could operate and an action thereon be founded. And the evidence adduced at the trial of this action puts beyond doubt not only the fact that there was none, but also that the valuators entirely misconceived their duty in the premises.

It seems they had from the beginning so misconceived the purpose of their appointment that they opened their proceedings on the assumption that they were arbitrators and as such had to hear evidence and determine accordingly. They were, after a remonstrance by appellant's counsel and discussion of an hour or two, persuaded that such was not the case and that they must act as valuators only.

One if not more of them frankly admitted he was not qualified by personal knowledge to discharge such duty. Explanations were given them that they had a right to become informed in such a way as they deemed best.

In the course of this discussion they and others concerned allege that the counsel who had appeared for appellant to explain that they must act as valuators and not as arbitrators, led them to believe they could award a lump sum including both the buildings held under each lease. Even if that were so it cannot bind appellant. He denies this so alleged and adds he had no authority to do any such thing. And in this latter regard he stands uncontradicted.

No attempt is made to prove such authority, but it is argued he was counsel for the appellant and hence must be held to have had implied authority.

Inasmuch as there was no trial, no judicial proceedings, in which counsel could act as such, the argument seems idle. And even if there had been such a

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judicial proceeding, counsel could have no implied authority to do any such thing. If it were a mere matter of procedure in such a case counsel might have been held to have implied authority relative to the scope thereof. But it is not matter of procedure. It is a most material substantive right appellant had to be dealt with upon the lines laid down in each of the separate notices under and pursuant to which the valuators were bound to act. They had no power beyond. Nor could they have acquired it except by some binding agreement between the parties fixing or blending into a new consolidated covenant the two independent covenants and the rights arising thereunder.

All this seems so clear as matter of law that I do not think the board correctly understood what counsel said and what they were about or they would at once have insisted upon his filing with them a consent by appellant to such a departure from the terms of their two respective appointments.

The advantages for the appellant in keeping the two things separate were so obvious that I cannot impute to any lawyer acting for the appellant his intentionally surrendering such advantage.

The buildings had been erected under a system of leasing such as adopted and were the separate results of different leases and rights in relation thereto. The buildings had not, as I understand it, been all built at the same time. But by reason of being on adjoining lands they were made in fact to form and to be used as a whole. That was a mere accident which so long as held by same party might secure a more profitable use than if kept separate. That advantage the occupying tenant could rightfully enjoy during the concurrence of the terms and do no injury to the lessor. But

at or within a few days of the end of each of the terms, which were approximately but not identically the same, the appellant's right in one of these parcels ceased. All she could ask from her landlord was to be compensated for the buildings thereon without any such advantage or augmented value incidentally flowing from such antecedent concurrence.

If, as suggested or hinted at in argument, she by some one else's stupidity, escaped the observation of this, and gained thereby, we have nothing to do therewith.

Again there was an agreement come to during the proceedings and reduced to writing whereby the valuators were fully relieved from the burden of the other part of the inquiry for which they were appointed and by which they were to determine what would be a proper rental in case of renewal.

If there had as alleged been in fact any further waiver or limitation of the duties to be discharged by the board it in all probability would have formed part of that writing. But it did not.

And the insurmountable reply of the appellant to the respondent and to the members of the board is that the written award does not in its recitals pretend to allege any such thing as now set up but proceeds on the original notices; if that is what it means.

But does it mean that? Indeed it reads or may be read as if founded only upon one notice. If that was what was present to the valuators' minds and they in truth had forgotten that there were two different sets of notices and appointments then the whole business has miscarried. In that event clearly there have not been any such valuations as the appointing notices required.

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In any way one can look at it there seems no escape from the conclusion that there never was such a valuation and finding within the requirements of either covenant as to entitle a recovery thereon.

Such a finding and valuation is a condition precedent to the covenant having any operative effect herein unless alternatively in the way I am about to point out as applicable to such a failure of purpose as is apparent.

I need not therefore enter upon the undesirable features of the case as presented and argued at length. I may be permitted, however, to point out that this is the third or fourth case where we have recently had to consider the duties of valuators, and this is not the first in which suspicions were cast, in argument, upon the manner of conducting the proceedings arising from indiscretion on the part of some of those concerned therein.

It is unpleasant to have to deal with such features. To palliate or excuse them tends to lead others to go and do likewise and to needlessly fix blame upon any one by pointing out wherein he has been indiscreet is not desirable. I, therefore, abstain from saying more than is prompted by what the experience of what has transpired in other cases as well as herein and that is that valuators should not listen to one party, or any one acting on his behalf or under him, unless the other is present or is consenting thereto, and it would be safer to keep away from having anything to do with either of such parties pending the inquiry and until the award is signed or otherwise openly declared to both parties.

And when valuators are sworn as they were here I submit, with great respect, none of them can properly

be treated as managing or acting for him who has appointed him or them.

This appeal should be allowed without costs to either party throughout except the costs of the proceedings up to trial so far as same usefully served the purpose of presenting plaintiff's claim.

But instead of dismissing the action the judgment should be so framed, in accordance with the principle proceeded upon by the Judicial Committee of the Privy Council in the case of *Cameron* v. *Cuddy*(1), as to have the value of the buildings in question under each lease determined by a referee to be named by this court or by the court below, unless the parties desire that the same board as originally constituted should proceed to do so.

It seems to me having regard to the facts in said case the paragraph therein, at page 656, covers this, as follows:—

> When an arbitration for any reason becomes abortive it is the duty of a court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a court of justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery*(2), might be referred to.

That case in which this language is used is alleged to have involved an arbitration and conceivably a distinction may be drawn between a valuation by arbitrators and by valuators. But the language quoted seems applicable in principle, especially when regard is had

(1) [1914] A.C. 651.
(2) [1894] A.C. 202.

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to the very involved contract before them in that case and to the fact that it was a case of valuation that was in question therein though those to value were designated arbitrators.

In that case apparently their Lordships assumed the party concerned might have had another remedy under the contract, and so it seemed to some of us. In this case the very "impasse" from which the parties' rights have "to be extricated" seems to render it impossible within the words preceding and forming the foundation of the covenants in the leases to find therein any remedy and hence renders it more imperative than there that the court must act in order that justice be done.

The case cited in the above paragraph and much therein suggests there was nothing more therein than the court doing what is done every day in our law unless the arbitration is made a condition precedent to the right of recovery. As I read their Lordships' language which I quote, in light of the contract they were dealing with, it means much more. It is, to repeat, the very "impasse" from which the parties' rights have "to be extricated" that is the pith of the judgment.

The agreement filed reduces the question involved, in order that justice may be done, to one of ascertaining in a proper manner the respective values of the buildings in question in each lease.

That being obtained the judgment finally should be for the respondent for the aggregate value thereof with all the costs of the reference if directed as I suggest and of entering judgment on the result.

After writing foregoing I modified my opinion as to the disposition of costs. I agreed to the judgment delivered.

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Duff J.

DUFF J.—This appeal should be allowed. It is necessary in my view to consider only one point.

The action is brought upon two distinct covenants in two separate leases. Each provides for the payment of the value of the buildings on the land demised to be ascertained in a certain way. In neither case has that value been ascertained. In fact there is one building, *i.e.*, a building which is a physical unit situated partly on the land demised by one lease and partly on that demised by the other, and it is the value of this building as a whole that has been ascertained. That sum cannot be recovered under either or both of the covenants for the simple reason that both the obligations and the accessory rights of action are distinct and independent. The obligation in each case is to pay a sum "proper to be paid" in respect of the buildings on the land demised by the lease in which the covenant appears which sum is to be ascertained by a valuation to be made in the prescribed manner. There is no such valuation in respect of buildings upon either parcel demised, and the condition the essential term that there shall be such a valuation is not purged by the production of a valuation of such buildings plus something else.

The judgment at the trial was not really based upon these covenants at all.

In substance the learned trial judge proceeded on the view that the appellant was "estopped" from taking this objection that the covenants were separate.

I think probably by this the learned trial judge means that the appellants are estopped by Millar's conduct from denying the existence of an agreement to pay the amount of the valuation.

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Duff J.

I think the learned judge himself holds that Millar never intended to enter into such an agreement; and I think it does not appear that Millar understood that the other parties thought he was entering into such an agreement or that they in fact thought so. If they had thought so and intended to rely upon it it is difficult to suppose that they would not have put the agreement in writing. My strong impression is, and indeed I think it is the proper conclusion, that Mr. Kerr thought the course taken was strictly regular and the Appellate Division has upheld his view. I think he was wrong and that this action as framed fails.

I say nothing of the charge of misconduct except this: Assuming Mr. Garland's honesty to be unimpeachable he has himself to thank for the suspicions which his conduct aroused.

It does not follow that the respondent should be dismissed empty handed. I agree with my brother Idington in thinking that the principle of *Cameron* v. *Cuddy*(1) applies, and I concur in his proposal as to the disposition of the appeal.

ANGLIN J. (dissenting).—Except in regard to the objection that, as the respondent's building occupied two parcels of land held under separate leases and notice was given for a distinct valuation under each lease, the valuators should have made two distinct valuations and should not have fixed one sum to be paid for the building as a whole, which seems to require further consideration, I fully concur in the disposition made of this case in the provincial courts.

(1) [1914] A.C. 651.

That the leases provided for a valuation and not for an arbitration is *res judicata* between the parties, *Re Irwin and Campbell*(1).

Notwithstanding Mr. Tilley's ingenious and plausible argument, it is quite clear that there was no ground for his attack on the valuator Garland (nominated by his own client) as a person illegally biased for the respondent and interested in his success. There was no connection of any kind between Garland and the respondent until after the valuators had determined upon, and communicated to the parties, the amount of their valuation; *Re Underwood and Bedford and Cambridge Railway Co.*(2); and, while it is to be regretted that relations between them arose before the valuation was formerly completed, they were probably of such a character as would not have affected the validity of the valuation had they arisen earlier. *Drew* v. *Drew*(3). There is nothing whatever to suggest that Garland was subject to any improper influence in making the valuation.

The obtaining from the respondent, probably in the absence of any representative of the appellant, of a statement of the lowest value which he would place on his building, though indiscreet, would appear to have been within the right of the valuators if, indeed, it was not something which was warranted by the views that had been expressed to them by the appellant's solicitor as to the scope of their duties and the methods by which they should be discharged. At all events it is quite clear upon the evidence of all three valuators that, as the direct result of their having re-

(1) 4 Ont. W.N. 1562; 5 Ont. W.N. 229.
(2) 11 C.B.N.S. 442.
(3) 2 Macq. 1.

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Anglin J.

ceived the respondent's statement, the figure at which they made their valuation was lower by several thousand dollars than it otherwise would have been. Of that the appellant cannot very well complain.

I am also satisfied that the appellant had every reasonable opportunity to furnish the valuators with such information as her solicitor thought it was in her interest that they should have. If he omitted to call an expert witness to answer the statements made by Waggett and Pickard as to the value of the building it was because the opinion of the expert Smith whom he consulted, if communicated to the valuators, would have confirmed the estimates of Waggett and Pickard.

Smith's opinion was communicated to Garland, the valuator chosen by the appellant, but not to the other valuators, and it goes far to establish that the valuation in appeal was not excessive.

In fine, no case has been made for impeaching the valuation on any ground of bias, interest, unfairness or misconduct. There is perhaps a little more difficulty in the question whether the valuation of the building as a whole can be sustained.

It cannot, in my opinion, be supported on the consent given by counsel for the appellant. Without at all suggesting wilful falsehood on the part of Mr. Millar, I feel bound to accept the finding of fact in that portion of the judgment of the learned trial judge in which he says:—

> The witnesses who testified upon this question are all men of unassailable integrity, men in whom I would place implicit credit. But, unfortunately, there is a clear conflict of testimony upon this one point, and I only conclude that there is an unintentional mistake somewhere. There is a strong preponderance of testimony to the effect that it was distinctly understood and agreed by all parties that this building should be valued as one building—"as a whole," as it is expressed. The defendant must abide by this.

Moreover, Mr. Millar was present when the valuation was formally executed by the valuators. He knew that it was a single valuation of the building as a whole and he took no exception to this course being followed. He had apparently instructed his own expert, Smith, to value the building as a whole. Indeed his conduct throughout the proceedings is consistent only with his knowledge of, and assent to, what the valuators were doing.

But while I think, with respect, that this conclusion of fact should not have been disturbed on appeal, I incline to think the view that neither as counsel in this non-litigious and extracurial matter; 2 Hals. L. of E., 241; nor as solicitor, *Chinnock* v. *Marchioness of Ely*(1), could Mr. Millar, without express authority, of which there is no evidence, by his consent bind his client to forego any substantial advantage which she might derive from the making of separate valuations under the two leases. In the view I take, however, it is unnecessary to determine this question.

It was, no doubt, the right of the appellant, but for the circumstances to which I shall presently allude, to have had a separate valuation under each of the leases. If the result of making separate valuations of the two parts of the building would have been substantially more advantageous to her than that reached by valuing the building as a whole, she would, in my opinion, be entitled to have the valuation which has been made treated as invalid and ineffectual. But I think in the present case there would have been no material difference between the result of the two methods of valuation such as would render that course necessary.

(1) 11 Jur. N.S. 329.

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Anglin J.

In delivering the judgment of the Appellate Division Mr. Justice Hodgins says:—

> I am not impressed with the idea, only faintly developed in the evidence, that this severance really destroys the usefulness of the building. It is admitted that the store can be reconstructed at a reasonable cost, and an examination of the plans filed shews that 14 feet is sufficient to provide for a store and an independent entrance as well.

If this view be sound the difference in the net result between the valuation of the building as a whole and separate valuations of its two component parts would be the cost of the alterations necessary to permit of each part being used as a separate building.

But there is another aspect of this case which indicates that even this difference did not in fact exist. The appellant was acquiring both parts of the building and she was obtaining it intact and as a whole. The possibility of her being able to arrange with her immediate landlords to obtain the benefit of holding or disposing of the building as a whole was something which the valuators would properly take into account. Although they are expropriation cases, I see no good reason why the principle underlying the decisions in *Re Lucas and Chesterfield Gas and Water Board* (1), and *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(2), should not be applicable to a valuation between a tenant and his landlord who is taking over the tenant's building on the expiry of a lease, subject, however, to this important difference that, in the case of the expired lease, it is not, as in expropriation proceedings (as the cases cited shew), the value of the property to the person relinquishing it which is to be fixed, but its value to the landlord, who is the party taking it over, or to his incoming tenant. Of course that value must include

(1) [1909] 1 K.B. 16. (2) [1914] A.C. 569.

the potentialities of the property in the landlord's hands and where he has already made the realization of a potentiality a certainty for himself I can see no reason why the valuation should not proceed on the basis of such potentiality having been realized, since it is the value of the building to him that is to be fixed — "the amount proper to be paid by the lessor to the lessee for the building." There is some evidence — slight, no doubt, but I think sufficient — that the appellant had succeeded in advantageously disposing of the building as a whole before the valuation proceedings now under review took place. This fact, asserted and not seriously disputed at bar, appears to have been known to all parties and it probably accounts for Mr. Millar's readiness — otherwise, as Mr. Justice Hodgins points out, difficult to understand — to consent to a single valuation of the building as a whole, which he seems afterwards to have forgotten so completely. The value of each part of the building to the appellant was not that of a portion which might have to be severed and dealt with independently, but that of a part destined to continue to be used, so far as she was concerned, as a portion of the building as a whole. The sum of the value to the appellant of the two component parts of the building erected respectively on the two parcels of leasehold land must under these circumstances have equalled the value of the building as a whole.

I would, for these reasons, affirm the judgment of the Appellate Division.

Appeal allowed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*

Solicitors for the respondent: *Kerr, Bull, Shaw, Montgomery & Edge.*

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*March 1.
*May 4.

THE J. H. McKNIGHT CONSTRUCTION COMPANY (DEFENDANTS). } APPELLANTS;

AND

J. A. VANSICKLER AND E. A. VANSICKLER (PLAINTIFFS) ..... } RESPONDENTS.

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

Company—Powers — Sale of business premises — Seal — Agreement signed by officer.

An industrial company, unless forbidden by its charter, has power to sell its business premises in order to secure others more suitable, and a contract for such sale may be valid though not under the company's seal.

Where the contract is executed by an officer of the company to whom the necessary authority might be given the other party thereto is not called upon to ascertain if proper steps had been taken to clothe him with such authority; it is sufficient that he is the apparent agent of the company to transact business of the kind and that the power which he purports to exercise is such as, under the constitution of the company, he might possess.

Per Idington J. dissenting.—A person dealing with a minor officer of a company is supposed to know what powers he has by by-law, passed in the manner provided by its charter, to enter into any unusual transaction. In this case it was not proved that the officer signing the contract was empowered to do so, and as the company was not authorized to deal in real estate the transaction was not one within the apparent scope of his authority. The contract was, therefore, not binding on the company.

Judgment of the Appellate Division (31 Ont. L.R. 531) affirmed.

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

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

(1) 31 Ont. L.R. 531.

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MCKNIGHT CONSTRUCTION CO. v. VANSICKLER.

The action was for specific performance of a contract by which the appellants had agreed to sell to respondents their business premises which were not large enough for their requirements. Two main questions raised on the appeal were — Was the contract void because the seal of the company was not affixed thereto ? Had Douglas, who signed the contract for the company as secretary-treasurer, authority to do so ? Both questions were decided against the company in the courts below.

Hellmuth K.C. and *R. S. Robertson* for the appellants. As to necessity for the seal see *Beer* v. *London and Paris Hotel Co.*(1), explaining *Holmes* v. *Trench* (2), relied on by the Appellate Division.

This case is not within the exception to the rule requiring the seal. *Garland Mfg. Co.* v. *Northumberland Paper and Electric Co.*(3); *Birney* v. *Toronto Milk Co.*(4).

McKay K.C. for the respondents referred to *Duck* v. *Tower Galvanizing Co.*(5); *Premier Industrial Bank* v. *Carlton Mfg. Co.*(6), at page 114; *Trusts and Guarantee Co.* v. *Abbott Mitchell Iron and Steel Co.* (7).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—I concur with Anglin J.

(1) L.R. 20 Eq. 412.
(2) [1898] 1 Ir. Ch. 319.
(3) 31 O.R. 40.
(4) 5 Ont. L.R. 1.
(5) [1901] 2 K.B. 314.
(6) [1909] 1 K.B. 106.
(7) 11 Ont. L.R. 403.

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McKNIGHT CONSTRUCTION CO. v. VANSICKLER.

Idington J.

IDINGTON J. (dissenting).—This is an appeal from the Appellate Division of the Supreme Court of Ontario maintaining a judgment against appellant company for specific performance.

The appellant is a company incorporated under the "Ontario Companies' Act" "for building sewers and so on," and in February, 1913, owned a piece of land used as a storage yard for the purpose of carrying on that business for which the company was incorporated.

Douglas, one of the appellants, was secretary-treasurer of the company. The respondents made in writing an offer of purchase of said land, addressed to said company and signed by the respondents.

That was accepted by the following writing at foot of said offer:—

> I hereby accept the above offer and its terms, and covenant, promise and agree to and with the said to duly carry out the same on the terms and conditions above mentioned.
>
> Dated A.D. 19 .
>
> J. H. McKNIGHT CONSTRUCTION CO., LIMITED.
>
> Witness:
>
> ..... W. E. Douglas, *Sec.-Treas.*

This offer apparently had been prepared by Douglas and enclosed to one of respondents in a letter to him of the 21st February and was signed apparently by Douglas, per M. J. It read as follows:—

> I am enclosing herewith an offer to purchase made out on the terms we discussed. You will notice that we are not required to give up possession until April 16th.
>
> As I told you, Mr. McKnight is out of town and will not be back till late in April, so that we will not be able to get his signature until then, but that need not make any difference in the transfer as far as you are concerned, it can go ahead and he can sign the necessary papers when he returns.
>
> If you will sign this offer and return it with a cheque for $100 I will sign a copy for you.

At foot of this letter one of respondents signed his name and following that is a receipt of cheque for $100 signed "W. E. D."

In the body of the offer appears the following:—

> This offer is to be accepted by February 22nd, 1913, otherwise void; and sale to be completed on or before the 10th day of March, 1913. Possession of the said premises is to be given me, April 16th, 1913.

This letter with its footing and the offer and apparent acceptance thereof might, I think, be read together, as the signing thereof by J. A. Vansickler could have been done for no other purpose than that they should be so read.

The above words,

> sale to be completed on or before the 10th day of March, 1913,

in light of such reading and the surrounding facts and circumstances certainly never were intended by the parties to mean what is usually meant thereby, but so far as was possible of completion consistent with the absence of McKnight.

I should, therefor (but for what I am about to refer to) have no difficulty in treating the contract as ended when appellants refused to complete it so far as it could be in such absence, and I have no doubt, would have been, but for the unfortunate absence of one of respondents' solicitors who knew the parties.

In my view of the case, however, it is needless to go through all that transpired relative to that phase of the business. I am inclined to think the appellant Douglas, if he had any authority, waived, by what happened later, the right to maintain this answer to the suit.

Nor do I think that the mere absence of the corporate seal is in itself fatal to the validity of the con-

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tract by a corporate company either to sell or buy land. It might well be that some officer of the company duly authorized to sign such a contract could bind it without affixing the corporate seal. Or, indeed, it might well be that the officer of the company duly entrusted with the power to affix the seal might, in conceivable cases, bind the company to some one else by using the seal, though exceeding his actual authority, yet using it in a way he had been held out as entitled to use it.

But there is a sense in which, as mere matter of argument illustrative of the question of authority to form a contract, the cases of the need for a seal may be serviceable. The ordinary every-day contract in which of necessity as it were a corporate seal is dispensed with has some analogy to the law applicable to measure the authority of an agent contracting on behalf of the company he represents himself to be acting for.

Beyond that I cannot see that the mere absence of the corporate seal is of any consequence. The contract may be of such an unusual character for the company to enter into that he dealing with the company may in law by the absence of a seal be put upon his guard to inquire why the transaction has not been sanctioned by use of the seal which at common law was the usual method by which a company had to speak in order to bind itself.

It is not, however, upon such subleties that the case for appellant must needs rest or the decision thereof turn.

The issues to be determined are whether or not the contract in question was within the scope of the actual or ostensible or apparent authority of Douglas

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as the secretary-treasurer of the appellant company. It was in his capacity of secretary-treasurer he professed to act. As such he had no authority to sell the company's land.

The Act under which the company was incorporated directs that the affairs of the company shall be managed by a board of directors; that, except as therein provided, no business of a company shall be transacted by its directors unless at a meeting of directors at which a quorum is present; that the directors may pass by-laws not contrary to law or the letters patent to regulate many specified things, and generally the conduct in all other particulars of the affairs of the company and, that such by-laws must be confirmed by the shareholders at or prior to next annual meeting or become thereafter null.

These general provisions any one dealing with a company is supposed to know and observe at his peril. If dealing with a minor officer of the company he is also supposed to know what powers that officer has by by-law passed as aforesaid to enter upon any unusual transaction.

The respondents have failed to point out anything in such by-laws enabling the secretary-treasurer to execute the contract in question, or anything duly and regularly done by the directors relative to such contract which would warrant the secretary-treasurer, as such, signing on their behalf.

In any way I can look at the matter it seems clear there was no actual authority duly conferred upon any one to make the said contract.

The by-laws provided that the directors from time to time might appoint one of their body to be managing director of the company, but I cannot find any by-law defining his duties.

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And when the directors made an appointment they did not observe this, but appointed McKnight "general manager of the company at a salary of $416.66 per month" and ante-dated the appointment by nearly three months.

At the same time W. E. Douglas was appointed by a motion seconded by himself, assistant general manager of the company at a salary of $208.33 per month. I cannot find any by-law or anything else indicating what his duties were to be as such. Now, do these nominations supply the authority, and how ?

I repeat it was as secretary-treasurer Douglas professed to act and I fail to see how his being something else, undefined, and unauthorized to do anything specifically within the legal powers of that something else, or what might be presumed such, can help.

But it is said McKnight was president and general manager and he authorized the contract to be entered into. But what authority had he, to begin with ? I cannot find he had any. And it seems quite clear he could not delegate even such powers as he possessed.

The board might have substituted some one else for him in his absence to act and the board might have acted directly in the matter. It did neither. Hence in all these suggestions I can find no actual authority in law for Douglas acting as secretary-treasurer and thereby binding the said company by signing said contract as he did.

Then did he act within the ostensible or apparent scope of his authority in making the contract ? I submit he clearly did not. If this company had been formed with one of its objects to be the dealing in real estate, then the matter would have been very simple. Either his position as secretary-treasurer or assistant

manager of such a corporation might well have implied authority to sell real estate, for that would be its business. Or had he entered into a contract for constructing a sewer involving ten times as much as involved herein, his company might have been held so bound if he had been, to the knowledge of the company, accustomed to have so acted in contracting on its behalf. But there is not the shadow of pretence for saying that either the president or the secretary-treasurer of the appellant company had ever sold or been expected to sell the real estate of the company. So far as we are informed this is the only piece of real estate the company ever had and that was in use by the company for the due execution of the purposes of the company as a builder of sewers, etc.

The analogous case presented in argument of a bank agent selling the business stand where his bank is carrying on business seemed to me much in point.

The proposal to do so would so shock one's sense of propriety that any one seriously making such a proposal would be treated as a fool or a madman. Yet wherein is the difference ? There is none in the law governing the bank agent any more than the manager of a sewer construction company who is apparently the agent for the purpose of executing the contracts within and necessary to transact the ordinary business of the company, just as the bank agent or manager is such, but by no means apparently authorized to sell out its business stand.

The cases cited by counsel for respondents are all distinguishable from this by applying the true test of the apparent scope of authority of the agent. When as here he goes beyond that, his express authority

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must be shewn and in that regard as already pointed out the respondent fails.

The appeal should be allowed with costs throughout and the action dismissed.

Nor do I think the claim against Douglas personally is maintainable. The mistake is one of law for which respondents are quite as much to blame as he.

An agent is not bound for a mistake in law as to the scope of his authority: see *Beattie* v. *Lord Ebury* (1). And still less if possible for mutual mistake of law. See *Eaglesfield* v. *Marquis of Londonderry* (2).

The cross-appeal should also be, therefore, dismissed with costs.

DUFF J.—I concur in the judgment of the Appellate Division delivered by Mr. Justice Clute. It is not necessary to add anything whatever to the very complete discussion of the points raised which is to be found in that judgment. Contentions were advanced, however, on part of the appellant which raised two questions of general importance in respect of which it is perhaps desirable to express one's views of the principle involved.

The first point is as to the authority of the secretary-treasurer. This point, although apparently taken in the court of appeal, was not taken in the appellant's factum and was I think advanced during the oral argument here on the invitation of the Bench. I am not surprised at this because on examining the record, there appears to be ample evidence that the secretary-treasurer was the apparent agent of the company for the transaction of the kind of business he undertook to do. That being so, the case

(1) 7 Ch. App. 777; L.R. 7 H.L. 102. (2) 4 Ch. D. 693.

is within the principle very satisfactorily stated in Palmer's Company Law, 9th ed., 1911, p. 44, in the following words:—

> This rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings—what Lord Hatherley called "the indoor management." They are entitled to assume that all is being done regularly. See also *Mahony* v. *East Holyford Mining Co.*(1); *Bargate* v. *Shortridge*(2); *In re Land Credit Co. of Ireland*(3); *In re County Life Assurance Co.*(4); *Premier Industrial Bank* v. *Carlton Manufacturing Co.*(5), is not easily reconcileable with the rule.
>
> This rule is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed.

The next point turns upon the absence of the company's seal. This question may be disposed of by a reference to the decisions of the Court of Exchequer and the Exchequer Chamber in *South of Ireland Colliery Co.* v. *Waddell*(6). The following passage from the judgment of Bovill C.J., at page 469, is cited by Sir Frederick Pollock (Contracts, 8th ed., p. 156), as stating the law upon the point. And it may be observed that the judgment of Bovill C.J. had the express approval of the Exchequer Chamber in the same case (at page 618) where Cockburn C.J., said, speaking for the court (of which Willes J. was a member):—

> It is unnecessary to say more than that we entirely concur in the reasoning and the authority of the cases referred to in the judgment of Bovill C.J. which seems to exhaust the subject.

(1) L.R. 7 H.L. 869.
(2) 5 H.L. Cas. 297, at p. 318.
(3) 4 Ch. App. 460.
(4) 5 Ch. App. 288.
(5) [1909] 1 K.B. 106.
(6) L.R. 3 C.P. 463; 4 C.P. 617.

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The passage in the judgment of Bovill C.J. which seems to me to conclude argument upon this point is as follows:—

> These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents, managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts (*n*), they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain the argument.

I may add that the decision in *Waddle's Case* (1) is over fifty years old and it is, of course, perfectly well known that the business of trading companies has now for many years been conducted on the assumption (based upon the observations of the learned judges who decided that case) that such corporations may express their consent in a binding manner to contracts within the scope of their business in the same way as an individual may do, provided that no statutory provision or regulation affecting them is infringed or departed from.

To break in upon this rule at this date by accepting the contentions advanced on behalf of the appellant, would be as Cockburn C.J. says, to give life to a relic of barbarity and so far as I can see with no other effect than to put unnecessary obstacles in the way of the transacting of ordinary business.

The appeal should be dismissed with costs.

ANGLIN J.—With Riddell J., who tried this action,

> I do not find anything * * * in the documents which necessitates the payment by the plaintiffs of the amount ($1,400) until such time as the sale was completed.

(1) L.R. 4 C.P. 617.

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I have no doubt that by the completion of the sale was meant the delivery of a conveyance and transfer of possession of the property. The evidence establishes that the defendants made default both as the conveyance and as to possession. They acknowledged their inability to give possession when the plaintiffs, shortly after the date fixed by the agreement for completion, offered to pay the $1,400 if given possession and to accept a solicitor's undertaking for the subsequent delivery of a deed. The evidence lends some support to the view that the plaintiffs knew before they made the agreement that there would probably be delay in the execution of the conveyance, and they, therefore, may have contemplated payment of the $1,400 on the date named for completion of the sale, although the vendors might not then be able to deliver a deed of the property. But there is not a tittle of evidence to warrant a suggestion that they had agreed to pay the $1,400, although the vendors should be unable to deliver possession of the premises.

While I think the defendants have failed, on the admissible evidence, to prove an agreement by the plaintiffs to pay the $1,400 before receiving a deed, the evidence of Mr. Dods makes it quite clear that the real cause of the delay in the completion of the sale was not that the plaintiffs were insisting on delivery of a deed contemporaneously with their payment of the $1,400, but that the defendants were not ready to transfer possession of the property. That certainly was the situation from the 20th of March until the 20th of May, when for the first time the defendants sought to escape from their contract on the pretext of delay on the part of the plaintiffs in the payment of the $1,400, although, as Mr. Dods's uncontradicted

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evidence shews, he had informed the defendants of his client's readiness to pay this money on the 20th of March and the subsequent delay had been at the instance of the defendants' own solicitor. Assuming a contract binding on the defendants, I have no hesitation in affirming the holding that the default in carrying it out was entirely theirs and that the plaintiffs are entitled to the relief of specific performance.

The defendants, however, maintain that there was not a contract binding upon them—(*a*) because the assistant general manager, Douglas, who, on their behalf, signed the acceptance of the plaintiffs' offer to purchase, did so without authority; and (*b*), because the seal of the company was not affixed to the document.

(*a*) There can be no question of the company's right to hold and to dispose of this real estate (2 Geo. V. ch. 31, sec. 23, and sec. 24(*b*)), nor is there room for doubt as to the power of the directors to make a contract such as that in question. (*Ibid.*, sec. 82.) The property had been acquired for and used as the business premises of the company. It had become too small for their needs and it had been decided to dispose of it in order to permit of more suitable premises being purchased. The sale was, therefore, arranged for in the course of the management of the company's affairs. By section 87(*e*) of the statute directors are empowered to pass by-laws providing for the conduct of the affairs of the company, and, by section 86 to elect a president and vice-president and to appoint all officers of the company. Under these statutory provisions by-laws were passed by this company as follows:—

20. The directors may from time to time appoint one of their body to be managing director of the company.

22. The directors may from time to time entrust to and confer upon the managing director such of the powers exercisable under these by-laws by the directors as they may think fit.

34. In case of the absence of any officer of the company the Board of Directors or President may delegate his powers or duties to any other officer or to any director for the time being.

The election of Mr. McKnight as president and his appointment as general manager and that of Mr. Douglas as assistant general manager are duly proven. I attach no importance to the fact that in the resolution for the appointment of Mr. McKnight he is styled general manager instead of managing director. The appointment was undoubtedly intended to be made under by-law No. 20.

On the evidence it is quite clear that the sale to the plaintiffs was arranged by them with Mr. McKnight and was discussed by him with his co-directors, who approved of it at least informally. Being obliged to leave the city Mr. McKnight, as president, delegated to Mr. Douglas authority to carry out the transaction and to prepare and execute a contract of sale with the plaintiffs. With the learned trial judge, I think,

that Douglas did draw up a document which was precisely what had been arranged by the parties and that document was one, therefore, which he had the right and the power to draw and afterwards to sign.

For any lack of formality in the steps leading to the authorization of Douglas the plaintiffs should not suffer. They were not called upon to ascertain that proper steps had been taken to clothe him with authority to execute the contract with them on behalf of the company. They acted with perfect good faith. The power which Douglas purported to exercise was

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such as, under the constitution of the company, he might possess, and that is enough for a person dealing with him *bonâ fide*. *Biggerstaff* v. *Rowatt's Wharf*(1); *Premier Industrial Bank* v. *Carlton Manufacturing Co.*(2). On the evidence I incline to think that the proper inference is that Douglas was in fact clothed with authority to bind the company by an agreement such as he made: but, if not, it is clear that under the statutory powers of the directors and the by-laws of the company provision was made for vesting such authority in an officer holding his position, and, as against third parties dealing with such an officer in good faith in regard to a matter in respect of which authority could be so conferred upon him, the company cannot be heard to deny his power to bind it. *Totterdell* v. *Fareham Blue Brick and Tile Co.*(3).

(*b*) Nor does the absence of its corporate seal afford a defence to the company.

I am, with respect, unable to accept the view which prevailed in the Appellate Division that section 139 of the "Ontario Companies' Act" (2 Geo. V. ch. 31) applies to the execution of contracts or other instruments. It deals only with the "authentication" of documents, not with formalities of execution. The substitution in revision of the more compendious word "document" for the particular words "writ, notice, order" formerly used did not change the character of that for which the section provides, namely, authentication as distinguished from execution. The

(1) [1896] 2 Ch. 93, at p. 102.

(2) [1909] 1 K.B. 106, at pp. 113-14.

(3) L.R. 1 C.P. 674.

word "authentication" has the same meaning in the revised Act which it bore in the former "Companies' Act" — the same meaning which it has in the corresponding section of the English "Companies' Consolidation Act of 1908" — 8 Edw. VII. ch. 69, sec. 117.

But the defendant company is a trading company.

"The general result of those cases," says Wightman J., in *Henderson* v. *Australian Royal Mail Steam Navigation Co.*(1),

seems to me to be that, whenever a contract is made with reference to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced, though not under seal.

As put by Bovill C.J. in *South of Ireland Colliery Co.* v. *Waddle*(2) :—

Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants, and the like. But, in progress of time as new descriptions of corporations came into existence, the courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first, there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions which, if inconsistent with them, must I think be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument.

The contract there in question was for the purchase of machinery required for the company's under-

(1) 5 E. & B. 409, at p. 415. (2) L.R. 3 C.P. 463, 469.

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taking. Here the contract is for the sale of unsuitable business premises in order to enable the company to acquire premises more commodious and better adapted for its purposes. Adopting the language of Erle J. in the *Henderson Case*(1),

> the contract was made for a purpose directly connected with the object of the incorporation.

That able judge added:—

> I think myself that it is most inexpedient that corporations should be able to hold out to persons dealing with them the semblance of a contract, and then repudiate it because not under seal.

The decision of the Court of Common Pleas in the *South of Ireland Colliery Co.* v. *Waddle* was affirmed in the Exchequer Chamber(2), where Cockburn C.J. said that the court had been

> invited to re-introduce a relic of barbarous antiquity,

and the reasoning of Bovill C.J. was unqualifiedly approved. An observation of Chatterton V.-C., in *Holmes* v. *Trench*(3), cited by Mr. Justice Clute:—

> It is true that a corporation may contract without seal for the purchase or sale of property necessary for carrying on the business for which the corporation was created,

is directly in point, and, although merely a dictum, is in accord with the tendency of modern decisions relating to the contracts of trading corporations and within the principle on which those decisions rest.

The defences set up in this action are purely technical and devoid of merit. It is gratifying to find that the law warrants our sustaining a conclusion

(1) 5 E. & B. 409, 415. (2) L.R. 4 C.P. 617.
(3) [1898] 1 Ir. Rep. 319, at p. 333.

which is in accord with the demands of substantial justice.

I would dismiss the appeal with costs.

BRODEUR J.—I concur with my brother Duff.

Appeal dismissed with costs.

Solicitor for the appellants: *R. F. Segsworth.*

Solicitors for the respondents: *Johnston, McKay, Dods & Grant.*

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*March 8.
*March 15.

SHAJOO RAM .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal law—Perjury—Form of oath—Practice—Voire dire.

After examination on *voire dire*, in a judicial proceeding, a person called as a witness (with the assistance of an interpreter) went through a ceremony accepted as the taking of an oath in the form usual with his race and class, knowing and intending that his testimony should be received and acted upon as evidence given under oath.

Held, that on prosecution for perjury in giving his testimony the witness could not set up the defence that he had not been duly sworn. *Rex* v. *Lai Ping* (11 B.C. Rep. 102); *The Queen's Case* (2 Brod. & Bing. 284); *Omychund* v. *Barker* (1 Atk. 21); *Attorney-General* v. *Bradlaugh* (14 Q.B.D. 667), and *Curry* v. *The King* (48 Can. S.C.R. 532), referred to.

Judgment appealed from (19 D.L.R. 313; 30 West. L.R. 65) affirmed.

APPEAL from the Court of Appeal for British Columbia(1), affirming the conviction of the appellant upon an indictment for perjury.

The judgment appealed from was rendered upon a case reserved at the trial by His Lordship Mr. Justice Gregory, which was as follows:—

"1. The prisoner was tried before me at the Vancouver Spring Assizes, on June 26th, 1914.

"2. The charge was that the said Shajoo Ram on

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

(1) 19 D.L.R. 313; 30 West. L.R. 65.

the 15th day of January, 1914, whilst appearing as a witness, and after having been duly sworn before Charles John South, Esq., then sitting as Deputy Police Magistrate in and for the City of Vancouver, in a judicial proceeding wherein one Baboo Singh was charged with having unlawfully broken a shop window, which magistrate had competent power and authority to administer the oath to the said accused, as a witness in that behalf, did then and there falsely, knowingly and corruptly swear and depose to the effect following, that is to say, that he the said Shajoo Ram was not present at a meeting at the Sikh Temple, Second Avenue, West, in the City of Vancouver, on the night of Saturday, the 10th day of January, 1914, whereas in truth and in fact the said Shajoo Ram was present at a meeting at the Sikh Temple aforesaid, on the Saturday night aforesaid, as he the said Shajoo Ram well knew when he so falsely and corruptly deposed as aforesaid, and the said Shajoo Ram did thereby then and there commit wilful and corrupt perjury.

"3. There was no evidence before me of the words (if any) that the magistrate put to the interpreter, L. J. Ricketts, to be interpreted to the accused by way of administering an oath. The magistrate was not called to give evidence.

"4. Counsel for the accused consented to the admission of the transcript of the proceedings in the Police Court as evidence that it was in the course a judicial proceeding that the alleged perjury had been committed, but not as evidence that the accused had been sworn.

"5. At the trial before me Henry William Gwyther, a Hindu interpreter who was present in the proceedings before Magistrate South, and L. J. Ricketts, who

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acted as interpreter in the proceedings in question, were the only witnesses called to prove that the accused had been properly sworn in the Police Court proceedings. The evidence of these two witnesses is made part of this case.

"6. The accused was called on his own behalf at the trial before me and the following is the stenographic report of what occurred when he was called upon to give evidence on his own behalf.

"Shajoo Ram, the accused, called:—

"Interpreter: He is a Guthric. He will affirm.

"Court: What is the custom? How do you people swear?

"Interpreter: He swears by putting his hand up. It is like affirming.

"Court: All right.

"Accused sworn.

"7. At the close of the case for the Crown counsel for the accused asked to have the case taken from the jury on the ground that there was no evidence that the accused had been duly sworn in the Police Court proceedings.

"8. I gave leave that an application be made later for a stated case.

"9. I instructed the jury that there was evidence that the accused had been duly sworn.

"10. The accused was found guilty of the charge.

"11. On the application for the stated case counsel for the accused asked that the evidence of the witness Gwyther in the Police Court should be made part of the stated case. This application I refused.

"12. However, I gave leave that an appeal should be taken on this point.

"13. The questions submitted are:—

"1st. Was there evidence that a proper oath had been administered to the accused in the Police Court proceedings, in which perjury was alleged to have been committed, and was I right in charging the jury that there was such evidence?

"2ndly. Was I right in refusing the application of Counsel for the accused that the deposition of Gwyther taken in the Police Court proceedings should form part of this case?"

By the judgment appealed from, the conviction was affirmed, Irving J. dissenting.

W. L. Scott for the appellant.

J. A. Ritchie for the respondent.

THE CHIEF JUSTICE.—This appeal should be dismissed.

IDINGTON J.—I think this appeal should be dismissed. Sufficient reasons are assigned therefor and appear in the judgments of the court below and it seems needless to repeat them here.

DUFF J.—I think there was evidence, meagre it is true, but still sufficient, to support a finding by the jury that the accused, presenting himself as a witness in a court of justice, and giving the answers he did give, on his examination, on the *voire dire,* in effect declared that the ceremony which was accepted as the taking of an oath was in fact binding on his conscience as an oath. It is probable that the jury in reaching their conclusion assumed, as I think they were entitled to assume, that the witness under-

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stood that he was going through that which was the ordinary form of oath administered to persons of his race and class in the courts of British Columbia, and of course generally accepted as a form of oath binding on their consciences.

On the questions of law I am in entire agreement with the view expressed by Mr. Justice Martin, in which Mr. Justice McPhillips concurred, which view is concisely stated in the judgment of the Chief Justice in the case of *Rex* v. *Lai Ping*(1), in a passage which is quoted in the judgment of Mr. Justice Martin and is in the following words:—

> It seems to me that when a man without objection takes the oath in the form ordinarily administered to persons of his race or belief, as the case may be, he is then under a legal obligation to speak the truth, and cannot be heard to say that he was not sworn. If we were to decide otherwise we would deprive the evidence given in a court of justice of the most powerful and necessary sanction which it is possible to give it, namely, the risk of a prosecution for perjury.

In British Columbia, indeed, the facts being as above mentioned the question would seem to be beyond controversy by reason of the declaratory enactment of 1 & 2 Vict, ch. 105, as follows:—

> AN ACT TO REMOVE DOUBTS AS TO THE VALIDITY OF CERTAIN OATHS.
>
> Be it declared and enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person in case of wilful false swearing may be convicted of

(1) 11 B.C. Rep. 102.

the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.

Eighteen years before that statute was passed, Abbott C.J., in the *Queen's Case*(1), used these words:

> I conceive, that, if a witness says he considers the oath as binding upon his conscience, he does, in effect affirm, that, in taking that oath, he has called his God to witness, * * * and having done that, that it is perfectly unnecessary and irrelevant to ask any further questions.

There seems to be no substance in the objection that the oath was administered by the interpreter and not by the magistrate. The interpreter was merely the mouthpiece of the judicial officer.

I think the appeal fails.

ANGLIN J.—The appellant was admittedly capable of taking an oath. He was not a person authorized to make affirmation under section 14 of the "Canada Evidence Act." To sustain his conviction for prejury under section 170 of the Criminal Code it is therefore necessary to shew that he told what was known to him to be false as part of his evidence upon oath in a judicial proceeding.

With Mr. Justice Galliher I regret that greater care was not taken in the Police Court proceedings, when the appellant was called as a witness, to make it certain that he fully understood that he was about to give evidence under the sanction of an invocation of the Deity (his Deity) as witness to his truthfulness. In whatever form it may be administered, that is in English law the essence of an oath. *Omychund* v.

(1) 2 Brod. & Bing. 284.

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Barker(1); *Attorney-General* v. *Bradlaugh*(2); *Curry* v. *The King*(3), at pages 534 and 535.

The evidence on the defendant's trial for perjury fairly establishes that, before giving his testimony at the Police Court, he solemnly promised with uplifted hand to tell the truth, the whole truth, and nothing but the truth. That he said "I swear," though probable, is uncertain. But he answered "yes" to the question: "Is the oath you have taken binding on you?" or, it may have been, "binding on your conscience," or some equivalent term? (*The Queen's Case*(4).) It also appears that it is the custom of the people to whom the defendant belongs to swear by putting up the hand; and he himself was so sworn when giving evidence on his own behalf on his trial for perjury. Taking all these circumstances into account it would seem to be a not unreasonable inference that the defendant knew he was taking what was intended to be an oath — that his purpose was to have the court believe that he was swearing to tell the truth and by uplifting his hand to invoke the Deity as witness. On the whole, though not entirely satisfied that the appellant did actually call upon the Deity to witness his truthfulness, neither am I satisfied that he did not. I entertain no doubt, however, that he gave his testimony with full knowledge that it would, and with deliberate intent that it should, be received and acted upon as evidence given under oath.

I am, for these reasons, not prepared to dissent from the judgment affirming this conviction.

(1) 1 Atk. 21, at p. 48.

(2) 14 Q.B.D. 667, at p. 708.

(3) 48 Can. S.C.R. 532.

(4) 2 Brod. & Bing. 284, at p. 285.

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SHAJOO RAM v. THE KING.

Brodeur J.

BRODEUR J.—The appellant claims that he has not been duly sworn and that he could not then be convicted of perjury.

He is a Hindoo, and the evidence shews that when he was sworn the interpreter did his best to convey to the mind of the witness what he was bound to do as such. He volunteered to take the oath by the uplifting of the hand.

As the Chief Justice said in *Curry* v. *The King* (1):—

> Having taken the oath in that form without objection it is an admission that the witness regarded it as binding on his conscience.

I cannot see how the appellant may claim to-day that he has not been duly sworn.

He was examined in this case before the criminal court and there took the oath in the same way.

I am of opinion that if a witness allows himself to be sworn in any form without objecting to it, he is liable to be indicted for perjury, if his testimony prove false. Best on Evidence (10 ed.), page 151.

It would be a pity if perjurers could escape on technicalities as the one which is raised in this case.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *Clarence Darling.*

Solicitor for the respondent: *A. D. Taylor.*

(1) 48 Can. S.C.R. 532.

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*March 8.
*March 15.

THE LINDE CANADIAN REFRIGERATOR COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

THE SASKATCHEWAN CREAMERY COMPANY (DEFENDANTS) .. RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Company—Dominion corporation—Provincial registration—Juristic disability—Right of action — Contract — Carrying on business within province—Legislative jurisdiction—R.S. Sask. 1909, *c.* 73, *ss.* 3, 10—*Non-compliance with S.C. Rule—Costs.*

A company, having its chief place of business in the Province of Quebec and incorporated under the Dominion statute with power to trade and carry on its business throughout the Dominion of Canada, did not comply with the provisions of the "Foreign Companies Act," R.S. Sask., 1909, ch. 73, requiring registration previous to carrying on business within the Province of Saskatchewan. In the ordinary course of its business, it sold and brought certain machinery into the province and did the work of installing it therein for a price which included setting it up and starting it working. An action for the contract price was dismissed by the judgment of the trial court (6 West. W.R. 1159), and this judgment was affirmed by the Supreme Court of Saskatchewan, on the ground that the unregistered extra-provincial company was denied the right of action in the courts of the province by the tenth section of the "Foreign Companies Act."

On appeal to the Supreme Court of Canada, the judgment appealed from (7 West. W.R. 89) was reversed.

Per Idington J.—The mere setting up and starting the working of the machinery by the extra-provincial company did not constitute the carrying on of business in the Province of Saskatchewan within the meaning of the "Foreign Companies Act."

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

Per Anglin J.—The installation of the plant was a substantial part of the consideration of the contract and, consequently, the unregistered extra-provincial company would be denied the right of enforcing its claim by action in the courts of the province under the provisions of the tenth section of the "Foreign Companies Act," but, inasmuch as the legislation in question had the effect of depriving the extra-provincial company of the status, capacities and powers which were the natural and logical consequences of its incorporation by the Dominion Government, it is *ultra vires* of the provincial legslature and inoperative for the purpose of depriving the company of its right to maintain the action in the provincial courts. *John Deere Plow Company* v. *Wharton* ([1915] A.C. 330), applied.

Costs were refused the appellant, on the allowance of the appeal, in consequence of non-compliance with Supreme Court Rule No. 30 in respect of the printing of the statutes regarding which questions were raised.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1), affirming the judgment of His Lordship Chief Justice Haultain, at the trial(2), by which the plaintiffs' action was dismissed with costs.

The circumstances of the case are sufficiently stated in the head-note.

At the opening of the argument the court announced that there could not, in any event, be any costs allowed on the appellants' factum on the appeal in consequence of non-compliance with the requirements of Supreme Court Rule No. 30 in respect to the printing of the statutes regarding which questions were to be raised on the appeal.

Atwater K.C. for the appellants.

The respondents were not represented at the hearing of the appeal.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed without costs.

(1) 7 West. W.R. 89. (2) 6 West. W.R. 1159.

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LINDE CANADIAN REFRIGERATOR CO. v. SASKATCHEWAN CREAMERY CO.

Idington J.

IDINGTON J.—The appellant is a company incorporated under a Dominion charter and carrying on its business in Montreal. The respondent is, or was, carrying on business at Moose Jaw, in the Province of Saskatchewan, in succession to another company which had a contract with appellant to supply it with a refrigerating plant, on the "Linde System," and erect same on the foundation prepared by the company receiving it.

The appellant did so and the respondent, I infer, became, in some way not clear, the company that is to pay therefor.

The statement of defence alleged as follows:—

2. The defendant says that the plaintiff corporation is a foreign corporation and was at the time the alleged cause of action arose and still is unregistered in the Province of Saskatchewan under the "Foreign Companies Ordinance" and that the plaintiff is, therefore, not entitled to bring this action.

The learned trial judge held that the appellant, though otherwise entitled to recover, was barred thereunder by section 3 of the "Foreign Companies Act" of Saskatchewan.

That section is in its first sub-section as follows:—

3. Unless otherwise provided by any Act no foreign company having gain for its object or a part of its object shall carry on any part of its business in Saskatchewan unless it is duly registered under this Act.

The only pleading on the record upon which such defence is rested is the second paragraph of the statement of defence which is quoted above.

This does not appear to me to raise such a defence as is contemplated by section 10 of said Act which reads as follows:—

10. Any foreign company required by this Act to become registered shall not while unregistered be capable of maintaining any action or other proceeding in any court in respect of any contract

made in whole or in part in Saskatchewan in the course of or in connection with business carried on without registration contrary to the provisions of section 3 hereof.

The plea does not bring the appellant within this section and, therefore, the defence as pleaded should not be held a bar to the action. This may be technical and amendable, but no one is here to ask therefor and there are no merits in the defence.

The third sub-section of said section 3 relied upon below is as follows:—

(3) The taking 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, the onus of proving which shall in any prosecution under this section rest on the accused, shall not be deemed to be carrying on business within the meaning of this Act. (1903, ch. 14, sec. 3; 1903 (2), ch. 19, sec. 1.)

The respondent has filed no factum and has not appeared by counsel on this appeal. Counsel for appellant relied upon the recent case of the *John Deere Plow Co.* v. *Wharton*(1), decided since this case was heard below, and seeks some amendment to bring this case within that.

As there are many features of the Act upon which that case was decided, and the Act here in question and the respective facts relevant respectively to said Acts, which may distinguish the two cases, it would be most unfortunate to have the decision turn thereon without argument.

I do not think it is necessary to deal with the appeal from that point of view. The contract seems to be one which may well fall within the exception provided by said sub-section 3 of section 3.

(1) [1915] A.C. 330.

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Idington J.

The appellant proved that it had no resident agent or representative and no office or place of business in Saskatchewan. The goods and machinery contracted for and other goods were shipped from Montreal and, on such reading and understanding of the contract as I am enabled to give it, I do not think the mere installation of the machinery so ordered, shipped and delivered, fairly falls within the meaning of the carrying on business in Saskatchewan. I cannot think it was intended to apply to the mere setting up and starting of machinery by a company doing no more in way of carrying on business than such acts involve. And if it did, that has been paid for, I imagine, or might be severable if we knew and understood the facts. The application of this Act made by the courts below would apply to many cases of mere agricultural machines and implements which are very commonly sold on terms of thus testing by starting them satisfactorily as we have found by experience in this court. The view of this court in the case of *John Deere Plow Co.* v. *Agnew*(1), does not seem to have been presented to the courts below.

It is also to be observed that the company's contract provided as follows:—

> Taxation:—All local or provincial taxes liable to be levied on outside companies or their employees to be paid by the purchaser.

The appellant, in any way one can look at it, was entitled to have within the Act (when acting in violation thereof) become licensed and then to proceed to recover from respondent what the trial judge found was justly due. The respondent would have had to pay, under the clause just quoted, the taxes; and the

(1) 48 Can. S.C.R. 208.

incidental expenses of procuring registration, is all that would have been involved.

If the words "maintaining any action" in the above quoted section were liberally interpreted, in any case the action would not have to be dismissed in such a way as to put an end to the appellant's rights as it might if the legislation in question can be upheld by distinguishing it from the British Columbia legislation which certainly is of a more objectionable character than that involved in this case.

I think the appeal should be allowed, but, as directed at the argument, without costs.

DUFF J.—I concur in allowing this appeal.

ANGLIN J.—The plaintiffs are a company incorporated by the Dominion of Canada with power to trade and carry on their business throughout the Dominion. Although the definition of "foreign company" in the "Foreign Companies Act," R.S. Sask. (1909), ch. 73, is not as clear or precise as could be desired, doubtless it was meant to include, and probably does cover any Dominion corporation. This action is brought to enforce payment under a contract made with the plaintiffs in Saskatchewan.

The provincial courts, in my opinion properly, have held that the installation by the plaintiffs, pursuant to the provisions of the contract sued upon, of the refrigerator plant which they sold to the defendants was a carrying on of a part of the plaintiffs' business in Saskatchewan within the meaning of section 3, and, therefore, brought the contract itself within the purview of section 10 of the "Foreign Companies Act," because it was a contract made in Saskatchewan in con-

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LINDE CANADIAN REFRIGERATOR CO. v. SASKATCHEWAN CREAMERY CO.

Anglin J.

nection with business carried on without registration contrary to the requirements of section 3. I am, with deference, unable to read the statute as affecting only the contracts of companies which have resident agents or representatives, or warehouses, offices or places of business in Saskatchewan (section 3, sub-section 3). Companies not having resident agents or representatives, or warehouses, offices or places of business in Saskatchewan may, no doubt, though not registered, fill orders taken in Saskatchewan by travellers for goods, wares and merchandise to be subsequently imported into that province, or may make contracts by correspondence for the buying or selling of such goods, wares, or merchandise without rendering themselves subject to the provisions of the statute. But even such companies may not enforce, by action in the Saskatchewan courts, any contract made in whole or in part in Saskatchewan in connection with business carried on without registration contrary to the provision which requires that no foreign company having gain for its object shall carry on any part of its business in Saskatchewan unless registered. Although the installing of the plant may in the present case have been a comparatively insignificant part of that which the plaintiffs contracted to do, it was a substantial part of the consideration which they agreed to give to the defendants in return for their money. That installation they undertook to carry out, and it was in fact carried out, by their engineer. As put by Haultain C.J.:—

> It is not a matter of contract by correspondence; it is not purely a matter of an order for goods to be made or to be taken by a travelling salesman. It is a contract for work as well as for material —for work to be done within the province that is subsequently done within the province by the plaintiff company, through their engineers who took charge of the installation of the plant.

As pointed out by Mr. Justice Elwood, the installing of refrigerator plants sold by them was admittedly a part of the plaintiffs' ordinary business. Nor was the installation here in question a solitary act of business done in Saskatchewan not indicating a purpose to carry on business in that province. *Oakland Sugar Mill Co.* v. *Fred. W. Wolf Co.*(1); *Cooper Manufacturing Co.* v. *Ferguson*(2). There was evidence that other plants had been installed by the plaintiffs in the province, and I cannot think that this evidence should be ignored, as is suggested by Elwood, J., merely because the defendants had failed to prove that the plaintiff company was not "registered" when these other transactions took place. Taking all the evidence into account, I think it sufficiently appears that what the plaintiffs did in this case was with the purpose and in the course of pursuing or carrying on such business as it could obtain in the Province of Saskatchewan and was not an isolated act, such as has in some cases been held to be insufficient to warrant a conclusion that business was being carried on. It should be noted that what is prohibited by the Saskatchewan statute is not the carrying on of the business of the company, but the carrying on of any part of its business while it remains unregistered. I respectfully concur in the view of the learned Chief Justice that there was in connection with the contract sued upon a carrying on of a part of the business of the plaintiff company in contravention of the provisions of the "Foreign Companies Act."

The question is therefore directly presented for

(1) 118 Fed. Rep. 239, at pp. 245-6.

(2) 113 U.S. Rep. 727, at pp. 733-5.

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Anglin J.

decision whether it is *intra vires* of a provincial legislature to enact that, as a penalty for, or consequence of, non-compliance with a provincial statute requiring it to become registered, a Dominion company shall be denied the right to maintain actions in the provincial courts upon contracts made by it in the exercise of the powers conferred on it by its Dominion charter. In the *John Deere Plow Co.* v. *Wharton*(1), the Judicial Committee categorically decided that it is not, when it held (at page 341) that

> those provisions of the "Companies' Act" of British Columbia which are relied on in the present case as compelling the appellant company * * * 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 had already said (page 341) :—

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

Further on they say (page 343) :—

> It might have been competent to that legislature to pass laws applying to companies without distinction and requiring those that were not incorporated within the province to register for certain limited purposes such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under section 92 to the provincial legislature. The analogy of the decision of this Board in *Union Colliery Co.* v. *Bryden*(2) therefore applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the province. They think that the legislation

(1) [1915] A.C. 330. (2) [1899] A.C. 580.

in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

No doubt the British Columbia statute contained objectionable provisions not found in the Saskatchewan Act, such as that requiring a foreign company to submit to a change in its corporate name as a condition of securing registration should the registrar deem it proper to demand such a change. But the sections of the Saskatchewan Act which are invoked by the defendants in this case I am unable to distinguish on any substantial ground from the corresponding provisions of the British Columbia legislation which were under consideration in the *John Deere Plow Company's Case*(1). Legislation excluding Dominion corporations, because they are not registered in conformity with the requirements of the provincial statute, from access to the provincial courts for the purpose of enforcing contracts made by them in the exercise of their charter powers is something which, as I understand the opinion delivered by the Lord Chancellor, the Privy Council has explictly declared to be *ultra vires* of a provincial legislature, because it

> really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government

and

> the status and powers of a Dominion company as such cannot be destroyed by provincial legislation.

I am for this reason of the opinion that this appeal should be allowed.

(1) [1915] A.C. 330.

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BRODEUR J.—I am of opinion that this appeal should be allowed with costs.

Appeal allowed without costs.

Solicitors for the appellants: *Willoughby, Craig, McWilliams & Benyon.*

Solicitors for the respondents: *Caldwell & Fraser.*

IN THE MATTER OF THE "VULCAN" TRADE MARK. 1915

*Feb. 18, 19.
*May 4.

BERGERON, WHISSELL & CO. (RESPONDENTS) ..... APPELLANTS;

AND

JONKOPINGS OCH VULCANS TANDSTICKSFABRIKSAKTIEBOLAG (PETITIONERS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade mark—Registration—Rectification of register—Jurisdiction of Exchequer Court—Construction of statute—"Trade Mark and Design Act," R.S.C., 1906, *c.* 71, *ss.* 11, 12, 13, 42—*"Exchequer Court Act," R.S.C.*, 1906, *c.* 140, *s.* 23.

Under the provisions of sections 11, 12, 13 and 42 of the "Trade Mark and Design Act," R.S.C., 1906, ch. 71, and the twenty-third section of the "Exchequer Court Act," R.S.C., 1906, ch. 140, the Exchequer Court of Canada has jurisdiction to order the rectification of the register of trade marks, at the suit of any person aggrieved, notwithstanding that the matter has not been referred to the court by the Minister under the provisions of the "Trade Mark and Design Act." Duff J. dissented.

The judgment appealed from (15 Ex. C.R. 265) was affirmed.

APPEAL from the judgment of the Exchequer Court of Canada(1), granting the petition of the respondents, with costs.

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

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

(1) 15 Ex. C.R. 265.

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IN RE "VULCAN" TRADE MARK.

St. Germain K.C. and *J. A. Ritchie* for the appellants.

J. F. Edgar for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—The only doubt I have entertained in this case arises out of the contention of Mr. Ritchie that the Exchequer Court had not jurisdiction to hear and determine it. That contention was based upon the limited construction placed by him upon the sections of the "Trade Marks and Designs Act" applicable, namely, sections 11, 12 and 13, and section 42.

An application had been made by the respondent company to the Minister for the registration of the trade mark "Vulcan" to be used in connection with the sale of their matches.

The application was refused on the ground that the word "Vulcan" had been registered as a trade mark in January, 1894, in the name of Quintal & Sons and now stood in the name of appellants, Bergeron, Whissell & Co., and that without their consent further action could not be taken by the Department.

The appellants' contention on this branch of the case was that it was absolutely in the power of the Minister under the 12th section of the Act to refer, or decline to refer, the matter of such an application to the Exchequer Court of Canada and that unless and until such reference was made that court had no jurisdiction to deal with the matter.

Section 42 of the Act is as follows:—

42. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any

omission, without sufficient cause, to make any entry in the register of trade marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the court thinks fit, or the court may refuse the application.

* * * * *

3. The court may, in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register.

It was contended that this section was only for the correction of errors in the registry and that it does not extend to errors made by the authority of the Minister, but, if I understood the argument correctly, is limited to clerical errors, or errors which had crept in without the Minister's authority. As to clerical errors, the section clearly does not refer to them. They are provided for by section 40. As to the limitation upon the section that the errors are to be confined to those made *without the Minister's authority,* I cannot see any justification for it in reason or in the statute.

The error complained of in this case was in the making of an entry of the trade mark "Vulcan" in the name of Quintal & Sons in an unlimited form, which covered "matches," as to which plaintiffs had acquired a right to a trade mark, as well as other articles about which there is no contention. It was a substantial and not a technical or clerical error and was made, as the decision in this case shews, "without sufficient cause," within my construction of those words in the section.

The effect of the decisions under the English Act is that the words "any person aggrieved" used in both statutes embrace any one who may possibly be injured by the continuance of the mark on the register in the form and to the extent it is so registered. *Re Rivière's*

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IN RE "VULCAN" TRADE MARK.

Davies J.

Trade Mark(1), and on further hearing(2); *Re Apollinaris Co.'s Trade Mark*(3); *Re Trade Mark of Wright, Crossly & Co.*(4). Quite apart from these decisions I should have been prepared to hold that the plaintiffs are quite within the words of the section "any person aggrieved," and are not, as suggested by Mr. Ritchie, mere "outlaws" not within the purview of the Act at all.

Then it was contended on the authority of an observation made by Lindley L.J., in *Re Trade Mark "Normal"*(5), at page 245, that the words "without sufficient cause" in the sections of both Acts are the controlling words and do not cover the error or mistake the plaintiff in his action seeks to have rectified. But it seems to me the observation of the Lord Justice had reference only to the question before him in the case and under the English statute he was then dealing with, namely, whether a person whose application to register a trade mark had been refused by the comptroller, could *appeal direct to the court* from such refusal as a person aggrieved by the omission of his name from the register under section 90 of the "Patents, Designs and Trade Marks Act, 1883," or *must take the special course prescribed by section* 62 *of appealing to the Board of Trade from the comptroller's decision.* The court held that the latter was his proper remedy and that an appeal did not lie to the court.

The sections in the English Act and in the Dominion Act are not at all the same. Nor is the scheme for

(1) 26 Ch. D. 48.
(2) 53 L.T. 237.
(3) [1891] 2 Ch. 186.
(4) 15 Cut. Pat. Cas. 131, 377.
(5) 35 Ch. D. 231.

the registration and control of trade marks in the Dominion analogous to that in Great Britain. Under the English Act an appeal lies from the decision of the comptroller to the Board of Trade and that body may, if they think fit, hear it themselves or may refer it to the court for hearing and in the case of such reference the court has jurisdiction to enter upon and determine all questions arising upon the objections, including, in a case where the comptroller has already registered the mark, the question whether the mark has been rightly admitted on the register. *Re Arbenz' Application* (1). An observation made by Lindley L.J., at page 264, of that case, is in point as applicable to the argument here. He says, dealing with the argument of want of jurisdiction:—

> The consequence of adopting that conclusion, as was candidly admitted, would be that we shall be precluded from doing what is right upon evidence, simply because the comptroller has done what he thought was right without evidence, a state of things which would be utterly intolerable. I have no doubt whatever that on the true construction of section 69 the whole case is properly before the court, and that being so, and the conclusion at which I have arrived from the evidence being what it is, I have no hesitation in saying that, in my opinion, this appeal ought to be allowed.

Under the Dominion Act there is no appeal from the Minister's decision and counsel for the appellants conceded that, if the Minister refused an application to register a trade mark under the 11th section of the Dominion Act and did not choose to refer to the Exchequer Court the matter of the application, the applicant, no matter how much aggrieved he might be, would be without any remedy. Lord Justice Lindley simply held that section 90 of the English Act did not apply to the case which was for the comptroller subject to the superior control of the Board of Trade to determine.

(1) 35 Ch. D. 248.

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IN RE "VULCAN" TRADE MARK.

Davies J.

His reasoning would not apply to our statute which does not give any appeal from the registration of the trade mark or from the refusal to register, and if the court was without jurisdiction to give an aggrieved party a remedy there would arise what Lord Lindley calls "a state of things which would be utterly intolerable."

Sections 11 and 42 of the "Trade Marks Act" must be read in conjunction with section 23 of the "Exchequer Court Act" which conferred jurisdiction upon that court *inter alia,*

> in all cases in which it is sought * * * to have any entry in any registry of copyrights, trade marks or industrial designs made, expunged, varied or rectified.

The jurisdiction conferred by the words of this section is broad and general, quite sufficiently so to cover the case now before us and I decline to read a limitation into the language of Parliament which would confine that jurisdiction either to references made to the court by the Minister under section 12 of the "Trade Marks Act," or to omissions in entries, or entries made without sufficient cause in the register of trade marks under section 42, if any such limited meaning is to be given to the words "without sufficient cause," as counsel suggest. Such a suggested limitation would in a large measure operate to defeat the object and purpose of the "Trade Marks Act" and the jurisdiction section of the "Exchequer Court Act" above quoted.

The two statutes were passed at the same session of Parliament. The plaintiff in this case is clearly a "person aggrieved" within the words of section 42, as appears by the decisions I have referred to above and in my opinion the court had jurisdiction either under it or under section 23 of the "Exchequer Court Act,"

to hear and determine plaintiffs' application to have the register of the appellants' trade mark rectified by limiting it in the manner it has done.

In *Canada Foundry Co.* v. *Bucyrus Co.*(1), a case similar to that now at bar, both in the Exchequer Court and in this court, jurisdiction was entertained without doubt or question.

As to the facts and merits of the case, I have only to say that I concur in the disposition of the case made by the learned judge of the Exchequer Court and with his reasoning.

The appeal should be dismissed with costs.

IDINGTON J.—If we observe the historical development of the Exchequer Court jurisdiction relative to registration of trade marks I think no difficulty in regard thereto exists in this case. Originally the Minister had been entrusted with absolute discretion free from other judicial supervision of what he might do in the course of granting or refusing registration. This was continued down to the time of the Revised Statutes of Canada, in 1886, ch. 63. By section 11 of the said chapter, formerly section 15 of 42 Vict. ch. 22, the Minister of Agriculture and his deputy were given limited judicial powers of determining the rights of rival claimants.

Evidently this, after some years' experience in its use, had been found unsatisfactory and was repealed by 53 Vict. ch. 14, sec. 1, which substituted therefor a section giving the Minister power in such cases to defer his decision till the matter in question had been passed upon by the Exchequer Court, which was em-

(1) 14 Ex. C.R. 35; 8 D.L.R. 920; 47 Can. S.C.R. 484; 10 D.L.R. 513.

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Idington J.

powered, by section 2, to hear such cases as the Minister had found a difficulty in dealing with. The Minister was to be guided by the order of the Exchequer Court. As a precautionary measure it was declared this new section should not be held to take away or affect the jurisdiction of any other court.

The scheme provided thereby in a rather clumsy manner seems to have been found unsatisfactory. The next step was taken, in 1891, by the enactment of 54 & 55 Vict. ch. 35, sec. 1, which repealed sections 11, 12 and 32 of the Revised Statutes of Canada, ch. 63, as it then stood amended by the foregoing Act.

In substitution therefor there was enacted a judicial code, as it were, for dealing with the whole matter.

It is quite clear to my mind that there was provided by this later statute just what it enacts, that the Minister if he thought fit might refer the matter of what he is entrusted with by the first sub-section, to the Exchequer Court which in such case was empowered to hear and determine any matter so referred.

In any case so falling under that sub-section of this lastly amending Act or of the entire provision above referred to of the previous session, the argument addressed to us relative to the jurisdiction of the Exchequer Court should have been entitled to prevail.

But over and above all that, section 12 of the Act thus amended created an entirely new and independent jurisdiction in the Exchequer Court.

That section 12 is now, slightly amended, section 42 of the Act as in the Revised Statutes of Canada, 1906, and reads as follows:—

42. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register

of trade marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the court thinks fit; or the court may refuse the application.

2. In either case, the court may make such order with respect to the costs of the proceedings as the court thinks fit.

3. The court may, in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register.

There does not seem to me any room for doubt as to the intention to create thus a jurisdiction wholly independent of the will of the Minister and that thereunder the Exchequer Court has the power to make such an order as made herein provided always the evidence warrants such an order being made and that from such order an appeal will lie here.

I can understand the contention that the facts do not warrant such an order as made herein, but I cannot quite understand any one appealing here trying to deny the jurisdiction of the court and yet appealing here.

If the contention is right appellants need not concern themselves with the result. Besides there has been in such case no final judgment. There may be an obvious fallacy in this suggestion, but I think it is quite as arguable as that there is no independent jurisdiction created.

On the merits of this case there seems to me to be but one rather serious difficulty, and that is that the predecessor in title of the appellant got without fraud a general trade mark registered and that the respondents failed to question it for at least sixteen years thereafter.

The effect of this under ordinary circumstances would perhaps be fatal to such a suit as this. For usually any business firm having adopted a trade mark uses it. But if we accept the learned judge's

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view of the facts this firm, which registered what appellants now claim, never used the mark in connection with their dealings in matches. Nor did appellants until three or four years before this action.

It was so easy, if this finding is not correct, to have put the matter beyond the shadow of doubt that the finding must stand so far as I am concerned.

The match manufacturer who departs from the use of his own trade mark and fill orders for a wholesale grocer to put up matches under the latter's trade mark I imagine does so reluctantly and only under well guarded stipulations relative thereto and tempted by better profit than he can make by adhering to his own trade mark. Such a dealing is not an ordinary every-day transaction such as a housewife ordering home a few bunches or boxes of matches in a way liable to be forgotten.

That no further proof of actual use of the trade mark was attempted than this record shews is most suggestive. That was the crucial point of this case. In it appellants fail. If they or their predecessors ever so habitually used, in relation to the selling of matches, this trade mark, they could have proved it up to the hilt and thereby invoked the authorities which might have maintained in a case so made out the abandonment of all claims on the part of respondent to interfere therewith.

The term "general trade mark" is so indefinite that I am not quite fully prepared to accept what seems to be the view of the learned trial judge that because the dealing in a particular article may properly fall within the ordinary course of a business classified as, for example, "wholesale grocers," therefore, every possible article within that class must, for

the purposes of this Act, be held covered by the trade mark adopted and used by a wholesale grocer.

The wholesale grocer may, in fact, confine his trade to a few articles; and he may expand or contract his list just as his capital and facilities for and perhaps necessities of business may demand.

Without going further than this to illustrate my meaning I think the course of dealing and of use of a general trade mark in relation thereto for a number of years after registration of such a trade mark may well be looked at as the measure of what was claimed and intended to be registered. If a firm having registered as herein such a general trade mark for ten or twelve or more years, never used it but for limited purposes and then assigned to another, I think that other got nothing beyond that which its assignor by use and mode of dealing had thus and thereby rendered definite.

If it had been shewn that the firm registering had prior thereto in fact used the trade mark more extensively, in the sense of covering a greater variety of kinds of articles and dealings, than it chose to apply it to later than the registration, I by no means think it would have lost its property therein. It is possible to lose by abandonment property of any kind. But it is not the case of abandonment by the firm registering we have to deal with so much as the finding of what the firm really intended to register.

I would measure that in such a vague and uncertain notice of registration as in evidence here and, no evidence being given of the use of such trade mark anterior thereto, by the conduct of those registering.

So looked at I cannot find the appellants ever had in law that which they claim herein. There is another

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and probably much more powerful reason for holding they never had that which they claim.

The respondent had beyond any doubt used most extensively the said trade mark all over the world, including Canada. The use thereof in Canada was not extensive, but clearly anterior to the registration, and such as to preclude the claim of the predecessor of appellants to register as regards matches, or by terms comprehensive of that which they had no legal property in or right to use.

It certainly was the property of respondent when the appellants' predecessors appropriated it to describe what they wanted in way of a general trade mark, and any such claim as made thereby must be limited accordingly.

The registration is of that and only that which at the time of registration was the property of him registering. Clearly this registration if to be interpreted as covering the selling of matches was void, for the property therein was then in respondent and, to use the language of section 42, the entry was made "without sufficient cause."

I must wholly dissent from the view urged so well by Mr. Ritchie that this registration creates a right not only akin to but also identical in kind with that created by a patent. The right of property always existed in a trade mark and was after much difference of opinion in regard to its being property finally so recognized about the time when our Act relative to trade marks was first passed. See the case of *Leather Cloth Co.* v. *The American Leather Cloth Co.*(1).

It is the purpose of procuring a system of registra-

(1) 4 DeG. J. & S. 137.

tion of such property that is the design of the Act now in question and for the convenience and security of business men is enforced by restricting, as section 20 of the Act does, the right in law to assert the right of protecting such property.

It is just there that the necessity exists for an independent authoritative jurisdiction such as section 42 creates in order to protect those who may inadvertently have been thus *primâ facie* deprived of the protection in the enjoyment of their property.

I conclude that the respondent is a party thus aggrieved by the registration of something which appears to deny its right and hence entitled to invoke the powers given in said section.

The use of the trade mark by the respondent may not have been extensive, but it was continuous from 1882 down to 1896 and cannot within the principles upon which the case of *Mouson & Co.* v. *Boehm* (1) proceeded, be held to have been abandoned by non-use in Canada in later years.

The appeal should, therefore, be dismissed with costs.

DUFF J. (dissenting).—I have been unable to satisfy myself that the Exchequer Court possesses the jurisdiction it has exercised in this case and on that ground I should allow the appeal. My learned brothers are, however, unanimous in thinking otherwise and as the point of jurisdiction involves no question of general principle, but only the construction of particular statutory provisions with respect to which the decision of this court in this case will be conclu-

(1) 26 Ch. D. 398.

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sive, there seems to be no object in entering at large upon my own particular views.

Anglin J.

ANGLIN J.—I concur in the judgment of Mr. Justice Davies.

BRODEUR J.—The respondents are manufacturers, in Sweden, of matches on which they have been using since 1870, throughout the world, the trade mark "Vulcan." From that period to 1894 they have shipped to Canada some cases of their goods bearing that trade mark.

In 1894, the assignors of the appellants, Quintal & Sons, wholesale grocers in Montreal, had the trade mark "Vulcan" registered in connection with their business and they have been using extensively that trade mark since. Later on the firm of Quintal & Sons was dissolved and the appellants acquired the assets of that firm, including that trade mark.

The respondents, in 1910, sought to secure registration of their trade mark in Canada to be used in connection with the sale of matches. This was refused by the Minister of Agriculture because there had already been such a trade mark registered for the appellants.

The Swedish manufacturers then applied to the Exchequer Court, under section 42, to have their trade mark registered as far as matches are concerned and to expunge and vary the trade mark registered in favour of the appellants. The Exchequer Court maintained the petition and ordered that the trade mark "Vulcan" should be registered in favour of the Swedish manufacturers as far as matches were concerned and prevented the appellants using their general trade mark on matches.

The main contention of appellants is that the Exchequer Court had no jurisdiction to deal with the matter and they rely on section 42 of the "Trade Mark and Designs Act," which reads as follows:—

> The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the said register of trade marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the court thinks fit; or the court may refuse the application.

I am unable to agree with that proposition that the Exchequer Court was without jurisdiction.

Formerly, the Minister of Agriculture was the only authority that could decide whether a trade mark should be registered or not. (R.S.C., 1886, ch. 63, sec. 11.) Provision was made also that if there was any contest as to the rights of parties to use a trade mark, the matter could be settled by the Minister.

It was found evident that the exercise of such judicial functions was more or less advisable to be made by the Minister and, in 1890, the law was amended and it was provided that if the Minister was not satisfied that the person was entitled to the exclusive use of the trade mark, he should cause all persons interested to be notified that the question should be decided by the Exchequer Court and the entry should be subsequently made in the register after the decision of that court. Then the matter could be brought up before the Exchequer Court upon information of the Attorney-General of Canada and at the relation of any party interested (53 Vict. ch. 14, secs. 1 and 2).

The same Act of 1890 provided also that if there were errors in registering a trade mark and oversight

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in regard to conflicting registration, that could be remedied and corrected by the Exchequer Court.

In 1891, Parliament dealt again with that question of jurisdiction. In proceeding to amend the "Exchequer Court Act," it was stated that that court had jurisdiction in all cases of conflicting applications for any trade mark, or in which it was sought to impeach or annul any entry in any register of trade marks, or in cases of infringement (54 & 55 Vict., ch. 26, sec. 4).

In the same year, by the Act of 54 & 55 Vict., ch. 35, secs. 1 and 2, it was at first provided that the Minister could refuse a trade mark and then power was given to him to refer the matter to the Exchequer Court and, then, a section was enacted corresponding word for word with the above section 42 that we find in the Revised Statutes of 1906.

The history of that legislation convinces me very conclusively that the matter which was at first exclusively in the hands of the Minister and under his judicial control could now be dealt with by the Exchequer Court. The Minister can register any trade mark, or refuse registration, but that would not prevent the Exchequer Court deciding whether the trade mark had been properly registered, or whether the omission of registration had been properly decided by the administrative authority.

I am, therefore, of opinion that the Exchequer Court had jurisdiction in the premises and could give the order which has been given.

Now the evidence shews that the trade mark "Vulcan" had been used in Canada by the Swedish manufacturers before the general trade mark of the appellants was registered. Then, when Quintal & Sons applied for the registration of a general trade mark, if

all the facts had been known, the Department would have rejected their application.

For those reasons, the judgment *a quo* should be confirmed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Belcourt, Ritchie & Chevrier.*

Solicitor for the respondents: *J. F. Edgar.*

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*Feb. 9,10.
*May 18.

THE STANDARD TRUSTS COMPANY (EXECUTORS OF THE WILL OF ROBERT MUIR) AND ROBERT R. MUIR AND ARTHUR E. MUIR.. } APPELLANTS;

AND

THE TREASURER OF THE PROVINCE OF MANITOBA..... } RESPONDENT.

In re ESTATE OF ROBERT MUIR AND OF THE "SUCCESSION DUTIES ACT."

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Constitutional law—Provincial legislation—Succession duties—Taxation—Property within province—Bona notabilia—Sale of lands—Covenant—Simple contract—Specialty—Construction of statute—Severable provisions—R.S.M. 1902, *c.* 161, *s.* 5 (*Man.*)—4 & 5 *Edw. VII., c.* 45, *s.* 4 (*Man.*)—*Appeal—Jurisdiction—Surrogate Court—Persona designata.*

M., who died in June, 1908, had his domicile in Manitoba and, under a verbal agreement, had erected elevators for L., also domiciled in Manitoba, on lands belonging to the Canadian Pacific Railway Company in the Province of Saskatchewan. Until fully paid for the buildings were to remain the property of M. who was to retain possession and operate the elevators and all net revenues were to be applied in reduction of the price for which they had been constructed. M. also owned lands in Saskatchewan, known as the "Kirkella Lands," which he had agreed to sell to purchasers under agreements under seal, in his possession in Manitoba at the time of his death, by which he remained owner until they had been fully paid for and then the lands were to be conveyed to the purchasers. The agreements contained no specific covenant to pay the price of the lands. The executors denied the right of the Government of Manitoba to collect succession duties

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

in respect of these debts under the Manitoba "Succession Duties Act," R.S.M., 1902, ch. 161, sec. 5, as re-enacted by the Manitoba statute 4 & 5 Edw. VII., ch. 45, sec. 4.

Per curiam.—The debt due under the contract with L. constituted property within the Province of Manitoba and, as such, was liable for succession duty as provided by the Manitoba statute. Also Davies J. dissenting, that under the agreements for sale of the "Kirkella Lands" a covenant to pay should be implied and, consequently, they were specialty debts which, as such, constituted property within the Province of Manitoba and were liable for succession duty there.

Per Davies, Idington, Anglin and Brodeur JJ.—The duties imposed by the Manitoba "Succession Duties Act" are direct taxation and, consequently, the legislation imposing them is *intra vires* of the provincial legislature.

Per Idington and Brodeur JJ.—The provincial legislature is competent to impose taxation as a condition for obtaining the benefit of probate.

Per Duff J.—In so far as the statute professes to impose duties in respect of property having a *situs* within Manitoba it is *intra vires* of the provincial legislature. *Rex* v. *Lovitt* ([1912] A.C. 212) followed. In so far as the statute professes to impose duties on property not having a *situs* in Manitoba, and without respect to the domicile of the owner, the reasoning of Lord Moulton in *Cotton* v. *The King* ([1914] A.C. 176), applies, the result of which is that such taxation if effectual in cases in which the beneficiary is domiciled abroad cannot be "direct taxation" within the meaning of section 92 of the "British North America Act, 1867."

Per Anglin J.—The succession duties imposed by the Manitoba statute are not fees payable for services rendered, but constitute taxation subject to the restrictions mentioned in item 2 of section 92 of the "British North America Act, 1867."

Per Duff and Anglin JJ.—The provisions of the Manitoba "Succession Duties Act" in respect to taxation which may be *ultra vires* may be treated as severable and do not render the statute ineffective as a whole.

Idington and Anglin JJ. questioned the jurisdiction of the Supreme Court of Canada under sub-section (*d*) of section 37 of the "Supreme Court Act," to entertain an appeal in a matter or proceeding originating in the Surrogate Court of Manitoba.

Anglin J. suggested that in the proceedings provided for by section 19 of the Manitoba "Succession Duties Act" the judge of the Surrogate Court would act as *persona designata* and that there may not be an appeal from his order to the Supreme Court of Canada.

The judgment appealed from (24 Man. R. 310) was affirmed.

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IN RE MUIR ESTATE.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the judgment of the judge of the Surrogate Court for the Eastern Judicial District of Manitoba by which it was declared that the estate of the late Robert Muir was liable for succession duties, claimed by the Government of the Province of Manitoba, in respect of the debts owing under a contract for the construction of buildings in the Province of Saskatchewan and under certain agreements for the sale of lands in the Province of Saskatchewan.

The circumstances in which the Government of Manitoba claimed the succession duties in question are stated in the head-note and the issues raised on the present appeal are fully discussed in the judgments now reported.

W. R. Mulock K.C. for the appellants.

Wallace Nesbitt K.C. and *R. B. Graham* for the respondent.

THE CHIEF JUSTICE concurred in the judgment dismissing the appeal with costs.

DAVIES J.—In this appeal important questions were raised not only as to whether the "Succession Duties Acts" of the Province of Manitoba were *ultra vires* the legislature of that province on the ground that the duties they imposed were *indirect* taxation, but also, in case the acts were *intra vires* the legislature, whether certain properties consisting of debts due to the testator at the time of the death, from parties some of whom were residents of Manitoba and

(1) 24 Man. R. 310.

others of whom resided abroad, were subject to the provisions of the Act. In the latter case, the contention was that these debts were "specialties" and for that reason were so subject. As to the "Little debt," it being a simple contract debt and both debtor and creditor being residents of Manitoba, it could have no local situation other than the residence of the debtor where the assets to satisfy it would presumably be and would be *bona notabilia* within Manitoba where he resided. *Commissioners of Stamps* v. *Hope*(1), at p. 482, cited with approval in *Rex* v. *Lovitt*(1), at p. 218.

As to the debts due or claimed in respect of the lands near Kirkella in Saskatchewan being specialty debts, by reason of the recital in the several agreements of sale and purchase entered into by the testator with certain purchasers under seal, I have come to the conclusion that these debts are not "specialties" which come within the meaning of the principle *"mobilia sequuntur personam."* I think the rule laid down in *Marryat* v. *Marryat*(3), and in *Isaacson* v. *Harwood*(4), applies to these agreements of sale and that no covenant to pay can be implied from the mere recital. The agreements did not contain any express covenant to pay the purchase money and the only question is whether one must be implied from the recital. I cannot understand how such an implication could create such a "corporal existence" with respect to this debt as would change its locality and make the debts "conspicuous" within the jurisdiction where the agreement happened to be found with the testator at the time of his death. But in any case, and supposing

(1) [1891] A.C. 476.
(2) [1912] A.C. 212.
(3) 28 Beav. 224.
(4) 3 Ch. App. 224.

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the rule to be as applicable to the case of an implied as of an express covenant to pay, it remains a pure question of the construction of the agreements. What did the parties intend ? If they intended that the recital should operate as a covenant, then the debtor would be liable accordingly. But it seems to me clear that the recital was not inserted for the simple purpose of acknowledging a debt by a deed under seal without any other object declared by the deed in which case a covenant to pay might be implied. On the contrary, the object and purpose of the agreement was to create a binding contract for the sale of a piece of land and to shew how and when the purchaser was to complete the payments of the purchase money, in order that he might obtain his title. As to the intention of the parties, the fact that the agreements do contain express covenants as to money that might be expended by the vendor in paying insurance rather goes to shew that where it was intended there should be a covenant to pay moneys under the agreement it was so expressed. Those agreements even if a covenant to pay the purchase money could be implied from the language of the recital are not, I agree with Perdue J.A., of the Court of Appeal, like money bonds, scrip or mortgages containing express covenants to pay money, etc. Before the executors could have any right to recover the purchase moneys under these agreements, they would have to obtain probate of the will in Saskatchewan and have the lands transmitted to them in accordance with the statute of that province. They have no rights under the agreements until they have put themselves in a position to perform the vendor's obligations under them. They could not recover the purchase moneys until they had obtained power to

convey the lands to the purchaser and they could only obtain such power by having their probate of the will re-sealed in Saskatchewan, the statutory equivalent of taking out ancillary probate there.

These instruments are mere agreements for the sale of land in Saskatchewan and involve mutual obligations on the part of vendor and vendee which can only be performed under the laws of that province and which cannot be enforced by the appellant executors until they have first complied with those laws.

The most important question, however, still remains, namely, whether the "Succession Duties Act" of the Province of Manitoba was *intra vires* of the legislature of that province.

The contention on the part of the appellant was that the construction to be put upon this Act and other similar succession duties Acts of the different provinces of the Dominion, was decided by the Judicial Committee in the recent case of *Cotton* v. *The King* (1). In that case it was held that the Quebec "Succession Duties Acts" did not impose duties upon the transmission of movable property outside of the province and that the taxation imposed by them on such property was not direct taxation within the meaning of the "British North America Act" and was consequently *ultra vires* the legislature of the province.

If this contention as made by the appellants was sustained, of course this appeal should have to be allowed and the results in the several provinces of the Dominion would be most serious and disquieting.

I have reached the conclusion after a very careful study of this decision of the Judicial Committe in the

(1) [1914] A.C. 176.

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Cotton Case(1), that it does not warrant the broad contention stated above.

The language made use of by Lord Moulton, who delivered the judgment, in parts of his judgment dealing with the transmission of movable property outside of the province, was very broad and general and would seem at first sight to justify the conclusion that all succession duties Acts of the several provinces necessarily violated the constitutional prohibition against provincial indirect taxation.

I do not think, however, their Lordships intended by any means to go that far or, indeed, to go any further than the specific question then before them required them to go. The language used by Lord Moulton must be read as only having reference to this special question they were in that case called upon to decide, namely, whether the Quebec Legislature imposed succession duties or had power to do so upon the transmission of movable property outside of the province.

In the *Cotton Case*(1) the duties had been levied upon two estates: first, on that of Charlotte L. Cotton; and, afterwards, on that of her husband, Henry H. Cotton, whom Charlotte predeceased.

A distinction was attempted to be made between the law as it stood at the death of Charlotte L. Cotton and as it was afterwards amended and stood at the death of Henry H. Cotton, and it was there contended that the amendment defining the meaning of the term "property" expressly included

> all movables *wherever situate* of persons having their domicile or residing in the Province of Quebec at the time of their deaths.

(1) [1914] A.C. 176.

Their Lordships, however, were of the opinion that this amended definition of the word "property" did not enlarge the express language of the operative clause of the Act which provided that of this property (that is the property made subject to the duties) those portions only are taxed which are *"biens situés dans la province."*

Dealing with this Act before it was amended and with reference to Charlotte L. Cotton's estate, His Lordship says at page 186:—

> No question arises as to the applicability of the doctrine *mobilia sequuntur personam*, because the section expressly limited the taxation to property in the province, and, therefore, whether or not the province possessed and might have exercised a right to tax movable property locally situated outside of the province, (such right arising from the domicile of the testatrix) it did not see fit so to do. For the same reason no question of *ultra vires* arises in this part of the case, since the appellants do not dispute the power of the Quebec Legislature to tax movable property situated in the province.

Dealing next with the Act after it was amended and with reference to Henry H. Cotton's estate, he says:—

> The same consideration which was decisive in the former case (Charlotte L. Cotton's), therefore, applies with equal force here.

His Lordship having thus disposed of the appeal with respect to the claims for succession duties on each of the two estates, on the ground that the statute either as originally enacted or as subsequently amended did not authorize the taxation of movable property situate outside of the province, went on to consider whether the succession duty imposed would be within the definition of an indirect tax if it be taken that the duty was imposed on all the property of the testator *wherever situate* — that is on the assumption that the limited words "property situate within the

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province" were deleted from the operative taxing section.

After quoting a number of the sections of the Act, he concludes that they only can be construed as

> entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration under oath of a complete schedule of the estate required by the sections quoted and who must recover the amount so paid from the assets of the estate or more accurately from the persons interested therein.

Taking as an instance the facts of the case, then before him, of movables in New York bequeathed to one domiciled in Quebec, and stating that there was no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries — and that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of such securities after satisfying the fiscal laws of New York relating thereto, he asks: How then would the provincial Government in such case obtain the payment of the succession duty? And answers his question by saying that it could only be from some one who was not intended himself to bear the burden but to be recouped by some one else, and that

> such an impost appeared to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

To assume that by this judgment the Judicial Committee intended to reverse many previous decisions of the Board which had held either expressly or by necessary implications that succession duty statutes properly framed and imposing taxes on movable or other property within the province were *intra vires* the legislatures which enacted them, would be unjustifiable.

In the case of *Rex* v. *Lovitt*(1) their Lordships expressly held, at page 223, that the statute of New Brunswick there in question

> was intended to be a direct burden on that property (*i.e.*, taxable property within the province) varying in amount according to the relationship of the successor to the testator.

Nothing is said in the judgment of the Board now under review calling in question this declaration of the intention and effect of the New Brunswick "Succession Duties Act." The only reference made to that case is as follows:—

> In the case of *Rex* v. *Lovitt*(1) no question arose as to the power of a province to levy succession duty situated *outside the province.*

And so in regard to *Woodruff* v. *The Attorney-General for Ontario*(2), the decision of the Judicial Committee in which, when the *Cotton Case*(3) was before us I considered as binding upon us, and followed, the only remark they made is that

> the circumstances of the case were so special and there is so much doubt as to the reasoning on which the decision was based that their Lordships have felt that it is better not to treat it as governing or affecting the present decision.

But not a suggestion that the Ontario "Succession Duties Act" so far as it levied taxes upon property within the province was *ultra vires* the legislature.

Assuming, therefore, I am correct in my understanding of the decision reached by their Lordships in the *Cotton Case*(3), I come to the Manitoba "Succession Duties Act" as it stood amended at the death of the testator Muir and under which the taxes in dispute in this case are levied. With respect to the "Kirkella lands" of the testator, situated in Saskatchewan,

(1) [1912] A.C. 212. (2) [1908] A.C. 508.
(3) [1914] A.C. 176.

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and the debts arising out of the agreements for the sale thereof I have already expressed my opinion that they do not come within the Act and are not taxable.

And with regard to the subject matter the statute deals with I am of opinion that it is direct taxation and not indirect. I accept the definition of direct taxation as

> one which is demanded from the very person whom it is intended should pay it,

and I think that the taxes sought to be imposed by that statute are such.

It is the estate that must pay the tax and it is the estate upon which the statute imposes the liability. The fact that the executor or the administrator is the channel through which the estate makes payment cannot make the tax indirect. He represents the estate. It is, in fact, by the law of Manitoba all vested in him and in paying the duties when he does so, he acts merely as the agent or person in charge of the estate.

The question is one of intention or expectation. Did the legislature either expect or intend that the executor or administrator should pay money out of his own pocket and afterwards take his chances of recovering it back from the legatee or beneficiary to whom the property was bequeathed or who by law became entitled to it ?

The statute answers the question I think in its 15th and 16th sections, which read as follows:—

> 15. Any administrator, executor or trustee, having in charge or trust, any estate, legacy or property subject to the said duty shall deduct the duty therefrom, or collect the duty thereon upon the appraised value thereof, from the person entitled to such property, and he shall not deliver any property subject to duty to any person until he has collected the duty thereon.
>
> 16. Executors, administrators, and trustees shall have power to

sell so much of the property of the deceased as will enable them to pay said duty in the same manner as they may be or are enabled by law so to do for the payment of debts of the testator or intestate.

Here executors and trustees are classed together. They are to deduct the duty from the property under their charge or which they hold in trust or collect it from the beneficiary, and are forbidden to deliver any property subject to duty to any person until the duty is collected. They are given power to sell so much of the property of deceased as will enable them to pay the duty in the same manner as they may do to pay the debts of the testator or intestate. If the property is of a character enabling them to deduct the duty they do so. If it is not they collect the duty from the beneciary or sell so much of the property as will enable them to pay the duty. But there is neither an intention nor an expectancy that they would pay, nor an obligation imposed upon them to pay, the duty out of their own moneys and take the chances of recovering it back from the beneficiary.

It must be remembered that in Manitoba the executor or administrator is by statute made for the time being the owner of all the property of the deceased testator or intestate as the case may be. Section 21 of the "Devolution of Estates Act" as enacted by 5 & 6 Edw. VII., ch. 21, sec. 1, and section 20 of the "Wills Act," R.S.M., 1902, ch. 174

But, of course, he only holds it for the purpose of administering the estate and as I have shewn is expressly empowered by section 16 of the "Succession Duties Act," to sell the property to pay the tax.

Section 5 of that Act says:—

Save as aforesaid the following property shall be subject to a succession duty as hereinafter provided,

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and sub-section (*a*) says:—

> All property within this province and any interest or income therefrom

shall be liable to the duties. Section 6 provides for the filing by the executors or administrator before the issue of letters probate or grant of administration

> of a full itemized inventory of all the property of the deceased person and the market value at the death of such deceased person,

and goes on to provide either for the payment by the executor or administrator of the duties called for by the Act or for the delivery of a prescribed bond conditioned for the due payment of any duty to which the property coming to the hands of such executor may be found liable.

I conclude that the duties under this Act were to be, as they were determined by the Judicial Commitee to be in the *Lovitt Case*(1),

> a direct burden on the property varying in amount according to the relationship of the successor to the testator,

and so to be burdens which the legislature had authority to impose.

I would, therefore, vary the judgment appealed from by excluding from the property subject to duty the debts arising out of the agreements for the sale of the "Kirkella lands" in the Province of Saskatchewan as not being specialties within the rule and with this variation I would dismiss the appeal, but without costs.

IDINGTON J.—The question of jurisdiction raised at the opening of the argument herein, is, in my opinion, so far from being beyond doubt that if either party had taken or maintained the objection I think

(1) [1912] A.C. 212.

we should have refused to exercise so doubtful a jurisdiction.

The parties hereto seem tacitly agreed we should act. Hence we may be justified in ignoring the doubt though, if that consent be our only right to hear them, the result may be a non-appealable judgment such as appears in *Attorney-General of Nova Scotia* v. *Gregory*(1).

It is upon the amendment of 52 Vict., ch. 37 (D.), alone that our jurisdiction, if any, must rest. It seems, in one way of reading it, possibly wide enough to confer jurisdiction in any case relative to what is involved in the probate of wills. But is the question to be determined herein at all of that nature? It may be that the legislature in the due exercise of its plenary power over civil rights in a province can say, as a condition precedent to anything being done in its courts, constituted by it with such limitations of authority as it has seen fit to confer, that such courts shall not hear the application for probate unless and until the tax for transmission has been secured and hence make the refusal to grant or granting of probate dependent thereon. But what has all that to do with the plain primary meaning of a "court of probate" acting as such or how can it bring this appeal within that term as used in the amending Act ?

I take the phrase "court of probate" in the sense indicated, for example, in *Pattison's Trustees* v. *Edinburgh University*(2), referred to in vol. 4, page 437, of Stroud's Judicial Dictionary.

But if all the judgments pursuant to any of the powers assigned to and exercised by said courts

(1) 11 App. Cas. 229. (2) 16 Ct. of Sess. Cas. (4 ser.) 73, 75*n*.

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(called "Surrogate" in Ontario and the Western Provinces) in a variety of ways beyond the mere granting or refusing of probate were to be held reviewable here whenever involving five hundred dollars, then it seems singular that this court has not been troubled ere this with some such case as might fall within the ambit of that view.

It is not the work of the court when acting in hearing the application for probate that we are herein asked to pass upon.

The Maritime provinces have called their courts dealing with such matters "Courts of Probate" and a number of appeals resting upon said amendment have come from there, but none involving any mere collateral matter without touching upon what is, properly speaking, the work of a court of probate has been cited in argument herein.

That is a remarkable result if the expression is to be held as covering anything else done in or by said court than what I suggest. It is to be observed that the case of *Lovitt* v. *The King*(1) came here by virtue of a case stated for the Supreme Court of New Brunswick.

The exclusion of Quebec (where there are no courts bearing the name "probate," but the Superior Court in certain cases discharges the duty involved) from the operation of the Act, rather clearly indicates we should not attach too much significance to the name, but look at the substance and confine appeals within the limits which that indicates.

Having thus indicated the reasons for my doubt I accept what seemed on the argument to be the opinion of the majority of this court as to its jurisdiction as

(1) 43 Can. S.C.R. 106.

binding me, and accordingly proceed to pass upon the questions raised by the appeal.

I have no doubt as to the power of the legislature, resting upon its plenary power over not only the property in a province, but also civil rights in a province and the constitution of the courts therein and limitation of their powers, to enact a law such as before us imposing a tax as a condition precedent to giving its assent through its courts to the transmission of any property so far as such assent may be necessary in law.

It is argued that it is not a direct tax because the executor has not the money to pay it and in the first place gives a bond for its due payment and the amount payable thereunder depends upon a number of considerations set forth in the legislation, and the modes of inquiry and determination also thereby provided for, and that the executor has to recoup himself out of the estate when realized and when debts and expenses are paid.

All these things constitute but the legal machinery for the determination of the facts and the scale by which the tax is to be measured.

Those beneficiaries sharing with the state in that which the executor may have realized, I rather think feel that the tax is pretty direct. They know that the executor or other personal representative is but their agent, as it were, by whose hands they receive what they get and that he has no civil right in the province to assert any acquisition of the property of the deceased, but what the legislature has chosen to give assent to.

I repeat we must look at the actual substance of things and not be misled by mere words.

If and so far as the person becoming ultimately

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entitled under this process to receive his share in the estate of a deceased can obtain by law any of it without provincial legislation that property so obtained may not be taxable. No such proposition in law or in fact is or can be put forward relative to what is in dispute herein; therefore, I am, for clarity's sake, resolved not to travel into side issues and other cases.

There are only two items in question herein.

That known as the claim against one Little residing in the province, clearly is not only in the province and dependent upon the civil right conditionally conferred by the province, but is also collectable there. And if his assets have to be followed elsewhere it is only by virtue of that civil right so conditionally given that they can be followed.

The other item is a specialty debt held by deceased at his domicile in Manitoba, enforceable there if the debtor had any property there, and wherever to be enforced must be dependent upon the same civil right also conditionally conferred by the province.

I hold that there is in the contract in question a covenant for the payment of said debt. And even if the purchaser of the land, for which it is given, has to be constrained, by virtue of his necessity to get a title, to pay, and that upon the facts should happen to be efficacious as a means of enforcing payment, it is to Manitoba he must come to discharge his debt and there tender a conveyance for execution.

I can conceive of the like cases where the balance unpaid might so far exceed the value of the land as to render the covenant of no value and the recovery of the land be the only thing available. No such thing is set up here except incidentally arguing that there is

no covenant; I, therefore, need not follow that alternative.

The appellant's counsel tells us there is required by the law of Saskatchewan an ancillary probate to be got there to complete the title to the purchaser. That is the purchaser's business. If there is required by Saskatchewan law anything beyond the nominal expense of producing such verification as to obtain registration, and thus in the nature of a second succession tax, then I should be sorry to find such legislation in any province. It is the vicious practice of insisting upon such double taxation that has aroused some antagonism to these succession taxes. I am glad to see that the Legislature of Manitoba has been moving in the direction of trying to avoid the evil. The merely reprehensible nature of legislation producing such evil should have no weight in measuring the right and power of the province. And every attempt on the part of the courts to ameliorate such incidental evil results by way of needlessly limiting and cutting down the power given by the "British North America Act" to provincial legislatures weakens the forces which would otherwise be directed to enlighten public opinion and produce in the legislature a proper consciousness of the unrighteousness of such methods.

There is only one thing involved in this case for us to deal with and that is the power of the legislature. All such collaterial arguments as bear upon the abuse of the power should be discarded and we will thereby be the better able to reach a clear apprehension of what that power is.

The basis of the right to tax the transmission was

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expressed by Lord Loreburn in *Winans* v. *Attorney-General*(1), at page 30, as follows:—

> In both cases the property received the full protection of British laws, which is a constant basis of taxation, and can only be transferred from the deceased to other persons by a British Court.

I admit that some recent decisions and dicta in other judgments, if followed to their logical conclusions of measuring the civil rights in a province by the consequences thereof when having to be dealt with abroad, would so abridge the rights and powers of provincial legislatures as to revolutionize the fundamental principles upon which the legislatures and judiciary of this country have for a life time proceeded. For my part I shall not attempt to build upon the foundation so laid until, if ever, it has reached such further development as to become by concrete decisions absolutely identical in principle with that we have to pass upon.

In regard to the argument founded upon such decisions and the supposed logical result thereof I should adopt and apply here the language of Lord Halsbury in the case of *Quinn* v. *Leathem*(2), at page 506.

This case does not fall within that category. It is well within the principles proceeded upon in the case of *Bank of Toronto* v. *Lambe*(3), where the court above, referring to the application of the definition of scientific political economists as limiting the powers of principal legislatures over direct taxation, at page 582, spoke as follows:—

> It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would

(1) [1910] A.C. 27.
(2) [1901] A.C. 495.
(3) 12 App. Cas. 575.

run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

Not only the income tax but much else of local taxation that has hitherto passed unchallenged would have to be revised if some such definitions had to be rigidly adhered to as the measure of the provincial legislatures' powers instead of the common sense of mankind as recognized in what I quote and the recognized legislative powers of other colonies in this regard.

It is further to be observed that it is not direct taxation of property within the province, but direct taxation within a province, that is the term used in the "British North America Act."

If people can get property of a deceased outside the province without asking or relying upon provincial authority then they may escape the tax.

Counsel for appellant complained that a schedule had to be filed shewing the entire estate of the deceased. That is simply as the basis of classification and for the determination of whether or not the deceased and his estate and those getting it fall within the class who could reasonably be asked to contribute to the public revenue.

That may in some cases rank the estate as of those which should pay 10%, for example, instead of 5%, or nothing.

The severity of it may in many cases be unwise and unjustifiable, but that has nothing to do with the existence of the power. It is merely the scale upon or by which the tax is to be measured.

If we had to clarify the legislative mind on the subject of taxation or to pass upon the merits of its

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product relative to taxation we should have perhaps a pretty heavy task. Some notions apparent in the work may occasionally seem to us to be crude.

But for us to tell the legislators that when using this exclusive power of the "British North America Act" over civil rights they must in the case of the beneficiaries by the death of one who has grown rich under the laws of his domicile, perhaps by virtue thereof, be careful that the power over civil rights be not used, but the law be so framed as to offer him a premium at the close of life to invest his acquisitions abroad and thereby escape the tax which probate duty, legacy duty, succession tax or death duty, or whatever other name be given the tax, would be apt to bring a sharp retort.

To try to distinguish between these names accidentally given in the course of the development of a century or more of law in England tends only, I submit, to lead to confusion. The purpose of the legislature has plainly been to so use its power over civil rights and to insist upon its right to withhold its needed sanction to give him claiming such benefits as derivable therefrom, unless and until this tax is paid. So acting I think the legislature is well within its powers within the province.

I think, therefore, the appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed. The statute in so far as it professes to impose duties in respect of property having a *situs* within Manitoba mut be held, I think, to be *intra vires* on the authority of *Rex* v. *Lovitt*(1). In so far as it professes to

(1) [1912] A.C. 212.

impose duties on property not having a *situs* within the province it must, I think, be held to attempt the imposition of taxes which are not "direct" taxes because it appears to me that as regards that feature of it the reasoning of Lord Moulton in *Cotton* v. *Rex*(1), at page 195, applies; and the result of that reasoning is, I think, that any attempt on the part of the province to exact succession duties in respect of property not situate within the province and without respect to the domicile of the beneficiary must fail for the simple reason that such taxation if effectual (in cases in which — the *situs* of the property being, let it be noted, outside the province — the beneficiary is domiciled abroad as well as in other cases) cannot be "direct taxation" within the meaning of that phrase as construed in that case.

I have had not a little difficulty in satisfying myself upon the point whether the provisions of the Act which bring personal property outside the province under the incidence of the duty ought not to be considered as of the essence of the statute in such a degree as to make it impossible to sustain the duty upon property within the province; after a good deal of doubt I have come to the conclusion that it is possible, in this case, and right to treat the provisions of the statute which if enacted by themselves would have been valid, as severable from those provisions which are *ultra vires*.

ANGLIN J.—The appellants challenge the right of the Province of Manitoba to recover succession duties from them as executors of the late Robert Muir, who

(1) [1914] A.C. 176; 15 D.L.R. 283.

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died domiciled in Manitoba, in respect of certain debts known as the "Little debt" and the "Kirkella lands debts," which formed part of the assets of his estate. It is asserted that these debts are not dutiable because they are not "locally situate" within the province; and that whether they are "locally situate" within or without the province the legislation authorizing the tax imposed is *ultra vires*.

Proceeding under section 19 of the Manitoba "Succession Duties Act" (R.S.M., 1902, ch. 161), the Surrogate Court of the Eastern Judicial District of Manitoba held the appellants liable to pay these duties. This judgment was affirmed by the Court of Appeal for Manitoba.

At the threshold of the appeal to this court there arises a question of jurisdiction. Is the Surrogate Court of Manitoba, admittedly not a superior court, a "Court of Probate" within the meaning of clause (*d*) of section 37 of the "Supreme Court Act"? This provision was introduced by 52 Vict., ch. 37. It had been held in *Beamish* v. *Kaulbach* (1), that this court had not jurisdiction to entertain an appeal in a case which originated in the Court of Wills and Probates of the County of Lunenburg, Nova Scotia. Having regard to the special provision made in section 96 of the "British North America Act" in regard to the courts of probate in the Provinces of Nova Scotia and New Brunswick and to the history of the surrogate courts in Ontario, upon which the surrogate courts of Manitoba appear to have been modelled in their constitution and jurisdiction (R.S.O., 1913, ch. 62; R.S.M., 1902, ch. 41), there would seem to be some ground for

(1) 3 Can. S.C.R. 704.

the suggestion that, if its application is not confined to the probate courts in the two former provinces, which have always been styled "Courts of Probate," such courts as the surrogate courts of Manitoba are not within clause (*d*) of section 37 of the "Supreme Court Act" If they are, a rather wide field of jurisdiction to entertain appeals in surrogate court matters would seem to be opened up.

It is also suggested that in the proceedings provided for by the section 19 of the Manitoba "Succession Duties Act" the surrogate court does not act as a court of probate, or that those proceedings are taken before the judge of the Surrogate Court as *persona designata* subject to a special right of appeal to the provincial court of appeal, and that there is, therefore, no right of appeal to this court. While by no means entirely satisfied that we have jurisdiction to entertain this appeal, in deference to the opinions of my learned colleagues who think that we have jurisdiction, I shall proceed to consider the appeal on its merits.

In regard to the "Little debt" the unanimous conclusion in the provincial courts, that, as a simple contract obligation, it was locally situate at the residence of the debtor in Manitoba, seems to me incontrovertible; and, while it has occasioned some divergence in judicial opinion, I am not prepared to differ from the view of the majority of the learned judges of the Court of Appeal that the respondent's contention that the "Kirkella lands claims" are locally situate in Manitoba, because they are specialty debts, is also well

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founded. *Commissioners of Stamps* v. *Hope*(1); *Emmens* v. *Elderton*(2); *Russell* v. *Watts*(3); *Aspdin* v. *Austin*(4); *Farrall* v. *Hilditch*(5); *Lay* v. *Mottram* (6).

In *Cotton* v. *The King*(7) the nature of succession duties imposed by the Legislature of Quebec was considered by the Judicial Committee. Although the case then before their Lordships might have been fully disposed of by the construction placed by them on the Quebec "Succession Duties Act," which excluded the property in question from its purview, Lord Moulton, delivering the judgment of the Board, after stating the questions at issue — the one as to the construction of the Quebec statute, the other as to the nature of the taxation which it imposed—says:—

> These are the two questions which this Board has to resolve, and though it may well be that the decision of one of these questions in favour of the appellants might render it unnecessary to decide the other, their Lordships are of opinion that they are of co-ordinate importance in the case, and that they should base their judgment equally on the answers to be given to the one and to the other. The latter of the two questions is of the greatest practical importance in view of the fact that by a later statute the operative portion of the section has been amended by omitting the qualifying words "in the province" so that a decision depending on the presence of those words would have no application to the present state of legislation.

Their Lordships' opinion, that, at least in regard to outside movables, the tax imposed by the Quebec "Succession Duties Act" would be indirect and the Act to that extent *ultra vires,* certainly cannot be regarded as *obiter dictum.* They have seen fit expressly to base their judgment upon it.

(1) [1891] A.C. 476.
(2) 4 H.L. Cas. 624, at pp. 666-7.
(3) 10 App. Cas. 590, at p. 611.
(4) 5 Q.B. 671, at p. 683.
(5) 5 C.B.N.S. 840.
(6) 19 C.B.N.S. 479.
(7) [1914] A.C. 176.

The liability to succession duties of movable property locally situate outside the province was the question at issue in the *Cotton Case*(1). Under the Quebec statute the person who made the schedule and declaration of the assets of the estate was held to be personally liable to pay the whole of the duties imposed on the estate (p. 194), and to be entitled to

> recover the amount so paid from the assets of the estate, or, more accurately, from the persons interested therein.

This provision was dealt with as if applicable equally to assets outside and to assets within the province. As an illustration of the indirectness of the Quebec taxation, Lord Moulton intances the case of

> bonds or shares in New York bequeathed to some person not domiciled in the province,

which the legatee could obtain on duly proving the will in New York and satisfying its fiscal laws in relation thereto regardless of any duty imposed by the Quebec statute. "The Quebec Government," his Lordships adds,

> could in such a case obtain its succession duties only from some one who was not intended himself to bear the burden, but to be recouped by some one else.

Because

> the payment is obtained from persons not intended to bear it, within the meaning of the accepted definition above referred to, (John Stuart Mill's well-known definition of indirect taxation.)

their Lordships held the Quebec legislation *ultra vires,* at all events as to movables situate outside the province, as imposing taxation which was not "direct taxation."

Section 5 of the Manitoba "Succession Duties Act,"

(1) [1914] A.C. 176; 15 D.L.R. 283.

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as enacted in 1905 and in force in 1908, rendered the movable property of a domiciled decedent situate without the province as well as all his property situate within the province liable to succession duties. Section 15 provided that:—

> Any administrator, executor or trustee having in charge or trust, any estate, legacy, or property subject to the said duty shall deduct the duty therefrom, or collect the duty thereon upon the appraised value thereof, from the person entitled to such property and he shall not deliver any property subject to duty to any person until he has collected the duty thereon.

On obtaining grant of probate or administration the personal representative was required by section 6 to execute and deliver to the surrogate clerk a bond

> conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of such executor or administrator may be found liable.

Giving to the words "coming to the hands" their widest signification (*Batten, Proffitt & Scott* v. *Dartmouth Harbour Commissioners*(1)), having regard to the terms of section 15, it would seem to be at least arguable that the personal liability of the executor or administrator was confined to duties payable in respect of property of which he should be entitled to obtain possession under and by virtue of the Manitoba grant, as a condition of receiving which he was obliged to give the bond for payment of succession duties. If so, as to the duties on outside movable property the Manitoba statute would seem to be distinguishable from the Quebec legislation. But if the liability of the Manitoba executor or administrator should also extend to duties in respect of movable property of which possession could be obtained only

(1) 45 Ch. D. 612, at p. 622.

under a foreign grant of probate or administration, or if outside movable property, though coming to the hands of the Manitoba executor or administrator, should be dealt with by a foreign court in the manner indicated in Lord Moulton's illustration, no doubt the duties imposed upon it by the Manitoba statute would contravene the prohibition against indirect taxation equally with the duties considered in the *Cotton Case* (1).

Upon a careful study of Lord Moulton's opinion, however, although I certainly do not find that the view which I expressed in the *Cotton Case* (2), at pages 532 *et seq.*, was approved of in the Judicial Committee, neither do I find that it was overruled or even questioned. Their Lordships merely preferred to rest their conclusion that the taxation of outside property in that case was *ultra vires* upon another ground. Having had no reason to change or modify it, I respectfully adhere to my opinion that succession duties such as those provided for by the Manitoba statute imposed in respect of any property physically or locally situate outside the province are not "taxation within the province" and are, therefore, *ultra vires* of a provincial legislature. To that extent I think the Manitoba "Succession Duties Act" as it stood in 1908 cannot be supported.

But I see no difficulty in severing the provision of that Act relating to the taxation of outside movable property from the rest of the Act. It is not essential to the scheme of the legislation. Neither the character, the incidence, nor the amount of the duties imposed on the property within Manitoba could be in any way

(1) [1914] A.C. 176; 15 D.L.R. 283. (2) 45 Can. S.C.R. 469.

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effected by the excision of the provision for the taxation of outside movables. The only effects of deleting it would be that the province would receive a somewhat smaller revenue under the statute and the beneficiaries of outside movable property would escape the burden of the taxation.

After indicating the indirect character of the tax imposed by the Quebec statute by instancing the procedure requisite for its collection in the case of foreign bonds or shares bequeathed to a person not domiciled in the province, Lord Moulton proceeds to say:—

> Although the case just referred to is probably one of the most striking instances of the excess of these duties beyond the legal limits of the powers of the provincial legislature it is by no means the only one. Indeed, the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear, but to obtain from other persons.

In this passage it seems to me that their Lordships condemn the Quebec succession duties as indirect taxation regardless of whether the property in respect of which they are levied is within or without the province.

But with regard to assets within the province the Manitoba legislation differs essentially from that of Quebec. Under the latter, as construed by the Judicial Committee, direct personal liability to pay the duties is imposed on a person who may never have any of the assets of the estate in his hands. Speaking of the sections of the statute which deal with the method of collection of the duties imposed upon the property of the decedent, Lord Moulton says:—

> Their Lordships can only construe these provisions as entitling the collector of Inland Revenue to collect the whole of the duties on the estate from the person making the declaration, who may (and as we understand in most cases will) be the notary before whom the will is executed and who must recover the amount so paid from the assets of the estate or, more accurately, from the persons interested therein.

Under the Manitoba statute the only liability imposed, other than that upon the property itself, is upon the executor or administrator or trustee and is confined to duties upon any estate, legacy or property which he has in charge or trust (sec. 15). Title to the entire succession of the decedent within the province vests in his personal representative. It is out of that which comes to his hands as personal representative that the executor or administrator is required to pay. He is empowered to collect the duty from the devisee or legatee before delivering over any property subject to duty and to sell so much of the property of the deceased as may be necessary to enable him to pay such duty (sec. 16). We have not, therefore, the case of one not intended to bear the burden being required to pay the duty and to recoup himself thereafter either from the assets of the estate or from the persons interested therein. The personal representative has imposed upon him the obligation of collecting for the province the duties imposed upon the property of the decedent which comes to his hands and is under his control. The security which he gives is for the faithful discharge of that duty. It is only upon default in fulfilling it that he incurs personal liability. To hold that such taxation is indirect merely because it is levied through the instrumentality of the personal representative seems to me not only to be something which the Judicial Committee did not decide in the *Cotton Case*(1), but to involve a limitation on the provincial power of direct taxation which would be largely destructive of it. Unless required to do so by a decision of their Lordships, or of this court, much

(1) [1914] A.C. 176; 15 D.L.R. 283.

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more directly in point, I am not prepared to accept that position. As to the duties imposed upon property locally situate within the province the Manitoba "Succession Duties Act," in my opinion, provided for

> direct taxation within the province in order to the raising of a revenue for provincial purposes,

and was, therefore, *intra vires* of the provincial legislature.

I have not overlooked Lord Moulton's observations, at page 194, that in the Quebec case "there is nothing corresponding to probate in the English sense," and at page 195, that

> this (the payment of duties) is not in return for services rendered by the Government as in the cases where local probate has been necessary and fees have been charged in respect thereof,

or Lord Robson's remarks in *Rex* v. *Lovitt*(1), at page 223. I cannot think that their Lordships meant to suggest that the succession duties imposed by the New Brunswick statute, which is in this respect indistinguishable from the Manitoba statute, were in the nature of probate fees and therefore not to be deemed taxation. But, if they did, these expressions of opinion were *obiter* and I am, with all proper deference, of the opinion that the duties imposed by both these statutes are not in any sense "fees charged in respect" of the grant of probate or administration. They are imposed in addition to and independently of the fees charged for these services — "over and above the fees provided by the 'Surrogate Courts Act.'" They are levied indifferently upon movable property within and without the province — upon all the decedent's property within the province to which title is conferred

(1) [1912] A.C. 212.

by the Manitoba probate or administration and upon his movable property without the province to which it confers no title. Their amount varies according to the degree of consanguinity between the decedent and the beneficiary and the amount of the estate. I deem these succession duties taxation — not fees payable for services — and as taxation subject to the restrictions of sub-section 2 of section 92 of the "British North America Act."

For these reasons I would, with respect, dismiss this appeal.

BRODEUR J.—The first question to be determined is whether the debts in respect of which succession duty is claimed by the respondent are "within the Province of Manitoba."

There does not seem to be any serious difficulty as to the debt which is called the "Little debt." The deceased and the debtor were both residing in that province. It may be that Little has not in the province sufficient means to pay what he owes, but at the same time there is nothing to shew that he will not discharge his obligation. It is a simple contract debt due by a resident of the province and it is liable to the succession duty claimed.

As to the debts due in respect of the "Kirkella lands," there is a more serious dispute. It is claimed by the appellants that they are not "property within the province" as required by sub-section (*a*) of section 5, chapter 161, Revised Statutes of Manitoba ("Succession Duties Act").

The deceased in his lifetime owned certain lands in the Province of Saskatchewan and they had been sold by him to different purchasers.

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All those sales were evidenced by agreements for sale under seal and those agreements were in the possession of the deceased in Manitoba at the time of his death.

These agreements for sale are specialty debts and applying the principle enunciated by Lord Field in *Commissioner of Stamps* v. *Hope*(1), at page 482, a debt under seal, or a specialty, has a species of corporeal existence by which its locality might be reduced to a certainty, and it is *bona notabilia* where it is conspicuous and is under the jurisdiction in which the specialty was found at the time of death.

Another very important question has been raised as to whether the "Succession Duties Act" is *intra vires*.

It is claimed by the appellants on the authority of the judgment rendered by the Privy Council in the case of *Cotton* v. *The King*(2), that the taxation imposed by the "Succession Duties Act" is indirect and, therefore, beyond the powers of the provincial legislatures.

It is true that the very wide and inclusive language used in some parts of that judgment might be construed in that way. But in the *Cotton Case*(2) the question at issue was whether the Legislature of Quebec, in view of the restrictive language of section 92 of the "British North America Act," which gives to the provinces the power to impose "direct taxation within the province," could tax property situate outside the province.

At the time of his death the deceased, in the *Cotton*

(1) [1891] A.C. 476. (2) [1914] A.C. 176; 15 D.L.R. 283.

Case(1), was domiciled in Quebec, but the provincial government levied succession duties on bonds, debentures and shares that were all locally situate in the United States.

So the question that presented itself in that case was as to the right of a province to tax property situate outside of the province, and it is in connection with that feature of the case that the question of indirect taxation was raised. I do not think it was intended to declare that a province could not require, as a condition for local probate, that a succession duty should be paid on property within the province.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Mulock, Armstrong & Lindsay.*

Solicitors for the respondent: *Graham, Hanneson & McTavish.*

(1) [1914] A.C. 176; 15 D.L.R. 283.

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*May 10, 11.
*June 24.

THE CAPITAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

LYDIA A. PARKER (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Life insurance—Non-payment of premiums—Misrepresentation to insured—Estoppel.

P., in payment of premiums on a life policy, gave his note for one instalment and an overdue balance of another. Shortly before it matured an official of the company, specially authorized to deal with the matter, informed P. that his policy had lapsed owing to the inclusion in the note of the overdue balance which was against the company rules. In consequence of this representation P. did not pay the note nor tender the amount of another instalment falling due before his death. In an action on the policy by the beneficiary no rule of the company was proved avoiding the policy as stated.

Held, affirming the judgment appealed against (48 N.S. Rep. 404), Fitzpatrick C.J. and Davies J. dissenting, that the company was estopped, by conduct, from claiming that the policy lapsed on non-payment of the note and subsequent instalment.

Per Davies J., that the non-payment of the note could not be relied on as avoiding the policy, but the estoppel did not extend to the failure to pay the quarterly premium which afterwards became due.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), affirming by an equal division the judgment at the trial in favour of the plaintiff.

The material facts are stated in the above headnote.

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

(1) 48 N.S. Rep. 404.

J. J. O'Meara for the appellants.

Mellish K.C. and *Findlay MacDonald K.C.* for the respondent.

THE CHIEF JUSTICE.—I would allow this appeal.

DAVIES J. (dissenting).—I do not think there was error in the court of appeal in holding on the findings of the learned trial judge that the non-payment of the note which the deceased, insured, had given for the payment of one of the quarterly premiums of his policy and which note included a balance of a former quarterly premium, did not operate to avoid his policy or cause it to lapse.

When the note in question was about maturing, Mr. Sorey, the superintendent of agencies of the defendant company, in the course of his travelling in the company's business, met the deceased in Sydney in the presence of two of his brothers and, after seeing the condition of his health, informed him that his policy was no longer in force because "he had allowed one part of an overdue premium to be carried forward with a note covering the next premium, which is against the rules of the company."

This statement of the company's chief representative took place between the 27th February and the 2nd March as found by the trial judge and the note fell due either on the 4th or, allowing for three days' grace, on the 7th.

In consequence of the statement as above of the policy being no longer in force the deceased did not pay his note and I am not prepared to say that the

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company was not under the circumstances estopped from setting up its non-payment as a ground for avoiding the policy.

I am, however, utterly unable to understand how such a holding can apply to the non-payment of a subsequent quarterly premium which fell due some time after the conversation before alluded to and before the death of the deceased insured.

That such a quarterly premium did so fall due and was not paid is proved and admitted.

Can it be contended for a moment that the conversation alluded to released the defendant for the remainder of his life from paying the premiums falling due upon his policy and estopped the defendant in an action on the policy from setting up such non-payments ?

If the argument cannot be accepted as covering the whole period of the insured's life, then for how long did it release the defendant from payment of his premiums and estop the company from setting up such subsequent defaults ?

The conversation had reference to a particular note then about falling due and to the effect which the inclusion in that note of part of a former overdue premium had. It may well be held to have induced the deceased not to have promptly paid his note until he had had time to understand what his true position was, and to have estopped the company from taking advantage of such default in its prompt payment to avoid the policy. But it surely cannot be held to operate in the same way with respect to premiums subsequently falling due; or to release deceased from his obligation to pay such subsequent premiums or to

estop the insurance company from appealing to the contractual result of such non-payment which was the avoiding of the policy.

For this reason that there is no estoppel with respect to such subsequent accruing premiums, I would allow the appeal and dismiss the action with costs in all the courts.

IDINGTON J.—This is an action on a policy of life insurance for a thousand dollars. The defence set up is non-payment of premiums and consequent lapsing of the policy. The appellant received through the hands of its local agent at Sydney a promissory note for one premium and a small part of another. This note was on a printed form evidently supplied by appellant for such uses. Its heading in type is as follows:—

Renewal Premium Note.

Note $..... Due.....
T. R. (if any) $..... Ottawa ....., 1914.

Balance $.....
Interest $.....

The part on right hand is filled in by writing of date. That on left hand is filled in opposite word "note" by figures $39.20, and opposite the letters "T. R." in figures 20c., and opposite the word "balance" $39.40, but nothing opposite the word "interest." No explanation is given in evidence or argument of what "T. R." stands for. The figures opposite that "T. R" and the words due date and balance seem to me from the ink to have been done by a later filling in than the remainder of the filling in of the blank.

Without attaching undue importance thereto, I think the fair inference, from the fact that this note

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was received in due course and never returned, but retained till the trial by the company, is that this note was received and accepted as payment.

The pretence that the small part of the note as clearly indicated to those at the head office being for a part of a past due payment must suffice to justify treating the policy as lapsed, seems idle. It may have been competent for the company to have so treated it on receipt and forthwith accordingly to have returned it and said so.

It was not competent for the head office to have held on to the note and later on attempt to repudiate it. Neither in law, justice nor common sense can such a position be maintained.

Another payment of premium fell due on the 20th March, which remained unpaid at the death of the insured.

By the learned trial judge it is found as fact that on a date between the 27th February and the 2nd March before the note fell due, the appellant's superintendent of agencies called on the insured and finding him in such a physical condition that an early death must be expected, told him, in language sworn to by two brothers of the insured, and not denied, that the policy was not in force because one part of the premiums had been carried forth into a note covering the next premium.

One of the brothers swears the premiums, but for this assertion, would have been paid, and doubtless that is true. They and deceased were thus dissuaded from tendering the amount of the note and of the March premium. It is not pretended that if tendered such payments would have been accepted. The re-

pudiation of the policy in such distinct and absolute terms dispensed with such tenders.

There was no justification under the circumstances for appellant's repudiation after accepting and retaining the note given in payment and receipted for as such by the local agent.

The superintendent alleges he wanted information or instructions from the head office of appellant before stating as alleged, so there can be no doubt of his conduct being duly authorized or confirmed.

Even his dispute of the date of this repudiation which was a leading question in contest at the trial, did not induce him to produce and file in evidence the telegram or other written communication to the head office or replies thereto.

The appeal should be dismissed with costs.

DUFF J.—The controversy on this appeal reduced to its lowest terms presents two questions of fact both of which are, as I think, conclusively determined against the appellants by reference to two pieces of evidence; the letter of August 29th addressed by the secretary to Mr. MacDonald, the respondent's solicitor, and the evidence relating to the interview between the assured and Mr. Jorey, referred to in the judgment of Mr. Justice Ritchie, which the learned judge finds took place between the 22nd of February and the 2nd of March.

The letter is as follows:—

E.L. Ottawa, Canada, August 29th, 1914.

Finley MacDonald, Esq.,
Barrister, Solicitor, etc.,
Dillon Block, Sydney, Nova Scotia.

Re William J. Parker.

Dear Sir,—Your favour of the 24th instant received. Policy No. 624 called for a premium of $27.65 payable four times yearly in

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advance, commencing Dec. 20th, 1912. At Dec. 20th, 1913, there remained a balance of $10.70 unpaid on account of the four instalments of premium due for the first policy year. This balance of $10.70 with interest of 85 cents for delay up to that time was merged by our agents with the next quarterly instalment due December 20th, 1913, and a note for the combined amounts, in all $39.20, was taken by them. This note fell due by its terms March 4th, with no payment whatever made thereon, and the policy consequently lapsed automatically. It might have been reinstated upon payment of the amount due, and submission of satisfactory evidence of health, but no application was ever made. So far as official receipts of premiums are concerned, these are handed to the insured upon his setting by cash or note. If a note is given, the policy, by the terms of the note, lapses unless payment is made on or before the due date thereof.

Yours truly,
M. D. GRANT, *Secretary.*

In itself this letter, a guarded letter, written by the secretary of the company after the death of the insured and no doubt framed in view of the probability of a claim being made under the policy, is sufficient evidence that the note of the second of February was accepted in payment, conditional payment, of course, of the moneys then due in respect of renewal premiums and that the company had treated the policy as a policy in force down to the maturity of the note. "No payment having been made" upon the note, "the policy," to quote the last letter, "consequently lapsed automatically." The letter, of course, is not conclusive evidence. It was open to the company to shew at the trial that the secretary had made a mistake, or to supplement the facts stated in the letter by other evidence shewing as was contended by the appellant that the policy had lapsed in consequence of non-payment of the premium due on the 20th September, or of that due on the 20th December; that the agent at Sidney had acted in excess of his authority in taking the note of the 2nd February, and that his action had not been

ratified by the company. But no attempt was made to do this, no testimony was offered to shew how the note was treated at the head office of the company or what communications were made with respect to it by the agent to the head office. The statement made by Mr. Jorey in the conversation above referred to, to the effect that the note had been "put through," confirms the conclusion suggested by the perusal of the letter itself.

I concur with the two courts below in thinking that the proper conclusion of fact is that the note was accepted in payment and — assuming (a point on which I am by no means satisfied) that on the 2nd February when the note was received, the insured was in default and that the company was entitled by reason of his default to treat the policy as a lapsed policy — the company by accepting the note as payment manifested its election to treat the policy as a policy in force and not to take advantage of the default of the insured. The company being bound by its election the policy was, of course, at the time of the interview between the insured and Mr. Jorey (some time before the 2nd March, as the trial judge found) a policy in force, and the company was bound on payment of the note at maturity and renewal premiums as they should fall due to observe and carry out its contract of insurance according to the terms of it. That was the state of affairs when the interview referred to took place.

The learned trial judge has accepted the account of that interview (which he has set out in his judgment) given in the evidence of George Richard Parker and Thomas Parker. I see no reason for the slightest doubt as to the correctness of his finding, and I think the proper interpretation of that interview

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is the interpretation contended for in the respondent's factum and on the oral argument before us. The insured was in fact told by Mr. Jorey (and it was upon this view of what he was told that he acted) that his policy had lapsed; and that the company would accept no payment from him except upon the condition that he furnished satisfactory evidence of health. This condition Mr. Jorey admits was obviously an impossible condition and the insured rightly interpreted the intention of the company's representative when he construed it as a refusal on the part of the company to continue the insurance. The declaration of the company of its intention not to carry out its contract was on well known principles an actionable breach of contract. *Frost* v. *Knight*(1); *Hochster* v. *De La Tour*(2); *Honour* v. *Equitable Life Assurance Society* (3). The insured, as he was entitled to do, treated it as a refusal to carry out the contract and a right of action immediately arose.

It is no answer to say that he might have tendered the amount of the promissory note and the renewal premiums. There is no suggestion and it could not have been suggested that any such tender would have been accepted and there is nothing in the law making it incumbent upon the insured to go through any such idle formality. Indeed, considering the evidence before us as to the state of health of the insured if the action had been brought in March immediately after the repudiation of the policy by the company the damages could have been but little less than the amount of the policy less the amount of the note and such pre-

(1) 26 L.T. 77. (2) 2 E. & B. 678.
(3) [1900] 1 Ch. 852.

miums as the insured might be expected to be obliged to pay.

I think the judgment below is right and should be affirmed.

ANGLIN J.—I entertain serious doubts whether upon the evidence before us the assured was so in default when the local agent of the respondent company took his note covering the premium due in December and a small balance of the September premium that the company was then entitled to terminate his policy. But if it was, I am satisfied that by what occurred in connection with that note (it was promptly sent to the head office of the company, it was there "put through," we are told by the defendants' superintendent of agencies, presumably as a payment of the premium, it was held for nearly a month before the insured was notified that there was any question as to its being accepted or as to his policy being in force, he being left in the meantime under the belief that the note had been accepted and that his policy was in good standing) the company is estopped from alleging that it elected to terminate the policy for any default prior to the taking of the note, and that if the amount of that note and of the March premium had been paid at maturity or had been duly tendered to the company there would have been no ground upon which they could have successfully resisted payment. Very shortly before the maturity of the note, however, the company, through a leading official (their superintendent of agencies), specially sent from the head office to deal with this matter, notified the assured that his policy was void because the local agent had exceeded his authority in including in the note taken for the

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December premium the balance of the premium due in September. The evidence, I think, supports the conclusion of the learned trial judge that the statement of the company's representative that the policy was void led the insured to believe that payment of the note and of subsequent premiums would not be accepted, and caused him not to tender them. This was a reasonable inference which the company's representative should have contemplated would be drawn by the insured. Although this misrepresentation might not justify the insured refraining indefinitely from tendering premiums or entitle his beneficiary after the lapse of a long period (how long it may be difficult to say) to prefer a claim for payment of the policy, I think the conduct of the company's representative precludes their setting up the failure of the assured to pay his note and the March premium, which fell due only a few days afterwards, as a defence to this action. *National Mutual Ins. Co.* v. *Home Benefit Society*(1); *Hayner* v. *The American Popular Life Ins. Co.*(2); *Heinlein* v. *Imperial Life Ins. Co.*(3), and other cases cited in May on Insurance, vol. 2, sec. 358, and 19 Am. & Eng. Encyc., page 57, N. 4; and *Webb* v. *New York Life Ins. Co.*(4). Of course, the defendants are entitled to deduct the amount of the note and of the March premium and also of the July premium (which had accrued due before the death of the insured, although the thirty days of grace had not expired) from the sum to be recovered on the policy.

In another aspect of the matter, the assured might have treated the declaration of the company's repre-

(1) 181 Pa. 443.
(2) 69 N.Y. 435, at p. 439.
(3) 101 Mich. 250.
(4) 22 Can. L.T. 179.

sentative as a repudiation of the contract entitling him to maintain an action of damages for breach. *Honour* v. *Equitable Life Assurance Society* (1). Having regard to his precarious state of health, the amount of his damages — the value of his policy at the date of the repudiation — would be little less than the sum insured. *Re Albert Life Ins. Co.* (2).

I am, for these reasons, of the opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *Colin Mackenzie.*

Solicitor for the respondent: *Finlay MacDonald.*

(1) [1900] 1 Ch. 852. (2) 22 L.T. 92.

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*May 21, 25.
*June 24.

THE EVANGELINE FRUIT COMPANY AND ANOTHER (PLAINTIFFS) } APPELLANTS;

AND

THE PROVINCIAL FIRE INSURANCE COMPANY OF CANADA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire insurance—Statutory conditions—Gasoline "stored or kept" on premises—Supply kept near building—Material circumstances—Non-disclosure.

By a condition in a policy of insurance against fire the policy would be void if more than five gallons of gasoline were "kept or stored" at one time in the building containing the property insured.

Held, that keeping 15 or 16 feet from said building, under an adjacent platform a barrel of gasoline for supplying the quantity required for daily use was not a breach of such condition.

Held, also, reversing the decision of the Supreme Court of Nova Scotia (48 N.S. Rep. 39), that as the company, when issuing the policy, knew that a gasoline engine had been installed in the building for use in manufacturing, and must be deemed to have known that a reasonable supply of gasoline for feeding it would be kept close at hand, the keeping of the barrel where it was placed was not a circumstance material to the risk, non-disclosure of which would avoid the policy.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), reversing the judgment at the trial in favour of the plaintiffs.

The questions raised for decision are stated in the above head-note.

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

(1) 48 N.S. Rep. 39.

Roscoe K.C. for the appellants.

Newcombe K.C. for the respondents.

THE CHIEF JUSTICE concurred in the judgment allowing the appeal with costs.

DAVIES J.—This appeal is from the judgment of the Supreme Court of Nova Scotia which reversed a judgment of the trial judge in favour of the plaintiff for the amount insured by its policy in the defendants' company on its stock of apples and general stores contained in a two-and-a-half story frame and cement building 60 x 94 and addition 20 x 20, situate in the Town of Windsor.

All kinds of defences were pleaded to the claim of the plaintiff, but they were either dropped or disposed of at the trial and the only two relied on by the court below and at the argument at bar were (1) the omission on plaintiff's part to communicate to the defendants before or at the time the policy issued what was alleged to be a material circumstance under condition 1 of the policy, namely, the presence of a barrel of gasoline under a broad platform running up to the building and about 15 or 16 feet from the building from which the daily supply of gasoline (about 5 gallons) for the gasoline engine in use in the building for evaporating applies was obtained, and (2) condition 11 which prohibited the storing or keeping of more than five gallons of, amongst other oils, gasoline "in the building insured" unless permission in writing from the insurer was first obtained.

The court below did not rely upon this condition for their judgment. On the contrary, I gather that

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they were of the opinion that the keeping of the gasoline in a barrel outside of the building and some 15 or 16 feet away from it for the purpose of obtaining the daily supply of five gallons for the running of the gasoline engine within the building was not in contravention of this eleventh condition.

In that conclusion I fully concur and with respect to the true meaning of that eleventh condition I would call attention to the observations of the Judicial Committee of the Privy Council in the case of *Thompson* v. *Equity Fire Ins. Co.*(1), at pp. 596 and 597.

The ground upon which the court below based its judgment reversing that of the trial judge was the omission on the part of the insured company to communicate the fact of the presence of the barrel of gasoline some 15 or 16 feet away from the building under the platform leading to the building from which the supply for the gasoline engine was daily obtained.

They held that was a material fact affecting the risk which it was the duty of the party insured to have disclosed to the insurance company at or before the date when the policy issued and that the failure to make the disclosure vitiated the policy.

The information given to the general agents of the defendant company and on which the policy sued on was issued, was that the goods, etc., upon which insurance was sought were contained in a factory, the machinery of which was operated by an engine for which gasoline furnished the power and in which factory were furnaces, piping, etc., besides the engine.

This information must have satisfied the insurance company that gasoline was used in the engine and the

(1) [1910] A.C. 592.

protection they required and the prohibition they provided for in consequence were provided for in the eleventh condition of the policy, prohibiting the keeping or storing of gasoline exceeding five gallons in quantity "in the building insured or containing the property insured." There was, as all the courts have held and as this court holds, no violation of that condition.

If with the knowledge the insurance company possessed when issuing the policy sued on of the facts that gasoline supplied the power which operated the engine in the factory or building the goods in which they were insuring and that such supply of gasoline had to be daily obtained from some outside source as it was prohibited from being kept or stored in the building or believed so to be; then if they desired further security and to know where the source of supply was kept or obtained, they should surely have asked for the information.

I am of the opinion that under the facts and circumstances proved in this case and in view of the knowledge of these facts possessed by the insurance company, the keeping of the barrel of gasoline under the platform some 15 or 16 feet away from the building for the purpose of furnishing the daily supply required for the running of the engine, was neither a breach of the eleventh condition nor such a material circumstance within condition 1 as it was the duty of the insured company voluntarily and without being asked to communicate to the insurance company.

I would allow the appeal with costs in this court and in the court of appeal and restore the judgment of the trial judge.

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IDINGTON J.—This is an action brought by appellant against respondent on a fire insurance policy, dated 7th January, 1912, for a year from that date, upon stock contained in a building in Windsor, Nova Scotia, for $2,500, to recover losses caused by fire on the 21st March, 1912.

The numerous defences pleaded were at the trial practically reduced to three in number, each resting upon one of the statutory conditions. That upon the condition No. 1 is relative to the alleged omission of the insured to communicate a circumstance material to the risk. Another was rested upon condition No. 9, relative to prior and subsequent insurances. And the third is dependent upon condition No. 11, so far as relative to the quantity of gasoline stored or kept in the building.

The learned trial judge, Mr. Justice Drysdale, held none of these defences established and entered judgment for the appellant for the amount claimed.

On appeal therefrom the Supreme Court of Nova Scotia does not seem to have been asked to pass upon anything arising out of condition No. 9 as only that raised by the others of said conditions is dealt with.

Of these that court maintained only the defence raised upon condition No. 1. We are not favoured by a copy of the reasons of appeal (if any) presented to that court.

It may be observed that, if no objection was raised in that court to the ruling of the learned trial judge relative to condition No. 9 and hence assented to or accepted by respondent, it should not now be entertained here.

The validity of the defence maintained by the court of appeal must depend on how we look at the cir-

cumstances under which the insurance was effected, and the facts which are alleged to have materially increased the risk.

The authority of the local agency which accepted the risk and issued the policy sued upon may also have to be considered.

The risk had been presented to these local agents in October, accepted by them and a policy issued accordingly by them but rejected by the head office under a misapprehension of the nature of the building in which the stock was.

The head office, on explanations, desired to retain the risk, but were too late on that occasion as another company had (upon such rejection) meantime taken it for three months. This is only material in considering the knowledge they in said head office must have acquired in course of that dealing; and its bearing upon the authority these local agents had relative to such matters as are involved in this defence.

The insurance now in question was asked for by Mr. Blanchard, another insurance agent, asking the local provincial agents of respondent over the phone when the three months' policy already referred to had expired, or was about to expire, to take the risk.

Mr. Pryor, of the firm representing the respondent for that province, states the matter thus:—

Q. Do you recognize this policy ? L.B./8
A. Yes, sir.
Q. That was issued by your firm at your office ?
A. Yes.
Q. And forwarded to whom ?
A. To Mr. Blanchard in Windsor.
Q. How did it come to be issued ?
A. Through a telephone message from Mr. Blanchard.
Q. Applying for ?

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A. For extra insurance on stock of the Evageline Fruit Company at Windsor.

Q. At that time were you aware of any other insurance on this stock ?

A. Yes.

Q. In what companies, and how much ?

A. $1,000 in the Nova Scotia and $2,500 in the Dominion.

Q. Can you tell me whether you were referred to any place by Mr. Blanchard to get particulars

A. Yes, to the Nova Scotia Fire.

Q. What did you do ?

A. I went to their office and took a copy from the daily report in their office of the stock item and building which they had.

Q. What was the daily report in reference to which you saw ?

A. Building, stock and machinery.

Q. Of what ?

A. Of the Evangeline Fruit Company.

Q. Made in respect to what ?

A. From inspection report.

Q. This daily report was in respect to what ? Was it in respect to a policy issued by the Nova Scotia Fire ?

A. Yes, it was.

Q. You saw that ?

A. Yes.

Q. What information did you get from that with reference first, to the building, if any, machinery, gasoline engine or gasoline ?

A. They were carrying $4,000 an the building, and $1,000 on the stock. I took a note of the stock item and also of the building, I understood there was machinery and gasoline engine, but there was a permit on the policy that no gasoline was to be kept in the building, but as we were not interested in the machinery, why I thought it was not worth taking notice of.

Q. You got this information before issuing the policy ?

A. Yes.

Q. When you came over to your office, what steps did you take ?

A. I simply handed the memorandum over to the stenographer and asked her to issue the policy.

It is not disputed now that said firm must have known, and, I should suspect, the head office of respondent must also have known unless it neglected to pay attention to that which had previously been before it that a gasoline engine was in use in the building containing the stock in question.

It turned out that instead of the supply cask from

which five gallons of gasoline were daily drawn to keep the engine running being in the building, it was kept under a platform running at right angles to the building and used for delivery of goods from or to waggons unloading or loading in the adjacent yard.

I should infer the end of this platform touched or at least came very near to the building. I understand any one inspecting in the most casual way could see this cask.

When insurers know that a gasoline engine is in use in a building regarding which they are concerned as insurers I cannot think they should be heard to say that they were ignorant of the fact which common sense tells them, that a reasonable quantity of gasoline is kept in or near by for purposes of keeping that engine running. No one has ventured to say that the quantity so kept was unreasonable under such circumstances.

It is not stated exactly what the size of the cask or barrel as it is sometimes referred to, really was, but if of an unusual capacity I think we would have heard of it.

It is shewn that in the case of a gasoline engine on the premises, an extra charge is made for the insurance on account of its use, but it is not shewn or pretended that the mere keeping of what is reasonably necessary to its use is still further taxed by any further increased rate. We have had in the case of *Anglo-American Fire Ins. Co.* v. *Morton*(1), an insurance company setting up this defence and claiming change of occupation whereby gasoline came in use and for other reasons policy voided. The appeal

(1) 46 Can. S.C.R. 653.

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failed. *The Prairie City Oil Co.* v. *The Standard Mutual Fire Ins. Co.*(1), though turning upon a condition similar to No. 11 in this case seems in principle adverse to respondent's contention herein.

I, therefore, conclude this defence is not open to the respondent.

The defence under condition No. 11 has, if possible, still less to be said for it. It only applies to the keeping or storing in the building, and what was done here cannot come within the language used.

Besides that the case of *Thompson* v. *The Equity Fire Ins. Co.*(2), reversing the decision of this court (3), seems to make the point hardly arguable, and, indeed, was not pressed on argument.

The remaining defence under condition No. 9, though apparently discarded in the court of appeal, was strongly pressed upon us by counsel for respondent.

But for the decision of this court in *Parsons* v. *Standard Fire Ins. Co.*(4), I should be inclined to think it much more arguable than the other foregoing defences.

I cannot, however, distinguish it in principle from that case and decision.

There is to my mind just one notable fact that might, but for what I am about to refer to, enable us to distinguish it. That is this: In that case the total of the other insurance in question would seem to have been noted upon the policy sued upon and the only change was in substituting one subsequent policy for part of said total. That decision related only to a

(1) 44 Can. S.C.R. 40.
(2) [1910] A.C. 592.
(3) 41 Can. S.C.R. 491.
(4) 5 Can. S.C.R. 233.

subsequent insurance and Mr. Newcombe has quite properly put forward this as one where there was also a prior insurance without express notice in writing or written waiver. I hardly think there is sufficient therein to distinguish this from that unless the fact, to which I have already adverted, that in that case the total of the existing insurance having been noted on the policy sued upon would bring the matter of the subsequent insurance more directly to the mind of the insurer than the knowledge I am about to refer to in this case.

Both the questions of prior and subsequent insurance are involved herein.

The question raised must, therefore, turn upon the effect of the knowledge of the local agents who were provincial agents for transacting the business of the respondent.

It certainly was competent for the head office to waive this condition. If the management there, possessed of actual knowledge of the existence of a prior insurance, chose to accept in face of such knowledge payment of the insurance premiums, and deliver as valid a policy of insurance, and thereby induce the insured to accept same, surely such insurers could not be heard to set up the omission on their part to make the necessary entries as an answer to the insured after the loss.

Now it seems to me that it is clearly established the provincial agents of respondent were authorized not merely to solicit business and give an interim receipt, but to make the contract and issue the policy. Those agents, as shewn by the evidence already quoted, knew of the existence of the prior insurance and that

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it should have been shewn upon the policy. That, however, and the omission to enter a record thereof upon the policy and knowledge of the substitutionary subsequent policy on the property are exhibited in their true light by the further evidence of Mr. Pryor as follows:—

Q. Did you know that the prior insurance should have been mentioned on the policy ?

A. I did not see the policy when it was sent out of the office. Had I checked it, I would probably have noticed it and made the correction.

Q. Tell me what you intended in reference to this prior insurance with regard to your policy ?

A. I intended to put it on the policy, in addition to other concurrent insurance. It was simply a mistake it was not there. It was my intention to have it on. As I said before, I did not see the policy before it went out of the office.

Q. Was the policy signed by you ?

A. No.

Q. It was sent out without you having an opportunity of seeing it ?

A. Yes.

Q. You say at the time there was what other insurance, to your knowledge, on the stock ?

A. $2,500 in the Dominion and $1,000 in the Nova Scotia.

Q. Who were the agents for the Dominion ?

A. Mr. Renwick.

Q. What became of the Dominion policy, was it ever replaced ? When it expired what happened ?

A. It was replaced by the Provincial.

Q. By a policy in the Provincial ?

A. Yes.

Q. And was this the policy L.B./8 by which that was replaced ?

A. Yes, sir.

Q. Do you know anything about a policy in the London Mutual ?

A. Yes.

Q. What was that on ?

A. On stock.

Q. The same stock ?

A. Yes.

Q. Did that expire ?

A. Yes, sir.

Q. What became of that ?

A. I think that was placed on the property.

Q. How much was the insurance on this property in the London Mutual ?

A. I think it was $2,500. I would not swear to it.

Q. You knew that was outstanding at the time this policy was prepared ?

A. Yes.

Q. And you say the same about that as of the other policies that were outstanding, that they should have been inserted in here, and would have been except for your mistakes ?

A. Yes, if I had seen the policy, no doubt it would have been done.

It seems to me that under the foregoing statements of fact and having regard to the authority of such agents who received the premium, the respondent cannot be heard to set up as defence the result of its own neglect to note on the policy the facts. And as to the subsequent substitution of a policy in the Provincial Company for that in the London Mutual which had expired, any objection thereto is met by the *Parsons* v. *Standard Fire Ins. Co.*(1) case, already referred to, where we find the responsibility for failure to note the latter on the policy is shewn to have rested with the respondent.

There is not so far as I have been able to see any English case exactly covering the questions raised by this defence under condition No. 9. This no doubt arises from the fact that English companies do not habitually use such like conditions.

There are many cases in the American courts and in our Canadian courts which are not binding upon us but amply cover this case. The many text books referred to by Mr. Roscoe on the law of insurance deal with and refer to waiver of such a condition as set up by the conduct of the insurers. Besides the case already referred to in this court there is the case of *Billington* v. *The Provincial Ins. Co.*(2), which seems

(1) 5 Can. S.C.R. 233.

(2) 3 Can. S.C.R. 182.

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clearly distinguishable and shews how the promise of an agent who had merely power to issue an interim receipt, would not bind his company.

The case of *Richard* v. *Springfield Fire and Marine Ins. Co.*(1) shews the distinction observed between the authority of such an agent and the authority of such agents as respondent's provincial managing and contracting agents in question herein.

I think the principle observed in the numerous cases cited in the text books referred to and in which the facts fit this case should be followed; though not binding upon us, they seem in line with the *Parsons* v. *Standard Fire Ins. Co.*(2) case, which does bind us.

The appeal should, therefore, be allowed with the costs throughout.

DUFF J.—I see no reason why the policy upon which the action was brought should not be construed according to the usual rule *contra proferentem*. I think the insurance of a going factory where the motor power is supplied by a gasoline engine must be taken to contemplate the keeping of a reasonable supply of gasoline for the engine and the keeping of it in a reasonably convenient way. I think, therefore, that the condition of the policy prohibiting the storing of the gasoline in larger quantities than five gallons does not apply to gasoline kept for that purpose. I think, moreover, that the language of Lord Macnaghten in *Thompson* v. *Equity Fire Ins. Co.*(3), at page 596, is applicable and that "stored or kept" imports a notion of warehousing or depositing for safe custody or

(1) 108 Am. St. Rep. 359. (2) 5 Can. S.C.R. 233.
(3) [1910] A.C. 592.

keeping in stock for trade purposes; Lord Macnaghten's illustration of the keeping of it for domestic uses seems to cover the ground.

As to non-disclosure; as the keeping of a reasonable quantity of gasoline must be taken to have been within the contemplation of the parties to the contract, I do not think there was any change of conditions of which the appellants were under any obligation to notify the insurance company.

ANGLIN J.—I am, with great respect for the Supreme Court of Nova Scotia, of the opinion that this appeal should be allowed and the judgment of Mr. Justice Drysdale, who tried the action, restored.

Because the insurers were referred to a former policy with another company for a description of the property to be insured they seek to incorporate the terms of that policy with regard to the presence of gasoline into the risk assumed. In their policy, however, they saw fit to substitute for the special provisions of the former policy dealing with gasoline the usual statutory condition, and, in my opinion, they are thereby precluded from contending that the risk was subject to any other condition in that particular.

By the statutory condition in the defendants' policy it is provided that the insurer shall not be liable for loss or damage occurring while gasoline is "stored or kept" in the building containing the property insured unless permission in writing is given by the insurer. I doubt whether the supply of gasoline which the plaintiffs had on hand in order to furnish fuel for a gasoline engine known by the insurers to be in use in the building containing the stock insured, and which consumed five gallons of gas-

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oline per diem, can properly be said to have been "stored or kept" within the meaning of this condition. *Thompson* v. *Equity Fire Ins. Co.*(1). But if it was otherwise within it, I am satisfied that the gasoline was not in the building which contained the insured property. It was in fact outside the building and under an adjacent platform used for purposes of loading and unloading wagons. There is no reason why the word "building" should here be given a meaning other than that which it ordinarily bears. *Moir* v. *Williams*(2).

Neither do I think that the policy is avoided because of non-disclosure of the proximity of this supply of gasoline to the building under the condition requiring communication by the insured of all circumstances material to the risk. Being aware that the insured were using the gasoline engine in the building for manufacturing purposes, the insurers must be taken to have had knowledge that a reasonable supply of gasoline for fuel would be kept close at hand. Having this knowledge, they saw fit to stipulate expressly against this supply being kept in the building and did not see fit to inquire at what distance from the building it was placed, although they must have known that convenience required that it should be reasonably close. They can scarcely be heard to say that its precise location was so material to the risk that the insured must have specially communicated it at the peril of the policy being avoided by his failure to do so.

The defence that subsequent assurance was effected without notice to the company in breach of the 9th

(1) [1910] A.C. 592. (2) [1892] 1 Q.B. 264.

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statutory condition, is not referred to in the judgment in the full court, and I am of opinion that it is satisfactorily dealt with by Mr. Justice Drysdale. The general agents of the insurers who issued the policy in question were fully apprised of the amount of the plaintiffs' concurrent insurance when the defendants' risk was assumed. Their knowledge was that of the defendants, and I think the latter cannot set up their failure to note their assent in or upon the policy as a defence. The subsequent transfer of one of the policies from one company to another was immaterial, there having been no increase in the amount of the concurrent insurance. *Parsons* v. *Standard Fire Ins. Co.*(1).

I would, for these reasons, allow this appeal with costs.

Appeal allowed with costs.

Solicitor for the appellants: *W. M. Christie.*

Solicitor for the respondents: *W. H. Fulton.*

(1) 5 Can. S.C.R. 233.

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*June 10, 11.
*June 24.

THE TORONTO POWER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ARTHUR E. RAYNOR (PLAINTIFF) ... RESPONDENT.

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

Negligence — Power company — Accident to employee—Injury from supposed dead wire—Duty of employer—Proper system.

A power company is not liable for injury to an employee from contact with an electric wire represented to be harmless, but which had, in some way become charged, when it is shewn that every reasonable precaution had been taken for the safety of employees and there is nothing which proves or from which it can be inferred that the accident was due to the negligence of some person for which the company was responsible.

Per Idington J. dissenting.—The only reasonable inference from the evidence is that the accident was caused by negligence; therefore, as decided by *McArthur* v. *Dominion Cartridge Co.* ([1905] A.C. 72) and *Toronto Railway Co.* v. *Fleming* (47 Can. S.C.R. 612), it is not necessary to determine precisely how such negligence produced the injury complained of. There was also some evidence of a want of a proper system and of failure to employ competent persons to superintend the work.

Judgment of the Appellate Division (32 Ont. L.R. 612) reversed, Fitzpatrick C.J. and Idington J. dissenting.

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

The appellant company generates electrical energy at Niagara Falls, Ont., and transmit it by high volt-

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

(1) 32 Ont. L.R. 612.

age wires to Hamilton and Toronto. The wires are divided into units consisting of three each, two of which are, for the purposes of this case, known as units A. and B.

On Sept. 2nd, 1913, the respondent, Rayner, was engaged in painting a tower supporting a wire of unit A. As the trial judge found he had been assured that this unit contained no current and that he could safely work there. He had been working about fifteen minutes when he received an electric shock which resulted in severe injuries. The trial judge also found that the shock came from contact with a wire on unit A.

At the trial, without a jury, the learned judge held the appellant company liable and assessed the damages at $1,200. This judgment was affirmed by the Appellate Division.

D. L. McCarthy K.C. for the appellants.

J. H. Campbell for the respondent.

THE CHIEF JUSTICE (dissenting).—I would dismiss this appeal.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J. (dissenting).—The respondent was engaged in the service of appellant in painting for it part of one of its towers beside the Welland Canal, at a point one hundred and thirty-five feet from the ground, when he received an electric current which burned his hand and possibly other parts of his body

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and caused him to fall some distance to a platform below him, thereby causing other bodily injuries.

He sued appellant for damages for such injuries, claiming them to have been caused by its negligence.

The tower in question and other like towers carry a number of wires used for conducting electric energy from the Niagara Falls where generated to the City of Toronto.

There are two of these wires or sets of wires which for the purpose of this work and this case are designated respectively A. and B. The respondent and his fellow workmen had been assured by appellant's representative that they would be in perfect safety from the electric current whilst engaged in their work. I do not think, though that assurance was relied upon in argument, that it carries the respondent further than the common law or the "Workmen's Compensation Act" for the purpose of this case.

The respondent, and a fellow workman named Hamilton, under the direction of one Maudsley, their foreman, had painted as required that part of the work carrying line "B" when they awaited the preparation in way of taking the electric current off line "A" and thereby so deadening it, as the expressive phrase used implies, that work could be safely done in close proximity thereto. That being supposed to be perfectly done they in response to the directions of one Creswick on the said tower, and one Smith on another tower some distance away, both engaged in said work of deadening the wire, began their work of painting where directed. They had only been engaged there some ten or fifteen minutes when respondent was so stricken by the current of electricity as to cause the injuries complained of.

The learned Chief Justice of the Queen's Bench Division who tried the case finds as a fact that these injuries were caused by electric current on the supposed dead wire.

I have read the entire evidence in the case and I have not the slightest doubt of the correctness of that finding.

The respondent and other men called to testify to what happened seem probably to have been strangers to each other till a few days before the accident when Rayner was first engaged by Maudsley. At all events no attack seems to have been made on the trial on their credibility.

The story told by Hamilton of a flash from the wire when he and respondent were engaged so closely together is such as to render it impossible to account for that flash by respondent having touched the live wire "B," five or six feet away from the point they were working at. Maudsley corroborates him. The respondent whose story seems told in a truthful manner denies emphatically touching the other wire or departing from his work. Indeed, the suggestion of his doing so seems most improbable. And curiously enough one Bull, also under Maudsley, working at another point, in proximity to same wire "A," says:—

Q. What were you painting?

A. I was painting iron.

Q. You heard nothing more?

A. I heard a sizzle on the wire and turned around immediately and saw Rayner fall.

Q. Can you tell from what wire the sizzle was?

A. From my estimation it came right from the wire alongside of what I was working, Rayner was in the position falling from that wire.

And in cross-examination he tells that he turned

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round and jumped because he felt sure the wire was alive.

The importance of this is that the appellant alleges that wire was dead, and rests its case chiefly upon that ground.

Upon all that evidence it seems impossible to impugn the finding of fact, even if one felt inclined, as I do not, to doubt the correctness of the finding. I only dwell upon it because there is an attempt, indirectly it is true, to challenge it by asking us to accept theories put forward as opposed to it yet resting only upon the evidence of some witnesses for appellant.

The appellant's case as presented by a number of witnesses convinces me that there was undoubtedly negligence on the part of appellant.

The evidence as to the steps taken by Cole and others looking to the clearance of the wire preparatory to the work of painting, may be accepted. But he and others testify in such a way as to demonstrate that, under weather and other conditions then prevailing, it was quite impossible, if the "A" line of wire had all been properly grounded, there could have been any such accident.

There seems a general concurrence of opinion that even when the power feeding the current is shut off any wire of the Niagara end, there may be in the wire so shut off what they term static and by induction from other wires an accumulation thereof may occur, which may become a source of danger. Hence the necessity, not only to have those at Niagara shut off the current from the wire to be deadened, but also the wire, when so relieved, protected by groundings at various places and specially so almost immediately at

the point next where men are set to work in proximity to or upon the supposedly dead wire.

Cole says in his examination in chief:—

Q. If a line is properly grounded what is the possibility of having power in it?

A. No chance at all if it is properly grounded; it would be impossible to get any juice off it.

And in cross-examination:—

Q. The static will give a shock?

A. Yes.

Q. And a man working at that wire at that point that I have described to you would possibly receive a shock from electricity if either one of these ground wires was not efficiently placed?

A. I do not see how he could get it there because the other man did not get it; if he got it the others would too.

Q. Answer the question; is that a correct proposition?

A. Of course, the man told me they had it on good——

Q. I am not asking you that at all; I am asking you to answer the question?

A. If it was not on properly certainly he might get it.

* * * * * *

Q. What is the true and correct meaning of statics as applied to electricity?

A. It is gathered off the other lines, the live lines.

Q. In the first place these three wires are dead, that is, the power is shut off at Niagara Falls?

A. Yes.

Q. And there is supposed to be no electricity or current in any of those wires in unit A. at that time, that is correct, is it?

A. Yes, just the static.

Q. But notwithstanding the fact that the power has been turned off at Niagara Falls, there is a certain quantity of electricity still in the wire?

A. Static, yes, from the other line.

Q. That is electricity, is it not?

A. Yes.

Q. And in order to protect men who are working at any particular point from that static it is necessary to ground the wires on either side?

A. That is the idea.

Q. So the proper grounding is essential?

A. Yes.

Seiler, foreman of the transformer at Niagara, says:—

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Q. The only power that can get on to that line is from your end of the system ?

A. No, you can make that line alive from some other source, at my end of it it is the only place you can make the line alive, and it might happen that is the only place I could make it alive.

* * * * *

Q. Is it possible for him to receive a shock if the wires are not properly grounded ?

A. Yes, static shock.

Q. I do not care so long as it is a shock; and if Rayner did get a shock either while putting his paint brush in or taking it out of the paint pot which was hanging on this wire or one of these wires he must have received it by reason of improper grounding of the wires ?

A. I could not say on that; I would make no statement there.

* * * * *

Q. Can you give any explanation as to how Rayner sustained this injury ?

A. Why, the only way that I can see that he received that shock was that in some way he made contact with line B.

* * * * *

Q. That is your inference ?

A. It was as near as I can say; that is truthfully in every way I know; I came to that firm conclusion that he must have got up against the live wire in some way which was carrying the load.

And Alexander Strangways says:—

Q. Do you know as a matter of fact whether it would be safe for a person to work on what is called a dead line in the event of a ground wire not being properly secured ?

A. In which way ?

Q. Would it be safe for you to work at any certain point on a dead line and that point being between two ground wires, providing those ground wires were not properly attached to the tower ?

A. It would if they were not very far apart; one set of ground wires to a distance of about four or five towers would be perfectly safe to work either side of the ground.

Q. That is one wire ?

A. One set of ground wires.

Q. That would be one wire attached to the tower and the other end of it being attached to three wires ?

A. Yes.

Q. Can you say whether it is sufficient simply to attach the wire to the tower or whether there should be some other grounding ?

A. With a proper set of grounds, the kind I was using, it was perfectly safe.

Q. What I mean is this, was it necessary and proper that the tower itself should be grounded ?

A. I could not say.

Q. Your experience does not warrant you in answering that question ?

A. No, sir.

Q. Do you know anything about these towers, the kind of foundation for them ?

A. There are footings in the ground, I do not know how far they go down in the ground.

Q. You cannot tell anything about that, whether they are grounded or not ?

A. I could not say.

This witness evidently used a patent appliance and something else not in use by others for grounding wires.

Connery appellant's superintendent says:—

Q. Do you mean to say there would not be any mark left on him ?

A. No, sir. I have seen a man killed right in front of my eyes with static shock and there was not a mark on him.

Q. Then it is possible for a person who gets a static shock to get a severe injury ?

A. Yes, because he fell on his head or fell 40 feet off a tower on his head.

And departing for a moment from this line of evidence this witness, who ought to have known, but does not seem to have, says as to the grounding:—

Q. You have had these twelve years' experience; can you tell me the system which is used in the grounding of wires in this company ?

A. Certainly I can.

Q. Kindly do it; are the towers grounded ?

A. Every tower is grounded, and that particular tower——

Q. Do you know that as a matter of fact ?

A. I think as a matter of fact I saw those towers built, and there is a copper ribbon in a box of gravel that has a bag over it, and a coil of wire made of copper brought up and riveted to the tower legs right down on the bottom.

Q. You saw those towers built ?

A. Yes. I was right there when they were built.

Ackerman says he was engaged in an advisory capacity by appellant:—

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Q. I asked you what voltage on the static, which is induced by the friction, how much voltage would you get on the wire ?

A. The voltage could theoretically reach, accumulate up to this point where this air gap would break down theoretically, but practically it depends very much on the country, and the fact is due to some conditions probably of the air; having leakage from some of the insulators, it would very seldom reach this voltage where this air gap goes; it happens sometimes, we have some records in very dry summer days where we do not have any lightning reported, we get so called discharge all over our lightning arresters, which we keep records from, which would indicate we have an accumulation of voltage up to this point of breakdown.

Q. I am speaking of the static ?

A. About the static on a dead wire, where we would not have any ground whatever, just the insulated wire we could reach the same voltage.

Q. What voltage would you reach ?

A. We could come up to possibly 60,000 volts or higher.

* * * * *

Q. You said the static that would get on the line by way of inducement would be 120 volts ?

A. Approximately 120 volts.

Q. What is the voltage on the ordinary wires where they burn 20 or 30 lights ?

A. That is 110 or 120 volts.

* * * * *

Q. I want to get a little further information upon this first kind of static, the static which is due to the wind and swinging wires ?

A. Yes.

Q. I understood you correctly then; I also understood you to say that static would extend to the adjoining wire, the voltage of the adjoining wire could be given to a dead wire ?

A. Yes.

* * * * *

Q. Could you get any static in the way you first mentioned in fifteen minutes on a wire ?

A. I could hardly think so; it takes some time to build up.

Now, assuming respondent's story true, can any one say on this evidence that there is any doubt but that somebody in appellant's service blundered ?

There is no mystery about the matter. If the appellant's story be true some neglect of a gross character I fear led to the incident.

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Creswick, already referred to as one of those who invited respondent to the work, I assume imagined he had grounded his part, for he says he sat on one wire. I doubt if he sat still, as he says. I doubt if his dealing with the wire did not disturb his imperfect work. It is also a very curious circumstance in his connection with the case that he started the rumor, without hearing anything about its truth (as he admits by failing to prove it) that respondent had touched "B" line and hence this accident. Why did he do that? That story flashed down to Niagara twenty minutes later coming from this man has a disagreeable aspect. And unless protected by some non-conductor his story of sitting upon the wire seems highly improbable.

Upon such a case as the evidence presents there could be no doubt if respondent sued as a stranger, entitled to do so, and not as a servant of the appellant, of his right to recover damages.

The decision in the case of *McArthur* v. *Dominion Cartridge Co.*(1), followed by this court in *Toronto Street Railway Co.* v. *Fleming*(2), shews that it is not necessary where the only reasonable inference to be drawn from the evidence is that there was negligence which caused the accident, to reach a finding of exactly how the result of such negligence produced the injuries complained of.

In considering the case then as one by a servant against his master it does not, in view of the moderate damages assessed, seem to matter whether the case can be rested upon the common law or not if maintainable upon the "Workmen's Compensation Act."

(1) [1905] A.C. 72. (2) 47 Can. S.C.R. 612.

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Let us consider, however, the liability of appellant at common law:—

The defence of common employment is not pleaded as some authorities seem to suggest must be done, and hence possibly not open to the appellant unless it can be implied under the fifth paragraph of the statement of defence.

That raises the issue of whether or not there was a proper system furnished to protect those in the position of the respondent.

In some features of the system as presented in evidence there certainly was all that possibly might be expected. But in many respects it was not by any means an ideal one.

The methods of grounding seem to have been left to the men engaged in the work. It is frankly admitted there were no standard appliances. One man, I infer, adopted one appliance. Others adopted another just as suited their respective views of what would be effective.

If we apply the oft-repeated test of Lord Cairns in *Wilson* v. *Merry*(1), at page 332, that the master is to select proper and competent persons to superintend the work and to furnish them with adequate materials and resources for the work, I cannot think that was done in this case.

In the last analysis it comes to a question of the competence of Creswick and Smith, and the appliances put at their disposal which seem to have been of a very questionable character.

Whether when used as they saw fit or not the possibility of the tower itself being such as to form a

(1) L.R. 1 H.L. (Sc.) 326.

means of grounding which I infer was treated as the means of grounding seems most doutbful from the evidence of the superintendent quoted above.

In this regard the onus rested upon the appellant to establish a defence and I think it failed. The evidence is meagre and most unsatisfactory.

I cannot assent to the proposition that a mere certificate of character in the general terms given by these men for themselves and by the superintendent for them, can fulfil all that is to be expected of men guarding others in a most dangerous occupation requiring therefor a degree of knowledge and skill they evidently did not possess.

Then under the "Workmen's Compensation Act," R.S.O. ch. 146, sec. 3, sub-secs. (*a*) and (*c*), I think the action can be maintained.

The painters, including respondent and foreman, as well as others, evidently were expected to conform to the direction of the patrolmen of whom either or both must have failed in his duty.

Of the other ground what I have said already presents my view of appellant's failure in many respects.

Indeed, in argument there was not very much attention paid to this branch of the case, though the matter is dealt with in appellant's factum.

The argument, however, was chiefly directed to the alleged improbabilities of the accident happening in the way or by reason of what respondent and his witnesses alleged and that failing, its cause was suggested to be an insoluble mystery which I have already dealt with.

Rylands v. *Fletcher* (1), relied upon below does not

(1) L.R. 3 H.L. 330.

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seem to me, whatever it stands for, to involve any question of negligence, upon which alone respondent must rest his action.

I think the appeal must be dismissed with costs.

DUFF J.—This appeal should be allowed. There is nothing in the so-called invitation augmenting the duties which the law imposed on the company as incidental to the relation of master and servant; it cannot reasonably be construed as involving anything like a warranty against accidents. If it had that effect it was clearly *ultra vires* of the foreman.

The respondent fails to make out a case and he fails in my opinion for this reason; when the evidence is looked at as a whole and I have carefully examined it all the proper conclusions are:—

(1) That the appellant company neglected no duty which the common law cast upon it in relation to the safety of the respondent; that is to say, the appellant company neglected no precaution suggested by science or practical experience which could reasonably be required of them for the diminution of the risk of accident.

Further assuming that the accident was the result of negligence of some servant of the company there is no ground whatever for saying that it was the negligence of anybody of whom the appellant company would be at common law responsible *vis à vis* the respondent.

(2) There is nothing in the evidence to bring the respondent's case within any of the classes of the cases in which by the terms of the "Workmen's Compensation Act" he would be entitled to recover. I asked Mr. Campbell during the argument more than

once to refer to the clause of the "Workmen's Compensation Act" upon which his right to recover could be based, but the question, of course, does not admit of an answer from the record.

The judgment of Mr. Justice Clute in the Court of Appeal proceeds, as far as I can gather, on the application of the doctrine of *Rylands* v. *Fletcher* (1).

This doctrine has never been applied and could not, without bringing the direst confusion into the law on the subject, be applied in cases of this description between master and servant, where apart from statute the question must always be (the master being charged with responsibility for harm coming to the servant in the course of his employment): Was the harm caused by the failure of the master in any duty to the servant arising out of the relation subsisting between them? The duty of protecting or compensating the servant for harm arising from the perils incidental to the service which cannot be avoided by any reasonable degree of care on the part of the master, is not one of the duties which the law casts upon the master. Even where the peril can be avoided the master performs his duty if he provides adequate means and appliances and competent servants, and provides a proper system of working with a view to securing safety.

The doctrine of *Rylands* v. *Fletcher* (1) imposes a responsibility which in the first place is, speaking generally, absolute for the consequences of the escape of the noxious agent (excepting where the escape is due to the act of God or the mischievous intervention of a third party) and in the second place cannot be

(1) L.R. 3 H.L. 330.

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Duff J.

discharged by employing independent contractors or servants never so competent and never so well equipped as to skill and means.

Such a principle could only become part of the law of master and servant by the instrumentality of legislation and, one must add, revolutionary legislation.

ANGLIN J.—With very great respect for the learned trial judge and the majority of the judges of the Appellate Division, I am of the opinion that the judgment in favour of the plaintiff cannot be sustained. The learned trial judge found as a fact that the electric current which the plaintiff received came from the supposedly dead wire on which he was working, and, while he did not accept that finding, Mr. McCarthy conceded that he could not attack it with any hope of success. But the learned judge did not suggest how the wire had become charged; nor did he indicate any negligence, which would be imputable to the defendant company, as the cause of this having occurred—and it is only, if there was such negligence, that the plaintiff can recover.

It may not improperly be assumed in favour of the plaintiff that the happening of the accident under the circumstances in which it occurred cast upon the defendants the burden of proving that they had taken every reasonable precaution to ensure the plaintiff's safety while at his work. That burden the defendants assumed and counsel for the plaintiff was unable to point to any particular in which they had failed to discharge it. Improbable — almost impossible — as it may seem in view of the precautions taken and the surrounding circumstances, if the wire upon which the plaintiff was working became charged with electricity, upon the evidence it is quite as likely that

this was due to some inexplicable electric phenomenon against which no precaution known to science would be effective as that it occurred through the negligence of any person. If it was the result of negligence it must be the purest conjecture that such negligence was in matter which would entail liability at common law, or was that of a person for whose fault the company would be responsible under the "Workmen's Compensation Act" (R.S.O. 1914, ch. 146), and was not the negligence of some workman against which the defence of common employment would prevail alike at common law and under the statute. The case does not fall within the maxim *res ipsa loquitur*. Indeed, upon the evidence accepted as veracious, negligence of any kind is, I think, completely disproved. I am, with respect, unable to understand the application of the doctrine of *Rylands* v. *Fletcher* (1), invoked in the Appellate Division to the case of a claim against his master by a servant injured in the course of his employment.

It may be that this case affords a striking illustration of an evil which the new "Ontario Workmen's Compensation Act" is designed to remedy. But under the law as it stood when the plaintiff was injured he had, in my opinion, no recourse against his employers.

The appeal must be allowed and the defendants are entitled to their costs of the litigation throughout, if they should see fit to exact them.

Appeal allowed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Lancaster, Campbell & Lancaster.*

(1) L.R. 3 H.L. 330.

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*June 11.
*June 24.

THE HAMILTON STREET RAILWAY COMPANY (DEFENDANTS) } APPELLANTS;

AND

ROBERT WEIR AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Negligence—Obstruction of highway—Street railway—Trolley poles between tracks—Statutory authority—Protection by light.

The Act incorporating the Hamilton Street Railway Co. authorized the City Council to enter into an agreement with the company for the construction and location of the railway. A by-law passed by the Council directed that the poles for holding wires should, on part of a certain street, be placed between the tracks, which was done under supervision of the City Engineer.

Held, reversing the judgment appealed against (32 Ont. L.R. 578), that the location of the poles was authorized by the legislature and did not constitute an obstruction of the highway amounting to a nuisance; the company was, therefore, not liable for injury resulting from an automobile while driven at night coming in contact with the pole.

Held, also, that as on the City Council was cast the duty of regulating the operation of the railway in respect to traffic and travelling on the street and it had made no regulation as to lighting the pole the company was under no obligation to do so.

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

On the 23rd day of May, 1913, at about nine o'clock in the evening, the respondent Robert Weir was driv-

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

(1) 32 Ont. L.R. 578.

ing an automobile in an easterly direction along King Street, being a public highway in the City of Hamilton, and came into collision with a pole supporting the trolley wires belonging to the appellants situated on the devil strip between the tracks of the said appellants' line of railway, which were situated on King Street immediately north of a park in the centre of the street, known as the Gore Extension, and by reason of the said collision, the respondent's automobile was damaged and the respondent Robert Weir and another occupant of the car, the respondent Gladys Weir, to some extent injured.

The action came on for trial before the Honourable Mr. Justice Latchford with a jury on the 21st of April, 1914, at the sittings holden at Toronto, when questions were submitted to the jury, who found the company guilty of negligence and respondents not guilty of contributory negligence. The trial judge entered judgment upon these answers in favour of the respondents, Robert Weir and Gladys Weir, for the sum of $1,035.20, the action being dismissed as to the claims of the respondents, James Gowans Kent and Caroline Kent.

From this judgment an appeal was taken to the Appellate Division of the Supreme Court of Ontario and that court gave judgment dismissing the appeal with costs, the Honourable Mr. Justice Hodgins dissenting, the Honourable Mr. Justice Leitch expressing no opinion.

From that judgment the appellants appealed to the Supreme Court of Canada.

The statute incorporating the appellants and under the authority of which the municipal corporation of

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the City of Hamilton had power and control over the location of the poles of the appellant company is chapter 100 of 36 Victoria (1873), more particularly sections 7, 15 and 16.

"7. The company are hereby authorized and empowered to construct, maintain, complete and operate a double or single iron railway, with the necessary side tracks and turnouts, for the passage of cars, carriages and other vehicles adapted to the same, upon and along streets and highways within the jurisdiction of the Corporation of the City of Hamilton, and of any of the adjoining municipalities as the company may be authorized to pass along, under and subject to any agreement hereafter to be made between the council of the said city and of said municipalities respectively, and of the said company and under and subject to any by-laws of the said corporation of the said city and municipalities respectively, or any of them, made in pursuance thereof * * * and to construct and maintain all necessary works, buildings, appliances and conveniences connected therewith."

"15. The council of the said city and of any of the said adjoining municipalities, or any of them, and the said company, are respectively hereby authorized to make and to enter into any agreement or covenants relating to the construction of the said railway; for the paving, macadamizing, repairing and grading of the streets or highways; and the construction, opening of, and repairing of drains or sewers; and the laying of gas and water pipes in the said streets and highways; the location of the railway, and the particular streets along which the same shall be laid; the pattern of rail; the time and speed of running of the cars, the time within which the works are to be commenced;

the manner of proceeding with the same, and the time for completion; and generally for the safety and convenience of passengers; the conduct of the agents and servants of the company; and the non-obstructing or impeding of the ordinary traffic."

In pursuance of the authority conferred upon the municipality by sections 7, 15, and 16, by-law No. 624 of the City of Hamilton, was passed and is incorporated as schedule "A" to an Act respecting the Hamilton Street Railway Company, being 56 Vict. ch. 90 (1893)—section 28 of the said by-law providing as follows: "All poles shall be placed on the sides of the street, except on King Street, between Hughson and Mary Streets, where they shall be placed between the tracks, and all the poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes." And section 31 provides that "all works of construction and repair and of removal and spreading of snow or ice shall be done, and all poles shall be placed under the supervision and to the satisfaction of the city engineer."

The pole in question was located in the position it occupied at the time of the accident, in the year 1893, by Mr. Haskins, who was city engineer at that time, and was erected under his directions. Subsequently, before the accident, an application was made by the street railway company to remove the poles on the devil-strip between Hughson and Mary Streets, of which the pole in question was one, but the municipality refused to entertain their application.

D. L. McCarthy K.C. and *A. H. Gibson* for the appellants, referred to *National Telephone Co.* v.

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Baker(1); *McLelland* v. *Manchester Corporation* (2).

Howitt for the respondents. No statutory authority could justify the obstruction of the highway by placing the pole in the middle of the street. See *Atkinson* v. *City of Chatham*(3).

THE CHIEF JUSTICE.—I would allow this appeal.

DAVIES J.—I confess myself unable fully to appreciate the meaning of the statement of the learned judge who delivered the judgment of the second Appellate Division of Ontario, and on which that judgment was founded as to "the limited character of the power of the provincial legislature to interfere with a public highway."

I have always understood that when legislating within any of the powers conferred upon it by the 92nd section of the "British North America Act," the powers of the provincial legislature are plenary except in so far as its legislation may be over-ridden or controlled by legislation of the Parliament of Canada under some one of the enumerated powers of section 91 of that Act.

No such question, however, of the clashing of the powers of the Parliament and the legislature arises in this case.

In my judgment the by-law under which the pole in question was placed in its specific location in the street was fully authorized by the incorporating statute of the appellant company and the pole must, therefore, be held to have been there properly.

(1) [1893] 2 Ch. 186. (2) [1912] 1 K.B. 118, at p. 130.
(3) 26 Ont. App. R. 521.

The finding of the jury that the trolley poles "should have been placed in a uniform position" cannot be upheld under the proved facts and the law. The company placed the poles in the places where they were directed by the city authorities under the by-law to place them. No other negligence on the defendants' part was found and this specific finding excludes any other.

I think, therefore, the appeal must be allowed and the action dismissed with costs including any costs which may have been incurred by the city the third party to the action.

IDINGTON J.—The appellant company is found by the verdict of a jury, maintained by the judgment of the Appellate Division of the Supreme Court of Ontario, guilty of negligence because its "trolley poles should have been placed in a uniform position along the entire thoroughfare," and, therefore, condemned to pay damages suffered by the respondents in consequence of driving, at thirteen miles an hour, along that part of the street whereon the appellant's electric street railway was constructed and colliding with one of the said trolley poles, although there was alongside the said railway a travellable space of street twenty-five feet in width upon which they might easily have driven.

The Legislature of Ontario which has absolute legislative power in the premises delegated to the municipal council of the corporation of the City of Hamilton the powers contained in the following amongst other sections:—

7. The company are hereby authorized and empowered to construct, maintain, complete, and operate a double or single iron rail-

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way, with the necessary side tracks and turnouts, for the passage of cars, carriages, and other vehicles adapted to the same, upon and along streets and highways within the jurisdiction of the Corporation of the City of Hamilton, and of any of the adjoining municipalities, as the company may be authorized to pass along, under and subject to any agreement hereafter to be made between the council of the said city and of said municipalities respectively, and the said company, and under and subject to any by-laws of the said corporation of the said city and municipalities respectively, or any of them, made in pursuance thereof, and to take, transport, and carry passengers and freight upon the same, by the force or power of animals or such other motive power as they may be authorized by the council of said city and municipalities respectively by by-law to use, and to construct and maintain all necessary works, buildings, appliances, and conveniences connected therewith.

15. The council of the said city, and of any of the said adjoining municipalities, or any of them, and the said company, are respectively hereby authorized to make and to enter into any agreement or covenants relating to the construction of the said railway; for the paving, macadamizing, repairing, and grading of the streets or highways; and the construction, opening of, and repairing of drains and sewers; and the laying of gas and water pipes in the said streets and highways; *the location of the railway*, and the particular streets along which the same shall be laid; the pattern of rail; the time and speed of running of the cars, the time within which the works are to be commenced; the manner of proceeding with the same, and the time for completion; and generally for the safety and convenience of passengers; the conduct of the agents and servants of the company; and the non-obstructing or impeding of the ordinary traffic.

16. The said city, and the said municipalities, are hereby authorized to pass any by-law or by-laws, and to amend, repeal, or enact the same for the purpose of carrying into effect any such agreements or covenants, and containing all such necessary clauses, provisions, rules, and regulations for the conduct of all parties concerned, including the company, and for the enjoining obedience thereto, and also for the facilitating the running of the company's cars, and for regulating the traffic and conduct of all persons travelling upon the streets and highways through which the said railway may pass.

The said council pursuant thereto passed a by-law which permitted the use by appellant of certain streets for its railway, and amongst other things relative thereto, provided as follows:—

28. The poles to be used for the company's wires on James Street, from Cannon Street to Hunter Street, and on King Street,

from Bay Street to Mary Street, shall be of iron and of the most improved pattern, except where the company shall use the poles of any telegraph or telephone company, and the wooden poles used by the company shall all be straight and perpendicular, and as nearly as possible of the same shape and size, and shall be dressed and painted throughout, and all poles shall be placed on the sides of the street except on King Street, between Hughson and Mary Streets, where *they shall be placed between the tracks*, and all the poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes.

31. All works of construction and repair and of removal and spreading of snow or ice shall be done, and all poles shall be placed under the supervision and *to the satisfaction of the city engineer.*

The poles complained of were accordingly placed as directed some twenty years before this accident now in question. The location of the railway was wholly within the power of the council. Ample reason is assigned for placing the poles as was done.

The matter was wholly within the legislative power thus conferred upon said council who no doubt exercised their best judgment (aided as appears by able and experienced counsel as to the law and by an engineer of skill) relative to public safety and convenience.

I do not think it is competent for a jury to sit in review upon such legislative work twenty years later, and to find that such legislative action was an act of negligence.

And if it was not negligence on the part of the councillors so directing, it certainly could not be negligence on the part of the appellant bound to conform therewith or have their road removed off the street.

I am also unable to understand how a gentleman driving an automobile, on a dark and misty night, at the rate he admitted over that side of the street whereon the appellant's track was laid, even though well lighted, could be acquitted of negligence, when he had

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no occasion for such a proceeding and a reasonably wide street alongside the track to travel upon. Possibly the city council has been guilty of negligence in failing (if it has) to pass and enforce a by-law prohibiting such conduct.

I think the action should have been dismissed and that this appeal should be allowed with costs throughout and the action dismissed.

DUFF J.—There are two questions:—First, is the company liable as for nuisance in placing its poles where it did place them? That question must be answered in the negative for the short reason that by-laws passed under the authority of statute expressly required the poles to be placed where these poles were placed. The precise thing that was done was authorized by the legislature. It, therefore, could not be a nuisance in contemplation of law. If harm arises from the placing of poles where the legislature directs they shall be put, such harm, as Lord Blackburn said, is *damnum absque injuriâ*. As to the authority of the legislature, with great respect, I think item 10 of section 92, "British North America Act," must have been overlooked. If the construction of the "British North America Act" adopted below were accepted the result would be that every provincial railway crossing a highway with its locomotives, and every tramway worked under provincial authority in the streets of a city, is a public nuisance.

The next question is whether there is evidence of negligence to go to the jury in the failure to provide a light. I think the answer to that also lies in the fact that the company was authorized to put its poles where it did put them, the city council having power

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to exact conditions for the protection of the traffic, and the city council also assuming the lighting of the streets. I do not think that any jury would be entitled to find that in these circumstances any legal duty was cast upon the railway company to apply itself to the question whether the lighting provided by the municipality in the particular locality was or was not sufficient for the protection of persons using the highway.

ANGLIN J.—I am, with respect, of the opinion that this appeal should be allowed.

The ground of the plaintiffs' claim, which has been upheld in the provincial courts, is that they were injured as the result of an automobile in which they were travelling colliding with a trolley pole of the defendants placed in the middle of the space between the double track, commonly called the devil-strip, on King Street in the City of Hamilton. This they allege was an unlawful obstruction of a highway amounting to a nuisance. The defendants maintain that they were obliged by the provisions of the statute under which their railway is constructed and operated to place and maintain the pole in question precisely where it was. There is no doubt that the pole was placed where a by-law of the municipality expressly required that it should be. The contention of counsel for the respondents is that the provincial statute does not authorize such a by-law, and that, if it does, the statute is *pro tanto ultra vires*.

Its incorporating statute (36 Vict., ch. 100), authorizes and empowers the appellant company

to construct, maintain, complete and operate a double or single iron railway * * * upon and along streets and highways within the

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Anglin J.

jurisdiction of the corporation of the City of Hamilton * * * subject to any agreement hereafter to be made between the council of the said city * * * and the said company and under and subject to any by-laws of the said corporation of the said city * * * made in pursuance thereof * * * and to construct and maintain all necessary works, buildings, appliances and conveniences connected therewith.

It is further enacted that

the council of the said city * * * and the said company are respectively hereby authorized to make and to enter into any agreement or covenants relating to the construction of the said railway * * * the location of the railway and the particular streets upon which the same shall be laid * * * and generally for the safety and convenience of passengers, the conduct of the agents and servants of the company and the non-obstructing or impeding of the ordinary traffic;

and the city is authorized

to pass any by-law or by-laws and to amend, repeal or enact the same for the purpose of carrying into effect any such agreements or covenants and containing all such necessary clauses, provisions, rules and regulations for the conduct of all parties concerned, including the company and for the enjoining obedience thereto and also for the facilitating the running of the company's cars and for regulating the traffic and conduct of all persons travelling upon streets and highways through which the said railway may pass.

The by-law in question was passed under this legislation and was subsequently appended as a schedule to an amending statute (56 Vict. ch. 90), which, however, does not in terms approve or confirm it. The effect of this legislation is discussed in the dissenting judgment of Mr. Justice Hodgins and I concur in his opinion that it empowered the municipality to enact the by-law under which the pole in question was placed and maintained where it was.

But I cannot agree with the view of the learned judge that there should be a new trial to permit of an investigation being made to ascertain whether some such precaution as the placing of a light on the pole should have been taken. There is no by-law or regu-

lation of the municipality which prescribes anything of the kind and it was to the council of the municipality and not to the defendants that the legislature entrusted the regulation of the operation of the railway so far as it might affect the safety of traffic on the highway. In my opinion the statute and the by-law afford a complete answer to the plaintiff's claim.

Mr. Justice Sutherland appears to think that if the by-law in question is authorized by the provincial statute the latter involves an interference with the legislative jurisdiction of Parliament over criminal law. "Common nuisance" as defined in the Criminal Code would not cover an obstruction in a highway authorized by a provincial legislature in which control over highways as local works and undertakings is vested. Moreover, we are now concerned merely with a question of civil rights, over which the legislature of the province had undoubted jurisdiction. With respect, I am unable to appreciate the ground on which the learned judge bases his view that there has been an invasion of federal jurisdiction.

I would, for these reasons, allow the defendants' appeal and would dismiss this action with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Gibson, Levy & Gibson.*
Solicitors for the respondents: *Gregory & Gooderham.*

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*June 14.
*June 24.

THE UNION BANK OF CANADA (PLAINTIFFS) ..... } APPELLANTS;

AND

A. McKILLOP AND SONS, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

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

Company law—Trading company—Powers—Contract of suretyship—R.S.O. [1897] *c.* 191.

An industrial company incorporated under, and governed by the "Ontario Companies Act," R.S.O. [1897] ch. 191, has no power to guarantee payment of advances by a bank to another company whose sole connection with the guarantor is that of a customer, for the general purposes of the latter's business, and such a contract of suretyship is *ultra vires* and void.

Judgment appealed against (30 Ont. L.R. 87) affirmed.

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

The facts which brought about the action in this case are not in dispute. The action is brought upon a guaranty executed under the defendants' seal and by its officers. The defences are two-fold, first that there was no money owing for the debt, second that the guaranty was *ultra vires* of the defendant company.

The defendants were incorporated pursuant to the "Ontario Companies Act" then in force (R.S.O., 1897,

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(1) 30 Ont. L.R. 87.

ch. 191), by letters patent of the Province of Ontario dated the 28th September, 1904, and the said guaranty is in form a general guaranty to the United Empire Bank of Canada guaranteeing the account of the West Lorne Wagon Company, Limited, to the sum of fifteen thousand dollars.

The Union Bank is the successor of the United Empire Bank and entitled to any rights it might have under such guaranty.

The defendant company was incorporated by Archibald McKillop, his three brothers and a sister; and on the 17th February, 1905, these individuals, as individuals, had executed a guaranty to the Merchants Bank for the indebtedness to the West Lorne Wagon Company, Limited, to the sum of twenty thousand dollars.

On the 13th day of March, 1907, when the guaranty sued on was executed the defendant company owned one share in the West Lorne Wagon Company, Limited, the West Lorne Wagon Co. then owed the Merchants Bank about forty thousand dollars, and at this time the wagon company arranged with the United Empire Bank that this latter bank should take over the account.

The West Lorne Wagon Co. assigned for the benefit of creditors to Mr. G. T. Clarkson, of Toronto, on the 25th April, 1911. The West Lorne Co. paid no divident to creditors, but the Union Bank as successors of the United Empire Bank received $105,250.71 from the assignee on bonds secured by mortgage held by the bank and the bank also received $20,081 in respect of book accounts also assigned to the bank. The plaintiffs claim that at the time the action was commenced, namely, the 5th June, 1912, there was owing

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to them in respect of the indebtedness of the West Lorne Co. the sum of seventy-eight thousand dollars odd. The respondents claim that after making proper allowance there was no indebtedness from the wagon company to the bank.

Hamilton Cassels K.C. for the appellants, cited *Attorney-General* v. *Great Eastern Railway Co.*(1); *Ashbury Railway Carriage and Iron Co.* v. *Riche*(2); *Hughes* v. *Northern Electric and Mfg. Co.*(3).

C. A. Moss and *J. B. McKillop* for the respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal.

DAVIES J.—For the reasons given by Mr. Justice Hodgins speaking for the Appellate Division of the Supreme Court of Ontario I am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—The appellant seeks to recover from respondent, which is a company incorporated on the 28th September, 1904, under the "Ontario Companies Act" then in force, upon an alleged guarantee of respondent for the indebtedness of the Lorne Wagon Company, Limited, to the appellant, for the sum of $15,000.

The "Ontario Companies Act" enabled the partnership firm of McKillop & Sons to become so incorporated, but did not in express terms enable respondent to give such a guarantee.

It happens to be the fact that the said firm was,

(1) 5 App. Cas. 473. (2) L.R. 7 H.L. 653.
(3) 50 Can. S.C.R. 626.

and the respondent company continued to be, a family-owned concern, having no other shareholders than those composing the firm which became so incorporated.

It is proven that the guarantee of said firm before its incorporation had been given for an amount and under such circumstances as would, if there had been no incorporation of the firm, have resulted, by virtue of the events which have transpired, in possibly rendering the members of the firm liable for the sum claimed.

They escaped that possible liability because the guarantee which the firm had given was surrendered and in substitution therefor the guarantee of the corporate company was taken.

The neat question whereon this appeal must turn is whether or not this corporate company had within the powers given it by the "Companies Act" that of guaranteeing as sureties the debt of the West Lorne Wagon Company, which all the shareholders of the respondent had a very material interest in seeing paid, or at least in their being relieved from liability therefor, but it as a corporation had none.

It is alleged that respondent had no other creditors.

It does not appear to me that this interest of the shareholders can have anything to do with the question or any bearing thereon whatever.

The powers of the incorporated company must be measured by the express powers given by the Act of incorporation and such necessarily implied powers as the general purview of the statute demonstrates were intended to be covered by the expressions used in the statute.

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Idington J.

For example, the corporation may have been enabled to undertake some obligation, or by law may have had imposed upon it some obligation, which in either case must be discharged. The clear legal duty thus created may have rendered necessary the doing of that which the express language of the statute creating it or enabling its creation may not by that language have been very accurately defined.

In such a case the corporation may, by way of implication, be found to possess the powers which the language defining its powers might not have made quite apparent.

In the case presented there is no pretence of such express power and there is nothing from which the express language used can, by interpretation, be so modified by way of implication therein as to support the alleged guarantee.

I think the corporation not only has no powers beyond that so given it, but must assert such power as it may have been given by the method through and by which it is enabled to act, and when going beyond such limits its acts are *ultra vires* and void. Such, I think, was the nature of this alleged guarantee.

The recent decision of this court in the case of *Hughes* v. *The Northern Electric and Mfg. Co.*(1), was relied upon by appellant's counsel. The decisions in that case and the unreported case of *Lambert* v. *Richards,* and some other cases, mark a trend of judicial opinion which, followed out logically, may soon justify the argument presented. The notion seems somewhat prevalent that so long as none but shareholders are concerned that they can use the

(1) 50 Can. S.C.R. 626.

name and so abuse or transgress the powers of the company as they please and by such acts as the statute has not enabled bind the corporation to contracts never contemplated by the statute creating it or upon which its creation rests, so long as it has not prohibited the doing thereof.

I respectfully submit that the proper measure of a company's powers are what it has been enabled to do, and not what it has been prohibited from doing.

But I do not think even these decisions or that mode of reasoning can maintain this appeal.

Again, the "Companies Act" was so modified in 1907 as to carry into it the word "guarantee" amongst the new powers of the corporations entitled to act upon such amended Act, and appellant relies thereon.

I do not think as at present advised that the amendment applies to such a case as presented here.

The facts, however, do not warrant such application. In the case of a company, which this is not, having for its object, or one of its objects, the business of a guarantor, or incidentally to the transaction of its business occasions to give a guarantee, we can conceive of such a thing as a company using this new power.

I shall not attempt to define what is intended by the amendment. I must be permitted to doubt if it ever can be applied to the case of a pure act of suretyship without any relation to the transactions in which the corporation is rightfully engaged.

The appeal should be dismissed with costs.

DUFF J.—The appellants now put their case in two ways. First, they say that the guarantee of the

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Duff J.

13th March, 1907, was within the powers of the defendant company.

The contract upon which the action is brought is not within the objects defined by the letters patent either expressly or by necessary implication. *Hughes* v. *Northern Electric and Manufacturing Co.*(1) was referred to, but that decision had no relevancy, resting as it did upon necessary implication.

Counsel for the appellant bank also relies upon the contention that he is entitled to call in aid of the provisions of the "Ontario Companies Act" of 1907, ch. 24, sec. 17, sub-sec. (*d*), and sections 210 and 211. The effect of the last two sections undoubtedly is to make this Act applicable to the defendant company, but it could not be read as giving validity to the pretended contract which was entered into before the passing of the Act. That contract is inoperative for want of capacity on the part of the company.

The ground which the appellant bank ultimately took up was that the defendant company by reason of its conduct since the Act of 1907 came in force has made itself responsible for the payment of the moneys the bank seeks to recover.

There is an objection based upon the Statute of Frauds which it will be unnecessary to discuss. The insuperable obstacle in the way of this contention is that it has no substratum of fact. The evidence is explicit and it is not contradicted that the advance made under this guarantee was made in the month of April, 1907, some months before the Act came in force. The note which was given for the advance was renewed a number of times after the passing of

(1) 50 Can. S.C.R. 626.

the Act of 1907, but it is not suggested that the renewals were granted by the bank upon the faith of anything done by the appellants and there is no evidence to justify a suggestion even that during this time the bank was not acting upon the faith of the guarantee given in March. I have no doubt it was assumed by everybody until advice was taken upon it that this guarantee was perfectly valid.

ANGLIN J.—The giving of the guarantee, which the plaintiffs seek to enforce, was not authorized in terms by R.S.O. 1897, ch. 191, by which the defendant company was governed when it was executed and delivered, and the authorities, many of which are cited in the judgment of the Appellate Division, make it clear that such a contract cannot be regarded as something incidental either to the undertaking or to the expressed powers of such a company. The evidence seems to shew that the account of the West Lorne Wagon Company was taken over by the United Empire Bank — the plaintiff's predecessors — before the date at which the "Ontario Companies Act" of 1907 came into force. But, if the bank actually made its advances subsequently to that date, they were made upon the faith of the guarantee given on the 13th March, 1907. There is no evidence of any new contract, or of any subsequent ratification by the defendant company of the guarantee sued upon, if, indeed, there could be ratification of such an *ultra vires* instrument. Indeed, it is quite clear that in taking over the account and making its advances the bank acted upon the assumption that the guarantee had been *ab initio* valid and effectual, and that neither ratification

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nor a new contract under the powers conferred by the Act of 1907 was requisite.

The appeal, in my opinion, fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Du Vernet, Raymond, Ross & Ardagh.*

Solicitors for the respondents: *McKillop, Murphy & Gunn.*

H. H. VIVIAN AND COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

FRANCIS HECTOR CLERGUE (DEFENDANT) ..... RESPONDENT.

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*June 16.
*June 24.

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

Contract—Sale of mining land—Substituted purchaser—Reservation of claim against original purchaser—Forfeiture of second contract—Sale of land to other parties—Effect on reserved claim.

In June, 1903, V. & Co., by agreeement in writing, contracted to sell, and C. to buy, mining property for $125,000, to be paid $5,000 down and the balance in annual instalments of $24,000. The $5,000 was paid and in March, 1905, when an instalment was overdue and the second accruing a new agreement was executed, to which C. was a party, for sale of the property to a mining company for the same price and on the same terms. This agreement provided that nothing in it should affect the right of the vendor to claim from C. the amount payable under the original contract up to March, 1905, otherwise the latter was to be merged in the new contract. The mining company made default in their payments and, as provided in their contract, the vendors gave notice that the contract was at an end and, later, sold the property for $75,000. They then took action against C. for the amount unpaid on the original agreement and recovered judgment. After the final sale of the mine C. applied for and obtained from a judge an order declaring that V. & Co. were not entitled to enforce their judgment against him except for the costs. On appeal from the affirmance of this order by the Appellate Division,

Held, affirming the decision of the Appellate Division (32 Ont. L.R. 200) that by extinguishing the interest of the mining company in the land and then selling it V. & Co. had put it out of their power to place C. in the position he was entitled to occupy on making payment and had thus disabled themselves from enforcing their judgment.

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

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming a judge's order declaring that plaintiffs were no longer entitled to enforce their judgment against the defendant.

The facts are fully stated in the above head-note.

W. M. Douglas K.C., and *Lefroy K.C.* for the appellants.

Shepley K.C. and *H. S. White* for the respondent.

THE CHIEF JUSTICE concurred in the judgment dismissing the appeal with costs.

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

IDINGTON J.—The respondent bought from the appellant a mining property for the sum of $125,000 payable by instalments, paid $500 cash and gave his promissory note for $4,500 to complete the cash payment.

The appellant recovered judgment against him on said promissory note and that judgment was paid by him some time before February, 1906.

Meantime he had entered into possession of the property and assigned his purchase to the Standard Mining Company.

Thereupon, on 10th March, 1905, an agreement was entered into between respondent of the first part, the said mining company of the second part, and appellant of the third part.

Therein the foregoing facts, save as to payment of

(1) 32 Ont. L.R. 200.

said judgment, were recited, and the further facts that the mining company had agreed to assume the payment of said purchase money and all other obligations imposed by the said contract upon the purchaser thereunder and that the parties desired in some respect to modify the terms of said agreement and to define their rights by a more formal document.

Then followed the last three recitals which may help to interpret the clauses of said document now in question and are as follows:—

And whereas the vendors also claim that the party of the third part is personally liable for the sum of twenty-four thousand dollars, a portion of the purchase money, falling due on the 23rd day of June, 1904, and is also liable for a portion of the instalment to fall due on the 23rd June, 1905.

And whereas the party of the third part disputes all personal liability therefor.

And whereas the parties hereto desire in the making of this agreement to reserve all the rights and liabilities both of the vendors and of the party of the third part with respect to the twenty-four thousand dollars which fell due on the 23rd June, 1904, and of the said payment accruing due on the 23rd of June, 1905.

I will refer presently to the operative parts of said agreement thus introduced.

The appellant, on the 27th of June, 1906, commenced an action against respondent to recover the sum of $33,000, being the instalment of the 23rd of June, 1904, and part of that of the 23rd of June, 1905, which are referred to in these recitals I have quoted.

In that action the appellant recovered judgment for $33,556.20, and therefrom respondent appealed unsuccessfully to the Divisional Court and the Court of Appeal for Ontario, and finally to this court.

These decisions(1) are respectively reported in 15 Ont. L.R. 280; 16 Ont. L.R. 372, and 41 Can. S.C.R. 607.

(1) *Vivian & Co.* v. *Clergue.*

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It was contended therein amongst other things, that the property having passed from the appellant, the vendor, by virtue of a tripartite agreement, and it being no longer possible for it to give to the respondent, the vendee, title thereto, the right to recover from the vendee was gone.

This court as well as those through which the case travelled here held that, the respondent, notwithstanding that and other contentions set up, was liable.

It is pressed upon us by Mr. Douglas that the right so maintained cannot now be disturbed by what has since transpired.

The appellant issued execution upon said judgment. The Standard Mining Company failed to pay purchase money as provided by the tripartite agreement above referred to; the appellant proceeded to declare under power therein the agreement null and to re-sell the property for $75,000, and, therefore, the respondent moved to set aside the said execution and obtained the order so asked for saving as to costs; which has been upheld by the Appellate Division of the Supreme Court of Ontario.

It appears to me that the correctness of such holding must turn upon the interpretation to be given the agreement of 10th March, 1905.

That agreement expressly provided for the sale by appellant to the mining company with the usual provisions one would expect to find in such a contract of sale and purchase, plus a few special provisions designed to preserve for appellant the liability of respondent for the parts of the original purchase money in respect of which the judgment has been recovered, which is now in question, and at the same time pro-

vide for its discharge out of the first payments to be made by the mining company.

Clause nine substituted the mining company for the respondent in the original agreement, and that was to be deemed merged in this agreement subject, however, to the provisions next contained.

That is followed by clause ten, reading thus:—

10. It is expressly agreed and understood that this agreement, and anything that may be done hereunder shall not affect or prejudice the claim of the vendors against the party of the third part in respect of the sum of $24,000 which fell due on the 23rd June, 1904; or the payment accruing due on the 23rd June, 1905, or for interest upon the unpaid purchase money up to the date of the said assignment hereinbefore in part recited, nor shall it affect or prejudice the rights of the said party of the third part with respect thereto, but until the purchaser shall pay the first two instalments of $24,000 each, with interest as aforesaid, the rights of the vendors and the party of the third part shall remain as they now are in respect of said instalments and interest.

Clause 12 provided that all moneys paid under this agreement shall in the first place be applied towards the discharge of said judgment (being that on the $4,500 note) and then towards the discharge of the claim of the vendors against the respondent in respect of which their rights have been thereinbefore reserved, being manifestly the claims referred to in clause 10, which are now in question.

The judgment first referred to as already stated has been paid and hence out of the way.

Nothing seems to have been paid on the purchase by the mining company.

Clause 8 of the agreement provided that upon such default as thereby occurred the appellant might forfeit the agreement by giving a month's notice; which on the default that took place was duly given. Then it

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was declared that upon such forfeiture this agreement shall be null and void.

Is there any answer to that realized result of what was contemplated ? If null and void thereby, is not the respondent in the same position as if the agreement never existed ? Is the relation between the parties hereto not left as it was originally of vendor and vendee with a judgment in favour of the former against the latter ? Is not the contemplated merger of the original agreement in this later one at an end ? Was it not a conditional merger ?

The suggestion is certainly a legal curiosity, but how otherwise can we give effect to the purpose of the parties ?

Can we say the agreement stands despite this declaration of its nullity ?

It was quite competent for the parties to have provided instead thereof that the appellant should be at liberty to resell the property. In that case the liability of the respondent as determined in the litigation to which I have adverted might have to be considered as finally determined and the result, it might in such event, have been argued, was that as he had assented to this sale to the mining company, he could not complain that his right as vendee had been infringed and he, therefore, entitled to be relieved as he claims herein.

But if this agreement and all therein is to be treated as null and void, surely the parties are restored to their original position as vendor and vendee, the original contract of sale and purchase and the judgment now in question standing for part of the purchase money. In that case it seems clear the relief

given below is what respondent as vendee is entitled to.

If the re-sale had taken place by virtue of a provision in the later agreement, some very interesting questions might still have arisen. Such as in that case was he to be held only a surety for the mining company, or in some such sort of position entitled to relief over against that company and thereby entitled to claim subrogation in some way I need not pursue.

My construction of the agreement as result of the foregoing analysis is that all it stood for is at an end and respondent entitled under the authorities to the relief he sought and got. I cannot see my way to holding the declaration of intended merger of such a character as to dominate all else in the agreement. It was not so argued.

The appeal should be dismissed with costs.

DUFF J.—What is the meaning of Clergue's being personally liable notwithstanding anything "done" under the agreement? It would be an extreme construction to hold that Clergue's obligation which would be a secondary obligation should persist notwithstanding the fact that the primary obligation had been destroyed. The clause was no doubt intended to deprive Clergue of some of the defences ordinarily open to a surety in consequence of an agreement between a creditor and the primary debtor — giving time to the debtor for example. I think the construction proposed by which Clergue's obligation is held to continue after the primary obligation has been wiped out must be rejected.

It is necessary to note very distinctly that no ques-

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DUFF J.

tion is raised as to the validity and effectiveness of the so called forfeiture. The appellant is insisting upon the forfeiture and the vendee is not disputing it. The result of the appellant's contention if successful would be that Clergue would be entitled to enforce his indemnity against the assignees and in that way the assignees would be compelled to pay an unpaid instalment after the contract had been put an end to. That would be a fraud on this contract.

ANGLIN J.—Upon the assignment to the Standard Mining Company of his contract to purchase from the plaintiffs the defendant became entitled to be indemnified by his assignees against liability under it. The right of indemnification carried with it a right, in the event of his being called upon to pay the plaintiffs, to a lien for the sum so paid on the Standard Mining Company's interest in the land, or to subrogation *pro tanto* to the rights of the plaintiffs under their vendors' lien. *Vivian & Co.* v. *Clergue*(1). By a subsequent agreement, to which the plaintiffs, the defendant, and the Standard Mining Company were parties, the liability of the defendant to pay two instalments of purchase money due under his original agreement, and now in controversy, was expressly preserved, as were also his rights with respect thereto, and it was declared that the rights of the vendors and of the defendant should

> remain as they now are in respect of said instalments and interest.

Amongst such rights were those incident to the position of quasi-surety to the plaintiffs, which the de-

(1) 16 Ont. L.R. 372, at p. 379.

fendant held, for payment to them by the Standard Mining Company of these instalments of the purchase money.

Judgment was recovered against him in the present action for the two instalments in question, which the Standard Mining Company had failed to pay. Before realizing on this judgment, the plaintiffs, exercising a power conferred by their agreement with the Standard Mining Company, annulled their contract for sale to that company by notice to them. Without any notice to the defendant they subsequently sold the land thus forfeited to another purchaser for $75,000 — $50,000 less than the sale price to the Standard Mining Company. The defendant claims that he was thereby discharged from his liability to the plaintiffs and that execution on the judgment against him, still unsatisfied, should be stayed except as to costs; and his right to that relief has been upheld in the provincial courts.

By extinguishing the interest of the Standard Mining Company in the land and re-selling it, the plaintiffs have put it out of their power to place the defendant in the position he was entitled to occupy upon making payment in fulfilment of his obligation as surety. Having done so they, in my opinion, disabled themselves from enforcing their judgment. Indeed, by annulling their contract with the Standard Mining Company they would seem to have extinguished the defendant's liability for any moneys not already paid, although judgment had been recovered for them. The liability of the principal debtor, the Standard Mining Company, no longer existed and with it the liability of the surety also ceased. An unsatisfied judg-

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ment against the principal debtors for purchase money could not have been enforced after the vendors took back the land. *Cameron* v. *Bradbury*(1); *Gibbons* v. *Cozens*(2); *McPherson* v. *U.S. Fidelity Co.*(3). The surety's position must be at least equally favourable. The former judgment in this action affords no support to the plaintiffs' contention in this appeal. No question such as that now before us was, or could have been, then presented for consideration.

The appeal fails and should be dismissed with costs.

BRODEUR J.—By their agreement of the 10th of March, 1905, the appellants sold to the Standard Mining Company of Algoma certain property with the condition that upon default of payment of the purchase price the appellants could rescind the agreement which would then become null and void.

The appellants having exercised that power of rescission, the contract was put an end to and they could not afterwards claim the payment of the purchase money from the purchasers.

The same property had been previously sold to the respondent, but he failed to pay the instalment that became due in June, 1904, and it was agreed then between the appellants and the respondent that the property would be re-sold for the same price to the Standard Mining Company and the agreement of the 10th March, 1905, was then passed for that purpose. It was stipulated that the

> agreement and anything that may be done hereunder shall not affect or prejudice the claim of the vendors against the party of the third

(1) 9 Gr. 67.
(2) 29 O.R. 356.
(3) 26 Ont. W.R. 620.

part (Clergue) in respect of the sum of $24,000 which fell due on the 23rd June, 1904, * * * nor shall it affect or prejudice the rights of the said party of the third part with respect thereto, but until the purchasers (Standard Mining Company) shall pay the first two instalments of $24,000, etc.

We have to construe the agreement and specially the clause just quoted.

There is no doubt that the respondent was bound to pay the sum of $24,000. He tried to dispute that liability, and this court decided against him(1). But the appellants having thought advisable to rescind the contract because the payments were not properly made, can they still claim from the respondent the payment of those $24,000 ?

The cancellation of the contract has put an end to the right of the vendors to claim the payment of the purchase money. But they say that the obligation of Clergue did not cover any part of the purchase money. I cannot accede to such a proposition. I consider that Clergue was surety for a part of the purchase price, and as the vendors cannot, after the rescission of the contract of sale, claim any part of the purchase money from their purchasers, they could not proceed also against the surety.

We must not forget also that it was formally stipulated in the agreement that the whole agreement would become null and void in case the vendors would exercise their right to rescind. The nullity which is stipulated would affect all the obligations mentioned in it, not only the obligations of the purchasers, but also the obligations of Clergue.

(1) *Clergue* v. *Vivian & Co.*, 41 Can. S.C.R. 607.

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Brodeur J.

The judgment *a quo* which declared that the appellants could not recover from the respondent is well founded and should be confirmed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *A. H. F. Lefroy.*

Solicitors for the respondent: *Macdonald, Shepley, Donald & Mason.*

E. S. COFFIN (PLAINTIFF).....APPELLANT; 1915

AND *June 15. *June 24.

JAMES R. GILLIES (DEFENDANT)....RESPONDENT.

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

Contract—Construction—Sale of foxes—Mixed breeds.

By contract in writing G. agreed to sell to C., who agreed to buy, two black foxes "to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911."

Held (Davies and Duff JJ. dissenting), that the proper construction of the contract was that the two foxes to be sold must have both Dalton and Oulton parentage and G. could not be compelled to deliver a pair bred from the Dalton strain only.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the plaintiff.

This action was brought by the plaintiff for damages for breach of an agreement to deliver two silver-black fox whelps of the litter of 1913, the offspring of Dalton and Oulton stock owned by the defendant. The agreement was reduced to writing, and the material parts are as follows: "The vendor (defendant) agrees to sell to the vendee (plaintiff), and the vendee agrees to purchase from the vendor (2) black foxes—silver tips—male and female whelps in 1913 on the ranch of the vendor in the Township of Fitzroy, County of Carleton, in Ontario, near the Town of Arnprior—the

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said foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000, and on the terms and conditions hereinafter contained." The agreement also further provided that 10% of the purchase price was to be paid on the execution of the agreement, and the balance on or before the 10th September, 1913, delivery f.o.b. Arnprior, title and ownership to remain in the vendor until the whole of the purchase money is fully paid. Clause 4 was as follows: "In case the vendor shall be unable by reason of any unforeseen occurrence or accident to deliver the said foxes at the time hereinbefore mentioned, deposit of 10% of the purchase money shall be returned forthwith upon said occurrence or accident rendering the vendor unable to make delivery as aforesaid to the vendee, and this agreement shall *ipso facto* be cancelled and rendered null and void."

At the time of entering into this agreement the vendor had a pair of black foxes, silver tips, purchased from Charles Dalton in 1911 which he had interbred, and which had a litter of four or five pups, and also a pair purchased in the same year from W. R. Oulton, which he had interbred and which had a litter at this time of six, five males and one female. The defendant says that he selected the female of the Oulton and one of the Dalton males to answer the plaintiff's contract. All the Oulton litter died, but there was a pair, male and female, of the Dalton litter which the plaintiff was willing to take in performance of the contract. The defendant refused to deliver this pair under the contract, at first placing his refusal upon the ground that the plaintiff had only a third option, and that one

J. W. Jones had the first right to a pair from the litters. The contract is silent as to options. The defendant finally took the position by letter of 9th July, 1913, probably after having had legal advice, a position which has been maintained ever since, that the agreement intended that the pair should be selected one from each litter, and as the Oulton litter had all died he was relieved from his contract under clause 4 thereof. The plaintiff on the other hand contended that a pair from one litter or from each litter would satisfy the contract, and that he was willing to take the Dalton pair, that the defendant had broken his contract in refusing to deliver this pair, that the intention in inserting the two strains was for the sake of protecting himself from being supplied with inferior stock, Dalton and Oulton being well-known on Prince Edward Island as pioneers in the fox industry, and had practised selective breeding to improve the type for a longer period than any other breeder, and their breeds of foxes were much sought after and had the highest value.

The case came on for trial before Latchford, J., without a jury at Toronto on the 26th day of June, 1914, when he gave judgment for the plaintiff for $1,750 with costs. The defendant thereupon appealed to the Appellate Division of the Supreme Court of Ontario (Mulock, C.J., Clute, Riddell, and Sutherland, JJ.), and judgment was given on the appeal on the 28th of October, 1914, unanimously allowing it with costs and dismissing the action with costs.

From the judgment the plaintiff appealed to the Supreme Court of Canada.

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D. C. Ross for the appellant.

W. M. Douglas K.C., and *J. E. Thompson* for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal.

DAVIES J. (dissenting).—This action is brought by the plaintiff appellant for damages for breach of an agreement to deliver two silver black whelps of the litter of 1913, the offspring of Dalton and Oulton stock owned by the defendant. The agreement was reduced to writing and the material parts are as follows:—

> The vendor (defendant) agrees to sell to the vendee (plaintiff) and the vendee agrees to purchase from the vendor (2) black foxes—silver tips—male and female whelped in 1913 on the ranch of the vendor in the Township of Fitzroy, County of Carleton, Province aforesaid, near the Town of Arnprior—the said foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000, and on the terms and conditions hereinafter contained.

Clause 4 is as follows:—

> In case the vendor shall be unable to deliver the said foxes at the time hereinbefore mentioned, deposit of 10% of the purchase money shall be returned forthwith upon said occurrence or accident rendering the vendor unable to make delivery as aforesaid to the vendee, and this agreement shall *ipso facto* be cancelled and rendered null and void.

At the time of entering into this agreement the vendor had a pair of black foxes, silver tips, purchased from Charles Dalton in 1911, which he had interbred and which had a litter of four or five pups, and also a pair purchased in the same year from W. R. Oulton, which he had interbred and which had a litter at this time of six, five males and one female. The defendant

says that he selected the female of the Oulton and one of the Dalton males to answer the plaintiff's contract. Unfortunately all the Oulton litter died, but there was a pair, male and female, of the Dalton litter which the plaintiff was willing to take in performance of the contract.

The defendant refused to deliver this pair under the contract, at first placing his refusal upon the ground that the plaintiff had only a third option, and that one J. W. Jones had the first right to a pair from the litters. This was clearly an untenable ground, as the contract is silent as to options. The defendant finally took the position by letter of 9th July, 1913, that the agreement intended that the pair should be selected one from each litter, and as the Oulton litter had all died he was relieved from his contract under clause 4 thereof.

The plaintiff on the other hand contended that a pair from one litter as well as one from each litter would satisfy the contract, and that he was willing to take the Dalton pair, that the defendant had broken his contract in refusing to deliver this pair, that the intention in inserting the two strains was for the sake of protecting himself from being supplied with inferior stock, Dalton and Oulton being well known on Prince Edward Island as pioneers in the fox industry, and as breeders who had practised selective breeding to improve the type for a longer period than most of the other breeders, and whose breeds of foxes were much sought after and had the highest value.

The case came on for trial before Latchford J., without a jury, at Toronto, on the 26th day of June, 1914, when he gave judgment for the plaintiff for $1,750 with costs.

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On appeal this judgment was reversed by the second Appellate Division of Ontario and the action dismissed on the ground that the contract meant delivery of a pair of foxes

> which were the offspring of the two pairs purchased from Dalton and Oulton, that is one from each pair, and that to otherwise interpret the language of the contract "or" must be substituted for the word "and."

I cannot agree with this conclusion or reasoning. I agree that the language used is not as clear as might be wished, but I do not think the substitution of the word "or" for "and" would remove any ambiguity which may at present exist. The pups were to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton. Now if "or" was inserted instead of "and" it would be argued that these foxes must be from either one or other of the Dalton or Oulton purchases and not from each of them as is now contended.

I do not doubt what the real intention of the parties was. I think, though it might have been made clearer, it is tolerably clear as the contract reads. The dialectician and the lawyer may dispute over the meaning, but the men in the business of fox raising, or the businessman on the street would, I think, have no doubt whatever what the intention was. As the trial judge says:—

> Any pair of cubs—a male and a female—from either one or both of the litters would have satisfied the language of the agreement.

I think the conduct of the parties afterwards shews what the true meaning of the ambiguous language was understood by the parties to be. The contract does not say that the pair is to be selected by the vendor from each strain, Daltons and Oultons. The position

taken at first by the defendant respondent in his correspondence was not that the plaintiff's contract had become null and void because the Oulton litter had all died, but that the purchaser was not entitled to the surviving pair of Dalton pups or cubs because he had only a third option, Professor Jones having a prior one, and the female selected for the plaintiff had died.

It was only after this defence had failed that he set up this other construction of the agreement now relied on. Such later construction never seemed to have entered his mind when he first was called on to carry out his contract.

My view is that the contract could have been satisfied in any one of three ways: (1) A pair from the cross-breeding of the strains, Dalton and Oulton; this, however, was impossible because they were interbred; (2) a pair selected from either litter; (3) a pair selected one from each litter.

If conditions existed which enabled the vendor to offer the purchaser a pair from either one litter or the other, I venture to say neither one of the parties would have dreamt that in doing so he was not fulfilling his contract.

Nothing could better exemplify what I venture to call the somewhat narrow construction placed on the contract than the paragraph in Mr. Justice Riddell's judgment where he says:—

> I think that the contract contemplated the delivery of young foxes the offspring in 1913 of all the four certain foxes bought in 1911 from the persons named, and not simply of some of these four foxes, and that the delivery of two pups which did not have between them the blood of all these four foxes would not be enough.

I think it would be difficult to prove the possibility of the offspring of the two pairs having between them

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the blood of all these four foxes unless by a cross-breeding of the strains which was not done. They had been interbred and their offsprings were alive and did not have between them the blood of all these four certain foxes, as their owner well knew, which is conclusive, if Mr. Justice Riddell is right, that the parties did not intend what is now said to be the meaning of the language used.

This language will be interpreted in the light of the facts which existed and were equally well known to both parties when the contract was entered into and if they used language somewhat ambiguous, the subsequent conduct of the parties can be used as explanatory of the real meaning of the ambiguous words.

I would allow the appeal and restore the judgment of the trial judge.

IDINGTON J.—The determining question raised herein must turn upon and be answered by the construction given that which forms the material part of a contract between the parties hereto and is as follows:—

> Witnesseth that the vendor agrees to sell to the vendee and the vendee agrees to purchase from the vendor two (2) black foxes—silver tips—male and female, whelped in 1913 on the ranch of the vendor in the Township of Fitzroy in the County of Carleton and Province aforesaid, near the said Town of Arnprior, the said young foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair, selected by the vendor at or for the price or sum of twelve thousand dollars, and on the terms and conditions hereinafter contained, that is to say:—

It appears to me that having regard to what the parties were concerned about in framing the contract and the plain ordinary meaning of the language used that

the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton,

did not exist when the time came for fulfilment of the contract. It is not denied that the offspring of the Oulton litter died. It is neither alleged nor proven that the offspring of the Dalton litter could be described truthfully as in any way issue of the Oulton purchase specified.

The contract provided for the event of the deaths which took place and thereby relieved the vendor.

The Appellate Division of the Supreme Court of Ontario has correctly construed the contract and this appeal should be dismissed with costs.

DUFF J. (dissenting).—This appeal raises the question of the construction of the agreement upon which the action is brought. It is set out in the third paragraph of the statement of claim.

3. The said agreement is in the words and figures following:—

This agreement made (in duplicate) the fifteenth day of May, A.D. 1913.

Between: James R. Gillies, of the Town of Arnprior, in the County of Renfrew, and Province of Ontario, gentleman (hereinafter called the vendor), of the first part,

—and—

E. S. Coffin, of the City of Charlottetown, in the County of Queen's, and Province of Prince Edward Island, grocer (hereinafter called the vendee), of the second part.

Witnesseth that the vendor agrees to sell to the vendee and the vendee agrees to purchase from the vendor two (2) black foxes—silver tips—male and female, whelped in 1913 on the ranch of the vendor in the Township of Fitzroy in the County of Carleton, and Province aforesaid, near the said Town of Arnprior, the said young foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair, selected by the vendor at or for the price or sum of twelve thousand dollars, and on the terms and conditions hereinafter contained, that is to say:—

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1. The vendee shall pay to the vendor for the said foxes the sum of twelve thousand dollars, payable as follows, namely: ten per cent. of the said purchase price, net at Arnprior aforesaid, upon the execution of these presents, and the remainder of the said purchase price, net at Arnprior aforesaid, on or before the tenth day of September next, 1913.

2. The vendor shall ship to the vendee and the vendee shall accept shipment of the said foxes not later than the tenth day of September next, 1913—f.o.b. Arnprior.

3. The title to and the ownership in the said foxes shall remain in the vendor until the whole of the said purchase price is fully paid as aforesaid.

4. In case the vendor shall be unable, by reason of any unforeseen occurrence or accident, to deliver the said foxes by the time hereinbefore mentioned, the said deposit of ten per cent. of the said purchase money shall be returned forthwith upon such occurrence or accident rendering the vendor unable to make delivery as aforesaid, to the vendee, and this agreement shall *ipso facto* be cancelled and rendered null and void.

5. In case the vendee shall make default in payment of the said purchase price as aforesaid, the vendor shall be entitled to retain the said deposit of ten per cent. of said purchase money, as liquidated damages and not by way of penalty, and shall be accepted by the vendor in full of all claims for or on account of such default on the part of the vendee.

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of (Sgd.) B. J. GILLIES. — (Sgd.) R. J. GILLIES.

Witness to signature of E. S. Coffin, (Sgd.) RITA MCKINNON. — (Sgd.) E. S. COFFIN.

At the time this agreement was entered into the fact was known to the purchaser as well as to the vendor that the vendor had two foxes purchased from Charles Dalton and two foxes purchased from W. R. Oulton and it is admitted that these are the foxes referred to as certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911. In fact at the time the agreement was signed the two Dalton foxes had been mated and the other

foxes had been mated, or rather the female of the Dalton pair was in pup by the Dalton male and the female of the other was in pup by the other male, and it is not disputed that the agreement contemplated selection and delivery of foxes from foxes comprised in these litters. Further the facts are stated in the judgment of Mr. Justice Latchford:—

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LATCHFORD J.:—Apart from the question of damages no issue of fact arises in this case.

On the 15th May, 1913, by an agreement in writing, the plaintiff agreed to purchase and the defendant to sell "two black foxes—silver tips—male and female, whelped in 1913, on the ranch of the vendor near the Town of Arnprior—the said young foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000."

Ten per cent. of the purchase money, or $1,200, was payable, and was paid, upon the execution of the agreement. Delivery was to be at Arnprior not later than the 10th September, 1913.

The agreement provided that, should the vendor be unable, "by reason of any unforeseen occurrence or accident," to deliver the foxes, the deposit should be returned, and the agreement should thereupon be null and void.

It was known to the plaintiff that the defendant had at his fox ranch in this province at least four Prince Edward Island black foxes —one pair of Dalton ancestry and one pair of Oulton ancestry. The plaintiff does not appear to have known what other foxes the defendant had, as in his letter of the 7th May, written after the purchase had been made, though before it was embodied in the formal agreement, the plaintiff asks the defendant to "state breeding of parents and from whom purchased and when."

Each pair produced cubs in the summer of 1913. All the Oulton litter died. Several, if not all, of the Dalton litter survived. The plaintiff was willing to accept a pair of the Dalton foxes, but the defendant refused to supply them, contending, as he now contends in this action, that, upon the true interpretation of the agreement, one of the foxes to be delivered was to be of the Dalton strain, and the other of the Oulton strain, and that as, by an "unforeseen occurrence or accident"—the loss of the Oulton litter—he was unable to deliver an Oulton cub, the contract with the plaintiff, upon the return (which was made) of the $1,200, was at an end.

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The defendant's original contention, made as early as the 24th May, or within ten days of the date of the agreement, was, that the plaintiff had but the "third option" on the litters of 1913—"the Dalton, also the Oulton" stock—and that, as the female of the pair the plaintiff was to receive—inferentially the third pair—had died, the agreement could not be carried out. That the inference mentioned is correct is shewn by a letter in evidence written by the defendant a few days later, on the 28th May, to J. Walter Jones, of Charlottetown, offering to supply a pair, a male and a female, from the Dalton little of six puppies. It seems clear that, as the Oulton litter had perished, the defendant at first intended to supply the plaintiff with a pair of cubs from the Dalton litter. This litter must, on the defendant's statement, have contained at least two females—the one mentioned as having died, and the one the defendant was willing to sell to Mr. Jones.

Jones was—unknown to the defendant—interested in the purchase which the plaintiff had made, and informed the plaintiff of the offer of the Dalton pair made to him by the defendant. The plaintiff then claimed to be entitled under the agreement to a pair of the Dalton litter; and the defendant, after assuming a manifestly untenable position as to the order in which the agreement was to be fulfilled—after two other pairs had been set apart—ultimately, on the 9th July, in a letter to the plaintiff, set up the construction on which he now relies.

There are several conceivable constructions of the agreement treating it as a matter of verbal analysis simply. First, that "the said young foxes" means each of "the said young foxes" and that each of these foxes is to be the "offspring" of all of the four foxes purchased as mentioned. Admittedly this construction is inadmissible because both parties knew that on such a construction the agreement would be impossible to perform.

Secondly, that the description, "offspring of certain foxes purchased, etc.," applies to the two foxes sold as a group only; and that the group is to have the character of being the offspring of all the foxes "purchased, etc." The only way in which a description could take effect as applied to a group as such (in the circumstances in which the parties were con-

tracting) was that the two foxes together should combine the strains of all four.

Thirdly, that the description "the offspring, etc.," is applicable to each of the foxes sold but that the words of the description are to be read as "offspring of certain foxes purchased by the vendor from Charles Dalton and of certain foxes purchased by the vendor from W. R. Oulton"; so that each is to satisfy the condition of combining the character of being Dalton offspring with the character of being Oulton offspring.

Fourthly, that the description "the offspring, etc.," applies to each of the said foxes and that the description is satisfied if each one of them belongs to the category described by "offspring of certain foxes, etc.," and that this category is simply a class which is made up of all the foxes which are the offspring of the four foxes mentioned mated in the way in which they had been mated, whatever that might be at the time the agreement was entered into.

It is admitted that the third of these alternative constructions must be rejected for the simple reason that it was known to both parties that there had been no cross-mating. I think that on the facts found by Latchford J., which were not impugned before us, the second construction must be rejected. It is clear enough from the findings of the learned judge that the respondent was quite ready to insist on the fourth construction as the proper construction if he had been in the position to carry out the agreement under that construction. Had it not been for the conduct of the respondent, I am not sure that I should have been able to arrive at the conclusion which of these was the better construction. It may, however, be said that both

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parties admit that the fourth construction imposes the minimum of what it was intended that the appellant should be entitled to. If the appellant had been suing resting upon the third construction I think it would have been a complete answer to say, you have not stipulated for that, you have used language which is consistent with the intention to create the less exacting obligation and, therefore, you must fail in your contention unless you can shew some surrounding circumstances controlling the construction of the language. It seems to me perfectly clear that it could not be contended that there is any such absurdity in the fourth construction as to lead us to reject it. It is not shewn that the price paid was any higher than the price that should have been paid for a pair of Daltons.

If the purchaser intended to mate them with the other stock a pair of Daltons might for all the evidence shews to the contrary have been quite satisfactory; and it appears that two from the Dalton strain were in fact allotted to and accepted by a purchaser. There is nothing in the appellant's letters or conduct inconsistent with this construction.

It is possible, of course, for a contract to be so uncertain in its terms as to be incapable of enforcement; as to be indeed no contract; *Ryan* v. *Thomas*(1) is an example. But the parties undoubtedly intended to enter into an enforceable contract and I think that on the facts found by Latchford J. the right construction is that indicated above. *Bank of New Zealand* v. *Simpson*(2).

I may add that the discussion touching the reading

(1) 55 Sol. J. 364.

(2) [1900] A.C. 182.

of "and" as "or" of which we had a good deal on the argument, seems to miss the mark.

ANGLIN J.—The description of the pair of foxes sold in my opinion could be satisfied either by two foxes each having one parent of the Dalton strain and the other of the Oulton strain, or by two foxes one having parents both of the Dalton strain and the other parents both of the Oulton strain. But it could not be satisfied by the delivery of two Dalton foxes without any Oulton blood in either. Counsel for the plaintiff stated on his behalf at the opening of the trial that cross-breeding of the defendant's foxes of the Dalton strain with his foxes of the Oulton strain had not been contemplated by the parties. No doubt it was because this admission was made that evidence was not given to shew that the defendant's pair of Dalton foxes had already been bred together and that his pair of Oulton foxes had likewise been so bred, as the facts were, and that these facts were known to the purchaser. At all events, it would seem to follow from the admission made by counsel that the construction put upon the contract by the Appellate Division was the only one of which it was, under the circumstances, susceptible.

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *DuVernet, Raymond, Ross & Ardagh.*

Solicitors for the respondent: *Douglas & Clipsham.*

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*May 6.
* May 18.

PAUL KOOP (PLAINTIFF).....APPELLANT;

AND

MABEL SMITH (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Bill of sale—Transfer between near relatives—Preferential assignment —Suspicious circumstances—Corroborative evidence—Bona fides —Practice.

Where a bill of sale made between near relatives is impeached as being in fraud of creditors and the circumstances attending its execution are such as to arouse suspicion the court may, as a matter of prudence, exact corroborative evidence in support of the reality of the consideration and the *bona fides* of the transaction.
Judgment appealed from (7 West. W.R. 416) reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Hunter C.J., at the trial, and dismissing the plaintiff's action with costs.

The action was brought to set aside a bill of sale executed in favour of the defendant by her brother, at a time when the latter was financially embarrassed, and to have the bill of sale declared void as a preferential assignment in fraud of the rights of the other creditors of the assignor.

The circumstances of the case which are material to the issues raised on the present appeal are stated in the judgments now reported.

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

(1) 7 West. W.R. 416; 20 D.L.R. 440.

E. Lafleur K.C. for the appellant.

J. F. Orde K.C. for the respondent.

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DAVIES J.—I think this appeal should be allowed and the judgment of the trial judge restored. He thought the circumstances under which the bill of sale was executed suspicious and declined to accept the uncorroborated testimony of the plaintiff's brother, who made the assignment to his sister now being impeached.

The Chief Justice of the Court of Appeal seems to have thought that although the trial judge did not accept the evidence of the defendant, Smith, still the burden of proof lay upon the plaintiff and that he had not discharged it.

The learned trial judge on the contrary found that the circumstances were so suspicious, connected with and surrounding the impeached bill of sale, as to throw the burden of proof of its *bona fides* upon the grantee, the plaintiff's sister. I agree with his findings in that regard. I think the rule laid down by the courts of Ontario with regard to assignments made between near relations and impeached by the creditors of the assignor as fraudulent is a salutory one, namely, that where it is accessible some corroborative evidence of the *bona fides* of the transaction should be given. No attempt was made by the defendant to act upon that rule in this case. Smith's evidence was not accepted and the trial judge pointed out many alleged facts which were accessible and could have been proved, if true, as corroborative evidence but were not. Under all the circumstances I think the learned trial

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judge was right and that the appeal should be allowed with costs and his judgment restored.

IDINGTON J.—This appeal presents a rather unsatisfactory case. The Court of Appeal in reversing the trial judgment proceeds upon the ground that the bill of sale attacked was not shewn to be void as against creditors on the ground of being preferential to the knowledge of the appellant. In that I quite agree if regard is had to the authorities relied upon by the majority of the Court of Appeal.

But the learned trial judge seems to have discredited the judgment debtor who had made the assignment and was the only witness called to support it.

I cannot say as matter of law that he erred in so finding. These cases of alleged fraudulent assignment must generally depend largely upon the view of the facts taken by the trial judge. It is quite competent for him, if impressed with the veracity of the assignor, to accept and act upon his unsupported statement. The transaction and established surrounding circumstances might be such as to justify his doing so. Or, on the other hand, they might be such as to render his doing so questionable.

In this case he has found the surrounding circumstances and the statements such as to call for corroboration, and that view is not attempted to be disputed and hence has not yet been reversed. The reversal of the judgment of the learned trial judge proceeding upon the question of a preferential assignment does not touch the want of *bona fides* in the transaction upon which he proceeded.

The pleadings, I suspect are partly responsible for this curious result.

The pleader improperly blends, in almost every sentence that is essential to his pleadings, the two distinct grounds of complaint. Casually looked at one might say it was intended only to attack the transaction on the ground of the assignment being preferential.

The case I imagine must have been argued upon that assumption. There does not appear in the case any notice of appeal to the Court of Appeal or reasons for or against same to enlighten us as to how all this happened.

The appeal must be allowed.

DUFF J.—I think this appeal should be allowed and the judgment of the learned Chief Justice, who tried the action, restored. The majority of the Court of Appeal appear, if I may say so with respect, to have fallen into the error of treating the relationship of the parties to the impeached transaction as possessing no very material significance. The learned trial judge, on the other hand, treated the relationship as decisive in this sense that it determined the point of view from which the evidence was to be considered and the all important question of the onus of proof. The learned trial judge indeed appears to have laid it down as a proposition of law that a transaction of this kind between two near relatives, carried out in circumstances in themselves sufficient to excite suspicion, can only be supported (in an action brought to impeach it by creditors) if the reality or the *bona fides* of it are established by evidence other than the testimony of the interested parties; and there is a series of authorities in the Ontario courts which has been supposed to decide that, and it may be that it is the settled law of Ontario to-day.

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I do not think the proposition put thus absolutely is part of the English law or of the law of British Columbia; but I think it is a maxim of prudence based upon experience that in such cases a tribunal of fact may properly act upon that when suspicion touching the reality or the *bona fides* of a transaction between near relatives arises from the circumstances in which the transaction took place then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and that, in such a case, the testimony of the parties must be scrutinized with care and suspicion; and it is very seldom that such evidence can safely be acted upon as in itself sufficient. In other words, I think the weight of the fact of relationship and the question of necessity of corroboration are primarily questions for the discretion of the trial judge subject, of course, to review; and that any trial judge will in such cases have regard to the course of common experience as indicated by the pronouncements and practice of very able and experienced judges such as Chief Justice Armour and Vice-Chancellor Mowat and will depart from the practice only in very exceptional circumstances.

I may add that I think it doubtful whether the Ontario decisions when properly read really do lay it down as a rule of law that the fact of relationship is sufficient in itself to shift the burden of establishing the burden of proof in the strict sense. It may be that the proper construction of these cases is that the burden of giving evidence and not the burden of the issue is shifted. (As to this distinction see the admirable chapter IX., in Professor Thayer's "Law of Evidence.") In my own view, as indicated above, even this would be putting the matter just a little too high;

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I think the true rule is that suspicious circumstances coupled with relationship make a case of *res ipsa loquitur* which the tribunal of fact may and will generally treat as a sufficient *primâ facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact. Having examined the evidence carefully I am satisfied that the learned trial judge was entitled to take the course he did take and not only that the evidence, as I read it in the record, casts the burden of explanation upon the respondent, but that the testimony given by her brother ought not in the circumstances to be accepted as establishing either the actual existence of the debt or of the *bona fides* of the transaction.

ANGLIN J.—Having regard to the circumstances of the impeached transaction, as deposed to by the transferror, who is the defendant's brother, and was her only witness — the relationship between the parties to it, the making of the transfer while the entry of judgment on the plaintiff's claim was deferred to enable the brother to make an arrangement to meet it, the nature of the property transferred, and the brother's admission that a power of attorney to the defendant would have served his alleged purpose of realizing on the property — the burden rested on the defendant of establishing the rectitude of her bill of sale. Whether this transaction was *bonâ fide* was eminently a question for the trial judge, and he has found that,

> the outstanding fact is that this story of this transfer is not supported *in any particular.*

It was, I think, clearly his view that no real debt from her brother to the defendant had been shewn to exist

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— that the purpose of the transfer was to protect the property covered by the bill of sale against his creditors, and that that purpose was sufficiently known to the defendant to involve her participation in it. After carefully considering the reasons given by the majority of the learned judges of the Court of Appeal and the argument presented on behalf of the respondent, I am, with respect, unable to find any ground on which the reversal of the judgment of the learned Chief Justice of British Columbia can be supported. The only evidence of the existence of a legal debt owing to the defendant by her brother was the testimony of the latter, which the learned Chief Justice declined to accept. It is difficult to conceive what was his motive for transferring to his sister his only exigible property, if it were not to stave off the plaintiff and his other creditors. Her knowledge of his financial embarrassment would seem to be a fair inference from all the circumstances. Although loath to reverse a considered judgment of the Court of Appeal of British Columbia on a question of fact, I think this is a case in which the opinion of an able and experienced trial judge, in whose conclusions two members of the appellate court have agreed, must prevail.

I would allow the appeal with costs in this court and the Court of Appeal and restore the judgment of the Chief Justice of British Columbia.

BRODEUR J.—The plaintiff's action was for a declaration that the sale of the horses made by T. J. Smith to his sister the defendant respondent, was null and void under the provisions of the "Fraudulent Preference and the Fraudulent Conveyances Acts" of British Columbia (R.S.B.C., ch. 93, secs. 2 and 4, and ch. 94, sec. 3).

The trial judge maintained the action on the ground that the conveyance was fraudulent The Court of Appeal, by a judgment of three to two, reversed the finding of the trial judge.

The debtor, T. J. Smith, was very largely indebted and had given a confession of judgment in favour of the plaintiff, Koop, on the 13th of February, 1912, for the sum of $63,000 and, on the 15th day of May following he sold the larger part of his assets to his sister.

He claimed, when under oath at the trial, that the consideration of that sale was the salary he owed to his sister. He said that she had been living with him for eight years and that he had always paid her a salary of $1,500 a year.

That evidence was not corroborated and was not accepted by the trial judge.

It would have been very easy for Smith to shew by his books or by his cheques that the alleged salary had been paid; but he did not do so. The sister could have given evidence to corroborate her brother; but she would not do so, claiming she was too nervous to appear in public. It is in evidence, however, that she had been able to attend horse shows and to ride horses.

The decision of the trial judge in these circumstances should not have been disturbed. I am of opinion that his judgment should be restored and that the appeal should be allowed with costs of this court and of the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Burns & Walkem.*

Solicitors for the respondent: *Russell, Macdonald & Hancox.*

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*May 27, 28.
*June 24.

THE GUARDIAN ASSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THE TOWN OF CHICOUTIMI (PLAINTIFF) ..... } RESPONDENT.

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

Fire insurance—General conflagration—Acts of municipal officials—Demolition of buildings—Statutory authority—R.S.Q., 1888, art. 4426—Indemnity—Subrogation — Tort — Transfer of rights to municipality—Liability of insurer.

Article 4426, R.S.Q., 1888, empowers town corporations, subject to indemnity to the owners, to cause the demolition of buildings in order to arrest the progress of fires; in the absence of a by-law to such effect power is given to the mayor to order the necessary demolition. In the Town of Chicoutimi, no such by-law having been enacted, the mayor gave orders for the demolition of a building for the purpose of arresting the progress of a general conflagration and, in carrying out his directions, an adjacent building was destroyed which was insured by respondents for $4,700. The municipality settled with the owner by paying her $5,500, as full indemnity for all damages sustained, and obtained a transfer of her rights under her policy of insurance. In an action on the policy so transferred:—

Held (Duff J. dissenting), that, as the destruction of the building insured was occasioned by an act justified by statutory authority and full indemnity had been paid, the municipality was entitled to subrogation in the rights of the owner and to maintain the action against the insurance company for reimbursement to the extent of the amount of the insurance upon the property.

Per Duff J. dissenting.—Although the destruction of the building insured was occasioned by an act justified at common law, the rights of the municipal corporation were determined by the principle laid down in *Cité de Québec* v. *Mahoney* (Q.R. 10 K.B.

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

378), and the claim for reimbursement to the extent of the amount for which the property was insured should not be maintained. *Quebec Fire Insurance Co.* v. *St. Louis* (7 Moo. P.C. 286) applied.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of Letellier J., in the Superior Court, District of Chicoutimi, by which the plaintiff's action was maintained with costs.

The circumstances of the case are sufficiently stated in the head-note and the issues raised on the present appeal are discussed in the judgments now reported.

Atwater K.C. for the appellants.

Belcourt K.C. for the respondent.

THE CHIEF JUSTICE.—I will state briefly the facts which I think are relevant and which are very simple. On the 24th June, 1912, a fire broke out on the Town of Chicoutimi which attained the portions of a general conflagration. In order to check the progress of this fire the mayor of the town ordered a house adjoining that of Mme. Claveau to be blown up by dynamite. The explosion involved the accidental demolition of Mme. Claveau's house as well.

The action of the mayor was authorized by article 4426 of the Revised Statutes of Quebec, 1888, which is as follows:—

To authorize certain persons to cause to be blown up, pulled down or demolished such buildings as may appear necessary in order to arrest the progress of any fire, saving all damages and indemnity payable by the corporation to the proprietors of such buildings, to an amount agreed upon between the parties, or, on contestation, to an amount settled by arbitrators.

In the absence of any by-law under this article, the mayor may, during the course of any fire, exercise this power by giving a special authorization.

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Mme. Claveau was insured in the appellant's office and the town having paid her the full amount of the damages which she sustained by the demolition of her house now seeks to recover from the appellant the amount of the insurance moneys.

Mme. Claveau would have had a right to collect these insurance moneys from the appellant and to recover from the town any further sum necessary to indemnify her for the destruction of her property. The town having paid the whole damage sustained by her is, I think, entitled to pursue the appellant for the value of the policies of the insurance.

In the case of *Simpson* v. *Thomson*(1), the Lord Chancellor in the course of his judgment referred to the

> well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.

I can see no difference in the present case except that the indemnity is provided by the statute instead of by agreement between the parties, and that does not appear to affect the principle.

In ordinary circumstances where A. has without any fault of his own damaged the property of B., A. is under no liability to indemnify B. for his loss. It is otherwise if A. was a wrongdoer, in which case he is liable to B. for the whole of the damage, and if B. recover any part of the loss from insurers, these latter are entitled to recover, in the name of B., the amount of their payment.

A statute may authorize the doing of an act which

(1) 3 App. Cas. 279, at p. 284.

without such authorization would be unlawful. In the present case the act of the council in blowing up a building to prevent the conflagration spreading might have been unlawful, but the statute legalized its action.

A statute may, however, as in the present case, impose upon an innocent party a liability to indemnify for damage caused by him.

Another instance of this may be found in the "Railway Act," R.S.C., 1906, ch. 37, sec. 298, as amended by 9 & 10 Edw. VII., ch. 50, sec. 10. By this section it is provided that:—

> Whenever damage is caused to any property by a fire started by any railway locomotive the company making use of such locomotive whether guilty of negligence or not shall be liable for such damage.
>
> Provided also that if there is any insurance existing on the property destroyed or damaged the total amount of the damages sustained by any claimant in respect of the destruction or damage of such property shall for the purposes of this sub-section be reduced by the amount accepted or recovered by or for the benefit of such claimant in respect of such insurance. No action shall lie against the company by reason of anything in any policy of insurance or by reason of payment of any moneys thereunder.

The legislature might have provided any indemnity it thought fit either, as in the case of the "Railway Act," expressly limiting it to the net loss after deduction of any insurance moneys or making it the total loss and so relieving the insurance company of its liability. In the absence of any express provision in article 4426 the question to be determined is the extent of the liability under the indemnity it provides. Is the indemnity to be interpreted by the principle which would apply in the case of a wrongdoer as being the total amount of the loss or only the net loss sustained by the owner after deducting from the total loss the amount for which the property was insured ?

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The Chief Justice.

The respondent had not only a right, but a duty to destroy the property and unless the statute had provided for indemnity there would have been none. There is no reason to suppose that the statute meant to relieve insurance companies of their contractual liabilities, I think it merely intended to secure a complete indemnity to property owners for whatever loss they might suffer.

The case is different from the liability of a wrongdoer. In *Yates* v. *Whyte*(1), in which the plaintiff was suing the defendants for damaging his ship by collision and the defendants sought to deduct from the amount of damages to be paid by them a sum of money paid to the plaintiff by his insurers in respect of such damage, Chief Justice Tindal said:—

> If the plaintiff cannot recover the wrongdoer pays nothing and takes all the benefit of a policy of insurance without paying the premium.

In construing the indemnity provided by article 4426 to be given by an innocent party I do not think the principle governing the liability of a wrongdoer is to be looked to. On the contrary, I think the indemnity should be confined to the narrowest limits which the words of the statute will permit. I think it should be taken to cover the actual loss sustained after deducting therefrom any insurance moneys paid in respect thereof; it should not be held to relieve an insurer of liability in respect of which he has been paid a premium.

Whatever may be the rights of the insurer, under the English law, to subrogation upon payment to the insured of the amount covered by the policy, in my

(1) 4 Bing. N.C. 272.

opinion the insurance company is not entitled in the Province of Quebec, after subrogation, to recover from a third party who may be liable to the insured, where there has been no fault on the part of the third party. The only right of subrogation is contained in article 2584, C.C., which says:—

> The insurer on paying the loss is entitled to a transfer of the rights of the insured against the person by whose fault the fire or loss was caused.

In the present case the acts of the corporation were authorized by statute. There was, therefore, no fault and the insurance company, if they had paid the insured, could not have recovered back the amount so paid, from the corporation.

The whole subject is fully and very learnedly discussed in La Revue Trimestrielle de Droit Civil, vol. 5, 1906, at page 37. See also Planiol, Droit Civil, vol. 2, Nos. 2142 and 2143 and Labbé's note to S.V. 80.1. 441.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant had insured one Madame Claveau in respect of a house, in the town of respondent, against loss by fire.

In a disastrous fire the mayor of respondent directed the use of some explosive to be applied to an adjacent house in order to arrest the progress of the fire. In so using the explosive not only was the house to which it was applied blown up, but that of Madame Claveau was also destroyed. The operation was successful in arresting the fire. The respondent town was threatened by Madame Claveau with a claim for damages and settled with her for an amount in excess of the amount of her insurance, upon the condition that

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she should assign to the respondent her claim under the policy of insurance issued to her, to indemnify her against loss, and she accordingly assigned to it, contemporaneously with and as part of the settlement, her claim (if any) against the appellant upon the policy in question. The respondent then sued appellant thereon. The learned trial judge allowed the claim and this the court of appeal has maintained. The appellant contends it is not liable because it alleges the respondent was primarily liable therefore.

Of course, if this can be maintained as a legal proposition the appellant should succeed. It is just there in my view that the case turns. For if the insurer can shew that the respondent was a wrongdoer and in law liable for the loss, then it could pay the insured and have recourse over against the respondent as a wrongdoer.

There may be, under other circumstances not present to my mind just now, possible cases where such right over or of subrogation might exist. But in this regard the appellant seemed to me in argument singularly weak.

I could not on the argument elicit from able counsel for the appellant any authority substantiating such a proposition as resting upon the facts herein would have entitled his client to an assignment of Madame Claveau's rights or otherwise in any way of subrogation as against the respondent.

Much reliance was placed upon the positions taken by respondent in the court below and in its dealings with the insured in way of acknowledgment of liability to her which seem to me entirely irrelevant.

It is not what respondent or its advisors imagined the law to have been, and her legal rights resting

thereon to have been, that should have any weight with us.

We must decide upon what we conceive to have been the actual legal rights of the parties and discard all such other imaginary legal positions as irrelevant.

If respondent was a wrongdoer, and in law liable therefor, the appellant is entitled to so answer any claim it (the respondent) may have imagined it either had or could acquire as against the appellant.

In that case, repeating what I have already said, the appellant in virtue of its right of recourse over could not be held liable herein.

The respondent, however, was not a wrongdoer, by reason of what was done, because the mayor, who ordered that to be done which was done, had the legal warrant embodied in the last part of the section 4426 of the Revised Statutes of Quebec of 1888, which is as follows:—

> In the absence of any by-law under this article, the mayor may, during the course of any fire, exercise this power by giving a special authorization.

To my mind it is exceedingly doubtful if, armed with such authority, he or those he represented, could be held liable for anything. That authority when acted upon might produce great hardship, but I fail to see how a man so acting could be said to have committed any legal wrong.

Of course, there is an argument for the construction of the section just quoted which might imply a right of indemnity, as in the case of a by-law authorizing such action as provided for in the section.

Assuming that argument good and liability resting upon the statute, what should be the measure of damages ?

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It does not appear to me that a person fully insured against loss could claim to have been damnified thereby. Her damages should be measured by the actual loss she sustained. And the insurance which she was entitled to have received must in such case have gone in reduction of the aggregate amount of such damages, and the assessment be made accordingly.

The course of events has been such that, instead of her suing therefor, she has compounded with the respondent upon the terms which entitled her to receive what she suffered, but upon the condition of subrogating conventionally respondent to her rights as against appellant. She might have accepted from respondent the part of the sum total in excess of the insurance and have sued the company. In that view I can see no reason for appellant's complaining.

The appellant primarily was liable and possibly has secured by what respondent's mayor did, great benefits beyond what appear herein.

Of this latter suggestion we have no evidence and it weighs naught with me save as an illustration of the legal position in which appellant stands.

The cases cited do not help. The principles upon which they proceed are either against appellant or irrelevant to the peculiar facts of this case.

The *Mahoney Case*(1) may be perfectly good law. I express no opinion thereon, but it does not touch what is involved herein.

The leading cases upon subrogation in relation to the rights of an insurer are lucidly explained in Bunyon on Insurance. I can find nothing in that or the

(1) Q.R. 10 K.B. 378.

cases so referred to justifying this appeal. Take the case of *Castellain* v. *Preston*(1), at page 388, where the exposition of the law by Brett L.J. is as follows:—

> Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished.

This covers the whole of the subject matters out of which the right of subrogation can arise to the insurer. There is nothing of a contractual nature in question therein.

And, as already shewn, there is nothing in the way of tort which in any way can found a right in the insured to be acquired by the insurer. Any right the insured had must rest in the right to be indemnified. She got that only to the extent of her actual loss, less what she had covered by the appellant's insurance which she chose to assign rather than follow.

In doing so she gave nothing appellant was entitled to claim.

I have given most careful consideration to the several articles of the Civil Code dealing with the subject of subrogation in general and to the subject of insurance in particular, to which we were referred in argument.

(1) 11 Q.B.D. 380.

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I cannot find therein anything essentially different from the principles expounded in said authorities as I read them.

Article 2584, C.C., seems that most directly applicable to this case. It is as follows:—

2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.

I do not think this case falls within that. Indeed, it seems possibly narrower than the rule of Brett L.J. above quoted. If there is any difference in their effect, preference should be given to the article.

It is exceedingly desirable there should be no difference in the laws governing such a subject.

If there had been legal negligence shewn in the doing that which was done, the result might have given rise to the application of the doctrine in that case, or legal principles outside that case.

I can find no negligence, and, indeed, though suggested, that ground was not much relied upon or pressed as it appeared to me.

The appeal should, therefore, be dismissed with costs.

DUFF J. (dissenting).—The respondent municipality does not dispute that it became, by reason of the act of its officials in causing the destruction of the house of Madame Claveau, bound to make reparation to her for the loss thereby suffered by her. The payment to Madame Claveau was made on that footing. That is the position taken by the respondent in its pleadings, in its factum filed in this court, and by counsel in the argument. This responsibility, according to the position taken by the respondent, rests upon

the principle of law upon which the Court of King's Bench proceeded in *Cité de Québec* v. *Mahoney*(1). The Court of King's Bench in this case has refused to apply that principle on the ground that the evidence shews the destruction of the property and progress of the fire to have been manifestly inevitable when the officials of the municipality took action; but the respondents have admitted their responsibility and the applicability of the common law principle on which the case of *Cité de Québec* v. *Mahoney*(1) proceeded, and do not support the decision below upon the ground taken up in the *considérants* of the judgment. The respondent, in its factum, says:—

> Was respondent bound in law to pay the loss caused by the demolition?
>
> The only similar case which we have been able to find is that of the *Cité de Québec* v. *Mahoney*(1).
>
> The majority of the Court of King's Bench, confirmed the judgment of the Superior Court by which the City of Quebec had been condemned to pay $400 for a demolition made under circumstances similar to those in the present case, on the ground that municipal corporations, representing the whole community, are bound to indemnify those who suffer loss by reason of the exercise of municipal authority, when such is done in the interest of the municipality. Whilst the Chief Justice in the King's Bench was dissenting he did so because there was not in his opinion sufficient evidence that the demolition had been ordered by the municipal authority, because the house so demolished had not been attacked by the fire and would not have been burnt as the fire had been put under control at the fifth house from the one so demolished, and because article 4426, Revised Statutes, Quebec, concerning demolitions, was not applicable to the City of Quebec, the latter being provided with a special charter.
>
> The Honourable Mr. Justice Letellier, who gave the judgment in the present case, considered himself bound by the decision above quoted *and adopted the reasoning thereof.*
>
> In England and in the United States the right to demolish under similar circumstances and the right to indemnity have been sanctioned repeatedly and the jurisprudence in these countries recog-

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nizes the right of a proprietor of a building demolished for the purpose of staying the progress of the fire to receive an indemnity, to be paid either by the municipal corporation or the insurance companies. The court of appeal in the case of *Mahoney* based its decision on French law, which is the law that governs questions of civil responsibility, and upon articles 677, Municipal Code, and 4426, Revised Statutes, Quebec, 1888.

Article 5638 of the present Revised Statutes, 1909, has replaced article 4426, and gives the right to demolish without dealing with the question of indemnity. The result is that the indemnity is left to the discretion of the court and is to be granted or not according to the facts of each case. The indemnity is one that exists by common law. The former article 4426 provided that in the absence of any by-law the mayor could order the demolition in case of fire.

Article 5638 does not so provide, but this right exists notwithstanding; it is a common law right. The learned trial judge very justly remarked in his notes that it is not when the fire is doing its ravaging work that the municipal council can meet and adopt a by-law to authorize the mayor to give an order of demolition.

The town did not have any by-law on the subject; the mayor, as such, gave the order in the interest of all; his action was subsequently ratified by the municipal council, which authorized the payment of the indemnity to Madame Claveau. The Town of Chicoutimi is subject to the general laws governing cities and towns.

The order of the mayor, ratified by the council, put an end to a vast conflagration which threatened to spread all over the town and which would have caused still far greater damages. The demolition was not only a measure of prudence; it was urgent and necessary. Without it, the whole east ward would have been burnt and other wards of the town as well. The object of the demolition, which was to circumscribe the fire, was secured fully and the fire was stayed at the building which was demolished and on both sides of the street. Under the circumstances the town was legally authorized and bound to indemnify the proprietors who suffered by reason of such demolition.

Before the Court of King's Bench the appellant, in its factum, admitted that the conclusion arrived at by the court of first instance on this point must be adopted.

I think the respondent's counsel is right in his contention that article 4426, R.S.Q., 1888, has been superseded by article 5638, R.S.Q., 1909, but, by reason of the position taken by the respondent, I do not think it is incumbent upon me to consider and I do not consider whether or not, by reason of the evidence to

which the Court of King's Bench refers, the principle of the *Cité de Québec* v. *Mahoney*(1) is inapplicable here.

The contention of the respondent on this branch of the case is, and it is on this contention that I think the respondent fails, that admitting the principle of the *Mahoney Case*(1) to be applicable the proprietor's right to reparation is only for the amount of his loss after taking into account the value of any insurance of which he may be entitled to the benefit.

I do not think the right to which effect is given in that case is so limited.

I quote from the judgment of Cimon J., at p. 401:—

Favard de Langlade, Repert. vbs. expropriation pour cause d'utilité publique, par. XIV.: "Si la dépossession a lieu dans l'intérêt particulier, comme, lorsque, pour arrêter un incendie, on abat une maison afin de préserver les édifices voisins, l'indemnité doit être payée par tous ceux dont on peut prévoir que les maisons ont été sauvées." Proudhon, Usufruit, no. 1594, dit la même chose.

Et, en passant au droit français plus moderne j'y trouve encore, comme résultat, qu'on assimile le cas à la doctrine du jet de mer, bien que plusieurs appelent cette démolition une expropriation tacite; et il en résulte que le propriétaire de la maison abattue a droit à une indemnité.

Seulement, avec le système des municipalités, ou, plutôt, le système communal en France, ce ne sont plus les voisins à qui le propriétaire de la maison démolie doit s'adresser, car ces voisins sont confondus dans la commune, et c'est pour le salut public de la commune que la démolition a eu lieu: il faudra que le propriétaire de la maison démolie s'adresse, pour son indemnité, à la commune, d'autant mieux qu'elle a le contrôle des mesures à prendre pour combattre l'incendie.

M. le conseiller Almeras Latour, dans son rapport de la cause de la *Commune de Chareton c. Gillet*(2), résume ainsi la doctrine:—

"D'après le jugement, nous ne sommes pas en présence d'une faute, d'un accident; nous avons devant nous un fait correspondant à un intérêt public, une mesure pratiquée dans le but de s'opposer au progrès d'un incendie. En pareil cas, la demande de sieur Gillet se retranche dans les principes ordinaires du droit civil. Le dommage souffert ou les frais faits par un seul, profitant à la généralité des

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habitants, la commune doit indemniser celui qui a coöpéré ainsi à la conservation de tous. C'est absolument comme en cas de guerre, la contribution payée par un seul dans l'intérêt de tous; c'est le jet a la mer, qui, en sauvant le navire, oblige à repartir la perte sur ceux qui en ont profité."

Dans une cause devant la cour de cassation, sous la présence de M. Troplong, une démolition est, en pareil cas, appelée "expropriation" (D.P. 66.1.75). Je crois cette qualification impropre. Mais qu'importe l'expression!

There is here no trace of any such restriction and the analogies suggested "la doctrine du jet de mer" and "expropriation tacite" are not consistent with the existence of such restriction.

As to the amount of the loss, that has been ascertained by the agreement of the parties. What then is the position of the appellant company ?

The contract of insurance is a contract of indemnity and I think that according to the law of Quebec the appellant company would have been entitled, on payment of the loss, to be subrogated to Madame Claveau's rights against the municipality.

The French version of article 4584, C.C., is clear upon the point. The English version creates a difficulty. The two versions are as follows:—

2584. L'assureur, en payant l'indemnité, a droit à la cession des droits de l'assuré contre ceux qui ont causé le feu ou la perte.

2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.

I shall assume that the right admitted by the municipality resting on the principle of *Cité de Québec* v. *Mahoney* (1) is not a right of action for a "fault." This does not conclude the matter. Article 2615, C.C., provides that where the French and English versions differ that version is to be accepted which most nearly accords with the existing law.

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I have come to the conclusion that the right of subrogation enjoyed by insurers under French law being an equity arising out of the fact that the contract is a contract of indemnity is not limited to a right to have the benefit of the obligations springing from the wrongful destruction of or injury to the property insured.

Such a view would not be consistent with the doctrine of Pothier (ed. Bugnet), vol. 5, "Assurance," art. 161:—

Lorsque les assureurs ont indemnisé l'assuré des pertes et dommages qui ont été causés pour le salut commun dans les marchandises assurées ils doivent être subrogés aux droits de l'assuré dans la contribution qui doit se faire en ce cas.

The rule of the French law in 1830 is stated by Quenault, arts. 325 and 326, in these words:—

325. Le paiement de l'assurance n'opère pas seulement en faveur des assureurs l'effet dont nous venons de parler. Il a encore pour effet d'obliger l'assuré à subroger les assureurs qui le paient, dans les droits, recours et actions en indemnité qu'il aurait par rapport à la chose assurée.

Cet abandon des actions de l'assuré au profit des assureurs semble une conséquence forcée des principes qui dominent la matière. En effet si l'assuré pouvait, après avoir obtenu des assureurs l'indemnité de sa perte, exiger encore de l'auteur du sinistre la même indemnité, à titre de dommages-intérêts, l'assuré trouverait dans le sinistre une source de bénifices, puisqu'il recevrait deux fois la valeur de ce qu'il aurait perdu. Les principes qui régissent le contrat d'assurance s'opposent à un pareil résultat; ils veulent que ce contrat ne devienne point un titre lucratif pour l'assuré, et conséquemment, que l'action qui en résulte en sa faveur ne puisse être cumulée avec une autre action tendente à obtenir l'indemnité de la même perte. L'assuré ne peut donc se faire payer par les assureurs l'indemnité de sa perte, qu'à la condition d'abandonner les autres actions en indemnité, qu'il aurait à exercer à raison du même sinistre.

326. Si l'assuré se refusait à faire cet abandon au profit des assureurs, ils pourraient obtenir que le montant de l'indemnité susceptible d'être recouvrée contre l'auteur du sinistre fut déduit de la somme qu'ils auraient à payer à l'assuré; et cela, en vertu du même principe que les autorise à déduire de cette somme la valeur des

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débris de la chose assurée conservés par l'assuré. L'assuré, pour éviter qu'on impute sur l'assurance le montant d'une indemnité, qu'il n'est pas certain de recouvrer contre l'auteur du sinistre, a évidemment intérêt à subroger les assureurs dans tous ses droits contre ce dernier. Mais quelque conforme aux principes du contrat d'assurance que soit cette subrogation, elle a besoin d'être formellement consentie par l'assurée.

Duff J.

The principle governing the rights of an insurer in this connection was considered in the judgment of Parke B., in 1851, in *Quebec Fire Assurance Co.* v. *St. Louis*(1), at pages 316 and 317. I quote the passage which gives the *ratio decidendi*:—

> The learned counsel for the plaintiffs admit that they did not fall within the description of persons who are subrogated by operation of law without requisition to or convention with the creditors, nor strictly to the class of co-obligors or sureties, to whom Pothier, "Coutume d'Orléans," tit. xx., sec. 5, p. 846, ascribes the right of requiring the creditors, when they pay the debt, for which they are jointly bound or responsible to him, either to subrogate or discharge them. But the learned counsel contended that an assuree, by a policy against either maritime or terrestrial risks, is clearly within the equity of the rules and has a similar right to require a subrogation at the time of the payment of the loss. The authorities cited in support of that position seem to us to establish that the assurees have that right; they are: Alauzel "On Assurance," p. 384, s. 477; Pardessus, "Cours de Droit Commercial," 595; Quinault, p. 248; Touiller, tit. 4, s. 175; Emérigon (English trans., 1850), ch. xii., s. 14, pp. 329-336; and Pothier "On Assurance," 248, who lays it down that in the case of a general average, the assurer, after having indemnified the assured against the losses sustained for the common benefit, ought to be subrogated to the rights of the assured, to the contribution, which in such case must be made. These authorities are so consistent with justice, and founded upon so equitable a principle, that we have no difficulty in adopting them; and we do not think that any of these are shewn to have been derived, as was suggested in argument, from the Code Napoleon, which is not in force in Canada.

I think the present case is well within the authority of this passage. I should add that I have not found it necessary to consider the contention of the

(1) 7 Moo. P.C. 286.

appellant company that the act of the mayor was a wrongful act or whether, assuming it were so, the municipality would be responsible or whether, in the circumstances, Madame Claveau in strict law would on that hypothesis have acquired a right to more than nominal damages. I have considered the case upon the footing upon which the respondent municipality has from the beginning put it, namely, that the act of demolition was a rightful act under powers vested in the municipality at common law and that the doctrine of the decision in *Cité de Québec* v. *Mahoney*(1) governs the determination of the appeal and that the municipality was responsible to make reparation according to the principle enunciated in the passage quoted above from the judgment of Cimon J.

On this footing I think the contentions of the appellant company ought to prevail over those of the municipality.

ANGLIN J.—Incorporated by 57 Vict. ch. 66 (Que.), the Town of Chicoutimi is governed by the provisions of the "Town Corporations' General Clauses Act," 1888, articles 4178, *et seq.* Applicable to towns incorporated prior to 1903 which have not been subsequently taken out of its operation (R.S.Q., 1909, art. 5884), this Act is still in force and unrepealed. See R.S.Q., 1909, vol 4, p. 373. By articles 4389 and 4426 of the Revised Statutes of Quebec, 1888, town corporations are authorized to pass by-laws

4426. To authorize certain persons to cause to be blown up, pulled down or demolished, such buildings as may appear necessary in order to arrest the progress of any fire, saving all damages and indemnity payable by the corporation to the proprietors of such buildings to an

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amount agreed upon between the parties, or on contestation to an amount settled by arbitrators. In the absence of any by-law under this article, the mayor may during the course of any fire, exercise this power by giving a special authorization. (40 Vict. ch. 29, sec. 251.)

It does not appear upon the record that any by-law such as is authorized by this article was passed by the Town of Chicoutimi. But the demolition of Mme. Claveau's house resulted from the blowing up of the adjacent Tremblay residence under the special direction of the mayor, and the liability of the municipal corporation to the owner was, in my opinion, the same as if the work had been carried out under the provisions of a by-law. This, I think, is the effect of the words "may exercise this power" That the demolition of Mme. Claveau's house was not directed or intended, but was occasioned by the use of an excessive charge of dynamite in blowing up the Tremblay residence, owing to a desire to insure the complete destruction of the latter, does not, in my opinion, suffice to take the present case out of the purview of article 4426, or to render the mayor or the municipal corporation liable therefor *ex delictu*. Under the circumstances — regard being had especially to the emergency which called for prompt and effective action — a case of fault has not been established against them under article 1053, C.C., in respect of liability for which the appellants might be entitled to subrogation. Article 2584, C.C., and report thereon of the Codification Commissioners.

Upon consideration of the scope and purpose of article 4426, R.S.Q., 1888, I am convinced that it was not the object of the legislature, in enacting it, to indemnify insurance companies against losses occasioned to them through the demolition of buildings

pursuant to its provisions for the purpose of arresting the progress of fires. The intention was, in my opinion, to subject the municipality to liability to the proprietor of any building so demolished for his own benefit, and not through him for the benefit of any insurance company interested, for the net loss which he would sustain in consequence — that is, for his damages over and above any indemnification to which he might be entitled under the provisions of any insurance policy. The fact that in most cases where buildings are demolished under the provisions of article 4426 they would themselves, if not so destroyed, become a prey to the conflagration which their demolition is designed to arrest, with consequent liability of the insurance companies, seems to me to confirm the view that the construction which I put upon that article is what the legislature intended it should bear. Where the building demolished is not covered by insurance, or, for any reason not attributable to his own fault, the proprietor is unable to recover upon his insurance, the municipal corporation would, of course, be liable to the full amount of the value of the property destroyed. But where the owner is entitled to the benefit of insurance the amount thereof recoverable must be first deducted from the total value of the property destroyed in estimating the amount of damages and indemnity payable to him by the corporation. To place any other construction upon article 4426 would, I am satisfied, be to give it an effect not intended by the legislature. In my opinion, therefore, the statute did not subject the respondent to any liability in respect of the part of Mme. Claveau's loss covered by insurance, and she, therefore, had no such rights against it to which the appellants could claim subro-

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gation. As already stated delictual liability of respondents has not been established. On the other hand it is admitted by the appellants — and I think there is no doubt — that they were liable, under their policy, to Mme. Claveau. Her loss was caused "by the means used for extinguishing the fire" Article 2580, C.C.

In settling with Mme Claveau for the sum of $5,500 the municipal corporation insisted upon her assigning her interest in her policies of insurance with the appellant company, which she did. Although in making this settlement it was not explicitly stated that the municipality assumed liability only for the amount of Mme. Claveau's loss in excess of her insurance, it is quite clear that it was not intended by the payment made to her to satisfy or extinguish the liability of the appellants. If it were, the taking of an assignment of her claims under her policies would be meaningless. I think the proper interpretation of what was done is that the municipality intended to purchase Madame Claveau's rights against the insurance company and to pay to her, in discharge of its liability under article 4426, only the difference between the amount recoverable under her insurance policies and the sum of $5,500, the balance being the purchase price of the assignment of her claims against the insurance company. Her policies amounted in all to $4,700 and the loss recoverable under them has been fixed by the learned trial judge at $4,000. No appeal has been taken against this assessment of the amount of the appellants' liability. The assignability of Madame Claveau's rights accrued against the insurance company has not been questioned.

I am, for these reasons, of the opinion that the

judgment in appeal should be affirmed and this appeal dismissed with costs.

BRODEUR J.—Les faits qui ont donné lieu au présent litige sont les suivants:—

La compagnie appellante avait assuré la propriété de Madame Claveau, située dans la Ville de Chicoutimi. Le 24 juin, 1912, un incendie considérable s'est déclaré qui menaça de détruire la principale partie de la ville.

Le maire, après avoir consulté la brigade du feu et certains citoyens, a décidé de faire détruire par la dynamite certaines propriétés dans le bût d'arrêter la conflagration; et parmi les propriétés qui furent ainsi détruites se trouvait celle de Madame Claveau.

Madame Claveau s'est alors adressée à la corporation pour se faire rembourser la valeur de sa propriété. La municipalité, vu l'incertitude où elle était de savoir si elle était responsable ou non, a cru devoir régler avec Madame Claveau, mais en se faisant transporter l'assurance que cette dernière avait sur la propriété; et elle poursuit maintenant la défenderesse-appelante pour en réclamer le montant.

La compagnie d'assurance prétend qu'elle n'est pas tenue de payer à la ville, vu que cette dernière ne pouvait pas être, dans les circonstances, subrogée aux droits de Madame Claveau contre la compagnie d'assurance.

En vertu de l'acte des villes, art. 4426, S.R.Q. (1888), qui s'applique à la Ville de Chicoutimi, les corporations municipales ont le droit

d'autoriser certaines personnes à faire sauter, démolir et abattre autant de constructions qu'il paraît nécessaire pour arrêter les progrès d'un incendie, sauf les dommages et indemnités payables par la corporation aux propriétaires de ces constructions, au montant

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convenu entre les parties, ou sur contestation au montant fixé par les arbitres.

En l'absence de règlement fait en vertu de cet article, le maire peut, dans le cours d'un incendie, exercer ce pouvoir, en donnant une autorisation spéciale.

Dans le cas actuel il ne paraît pas y avoir eu de règlement de passé par le conseil municipal de la Ville de Chicoutimi; mais, en vertu de la loi dont nous venons de lire le texte, le maire pouvait certainement pendant la conflagration ordonner de détruire et de démolir toute propriété qu'il jugerait nécessaire afin d'arrêter le progrès du feu.

Dans ce cas-là, il serait obligé cependant d'indemniser le propriétaire de ces bâtisses.

Nous retombons virtuellement sous les dispositions de l'article 407 du Code Civil qui dit que nul ne peut être contrait de céder sa propriété si ce n'est pour une cause d'utilité publique et pour une juste et préalable indemnité.

L'intérêt public commandait, dans les circonstances exceptionelles où on était, de détruire les bâtisses en question. Mais le propriétaire avait le droit alors de se faire indemniser ainsi que la loi le déclare et ainsi qu'il a été décidé d'ailleurs dans la cause de *Cité de Québec* v. *Mahoney* (1).

Si la ville eût été en faute, la subrogation aurait été de nul effet parce que la compagnie d'assurance, en acquittant sa dette, aurait eu le droit de se faire céder les droits que le propriétaire avait contre ceux qui par leur faute avaient détruit la propriété.

Mais dans le cas actuel il n'y a pas de faute qui puisse être imputée à la ville. Le maire a fait ce que la loi l'autorisait de faire. Il n'y a donc pas eu de délit de sa part.

(1) Q.R. 10 K.B. 378.

M. Atwater, dans son argument, nous a dit que l'article 2584, C.C., s'appliquait non seulement au cas délictuel, mais aussi au cas où il y aurait responsabilité légale ou conventionelle de la part de celui qui aurait détruit la chose.

Je suis incapable d'accepter cette prétention.

L'article 2584 du Code Civil a été basé sur l'autorité de la doctrine maintenue par le Conseil Privé dans la cause de *Quebec Fire Assurance Co.* v. *Molson* (1), en 1851. C'est ce que déclarent formellement les codificateurs dans leur rapport.

Il s'agissait dans cette cause de l'incendie d'une église qui avait été causé par la faute de Molson et de St. Louis.

La compagnie d'assurance, ayant payé les propriétaires de l'église, a poursuivi les auteurs du délit, Molson et St. Louis, et le Conseil Privé, saisi de la cause, a décidé,

que les assureurs contre le feu ont le droit d'être subrogés aux droits et actions de l'assuré contre ceux qui ont causé le feu et la perte.

Les codificateurs ont inséré dans le Code l'article qui est devenu notre article 2584, qui se lit comme suit:—

L'assureur en payant l'indemnité a droit à la cession les droits de l'assuré contre ceux qui ont causé le feu ou la perte.

Si nous lisons littéralement cet article, nous en arriverons à la conclusion que l'assuré serait tenu de céder à l'assureur tous les droits qu'il possède contre les tiers, que ces droits résultent du délit de ces derniers ou qu'ils existent en vertu de la loi ou d'une convention. En d'autres termes, que l'obligation du tiers soit délictuelle ou simplement contrac-

(1) 1 L.C.R. 222.

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tuelle ou légale, l'assuré devait céder ses droits à l'assureur contre ce tiers.

La version anglaise cependant ne laisse pas de doute que la seule obligation du tiers qui passe à l'assureur est l'obligation délictuelle. Voici, en effet, le texte de l'article:—

The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons *by whose fault* the fire or loss was caused.

Les deux textes diffèrent évidemment. Alors nous devons pour les intérpréter, suivre la règle énoncée en l'article 2615, C.C., qui dit que nous devons suivre

le texte le plus compatible avec les dispositions des lois existantes.

Les codificateurs dans leur rapport se sont chargés de nous expliquer cet article.

Comme je viens de le dire, les codificateurs ont donné comme l'une des sources de cet article 2584 la décision du Conseil Privé dans la cause de *Quebec Fire Assurance Co.* v. *Molson et al.*(1). Or, cette cause consistait en un recours en dommages de l'assureur contre ceux qui par leur faute avaient incendié la propriété assurée et dans leur rapport les codificateurs disent formellement:—

Il semblerait que le droit de l'assureur qui paie est le droit d'obtenir de l'assuré une *cession de son recours en dommage.*

Les codificateurs citent aussi, à l'appui de leur rapport, Pardessus, Droit Commercial, paragraphe 595, qui nous dit qu'il arrive souvent que la perte dont l'assureur est obligé de faire la réparation est causé par le crime ou par la faute d'un tiers, alors dans ce cas l'assureur aurait toujours le droit de réquérir l'assuré de lui céder le droit d'action qu'il aurait contre l'auteur du délit (p. 143, 6ème édition) :—

(1) 1 L.C.R. 222.

Ce n'est point, il est vrai, le cas de subrogation légale; ce n'est pas même celui de la subrogation conventionelle; c'est le cas de la règle que nul ne peut se dispenser de réparer le tort qu'il a fait (art. 1382, C.N.).

Je pourrais aussi citer Dalloz, Répertoire Pratique, vo. "Assurance," No. 136, qui dit:—

Il est généralement admis que l'assureur a une action directe contre les tiers responsables du sinistre en vertu du principe général formulé par les articles 1382-1383. Cette action ne lui permet pas d'invoquer toutes les garanties spéciales dont jouit l'assuré.

Les articles 1382 et 1383 du Code Napoléon, qui correspondent à notre article 1053, n'ont trait qu'aux délits et non pas aux obligations résultant de la loi ou des conventions. Il est donc évident pour moi que les droits dont parle l'article 2584 du Code Civil ne sont que les droits de l'assuré contre les personnes *par la faute* desquelles la perte a été causée

Le texte anglais de cet article est donc celui qui répond à l'intention des codificateurs et qui énonce le plus correctement la loi alors existante.

Je pourrais citer à l'appui de cette opinion: Laverty, Insurance Law, pp. 458-459 et 460; Dalloz, 1853-1-93; Dalloz, 1882-2-238.

La compagnie d'assurance n'avait donc pas le droit dans les circonstances de se faire céder les droits que Madame Claveau, l'assurée, avait contre la Ville de Chicoutimi. Par contre, cette dernière est légalement devenue propriétaire de la créance de l'assurée contre la défenderesse appelante.

Je considère que la compagnie est tenue de payer et le jugement qui l'a condamnée doit être confirmé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Atwater, Duclos & Bond.*
Solicitor for the respondent: *L. Alain.*

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*June 2.
*June 24.

CYRILLE TURGEON (SUPPLIANT) ....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government railway regulations—Operation of trains—Negligent signaling—Fault of fellow servant—Common fault—Boarding moving train — Disobedience of employee — Voluntary exposure to danger—Cause of injury—R.S.C., 1906, *c.* 36, *ss.* 49, 54.

By a regulation of the Intercolonial Railway, no person is allowed to get aboard cars while trains are in motion. Without ascertaining that all his train-crew were aboard, the conductor signalled the engineman to start his train from a station where it had stopped to discharge freight. One of the crew, who had been assisting in unloading, then attempted to board the moving train and, in doing so, he was injured.

Held, that the injury sustained by the employee was the direct and immediate consequence of his infraction of the regulation which he was, by law, obliged to obey and not the result of the fault of the conductor; that by disobedience to the regulation, the employee had voluntarily exposed himself to danger from the moving train; that the negligence of the conductor in giving the signal to start the train was not an act for which the Government of Canada could be held responsible and that its relation to the accident was too remote to be regarded as the cause of the injury.

Judgment appealed from (15 Ex. C.R.), affirmed.

APPEAL from the judgment of the Exchequer Court of Canada(1), dismissing the petition of right of the suppliant with costs.

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

(1) 15 Ex. C.R.

The circumstances of the case are stated in the head-note and the issues raised on the appeal are discussed on the judgments now reported.

J. A. Lane, K.C. for the appellant.

P. J. Jolicœur for the respondent.

THE CHIEF JUSTICE agreed in the judgment dismissing the appeal with costs.

IDINGTON J.—I think this appeal must be dismissed with costs.

DUFF J.—Rule No. 48 enacts (*inter alia*) :—

> No person shall be allowed to get into or upon or quit any car after the car has been put in motion or until it stops.

To this extent at all events the rule is within the rule-making authority conferred, by the Revised Statutes of Canada, 1906, ch. 36, sec. 49, upon the Governor-in-Council; and it must be given effect to as a legislative enactment as well as one of the rules of the appellant's employment. The injury suffered by the appellant was the direct and immediate consequence of a violation of this rule; but he alleges that the act done in violation of it was done at the invitation of the conductor and upon that allegation he bases his contention which is the ground of his appeal that this is a case of *faute commune*.

There are three answers to that. 1. If what the conductor did was an invitation to commit a breach of this rule, it was, in so far, an act for which the Government is not responsible. 2. The forbidden act was the act of the appellant; and it could only be in very spe-

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cial circumstances, if ever, that conduct such as that of the conductor which is relied upon as constituting the fault upon which the claim is based could be so connected with the forbidden act as to bring it within the category of fault *dans locum injuriæ*. In this case it is clear that the fault relied upon is in its relation to the injury too remote to be regarded as in the legal sense one of the *causes* of it. 3. The rule is plainly framed with the object of avoiding just such accidents as that which happened. The observance of it is one of the duties which the law imposes upon the employee for that purpose. The violation of it cannot give him a right of action merely because other fellow servants equally bound to observe it concurred with him in that violation.

The appeal should be dismissed with costs.

ANGLIN J.—There can be no doubt that the direct and immediate cause of the injuries sustained by the appellant was his violation of Rule No. 48, which enacts that—

> No person shall be allowed to get into or upon or quit any car after the car has been put in motion or until it stops.

This was a rule

> to be observed by conductors, engine-drivers and other officers and servants of the Intercolonial Railway: R.S.C., ch. 36, sec. 49,

and was intended for the safety of persons in the position of the appellant. While the conductor was, no doubt, most blameworthy for having signalled the train to start when he knew, or should have known, that if the appellant was to board it he must do so while it was in motion, that does not excuse the plaintiff's breach of the explicit prohibition of Rule 48. I agree with the learned trial judge that on this account alone this petition of right must fail.

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BRODEUR J.—Il s'agit d'un accident de chemin de fer arrivé sur "l'Intercolonial." L'appelant était employé comme serrefrein sur un convoi de marchandises.

Ce convoi était en gare et l'appelant en était descendu pour aider à charger et décharger des marchandises. Après avoir fini son ouvrage, il se disposait à rejoindre le char où les employés se tiennent pendant le trajet d'une gare à l'autre et qui se trouvait à l'arrière du convoi. Le conducteur du train donna ordre de partir; et, pendant que le convoi était en mouvement, l'appelant a essayé de monter dans son char. Malheureusement il glissa et se fit écraser la jambe gauche et reçut d'autres contusions moins graves.

Le gouvernement plaide que l'accident est dû entièrement à la faute de l'appelant parce qu'il aurait monté sur le train lorsque ce dernier était en mouvement.

Par la section 49 de l'acte des chemins de fer du gouvernement, le gouverneur en conseil est autorisé de faire des règlements pour la conduite des employés du chemin. Parmi ces règlements se trouve celui portant le No. 48 qui dit:—

No person shall be allowed to get into or upon or quit any car after the train has been put in motion or until it stops. Any person doing so or attempting to do so has no recourse upon the Railway Department for any accident which may take place in consequence of such conduct.

Par la section 54 du même acte il est dit que ces règlements seront considérés comme ayant force de loi. Bien loin d'être tenu de monter sur le convoi lorsqu'il était en mouvement, cela lui était formellement défendu par les règlements qui lui étaient donnés comme règle de conduite.

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Laurent, vol. 20, p. 521, dit:—

> Quand la partie lésée a enfreint un règlement et que c'est par suite de cette infraction qu'elle a éprouvé un dommage, elle ne peut pas, en général, se plaindre; c'est le cas de dire avec l'adage qu'elle est censée n'avoir pas été lésée.

Il pourrait peut-être se présenter dans cette cause la question de savoir s'il y a eu "faute commune" de la partie lésée et de la partie défenderesse.

Les faits cependant sembleraient démontrer que l'accident est dû entièrement à la faute de la victime.

La cour d'appel de Québec, appelée à apprécier un accident à peu près semblable, dans une cause de *Central Vermont Railroad Co.* v. *Lareau*(1), en 1886, a décidé que ce n'était pas un cas de faute commune mais que la personne lésée en était seule responsable.

C'est là d'ailleurs, je crois, la conclusion à laquelle en est venu lui-même l'honorable juge de la cour inférieure, que l'accident est dû entièrement à la faute de la victime. Cependant je ne pourrais pas acquiescer à la proposition que je relève à la fin de son jugement et qui est dans les termes suivants:—

> As the proximate cause of the accident is the boarding by him of a train in motion, he thus contributed to the cause which determined the accident and the doctrine of *faute commune* does not apply when the person injured contributed to the determining cause of the accident.

Il ne faut pas oublier que les principes de la "contributory negligence" du droit anglais ne s'appliquent pas dans la province de Québec (Juge Dorion dans *Desroches* v. *Gauthier*(2)), et cet accident ayant eu lieu dans cette province doit être jugé suivant les lois de cette province.

La faute de la victime n'est pas toujours un ob-

(1) 30 L.C. Jur. 231 (2) 3 Dor. Q.B. 25.

stacle à sa demande en dommages-intérêts. Si son imprudence ou sa faute est *la seule cause* du dommage, évidemment elle ne peut rechercher personne en justice pour l'indemniser de ce dommage. Mais si une autre personne a contribué aussi à produire le fait préjudiciable, si les deux parties sont en faute, alors nous sommes en présence d'une faute commune. Et l'imprudence commise par la partie lésée ne saurait affranchir de toute responsabilité celui dont la faute a contribué à déterminer l'accident. Cette imprudence de la victime du dommage a seulement pour effet d'en entraîner la réduction du chiffre. Sourdat, Responsabilité, No. 108, dit:—

> Les tribunaux arbitreront jusqu'à quel point la faute de l'un et celle de l'autre sont intervenues comme élément dans la perte, et feront supporter à chacun la valeur, proportionnellement à ce qui lui est imputable.

Tout en confirmant le jugement de la Cour d'Echiquier dans la présente cause, je ne saurais accepter le principe que

> the doctrine of *faute commune* does not apply when the person injured *contributed* to the determining cause of the accident.

C'est, au contraire, dans ces cas-là que la faute commune existe et qu'il y a lieu d'appliquer les principes. Aubry & Rau, vol. 4, p. 755; Huc, vol. 8, No. 434; Laurent, vol. 20, No. 491; Baudry-Lacantinerie, "Obligations," No. 2881; Dalloz, 1880-1-16; Dalloz, 1896-1-81, avec note de Planiol.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Lane.*
Solicitor for the respondent: *P. J. Jolicoeur.*

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*June 17.
*June 24.

THE QUEBEC, JACQUES-CARTIER ELECTRIC COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

HIS MAJESTY THE KING (*ex rel.* THE ATTORNEY-GENERAL FOR CANADA) (PLAINTIFF) ..... RESPONDENT.

THE FRONTENAC GAS COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

HIS MAJESTY THE KING (*ex rel.* THE ATTORNEY-GENERAL FOR CANADA) (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

"Expropriation Act," R.S.C., 1906, *c.* 143, *ss.* 8, 23, 31—*Abandonment of proceedings—Compensation—Allowance of interest—Construction of statute—Practice—Taxation of costs—Solicitor and client—Reimbursement of expenses—Interpretation of formal judgment—Reference to opinion of judge.*

While the owners still continued in possession of lands in respect of which expropriation proceedings had been commenced under the "Expropriation Act," R.S.C., 1906, ch. 143, and before the indemnity to be paid had been ascertained, the proceedings were abandoned, no special damages having been sustained.

Held, that in assessing the amount to paid as compensation to the owners, under the provisions of the fourth sub-section of section 23 of the "Expropriation Act," there could be no allowance of interest either upon the estimated value of the lands or upon the amount tendered therefor by the Government.

The trial judge, by his written opinion, held that the owners were entitled to be fully indemnified for their costs as between solici-

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

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tor and client and for all legitimate and reasonable charges and disbursements made in consequence of the proceedings which had been taken. The formal judgment provided merely that costs should be taxed as between solicitor and client.

Per Davies, Idington, Anglin and Brodeur JJ.—In the taxation of costs, the registrar should follow the directions given in the judge's opinion to interpret the formal judgment as framed. Duff J. *contra.*

Per Duff J.—The registrar, in taxing costs, is required by law to follow the terms of the formal judgment and it is not open to him to correct it in order to make it accord with his interpretation of the opinion judgment. The court appealed from, however, may correct the formal judgment in so far as it does not express the intention of the opinion judgment.

APPEALS from judgments of the Exchequer Court of Canada by which the defendants, in both actions, were refused claims for interest on the value of lands in respect of which expropriation proceedings had been commenced and subsequently abandoned.

In the month of April, 1912, the Government of Canada gave notice of the expropriation of a strip of land, of which the appellants were owners, and which was required for the purposes of the National Transcontinental Railway. At the same time a plan and book of reference describing the lands were deposited in the office of the registrar of deeds for the County of Quebec within which the lands were situated. The Crown did not enter into possession of the lands, which the appellants continued to occupy, and, in June, 1914, an information was filed in the Exchequer Court of Canada tendering, respectively, certain sums as compensation therefor. The appellants filed answers claiming much larger amounts as the values of their lands. After issue had been joined and some evidence given on behalf of the appellants, the respondent filed an abandonment, as provided by section 23 of the "Expropriation Act," R.S.C., 1906, ch. 143, and

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moved the court for an order granting leave to discontinue proceedings. The appellants then claimed reimbursement of their costs and also that they should be paid interest upon the amounts at which they had valued their lands or, alternatively, upon the amounts which had been tendered as compensation by the Crown. No further evidence was adduced and, on 27th January, 1915, the judge of the Exchequer Court rendered judgment, holding that the appellants had not suffered any special damages in consequence of the proceedings taken, but that they were entitled to their costs, as between solicitor and client, and to be recouped all legitimate and reasonable charges and disbursements. Judgment was formally entered allowing the discontinuance of the proceedings, declaring that the appellants, defendants, were not entitled to recover compensation and that they were entitled to recover from the Crown their costs in connection with the proceedings "to be taxed as between solicitor and client." From this judgment the present appeals were taken.

The questions in issue on the appeal are stated in the judgments now reported.

E. A. D. Morgan for the appellants.

Newcombe K.C., Deputy-Minister of Justice, for the respondent.

THE CHIEF JUSTICE agreed in the judgments dismissing the appeals with costs.

DAVIES J.—These two appeals from the Exchequer Court of Canada raise for determination the same questions and were argued together.

The questions arise out of proceedings having been taken on behalf of the Crown for the expropriation of lands of the respective defendants and the rights and liabilities of the parties — defendants and the Crown — under those proceedings are to be determined by the provisions of the "Expropriation Act."

A plan and description of the lands intended to be taken under section 8 of the Act were duly filed. Subsequently and before compensation was agreed upon or paid the Crown, under section 23, gave notice to the appellants that their lands were not required and were abandoned by the Crown.

The appellants thereupon filed, to the information of the Attorney-General claiming a declaration that the amount tendered by the Crown was sufficient, a new defence claiming to recover interest at 5% upon the sum which should have been awarded them for damages in case the Crown had not abandoned. In the alternative they claimed interest upon the sum the Crown had tendered as the value of the lands taken.

In my opinion, the section of the Act relating to interest being allowed has reference only to cases where the Crown has retained the lands taken and does not extend to or cover cases where, after filing notice of intention to take lands, the Crown has subsequently "abandoned" the lands to the owners under the provisions of the Act. Sub-section 4 of section 23 makes special provision for the assessment of damages in the latter case.

The learned trial judge acting under this sub-section found, as the appellants had always retained "the unlimited user of the lands taken" which were enclosed with fences, that they had not sustained any

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special damage but, under the circumstances, determined that they should be allowed the costs of their action to be taxed as between attorney and client so as to cover

> all the legitimate and reasonable charges and disbursements under the circumstances.

Counsel for the appellants admits that no special damages were sustained by his clients, but contends that they were entitled as of right to interest, as previously stated, whether they have sustained special damage or not.

I cannot for the reasons I have stated accept this contention and am of opinion that the finding of fact of the learned judge as to the actual user and possession of the land, which was fenced in, having continued with the appellants and never having been interfered with, their rights are confined to the damages which might be awarded them under sub-section 4 of section 23. That sub-section directs

> the fact of the abandonment or revesting shall be taken into account, in connection with all the circumstances of the case,

in assessing the damages to be awarded. This the learned judge has done and he has in excluding the claim for interest, in my opinion, acted properly.

No doubt, in the taxation of costs, the registrar will follow the directions of the learned judge as to the basis upon which allowance should be made, and the formal judgment so interpreted will fully protect the appellants.

The appeals, therefore, fail and must be dismissed with costs.

IDINGTON J.—These appeals involve the same points of law and were argued together.

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Idington J.

In each case the respondent had instituted proceedings for the expropriation of land needed for the National Transcontinental Railway, under and pursuant to 3 Edw. VII., ch. 71, and deposited a plan and book of reference on the 23rd of April, 1912, with the registrar of deeds for the County of Quebec.

Informations respectively filed in each case in the Exchequer Court sought to have it declared that a sum named was sufficient compensation for the land taken. Thereupon proceedings were had in each case until the respondent desisted from further proceedings and the court declared the defendant was not entitled to recover from respondent any compensation in respect of such expropriation and abandonment, but that the defendant was entitled to recover from respondent its costs in connection with the proceedings to be taxed as between solicitor and client.

It was further ordered and adjudged that the plaintiff (now respondent) should have leave to discontinue.

These appellants each claim to be entitled to interest upon at least the amount tendered as compensation.

There seems to be rather a curious misconception of legal rights arising out of such proceedings.

The statute under which the respective proceedings were taken rendered that done legal and furnishes the only remedy the appellant can have. It entitles the respondent to withdraw when so advised but provides for the assessment of any damages sustained in consequences of the proceedings.

The learned trial judge has found there were no damages suffered save the costs duly awarded.

Each of these appellants, however, contends that

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it is entitled to interest; though frankly admitting there were no damages suffered and no change of actual possession.

The statute provides for interest being awarded in the case of the proceedings being so continued as to determine a sum due for compensation, but makes no provision for interest upon any imaginary undetermined sum.

There is neither contractual nor statutory basis upon which to award interest.

The references to the Code and to the condition of things arising between an ordinary vendor and purchaser are all beside the question.

These would not help appellants much even if applicable when he, parting with his ownership in the property, had not been deprived of the fruits thereof, but remained in undisturbed possession thereof.

Cases may arise where the party whose property has been claimed in way of expropriation has by reason of its being tied up suffered material damages, but this is not that case.

The appeal as to costs seems hopeless in view of the costs awarded. I agree that the opinion judgment of Mr. Justice Audette should be read to interpret the formal judgment issued.

These appeals should be dismissed with costs.

DUFF J.—The learned trial judge has found first, that the appellants retained possession, and secondly, that they had suffered no loss in consequence of the expropriation proceedings apart from the expenses of preparation for trial thrown away.

These findings are fatal to the claim for interest although it is better to say nothing on the point which

might have arisen had possession been taken by the Crown.

The appellants are entitled, however, and I think the learned judge so held, to be indemnified fully in respect of their costs as between solicitor and client and all costs, charges and expenses properly incurred in preparation for the trial. The formal judgment does not sufficiently provide for that. As the judgment now stands the registrar, bound as he is to follow the terms of the formal judgment, is required by law to tax the costs as between solicitor and client according to the well settled rule, and that will be far indeed from affording the appellants the indemnity to which they are justly entitled.

The law requires the registrar to follow the formal judgment and it is not open to him to correct it to make it accord with his interpretation of the learned trial judge's reasons; and as the judgment is perfectly plain and unambiguous in its terms there is no room for interpretation. Expressions of opinion by judges of this court can add nothing to the powers of the registrar who is bound by law to act upon the judgment as framed construed as the law requires it to be.

These expressions may, however, remove the reluctance the learned judge would probably have felt otherwise in correcting the formal judgment (after appeal to the court) and making it conform to the judgment he in fact pronounced.

The judgment ought to have been formally altered by this court; but nevertheless I think the learned trial judge in the circumstances would be acting

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within his jurisdiction in making the correction this court ought to have made. See *Prevost* v. *Bedard*(1).

ANGLIN and BRODEUR JJ. concurred with Davies J.

Appeal dismissed with costs.

Solicitor for the appellants: *E. A. D. Morgan.*

Solicitor for the respondent: *J. B. Lucien Moraud.*

(1) 51 Can. S.C.R. 629.

PAUL SAINT-DENIS (PLAINTIFF) ....APPELLANT;

AND

FRANÇOIS-XAVIER QUEVILLON AND HENRI PAYETTE (DEFENDANTS) ..... RESPONDENTS.

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*Feb. 15.
*May 18.

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

Lease of land—Special condition—Promise of sale—Option—Pacte de préférence—Unilateral contract—Real rights—Registry laws—Arts. 2082, 2085 *C.C.—Specific performance—Damages—Right of action.*

In a lease of lands for the term of five years, which was registered, the lessor agreed to sell the property to the lessee for a certain price at any time during the term of the lease. It was also stipulated that in the event of a proposed sale to any other person, for any price whatsoever, the lessor should notify the lessee thereof and give him the right, by preference, to exercise his option to purchase. After the expiration of about two years of the term, the lessor served written notice on the lessee requiring him to exercise his option forthwith and stating that, in default, he would sell to another person, without, however, mentioning the terms and conditions of the proposed sale and, on request by the lessee, these particulars were refused. The lessee took no action on this notice and the lessor executed a deed of sale of the property to P. by conveyance in which the latter undertook that the registered lease would be maintained in force. Two years later, the lessee brought suit against the lessor and P. for specific performance of the agreement to sell and, alternatively, for damages against the lessor for breach of contract.

Per curiam.—The notice as given, without mentioning the terms and conditions of the proposed sale to P., was ineffectual to place the lessee in default in regard to exercising his option; the

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

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rights of the lessee under the deed of lease continued to subsist during the whole term of the lease.

Per Idington and Brodeur JJ. (Duff and Anglin JJ. *contra*).—The promise of sale and *pacte de préférence* were accessory to the contract of lease and created a real right in favour of the lessee which was capable of being registered against the leased lands. The registration of the deed of lease and actual knowledge by the purchaser of the rights of the lessee thereunder placed P. in the position of a purchaser in bad faith and, consequently, he became bound by the obligations resting upon the lessor and specific performance should be decreed against him as well as against the lessor.

Per Duff and Anglin JJ.—The promise of sale and *pacte de préférence*, being stipulations separate and distinct from the contract of lease, did not create real rights in the property leased which might be protected by registration under the registry laws of the Province of Quebec. Under the laws of that province (there being no evidence of bad faith on the part of the purchaser), the purchase of the leased property with knowledge of the owner's obligations, *in personam*, could not render such purchaser liable to a decree for specific performance thereof.

Per Fitzpatrick C.J. and Anglin J.—The plaintiff had the right to bring his action notwithstanding the expiration of the period of two years after the date of the sale; the wrongful act of the lessor, in violation of his obligations under the deed of lease, did not impose upon the lessee the duty of asserting his rights at a period earlier than that required in his option.

Judgment appealed from (Q.R. 23 K.B. 436) reversed.

APPEAL from the judgment of the Court of King's Bench (1), reversing the judgment of Lafontaine J. in the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

The material circumstances of the case are stated in the head-note and the questions in issue on the present appeal are discussed in the judgments now reported.

Lafleur K.C. and *Perron K.C.* for the appellant.

Migneault K.C. and *Robillard K.C* for the respondents

(1) Q.R. 23 K.B. 436.

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THE CHIEF JUSTICE.—This is an action "en passation de titre" and in the alternative damages are claimed on the ground that the defendants, now respondents, conspired together to prevent the plaintiff, now appellant, from getting his deed. The trial judge maintained the action, but his judgment was reversed on appeal to the Court of King's Bench on these two grounds:—

(1) That respondent Payette was a *"bonâ fide"* purchaser for value, and that his knowledge of the option given by his co-respondent Quevillon to the appellant St. Denis in the lease of the latter did not constitute him fraudulent purchaser or chargeable with illegal collusion;

(2) That Quevillon complied with the stipulation in said deed of lease in favour of said St. Denis respecting said option and that the said St. Denis did not exercise his rights of purchasing the property in question in this cause, although duly notified and put in default to do so by the said Quevillon.

It appears by the record that in July, 1908, Quevillon leased to St. Denis for a period of five years a store and dwelling; the lease was duly registered in the month of September following, and in the interval St. Denis entered into possession of the premises which were subsequently purchased (8th June, 1910) by the respondent Payette.

The lease contains this clause:—

Le locataire aura droit de prendre possession des dits magasin et logement au vingt de juillet courant, 1908. Et le dit locataire aura en outre le droit d'acheter l'immeuble ci-dessus loué, comprenant les dits magasin, logement, étal de boucher et dépendances, en aucun temps pendant la durée du présent bail, moyennant le prix de sept mille cinq cent piastres, dont trois mille piastres seront payables comptant et la balance par versements annuels de mille piastres, avec intérêt au taux de six pour cent. par an; et dans le cas où le dit bailleur désirerait vendre à quelque autre pour un prix quelconque, il devra en signifier l'avis par écrit au dit locataire et donner la préférence à ce dernier.

The questions to be decided in this appeals are:—(1) What are the rights of the landlord and tenant

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respectively under this clause during the term of the lease; (2) what is the legal recourse of St. Denis in view of the sale to Payette ?

The trial judge came to the conclusion that the intention of the parties was (1) to give the tenant St. Denis the right, at any time during the whole period of the lease, to purchase the property at $7,500; (2) to reserve to the landlord Quevillon the right to dispose of the property during the same period to any one and at any price, provided, however, notice in writing of the landlord's intention to avail himself of that right was given to the tenant, who was in that case entitled to take the property at the new price offered by any serious intending purchaser. The trial judge held also that the sale to Payette, having been deliberately entered into by both the parties to it, for the purpose of defeating the plaintiff's rights, should be set aside.

I agree entirely with the learned trial judge in his appreciation of the evidence and his statement of the law.

Having carefully read the notes of Mr. Justice Cross in the court of appeal, I come to the conclusion that the main ground upon which the judgment of the Superior Court is reversed is that St. Denis, when notified of Quevillon's intention to sell, did not object more definitely and explicitly. The learned judge says, speaking of the time when Quevillon served notice of his intention to sell to Payette:—

> I think that the plaintiff St. Denis should have objected more definitely and should have pressed his request for particulars then and there more explicitly. Instead of doing so, he remained inactive for over two years.

With all respect, it is impossible for me to agree that the appellant was under any obligation to take

action upon the notice served upon him by Quevillon, or that his rights under the promise of sale were in any wise affected by that notice. By virtue of the promise of sale the appellant was entitled to buy the property at any time during the currency of the lease for the stipulated price of $7,500. (S.V., 60.1.849.) On the other hand, the respondent Quevillon reserved to himself the right to sell the same property at any time and for any price obtainable, but that right so reserved could only be exercised subject to notice to the appellant, who then was entitled to the preference, that is to say, to the right to purchase the property by preference on the same terms as the intending purchaser offered. To exercise this right it was, of course, necessary for the appellant to be informed not only of the price offered, but also of the name of the purchaser, that he might be in a position to judge of the *bona fides* of the offer (see Beaudant, page 224), otherwise the tenant could not intelligently exercise his right to purchase subject to which the landlord retained the right to sell notwithstanding the option contained in the first part of the clause. I gather from the notes of judgment that Mr. Justice Cross is also of opinion that a notice such as was required was not given. He says:—

> If Quevillon desired to sell to somebody else pending the option the covenant was that "il devra en signifier un avis par écrit au dit locataire et donner la préférence à ce dernier."
>
> The notice served called upon the plaintiff to sign a draft deed and intimated that if he did not comply, Quevillon would hold himself free to sell to another person, *but it did not give the plaintiff* a notice of the purport or terms of the sale desired to be made to another, as I think should have been done.
>
> The plaintiff's testimony is to the effect that he asked who the intending offerer was.
>
> The defendant Quevillon admits that his intention was not to

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disclose the term or terms of the contemplated sale to the plaintiff, and he did not do so.

If, as found by Mr. Justice Cross, the required notice was not given, I am with all respect, unable to understand how it can be said that Quevillon complied with the express condition subject to which he retained his right to sell and what steps St. Denis was obliged to take in order to protect his option, which had still about three years to run.

Coming now to the sale to Payette. Assuming in favour of the respondents that the clause in the lease is analogous to a *"pacte de préférence."* In ordinary circumstances the recourse of the appellant Payette would be limited to damages (Beaudant, Vente et Louage, p. 224). But the trial judge finds that Payette bound himself

de maintenir les baux existants, en percevant les loyers, à compter du premier juin aussi courant.

When examined as a witness, he says that he was careful to take legal advice as to the meaning of the clause above quoted. Payette also knew, before he bought, of the difficulty which had arisen between Quevillon and St. Denis about the sale and that the latter was insisting upon his right to have the terms and conditions under which the sale was to be made before exercising his right under his deed. And finally Payette served a protest on the appellant from which I quote the three following clauses:—

(*a*) Qu'en vertu d'un bail par le dit F. X. Quevillon à Paul Saint-Denis, devant Mtre J. H. A. Bohémier, N.P. le 3 juillet, 1908; ce dernier Paul Saint-Denis est locataire et occupant de partie des lieux sus-mentionnés, magasin No. 1580 et logement 1582 de la dite rue Saint-Hubert, et ce, pour le loyer et aux charges, clauses et considération spécifiées au dit bail;

(*b*) En conséquence les requérants, notifient et signifient au dit Paul Saint-Denis de se conformer au dit bail et *à tout ce qui y est*

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mentionné, tel que loyer, etc., en faveur des dits H. et D. Payette, en leur payant tous les loyers échus et à échoir pour la durée d'icelui.

Qu'à défaut par le dit Paul Saint-Denis d'exécuter ce que mentionné aux dits actes en leur faveur, les requérants prendront contre lui tous procédés légaux et de droit pour l'y contraindre et le tiennent responsable immédiatement de tous frais, perte, dépens, dommages et intérêts soufferts et à souffrir et du coût des présentes, copie et signification. Pour que le dit Paul Saint-Denis ne puisse plaider ignorance, je, dit notaire, lui ai signifié une copie de l'acte de vente suscité et des présentes en parlant comme susdit.

What could be the object or the meaning of this protest if not to notify the tenant that he was thereafter to deal with his new landlord on the same footing as with the old and to warn him that the "charges, clauses et considérations spécifiées" in his lease were to be considered as still binding upon both parties?

I was much impressed by the argument that the provision in the deed by Quevillon to Payette above referred to was merely to give effect to article 1663, C.C., but after much consideration I cannot escape from the conviction that in the protest served by Payette on St. Denis the former construed his deed of sale to mean that he, Payette, acquired all the rights and assumed all the obligations of his vendor Quevillon towards St. Denis, not only as landlord, but also as owner of the property.

The authorities referred to by the learned trial judge are conclusive in support of his judgment granting rescission on the ground of collusion. *Alambert* v. *Reynal*(1); Dal. 1903, 2, 41 (*vide* note); Dal. 1903, 1, 38.

The appeal should be allowed with costs.

IDINGTON J.—The appellant was lessee of certain property owned by the respondent Quevillon. By

(1) D. 85.2.259.

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the terms of the lease appellant was given an option of purchase at a price named, during the entire term of the lease and a further option, as some put it, but as others contend in modification of said option, that in case the lessor should desire to sell to someone else for any price whatever that he must notify in writing the appellant lessee, and give the preference to the latter.

We have heard many diverse attempts in argument to put a construction upon the terms of this clause. Some of these attempts seemed to me to begin with adopting that which might best fit the legal consequences sought to be reached by him arguing.

I think we should, rather than beginning thus, begin by attempting to realize what the parties, in a business-like common-sense way, probably desired to accomplish and let the legal consequences be ascertained after so determining the realization of the actual purpose in hand when framing a somewhat ambiguously worded contract. If there were surrounding circumstances which might have helped they have not been brought much in evidence by those concerned.

I think in default thereof we are safe in assuming that the parties were rational business people who were fair-minded enough at that stage, whatever they may have become since, to try to arrange to give such advantages to the lessee as would be likely to induce him to give the best renting terms he could, in light of such advantages, afford to the advantage of the lessor. And on the other hand the lessor would desire whilst giving the option not to be tied down thereto for five years if during that term he should find a purchaser. It was agreed accordingly in such case

that the lessee should be notified of any such proposal and given his alternative option. That no doubt was fair and a very common way, and common sense way, of dealing with such a problem and I think the document should be construed accordingly.

If the respondent had acted thereupon in the way I have no doubt intended originally, he would have informed the appellant of the offer he had got and its terms and possibly as evidence of, or means of shewing, good faith the name of the purchaser also.

The latter, however, need not have to be pressed for, unless the terms are such as to arouse some suspicion, and it was not.

A full knowledge of the terms, however, was pressed for and refused. That part of the contract having been so broken could not affect the first option and hence that stood. Had it been honestly observed and the terms of the alleged purchase disclosed and the chance given appellant to accept them or reject them then the lessee would have been driven to act. If he accepted in such case the matter of purchase was closed. If he in such event had rejected such terms then I think the respondent, Quevillon, would have been quite within his rights in making the sale and the first option might have ended.

I have no hesitation in accepting the version of appellant as to what transpired when he sought to learn the terms. The sort of contradiction given thereto is quite as emphatic as a straightforward assent thereto. So far I have little trouble in dealing with this case.

Before coming to what arises out of mere local practice and mode of thought, in regard to which I

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speak with diffidence, there are to be considered one or two interesting questions.

Is this contract a subject of registration ? It has, as embodied in the lease which was duly registered, but by some error so as to omit an unimportant part of the land, been in fact registered.

Could it if embodied in a separate instrument have been registered ?

It seems to me that article 2085 of the Civil Code was only designed to force any one having a registrable deed to register it under pain of losing his priority even over another who has notice of the right conferred thereby unless he is claiming through an insolvent.

As it was in fact registered the operation of this article seems automatically eliminated from any possible bearing upon the question of what effect notice or knowledge on the part of Payette might otherwise have had on his good faith.

Hence it seems to me Payette whether acting in face of a contract affecting real property, or in face of a mere personal right such as his counsel contends this alleged unilateral contract to have been, must be held to have acted in bad faith.

In the latter point of view I agree with the learned trial judge that Payette has as a result of his bad faith become bound to observe the obligation thus resting upon Quevillon.

It is to be observed that the article 2085, C.C., does not in terms protect such a purchaser except as against

an unregistered right belonging to a third party and subject to registration.

If as contended (of which I say nothing) this option was not the subject of registration then no protection exists for him acting in face of positive knowledge and he must abide by the general consequences attaching by law to such a course of conduct.

If on the other hand the unilateral contract is to be treated according to the authorities referred to in Mr. Justice Cross' judgment, at lower part of page 438 of the official report of this case in volume 23, Cour du Banc du Roi, then there can be no doubt of the matter.

And I most respectfully submit that in view of what I have above set forth relative to the question of registration the learned judge's view of the effect of the registry system upon said opinions, which he cites, is not well founded.

There is another view occurs to me, not in conflict with what the same learned judge has later on presented, and that is that an option such as this in question in a lease and forming part of the bargain between the parties might well be considered accessory thereto and part of the leasing contract and consideration for the terms in way of rental and, hence, cannot be dissociated from the lease in the way sought to be done by counsel for respondent. It is quite clear to my mind that many a man would for the sake of obtaining such an option in his lease be willing to increase the rent beyond what he would otherwise give and may have done so in this very case. The case where a tenant, as often happens, desires to make improvements (which the lessor cannot afford) in the property, and does so relying upon his option in the lease, is one where pushing too far the doctrine of the

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option being merely unilateral and hence merely a personal obligation dissociated from the lease proper might in the consequences work much injustice. As this suggestion only occurs to myself and was not dealt with in argument by the able counsel representing the parties herein, I put it forward with much hesitation.

Yet I must say that when I come to consider the question of what meaning is to be attached to the language of the deed from Quevillon to Payette and the obligation therein to maintain the lease and of the protest following it relative thereto, I think such considerations are entitled to some weight.

When people speak of a lease they usually mean all that exists therein and hardly ever think of severing all that is therein from that which in a narrow sense alone constitutes the lease.

Looking to the matter in that way makes me the more inclined to adopt the view pressed by Mr. Lafleur that the vendee of Quevillon assumed as part of his obligation to maintain the lease, to observe the option therein as well as all else and thereby preserve his vendor from damages for breach of anything arising from the failure of said vendor to maintain his tenant in possession. It may be answered the law in such case does so in case of registration. Granted so; what then is the use of any covenant unless to cover any risk beyond the mere tenant's possession?

However all this may be I think the construction I put upon the much discussed clause giving appellant the option renders it unnecessary to rely upon this part of appellant's contentions.

It is the different construction which the court of appeal has put upon the said clause that gives rise to

any trouble. The other way of construing it which I adopt leads on the reasoning of Mr. Justice Cross to the same conclusion as the learned trial judge.

If anything in the objections of form of pleading and difficulty arising therefrom and practice I think they can be all overcome if necessary by amendment this court has the power and must observe the duty to make to render them conformable with the facts in order that justice be done.

I should, therefore, allow the appeal and restore the judgment of the learned trial judge with costs here and below.

DUFF J.—First as to the construction of the *pacte de préférence*. I think the lessor's right to sell was conditional upon his giving notice in writing to the lessee of the price at which he proposed to sell; and giving the lessee an opportunity to buy. Whether the lessee would be entitled to buy at the price mentioned in his option or at the price named by the lessor, or at the more favourable of the two is a question which I need not discuss. The answer to it is by no means obvious and I express no opinion on it. No notice was given and the sale was therefore a violation of the lessor's obligation; and admittedly on this construction the lessee is entitled to damages; but in the view taken by the majority of the court it is unnecessary to consider how much.

Is the appellant entitled to enforce his option against Payette, the purchaser ? He is not entitled to do so in my opinion. The lessee's right under the promise of sale is not a *jus in re*. It is a *jus in personam ad jus in rem acquirendum*. The lessor's obligation,

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therefore, does not (in the absence of special circumstances giving a right against the purchaser) bind the purchaser from him or the land in the hands of the purchaser.

Then, is there just reason for enforcing the obligation against the respondent on the ground of bad faith? Of *bad faith* there is really no evidence, in the sense that the transaction was colourable. Bad faith in the sense of the English equity there was, the transfer, that is to say, was taken with full notice of the appellant's rights; but I have not found any authority for the proposition that, in the law of Quebec, to purchase property with the knowledge of the owner's obligation *in personam* to sell it to another—there being no *jus in re* vested in the person in whom the obligation inheres—subjects the purchaser to a like obligation.

A more important question is as to the effect of the registration of the lease. Has the registration the effect of making the obligation binding on the lands in the hands of a purchaser? Does it transform a *jus in personam* into a *jus in re*? The point to be determined is a question of strict law and that is whether or not the promisee's right is a *droit réel* within the meaning of article 2082, C.C. It is not a *droit réel* within the strict meaning of that term, that is to say, it is not a right in the thing or a right assertable generally against the world. I have examined the context fully (see articles 2089, 2098, 1601, 1663, 2128, 2102, 2106, 2016, 2168, C.C.) and I can see nothing justifying an interpretation inconsistent with this.

ANGLIN J.—There is no evidence in the record to sustain the defendant's contention that the plaintiff

parted with his interest in the lease in question and, therefore, has no status to maintain this action.

In the view I take it is not necessary to determine whether the option of purchase, which the lease gave to the lessee, was entirely independent of and unaffected by the *pacte de préférence* which follows it. There is a great deal to be said in support of the position taken by Mr. Justice Lafontaine that it was and that no action by the lessor under the latter clause could effect his obligations or the lessee's rights under the earlier provision; and I am far from being convinced that his view is not correct. On the other hand, with great respect, I can find nothing to warrant the construction which its formal judgment shews was placed by the court of appeal on the *pacte de préférence* itself, namely, that by it the lessor, on receipt of any offer of purchase which he was willing to accept, was empowered to call upon his lessee to exercise at once his option to buy under the former clause, with the consequence that, if he should decline or neglect to do so and the lessor should accept the offer and carry out the sale, all the lessee's rights under the option would be extinguished. As I read the clause creating the *pacte de préférence* whatever may have been its effect (if any) upon the rights of the lessee under his option, it entitled him to a preferential right during the term of the lease to purchase the property at whatever price and upon whatever terms the lessor might desire to sell it to any other person.

It is obvious that it was essential to the lessee's enjoyment of this right of preference that he should have been told the price and the terms which the

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lessor was prepared to accept from the other proposing purchaser. This information was refused him and he was notified that, although his lease had still more than three years to run, he must at once agree to buy the property under his option (which by its terms was to hold good until the termination of the lease), or forego all rights under it. Assuming, therefore, in favour of the lessor, that if proper notice had been given to enable the lessee to exercise his rights under the *pacte de préférence* his refusal to purchase under it would have extinguished his option to buy at $7,500, such notice was not given, the lessee never had an opportunity to buy at the price and on the terms which the lessor accepted from the Payettes, and it follows that not only was the *pacte de préférence* itself broken, but the lessee's rights under his option remained intact.

I am, however, unable to agree with the learned trial judge that, notwithstanding the sale by the lessor to the Payettes and the subsequent transfer from Didyme Payette to the defendant Henri Payette, the plaintiff is entitled to specific performance of his lessor's promise to sell and transfer the property in question to him. Until he signified acceptance of his lessors' offer to sell under the option, as Mr. Justice Lafontaine states, it gave him no interest in the land but merely a personal right against the lessor. I have not found in the Quebec registry law any provision for the registration of an unaccepted unilateral promise of sale or anything which would render a subsequent purchaser from the promisor liable to implement such a promise merely because it was included in a registered document, such as a lease, which contained other provisions susceptible of registration. With defer-

ence, I am unable to accept the view expressed by Mr. Justice Cross on this point.

The learned trial judge did not rest his judgment against the defendant Payette on this ground, but on his knowledge of the plaintiff's option and fraudulent conspiracy on his part with his co-defendant to defeat it.

By the sale to the Payettes the lessor put it out of his power to fulfil his personal obligation to the plaintiff, and, although the Payettes took subject to the lease, I cannot find that they assumed Quevillon's obligation to sell to the plaintiff, which was not an ordinary covenant incident or accessory to a lease, but a substantive and independent contract. Fuzier-Hermann, Rep., *vo.*, "Bail en général," Nos.2354 and 2355; Guillouard, "Louage," No. 361. On the contrary, the clear purpose of Quevillon and the Payettes was that the latter should obtain a title free from any claim of the plaintiffs. Quevillon guaranteed the Payettes against disturbance by St. Denis. Nor does it appear, as was alleged, that the Payettes were parties to a fraudulent conspiracy to deprive the plaintiff of a right which they knew he had to obtain the property. They appear to have acted in the belief, and on the assurance of Quevillon based on opinions of counsel, that he was entitled to determine all the rights of St. Denis, except his interest as lessee, by calling on him, as he did, forthwith to exercise his option to purchase. Notice of the clause in the lease under which St. Denis claims did not, I think, under these circumstances (if, indeed, it ever would) suffice to establish bad faith on the part of the Payettes such as the learned trial judge thinks would render them

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liable at the suit of St. Denis to carry out Quevillon's obligation to sell to him. Moreover, the deed to the Payettes was duly registered and the plaintiff has not asked to have it declared void or set aside.

Then it is urged that by delaying for over two years after the sale to the Payettes before bringing action and paying them meantime the rental for the property under his lease, the plaintiff acquiesced in the sale to them and abandoned all rights under his option to purchase. He had, no doubt, an immediate right of action against Quevillon for his breach of the *pacte de préférence* by the sale to the Payettes. It may be that he could have treated that sale as a repudiation by Quevillon of the option as well and sued him thereupon for breach of his promise to sell. But the lease gave the plaintiff the right to exercise his option at any time during the term, and I do not think he can be charged with default or laches in asserting that right during its currency. Notwithstanding what he had done the lessor might re-acquire the property or otherwise put himself in a position to meet the exigency of the plaintiff's option. I cannot think that the lessee was bound to treat the sale as a repudiation and breach of the option and elect promptly to bring action or to abandon his rights. He was entitled to wait until it suited him (of course, within the term of the lease) to make his demand upon the lessor to implement his promise to sell and on failure to meet that demand to bring action for the breach then committed. I cannot understand on what basis the position can be maintained that the lessor's own wrongful act in selling, without giving his lessee the benefit of his *pacte de préférence* and in violation of the option, imposed upon the lessee an obligation to assert

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his rights under that option at a period earlier than the option itself required. The plaintiff certainly did nothing which amounted to a positive or direct renunciation of his rights, and, under the circumstances, there was, in my opinion, no delay on his part which implied an abandonment, or barred his assertion of them.

I am, for these reasons, of the opinion that the appellant is entitled to succeed as against the defendant Quevillon for breach of his personal obligation, but that the recovery must be limited to damages. There is no material in the record, however, to enable us to determine the quantum of the damages which should be awarded. Unless the parties can agree upon the amount for which judgment should be entered for the plaintiff, the action must be remitted to the Superior Court for the assessment of his damages.

The appellant should have his costs throughout as against the defendant Quevillon. Under all the circumstances, while the appeal against the Payettes must be dismissed, I think it should be without costs.

BRODEUR J.—Il s'agit d'une action en passation de titre qui a été maintenue par la cour supérieure et renvoyée par la cour d'appel.

Le demandeur appelle de ce dernier jugement.

Les circonstances qui ont donné lieu à cette poursuite sont les suivantes.

Le 3 juillet, 1908, l'intimé, Quevillon, a loué à l'appelant St. Denis une certaine propriété pour cinq ans. Le bail contenait la clause suivante, qui a donné lieu au présent litige:—

Et le dit locataire aura en outre le droit d'acheter l'immeuble ci-dessus loué * * * en aucun temps pendant la durée du présent

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bail moyennant le prix de $7,500, dont $3,000 seront payables comptant et la balance par versements annuels de mille piastres, avec intérêt au taux de six pour cent par an; et dans le cas où le dit bailleur désirerait vendre à quelque autre pour un prix quelconque, il devra en signifier un avis par écrit au dit locataire, et donner la préférence à ce dernier.

Ce bail fut enregistré sur la propriété.

Le 28 mai, 1910, le locateur, Quevillon, fit signifier un protêt à l'appelant et le mit en demeure d'acheter la propriété suivant la promesse de vente contenue au bail pour le prix de sept mille cinq piastres, et, qu'à défaut par lui de ce faire, il déclarait qu'il vendrait alors aux conditions qu'il jugerait à propos.

Il ne dénonça pas dans ce protêt les conditions auxquelles il disposerait de sa propriété.

Le 8 juin, 1910, Quevillon, l'intimé, vendit la propriété à Payette pour la somme de $7,925, dont $500 comptant et la balance qui était stipulée payable au vendeur devait être acquittée par versements de $400 par année. Il était déclaré en outre dans l'acte de vente entre Quevillon et Payette que ce dernier maintiendrait les baux existants.

Le demandeur a, le 22 novembre, 1912, institué son action en passation de titre qu'il a dirigée et contre Quevillon et contre Payette, en alléguant qu'ils s'étaient concertés ensemble pour le priver de ses droits.

Il prétend que la promesse de vente a toujours continué de subsister malgré la vente faite à Payette, que ce dernier, en s'engageant de maintenir le bail, a assumé la promesse de vente qui y était stipulée.

Les défendeurs prétendent, au contraire, que le défaut par St. Denis d'exercer sa promesse de vente a mis fin à son droit, que le demandeur était libre de vendre la propriété à Payette et qu'il n'était pas tenu

de lui dénoncer les clauses auxquelles il vendait la propriété à Payette.

La cour supérieure a maintenu l'action, mais ce jugement a été renversé par la cour d'appel.

Cette clause du contrat stipulant promesse de vente et préférence est loin d'être claire et peut donner lieu à différentes interprétations.

Après avoir mûrement considéré le contrat et les circonstances établies par la preuve, j'en suis venu à la conclusion que le contrat pourvoit à une promesse de vente unilatérale et à un pacte de préférence qui doivent cependant s'interpréter l'un par l'autre. Nous avons d'abord le locateur qui promet à son locataire de lui vendre pendant la durée du bail la propriété louée moyennant le prix de $7,500. Mais en même temps cette obligation de sa part se trouverait à disparaître au cas où il trouverait un acheteur pour sa propriété et alors il ne pourrait en disposer qu'en donnant la préférence à son locataire.

Voilà pour l'interprétation du contrat. Maintenant Quevillon a-t-il rempli ses obligations ?

Je considère que la mise en demeure qu'il a faite à St. Denis était insuffisante. Il aurait dû lui dénoncer les conditions auxquelles il vendait à Payette, le prix, les termes de paiement, enfin toutes les conditions de la vente. Mais Quevillon ne s'est pas soumis à cette obligation. Comme je le disais tout à l'heure, il a simplement demandé par son protêt à St. Denis d'acheter la propriété aux conditions contenues dans le bail.

Quevillon a donc engagé sa responsabilité. Il nous reste à savoir si le demandeur avait droit à une action en passation de titre et de se faire mettre en

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possession de la propriété, ou bien s'il n'avait droit qu'à des dommages.

Les intimés prétendent que la propriété étant passée entre les mains d'un tiers, le demandeur n'aurait pas le droit de revendiquer.

Je considère que le concert frauduleux du promettant vendeur et du tiers acquéreur et l'obligation du tiers acquéreur de maintenir le bail m'amènent à considérer comme bien fondée l'action en revendication.

Sur l'effet de l'enregistrement d'une promesse de vente, l'honorable Juge Lafontaine, en cour supérieure, déclare formellement dans son jugement qu'une promesse unilatérale de vente, sans promesse réciproque d'acheter, de même que la promesse de pacte de préférence, ne confèrent aucun droit réel et que, lorsque le promettant vendeur a cessé d'être propriétaire, le recours que le promettant acheteur peut avoir est un recours en dommages-intérêts.

La cour d'appel, sur ce point, a décidé, au contraire, que:—

1. Un acte enregistré qui affecte un immeuble, tel qu'une promesse de vente ou option d'acheter, peut être opposé à un tiers acheteur qui a un titre subséquent à cet enregistrement, nos lois d'enregistrement n'étant pas limitées dans leurs effets au contrat translatif de propriété ou aux droits susceptibles d'hypothèques.

Je serais porté à croire avec la cour d'appel que tout droit dans une propriété résultant soit d'une promesse de vente, soit d'un autre contrat, est un droit réel et susceptible d'être enregistré et je citerais à l'appui de cette opinion Dalloz, "Biens," No. 151.

La loi ne dit pas qu'il n'y a que les contrats synallagmatiques, ou bilatéraux, qui soient susceptibles d'être enregistrés; mais tout acte qui est de nature à affecter une propriété et à conférer un droit réel sur

l'immeuble peut donner lieu à l'enregistrement. (Aubry & Rau, vol. 2, § 209, note 1; Mourlon, Revue Pratique, vol. 2, p. 193, note 39.)

Il me semble que la promesse de vente et la faculté de réméré devraient être traitées de la même façon. Dans la faculté de réméré comme dans la promesse de vente le créancier de l'obligation n'est pas tenu d'en demander l'execution. Il n'y a aucune obligation de sa part d'acheter. Cependant si la faculté de réméré a été enregistrée, l'acheteur ne pourra pas disposer de la propriété; (art. 2102, C.C.).

Mais il n'est pas nécessaire pour moi de disposer de cette question d'enregistrement, vu la conclusion à laquelle j'en suis venu sur les deux autres points de la cause.

Je considère en effet que le concert frauduleux qui s'est fait entre Quevillon et Payette et l'obligation assumée par Payette de maintenir le bail engagent la responsabilité de ce dernier et le forcent à donner suite à la promesse de vente contenue dans le bail.

Dans une cause analogue à celle-ci, la cour de cassation, en France, a décidé (Dalloz, 1903-1-38) que l'on peut annuler la vente faite au mépris d'un pacte de préférence et condamner le tiers acquéreur à la restitution de la chose s'il est constaté en fait que le tiers acquéreur subrogé par son titre aux droits et obligations résultant d'un bail a connu l'existence de ce droit de préférence et l'intention du bénéficiaire d'en profiter.

Dans la présente cause nous avons une promesse de vente stipulée en faveur de l'appelant par l'intimé Quevillon dans le bail qu'il lui a fait de la propriété

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en question. Cette promesse de vente, enregistrée sur la propriété, était connue au défendeur Payette. La preuve démontre, ainsi que le décide le juge instructeur, que Payette et Quevillon s'étaient concertés pour la faire échouer. Dans ce cas il n'est pas douteux que le tiers acquéreur devient obligé vis-à-vis du titulaire.

De plus, Payette, en s'obligeant de maintenir les baux existants sur la propriété, est devenu substitué aux droits et obligations de Quevillon lui-même. Il s'est contractuellement substitué à l'obligation qui pesait sur son vendeur et il est tenu comme l'était celui-ci.

Le titulaire de la promesse est donc en droit d'intenter contre le tiers acquéreur l'action réelle en délivrance de la chose dérivant du contrat qui les lie désormais et de provoquer en conséquence l'annulation de la vente qui lui fait grief. Dalloz, 1885-2-259.

Et même au cas où le tiers acquéreur n'aurait pas pris vis-à-vis de son vendeur l'engagement de subir la réalisation de la promesse de préférence, s'il s'est concerté avec le vendeur pour déposséder le titulaire du pacte de préférence, ce dernier pourrait tout de même provoquer la nullité de la vente comme faite en fraude de ses droits. Dalloz 1849-2-46.

Mais on dit que dans le cas actuel Payette en s'obligeant de maintenir le bail n'a pas entendu par là assumer des obligations étrangères aux rapports entre locateur et locataire. Pothier, "Louage," No. 299, dit:—

> Lorsque celui à qui j'ai succédé à titre singulier à un héritage m'a chargé de l'entretien du bail * * * il est censé * * * m'en avoir aussi cédé tous les droits et actions.

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Et il a été jugé par la cour de Dijon que l'acquéreur d'un immeuble est obligé de respecter non-seulement le bail proprement dit mais les conventions qui y sont jointes et forment avec lui un tout indivisible. Sirey 1875-2-33.

Dans cette cause, jugée par la cour de Dijon, le locateur s'était obligé de fournir une matière première pour l'exploitation d'une usine que le locataire devait installer sur la propriété louée. Il vendit plus tard la propriété à une autre personne avec obligation de maintenir le bail et la cour a décidé que ce nouveau propriétaire était obligé non-seulement de respecter le bail proprement dit mais les conventions qui y ont été jointes.

Il est vrai que cette décision a été critiqué par Guillouard et Fuzier-Herman. Il me semble cependant que le fait pour un tiers acquéreur d'assumer les obligations d'un bail doit couvrir tout ce qui y est mentionné, car autrement les stipulations en faveur du locataire et pour lesquelles il est censé avoir donné considération se trouveraient annulées.

Dans la cause décidée par la cour de cassation et qui est rapportée dans Dalloz, 1903-1-38, les tribunaux ont décidé que le tiers acquéreur était supposé assumer toutes les obligations contractées par son vendeur dans le bail.

Cette décision de la cour de cassation confirme par conséquent la position prise par la cour de Dijon en 1875.

Je considère que dans ces circonstances le demandeur avait le droit d'instituer son action en passation

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de titre, que le jugement qui a renvoyé cette action doit être renversé et que le dispositif du jugement de la cour supérieure devrait être rétabli.

Appeal allowed with costs.

Solicitors for the appellant: *Perron, Taschereau, Rinfret, Genest, Billette & Plimsol.*

Solicitors for the respondents: *Robillard, Julien, Tétreau & Marin.*

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*May 10.
*May 18.

Practice — Recalling judgment — Defect — Correction of omission — Amendment of pleadings — Jurisdiction — Costs — Settlement of minutes.

Where by an accidental slip or oversight the formal judgment on an appeal failed to express the clear intention of the court that certain amendments in the pleadings should be allowed for the purpose of effective relief to the successful party the Supreme Court of Canada, on application subsequent to the transmission of the formal judgment to the court below, ordered that its judgment should be varied by inserting therein a direction that the judgment appealed from and the plaintiff's declaration should be varied so as to correct the inadequate description of certain lands therein mentioned. *Rattray* v. *Young* (Cout. Dig. 1123), and *Penrose* v. *Knight* (Cout. Dig. 1122), referred to. Idington and Duff JJ. dissented from this order.

Per Duff J.—The judgment that the court in fact pronounced, and intended to pronounce, was simply that the appeal should be dismissed; such judgment does not involve any consequences whatever in respect of the amendment of the judgment or pleadings in the court of original jurisdiction. The power of the court to amend a judgment after it has become a record of the court is specially limited to making the record conform to the judgment pronounced or intended to be pronounced; it does not authorize the recalling of the judgment in order to deal with a collateral matter not actually or constructively involved in the court's decision. The proper course was to apply to the court of original jurisdiction for an amendment of the record of that court.

The application was allowed only upon payment of costs thereof by the party moving inasmuch as it had been his duty to have seen that the provision was inserted at the time of the settlement of the minutes of judgment.

APPLICATION, by motion on behalf of the respondent, for an order varying the formal judgment trans-

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mitted to the court below, upon the dismissal of the appeal in this cause(1), by correcting an omission therein.

The formal judgment issued and certified to the court below, upon the dismissal of the appeal to the Supreme Court of Canada failed to provide for a formal amendment of the plaintiff's declaration (which had been asked for) by supplying a reference to the cadastral number of the lot of land in respect of which the action had been brought, according to the official plan of subdivision of the lands of which it formed part. The formal judgment had been regularly transmitted to the proper officer of the court appealed from before the omission was discovered and the object of the application was to have this defect cured.

St. Germain K.C. supported the motion.

Lamarche K.C. contra.

THE CHIEF JUSTICE agreed in the judgment allowing the motion.

IDINGTON J. dissented from the judgment allowing the motion.

DUFF J. (dissenting).—This was an appeal from a judgment of the Court of Review, in Quebec dismissing an appeal from a judgment of the Superior Court in an action brought by the respondent for a declaration that he was the owner of a certain property which his *auteur* of certain land had professed by notarial

(1) 51 Can. S.C.R. 149.

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deed to convey to the Phœnix Land Co. The appellant is curator of that company which is now in process of winding up. The appeal was dismissed and the judgment of the court dismissing the appeal was settled and entered and certified by the registrar in the usual way to the proper officer of the court of original jurisdiction.

It now appears that the lands which were the subject matter of the action were inadequately described in the respondent's declaration and that in consequence the respondent cannot obtain effective registration of his title; and an application is made for an order amending the judgment of this court by directing an amendment of the declaration and the judgment of the Superior Court in order to cure this defect.

I should have thought that in the circumstances the respondents would have pursued the course of applying to the Superior Court for an order amending its judgment. The status of that judgment as a judgment of the Superior Court could not be and was not altered or affected by the appeal to this court which was simply dismissed. And I should have supposed it not open to doubt that the Superior Court of the Province of Quebec must possess authority to correct errors in the record of one of its judgments to whatever extent it might be necessary to do so for the purpose of making the record conform to the judgment which the court obviously intended to pronounce.

This court has power, under section 54 of the "Supreme Court Act," to make all such amendments in the pleadings as may be necessary for the purpose

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of determining the question in controversy between the parties, but the power conferred by section 54 can only be exercised, by the express terms of the section itself, during the pendency of the appeal; and that section alone is obviously not sufficient to justify the order asked for at this time after the appeal has been brought to an end by the simple dismissal of it.

In England the courts, including the House of Lords and the Judicial Committee of the Privy Council, at common law possess authority, to quote the language of Romer J., in *Ainsworth* v. *Wilding*(1), to make the amendment:—

> (1) Where there has been an accidental slip in the judgment as drawn up in which case the court has power to rectify it under Order XXVIII., Rule 11; (2) when the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended.

Romer J., is here specifically dealing with the power of the High Court of Justice and he naturally, for the first case, referred to the specific rule—the "slip order," as it is known. But the decision of the Judicial Committee in *Milson* v. *Carter*(2), is authority for the proposition that this power is one of the inherent powers of a court of record notwithstanding the absence of any specific rule; that the rule is simply declaratory of the common law. At page 640, Lord Hobhouse says their Lordships do not doubt that the court has power at any time to correct "an error" in a degree or order arising from a "slip or accidental omission" whether there is or is not a general order to that effect.

I have come to the conclusion that the power does not extend to the circumstances of this case.

(1) (1896) 1 Ch. 673, at p. 677. (2) [1893] A.C. 638.

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The application for amendment was in point of fact mentioned during the argument. But in fact it cannot be said that when the court gave judgment it had any intention in relation to this application or that the amendment was in any way necessary to give effect to the judgment of the court. It was a collateral matter which a court might or might not have thought it right to deal with.

It is desirable I think to add a word or two as to the limits of this jurisdiction because my impression is that some misapprehension prevails upon the subject.

The whole matter is summed up in the following sentence taken from the judgment of Lord Watson in *Hatton* v. *Harris* (1) : —

> When an error of that kind has been committed, it is always within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the *order which the judge obviously meant to pronounce.*

That is the limit of the jurisdiction of this court in such cases. Once the judgment has been passed and entered once it has become a record the appeal *transit in rem judicatam;* and the court has no power to re-open it for the purpose of passing upon points which were not actually or constructively involved in the judgment pronounced or intended to be pronounced.

There is not the least reason for relaxing this rule, which is no mere rule of practice, but a rule of high policy for the protection of litigants; there must some time be an end of litigation. The practice of this court is liberal to a fault in hearing parties with re-

(1) [1892] A.C. 547, at p. 560.

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spect not only to the frame of the judgment, but with respect to the topics not dealt with in the judgment up to the time when the judgment has been passed and entered; and it would be a distinct violation of the rule to grant the present application.

ANGLIN J.—The respondent moves to amend the judgment of this court as issued on the ground that it fails to provide for a formal amendment of the declaration and of the judgment based upon it pronounced by the Superior Court. By an accidental slip or oversight the declaration omitted a reference to the cadastral number of the subdivided official lot which covered the property in respect of which the plaintiff brought his petitory action. The judgment of the Superior Court in this respect followed the declaration and in this court an appeal from the judgment of the Court of Review affirming it was dismissed. At the hearing of the appeal counsel for the respondent directed attention to the mistake and asked that the judgment of this court should provide for the necessary amendment. That the amendment would be made if the respondent should be successful would appear to have been taken as a matter of course, and that probably accounts for the fact that in disposing of the case on the merits the judges omitted to mention the amendment. The matter also appears to have escaped the attention of the solicitors in issuing the certificate of judgment and the omission was not discovered until after the formal certificate had been transmitted to the provincial courts.

In *Rattray* v. *Young* (1), this court appears to have

(1) Cout. Dig. 1123.

held that it has jurisdiction after its formal judgment has been issued to recall it for the purpose of amending errors or omissions in it due to oversight or mistake—the same power which is exercised by the Supreme Court of Judicature in England under O. 28, R. 11. Similar jurisdiction was exercised in *Penrose* v. *Knight*(1).

In *E.* v. *E.*(2), the President of the Probate Division directed the amendment of the judgment of that court by providing for the date from which certain payments ordered were to run. This date had been inadvertently omitted in delivering the opinion of the court. Exercising similar jurisdiction the Master of the Rolls in Ireland, where the plaintiff through an error of account in the notice of motion had obtained a judgment for less than he was entitled to, directed the necessary amendment to be made. *McCaughey* v. *Stringer*(3). Of course this jurisdiction is distinct from the inherent power which the court possesses to correct its formal judgment when it finds that as drawn up it does not correctly state what the court actually directed and intended. There can be no doubt that the omission to provide in the judgment for the amendment was due to an accidental slip or oversight. Had the request and necessity for it been present to the minds of the judges when delivering judgment it would certainly have been directed. In delivering its judgment dismissing the appeal, the purpose of the court clearly was that the respondent should have an effective judgment for the relief which he sought. That intention might be defeated if

(1) Cout. Dig. 1122. (2) [1903] P. 88.
(3) [1914] 1 Ir. R. 73.

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the court were powerless to grant the amendment now asked. Under these circumstances I am of the opinion that the motion should be granted, but only upon payment of the costs of it by the respondent as he should have seen that the amendment was provided for in the judgment of the court as issued, and should, if necessary, have spoken to the minutes of judgment for that purpose. *Re Swire* (1).

BRODEUR J. concurred with Anglin J.

Application granted.

(1) 30 Ch. D. 239.

MARIE-LOUISE LAREAU (DEFENDANT) ..... } APPELLANT;

AND

FERDINAND POIRIER (PLAINTIFF) ..... } RESPONDENT.

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*Feb. 16.
*June 24.

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

Sale of land—Deferred payment—Omission of date—Completion of Contract—Acceptance by purchaser—New term—Instruments of title—Delivery—Arts. 1025, 1235, 1472, 1491-1494, 1533, 1534 *C.C.*

A contract for the sale of land, in the Province of Quebec, by which the date of the deferred payment of an instalment of the price is not fixed is, nevertheless, according to the law of that province, a completed contract of which specific performance may be enforced. (Duff and Brodeur JJ. *contra.*)

In his letter accepting the offer of sale, the purchaser requested the vendor to send to his notary the documents of title and the registrar's certified abstract of the deeds affecting the property.

Held, per Fitzpatrick C.J. and Anglin J. that this request did not intend the stipulation of a new term to the contract.

Per Brodeur J.—Although the vendor is obliged to furnish the documents of title, including the registrar's certified abstract, yet, in the present case, as it appeared that the vendor made it a condition that the titles and certificate were not to be delivered into the possession of the purchaser the request in the letter of acceptance was a stipulation of a new term which left the contract incomplete. *La Banque Ville Marie* v. *Kent* (Q.R. 22 S.C. 162), and *Sauvé* v. *Picard* (20 Rev. de Jur. 142) referred to.

Judgment appealed from (Q.R. 23 K.B. 495) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the

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(1) Q.R. 23 K.B. 495, *sub nom. Poirier* v. *Archambault.*

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Superior Court sitting in review (1), and restoring the judgment of Demers J. at the trial, in the Superior Court, District of Montreal, by which the action of the plaintiff, respondent, was maintained with costs.

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

St. Germain K.C. and *C. A. Archambault* for the appellant.

St. Jacques for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

The sale was complete when the respondent accepted the offer of Mr. Archambault, the vendor. There was no doubt left as to the thing (*chose*) which the vendor offered to sell nor as to the price at which he was prepared to sell it. Once the appellant agreed to give the property at the price fixed, nothing was left to uncertainty, the obligation to pay the purchase price was then absolute.

It may be that when the vendor seeks to collect the second half of the purchase price a question may arise as to the time at which it becomes payable. In my view, nothing turns on that now. This action was brought merely to get a deed evidencing the sale which was complete and produced all its effects from the moment the vendor agreed to give his property and the vendee obliged himself to take it at the stipulated price. (Art. 1472, C.C.; S. V., 87.1.167.)

No question was ever raised during the lifetime of

(1) 19 R.L.N.S. 488.

the vendor, Archambault, now represented by the appellant, as to the conditions subject to which the purchase price was to be paid. Considerable negotiations took place between the parties after the contract was entered into. But the sole dispute between them turned exclusively upon the right of the purchaser to insist upon the production of the vendor's title deeds and the registrar's certificate. The vendor's position then was that there was a concluded agreement, a completed sale, between him and the respondent here. The language which he uses invariably is "qu'il s'en tenait à la lettre stricte de son contrat" (see protest exchanged between the parties and fyled in the case). In his pleadings the appellant says:—

> Le défendeur déclara alors au demandeur qu'il n'avait pas de certificats du bureau d'enregistrement ni de titres a produire, excepté son propre titre d'achat, (lequel se trouvait le et dès avant le 29 octobre, 1910, en possession du notaire Olivier, mais que le dit notaire a alors passé au défendeur qui l'avait en sa possession lors de sa rencontre susdite avec le demandeur) et le défendeur lui réitera, comme dernier mot, qu'il s'en tenait à la lettre striete de son écrit du 27 octobre, 1910, *que son écrit était son contrat; qu'en dehors de son écrit il n'y avait rien à faire*, et sur ce, les dits pourparlers de vente entre le demandeur et le défendeur prirent fin.

And he repeats the same thing again here. One witness only was examined on behalf of the respondent, plaintiff below, and his evidence is to the same effect.

There does not seem to have been any doubt as to this in the minds of the judges below, as appears by the observations of Mr. Justice Tellier in the Court of Review.

It is true, as found by the trial judge, that Guillouiard and Duvergier would seem to make the condition of payment of the price of sale a condition of the sale itself, but it is to be noticed here that all the

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The Chief Justice.

conditions with respect to the purchase price and to the terms of payment were settled except as to the time at which the second instalment would become due and exigible. As I said before, I do not consider this question arises on this record, but if it did, I quite agree with the judges in *Bartley* v. *Breakey*(1), where they say that the court would have, in a case like this, the power to fix the delay for payment. To the same effect, Baudry-Lacantinerie, vol. 19, page 540, No. 499; Aubry & Rau, vol. 4, paragraph 303, page 87. Reference may possibly be made to Dalloz 82,2,177, and to the note. I would draw special attention to the second "considérant" of that judgment which explains why it was there held that the sale was not perfect. On this point see also Duranton, vol. 16, No. 107 *bis;* 17 Laurent, No. 59 *in fine.*

A question was raised as to the effect of the last paragraph in the writing accepting the offer of sale. "Faites venir vos titres et certificat chez mon notaire." Do these words qualify the acceptance; I do not think so. The vendee bound himself absolutely in the first paragraph to buy on the terms contained in the offer and the words above quoted constituted merely a request for information as to the title and not a condition subject to which the offer was accepted. As admitted by the Court of Review, the letter of acceptance contained two distinct, separate and separable things; first, an acceptance pure and simple of the offer; secondly, a request which had reference not to the sale which was complete when the offeree expressed his intention to accept (arts. 1472 and 1025, C.C.), but to the obligation to deliver which follows on the

(1) 11 Q.L.R. 1.

completion of the contract of sale. I do not think there can be any doubt that the obligation to deliver the thing sold includes its accessories, (art. 1492 C.C.; Pothier, Vente, No. 47) :—

> Les titres et tous les enseignements qui concernent un héritage, en sont des accessoires que le vendeur est obligé de remettre à l'acheteur.

See also authorities in Revue Legale, N.S. Vol. 1, pages 322, 323, 324, 325, 326; *Banque Ville-Marie* v. *Kent*(1).

On the assumption that the vendor brought suit, could the vendee escape on the ground that having accepted the offer absolutely he asked for something in addition which the vendor might or might not be obliged to give ? I think not. All the circumstances were fully and carefully considered by the trial judge and I agree in his conclusions which have the approval of the court of appeal.

I understand that the opinion of some of my colleagues is that the sale was not complete because, although the purchase price was fixed, by an inadvertent omission the time at which the second instalment of that purchase price was made payable was not stated in the deed. I find comfort in the thought that all the judges below who heard this case agree that this objection is without substance.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J. (dissenting).—The principal question is whether there was a concluded agreement of sale. I

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think the agreement was incomplete. The date of payment of the second instalment does not appear and I think that was an essential term. There does not appear to be any rule supplied by the general law where the parties agree that time shall be given, but do not specify what the time is to be. Where nothing is said as to the date of payment the law may imply a term that payment shall be made in cash or that it shall be within a delay necessitated by the circumstances where the circumstances enable the court to fix the necessary delay. The implications in both cases rest upon the presumed intentions of the parties. There are no circumstances here from which the intentions of the parties can be presumed or inferred in respect of the date of payment. The respondent's suggestion necessarily involves the hypothesis that the parties had no common intention on the point except that the court should make a bargain between them in the event of their failing to agree. I think that is an inadmissible hypothesis.

Moreover, it is not the function of the courts to complete incomplete juridical acts, but to interpret and to give effect to complete juridical acts according to law.

In construing the offer we must give it the meaning which a person of reasonable knowledge of business would expect it would convey to another person having like knowledge. I think any business man reading the offer in question would conclude either that the failure to mention the time of the payment of the second instalment was an oversight or that the point was to be left to further negotiations. And reading the offer and the acceptance together I have

no doubt that a reasonable construction of them is that the question of this date was left to be settled and inserted in the formal deed of sale.

The evidence given by the notary, Olivier, to the effect that a period of two years was agreed upon cannot in my judgment be safely acted upon for these reasons: Neither the learned trial judge nor the court of appeal has accepted the evidence. There is no mention of the conversation in the protest; and the draft deed prepared by the notary leaves the matter at large. Add to that the fact that the notary was the real party in interest—a fact that he concealed from Archambault—and it seems clear that his uncorroborated evidence ought not to be accepted, on this point the evidence of Mr. Archambault being no longer available.

As to the reference in the protest to the strict letter of the offer, I do not think any inference can be built upon it because it is obvious that the point then under discussion was not the question of the terms of payment, and I think the expression must be taken only to refer to the subject matter of the discussion.

ANGLIN J.—If this case fell to be disposed of under English law I should be prepared to allow this appeal on the ground taken by my brother Duff. But after devoting a great deal of time to the question I remain in doubt whether under the law of the Province of Quebec the failure of the parties to fix a date for the payment of the second half of the purchase money renders the contract alleged by the plaintiff incomplete and ineffective. The weight of the authorities to which I have had access rather favours the view that it does not.

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Anglin J.

On the other branch of the case I entertain no doubt that in making his request that documents of title should be sent to his notary the respondent did not and did not intend to stipulate for that as a term of the contract.

BRODEUR J. (dissident).—Pour qu'un contrat de vente puisse être considéré comme conclu il faut que les parties contractantes s'entendent sur la chose et sur le prix. Ce sont là deux conditions essentielles sans lesquelles il ne saurait y avoir de convention.

Il peut y avoir aussi d'autres conditions que l'une ou l'autre des parties peut stipuler et qui seraient de nature à restreindre les obligations et les droits respectifs du vendeur ou de l'acheteur. Ces dernières conditions ne sont pas essentielles; mais, cependant, si l'une des parties ne veut pas s'engager sans que ces conditions ne soient acceptées par l'autre, alors il n'y a pas de convention tant qu'elles ne se sont pas entendues sur ces clauses additionnelles.

Dans le cas actuel, les parties paraissent être tombées d'accord sur la chose. Quant au prix il a été convenu qu'une partie du prix de vente serait payable à terme, mais on a omis de stipuler quand elle serait payable. Serait-ce dans un an, dans deux ans ou dans cinq ans, leurs écrits n'indiquent aucune date.

Dans les cas ordinaires je crois que cette absence de stipulation devrait nous faire considérer que la vente n'est pas parfaite parce que les parties ne se seraient pas entendues sur ce point.

La loi nous dit bien (art. 1533, C.C.) que si le temps du paiement n'est pas fixé par la convention l'acheteur doit payer au temps de la livraison de la

chose. Mais dans le cas où les parties ont stipulé un terme, alors l'article 1533 ne s'applique pas. Ce terme alors doit faire l'objet de nouvelles négociations. La vente reste à l'état de projet tant que ce point n'a pas reçu de solution par un accord intervenu sur ce point: Dalloz, 1882-2-177; Baudry-Lacantinerie, 3ème édition, vol. 19, No. 24.

Dans cette cause-ci, ce point, quoique soulevée par le réputé vendeur, M. Archambault, dans son protêt du 3 novembre, 1910, n'a pas fait l'objet d'une allégation spécifique de son plaidoyer et ce n'est qu'à l'argument qu'il a été discuté. Il perd, dans ces circonstances, beaucoup de sa force; car il est toujours dangereux de décider une cause sur des faits qui n'ont pas été mentionnés dans l'action, dans la défense, ou dans les autres pièces de plaidoiries.

Mais dans cette cause-ci j'en suis venu à la conclusion également qu'il n'y avait pas eu de convention qui donnât lieu à l'action en passation de titre parce que les parties ne se sont pas entendues sur un point accessoire, savoir l'obligation pour le vendeur de fournir des titres et des certificats de recherche.

Voici en effet ce qui s'est passé.

Le 27 octobre, 1910, Archambault écrivait à Poirier la lettre suivante:—

Montréal, 27 octobre, 1910.

M. Ferd. Poirier,
Outremont.

Monsieur,—Je consens à vous vendre mon terrain d'Outremont (50 x 150) sur la côte Ste. Catherine pour le prix offert, savoir 70 cts le pied, mesuré d'après la mesure portée à mon contrat de concession et *aussi d'après les conditions de mon contrat de concession* payable la moitié (½) comptant et la moitié (½) avec intérêt à 6%, le tout à compter d'aujourd'hui. Répondez de suite, S. V. P.

A. M. ARCHAMBAULT,
N.P.

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Le même jour l'intimé répondit:—

Montréal, le 27 octobre, 1910

Monsieur A. M. Archambault,
Notaire.

J'accepte l'offre que vous me faites, ce jour, d'acheter vos terrains d'Outremont (50 x 150) sur le chemin de la côte Ste. Catherine, pour le prix et aux conditions y mentionnées.

Faites parvenir vos titres et certificats chez mon notaire, Me. J. H. Olivier, où j'ai déposé mon chèque en paiement.

FERD. POIRIER.

Le contrat de concession auquel Archambault référait contenait plusieurs conditions. La première, c'est que l'acheteur devait payer les frais d'actes et d'enregistrement. La seconde condition avait trait au paiement des taxes municipales. En troisième lieu il était dit que le vendeur ne serait pas tenu de fournir de titres ou de certificat d'enregistrement; mais que ces titres et ce certificat d'enregistrement resteraient au bureau d'un tiers, où l'acheteur ou ses représentants pourraient en prendre connaissance.

Il y avait aussi certaines autres conditions sur la nature des bâtiments qui devaient être érigés sur la propriété vendue.

Poirier, en acceptant l'offre de M. Archambault dans les termes employés par ce dernier et en lui demandant en même temps de fournir ses titres et ses certificats, est-il censé avoir accepté purement et simplement l'offre qu'Archambault lui avait faite ?

Si oui, le contrat de vente s'est alors formé; et, par conséquent, l'action en passation de titre intentée par Poirier devrait être maintenue.

Si non, le contrat ne s'est pas formé, les parties ne se sont pas entendues et alors M. Archambault était en droit, quelques jours après, de déclarer au demandeur par protêt, comme il l'a fait, que son offre était retirée.

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A première vue, à la lecture de ces deux lettres, on serait porté à croire que l'offre de M. Archambault était acceptée purement et simplement. Mais quand on examine cette offre et le contrat de concession auquel elle réfère et qu'on examine en même temps la lettre d'acceptation et surtout la demande qui y est contenue quant aux titres et aux certificats de recherches, il me semble évident que les parties ne se sont pas entendues sur cette condition du vendeur qu'il ne serait tenu de fournir ni titres ni certificats de recherches.

En effet, sur ce point que dit l'offre de M. Archambault ? En résumé, elle comporte qu'il était prêt à vendre sa propriété, mais à la condition de ne pas livrer de titres à son acheteur ni de lui donner de certificats. L'acheteur lui aurait répondu: "Je suis prêt à acheter la propriété; mais vous allez me donner vos titres et vos certificats." Voilà exactement ce que ces deux écrits comportent. Peut-on prétendre qu'il y a eu là convention ? Il me semble que poser la question c'est la résoudre.

Le 29 octobre, 1910, il y a eu évidemment de nouvelles entrevues, de nouvelles négociations; mais la preuve testimoniale ne pourrait légalement nous révéler ce qui s'est alors passé. (Art. 1235, C.C.). Nous sommes donc obligés de nous en rapporter aux écrits que nous avons devant nous. Or, ces écrits nous démontrent qu'il n'y a pas eu d'accord entre les parties ni sur le paiement qui devait être fait ni sur l'étendue de l'obligation du vendeur de fournir des titres.

Les jugements de la cour d'appel et de la Cour Supérieure qui ont maintenu l'action en passation de titre seraient suivant moi mal fondés et je serais

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d'opinion de rétablir le jugement de la Cour de Revision qui avait débouté Poirier de ses conclusions.

Tout en maintenant le jugement de la Cour de Revision, je ne puis acquiescer à l'opinion exprimée par l'un des honorables juges de cette cour qui déclare qu'en loi un acheteur ne peut pas forcer son vendeur à lui fournir le certificat du régistrateur.

Je crois, au contraire, que le vendeur est tenu de fournir les titres de l'immeuble qu'il vend, y compris le certificat.

La première obligation du vendeur est la délivrance qui consiste en la translation de la chose vendue en la puissance et possesion de l'acheteur. (Arts. 1491 et 1492, C.C.)

L'article 1493 nous dit:—

L'obligation de délivrer est remplie de la part du vendeur, lorsqu'il met l'acheteur en possession actuelle de la chose, ou consent qu'il en prenne possession, tous obstacles en étant écartés.

Cet article correspond à l'article 1605 du Code Napoléon, qui se lit comme suit:—

1605. L'obligation de délivrer les immeubles est remplie de la part du vendeur lorsqu'il a remis les clefs, s'il s'agit d'un bâtiment, ou lorsqu'il a remis les titres de propriété.

Comme on le voit, il y a une différence entre les deux articles 1493 de notre code et 1605 du Code Napoléon. Le Code Napoléon déclare expressément que le vendeur doit fournir les titres; notre article, au contraire, n'en parle pas. Mais les codificateurs nous donnent la raison de cette différence; et voici ce qu'ils nous disent:—

Cet article est d'accord avec la règle du C.N., article 1605, mais en diffère par l'expression et par l'absence de détails qui, dans ce dernier article, sont incomplets et en laissent la disposition imparfaite. Notre article a été rédigé d'après les critiques et les judicieuses

suggestions des auteurs cités et est conforme au Code Napoléon dans ses innovations relativement au contrat de vente.

L'article 1605 du Code Napoléon avait été, comme le disent les codificateurs, critiqué par les commentateurs et notamment par Boileux, 6ème édition, p. 643, Marcadé, pp. 221-222 et 225 et par Troplong, "Traité de la Vente," Nos. 675-6-7-8.

Marcadé disait, par exemple, qu'il serait absurde de dire que le vendeur a rempli son obligation quand il remet les titres en gardant les clefs:—

> Quand je vends la maison que j'occupe, il serait ridicule de dire que j'ai rempli mon obligation de vous faire la délivrance par cela seul que je remets les différents titres établissant mon droit de propriété et en continuant d'habiter la maison. Il est clair que je dois non-seulement vous remettre tout à la fois et les titres et les clefs, mais aussi délaisser l'immeuble.

Nos codificateurs, en présence de ces critiques de la rédaction de l'article 1605 du Code Napoléon, ont cru simplement devoir déclarer qu'ils adoptaient la règle de l'article du Code Napoléon, mais qu'ils ne donnaient pas les détails portés dans cet article parce qu'ils étaient incomplets et qu'ils laissaient la disposition imparfaite.

La seule conclusion à tirer, dans les circonstances, c'est que sous notre Code Civil, comme sous le Code Napoléon, l'acheteur, pour remplir son obligation de délivrance, est obligé de remettre les titres qui concernent la propriété.

Maintenant le certificat doit-il être aussi donné par le vendeur ?

On sait parfaitement qu'un acheteur ne voudrait pas se porter acquéreur d'une propriété sans connaître exactement les entrées qui affectent cette propriété au bureau d'enregistrement: même, à part le contrat de vente lui-même, ce que l'acheteur a le plus d'intérêt à

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avoir c'est la situation dans laquelle l'immeuble vendu se trouve au bureau d'enregistrement.

La chaine des titres peut être parfaite; mais, par contre, si l'un des vendeurs antérieurs avait disposé de sa propriété entre les mains de deux acheteurs, celui qui aurait un titre parfait à la propriété serait celui qui aurait fait enregistrer son titre d'abord.

D'un autre côté, un acheteur prudent ne paierait jamais un montant considérable sur la propriété en acompte sur son prix de vente sans connaître exactement les hypothèques qui doivent affecter cette propriété-là.

Alors le certificat d'enregistrement est donc l'un des titres les plus importants que l'acheteur doit se procurer.

Troplong, en discutant l'article 1615 du Code Napoléon, dit (No. 324) :—

> Il y a deux règles qui s'appliquent à presque toutes les ventes que nous venons de passer en revue, mais particulièrement aux ventes d'immeubles.
>
> La première, c'est que le vendeur est tenu de se dessaisir des titres, des plans, et autres renseignements qui se rapportent à la chose, qui en indiquent la mouvance, en déterminent l'importance et l'étendue. Ce sont là des accessoires de l'objet vendu.

Selon Boileux, tous les actes qui sont une garantie pour l'acquéreur doivent être livrés à l'acheteur.

Laurent et Mourlon sont aussi du même avis.

Or, il est incontestable que le certificat, sous nos lois d'enregistrement, est absolument nécessaire pour établir qui est le véritable propriétaire d'un immeuble. Ces certificats d'enregistrement sont généralement assez dispendieux, surtout dans un cas comme celui-ci où il y a plusieurs lots ou parties de lots qui font partie du contrat de vente. Il est donc extrêmement utile pour l'acheteur d'avoir ce certificat du régistra-

teur en sa possession et le vendeur, je crois, devrait être obligé de le remettre à son acheteur.

C'est l'opinion émise par M. Bouchard dans une étude remarquable qu'il a faite sur la matière et qui se trouve au premier volume de la Revue Légale, Nouvelle Série.

C'est aussi la décision rendue par l'Honorable Juge Mathieu, un ancien notaire et l'un de nos jurisconsultes les plus distingués, dans une cause de *La Banque de Ville-Marie* v. *Kent*(1).

L'Honorable Juge Bruneau, dans une cause de *Sauvé* v. *Picard*(2), en est venu également à cette conclusion.

Pour ces raisons, l'appel doit être maintenu et l'action du demandeur intimé doit être renvoyée avec dépens de cette cour et des cours inférieures.

Appeal dismissed with costs.

Solicitor for the appellant: *C. A. Archambault.*

Solicitors for the respondent: *Lamothe, St. Jacques & Lamothe.*

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(1) Q.R. 22 S.C. 162.

(2) 20 Rev. de Jur. 412.

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the courts of Manitoba, where the action was brought. *The "Halley"* (L.R. 2 P.C. 193) referred to.—Judgment appealed from (23 Man. R. 435) affirmed, Idington and Duff JJ. dissenting.—*Per* Idington and Duff JJ. dissenting.—Section 264 of the "Railway Act" imposes upon railway companies the absolute and continuing duty not only to provide, but also to maintain in efficient use the apparatus thereby required; where it is shewn that the apparatus failed to operate, when used, the onus is upon the railway company, in an action under section 386 of the "Railway Act," to shew that there had been a thorough inspection thereof made to ascertain that it was in efficient working order before the train was moved. *Johnson* v. *Southern Pacific Co.* (25 S.C. Repr. 159) referred to. PHELAN *v.* GRAND TRUNK PACIFIC RWAY. CO. **113**

4——*Shipping contract—Carrying person in charge of live stock—Free pass—Release from liability—Approved form—Negligence —Action by dependents—Conflict of laws—"Railway Act," R.S.C.*, 1906, *c.* 37, *s.* 340.] The shipping bill for live stock, to be carried from Manitoba to its destination in the Province of Quebec, was in a form approved by the Board of Railway Commissioners and provided that, if the person in charge of the stock should be carried at a rate less than full passenger fare on the train by which the stock was transported, the company should be free from liability for death or injury whether caused by the negligence of the company or of its servants. C. travelled by the train in charge of the stock upon a "Live-Stock Transportation Pass" and signed conditions indorsed in English thereon by which he assumed all risks of injury and released the company from liability for damages to person or property while travelling on the pass, whether caused by negligence or otherwise. While the train was passing through the Province of Ontario, an accident happened through the negligence of the company's employees and C. was killed. In an action by his dependents, instituted in the Province of Quebec, it was shewn that C. could neither read nor write, except to sign his name, and that he only understood enough English to comprehend orders in respect of his occupation as a stock-man; there was no evidence that the nature of the conditions was explained to him.—*Held* (Fitzpatrick C.J. dissenting), that the railway company was liable for damages in the action by the dependents.—*Per* Davies, Idington, Duff and Brodeur JJ. (Fitzpatrick C.J. and Anglin J. *contra*), that, as C. could not have known the nature of the conditions or that they released the company from liability, and the company had not done what was reasonably sufficient to give him notice of the conditions on which he was being carried, the company was liable in damages either under the law of Ontario or that of Quebec.—*Per* Anglin J.—Although no action would lie in Ontario unless the deceased would have had a right of action, had he survived, and such an action would have been barred there by the contract signed by him, nevertheless, in Quebec, where there is no such rule of law, the action would lie, though the wrongful act had been committed in Ontario, as it was of a class actionable in Ontario. *Machado* v. *Fontes* ((1897) 2 Q.B. 231) applied.—Section 340 of the "Railway Act," R.S.C., 1906, ch. 37, provides that "no contract, condition . . . or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall . . . relieve the company from such liability unless such class of contract . . . shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited." The Board of Railway Commissioners made an interim order permitting the use by the company, until otherwise determined, of the shipping form used, but did not expressly authorize the form containing the conditions signed by deceased.—*Held, per* Fitzpatrick C.J. and Davies and Anglin JJ. (Idington, Duff and Brodeur JJ. *contra*), that the contract signed by deceased was one of a class of contracts authorized by the Board.—*Per* Duff J.—The contract signed by deceased could not have the effect of limiting the liability of the company in respect of death because it was not in a form authorized or approved by the Board of Railway Commissioners and there had been no order or regulation made by the Board expressly determining the extent to which the company's liability should be impaired, restricted or limited as provided by sub-section 2 of section 340 of

SUBROGATION—*Fire insurance—General conflagration—Acts of municipal officials—Demolition of buildings—Statutory authority—R.S.Q.*, 1888, *art.* 4426—*Indemnity—Tort—Transfer of rights to municipality—Liability of insurer.* Article 4426, R.S.Q., 188, empowers town corporations, subject to indemnity to the owners, to cause the demolition of buildings in order to arrest the progress of fires; in the absence of a by-law to such effect power is given to the mayor to order the necessary demolition. In the Town of Chicoutimi, no such by-law having been enacted, the mayor gave orders for the demolition of a building for the purpose of arresting the progress of a general conflagration and, in carrying out his directions, an adjacent building was destroyed which was insured by respondents for $4,700. The municipality settled with the owner by paying her $5,500, as full indemnity for all damages sustained, and obtained a transfer of her rights under her policy of insurance. In an action on the policy so transferred:—

SUBROGATION—*Continued.*

Held (Duff J. dissenting), that, as the destruction of the building insured was occasioned by an act justified by statutory authority and full indemnity had been paid, the municipality was entitled to subrogation in the rights of the owner and to maintain the action against the insurance company for reimbursement to the extent of the amount of the insurance upon the property.—*Per* Duff J. dissenting. Although the destruction of the building insured was occasioned by an act justified at common law, the rights of the municipal corporation were determined by the principle laid down in *Cité de Québec* v. *Mahoney* (Q.R. 10 K.B. 378), and the claim for reimbursement to the extent of the amount for which the property was insured should not be maintained. *Quebec Fire Insurance Co.* v. *St. Louis* (7 Moo. P.C. 286) applied. GUARDIAN ASSURANCE CO. *v.* TOWN OF CHICOUTIMI..... **562**

SUCCESSION DUTY — *Constitutional law—Provincial legislation—Succession duties—Taxation—Property within province—Bona notabilia—Sale of lands—Covenant—Simple contract—Specialty—Construction of statute—Severable provisions—R.S.M.* 1902, *c.* 161, *s.* 5 (*Man.*) —4 *&* 5 *Edw. VII.*, *c.* 45, *s.* 4 (*Man.*)—*Appeal—Jurisdiction—Surrogate Court—Persona designata.*] M., who died in June, 1908, had his domicile in Manitoba and, under a verbal agreement, had erected elevators for L., also domiciled in Manitoba, on lands belonging to the Canadian Pacific Railway Company in the Province of Saskatchewan. Until fully paid for the buildings were to remain the property of M. who was to retain possession and operate the elevators and all net revenues were to be applied in reduction of the price for which they had been constructed. M. also owned lands in Saskatchewan, known as the "Kirkella Lands," which he had agreed to sell to purchasers under agreements under seal, in his possession in Manitoba at the time of his death, by which he remained owner until they had been fully paid for and then the lands were to be conveyed to the purchasers. The agreements contained no specific covenant to pay the price of the lands. The executors denied the right of the Government of Manitoba to collect succession duties in respect of these debts under the Manitoba "Succession Duties Act," R.S.M., 1902, ch. 161, sec. 5, as re-