REPORTS

OF THE

SUPREME COURT

OF

CANADA.

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1911.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

" Désiré Girouard J.

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

" John Idington J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Sir Allen Bristol Aylesworth K.C., K.C.M.G.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Jacques Bureau K.C.

MEMORANDA.

On the 22nd day of March, 1911, the Honourable Désiré Girouard, one of the Puisné Judges of the Supreme Court of Canada, died at the City of Ottawa, in the Province of Ontario.

On the 22nd day of June, 1911, the Right Honourable Sir Charles Fitzpatrick, Chief Justice of Canada, was created Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George.

On the 11th day of August, 1911, the Honourable Louis Philippe Brodeur, a Member of the King's Privy Council of Canada, and one of His Majesty's Counsel learned in the law, was appointed a Puisné Judge of the Supreme Court of Canada, in the room and stead of the Honourable Désiré Girouard, deceased.

ADDENDA ET CORRIGENDA.

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

Page 65, line 18—for "oceupied," read "occupied."

" 131 to 136—in side notes, for "Rogue," read "Rouge."

" 187, line 7—For "Ontario Municipal Act," read "Municipal corporation."

" 258, line 30—for "*ter*," read "*Charter*."

" 300, line 21—After "agreement" insert "according."

" 391, line 23—For "Sessions," read "Session."

" 495, lines 8 and 15—For "2," read "20."

" 620, line 6—For "*refused*," read "*allowed*."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 43 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Attorney-General of Canada v. *Standard Trust Co.* (not reported). Appeal to Privy Council dismissed with costs, 23rd May, 1911 ([1911] A.C. 498).

Attorney-General of Quebec v. *Fraser and Adams* (37 Can. S.C.R. 577). The appeal by *Wyatt et al.* was dismissed with costs, 13th June, 1911 ([1911] A.C. 489).

Alberta Railway and Irrigation Co. v. *The King* (44 Can. S.C.R. 505). Leave to appeal to the Privy Council was granted, 20th July, 1911.

Bell Bros. v. *Hudson Bay Ins. Co.* (44 Can. S.C.R. 419). Leave to appeal to Privy Council refused, 23rd Nov., 1911. (*London Times,* 24th Nov., 1911).

Canadian Northern Railway Co. v. *Robinson* (43 Can. S.C.R. 387). Appeal to the Privy Council dismissed with costs, as between solicitor and client ([1911] A.C. 739).

Cornwallis, Rural Municipality of, v. *Canadian Pacific Railway Co.* (19 Can. S.C.R. 702). Approved in *Rex* v. *Canadian Pacific Railway Co.* ([1911] A.C. 328).

Grand Trunk Railway Co. v. *City of Toronto* (Viaduct Case) (42 Can. S.C.R. 613). Appeal to Privy Council dismissed with costs. ([1911] A.C. 461).

Grand Trunk Pacific Railway Company's Bonds, In re (42 Can. S.C.R. 505). Appeal to Privy Council allowed, 2nd Nov. 1911.

King, The, v. *Wallberg* (44 Can. S.C.R. 208). Leave to appeal to Privy Council refused, 11th July, 1911.

Laidlaw v. *Vaughan-Rhys* (44 Can. S.C.R. 458). Leave to appeal to Privy Council refused, 29th July, 1911.

Larin v. *Lapointe* (42 Can. S.C.R. 521). Appeal to Privy Council allowed with costs, 28th June, 1911 ([1911] A.C. 520).

Lovitt v. *The King* (43 Can. S.C.R. 106). Appeal to Privy Council allowed with costs, 2nd Nov., 1911.

McLellan v. *Powassan Lumber Co.* (43 Can. S.C.R. 249). Appeal to Privy Council dismissed by consent, 8th March, 1911.

North Cypress, Rural Municipality of, v. *Canadian Pacific Railway Co.* (35 Can. S.C.R. 550). Approved in *Rex* v. *Canadian Pacific Railway Co.* ([1911] A.C. 328).

Ontario Bank v. *McAllister* (43 Can. S.C.R. 338). Leave to appeal to Privy Council refused, 28th Feb., 1911.

Pilling et al. v. *Attorney-General of Canada; In re Quebec Southern Railway* (not reported). Appeal withdrawn by virtue of P. C. Rule 32, and stands dismissed without further order, 5th Dec., 1910.

References by Governor-General in Council, In Re (43 Can. S.C.R. 536). Leave to appeal to Privy Council granted, 7th Feb., 1911.

Renton v. *Galligher* (not reported). Leave to appeal to Privy Council, *in formâ pauperis*, refused, 15th May, 1911.

Ste. Anne, Club de Chasse et de Pèche de, v. *Rivière-Ouelle Pulp and Lumber Co.* (45 Can. S.C.R. 1). Leave to appeal to Privy Council refused, 15th May, 1911.

Travis v. *Breckenridge-Lund Lumber and Coal Co.* (43 Can. S.C.R. 59). Leave to appeal to Privy Council refused, 28th Feb., 1911.

Union Bank of Canada v. *Felix McHugh* (44 Can. S.C.R. 473). Leave to appeal to Privy Council granted, 8th Nov. 1911.

Union Bank of Canada v. *T. P. McHugh* (not reported). Leave to appeal to Privy Council granted, 8th Nov., 1911.

Williams v. *Box* (44 Can. S.C.R. 1). Leave to appeal to Privy Council refused, 11th July, 1911.

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OF THE

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TABLE OF CASES CITED.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS.

JANE WILLIAMS (PLAINTIFF) .....APPELLANT; 1910

AND *Oct. 26, 27.
*Nov. 2.

JOHN BOX (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Title to land—Mortgage—Foreclosure—Equitable jurisdiction of court—Opening up foreclosure proceedings—Construction of statute—"Real Property Act," R.S.M. (1902), c. 148—5 & 6 Edw. VII. c. 75, s. 3, (Man.)—Equity of redemption—Certificate of title.

Under the provisions of section 126 of the Manitoba "Real Property Act," R.S.M. (1902), ch. 148, as amended by section 3 of chapter 75 of the statute of Manitoba, 5 & 6 Edw. VII., the court has jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under sections 113 and 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a *bonâ fide* purchaser for value have not intervened.

Judgment appealed from (19 Man. R. 560) reversed.

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

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers J., at the trial, by which the plaintiff's action was dismissed with costs.

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

J. B. Coyne for the appellant.

G. W. Baker for the respondent.

THE CHIEF JUSTICE and GIROUARD J. agreed in the opinion stated by Mr. Justice Anglin.

DAVIES J.—This was an action brought by the mortgagor (appellant) to set aside a foreclosure of mortgage made by the district registrar under the "Real Property Act" of Manitoba and to cancel the certificate of title given by the registrar after such foreclosure so as to enable the mortgagor to redeem.

The trial judge, Mathers J., was of the opinion that the circumstances proved entitled the mortgagor (plaintiff) to be allowed in to redeem if the right of redemption had not been taken away by the "Real Property Act."

He reached the conclusion as he said with much regret that this Act did take away the right the mortgagor would otherwise have had and that he was powerless to grant the plaintiff (mortgagor) any relief.

On appeal the Court of Appeal was divided, Richards J. holding that the court had the jurisdiction to grant the relief asked, while Perdue and Cameron JJ. held with the trial judge that it had not.

(1) 19 Man. R. 560.

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On the hearing of the appeal at bar Mr. Baker for the respondent, mortgagee, frankly, and I think properly, conceded that but for the statute the plaintiff would have had the right to redeem. This concession relieves us of the necessity of examining the facts and of determining whether under them the ordinary right to redeem existed in the plaintiff when she brought her action, and leaves as the only question for us to determine whether or not the statute has taken away the right.

Mr. Coyne in his able argument contended that under the true construction of the Act the district-registrar could not foreclose the mortgage without such notice to the mortgagor of his intention to do so as would put the latter on her guard and give her an opportunity of shewing cause against the final order issuing and that the making of the final order of foreclosure without such notice was contrary to natural justice.

I incline to the opinion, however, that Mr. Baker was successful in shewing that the proceedings were in strict conformity with the Act, and that as a matter of fact they substantially followed the procedure of the old Court of Chancery in foreclosure cases.

The whole question before us, to my mind, turns upon the construction to be put upon the "Real Property Act" of Manitoba as it stood amended when the defendant (respondent) took his first step to foreclose under it.

Mr. Baker contended that these amendments affected a vested right his client possessed and being passed by the legislature after defendant became assignee of the mortgage would not be construed so as to affect that right.

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I am not able to accept this argument, as it seems to me the amendments do not so much affect vested rights as they do the mode and practice by and under which these rights can be given practical effect. The respondent became assignee of a mortgage and afterwards and while he was such assignee, and long before he had taken steps to foreclose, the legislature, it is contended, by the amendments to the "Real Property Act" made it clear that it was not the intention of that Act to take away or affect the jurisdiction of any competent court to foreclose or redeem statutory mortgages.

The question, therefore, is reduced to the meaning of these amendments. They are two in number, one to the 126th section of the Act and the other to the 108th section. The latter section was one declaring the statutory mortgagee's rights and remedies at law and in equity to be the same as if the legal estate had been vested in him and the amendment made evidently to set at rest any possible doubts added the words "including the right to foreclose and sell in any competent court."

The 126th section as amended reads as follows, the words in italics following the words "or over equitable interests therein" constituting the amendment:

> 126. Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud or over contracts for the sale or other disposition of land, or over equitable interests therein, *or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent court, which right it is hereby declared may be exercised in such court.*

Now what is the true meaning of these two amendments made in 1906 ? Are they practically inoperative to effect anything beyond giving an alternative

remedy to the mortgagee to foreclose a statutory mortgage and sell through the courts in addition to the remedy of foreclosure and granting a certificate of title provided by the statute? In other language, must the words "or over mortgages" with which the amendment begins be read and construed as mere surplusage signifying nothing?

A little attention to the provision of the Act as first enacted, the conditions then existing and which it had to meet and also those existing when the amendments were made will, it seems to me, shew clearly that these words added to the 126th section "or over mortgages" were intended to have and legally do have a most important meaning and effect.

The 100th section of the statute enacts that

> a mortgage or an incumbrance under the new system shall have effect as security, but shall not operate as a transfer of land thereby charged, *or of any estate or interest therein.*

The 126th section declared that

> nothing contained in the Act shall take away or affect the jurisdiction of any competent court on the ground of fraud or over contracts for the sale or other disposition of land or over equitable interests therein.

So that except upon one of these three grounds,—either that there was fraud or that there was a contract for the sale of land involved or that there were equitable interests to be protected or enforced,—the jurisdiction of the courts to intervene or control the working of the Act by the district-registrar seemed to have been taken away.

Now the 100th section, above quoted, had explicitly declared the statutory mortgage to be a charge upon the land only and not a transfer of any estate or interest therein.

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The mortgage, therefore, created a statutory charge upon the land and the way and manner in which it should be enforced together with the mortgagee's other rights and remedies were specifically pointed out and enacted; sections 106 to 114.

These included the right to have the mortgage foreclosed by the district-registrar and such an order when made by him was declared by section 114 to

> have the effect of vesting in the mortgagee or his transferee the land mentioned in such order, *free from all right and equity of redemption on the part of the owner, mortgagor or incumbrancer,*

or of any person claiming through or under him subsequently to the mortgage or incumbrance.

This section 114, declaring the effect of an order for foreclosure when made by the district-registrar, read together with section 71 making the certificate of title the registrar was authorized to issue conclusive evidence of title against all the world, subject to certain specific reservations and exceptions, of which fraud is one, may well have led to the conclusion that the mortgagee's right under the statutory mortgage was not such "an equitable interest" in the lands charged as entitled the mortgagee to ignore the enabling provisions of the Act providing for foreclosure before the district-registrar and go into the courts and foreclose his mortgage there.

It was, I take it, to remove this possible doubt that the amendments to sections 108 and 126 expressly conceding to the mortgagee the right to foreclose in any competent court were enacted. There may have been other reasons. Part of the lands of Manitoba had been brought under this "new system" provided by the "Real Property Act"; part had not. A mortgagee of lands which had not clearly could still resort to the

courts to have his mortgage foreclosed. If that mortgage contained two plots of land, one of which had been brought under the "new system" and one of which had not, obvious difficulties arose with regard to foreclosure. The result was the specific declaration by the legislature, in 1906, of the right of any competent court, at the instance of the mortgagee, to exercise its jurisdiction respecting foreclosure over statutory mortgages.

An election on the part of the mortgagee, therefore, to invoke that jurisdiction involved necessarily a right to redeem on the part of the mortgagor. The mortgagee could not invoke the jurisdiction of the courts with respect to foreclosure without accepting that jurisdiction in full, involving the mortgagor's right of redemption in accordance with the ordinary practice and rules of the court.

But if those amendments giving the mortgagee his alternative remedy of foreclosure in the courts or in the district-registrar's office stood alone, where would the mortgagor stand ? He certainly had no equitable interest in the land charged which would enable him, under the 126th section before it was amended, to invoke the equitable jurisdiction of the court and open up a statutory foreclosure. He was the owner of the land possessing the entire legal estate. He could not, therefore, invoke the aid of the courts to give him relief against an order of foreclosure made by the district-registrar unless he brought his case within the cases expressly excepted by the statute in which the district-registrar's order was not to be conclusive. The consequences would be that, with respect to statutory mortgages foreclosed before the district-registrar, the mortgagor would be in an anomalous position and

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might be powerless to have a great wrong remedied. He certainly could not have recourse against the insurance fund in such a case as this, and if the courts had not jurisdiction to grant him relief he would be without remedy.

It was just this condition of things, it seems to me, which was in the mind of the legislature when amending the "Real Property Act" in 1906, which induced the insertion of the words "or over mortgages" amongst the amendments to section 126 reserving to the courts their jurisdiction.

The words were intended to have, and in my judgment do have, an important meaning. They refer to statutory mortgages, not to mortgages outside the statute as to which there never was or could be any doubt as to the court's jurisdiction. They were inserted for the benefit of the statutory mortgagor who, not having any equitable interest in the lands mortgaged (section 100), had no remedy in the courts unless in cases of fraud to impeach an utterly unjust statutory foreclosure order. The district-registrar would, I conceive, have no right to open up such an order. He was *functus officio* when he had issued it, and the courts could not interfere.

The amendment, therefore, was made so that, in a proper case, the mortgagor might, even if there was no fraud, obtain relief. The jurisdiction of the courts was made clear. Section 126 as amended reads:

> Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud, or over contracts for the sale or other disposition of land, or over equitable interests therein or over mortgages, etc.

No matter, therefore, how strong the language of the sections are declaring the effect of the order for

foreclosure or the certificate of title they must be read as subject to section 126. Just as the courts retain by that section the right to re-open certificates of title on the ground of *fraud,* so they retain a similar right to re-open, in proper cases, such certificates and the orders for foreclosure on which they are founded, in the cases of statutory mortgages. And this they retain by virtue of the insertion of these amending words, "or over mortgages," in the section.

It is idle to refer in construing these amendments to the decisions of the courts in New Zealand, or New South Wales, or elsewhere, upon their "Real Property Acts," or to the appeals from those decisions to the Judicial Committee. I have carefully read all of these. Such sections as we have before us for construction were not in the Acts of these colonies. If section 126 bears the construction I have put upon it, then the 71st section of the Act, making the certificate of title conclusive evidence, and the 114th, declaring the effect of the order of foreclosure, must as between the parties to the mortgage and their transferees in actions to redeem by the mortgagor or his representatives be read and construed as subject to the 126th section.

I need not say that this construction of the Act has nothing to do with the case of a *bonâ fide* purchaser for value. His title stands clear of any infirmities which as between the immediate parties, mortgagor and mortgagee and their representatives, the courts can investigate and, of course, cannot be attacked on the ground of any such infirmity existing prior to the certificate of title on the faith of which he is entitled in perfect confidence to buy or deal with the land. Such a case is not, however, before us now.

For these reasons I would allow the appeal with

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costs here and in the courts below, giving the plaintiff a reasonable time to be fixed by the prothonotary of the court within which to redeem.

IDINGTON J.—If we would interpret correctly the meaning of any statute or other writing we must understand what those framing it were about, and the purpose it was intended to execute.

The "Real Property Act" of Manitoba, so far as it related to the adoption and application of the "Torrens System," was as clearly as anything could well be intended to provide a registered title to which intending purchasers could resort with facility to ascertain the ownership and upon which they might rely with absolute safety in buying or acquiring any interest.

The primary purpose of the Act was not for the purpose of determining the right *inter se* or of quieting titles.

The "Real Property Act" provides machinery that may result in depriving men of their rights at common law or in equity.

Its operation cannot be permitted to take away men's recognized rights beyond that which the statute expressly enacts.

Ingenious arguments are presented based upon the meaning of the word "'foreclosure" and the application of the ordinary proceedings in equity, known or qualified by that term to the system of registration now in question.

In the first place this jurisdiction now invoked is for redemption. In the sense used in the amendment I am about to deal with, it has nothing to do with foreclosure. It is sought to be applied to open up a foreclosure.

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Quite true the suit for redemption might end by a foreclosure, so the suit for foreclosure might end in redemption.

All I am concerned with here is to shew they are neither interchangeable terms as definitions of a legal proceeding nor in any way to be treated as if they were so in construing this amended statute, and especially the amending part.

Mr. Justice Perdue explains that under this registration system the mortgagee never has vested in him the legal estate, never has and cannot get more than a charge upon the land, and then he suggests foreclosure never could exist as a method of procedure in regard to such a form of mortgage.

I will assume that to be so without entering into that which is a wide field in some aspects of it, and certainly do not question the general principle. See the judgment of Sterling J. in *Re Lloyd*(1), at p. 397, speaking for the court.

Its application to this case has, I respectfully submit, entirely different results from those Mr. Justice Perdue deduces therefrom as will presently appear.

These several observations and the legal consequences thereof also being borne in mind, let us turn to section 71 of the Act, which is its essentially operative clause. This case must be determined by the construction of that section and the amended section 126. Section 71 is as follows:

> Every certificate of title hereafter or heretofore issued under this Act shall, so long as the same remains in force and uncancelled, be conclusive evidence at law and in equity as against His Majesty and all persons whomsover that the person named in such certificate is

(1) [1903] 1 Ch. 385.

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entitled to the land described therein for the estate or interest therein specified, subject, however, to the right of any person to shew that the land described in such certificate is subject to any of the exceptions or reservations mentioned in the seventieth or seventy-fourth sections of this Act, or to shew fraud wherein the registered owner, mortgagee or incumbrancee has participated or colluded and as against such registered owner, mortgagee or incumbrancee; but the onus of proving that such certificate is so subject, or of proving such fraud, shall be upon the person alleging the same.

Section 126, as amended, is as follows:

126. Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud, or over contracts for the sale or other disposition of land, or over equitable interests therein, or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent court, which right it is hereby declared may be exercised in such court.

Stress is laid by the respondent upon the operative words of section 71.

With great respect I may be permitted to say that so much has been the effect given to these strong words that the limiting words, "so long as the same remain in force and uncancelled," have been entirely overlooked.

Do these words not imply a possibility of the certificate of title being cancelled ? And if cancelled by what power ? And under what circumstances ?

We have as a piece of great caution the exceptions made therein of the 70th and 74th sections and fraud added. Their repetition in the section does not add to or detract from what its operation would have been without such addition. It must have, in any case, been held, as regards the finality of title, to be subject to these express limitations in the other sections named. In like manner it also was always subject to the 126th section or its predecessor. And, as to fraud,

everything is subject to be avoided by reason of fraud. It need not have been specified.

But who is to pronounce upon the fraud ? Is it the registrar ? How can he deal with it ? I do not say he may not in some way act to defeat fraudulent devices that may have been practised upon him. But the possibilities of how far the fraud may have operated when the whole transaction is not involved must, of necessity, be relegated to the courts, if for no other reason than this, that fraud may be only voidable at the instance of some one complaining.

The rights arising under sections 70 and 74 might also have required the assistance of the courts to determine conflicting rights arising thereunder as against the certificate of title.

Sections 49 and 52 indicate clearly that the registrar and a judge of the Court of King's Bench have each powers independent of the other for the correction of error. The latter section anticipates and provides for the decree of a court being executed save as in the proviso that the issuing of a new certificate must have the registrar's approval in the case and way stated.

This 52nd section clearly contemplates such actions and, when we have regard to the purview of the Act, the results of such actions, as well as those section 126 reserves to the court, must be worked out by the court and given effect to by the registrar. At the same time by way of precaution for the protection of the rights of others (not parties to such litigation) which may have arisen, such rights are protected from being cut out by a new certificate until the registrar has had opportunity to see no harm can arise.

The decree of the court, signified by a judge's

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order, is as to all else to be obeyed and to determine the rights of the parties before it.

Let us turn to section 126 and we find it gives the jurisdiction and is indeed the only effective jurisdiction given by the Act in respect of the subjects stated and had, as the section stood originally, the subjects of fraud, contracts for sale of such lands as dealt with, and equitable interests therein, all put on the same footing.

These subjects thus given did not impair in the slightest the efficiency of the "Real Property Act" for the purpose for which it was framed.

If any one bought on faith of a certificate he would be protected and the protection thus given him might limit the powers of the court to reach and effectively remedy a wrong. But short of that the court could as between him who got and still held the certificate by means of some wrong done in violation of duties had in view in said section enforce the rights of the parties arising out of the specified subject-matters and if need be direct the certificate to be cancelled; or by a more indirect method direct the wrongdoer holding the title to transfer it or such interest as demands of justice required, to the person or persons the court had found entitled.

I cannot for a moment suppose as has been suggested that these subjects so added to that of fraud had ever the remotest relation to an action on covenant for price or anything collateral to the contract or trust that affected the land. It was only the land or interest therein that was being dealt with at all.

Such having been substantially the state of the law for many years the legislature saw fit to amend it by adding the like power "over mortgages." Could any-

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thing be more comprehensive? If we bear all this in mind and then give the plain ordinary meaning to the words "or over mortgages" or the meaning of the interpretation clause of the last word of the phrase, equally wide we find thus conferred a jurisdiction that must comprehend all judicial powers relative to mortgages.

Of these the most elementary, beneficial and far-reaching is the power to enforce redemption which is that now in question.

Unless the express language is to be frittered away, that jurisdiction has been given to deal with such cases as this.

The courts of equity have repeatedly interfered to open up final orders of foreclosure, and permit redemption. They have not hesitated to deal with the exercise of powers of sale when not conducted in conformity with the principles of justice that the courts have approved of and enforced.

Without adopting in its entirety (unless connecting therewith the considerations I am about to present) the argument of Mr. Coyne, so well presented, when he contended that the act of the registrar being a judicial one he should have given or directed notice to be given, and hence his failure to do so rendered his action a nullity, I think the failure (when the property was shewn to him to be worth twice the sum the mortgage stood for) to do so or to direct a sale under his own supervision such as section 114 contemplates was an improvident proceeding and so oppressive that the court might now under the amendment well exercise its inherent powers respecting mortgages in the way desired.

Moreover, it might well exercise its powers over

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the oppressor who thus abused the use of the powers of an inferior court, to direct that such abuse shall not avail him, but that he re-convey what he has so got thereby upon payment of what is due him.

It was conceded at the opening of the argument, and has been throughout in the court below assumed, that the case was one in which a court of equity would open up its own final order of foreclosure.

This proceeding given by the Act is but a statutory application of the ordinary power of sale in a mortgage, plus the power of final foreclosure, or rather statutory transfer of property.

It is a substitute for the ordinary bill of complaint, or like procedure appealing to equitable jurisdiction, of the mortgagee praying a sale and coupling with it a statutory alternative foreclosure.

And when it is supplemented by the added power given the courts in the amendment as to mortgages and both read together as they must be, implies what is usual in foreclosure in the way of the limited right to redeem by opening a judicial order. I think it must now be implied under this amended section, and can be enforced as between the original parties. As will be seen presently I do not rest entirely upon this implication.

No harm, however, can follow this interpretation, for the mortgagee gets what he is entitled to, and it only deprives him of the fruits of oppression or fraud as the case may be.

To put another construction that would cut out this power of the courts relative to foreclosure or redemption proceedings would equally cut out fraud classed in the same amended section 126, of the Act as within the power of the courts.

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It seems to me the New South Wales statute and the cases that have arisen on that or other like Acts are beside the question.

None of these statutes upon which such questions have been raised have conferred any jurisdiction upon the courts relative to mortgages and of the comprehensive character involved in the jurisdiction here given over mortgages.

In giving that jurisdiction I think something far beyond what is suggested in the court below has been intentionally given by these words, "or over mortgages," to the courts. And I do not think it is to be restricted either to the limits of the mere matter of procedure, discarding the principles involved or to the cases of a foreclosure suit or incident thereto.

The grammatical construction of the language does not permit of its restriction to a foreclosure proceeding, for that is a distinct thing of itself as the language indicates and especially so when we have due regard to the distinction I have already adverted to between redemption and foreclosure.

I prefer interpreting the amendment of a beneficent enactment so that the wrong to be redressed may be redressed, and so effectually that the principles upon which courts of equity have always acted become applicable to the like procedure under a somewhat different form when operated by means of an inferior jurisdiction merely having another name, but the real character of which is a substitution of one form of procedure for another.

Among the many considerations presented to my mind, though not noticed in the excellent arguments presented, as possibly worth noting was this, that it might be urged that at the time when the court's juris-

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diction was invoked the security by virtue of the certificate and force of the Act ceased to be a mortgage and hence no mortgage upon which the courts could act.

The illustration Mr. Justice Richards has given relative to a mortgage by way of absolute deed or where the consideration had not been advanced (or I may add only in part) as among the evils to be remedied might all be cases wherein justice might be defeated by the technical interpretation I have suggested, convinced me it should not be applied.

A question is raised that this new form of procedure is to be treated as a sale for taxes.

I first answer, even sales for taxes when not conducted with due regard to the inherent rights of those concerned that a fair sale be had, have been set aside even when the statutory and, as it were, external forms have been literally observed, but injustice has been done.

In the next place we are dealing with a statute so amended as to rectify or furnish the means of rectifying the exercise of a power thus inferentially restricted to operate within the recognized principles of justice as administered in the courts of equity.

No question is raised in the factum submitted respecting the form of notice served on the appellant, upon which the alleged foreclosure is founded. However, it was pointed out from the bench that the notice does not, as usual in suits for foreclosure anticipating possible default on the part of the mortgagor or owner of the equity of redemption, make clear that in default of appearance the proceedings would be taken *ex parte* and without further notice.

Respondent's counsel in answer to this pointed to

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and relied upon the first section of the notice after the demand gives notice that in default of payment within the time there specified the mortgagee would proceed

without any further notice to enter into possession of the land and to receive and take the rents, issues and profits thereof,

and to lease, etc.

It does not seem to me this notice fully supplies all it should. It rather seems to imply that the ulterior proceedings to be taken without further notice are limited to those above stated, *i.e.*, the taking possession and reaping the fruits thereof.

It does not in regard to the later steps threatened, declare they or either of them, shall be taken without further notice.

Suppose the mortgagee had gone into possession and so remained and obtained from the rents the greater part of his claim, and then without further notice, there being still default in completing the payment of the full sum due, offered the property for sale, and that the attempted sale proved abortive by reason of not reaching the reserved bid properly fixed, and a year or two later, without further notice, made his application to the registrar for a final order of foreclosure, and got it, he would, if respondent's position is correct, have barred forever the owner of the equity of redemption.

And that would be supposed to have been the administration of justice.

The registrar is called and states there never has been an advertisement under section 114, and indicates pretty clearly the first part of the section is treated as if null.

And, of course, no time or place is appointed for

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hearing or for payment of the amount due when the ulterior proceedings may be resorted to.

On the face of the proceedings an affidavit filed on the application for final order shews the amount due and the value of the property.

The value thus shewn is about double the indebtedness.

The affidavit of value was for the purpose of fixing the fees to go into the guarantee fund which the Act provides for.

The learned trial judge finds as a fact the property is worth five or six times the amount against it.

Making due allowances for the differences of opinion people may form as to values of real estate the affidavit fixing the value at $4,000 and no more does not seem to have been a proper statement of fact.

The purpose for which it was made may, however, render the statement of no legal consequence in this connection. Yet it is illustrative of what the registrar conceives his duty to be under the Act when such facts appearing on an *ex parte* proceeding under the Act he does not think the power he had should be executed.

Assuming for the moment his view and practice quite correct, but without passing upon it any opinion, the existence of such a practice and long continuance thereof rendered it doubly important that the original notice given by the respondent should be so clear and explicit that no one could mistake what it meant, and no one could ever suppose all threatened was to be done, without further notice.

Section 109 enabling the proceeding by such a notice to sell, contemplates the possibility of the mortgagor being content with possession and its fruits but enables without defining more the giving in the same

a notice for sale and the further notice for resorting to competent remedies.

Section 110 seems to contemplate the directions of the registrar to fix the conditions. Nothing of the kind seems to have been done so far as the record discloses. The statement of claim merely challenges the service of notice under section 109 and does not make any point of the absence of the direction by the registrar. But even so its absence adds force to the contention set up generally that proceedings so far as the registrar was concerned and had power to direct, were judicial, and in absence of an opportunity having been given to be heard, are null.

Section 113 imposes upon the mortgagee the burden of shewing that the lands

had been offered for sale at public auction after a notice of sale served as hereinbefore provided, etc.

It pre-supposes that the direction of the registrar in section 110, regarding such sale had been taken and acted upon.

I repeat such not being shewn to the registrar it became on the material before him doubly his duty to see that the appellant's land was not taken from her without an opportunity to be heard.

The absence of notice to her under such circumstances rendered the proceedings null within the meaning of the numerous authorities collected by appellant and referred to in the factum so fully and carefully prepared.

I do not think such a general notice as given by respondent in originating these proceedings is of such a character as to dispense with the later notice that the discharge of a judicial duty implies should be given.

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It seems to me such being the condition of things existent in the administration of justice it was high time there was a remedy applied.

And I can give no limited meaning to the words "or over mortgages" which assigned expressly to the courts entire, if not exclusive, jurisdiction as a check upon such abuses. Much less can I read them out of the statute.

I think, adopting the language used in *Heydon's Case*(1), that there appears here "the true reason for the remedy," and that our duty is

> always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasion for the continuance of the mischief and *pro privato commodo* and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.

The appellant's rights not having been taken away judicially she is entitled by virtue of the remedy given to the relief prayed for, and if need be to the cancellation of the certificate in question.

I think the appeal should be allowed with costs throughout.

ANGLIN J.—The plaintiff (appellant) brings this action to open up foreclosure proceedings taken under sections 113 and 114 of the "Real Property Act" of Manitoba, R.S.M. (1902), ch. 148. Under these sections and those immediately preceding, provision is made for the foreclosure of "new system" mortgages without action.

The regularity of the defendant's proceedings is attacked by the plaintiff principally on the ground that, although he gave her notice under section 109

(1) 3 Co. Rep. 7*b*.

that he intended to enter into possession of the lands and to take the rents and profits thereof, that in default of payment he would proceed to sell the lands and that in the event of the attempted sale not realizing sufficient to satisfy the moneys secured by the mortgage and expenses he would, after six months' default, make application for foreclosure, she did not receive any further notice of the application for foreclosure or any notice whatever of the date fixed by the district-registrar under section 114, on or after which he would issue a final order of foreclosure. The provincial courts have held that the plaintiff was not entitled to such further notice. The question is not free from difficulty. But in the view which I take of section 126 and of other provisions of the statute, it need not be dealt with.

Section 126, as amended in 1906, reads as follows, the amendment being italicized:

126. Nothing contained in this Act shall take away or affect the jurisdiction of any competent court on the ground of fraud, or over contracts for the sale or other disposition of land, or over equitable interests therein, *or over mortgages, nor shall anything contained in this Act affect the right of the mortgagee to foreclose or sell through any competent court, which right it is hereby declared may be exercised in such court.*

In the Manitoba Court of Appeal, Perdue and Cameron JJ.A. took the view that the sole purpose of this amendment was to enable mortgagees who held mortgages taken under the "new system" (*i.e.*, mortgages to which the foreclosure procedure provided by sections 113 and 114 is applicable) instead of proceeding under those sections, to bring an ordinary action of foreclosure. Richards J.A., who dissented, thought that in respect of the statutory foreclosures of mortgages under the new system, the amendment restored

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to the court (if it had been taken away) the jurisdiction which it has always undoubtedly possessed over ordinary foreclosure proceedings. With very great respect for the views of the majority in the Court of Appeal, I think that the construction which they have placed on section 126 involves reading out of it the words "or over mortgages." To treat any part of a statute as ineffectual, or as mere surplusage, is never justifiable if any other construction be possible. The rejection or excision of a word or phrase is permissible only where it is impossible otherwise to reconcile or give effect to the provisions of the Act. I find no such difficulty in the Manitoba "Real Property Act." I cannot see that giving full effect to the words "or over mortgages" does violence to any other provision of the statute.

Section 71 of the Act deals with the effect of certificates of title and declares them to be "conclusive evidence at law and in equity," except in certain specified cases, but only "so long as the same remain in force and uncancelled."

As pointed out by Richards J.A., the present section 52, enabling a judge to order a district-registrar to issue, cancel, or correct certificates, etc., is the successor of section 128 of the "Real Property Act" of the revision of 1892. Section 128 of that Act, however, contained the following additional proviso, which is not found in the present section 52:

(*a*) Provided that no certificate of title shall be cancelled or set aside except in the cases especially excepted in the fifty-seventh section of this Act.

While this proviso remained in the statute the jurisdiction of the court to cancel certificates was confined to the cases specially mentioned by way of excep-

tion in section 71, the successor of former section 57. With this restriction upon the power given to the court to order the cancellation of certificates removed, and the provision that they shall be conclusive evidence, etc., only so long as they remain in force and uncancelled, the court, independently of the present section 126, would probably have jurisdiction in such an action as this, which in my opinion is not within section 76, upon equitable grounds other than those specially excepted in section 71, to order the cancellation of a certificate, at all events where rights of a third party holding the status of a *bonâ fide* purchaser for value have not intervened.

By section 52 the court is further enabled to require the district-registrar

> to do every such act and make every such entry as may be necessary to give effect to the judgment, order, or decree of the court.

Under this provision I am of the opinion that in a proper case the court may require that an order of foreclosure shall be removed from the register whether a certificate of title based upon it has or has not issued. I have not failed to note that by section 114 an order of foreclosure when entered in the register is declared to

> have the effect of vesting in the mortgagee or his transferee the land mentioned in such order free from all right and equity of redemption on the part of the owner, mortgagor or incumbrancer,

and that such an order is not expressly made subject to the provision, "so long as the same remains in force and uncancelled," as are certificates of title under section 71. But section 114 proceeds to provide that upon entry of the order of foreclosure the

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mortgagee, incumbrancee or transferee shall * * * be deemed a transferee of the land and be entitled to receive a certificate of title for the same.

Where a certificate of title issues it is the culmination of the proceedings for foreclosure. It cannot be that, although this certificate is subject to cancellation under the combined effect of sections 52 and 71, the order of foreclosure is so irrevocable and conclusive that it renders effective action by the courts impossible and the cancellation or vacating of the certificate based upon it entirely futile. It is true that on its face the language of section 114 is absolute and subject to no qualification. But reading this section in the light of sections 52 and 71, and having regard to the nature and the office of the certificate of title and its relation to the foreclosure proceedings, it is, I think, reasonably clear that an order for foreclosure under section 114 must be subject to the jurisdiction of the court at least to the same extent as a certificate of title and that such an order is an instrument with which the court is empowered by section 52 to require the registrar to deal as it may direct.

But I entertain no doubt that since the amendment to section 126, conferring upon the court, or declaring it to possess, in respect of mortgages, the jurisdiction which it would have if the "Real Property Act" had not been passed (probably enacted to remove doubts), the court has power to open up foreclosure proceedings taken under sections 113 and 114 of the "Real Property Act" in the same manner and upon the same grounds as it may open up a foreclosure decreed in an ordinary action. I express no opinion

upon the existence or the exercise of this power in cases of statutory foreclosure where the rights of a *bonâ fide* purchaser for value have intervened. That case is not before us. But while the property still remains entirely in the control of the mortgagee, his statutory foreclosure under sections 113 and 114 is, in my opinion, clearly subject to the equitable jurisdiction of the court.

It was held by the learned trial judge, not dissented from in the Court of Appeal, and admitted at bar in this court, that if this foreclosure had been in an ordinary action the court would in the exercise of its discretion open it up and appoint a new day for redemption. This admission renders it unnecessary now to consider the sufficiency of the grounds on which the plaintiff claims relief.

I merely desire to add that a perusal of the record has satisfied me that the view of the learned trial judge is abundantly supported and that the admission of counsel for the respondent was well advised. *Platt* v. *Ashbridge*(1); *Campbell* v. *Holyland*(2), at page 172.

The plaintiff's appeal should be allowed with costs in this court and in the provincial Court of Appeal. In my opinion she is also entitled, in the peculiar circumstances of this case, to her costs of action. She should be declared entitled to redeem the mortgaged premises upon payment of the proper amount of redemption moneys to be fixed according to the usual practice in the Court of King's Bench for Manitoba,

(1) 12 Gr. 105. (2) 7 Ch.D. 166.

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which should also appoint a new day for redemption. In default of redemption under this judgment the plaintiff's appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Aikins, Fullerton, Coyne & Foley.*

Solicitors for the respondent: *Baker & Young.*

THE SISTERS OF CHARITY OF PROVIDENCE IN BRITISH COLUMBIA..... APPELLANTS;

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*Oct. 11, 12.
*Nov 21.

AND

THE CITY OF VANCOUVER.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Municipal corporation—Assessment and taxes—Exemption from taxation—Board of Revision—Judicial functions—Administrative powers — Construction of statute — "Vancouver Incorporation Act," 64 V. c. 54, s. 46, s.-s. 3.

The "Vancouver Incorporation Act," 64 Vict. ch. 54 (B.C.), by subsection 3 of section 46, provides that "the buildings and grounds of and attached to and belonging to * * * any incorporated seminary of learning, public hospital, or any incorporated charitable institution, whether vested in trustees or otherwise, so long as such buildings and grounds are actually used and occupied by such institution, or if unoccupied, but not if otherwise used or occupied; provided, that such grounds shall not exceed in extent the amount actually necessary for the requirements of the institution. The question as to what amount of land is necessary shall be decided by the Court of Revision, whose decision shall be final."

Held, per Davies, Duff and Anglin JJ., that the functions in respect of the limitation of exemptions from taxation so vested in the Court of Revision are quasi-judicial and must be exercised in each case with respect to that case alone; it is not vested with power to lay down a general rule based solely upon general considerations.

Per Idington J.—That the provision in question was merely a delegation of a legislative or administrative power, probably carrying with it a duty, but in no manner implying the discharge of a judicial duty subject to review or supervision.

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

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In proceedings, by certiorari, to remove a decision of the Court of Revision, the evidence adduced in support of the contention that the court had failed to dispose of the question in a proper manner consisted merely of a minute of its proceedings whereby it was resolved "that all charitable institutions mentioned in subsection 3 of section 46 of 'Vancouver Incorporation Act' be exempted from taxation to the extent of the area occupied by the buildings thereon and an additional amount of land equal to 25 per cent. of the area, and that the assessment roll for 1900, as amended, be confirmed."

Held, affirming the judgment appealed from (15 B.C. Rep. 344), that this minute, in the absence of further evidence, was not incompatible with the view that the Court of Revision had examined each particular case before deciding to act in the sense of the minute and that it would be a proper direction in each individual case.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment by Morrison J. at the trial, and setting aside his order directing that a writ of certiorari should issue to remove a decision of the Court of Revision of the City of Vancouver.

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

Lafleur K.C. for the appellants.

Craig for the respondent.

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

DAVIES J. agreed with Duff J.

IDINGTON J.—The respondent was incorporated and was governed by a special charter contained in 64 Vict. ch. 54, of British Columbia.

(1) 15 B.C. Rep. 344.

It provides for the assessment being made in the year preceding that for which it is to become the basis for levying rates to meet the expenses of the city.

The duty is imposed on each owner or occupant of ratable property to give all information and if required by the assessor to deliver a written statement duly signed containing all the particulars required for the assessment roll.

It is the duty of the assessor to enter all ratable property at its cash value estimating separately the improvements and the land.

The City Council

> may by by-law exempt from taxation, wholly or in part, any improvements, erections and buildings erected on any land within the city, notwithstanding that they may be part of the real estate.

The next section, 46, under the heading of "Exemptions," declares

> all lands, real property, improvements thereon, machinery and plant being fixtures therein and thereon in the city shall be liable to taxation subject

to exemptions specified in some five sub-sections.

Of these sub-sections, the third specifies a great variety of educational or charitable institutions of whose buildings and grounds not otherwise used than for the purposes thereof, are declared exempt

> provided, that such grounds shall not exceed in extent the amount actually necessary for the requirements of the institution. The question as to what amount of land is necessary shall be decided by the Court of Revision, whose decision shall be final.

Under the heading "Court of Revision" there appear a number of sections dealing with the functions of that body. The first of these is section 47, as follows:

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47. The assessment roll of the city shall be annually revised, equalized and corrected by the council sitting as a Court of Revision, who may hold or adjourn the sittings of the Court of Revision as a majority of the members present may determine.

The next section provides for the council appointing a "time and place for the sitting of the Court of Revision," which is composed of the entire council,

for hearing all complaints against the assessment as made by the assessor.

The sections immediately following this are directed to the form of notice of appeal, the power entitled to give same, the ground thereof and the mode of procedure to be adopted.

It does not appear to me that there is either in these sections or in the later one providing for appeals to a judge, any right of appeal given to bodies or persons such as appellants herein, to make an appeal relative to the question of how the Court of Revision may have discharged the duty assigned to it by the sentence quoted above from sub-section 3 of section 46.

As illustrative of the scope and purpose of the Act I may refer to the power given by section 45, enabling the council to exempt buildings or a percentage of improvements from taxation and provision which is furnished after all this by section 54, for the members of the council constituting the Court of Revision equalizing the assessed value of land and improvements.

These powers are given in such terms as to indicate it is in one class of cases to be exercised upon an originating motion in the court and merely by a majority of all the members expressing their opinion, and in another class of cases without any judicial examination by way of hearing evidence or parties though in some cases upon complaint.

Then section 55 declares the roll as revised or confirmed and passed by the Court of Revision

shall, except in so far as the same may be further amended on an appeal to a judge of the Supreme Court, be valid and bind all parties, etc.

The appeal given to the judge as thus anticipated does not seem to apply to any such case as the one appellant raises, but is confined

to the question of whether the assessment in respect of which the appeal is taken is or is not equal and ratable with the assessment of other similar property in the having equal advantage of situation against the assessment of which no appeal has been taken.

The first part of this is wide enough to cover such a class of subjects as that of the property of appellant as compared with others in like class, but these latter words seem to render it impossible to say an appeal would lie in either such a case as this or anything arising under the equalizing powers under section 54 above referred to.

I present these various provisions I have referred to in order to illuminate the character and enable us to correctly understand the scope and purpose of the legislation in which is found the peculiar wording of a sentence upon which this appeal turns.

In short there is nothing in the language imposing the duty and giving the power to the Court of Revision which it has exercised and is now in question, that necessarily constitutes the duty one of a judicial character.

It is merely a delegation of a legislative or administrative power probably carrying with it a duty, but in neither way one can look at it implying the discharge of a judicial duty subject to review or supervision.

An omission to exercise the power would leave only

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a limited exemption, and who could complain ? The assessor as in duty bound assesses what he deems ratable. If any error appears to have been made by him within the sphere of his authority, that might be appealed against on the ground of want of ratability. But that involves another view I will deal with presently. It has no relation to the duty of the Court of Revision relative to that which is *primâ facie* ratable, and as to which the assessor's only duty is to assess.

The term "Court of Revision" in this connection means no more nor less than the council, for it is the same body under another name.

The statute by using this alternative name beyond doubt impliedly attaches to the execution of the power and discharge of implied duty a limit of time for its exercise; and in so doing also gives it a chance of being better exercised than if given at large during the entire year for which the council as such endures.

It seems to me appellant's claim herein is thus in this last suggestion entirely answered, for whether legislative, judicial or administrative, the time has long gone by for its exercise.

The time for its exercise had passed when these proceedings were had.

If the Court of Revision could ever have been enjoined or controlled in any way, it should in the very nature of its constitution have been exercised before it was discharged by the mere operation of the statute. Its function ceased with the certifying by the court of the roll as completed.

If the act done was merely legislative or administrative in its character, the name of the body doing it could not change that character.

The word "court" is a good old English term of

such wide import as to cover as the context in which it appears may indicate duties of these several and respective characters and is of no peculiar signification in this connection.

Again let us see what is to be done. It is merely a question of policy that has to be decided.

The buildings and lands to be occupied thereby are exempt, and hence not ratable and presumably were not rated.

Whether the city can or ought to afford more than this absolute necessity in law is a matter respecting which men might well differ in opinion.

Where to draw the line is left to the discretion—I think, the absolute, unqualified discretion — of a majority of the council sitting as a court of revision.

If an appeal from that discretion had been given, a different inference might have been drawn.

It might have been well argued in such case that the act was to be a judicial one.

But beyond all these things assuming the power exercised by the Court of Revision a judicial act and assuming (a pretty strong assumption upon this statute) a writ of certiorari ever could run to bring up the record of a court of revision constituted for working out the provisions of legislation no way dependent upon its being the development or amended method of imposing rates by or through a court, such as the Courts of Sessions, of which instances can be found, is there anything in this case that might warrant interference ?

I, for the present, put aside all the considerations tending to shew it was a mere exercise of legislative or administrative power and duty.

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I will then assume that the question of the assessor's rating is subject to be complained of on the ground that he has not properly discharged his duty, but omitted to give due exemption to the extent *primâ facie* claimable.

What happened? An appeal was taken as if against the assessor's act.

Counsel was heard for the appellant. No witnesses were tendered. No claim was made here that such should be heard and then a refusal to hear them. In such latter event I could understand how the court (discharging for the moment a judicial duty) might be said to be acting without jurisdiction.

Nothing of the kind appears. Courts of revision are not bound of their own motion to call evidence. They may be entitled when the assessor's action is thus presented incidentally to hearing complaint against his ruling, to use their own judgment as men of affairs and often do so, as was done here to reduce the assessment.

Under this statute they are by section 54 expressly given such power quite independently of the general power.

Now what this court did, when appellant failed to give evidence or claim to do so, was to assume, as entitled to assume, the assessor's rating presumably correct and quite well warranted by the statute, and then to exercise their power to reduce. It was either an exercise of the express power to exempt or fix exemption or of power, incidental to an appeal, to reduce. I think it was the former.

The strange complaint is made that they coupled all institutions of the classes the statute enables them to relieve together, and made a uniform reduction on a percentage basis.

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What is wrong with that? The court could have dismissed the complaint as unsupported by evidence.

The court might then, so far as the law goes, have ignored the appellant's complaint and in other cases upon evidence, have given more ample exemption. Yet what ground of complaint could appellant have?

The judgment and act of the assessor stood, and stands yet (subject to the power exercised not by way of determining the appeal, but executing their special power), by every presumption of law as correct.

The sole question possible to be raised by this proceeding, if it lie at all, which I more than doubt, is whether jurisdiction existed or not.

It would be hard, I think, to find a clearer case of acting within jurisdiction.

Moreover, the rules of British Columbia require that any case of certiorari the objection, whether of omission or mistake to be relied upon, must be specified in the order for the issue of the writ.

None appears on this order.

The appeal should be dismissed with costs.

DUFF J.—Under section 46, sub-section 3, chapter 54 of 64 Vict. (B.C.), the appellants are, I think, *primâ facie* exempt from taxation in respect of "the buildings and grounds attached and belonging to" their institution in so far as such buildings and grounds are actually used and occupied by them for the purposes of that institution. The same sub-section confers upon the Court of Revision the power to limit this exemption. It is quite clear, I think, that the function thus vested in the Court of Revision is *quasi judicial* and must be exercised in each case with respect to the merits of that case alone; no administrative authority is con-

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ferred upon the Court of Revision empowering it to lay down a general rule based only upon general considerations. The principal contention of the appellants is that in this case the Court of Revision did not apply itself to the merits, but acted upon some such self-imposed general rule.

I express no opinion upon the question whether had the appellants succeeded in establishing this, the substance of their contention, they might still have been successfully met by the objection that the case is not a proper one for certiorari; they fail, in my opinion, because on the whole of the evidence before us we are not entitled to conclude that the Court of Revision acted otherwise than in accordance with its legal duty. There is in evidence a minute of that body in these words:

> That all charitable institutions mentioned in sub-section 3 of section 46 of "Vancouver Incorporation Act" be exempted from taxation to the extent of the area occupied by the buildings thereon and an additional amount of land equal to 25 per cent. of the area, and that the assessment roll for 1900, as amended, be confirmed.
>
> And that the court then adjourned *sine die.*

And it is upon this minute that the appellants chiefly rely in support of the contention just indicated. The existence of this minute does not appear to me to be conclusive. In itself it is not incompatible with the view that the Court of Revision had examined each particular case falling within the enactment before deciding to act in the sense of this memorandum. We have no evidence as to the number of these institutions in Vancouver, and it is quite conceivable that in respect of all of them there is such a similarity of relevant circumstances that the direction contained in the minute would be a reasonable and proper direction in each individual case. We are bound, of course, to assume that this municipal body did, pursuant to its

duty, examine each case until there is some solid reason for otherwise deciding. The presumption that they did so is strengthened by the circumstance that the appellants' solicitor being present on the occasion on which the appellants' case was considered, took no objection to the mode of procedure, and further by the additional circumstance that in his affidavit he refrains from saying that the case of the appellants was not discussed or considered on its own merits.

I should not wish to be understood as undervaluing in the least degree the importance of a proper observance by courts of revision and the like bodies of the broad rules of judicial conduct when exercising judicial functions; but it is just as important that misconduct should not be imputed to such bodies upon evidence so meagre and equivocal as that upon which this proceeding is based. I have the less hesitation in dismissing the appeal in that the material before us appears to indicate that if the charge of misconduct be well founded there was palpable abuse of the statutory authority vested in the council. Abuse is only one form of excess; and whether the circumstances of this case do or do not now preclude these appellants from bringing forward fresh evidence in another proceeding—there seems to be no good reason for thinking that at an earlier stage (assuming the assessment to have been, on the true facts, vitiated by the council's alleged *ultra vires* proceeding) they were not without a complete and satisfactory remedy.

ANGLIN J. agreed with Duff J.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Tiffin.*
Solicitor for the respondent: *J. G. Hay.*

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*Oct. 24, 25.
*Nov. 21.

ALBERT E. LEWIS, GEORGE F. CAMPBELL, GEORGE C. HASCALL AND ROY B. ROBINETTE, TRADING TOGETHER AS CO-PARTNERS UNDER THE NAME AND STYLE OF PRAIRIE CITY OIL COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

THE STANDARD MUTUAL FIRE INSURANCE COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Fire insurance—Policy—Statutory conditions—Gasoline on premises—Illuminating oils insured—Notice of loss—Remedial clause in Act — Discretion of court — Construction of statute — R.S.M. (1902) *c.* 87.

By the Manitoba "Fire Insurance Policy Act" (R.S.M. (1902) ch. 87, sch.), an insurance company insuring against loss by fire is not liable "for loss or damage occurring while * * * gasoline * * * is stored or kept in the building insured or containing the property insured unless permission is given in writing by the company." Insurance was effected "on stock consisting chiefly of illuminating and lubricating oils, etc., and all other goods kept by them for sale." A quantity of gasoline was in the building containing the stock when destroyed by fire.

Held, that gasoline, being an illuminating oil, was part of the stock insured and the above statutory condition could not be invoked to defeat the policy.

Held, per Anglin J., that if gasoline was not insured as an illuminating oil it was within the description of "all other goods kept for sale."

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

By section 2 of the Act "where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with * * * or where from any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions," the company shall not be discharged from liability.

By statutory condition 13(*a*) in the schedule to the Act every person entitled to make a claim "is forthwith after loss to give notice in writing to the company."

Held, Fitzpatrick C.J. dissenting, that the above clause applies to said condition and under it, in the circumstances of this case, the insurance should be held not to be forfeited by reason of the failure to give such notice.

Judgment appealed from (19 Man. R. 720) reversed, Fitzpatrick C.J. dissenting.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Metcalfe J., at the trial, by which the plaintiffs' action was dismissed with costs.

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

J. B. Coyne and *S. Hart Green* for the appellants.

Affleck for the respondents.

THE CHIEF JUSTICE (dissenting).—Referring to the objection that the policy was void by reason of a breach of the statutory condition which exempts the insurer from liability for loss occurring where gasoline is kept upon the premises insured without permission in writing from the insurer, I agree absolutely in the conclusion reached by the majority of the court on

(1) 19 Man. R. 720.

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this point. Insurance contracts are to be construed like ordinary contracts. The duty of the court is to seek the intention of the parties, which, in this case, is manifest; that is, it was, in my opinion, clearly intended to insure the stock in trade of the appellants, an oil company, which, to the knowledge of the respondents, dealt in gasoline and other petroleum products. The general agents of the company inspected the premises; saw gasoline there; and their knowledge was, in the circumstances of this case, the knowledge of the company. *Holdsworth* v. *Lancashire and Yorkshire Ins. Co.*(1). To hold that because of some statutory condition the policy was rendered void if the insured kept and stored goods covered by the description in the body of the policy without the permission in writing of the insurer would be to assume that one of the parties may insert some condition in a contract which will avail on a possible construction of the whole instrument to defeat the right of the other. Let me test it in this way. When the contract was made, did the risk attach to any gasoline that might then be on the premises? This question must be answered affirmatively. The object of the insurance was

the stock, consisting chiefly of illuminating and lubricating oils,

viz., those articles of commerce, including gasoline, which to the respondents' knowledge the appellant kept on the premises for sale. Further, can it be doubted that gasoline, which is well known to be one of the products obtained from the distillation of petroleum, and generally used for illuminating purposes, comes within the generic name and description of

(1) 23 Times L.R. 521.

illuminating oil? Is it conceivable that the main object of the contract is defeated by a condition such as the one relied upon?

I cannot add anything further to what has been said by my brothers Davies and Anglin, in all of which I concur.

I regret, however, that it is impossible for me to accept their conclusion with respect to the breach of the statutory condition (sch. 13(*a*)), which imposes upon the insured the obligation forthwith after the loss to give notice in writing to the company. By the contract declared upon the appellants were insured by the respondent company to the amount stipulated against loss resulting from or occasioned by the happening of the event insured against—fire. It is clearly a contract of indemnity and the payment of the amount for which the company is liable under the policy is made subject to certain conditions with respect

1. To notice of loss;

2. To proofs of loss.

And the questions to be determined by us on this branch of the case are:

1. Is the condition in this policy as to notice of loss so framed as to make a strict compliance with its requirements a condition precedent to the right to recover the amount of the policy?

2. Are the provisions of the policy concerning notice of loss and proofs of loss severable and distinct?

Whether the condition as to notice of loss is a condition precedent may not be free from doubt; but, on the whole, I agree with the conclusion reached by the trial judge, based as it is upon what may be called

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the well-settled jurisprudence of this court. *Accident Ins. Co. of North America* v. *Young*(1); *Employers' Liability Assurance Corporation* v. *Taylor* (2); *Home Life Association of Canada* v. *Randall*(3), and *Hyde* v. *Lefaivre*(4). See also *Scott* v. *Phœnix Assurance Co.*(5), decided in the Privy Council.

Whether the condition as to the notice is a condition precedent or not is, I admit, a question of construction in each case; but the obligation to give notice is clearly distinguishable from the obligation to produce proofs of loss. The imperfect compliance with the condition to provide full and complete proofs of loss may be remedied without injury to the company and is merely a directory provision. The purpose which proofs of loss are intended to serve, that is, to enable the company to determine the amount of its liability may be effected otherwise. But the failure to give notice of the loss cannot be remedied. The opportunity to inquire into the circumstances of the fire while the matter is still fresh is lost and this may be of great importance to the company. See *In re, Coleman's Depositories and Life and Health Assurance Association* (6), *per* Fletcher Moulton L.J., at page 807. Moreover, the policy is made and accepted subject to the conditions imposed by the legislature upon the insurance companies for the benefit presumably of the public and one of those conditions, accepted by the insured, is that the amount of the claim is made payable sixty days after due notice of the loss has been given in writing and the condition cannot be waived

(1) 20 Can. S.C.R. 280.
(2) 29 Can. S.C.R. 104.
(3) 30 Can. S.C.R. 97.
(4) 32 Can. S.C.R. 474.
(5) 1 Mathieu, Rev. Rep. 188; Stu. K.B. 354.
(6) (1907) 2 K.B. 798.

unless the waiver is clearly expressed in writing, signed by an agent of the company.

If notice is not given, when does the amount become due and exigible ?

The remaining question now is: Can section two of the Manitoba "Fire Policy Act" be held to vest this court with authority or jurisdiction to relieve the appellants against their failure to comply with the condition as to notice of loss ?

That section is in these words:

Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith or on behalf of the insured, in pursuance of any proviso or condition of such contract, the company, through its agent, or otherwise, objects to the loss upon such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the insured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective, and so from time to time, or where from any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be), shall, in any such case, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into. R.S.M. ch. 59, sec. 2, part.

The purpose of the statute was undoubtedly to protect persons insured who, by reason of necessity, accident or mistake, failed to comply strictly with the conditions of the policy as to the proof to be given to the company after the occurrence of the fire. This extraordinary power to relieve one of the parties to a contract from the consequences of a breach of its conditions, which is vested in the court, is limited to the proofs of loss and, in order to make it applicable to

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the present case, it is necessary to extend the scope of the statute so as to include the condition as to notice of loss. I cannot agree that the statute gives us power to make, practically, a new contract for the parties. If this condition is, as I hold, a condition precedent; and, as to this, I think we are bound by the cases decided in this court and mentioned above; failure to comply with that condition defeats the claim and we cannot, in this court, revive it. Moreover, as I said before, the section of the Act is intended to relieve against necessity, accident or mistake. Under which head can we give relief? There can be no suggestion of necessity. It is obvious that it is not a case of mistake or accident. To say that a man forgot to do something is not the same thing as saying that he was mistaken. It is not accident, in the sense in which that word is used in the Act, to say that a man omitted to do something which his contract required him to do. *Johnston* v. *Dominion Guarantee and Accident Ins. Co.*(1). I may add that if I saw my way to find for the appellant, I would gladly do so, but the giving of the notice is a fundamental condition of recovery, a condition that goes to the root of the contract; and against the consequence of his failure to comply with the condition we cannot give relief.

I would dismiss this appeal.

GIROUARD J. agreed with Anglin J.

DAVIES J.—This was an action brought on a policy of insurance to recover a loss sustained by fire which

(1) 44 Can. L.J. 783.

destroyed the plaintiffs' goods alleged to have been insured under the policy.

The two main grounds set up by way of defence at the trial and afterwards in the Court of Appeal for Manitoba were that under the conditions of the policy the presence of gasoline kept or stored on the premises discharged the insurance company from all liability, and secondly, that under rule 13 it was a condition precedent to the plaintiffs' right to recover that he should forthwith after loss give notice in writing to the company, and that he had not done so.

The trial judge held the objection as to want of notice to be fatal and entered judgment for the defendant accordingly.

On appeal the four judges were divided as to the want of notice; Chief Justice Howell, with whom Perdue J. concurred, holding that the defendants had not in their defence distinctly set up the condition and its non-performance as required by rule 15A of the statute regulating the practice and pleading of the court, while Richards and Cameron JJ. held that there was a substantial compliance with the rule, and that the want of notice had been sufficiently pleaded and was fatal to plaintiffs' right to recover.

The Chief Justice and Perdue J. also held that under the circumstances of this case, and having regard to the special kind and character of the stock insured and the actual knowledge of the agent who issued the policy, that the insured did actually keep for limited times small quantities of gasoline on hand and that as such quantities were in the stock of the insured and seen by him at the time the policy issued, it might fairly be held that on a true construction of the policy the statutory condition F, prohibiting petro-

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leum, coal oil, gasoline, etc., from being kept or stored on the premises insured was inapplicable to this particular insurance. On this point the other two judges, Richards and Cameron JJ., expressed no opinion.

As the appeal court was equally divided the judgment of the trial judge remained.

As the point was taken and argued before us that gasoline was stored or kept on the premises in violation of statutory condition F, it is necessary to consider the written part of the policy relating to the stock insured and determine whether statutory condition F is applicable to such an insurance policy.

That part reads as follows:

> On stock consisting chiefly of illuminating and lubricating oils, greases, paints, varnishes, and all other goods kept by them for sale, manufactured and in process, including advertising matter and all materials used in the manufacture, packing and shipping of same, their own or held in trust, or on commission, or sold but not removed, while contained in the above described building or on platforms on ground within 100 feet of building.

The Prairie City Oil Company, which entered into the above insurance contract was, as its name indicates, a dealer in oils of all kinds. They formed, indeed, a large part of its stock in trade. The insurance agent who visited their place of business and filled up the insurance policy now sued on knew this. The fact was a patent and visible one. He embodied it in the above written description of the property insured by the policy. The insurance company in accepting such a policy from their agent and insuring a merchant's stock of the character described never could have intended that the statutory condition F now invoked to relieve them from liability should apply. The risk they expressly undertook in the written part of their policy to accept was in large part on the very

class of articles prohibited at the risk of forfeiture from being kept or stored on the premises by such condition F. The stock insured, as described, and this statutory condition, were repugnant to and inconsistent with each other, and could not be harmonized or reconciled. One or other must be ignored, and it needs no argument to shew that in such cases the statutory printed form of condition being repugnant to the substantive part of the contract entered into in writing cannot be held to govern the contract. This contract can fairly be read and construed ignoring such statutory condition, so far as least as it is repugnant to the real contract of insurance entered into; otherwise the courts would be lending themselves to the carrying out of a fraud.

As to whether gasoline comes within the terms used in the written part of the policy "illuminating oils" there was little argument at bar and the evidence seems clear that it may be so classed. Smith, the insurance agent who issued the policy, said in answer to a question from the trial judge asking whether gasoline was considered an illuminating oil, that from his point of view, the insurance point, it would be, but he did not know how the trade would consider it. He said they got

permits for it as an illuminating oil—as a gasoline lighting system.

Mr. Lewis, the head of the plaintiff's firm, in answer to questions on this point, speaking from the trade point of view, said that gasoline was used largely for illuminating, that it was used in the city by half a dozen different companies who sold a system for lighting with gasoline, that of his own knowledge a large quantity of it was used for illuminating purposes and

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that he would, if asked to name the different illuminating oils, include gasoline. The fact seems to be that it cannot be used in the ordinary household or other burning lamps, but that it can be and is used in lamps and ways specially designed as an illuminant and as fuel.

In Webster's new unabridged dictionary it is described as being a product of petroleum and its uses are stated as "solvent; fuel; illuminant."

Other oils such as petroleum, rock oil, kerosene, coal oil, burning fluid, are classed together with gasoline in the condition F as being dangerous and are prohibited from being kept or stored on the insured premises without written permission. All of these are admitted as coming within the general words of the policy "illuminating oils" and under the evidence given I think gasoline should also in this contract be so included.

That being so, the words of condition F "unless permission is given in writing by the company" clearly apply. If the company have insured expressly the very articles prohibited by clause F, unless permission is granted to keep or store them, surely it is not open to argument that in such a case written permission has been given.

The other question raised as to the assured's noncompliance with the condition requiring him forthwith after loss to give notice in writing to the company gives rise to greater difficulties than the one I have already disposed of.

I am not able to accept the reasoning of the learned judges below who held the telegram sent to the company by their local agent stating the facts of the fire and loss could under the circumstances be held as a

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compliance with the condition requiring written notice from the assured. The agent of the company was in no sense the agent of the assured when sending his telegram to his principals. I have, however, after a good deal of consideration reached the conclusion that this notice comes within section 2 of chapter 87 of the Revised Statutes of Manitoba, and that this section enables and justifies us in refusing to allow the objection as to the neglect of the insured to give the notice in question to be set up as a discharge of the liability of the company under the policy sued on.

That it was under the circumstances proved a most inequitable defence was found by the trial judge and hardly admits even of argument.

The only question remaining was whether that notice so required came within the terms of the enabling section above referred to.

Strangely enough it does not appear to have been called to the attention either of the trial judge or of the Court of Appeal.

The statutory condition requiring the notice is No. 13. It reads:

> Any person entitled to make a claim under this policy is to observe the following conditions:
>
> (*a*) He is forthwith after loss to give notice in writing to the company.

This is followed by a number of other conditions, (*b*), (*c*), (*d*), and (*e*), relating to the proofs or particulars of loss which are subsequently to be delivered.

The question is whether the section of the statute I have above referred to is to be construed as limited to the requirements of statutory condition 13 relating to the particulars of loss as required by sub-sections (*b*), (*c*), (*d*), and (*e*), or whether it embraces and

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includes the requirement of sub-section (*a*) relating to the notice in writing to be given forthwith after the fire.

The question is one not free from doubt. The first part of the section reads:

> Where by reason of necessity, accident, or mistake, the conditions of any contract of fire insurance on property in this province, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with, or where after a statement or proof of loss has been given in good faith or on behalf of the insured, etc.

Do the words "as to the proof to be given to the insurance company after the fire" embrace or exclude the notice in writing required by sub-section (*a*) of statutory condition 13.

The word "proof" as used here is inapt. In the latter part of the section it is used alternatively, but evidently synonymously with "statement," and in this way "no objection to the sufficiency of such statement or proof," etc.

The statutory condition 13 does not in itself use the word proof with reference either to this written notice of loss or with reference to what is called in it

> as particular account of the loss as the nature of the case admits of.

These are to embrace: 1. Statutory declarations; 2. Books of account, invoices and other vouchers, etc.; 3. A certificate under the hand of a magistrate or other specified official.

The condition 14 which follows refers to the "above proofs of loss," but, of course, that may embrace as well the notice as the "particular account of the loss" the assured is required to deliver. These statements the assured is required to deliver are not, properly speaking, proofs, they are supposed to be and embrace the best evidence of the loss he can supply.

In reason and equity there is no ground for putting the narrow construction upon the above section 2 of chapter 87 giving to the court or judge the power to prevent on the ground of it being inequitable any objection as to the sufficiency of "such statement or proof" required after the fire. Non-compliance with the condition required as to notice of the fire arising from mistake, accident or necessity from which the company was not prejudiced is just as inequitable a plea as non-compliance arising from the same causes and with the same innocuous results in respect to the fuller particulars which the assured is subsequently required to give.

The notice of the fire is required by the same statutory condition as the subsequent more particular statements or accounts. That they are called "proof" in one part of section and "statements or proof" in another part, satisfies me that the legislature intended the equitable jurisdiction it vested in the court or judge to extend to and cover as well the written notice required by sub-section (*a*) as to the fire having occurred as the more particular subsequent of the loss required by sub-sections (*b*), (*c*), (*d*), and (*e*).

The appeal should be allowed with costs here and in the court below and judgment entered for the amount of the claim with costs.

IDINGTON J.—The learned trial judge held the appellants' action must fail by reason of the first paragraph in the list of conditions embraced in No. 13 of the statutory conditions indorsed on the policy sued upon.

The Court of Appeal for Manitoba dividing equally on an appeal against that decision, the appeal failed.

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In answer to the appeal here the respondent besides maintaining the contention upheld as above, urged as had been urged throughout, and I rather think had been its chief objection at the outset, that the condition on the policy forbidding the keeping of coal oil, gasoline and a number of other products of petroleum, had been violated.

As to this contention it was shewn that gasoline itself as well as other things kept, were in fact illuminating oils and thus within the very terms of the specific things that were described as what was insured. Moreover, the oral evidence was clear that the contention ought never to have been set up.

Therefore, I need not argue that this contention is quite untenable.

The other contention I have referred to though one not to be favoured has not so much inherent absurdity in it.

I think each one of a number of answers that appear hereunder may be held good.

It so happens that neither one of these helps the other. Each must stand or fall of its own strength or weakness.

The fire took place in Winnipeg where the oil business of appellants is carried on and where a firm engaged as the general agents of the respondents, live and represent it, by virtue of a power of attorney that seems comprehensive enough to sanction almost, yet not altogether, everything an insurance company may have to transact in the course of its business.

It was such as to attract both the junior member of the firm of general agents and one or more members of the appellant firm to the spot whilst the insured property was being burned on the 13th November, 1908.

The senior member of the firm of general agents also knew of it and immediately reported by wire to his company at its head office in Toronto, on the same day as the fire took place, the fact of the total loss.

The next day the company's manager, on the 14th November, wrote the general agents acknowledging this message and making remarks clearly indicative of liability to pay and expectation the company would pay.

The general agents acting within their powers engaged one Paterson, a professional or official adjuster of insurance losses.

Mr. Smith says

> we instructed the adjuster to adjust the claim of the plaintiffs. * * We supplied him with the forms that the company supplied us with.

The papers contain statements of loss, declaration of one of the plaintiffs as to the fire and other insurances and valuation by the adjuster of the property burned and of the salvage.

But to my mind, in the view of the case that the question of estoppel gives rise to, the most important part is an apportionment of the loss between this company and five other insurance companies.

The amount of what would on such bases be payable to the appellants by the respondent company was thereby fixed at $3,532.70 and agreed to.

The whole mass of work and consideration to be given thereto lasted until the 27th November, when the papers having been completed were duly handed over by Paterson to the said general agents and by them forwarded to the company's head office on the 1st December.

The general agents write at same time requesting cheque within thirty days. In short they treat the

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whole business as closed except the payment within usual delays.

No answer or objection appears until January when Smith, at the head office, brought the matter under the notice of the president and the manager of the respondent, who replied they had the impression other companies concerned were resisting payment, and upon being told other companies were paying, the manager said he would recommend payment by his company also.

No such objection as now relied upon was ever made until the statement of defence shewed it amongst a great many other random shots.

It is in argument replied to this objection that the pleading does not, as the rules require, distinctly set up such a condition as now relied upon, (namely, the omission to give written notice), but one of a distinctly different nature, namely, of "the alleged loss and damage." The want of its being in writing is not pleaded.

I incline to think the objection is well taken. If the issue joined is looked to, then it may well be said that issue is to be found in the appellants' favour proven by oral notice to the general agents. It may be inferred from what transpired between them and the appellants.

It is the notice to the company at their office that is pleaded and their office, I think, for the purposes of the business in hand must be held to be that in Winnipeg conducted with such ample powers as the constitution thereof by the power of attorney to the general agents both expresses and implies.

Again the reason for the notice is that at the earliest practicable time after its receipt the company

may have an opportunity to investigate and, if possible, adjust the damages. All the purposes which the notice could serve were served by the oral notice to the general agents. Suppose the case, not an unusual one, but a thing likely to arise daily, of an English company with an agency well-known and through which a policy was issued in this country, and a man, insured thereby, instead of directing his notice upon loss occurring to the office with which the business was transacted took it in his head for improper purposes desiring to defeat investigation to direct his notice to the head office in England.

What would such a company say and the law hold relative to such conduct ?

I think notice was intended in such a case and in this case to be directed to the general agency in the province where the fire occurred. Such, undoubtedly, was what the company intended by this so-called condition.

Even if, looking at the condition, oral evidence is not sufficient it is a complete answer to the plea as framed.

Let us pass such technicality and get to the substance. Suppose a fire occurred next door to the head office of a company liable for the loss under a policy such as this.

Suppose, further, the insured in half an hour called at the head office, saw the manager, explained the loss which had occurred and the manager wrote down in his books a record of the oral notice. Could the company plead in such a case want of written notice ? Could not the insured point to the manager's own written record as a full answer ? Suppose, following all that the happening of such dealings in relation to the loss

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as appear herein and the company had no other defence. I can hardly imagine such a defence successful.

I certainly do not think the writing must of necessity be that of the insured or signed by him if framed so as to identify the parties concerned.

There is the purpose of the thing and reason for it to be considered.

Let us consider further that the writing in this case was sent by wire. Is that sufficient? Can any one say if done by the appellants it was not in writing, but by wire, and the writing was not transmitted to the company? Where is the end to be of all such wretched subterfuges if we pass by the reason for the thing and the substantial purpose of the parties? I by no means wish to imply that there may not be cases of a writing being imperatively required by the hand of a named person as part of the contract.

The appellants claim the respondent estopped by reason of its inducing them to enter upon extensive and expensive inquiries and to an assent to the finding and apportionment of the loss implying thus a discharge *pro tanto* of each of the other companies. I think there is a great deal in the contention, but I doubt if the pleadings give the ground for either that or the claim of a binding adjustment or adjudication.

Again, can the appellants not be taken to have adopted the act of the agents and that adoption to relate back to the time the agents gave the written notice? I merely suggest that as a possibly fair inference from the facts knowing as matter of common knowledge how much the agents for insurance companies daily constitute themselves the agents of both parties for many things relative to the transaction of the business in hand.

This point was not taken in argument and the appellants' case being well argued probably not enough in the evidence to maintain it. I, therefore, have not fully examined it.

I think there is a complete answer to the whole contention furnished by section 2 of chapter 87 of the Revised Statutes of Manitoba, enabling the court to disallow such objection.

The section is identical with one in force in Ontario in whose legislature it originated as the result of a commission designed thirty-five years ago to put an end to the unjust advantages taken by virtue of such conditions as insurance companies saw fit to put upon their policies.

The fact that not a single case has arisen and been reported of such an attempt as this is pretty strong evidence that the profession and judges of that province and other provinces adopting the legislation have interpreted the section as a cure for such wrong as involved in permitting such a defence to prevail.

No such case has been cited and a diligent search by myself has not resulted in finding one.

The cases cited as decided in this court do not touch the point.

The statute in this second section is wide enough to cover any mistake of which this is one.

My only doubt has been as to its language relative to statement or proof of loss and that is wide enough when we have regard to the purview of the statute and especially the clauses of the condition relative to proofs of loss.

I think No. 13 is intended to form a group of subject-matters designated by No. 14 as proofs of loss and so introduced by No. 12 on the same subject.

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It seems to me the remedial nature of the Act must also be borne in mind. Though this is a contract, it is one of which the Act in this regard has imposed the form and tried to limit its meaning.

Its use is rendered imperative upon the companies and was designed to protect insurers, and hence requires we should interpret it as I have no doubt it has in practice and judicially been for a long time.

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

ANGLIN J.—To the appellants' claim to recover on an insurance policy for $4,000 on their stock, buildings and machinery the respondent company answers (*a*) that the policy was rendered void by the appellants' breach of statutory condition 10(*f*), exempting the insurers from liability for loss or damage occurring while gasoline is stored or kept on the premises without permission in writing from the insurers; and (*b*) that the appellants failed to give to the company the notice in writing required by statutory condition 13 (*a*).

The statutory conditions are found in the schedule to chapter 87 of the Revised Statutes of Manitoba, 1902. They were printed on the policy issued to the appellants.

(*a*) The appellants were an oil company and were notoriously dealers in gasoline and other petroleum products. This feature of their business was specially brought to the notice of the insurers through their agents at the time the risk was taken. If statutory condition 10(*f*) was applicable, and if the permission in writing of the company which it requires had not been obtained, it deprived the appellants of any insur-

ance by the respondents, because the very keeping or storing of staple articles in which they dealt would exempt the insurers from all liability.

The description of the risk on the face of the policy contains the follow paragraph:

> $3,000. On stock, consisting chiefly of illuminating and lubricating oils, greases, paints, varnishes, and all other goods kept by them for sale, manufactured and in process, including advertising matter and all materials used in the manufacture, packing and shipping of same, their own or held in trust, or on commisssion, or sold but not removed, while contained in the above described building or on platforms on ground within 100 feet, or in cars within 100 feet of building.

The evidence, in my opinion (if indeed evidence of such a fact of common knowledge be necessary), establishes that gasoline is an illuminating oil within the meaning of that term in the above description. I think the words "illuminating and lubricating" should be read distributively, and that the insurance was not confined, as argued by counsel for the respondents, to such oils as were both illuminating and lubricating, but included all oils in the appellants' stock which were either illuminating or lubricating. But if gasoline was not within this part of the description it was undoubtedly within the other part, which reads,

> other goods kept by (the appellants) for sale, manufactured and in process.

It was part of the appellants' stock in trade when the general agents of the respondents, who prepared this description to insert in the policy, inspected the premises of the appellants for that purpose and, as already stated, their attention was then specially drawn to it. Unless we are to regard the policy as a nullity because of inconsistency between the description of the risk and condition 10(*f*), we must either discard that

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condition as void for repugnancy—something left in the document *per incuriam*—or we must treat the policy containing this description as itself a permission in writing of the insurers for the insured to keep and store all goods covered by the description and a compliance with this requirement of condition 10(*f*). Because it does not involve the rejection of any part of the contract, I incline to think that the latter is the correct view.

Whether on that ground or by rejecting the condition 10(*f*) for repugnancy, *ut res magis valeat*, we should uphold the policy and regard the insurance given by the appellants as real and not illusory. I am, therefore, of the opinion that the keeping and storing of gasoline on the appellants' premises did not exempt the insurers from liability. That was one of the very risks against which they insured the plaintiffs, and for which the policy itself embodied their written permission.

(*b*) The appellants admittedly did not themselves give to the company notice of the loss in writing forthwith after the fire. The general agents of the company, however, immediately notified their principals of the loss by telegram. The company's adjuster on instructions from its agents at once prepared the particulars and other evidence of loss called for by articles (*b*) and (*c*) of the 13th condition and attended the insured and had them execute these documents and adjusted with them the amount of their claim. Until they delivered their statement of defence in this action no exception appears to have been taken by the company to these proofs or statements on the ground that the insured had failed to give the notice in writing called for by clause (*a*) of the 13th condition.

It is, perhaps, doubtful whether they have in their plea set up want of notice in writing with the precision required by the Manitoba Judicature Rule 315(*a*). But in the view I take it becomes unnecessary to deal with this question of practice.

Ordinarily I should not regard a notice such as is called for by clause (*a*) of the 13th condition as any part of the proofs of loss. But I find that other clauses of this 13th condition deal with what are unquestionably proofs of loss. Proofs of loss are first mentioned in clause 12 and the references to them are completed in clause 14. Clauses 12, 13 and 14 appear to be a fasciculus of provisions dealing with proofs of loss. Because of the collocation in which it is found, I have, though not without some hesitation, reached the conclusion that the requirement of a notice in writing under clause 13(*a*), is one of

> the conditions * * * as to the proof to be given to the insurance company after the occurrence of a fire,

referred to in section 2 of the statute(1). This is a case in which (in the language of section 2) after receiving a statement or proof of loss given in good faith by or on behalf of the insured in pursuance of a proviso or condition of the contract, the company has objected to the loss upon other grounds than for imperfect compliance with such conditions: it did not within a reasonable time after receiving such statement or proof notify the assured in writing that such statement or proof was objected to, giving the particulars of the alleged defects. Its officers had, through the telegram from its own agents, all the benefit which they could derive from a notice in writing given personally by the

(1) R.S.M. 1902, ch. 87.

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insured. They so conducted themselves that the insured may well have been lulled into the belief that the company would accept its agents' notification as a compliance with clause (*a*) of the 13th condition. The omission of the insured to give the notice in writing was obviously due to accident or mistake. This is, therefore, in my opinion, eminently a case in which it would be inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with the condition as to immediate notice in writing. The use in section 2 of the terms "statement" and "proof" indifferently and as interchangeable equivalents helps the conclusion that the notice in writing under clause 13(*a*) is part of the proof mentioned in section 2. It follows that the company's plea that the insured had failed to give this notice, assuming it to be formulated in compliance with rule 315(*a*) and to be proven, should not be deemed an answer to the plaintiff's claim. Section 2 of the statute renders the plea of want of notice in such circumstances ineffectual.

On these grounds I would, with respect, allow the plaintiffs' appeal with costs here and in the provincial Court of Appeal, and would direct the entry of judgment for them for the amount of their claim and costs of the action.

Appeal allowed with costs.

Solicitors for the appellants: *Chapman & Green.*

Solicitors for the respondents: *Richards, Affleck & Co.*

THE VANCOUVER, VICTORIA & EASTERN RAILWAY & NAVIGATION COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

PHILIP McDONALD (PLAINTIFF) .... RESPONDENT.

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*Oct. 13.
*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Railways — Construction and operation — Location plans — Delaying notice to treat—Action to compel expropriation—Compensation in respect of lands not acquired—Mandamus—Use of highway—Crossing public lane—Nuisance.

The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the "Railway Act," and the subsequent construction and operation of a railway along such area, do not render the railway company liable to mandamus ordering the expropriation of a portion of the lands shewn upon the plans which has not been physically occupied by the permanent way so constructed and operated.

Judgment appealed from reversed, the Chief Justice and Davies J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia affirming the order for mandamus made by Irving J. at the trial.

The plaintiff is lessee of land on the projected line of the railway. The company, pursuant to sections 158, 159 and 160 of the "Railway Act," obtained from the Board of Railway Commissioners the approval of

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

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a plan, profile and book of reference, shewing the right-of-way as including part of the plaintiff's property, but at no point was the whole of the right-of-way upon this property; the greater part of it was on adjoining lands. The company caused the plan, etc., to be duly registered and, without resorting to arbitration, acquired the interest of plaintiff's landlord, and constructed their permanent way clear of that portion of the right-of-way which extended over the land in which the plaintiff was interested, keeping it upon the adjoining lands in which the plaintiff had no interest. The company consequently proposed to wait until the expiration of the plaintiff's lease before taking possession of the portion of the right-of-way in question and contended that they could not be compelled to make compensation for the portion of its right-of-way of which they had not actually taken possession, and that they were operating their railway without interfering with the plaintiff's enjoyment of his property. They gave no notice to treat and took no steps towards expropriating the plaintiff's rights. The property in question is situated in the townsite of Huntingdon, B.C., and, in virtue of permission to cross the highways granted by the Board of Railway Commissioners, the company constructed the railway across a public lane in rear of the plaintiff's property. The evidence shewed that, on one occasion, a projection from one of the company's trains damaged the fence and an outbuilding upon the plaintiff's property, the injury so caused being to the amount of $10.

By the judgment appealed from the plaintiff recovered judgment for $10 for the damages mentioned, and the company was directed forthwith to acquire the portion of the right-of-way shewn over the plaintiff's

property and make compensation therefor under the provisions of the "Railway Act."

Ewart K.C. for the appellants. The company is not bound immediately upon the filing, approval or registration of the plans, etc., to acquire, by purchase or expropriation, all the lands and interests in lands shewn to lie within the limits of the right-of-way. Unless they enter upon or injure the property they are not bound to take proceedings to acquire it or settle compensation under the "Railway Act." They have constructed and are operating the railway without such entry or injury, they have done no wrong to the owner or occupant, and he cannot compel them to do him an injury in order that he may obtain compensation therefor. There is nothing to prevent the company permitting an owner or tenant remaining in possession of a portion of their right-of-way.

The "Railway Act" does not contemplate that a railway company should acquire a right-of-way of uniform width. See section 158. If it was contemplated that all the lands shewn on the plans should be acquired the provisions of section 164 requiring the filing of another plan when the railway is completed would be superfluous. See also 3 Edw. VII. ch. 58, sec. 128. The amendments, in 1909 (sec. 3), to subsection 2 of section 192 give the owner the remedy of forcing the company to take the lands and pay compensation whenever the plans have been filed.

The judgment appealed from is inconsistent with section 194 requiring an engineer's certificate that the land is necessary for the purposes of the railway, at the date of the certificate. There is nothing to shew that the lands in question in this case are so required;

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on the contrary, the fact that the railway is in operation without taking or interfering with these lands indicates that they are not required. If, under section 207, the company may decide not to take the lands mentioned in the notice, why may they not come to the same decision before any notice is given? We also refer to sections 151 and 155 as to alteration and discontinuance of works and the making of compensation. By refraining from entering or interfering with the plaintiff's lands and allowing him to remain in possession for the unexpired term of his lease the company is carrying out the spirit of the Act.

There is no precedent for an action such as the present. The powers given to railway companies are permissive only and not compulsory. So long as the respondent remains in occupation, by lease or license, without injury to himself or to the public there can be no ground of complaint.

We rely upon the decisions in *York and North Midland Railway Co.* v. *The Queen*(1); *Scottish North Eastern Railway Co.* v. *Stewart*(2); *The Queen* v. *Great Western Railway Co.*(3).

George F. Martin for the respondent. We rely upon section 2, sub-sections 11 and 15, section 155 and section 237, sub-section 3, of the "Railway Act." The cases of *Corporation of Parkdale* v. *West*(4), and *Hendrie* v. *Toronto, Hamilton and Buffalo Railway Co.*(5), apply; and it is admitted that the lessee is in the same position as an owner of land.

The company have taken the lane in rear of the

(1) 1 E. & B. 178, 858.
(2) 3 Macq. 382.
(3) 62 L.J.Q.B. 572.
(4) 12 App. Cas. 602.
(5) 26 O.R. 667; 27 O.R. 46.

property and trespassed upon the property itself. The respondent is, therefore, entitled to compensation to be settled under the "Railway Act." Section 158 of the Act does not contemplate the operation of a railway for years without acquiring the right-of-way. The company has acquired the fee from the owner, but insist that the tenant must await their pleasure. If the lease had 99 years to run, could they delay until it had expired ?

On filing the plan mentioned in section 164 the company have the right to obtain forcible possession under sections 217 and 218. This clouds the title to the lands and prohibits improvements of a permanent nature or advantageous sale of the plaintiff's rights. When the company commenced the operation of the railway the right-of-way shewn on the plan must have been acquired; sections 192 and 193. The provisions of section 254, sub-section (*a*), are directory and must mean the whole right-of-way, not a zig-zag course. The railway fencing could not be done without interfering with the plaintiff's property. The amendment by 8 & 9 Edw. VII. ch. 32, sec. 3, was passed after the writ in this action was issued. Mandamus or direction to proceed to acquire the right-of-way is the proper remedy under the provisions of the "Railway Act." *Corporation of Parkdale* v. *West*(1); *Bowen* v. *Canada Southern Railway Co.*(2).

THE CHIEF JUSTICE (dissenting).—I would dismiss this appeal for the reasons given by Sir Louis Davies.

(1) 12 App. Cas. 602.

(2) 14 Ont. App. R. 1.

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DAVIES J. (dissenting).—A very nice and difficult question has been raised by the appellants in this case, namely, whether a railway company can at any time be compelled by law to have compensation assessed and paid to the owners of parcels of lands embraced within the "located area" of the approved plans deposited by them with the Railway Board and in the county registry offices and over or along which they have constructed their roadbed, when such construction does not physically cross or touch these parcels of lands.

The appellate court of British Columbia held in this case that under the circumstances existing at the time respondent made his application for a mandamus such a right existed in him with respect to his lands, they being embraced and included in the located area of the approved plans deposited with the Board and with the registrar of deeds for the county or district through which the line of railway passed, and the roadbed having been constructed and the road operated on the adjoining parcels of lands past plaintiff's lot within the railway "located area."

The appellants contend that while they have *the right* to take the necessary proceedings to value any parcel of land embraced within the plans at any time after the latter's approval and registration has taken place, and the further right to take possession of any such lands upon payment or legal tender of the amount awarded, the right is purely optional, and that, with respect to lands within the located area not physically taken for the roadbed or touched by it, they cannot be forced or compelled to take the necessary proceedings to have compensation awarded whether their roadbed is completed past such lands or not. In

other words, they contend that they can lay and run their railway along the lands embraced within their plans and can leave any one or more plots or parcels of land on either side of their rails and embankment, although within the area of the approved and filed plans, without taking the statutory steps to compensate the owner. They, of course, concede that they could not legally take physical possession of any part of any plot of land without first compensating the owner, but they contend that, if they can succeed in constructing their roadbed and laying their rails and running their road without touching any particular parcel of land within the located area, the owner of that parcel is powerless to compel them to take the compensation proceedings.

These propositions are, to say the least, a little startling. If the "Railway Act" permits a company to construct and run its road within and along a "located area" as to which their plans have been approved and registered, and compels them only to pay compensation to the owners of such plots of land within such located area as their roadbed has physically crossed, while permitting them to refuse compensation to the owners of such plots within such area as they have constructed their roadbed past, but have not physically touched, then a legislative wrong has been unintentionally committed. A cloud will have been placed on the owner's title; he will practically be unable to sell or utilize his lands as he might otherwise desire to do, and be helpless to have the wrong remedied. I cannot adopt such a construction of the statute.

The general scheme of the Act provides in section 157 for the fixing, subject to the approval of the Minis-

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ter, of the *general location* of the proposed line of railway, shewing among other things the termini and the principal towns and places through which the railway is to pass.

Then section 158 provides for the special and *defined location* and enacts that, when the provisions of section 157 are complied with, the

> company shall make a plan, profile and book of reference of the railway

shewing a great many particulars, amongst them being

> (*d*) the property lines and owners' names; (*e*) the areas and length and width of land proposed to be taken, in figures, stating every change of width.

Sub-section 4 provides that

> the book of reference shall describe the portion of land proposed to be taken in each lot to be *traversed* giving numbers of the lots and the area, length and width of the portion of each lot proposed to be taken, and the names of owners and occupiers so far as they can be ascertained.

I take it as beyond doubt that the words "traversed" and "taken" apply in this sub-section to all the parcels of land within the located area, whether physically crossed by the company's roadbed or not.

Sub-section 6 provides that

> the plan, profile and book of reference may be of a section or sections of the railway.

The 159th and following sections provide for the sanction of the Board being given to such plan, profile and book of reference and for their deposit, when sanctioned, with the Board, and the deposit of copies in the offices of the registrars of deeds for the districts or counties through which the road passes; and the 168th section prohibits the commencement of construction until the plan, profile and book of reference have been

so sanctioned by the Board and copies deposited with the registrars of deeds.

The practical effect of these sections is to delimit definitely the right-of-way of the company and to accurately fix and determine the areas, length and width of the lands proposed to be taken "and the proportion of land proposed to be taken in each lot" to be traversed and to give the company "power to proceed at once with the construction of the railway."

The 191st section provides for a notice of the deposit of such plans being given and published after which the company may enter into voluntary agreements with any of the owners of the lands taken "touching the same or the compensation to be paid therefore"; and section 192 declares that the deposit of the plans, etc., 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,* and that the date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained.

An amendment was made in 1909 to the latter part of section 192 providing that, if the company did not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition should be the date with reference to which such compensation or damages should be ascertained.

This amendment does not, however, in my opinion, affect the question of the owner's right to compel the company in case the compensation cannot be voluntarily agreed upon to take the statutory steps to have it fixed by arbitration.

Then follow sections 193 to 214 setting out the method or procedure with respect to the fixing of the

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compensation for the lands taken if not mutually agreed upon. The initiation of these proceedings lies with the company and, as I understand the argument submitted to us, it comes to this, that as the Act does not in the cases of disagreement as to the amount of compensation to be paid specifically confer on the owners of the lands taken power to initiate or bring about an arbitration to fix the damages, the company cannot be compelled to exercise its statutory powers of having an arbitration held for the purpose, and the owner, although his title had been clouded by the plan, profile and book of reference filed, and he himself practically denied the power of utilizing his lands for the purposes an owner may legitimately desire to do, must submit for just so long a time as the company determines. The argument is pressed in the case before us to the length of saying that even if the company by agreement or otherwise with some of the owners of these located lands is able to lay its rails along and across their lots past the lots of other owners, all being within the "located area," and operate its railway on these rails, without encroaching upon the actual area of these latter parcels, the owners of these latter parcels within the "located area" must submit to go without compensation at the whim or caprice of the company, and are powerless to invoke the aid of the courts to compel the company to exercise its statutory powers of having the damages assessed. In short, the argument is that the lands within the "located area" are not necessarily to be compensated for, but only such lots or parcels as the roadbed physically touches.

The 215th section declares that on payment or legal tender of the compensation or annual rent as awarded and agreed upon to the person entitled to receive it,

the award or agreement shall vest in the company the power forthwith to take possession of the lands. I cannot, however, conceive it to be the true construction of the "Railway Act" to vest in the company the arbitrary powers of selecting which of the parcels of lands they have described in the located area for their railway right-of-way they shall have the compensation assessed for and which they can refuse unless they can get the lands on their own terms.

The depositing by the railway company of the approved plans with the Board and the registrars of the several counties through which the road is to pass, and the public notice given of such deposit vests a power in the company to take all the lands within the bounds of the located area of the right-of-way for the purposes of their road. It seems to me that if the company in the exercise of that power, either by agreement or arbitration, acquires the right to possession of some of the areas within their located right-of-way and then actually constructs their railway along and across those areas so acquired, their right to have compensation assessed as against the owners of other areas within the located area, which their railway has passed by but has escaped touching, at once ripens into a *duty,* which the injured owner can invoke the aid of the courts to have enforced.

If this is not so then it must be held that the company's caprice with regard to the parcels of land in the located area not physically crossed by their roadbed for which they must pay damages shall be the test of their liability to pay compensation, and that, although they have done everything required by the statute to delimit and fix the located area for their right-of-way, they can construct their roadbed in such

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way and manner that many parcels of land which they cannot obtain at their own price may be tied up in their owners' hands, the title clouded by the statutory action taken by the railway in placing the lands within the located area, and the owners left without any remedy to compel a valuation and payment. Such a construction is, to say the least, very startling and would result in many cases in creating most grievous hardship. I have reached the conclusion that there is a stage in the progress of these statutory proceedings when the powers of the railway ripen into a duty and that the facts of the case now before us shew that stage had been reached when the plaintiff began this action and entitled him to invoke the powers of the courts to compel the performance of that duty.

In the case now before us the determining factors are the approval in the first instance by the Minister of Railways of the *general location* of the defendant company's proposed line of railway. Secondly, the submitting by the company to the Board of Railway Commissioners of the plan, profile and book of reference of the located area, which included plaintiff's lands, and obtaining the Board's sanction to the same. Thirdly, the deposit with the Board of such approved plan, profile and book of reference, and of copies of the same in the offices of the registrars of deeds of the districts or counties through which the railway was to pass. Fourthly, the actual construction of such railway along the company's located right-of-way past and beyond but not touching physically plaintiff's lands.

The company's answer to the plaintiff's demand for compensation is that as it was able to construct its railway along its located right-of-way past the

plaintiff's lot of land without physically touching his plot they cannot be compelled to initiate the compensation proceedings with respect to it.

These several acts by the defendant company, all of them done under the authority of the "Railway Act," combine, in my judgment, to create a condition under which the defendant's statutory power to expropriate plaintiff's interest in the lands in question and have the compensation for such interest fixed by the arbitrators developed into a statutory duty of which the courts were competent to enjoin the performance. The language of the statute in conferring these powers, it is true, is not imperative, but the defendant's action may, in my opinion, at a certain stage make them so.

We have to choose between two interpretations of the statute, one leaving in the railway company an arbitrary discretion as to what lands within their located right-of-way they will pay compensation for, limited and controlled only by their ability so to construct their roadbed as to avoid trespassing physically upon areas or plots they do not desire to pay compensation for, or the interpretation I have adopted which is that, after the deposit of the approved plans with the Board and the registrars of the counties along the "located right-of-way," and after the giving of the prescribed public notice of this having been done, and after the construction of the roadbed along and across such located area has actually taken place, the company can be compelled to take the statutory proceedings to have the damages assessed with respect to all lands within such located and approved right-of-way along and past which they have so constructed their roadbed, whether the roadbed physically touches any part of such lands or not.

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The statute is careful to guard against the railway being compelled to pay for the lands within the right-of-way before they are required, because it provides that the plans submitted to the Board for its approval may be of a section or sections of the railway only, and the construction of the Act I contend for as the correct one does not impose upon the company the duty of initiating the proceedings for compensation except with respect to lands within the located area of their right-of-way as far as they have constructed their roadbed.

The conclusion, therefore, I reach is that where construction has commenced and been carried on along the located line and to the extent to which such construction has been carried, there has been a statutory taking of all the lands within such located lines, and that all of the owners of such lands have by reason of such statutory taking become entitled to require proceedings to be taken for the assessment of their compensation or damages; that the option of paying one such owner and refusing to pay another is not vested in the company, and that the test is not whether an owner's lot within the located area has been physically touched by the constructed roadbed, but whether such roadbed has been constructed on the located area past an owner's lot within such area.

I would, therefore, dismiss the appeal.

IDINGTON J.—The appellant obtained an order from the Railway Commission approving under section 237 of the "Railway Act" of the plans filed by said company, and permitting construction in accordance therewith.

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It registered said plan and constructed said railway according thereto before this suit.

The right-of-way claimed by said plan and approved by said order covered part of the lands of which respondent was and is a lessee.

The appellant took no steps to acquire the title to said lands so leased, by giving notice to treat or obtaining an order for possession.

The railway track does not touch said lands, but passes so closely that a piece of timber on a passing car struck and damaged a fence or shed thereon.

The respondent sued for such damages and also to have a mandatory order issued directing the appellant to acquire said lands and compensate respondent therefor, so far as lying within the limits of said proposed right-of-way.

The case coming on for trial was disposed of, on statements of counsel as to the facts, by a judgment for ten dollars, to cover said damages, and ordering the appellant to proceed forthwith to acquire the right-of-way for their railway through and over lots 19 and 20, block 10, which includes the lands held by respondent as lessee, and pay him compensation he is entitled to by virtue of the "Railway Act."

On appeal the Court of Appeal for British Columbia maintained the judgment and dismissed the appeal.

I regret I cannot see my way to upholding the mandatory part of the said judgment.

It seems to me no legal relationship has arisen between the parties respecting said lands entitling any court to so direct as this judgment does, relative to the acquisition of said lands or compensation therefor.

In the absence of a notice to treat or any other

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basis in way of contract, there is no such contractual relation created as to warrant such interference.

Nor can I see any other obligation in law springing from what has transpired to form a basis of action for such adjudication.

The statute neither expressly nor impliedly asserts any such thing by way of creating a right in respondent.

The conduct of appellant, in refraining from living up to the spirit of what the Commission, in making the order permitting the construction, probably anticipated would be done, may be improper.

It may render the appellant liable to such proceedings as the Board of Railway Commissioners in discharge of their duties relative to public safety may see fit to take.

It does not, however, give to the respondent any special and personal right peculiar to him apart from the rest of the public.

It is, in a loose sort of way alleged, that the railway has been constructed along or across a lane in such a way as to injuriously affect the respondent's property.

I am not able on the meagre facts presented relative to this branch of the case made by the pleadings to see how we can give any relief on that score.

I am not sure that any relief in law is possible.

So far as it appears it may be that the appellant has acted entirely within its rights in law and injured no more than necessarily incidental to the exercise of its powers.

It may, on the other hand, have brought itself within the range of what is contemplated by section

155 of the "Railway Act," which has not been passed upon by this court in any case I can find.

So far as judicial authority goes the railway company may in constructing and running its road, or at all events the latter, do much detrimental to others for which no compensation can be claimed.

I am not prepared, however, to say, that no case can be made for claim to damages arising from obstructing and impeding the entrance to any part of an owner or lessee's property.

Probably this part of the case of the lessee has merely been alleged in the pleading on the supposition that the claim for mandamus, if tenable, would cover the whole, and substantially give full relief.

Without expressing any opinion on the legal merits of such a claim or that our present judgment may be pleaded by way of *res judicata* thereto, I think, as the respondent may be justified in overlooking it under the circumstances, he ought to be given, if he desires it, the opportunity to strike it out of his pleading if he thinks our refusal to maintain the mandatory order can be treated as relative thereto *res judicata*.

I would, therefore, allow the appeal and direct that the judgment be set aside and the claim for mandamus covered thereby be dismissed.

DUFF J.—I think the appeal should be allowed and for the reasons given by my brother Idington.

ANGLIN J.—Notwithstanding that the defendants appear to have used their statutory powers in a manner which I find it impossible to conceive that Parliament contemplated, I fear that the present action must fail.

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Apart from the injury to his fence, which is admitted and in respect of which he has been allowed $10 as damages, the plaintiff has not shewn that his lands have been "injuriously affected" by the construction of the defendants' railway. He has not established a case of interference with access to and from his property by the lane in question. He has not shewn that this lane has actually been taken by the company as part of its right-of way. Without a specific order for the closing or diversion of a highway the mere approval of a location plan, which shews it to be included in the projected right-of-way, does not warrant its being closed to traffic by a railway company. If it were duly closed and were actually taken as part of the right-of-way it may well be that the company would be obliged to fence it off from the adjoining property under section 254(*a*). There is no evidence that it has been so closed or taken. The only order of the Railway Board produced gives to the company merely a right to cross the lane—not a right to close it or divert it. An order merely authorizing the crossing of a highway does not confer the right to close it or the right to fence it off or otherwise to interfere with the access to it of the public or of adjoining property owners. It has been held in many cases that the mere laying of a railway upon a public highway does not give a right to compensation to the property owners whose property adjoins such highway. *Powell* v. *Toronto, Hamilton and Buffalo Railway Co.*(1).

Assuming that the construction of the defendants' railway and its operation where it passes the plaintiff's property with a narrower right-of-way than that shewn upon the location plan and sanctioned by the

(1) 25 Ont. App. R. 209.

Railway Board involved "a change, alteration or deviation" prohibited by section 168 of the Act, because the steps prescribed by section 167 had not been taken, and that such construction and operation were, therefore, illegal, the plaintiff has entirely failed to give evidence of any special damage such as he would have to prove to entitle him to an injunction restraining the operations of the defendants if he had in other respects made out a case for such relief. At the trial he tacitly disclaimed any special damage except as to the injury to his fence valued at $10 already referred to. Moreover, in his statement of claim he has not asked that the operation of the defendants' railway be enjoined as a nuisance, and at the opening of the trial his counsel defined his claim in these words:

> This is an action to compel the railway company to take lots 19 and 20 in the town-site of Huntingdon.

The proceedings which followed, consisting merely of statements by the opposing counsel to the presiding judge, make it clear that the only relief sought by the plaintiff was a mandatory order requiring the defendants to take statutory steps for the expropriation of his interest in the portions of the above lots included in their right-of-way as shewn on their location plan and to make him compensation for the interest so to be taken. In order to grant the plaintiff any other relief his action must be entirely re-cast and inferences of the existence of certain conditions and of special damage must be drawn without evidence to support them. I think it impossible that this should be done at the present stage of the litigation.

For the reasons given by Mr. Justice Idington I am of the opinion that the mandatory order granted

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to the plaintiff in the provincial courts cannot be maintained. However far the appellants may have departed from the spirit, and indeed from the letter, of the provisions of the "Railway Act"—however grossly they may have abused their statutory powers, I find no basis on which to rest an adjudication that they have established between themselves and the plaintiff a relationship such that from it flows a duty on their part to acquire his interest in the property in question which the courts may enforce by mandamus. I reach this conclusion with regret, because the conduct of the defendants seems to me to have been high-handed and most objectionable.

Although, in a proper case and upon proper evidence, it may be that the plaintiff would not be entirely without relief, the circumstances of this case appear to me to make it reasonably clear that legislation is desirable expressly empowering the Board of Railway Commissioners, when approving a location plan, to fix either a period within which the railway company must acquire or abandon the lands included in its right-of-way as shewn thereon, or after which the notices mentioned in section 193 shall be conclusively deemed to have been given, and, whether the Board has or has not fixed such a period when sanctioning the location plan, on the application of the owner of any such land at any time thereafter to fix such a period in respect of his property. The amendment of 1909 enabling the property owner, where notice to treat (section 193) has been given to him but has not been followed up by the company, himself to apply for the appointment of arbitrators, etc., does not provide for what is a case of real hardship, viz., the inclusion by a railway company in its

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projected right-of-way, as shewn upon a location plan, of lands in respect of which it unreasonably postpones the giving of notice to treat, although by the registration of the sanctioned location plan the owners of all lands within the located right-of-way are practically prevented from selling them or using them to any advantage. Where the company has not only filed the location plan, but proceeds to construct and operate its lines without acquiring some of the land included in its right-of-way as shewn on the location plan the hardship to which the owner of such land is subjected is still greater. It may be that in the latter case the land-owner can obtain some indirect and not very satisfactory relief by way of injunction or otherwise; but in the former, under the present legislation, he appears to be entirely without relief.

I am, with respect, of the opinion that this appeal must be allowed.

Appeal allowed with costs.

Solicitors for the appellants: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitor for the respondent: *George E. Martin.*

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*Oct. 18.
*Dec. 9.

JOSEPH LIMOGES (DEFENDANT).....APPELLANT;

AND

ACLE C. SCRATCH AND OTHERS (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Mechanics' lien—Construction of statute—Alberta Mechanics' Lien Act—6 Edw. VII. c. 21, ss. 4 and 11—Building erected by lessee—Liability of "owner."

Section 4 of the "Alberta Mechanics' Lien Act" (6 Edw. VII. ch. 21) gives to any contractor or materialman furnishing labour or materials for a building at the request of the owner of the land a lien on such land for the value of such labour or materials. Sub-section 4 of section 2 provides that the term "owner" shall extend to and include a person having any estate or interest "in the land upon or in respect of which the work is done or materials are placed or furnished at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work is done, etc." By section 11 "every building * * * mentioned in the fourth section of this Act, constructed upon any lands with the knowledge of the owner or of his authorized agent * * * shall be held to have been constructed at the request of such owner," unless the latter gives notice within three days after acquiring such knowledge that he will not be responsible.

The lessee of land, as permitted by his lease, had buildings thereon pulled down and proceeded to erect others in their place, but was obliged to abandon the work before it was finished. The owner of the land was aware of the work being done but gave no notice disclaiming responsibility therefor. Mechanics' liens having been filed under the Act:

Held, that the interest of the owner in the land was subject to such liens.

Judgment appealed from, varying that at the trial (2 Alta. L.R. 109) in favour of the lienholders, affirmed.

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

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APPEAL from the judgment of the Supreme Court of Alberta, affirming, with some variation, the judgment of Beck J.(1), at the trial, by which the respondents' action was maintained with costs.

The appellant was the registered owner of property used as a hotel in the Town of High River, Alta., which he leased to persons named Anderson and Skead for a term of years, giving the lessees an option to purchase the property within a time limited and granting them permission to remove certain buildings constructed on the land and build others in their stead. The lessees took possession of the premises and, pursuant to the terms of the lease, removed several of the buildings then on the land and proceeded to construct new ones, but, after they had been partially constructed the tenants failed in business, the building operations were discontinued and the appellant re-entered the demised premises for breach of the covenant to pay rent. The respondents filed mechanics' liens against the property for work and labour done and materials furnished in constructing the new buildings and instituted actions against the owner and his lessees to enforce their liens, these actions being, subsequently, consolidated by order of a judge. The principal ground of defence urged by the appellant was that the liens claimed attached only to the interest of the lessees, which had determined, and that his interest as owner could not, in the circumstances, be affected by the charges sought to be imposed under the "Mechanics' Lien Act" of the Province of Alberta.

At the trial, Beck J. held that the appellant's title was affected to the extent to which the improvements

(1) 2 Alta. L.R. 109, *sub nom. Scratch* v. *Anderson.*

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made had benefited his property, and, by the judgment appealed from, the full court in effect affirmed the judgment of the trial judge but varied it by declaring that the estate of the owner was liable generally for the claims for which the liens were sought to be enforced.

Perron K.C. for the appellant.

Bennett K.C. for the respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal for the reason that, as the trial judge found, the appellant, owner of the property, allowed the improvements in connection with which the mechanic's lien arises to be made without notice or protest.

GIROUARD J.—In my opinion this appeal should be dismissed for the reasons stated in the court below.

DAVIES J.—For the reasons given by the Appeal Court of Alberta delivered by Mr. Justice Harvey, and to which I do not desire to add anything, I think this appeal should be dismissed with costs.

IDINGTON J.—In this appeal arising out of a judgment of the Supreme Court of Alberta to enforce mechanics' liens under the "Mechanics' Lien Act" of that province, otherwise known as chapter 21 of the statutes of that province for 1906, there is nothing involved but the construction of sections 4 and 11 of that Act.

Sub-section 4 of section 2 declares a lien in favour of every contractor and sub-contractor, and other named classes furnishing labour or material of the

classes specified "at the request of the owner of such land."

Sub-section 4 of that section declares that the term "owner" shall extend to and include a person having any estate or interest, etc.,

> in the land upon or in respect of which the work is done or materials are placed or furnished at whose request and upon whose credit or on whose behalf or with whose priority or consent or for whose direct benefit any such work is done or materials are placed or furnished, etc.

Section 11 declares

> every building, etc., mentioned in the fourth section of this Act, constructed upon any lands with the knowledge of the owner or his authorized agent, or the person having or claiming any interest therein, shall be held to have been constructed at the request of such owner, etc., unless such owner, etc., shall within three days after he shall have obtained knowledge of the construction, alteration or repair give notice that he will not be responsible for the same,

in manner specified.

The owner here in question is admitted to have known and to have omitted to give any such notice.

I am unable to understand how on such clear and explicit language declaring he must in such case be held to have requested the construction for which a lien is created on certain things having been done, could ever have given rise to difficulty.

The proviso at the end of section four limiting the charge to the interest of the owner and the definition of the word "owner" have been made a source of confusion.

Neither of these conflict with the plain, imperative language of the remaining parts of this section 4, and are left operative in proper cases to which they respectively may be applicable.

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The owner's interest has been herein properly reached.

The appeal should be dismissed with costs.

ANGLIN J.—The question for determination in this appeal is the liability of the interest of the owner of leased land to a mechanic's lien in favour of a contractor employed by the lessee. It is conceded that the work done upon the land is such as would entitle the plaintiff to a lien under section 4 of the Alberta "Mechanics' Lien Act" (6 Edw. VII. ch. 21), if done at the request of the owner. By section 11 it is provided that every such work if

> constructed upon any lands with the knowledge of the owner or his authorized agent or the person having or claiming any interest therein, shall be held to have been constructed at the request of such owner or person having or claiming any interest therein,

unless, within three days after obtaining knowledge of the construction, he gives notice that he will not be responsible for the same, etc.

The knowledge by the owner of the construction and his failure to give the statutory notice are admitted. The contention for the appellants is that the word "owner" in section 11 is subject to the defining provision contained in sub-section 4 of section 2. Apart from the fact that in this sub-section it is provided not that the word "owner" shall "mean," but only that it shall "extend to and include," a person, having any estate, etc., it is obvious from a mere perusal of section 11 that the definition of "owner" in sub-section 4 of section 2, as a person at whose request and upon whose credit, or on whose behalf, etc., work is done, can have no application to that section which provides that in certain circumstances a build-

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ing, not constructed at the request, etc., of the owner shall, nevertheless, be deemed to have been constructed at his request. The context in section 11 precludes the application to it of the definition of the word "owner" in section 2, sub-section 4. I have no doubt that section 11 was intended to provide for just such a case as the present.

The judgment in appeal was, in my opinion, entirely correct and should be affirmed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. E. Varley.*

Solicitor for the respondents: *R. B. Bennett.*

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*Dec. 2.
*Dec. 9.

THE BLACKWOODS LIMITED, AND THE MANITOBA BREWING AND MALTING COMPANY. } APPELLANTS;

AND

THE CANADIAN NORTHERN RAILWAY COMPANY AND THE CITY OF WINNIPEG..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Private siding—Construction of statute—"Railway Act," R.S.C. (1906) *c.* 37, *ss.* 222, 226, 317—*Branch of railway—Estoppel—Res inter alios.*

The Board of Railway Commissioners for Canada has not the power, (except on expropriation or consent of the owner,) to order that a private industrial spur-track or siding, constructed and operated under an agreement between a railway company and the owner of the land upon which it is laid and used only in connection with the business of such owner, shall be also used and operated as a branch of the railway with which it is connected.

APPEAL, by leave of a judge of the Supreme Court of Canada, upon the question of the jurisdiction of the Board of Railway Commissioners for Canada to order the construction of a railway siding extending from the extremity of an existing spur-track or siding upon the property of the appellants.

The circumstances of the case are stated in the judgment of Mr. Justice Duff, commencing at page 96 of this report.

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

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W. L. Scott for the appellants.
Chrysler K.C. for the respondents.

THE CHIEF JUSTICE and GIROUARD and DAVIES JJ. concurred in the opinion stated by Anglin J.

IDINGTON J.—The appellants and respondents agreed that a siding or industrial spur, purely of a private character, should be put down over the railway company's land and part of appellants' property to serve the latter's use.

It seems the agreement was reduced to writing, but that writing does not appear on the record. Save by statements and admissions which do appear of record we know nothing of it.

These make it, however, quite clear that the respondents never acquired any permanent rights of property in appellants' land; that the work of construction, so far as grading and ties, was either done by or at the expense of appellants, and the iron placed thereon at the expense of respondents; that the appellants pay a rental for the use of the iron; that the respondents had the right to shunt cars from their track over this siding; and that the whole arrangement is terminable at any time by either party.

The appellants gave the following letter to agents now alleged by some one, but not proven, to be part owners of land to which it is now proposed to extend said siding.

Messrs. Berry & Bond, June 22, 1908.
City.

Dear Sirs,—With reference to your application for right-of-way over our land, on the C.N.R. spur, we are perfectly willing to grant this.

Arrangements can be made later.

Yours very truly,
THE BLACKWOOD'S LIMITED,
(*per* N. W. B.).

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It was stated before the Board, and not denied, that the party who was about to buy at the time when this letter was written failed to complete the expected purchase.

The party who has since acquired the property and moved the respondents to make the application now in question, did so in 1909, sometime not exactly stated, but as result of negotiations begun in the early part of said year, 1909.

The Board made an order giving leave to extend the said siding or spur from the point where it ends on the appellants' property to another point on the said property, acquired as just stated and as shewn on a plan

> for the purpose of furnishing railway facilities to the owner of the said last mentioned lot.

The appellants by leave appeal against said order on the ground that the Board had no jurisdiction to make the said order.

The Board finds as a fact that the party who bought last mentioned land as an industrial site and upon whose behalf or for whose benefit the application now in question was made, relied upon the said letter in making his purchase.

It is quite clear that the Board founds its jurisdiction upon that fact.

Two clear implications spring from this.

One is that the siding or spur was not in the view of the Board part of the railway. If it had been, then the Board needed no such authority to provide for and direct an extension, but could and would have rested solely on the "Railway Act."

The other is that but for the said letter the Board did not conceive it had, on the facts, any jurisdiction.

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The first implication just stated, is what I would have been inclined to infer, notwithstanding Mr. Chrysler's ingenious suggestion, that the siding being used by the respondents, must be taken or presumed to have been constructed under the Act and to have formed part of the railway.

But the first of said implications rebuts if necessary any such presumption and effectually disposes of its results.

In the second implication I cannot think that the Board had any jurisdiction over the parties to enforce specific performance, as it were, of rights springing from the letter, however much that might or might not bear upon the compensation to be fixed in case of expropriation.

As to this I am not to be supposed as expressing any view much less that the letter should affect that compensation. I merely wish to point out the only conceivable result the letter in any way can by any possibility have on the questions involved herein.

This brings me to the crucial test of authority in the Board to make the order. The order is made for the express purpose of furnishing facilities. It would be no facility if its operation ended at a point ninety feet within the appellant's grounds.

The order clearly implies the giving of authority to run over the appellants' siding.

With great respect, I cannot read the letter above quoted as having any such consequences as thus implied even if as fact found by the Board which I must observe the purchaser of an industrial site bought on faith thereof.

His buying on faith thereof cannot confer upon the respondents any right to construct and operate a

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branch railway or spur over a mere private siding to serve the rest of the industrial community.

The doing so would be clearly *ultra vires*.

I think the appeal must be allowed with costs.

DUFF J.—The Blackwoods are owners of land adjoining the line of the Canadian Northern Railway Company at Winnipeg. In the year 1907, under an arrangement between them and the railway company, a spur-track was constructed upon their land connected with the railway; and by the terms of the agreement the railway company were to supply them and did supply them with facilities for receiving and delivering freight. The agreement is not in evidence, but from the uncontradicted statements made at the hearing it is clear that the expense of construction was borne by the Blackwoods with the exception of the actual laying of the rails which was borne by the railway company; that the railway company retained the ownership of the rails for which the Blackwoods pay an annual rental; that the spur was constructed for the purpose of providing facilities for the Blackwoods and that the railway company acquired no permanent rights in the land, and, indeed, no rights in it of any kind except such as might be implied in their obligation to carry out the provisions of the agreement.

It was not disputed on the argument that the spur-track was constructed solely under the authority of this agreement, and I think that is the necessary result of what occurred at the hearing. After the delivery of judgment it is true the Chief Commissioner stated that he would make no finding upon the question of fact whether in respect of this

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spur the provisions of section 222 of the "Railway Act" had been complied with, and he also expressly stated that he did not understand that any admission upon the point had been made. Since, however, the Blackwoods in their answer to the railway company's application expressly alleged the non-observance of the requirements of section 222 the onus of shewing that these requirements had been observed would appear to have been upon the railway company unless some presumption in their favour can be held to arise from the construction and use of the track since the year 1907. No such presumption does, in my opinion, arise because it appears to me to be clear that in such a case as this, reading sub-section 5 of section 317 with section 226, no warrant other than that of the arrangement between the parties themselves would be necessary to authorize the furnishing of such facilities as those provided under the agreement mentioned. Sub-section 5 indeed is perhaps little more than a confirmation by the legislature of the decision of this court in *Canadian Northern Railway Co.* v. *Robinson* (1), which affirmed the validity of such an arrangement in the absence of any special sanction by the Board of Railway Commissioners. Since, then, the authority of the Board under sections 221-223 was not in this case needed, there is no presumption arising from the construction and operation of the work that this authority was obtained. The spur-track upon the land of the Blackwoods is therefore to be treated as a private siding or private branch owned by them and worked so far as it is worked by the railway under the authority of a special agreement with the Black-

(1) 37 Can. S.C.R. 541.

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woods to provide them with shipping facilities. The question which on this state of facts comes before this court is this: Has the Board of Railway Commissioners the power to authorize the railway company to extend this spur-track from its present terminus on the Blackwoods's property into property situated beyond that of the Blackwoods for the purpose of providing others with the same sort of facilities as those which the Blackwoods enjoy without first acquiring, by expropriation or otherwise, from the Blackwoods the property or additional rights of user in the existing spur-track. The Board of Railway Commissioners has held the jurisdiction to exist and has exercised it. The assumed basis of jurisdiction is, I think, neatly put by the Chief Commissioner in the course of the discussion in these words: "We are treating this spur as the railway." If this spur can properly be treated as part of the railway for all purposes within the meaning of sections 221, 222 and 226 there is jurisdiction unquestionably to make the order the Board has made. On the other hand it seems to be equally clear that it is a condition of the jurisdiction that the spur should appear to be of this character. I am not able, with great respect, to agree with the opinion of the Chief Commissioner, although the question is certainly not free from difficulty.

The strong point in favour of the Chief Commissioner's view appears to be that by sub-section 21 of section 2 of the "Railway Act"(1), "railway" is for the purpose of the Act defined in these terms:

(21) "Railway" means any railway which the company has authority to construct or operate, and includes all branches, sidings, stations, depots, wharves, rolling stock, equipment, stores, property

(1) R.S.C. (1906) ch. 37.

real or personal and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorized to construct.

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If we are to treat the word "railway" wherever it appears in the Act as always and for all purposes denoting the whole and every part of this definition then the argument is *primâ facie* at all events a forcible one that this spur-track being a branch or siding connected with a "railway which the company has authority to construct or operate" is by the terms of this definition a part of the railway. The courts have often, however, taken occasion to observe that there is some danger that this method of applying an interpretation clause in an Act of Parliament dealing variously with a large range of subjects may lead to results out of conformity with the intention of the legislature and that the particular provision in respect of which it is proposed to apply the definition must be carefully examined to see whether such an application of it may not defeat the obvious purpose of the provision itself; and this is recognized in the main enacting clause of section 2. Coming to sections 221, 222 and 226, section 221 authorizes the construction of branch lines "from the main line of the railway or from any branch thereof." It is not open to doubt that what this provision contemplates is the construction of lines which are not only physically connected with the main line of the railway, but which may be operated in connection with the main line. In this view there would appear to be very little difference between a branch line so called which should be wholly *en l'air* in reference to the main line or any of its branches, and a branch (so called) which should connect itself with the main line only through an intervening link of

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track over which the proprietors of the railway should have no rights to run their trains. Nor do I see any substantial distinction between this latter case and the case in which, as in that before us, there are rights to use the intervening track for a limited purpose only which does not include that of passing traffic over it originating at or destined to points on the so-called branch. The same observations apply to section 226.

In the absence of consent by the Blackwoods it follows from this that the authority needful to sustain the order is lacking, unless, indeed, we are entitled to act upon the theory that the Blackwoods's rights in this spur-track and in the land upon which it is constructed (which include, of course, the right to exclude from the use of it all persons who have no legal title to use it) may under the authority of the "Railway Act" be taken from them without compensation. The Chief Commissioner in his opinion expressly states that the Act confers upon the Board no authority to assess compensation in respect of the rights of user which the order assumes may be exercised by the railway company and the persons for whom the railway company desires to provide facilities. Among canons of statutory construction none, I think, is more important than that which declares the legislature to be presumed not to intend to take away private rights without compensation; and I know of nothing in the "Railway Act" which excludes the application of it. It must, of course, yield where an intention to abrogate or limit the principle is clearly expressed or implied, but it may, I think, be taken to be a general principle of the "Railway Act" that a railway company governed by the Act can only acquire the property of private persons or

rights of user in respect of such property either by putting in motion the machinery provided by the compulsory clauses of the Act or by agreement, and sections 222 and 224 seem to shew conclusively that this principle, as one would expect, applies to the construction and operation of branch lines as well as to the main line. I do not understand, therefore, on what principle it can be held that without proceeding under the compulsory clauses of the Act, and without the consent of the Blackwoods, the railway company can acquire the right to use this spur as a part of the proposed branch.

It is contended, however, and the contention has been accepted by the Board, that the Blackwoods are by reason of their conduct precluded from denying that rights of user over this spur have been acquired by Mr. Hugh Sutherland for whose benefit the proposed extension is now applied for. A certain letter written by the Blackwoods, on the 22nd of June, 1908, was held by the Chief Commissioner to have been reasonably relied upon by Mr. Sutherland as containing a representation by the Blackwoods of their willingness to permit the use of their spur for the purpose of affording the facilities desired and that Mr. Sutherland purchased the property in respect of which it is proposed to grant the facilities on the strength of this letter. It was held that the effect of this was to preclude the Blackwoods from objecting to the order applied for. In so far as this conclusion of the Chief Commissioner involves a finding of fact, I do not think it is open to be questioned in this court. In so far as it involves a conclusion upon a question of law which was made the foundation of the Board's jurisdiction it is, I think, subject to be reviewed; the Board can-

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not acquire jurisdiction through an erroneous decision upon a point of law. I am unable to agree with the Chief Commissioner that the legal effect of these findings of fact is such as to preclude the Blackwoods from opposing the application. I repeat that I take the findings to be that the letter in question was communicated to Mr. Sutherland and that he reasonably acted upon it in purchasing the property mentioned. The legal effect of this upon the position of the Blackwoods appears to me to be absolutely nil. The letter is not addressed to Mr. Sutherland, but I shall assume—as I think we must in view of the finding of the Board assume—that it might reasonably be taken to have been given to the agents for the information of intending purchasers of the property.

The argument on this assumption is that this letter contains representations that the Blackwoods will not insist on their legal rights in respect of this spur and that these representations they are bound to make good to the person who acted on the faith of them. Now, that contention can only be sustained upon one of two views respecting the construction of the letter. One of these alternatives is that the letter contains some misrepresentation as to some state of facts alleged to exist at the time it was written upon which Mr. Sutherland acted. If such be the construction of the letter then equities in Mr. Sutherland's favour might arise. But where is the representation of fact? The only representation of fact actually existing relates to the then existing state of the Blackwoods's intentions. Nobody suggests that there is any misrepresentation here—that is to say, nobody suggests that the Blackwoods in writing the letter did not sincerely express the state of their minds in the matter

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—that in other words, they were committing a very stupid and motiveless fraud.

We may then put aside any suggestion that the appellants can rest upon estoppel or misrepresentation of fact. What is left? The construction put upon the document by the Board and by Mr. Sutherland was that it was a representation that the Blackwoods "were," to quote the words of the Chief Commissioner,

> perfectly willing to grant an application for the right-of-way for the extension of this spur.

Now, that is a representation of intention *de futuro* which juridically can only take effect *ex contractû*. It is binding as a promise or not at all. I shall not labour the authorities which shew that the supposed equitable doctrine of making representations good has, apart from estoppel or contract, no place in English law. *Jorden* v. *Money*(1); *Maddison* v. *Alderson*(2), at pages 472, 473, 487, 491, 492; *Chadwick* v. *Manning* (3).

The Board has not found a contract between the parties and there appear to be insuperable difficulties in the way of doing so. It is necessary in this connection to call attention to one point only. The letter plainly indicates that the terms of any arrangement entered into pursuant to it are to be left for further settlement; and there could, of course, be no completed *vinculum juris* until these terms had been agreed upon. I think, therefore, that this supposed foundation of the Board's jurisdiction fails in point of law.

(1) 5 H.L. Cas. 185. (2) 8 App. Cas. 467.
(3) [1896] A.C. 231.

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Anglin J.

ANGLIN J.—The material facts are fully stated in the opinion of my brother Idington in whose conclusions I concur.

Unless the order in appeal authorizes the use of the existing siding in connection with the extension of it for which it provides the new construction would be merely of a detached piece of railway. At bar the order was treated (I think properly having regard to the statement that the extension authorized was "for the purpose of furnishing railway facilities" to the applicant) as involving the taking by the respondents for the purposes of their railway of the appellants' existing siding, without their consent and without expropriation or compensation.

The letter in evidence neither expresses nor implies a consent to this being done.

It has, I think, been clearly shewn that the existing siding is the private property of the appellants. Neither authority for its construction as part of, nor an order for its connection with, the respondents' railway has been produced. The case has proceeded on the assumption that no such authority or order exists.

The order in appeal is, in my opinion, beyond the jurisdiction of the Railway Board.

Appeal allowed with costs.

Solicitors for the appellants: *Elliott, Macneil & Deacon.*

Solicitors for the respondents: *Clark & Sweatman.*

THE BRITISH COLUMBIA SUGAR REFINING COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

KATE GRANICK (PLAINTIFF) ..... RESPONDENT.

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*Oct. 12.
*Dec. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Employer and employee—Compensation for injury—Contributory negligence—Construction of statute—"Workmen's Compensation Act," 2 Edw. VII. c. 74, s. 2, s.-s. 2(c) and 4, sch. 2, art. 4—Remedial legislation—Refusal of damages—Right of appeal—Evidence.

In an action in the Supreme Court of British Columbia claiming damages under the "Employers' Liability Act" and, alternatively, under the "Workmen's Compensation Act," the plaintiff, at the trial, abandoned the claim under the former Act and, thereupon, the judge dealt with the case as a claim under the "Workmen's Compensation Act," found that the plaintiff's deceased husband came to his death solely in consequence of his own "wilful and serious misconduct," and, therefore, under sub-section 2(c) of section 2 of the Act, held that she was precluded from obtaining compensation in consequence of his death.

Per Davies, Duff and Anglin JJ.—The right of appeal from a decision in the course of proceedings to which article 4 of the second schedule of the "Workmen's Compensation Act" applies is available only for questioning the determination of the court or judge upon some question of law. Decisions upon questions of fact in adjudicating upon a claim brought before the Supreme Court under sub-section 4 of section 2 of that Act are not subject to appeal. Whether or not there is any reasonable evidence to support a finding of wilful and serious misconduct is an appealable question.

In the circumstances of the case the court held, Davies and Anglin JJ. dissenting, that there was not reasonable evidence to support the finding of wilful and serious misconduct.

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

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The appeal from the judgment of the Court of Appeal for British Columbia (15 B.C. Rep. 198) was dismissed, Davies and Anglin JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Morrison J. at the trial(2), and referring the case back to the trial judge for the assessment of compensation to the plaintiff.

The circumstances of the case are stated in the head-note and are discussed in the judgments now reported.

Lafleur K.C. for the appellants.

Craig for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Court of Appeal for British Columbia in an action for damages brought under the "Employer's Liability Act," but disposed of by the trial judge as a claim under the "Workmen's Compensation Act." The reasonable inference from all the evidence as found by the trial judge, is that the deceased lost his life when in the employment of the defendants through an accident arising out of that employment. This finding having been accepted by both parties, the question, and the only question, the provincial appeal court was called upon to decide was: In the materials he had before him was there sufficient to justify the learned trial judge, when fixing the compensation to be assessed under the "Workmen's Compensation Act" for British Columbia, in dismissing the respondent's claim on the ground that the deceased had been guilty

(1) 15 B.C. Rep. 198. (2) 14 B.C. Rep. 251.

of serious and wilful misconduct to which the accident was solely attributable? That court found no evidence from which this conclusion could reasonably be drawn. It is now for us to say whether the finding of the appeal court is so clearly erroneous that we should reverse. No one saw what occurred and the real cause of the accident is left to conjecture and the evidence shews it could have happened in a variety of ways. The deceased was a foreigner with an imperfect knowledge of the English language. He was hired as a temporary man in the appellants' factory and his work brought him in contact with a lift or elevator used for the hoisting of goods and the conveyance of employees from one floor to another. No one was in charge of the lift which appears to have been slow going, of simple construction and easily managed. It was in fact set in motion by each one of the employees as he required to use it. After he had been at work for the best portion of the first day, the body of the deceased was found caught between the elevator and the archway at the ceiling.

The plaintiff (now respondent) having proved that she was dependent on the deceased and that he came to his death during his employment, the defendants (now appellants) to escape liability were required to prove that the injury was attributable solely to the serious and wilful misconduct or serious negligence of the deceased.

How can the appellants be held to have discharged this burden so long as the cause of the accident is admitted to be unknown? The deceased is not here to explain; and with all their witnesses available the appellants are obliged to admit that they cannot say how the body reached the place where it was found.

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The learned trial judge, it is quite true, drew this inference;

> that on his way to the lavatory, he worked the lift in the wrong way and upon finding it ascending instead of descending, the deceased attempted to get out and was caught.

I admit that where the evidence is contradictory one must proceed very cautiously in considering the weight to be given to inferences drawn by a judge when assessing damages in a proceeding under the "Workmen's Compensation Act"; but here there is no dispute as to the facts. The only evidence of the occurrence is given by the employees of the defendants, and our duty is to decide whether the intermediate provincial court of appeal was absolutely in error when they held that the inference drawn by the trial judge from that evidence read and considered as a whole was wrong.

If the trial judge might fairly assume that the deceased met his death when using the elevator, this question remains: Was there any evidence to justify the further assumption that to have done so in the circumstances was such serious and wilful misconduct as to defeat the plaintiff's claim? The misconduct consisted, as the trial judge apparently found, in the deliberate breach of a rule and warning, in that the deceased used the elevator contrary to an order and that he was personally and specifically told not to use it. I agree with the Court of Appeal. There is no evidence to support these findings. Morgan, in his evidence, states that Woodworth, the head foreman, said:

> I told Granick and Morgan both standing there not to let Granick use the elevator until he was acquainted with it. * * * I told him to leave it alone until he learned how to run it.

The only evidence of the rule relied upon by the trial judge is to be found in Morgan's deposition where he states the rule with respect to new men. He says that

> new men were generally instructed not to use the elevator at all unless there was somebody running it.

In this case no such rule was ever made known to the deceased. He received, when entering upon his duties, the qualified instruction not to use the elevator until he knew how to run it, leaving it, therefore, by implication, to himself to decide when he could safely use it. Assuming, as inferred by the judge, that the deceased used the elevator when going to the lavatory, — what were the special instructions he received at that time ? Being asked to give all the conversation that took place, Morgan says:

> I was in quite a hurry and I explained to him as well as I could where it was, pointed to the stairway.

Does this hurried instruction to a foreigner imperfectly acquainted with the English language imply a prohibition against using the elevator on his way to the lavatory ? And, if he did use it, what evidence is there he had not learned to use it at that time ? He had been employed previously in electric works in Winnipeg and as a blacksmith for the Canadian Pacific Railway Co. The elevator was easily worked. Is there a necessary and inevitable presumption that he did not then know how to use it ? The previous warning given by Morgan, and so much relied on, was given some time in the forenoon. The accident was at No. 2 elevator, and the conversation with Morgan in the forenoon was at No. 1. To sum up my view I cannot agree that, because of the instructions given by Woodworth in the early morning before work began, or by

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Morgan sometime in the forenoon, or again immediately before the accident when Granick started for the lavatory, to use the elevator, if the deceased did use it, was wilful wrongdoing and not mere thoughtlessness. No categorical rule applicable to those who used the elevator is proved to have been observed in the factory, or ever brought to the notice of the deceased; and to support the trial judge we must infer from the vague instructions given as to the use of the elevator in the forenoon, from the hurried explanation of the way to the lavatory given immediately before the fatal accident, that the deceased, if he used the elevator, was in so doing guilty of serious and wilful misconduct. I think the reasonable conclusion on all the evidence is that, the direct cause of the accident being admittedly unexplained, it must be classed among those known in the French law as *accidents anonymes* which apparently are almost inevitable in the operation of large industrial establishments and the burdens of which are made a charge directly upon the industry but indirectly on the public by the "Workmen's Compensation Act." Planiol, *Thèses sur la responsibilité civile,* vol. 34; Rev. Crit. de Lég., at p. 282.

The body was found between the elevator and the floor. How it got there, how the deceased was killed, is the secret of Providence. All, in so far as this record shews, is left to conjecture. I am fortified in my conclusion by the rule laid down in this court in *Demers* v. *Montreal Steam Laundry Co.*(1), where Taschereau J. said, at page 538, speaking for the court:

> For it is settled law upon which we have often acted here, that where a judgment upon facts has been rendered by a court of first

(1) 27 Can. S.C.R. 537.

instance, and a first court of appeal has reversed that judgment, a second court of appeal should interfere with the judgment on the first appeal only if clearly satisfied that it is erroneous.

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Davies J.

I would dismiss with costs.

DAVIES J. (dissenting).—I agree that there is no general right of appeal from the decisions of a judge in assessing or refusing to assess damages under subsection 2 of section 4 of the "Workmen's Compensation Act" of British Columbia. The only right of appeal given by the statute to the full court from any such decision is upon any question of law in respect of such assessment of damages.

Such being the case, the only question for the appeal court to decide was whether there was any evidence from which a reasonable man could find that the accident which caused the death of the deceased was solely attributable to the serious and wilful misconduct of the workman.

I have reached the conclusion that there was such evidence and that the finding of the trial judge was right, but whether we agree or do not agree with his conclusions, we have no power to interfere if there is any evidence from which a reasonable man might find as he did.

Some remarks of Lord Loreburn, in the case of *Johnson* v. *Marshall Sons & Co.*(1), at page 412, were relied upon as shewing that in his opinion the use of a lift contrary to orders or rules was not so dangerous as in itself to amount to serious misconduct. But I venture to think no such general conclusion should be drawn from his language, which was intended to be

(1) [1906] A.C. 409.

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applied to the facts with which he was dealing only. In that case the lift was for use by workmen in charge of a load, forbidden to workmen not in charge of a load; as His Lordship there says:

> the offence was not that the man used it, but that he used it *without a load.*

User by a workman entitled to use it when in charge of a load was not "serious misconduct" on the same workman's part if used by him at a time when there was no load, because, though a breach of the orders, it was not such a breach as necessarily involved himself or others in danger.

The language of Lord Loreburn in my judgment lends no countenance to the conclusion that a workman not understanding how to use or control a lift and forbidden to operate it until he does understand it, is not guilty of "serious and wilful misconduct" if he attempts to use it in violation of his orders.

In a later case, *George* v. *Glasgow Coal Co.*(1), at page 128, Lord Loreburn says:

> In my opinion it is not the province of a court to lay down that the breach of a rule is *primâ facie* evidence of serious and wilful misconduct. That is a question purely of fact to be determined by the arbitrator as such. The arbitrator must decide for himself and ought not to be fettered by artificial presumptions of fact prescribed by a court of law.

Now, in the case before us the judge, acting as arbitrator, found as a reasonable inference from all the facts that the deceased workman was guilty of serious and wilful misconduct in attempting, contrary to his explicit instructions, to use the elevator before he had learned how to use it, and we have no right as a

(1) [1909] A.C. 123.

court of appeal, to "fetter by artificial presumptions of fact" any such finding or to review it.

As to whether the use of an elevator contrary to express orders by a workman ignorant of how to use and control it is "serious misconduct," I think the judgment of Lord Robertson, concurred in by Lord Collins in the case of *George* v. *Glasgow Coal Co.*(1) conclusive that it is. He says, at page 130:

> You are to judge of the question of seriousness by reference to the subject-matter, if it touches life or limb.

I understand it is contended that as the deceased man's instructions were not to use the elevator until he had learned how to do so, he cannot be held guilty of wilful and serious misconduct in using it unless it is proved he had not at the moment of the accident learned how to do so. There is evidence, I think, beyond doubt, from which it may fairly be inferred that he did not know how to use the elevator when he was employed in the morning, and also that he had not learned how to use it at some time not fixed in the forenoon. It is obvious that such proof cannot be direct and positive and have relation to the man's knowledge at the very moment of the accident. From the very nature of the case the question whether he had learned to use the elevator or not must remain and be a question of fact to be found by the arbitrator by reasonable inference from all the proved facts.

The broad facts here are that the man was hired in the morning as a temporary hand during a rush of work. That the foreman instructed him to go to work with Morgan, one of the older hands, and told them both, Granick (the deceased) and Morgan, while

(1) [1909] A.C. 123.

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standing together, that Granick was not to use the elevator until he was acquainted with it, and that Morgan was to send him up to open the trap doors and shut them again and come down the steps.

Here we have one thing prohibited and other work prescribed. The foreman saw the man afterwards doing the work of opening and shutting the trap doors specially assigned to him.

It seems clear from Morgan's evidence that this division of work was maintained during the few hours between the hiring and the occurrence of the accident, Morgan operating the lift and Granick opening and closing the trap doors of the several floors, using the staircase while so doing. That once, during some part of the forenoon, the exact hour not being fixed, Granick went on the elevator ahead of Morgan and attempted to run it, but was promptly told "to leave it alone till he knew how to run it." That after dinner and just before the fatal accident, the same division of labour continued. The elevator was on the third floor; Morgan and Granick were there and the former sent the latter down the staircase, as usual, to close the traps while he himself took two trucks down the elevator; and when he descended to the shipping or first floor he there met Granick, who had come down the staircase and who said he wanted to go to the toilet, whereupon he explained where it was and pointed to the stairway for him to go to it.

Morgan further explained that he, Morgan, closed the doors of the elevator, left it standing at the first floor where he got out, and went to an adjoining shed for a few minutes to get something wanted; when returning, he found the elevator up against the bottom

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of No. 2 floor, and the body of Granick jammed between the elevator and the floor.

The inference which the trial judge drew as an arbitrator from this evidence was that

> on his way to the lavatory he worked the lift in the wrong way and finding it ascending instead of descending, he attempted to get out and was killed.

I think this a justifiable finding of fact under the evidence. The evidence may not be as strong as one could wish, but there is some and enough to enable the reasonable inference to be drawn which the arbitrator has drawn.

Granick was forbidden when taken on as a temporary hand in the morning to use the elevator until he had learned how to do so. He was put with and under the charge of an experienced man who was to use the elevator and to employ Granick at other work, such as opening and closing the traps while the elevator was being used in carrying loads. At some time in the morning hours before dinner, he went into the elevator ahead of Morgan and made an attempt to use it, but was promptly stopped and forbidden to do so until he knew how. Neither at that time nor when the foreman gave him his instructions at the hiring did he suggest that he knew how to use it. Immediately before the accident, at 2 p.m., he came down from the third floor by way of the staircase, attending to his special duty of opening and closing the trap doors while Morgan descended by the elevator. He asked for the toilet and was told to go by the staircase and evidently must, as soon as Morgan turned and went to the adjoining shed, have wilfully opened the door of the elevator and attempted, with fatal results, to use it.

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Idington J.

As I think there was evidence on which the arbitrator-judge could make his finding, and as in such case we have no right to review it, I would allow the appeal and dismiss the action.

IDINGTON J.—The respondent sued for damages arising from the death of her husband as result of an accident in appellants' factory claiming under the "Employers' Liability Act" and alternatively under the "Workmen's Compensation Act."

She failed under the former, but was entitled to have succeeded under the latter and have her damages assessed by the learned trial judge under and by virtue of sub-section 4 of section 2 of the said Act, unless her late husband's death had been the result of his own serious and wilful misconduct.

The learned trial judge held the husband had been so guilty and respondent had thereby become disentitled to recover at all.

The Court of Appeal for British Columbia reversed this finding and referred the matter back to the learned trial judge to assess the damages.

The sole question thus raised for our decision is whether or not the deceased had been guilty of such misconduct.

He was found crushed in an elevator used in appellants' warehouse, and which it is alleged he was forbidden to use.

It is not by any means clear how deceased came into the place where his body was found. Whether it had been the result of its use solely by himself or by some other of the employees whom he had been helping is left in doubt.

He was only a casual hand hired by the day at so

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much an hour, coming on for the first time at seven a.m., and he was found dead at two p.m., in the elevator, crushed between its cage and the ceiling of one of the five or six flats served by this elevator.

The evidence is very meagre and, I agree with the learned Chief Justice below, could have been made clearer on many points by the appellants on whom the burden of proof lay.

It is contended that deceased violated a positive command not to use the elevator at all.

But there is not any proper evidence to maintain such a contention, and in any event I doubt if anything short thereof could avail appellant.

The foreman says as follows:

17. Q. What conversation did you have with him then? A. I told Granick and Morgan, both standing there, to not let Granick use the elevator until he was acquainted with it, and send him up and open the trap doors and shut them again, and come down the steps.

18. Q. You say you told Granick that? A. Well, Morgan and Granick together; I says to Morgan, I say you take the things up the elevator and bring them down again and let Granick open up the trap doors and close them again.

19. Q. Do you know whether Granick understood you or not? A. He must have understood me, because he done as he was told, he shut the trap doors and opened them.

This foreman directing operations did not know whether the deceased could speak English or not, yet seeks to lead the court to infer from the man's doing things he had been directed to do that he must have understood English.

I surmise, from the fact that the foreman's remarks were addressed to Morgan, enjoining him not to let Granick use the elevator till he was "acquainted" with its use, that the foreman had a pretty shrewd idea Granick was not possessed of an English tongue.

Moreover, why was there any doubt left to exist on

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the point of this command being expressly and clearly understood if intended to insist upon its breach as misconduct of any kind ?

The first thing done by Morgan and Granick was to use this or another elevator. Morgan ran it then.

If the Swede, or German, had the ordinary intelligence of his race and calling that ride alone probably enabled him to see how it was run.

Even if he understood English only as imperfectly as appears, he might not so have grasped the purport of the words addressed to Morgan as to understand them in the sense that he was duly commanded to refrain from running the elevator.

But the man's command of English was most imperfect if we read the respondent's broken English in which she gave her evidence and believe her when she says:

Q. And did he speak or understand English ? A. He didn't speak very well, but he could understand enough if he got work any places.

Q. He couldn't speak as well as you ? A. No, not half so good.

Q. How do you account for that; as a matter of fact he was in the country longer than you, had he not been ? A. Yes, but he wasn't working with English people.

Q. In Winnipeg he was working ? A. He didn't work for English people.

Q. How do you come to speak as well as you do ? A. I come from the old country and went right straight working in one place two years.

Q. (By the court): With English-speaking people ? A. Yes.

No one questions her veracity.

Morgan, who took him to shew him his work, says:

Q. What did you say to him ? A. We were talking about several things.

Q. Did he understand English ? A. Yes, sir.

Q. Well, or fairly well, or how ? A. He understood it pretty good.

Q. You hadn't any difficulty in understanding him ? A. No.

Q. Did he have any difficulty in understanding you ? A. None.

I venture to submit with respect, that any person who can find from this evidence, giving all of it due credence, that the deceased had any accurate idea of what the word "acquainted" as used by the foreman meant or implied, must, I fear, have little idea of the embarrassments that such a man as deceased has to endure in his struggle to understand the English tongue.

It seems to me that to infer, even if we are to assume, what is not proven, that the user of this elevator on the fatal occasion was solely an act of the deceased undirected or unaided by any one else, was a disobedient, wilful violation of this alleged command would be cruel indeed.

To treat it as serious and wilful misconduct is something never intended by the Act.

But reliance is also placed by appellants on another circumstance stated by Morgan as follows:

Q. Was there any other circumstance connected with the accident; that is, you used some other elevator ? A. Yes, sir.

Q. Did you have any conversation with him about the elevator ? A. Yes, sir.

Q. What was it; tell me ? A. He went on the elevator ahead of me there over in No. 1 shed, and he wanted to run it, and I told him to leave it alone until he knew how to run it.

Q. How long was this before the accident ? A. That was some time in the forenoon.

What is there in this ? Or coupled with the foregoing, what do these suggestions amount to ? The elevator was of a slow-running type and the description given of all one had to learn shews its operation to have been of the simplest kind.

Any ordinary man who had been engaged as the deceased was in a Canadian Pacific Railway shop as blacksmith's helper, for nearly a year, must have been very stupid if he could not learn the running of such a

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machine by watching Morgan do it on the two occasions he was with him.

Besides we have, as the learned Chief Justice of the Court of Appeal points out, a half-day's work all over the place and what it implies, and no attempt to fix this latter incident later than it might have been, possibly the same hour as the first.

The very direction given by the foreman in regard to a man only hired for a day, implied the expectation that the man would learn through the day to use the elevator. His usefulness as a servant demanded that he should do so as soon as possible.

There is no evidence that he did not or from which it can be fairly inferred he did not.

In addition to all this I agree with the reasoning of the learned Chief Justice in the court below.

Moreover, if I had any doubt it necessarily should be resolved in favour of the judgment appealed from.

In my view of the evidence I find no occasion for struggling with the problem of whether or not the learned trial judge is to be held as taking the place of and being held as an arbitrator. There is, I respectfully submit, no such evidence as would entitle, within the law as laid down in *Johnson* v. *Marshall Sons & Co.*(1), the learned judge to draw such inference of serious and wilful misconduct as to exonerate appellant.

The appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed.

I am not able to agree with the opinion of the court below that there is a general right of appeal against a

(1) [1906] A.C. 409.

refusal by a judge of the Supreme Court to assess compensation under section 2 (4) of the "Workmen's Compensation Act, 1902." It seems to be clear that the right of appeal from a decision of the Supreme Court in the course of proceedings to which article 4 of the second schedule applies is available only for the purpose of questioning the determination of that court upon some point of law. If decisions upon questions of fact in adjudicating upon a claim brought before the Supreme Court under sub-section 4 of section 2 are to be treated as decisions falling within the provisions of the "Supreme Court Act" conferring a right of appeal from judgments and orders of the Supreme Court, then these provisions must also extend to decisions on points of law in any such adjudication; and if so what purpose is served by that part of article 4 which expressly gives a right of appeal from such last-mentioned decisions ? That part of the enactment is upon the hypothesis suggested, entirely superfluous. The implication that the general right of appeal is excluded is palpable; and it is of much the same order as that which excludes the remedy by action for the infringement of a newly created statutory right where the enactment that constitutes the right at the same time provides another remedy for the violation of it. Here there is an authority vested for the first time in the Supreme Court to hear and determine claims under a new statutory provision and a right of appeal restricted to a special class of decisions given in the course of passing upon such claims. In the absence of something indicating a contrary intention the legislature must be taken to have intended that the claimant's statutory right should be vindicated in the manner prescribed as well in respect of appeals as of proceedings in the first instance.

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Duff J.

This view finds in my judgment some confirmation when we consider that the frame of the statute indisputably shews that a most important feature of the scheme adopted was this limited character of the right of appeal given by article 4. The legislature intended obviously to provide a speedy and inexpensive means of dealing with claims under the Act. The importance of instituting some such procedure for determining the claims of the persons—usually of very limited resources—for whose benefit the scheme was designed, can hardly be exaggerated; and the last thing a legislature with such objects in view would be likely to sanction is a general right of appeal on facts as well as on law—with all that such a right of appeal implies in a controversy between litigants of large resources and adversaries with means inadequate to sustaining the burden of a protracted contest.

The questions which the learned trial judge had before him were: (1) Whether the deceased, Granick, lost his life through an accident arising out of and in the course of his employment: (2) Assuming the first question to be answered in the affirmative, whether the claim of the plaintiff must be rejected on the ground that the injury is attributable solely to the "serious and wilful misconduct or serious neglect" of Granick.

Both of these questions were decided by the learned trial judge in the affirmative and the claim was consequently rejected by him. The question before us is whether there was evidence before him on which such findings could reasonably be reached; and upon the admitted facts of this case I think the decision of the House of Lords in *Moore* v. *The Manchester Liners* (1)

(1) [1910] A.C. 498.

is conclusive in favour of the respondent upon the questions whether or not the learned trial judge had before him sufficient evidence to support his conclusion upon the first point.

The second question raises greater difficulties, but I have come to the conclusion, after careful examination of the evidence and the decision of the learned trial judge, that there was not before him evidence to support a finding against the plaintiff upon that point. In *Johnson* v. *Marshall Sons & Co.*(1), at page 412, Lord Loreburn, L.C., said:

> I cannot agree that a lift is an appliance so dangerous that the use of it, when believed to be in proper condition and intended for use, does in itself amount to serious misconduct. Certainly it is for the arbitrator under the Act to decide questions of fact; but when there is no evidence it is for the court to interpose.

In that case the workman had used the lift in disobedience to orders and it was held that that circumstance alone was not sufficient to support a finding bringing him within the "misconduct" clause. In this case the learned trial judge has found that Granick was forbidden to use the lift until he should learn how to use it. This direction was given at 7 o'clock in the morning when Granick was first taken on by the appellants as a temporary hand. There is no evidence that between 7 o'clock in the morning and 2 o'clock in the afternoon, when the accident occurred, Granick was not taught to use the lift. The learned Judge has found that Granick was inexperienced as regards lifts, but that is an observation, with great respect, which is not based on anything in the record. It is admitted that the lift was of the very simplest kind, and it seems to me to be too palpable for discussion that

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there is nothing in the evidence whatever to shew or upon which to base an interference that complete mastery of it could not be acquired by any man of ordinary intelligence within a very short time. There are suggestions in the evidence to the effect that there was a rule forbidding the employees to use the lift except for the purpose of carrying freight. That, however, has no bearing upon the issue the learned judge was called upon to decide because there is nothing whatever to shew that any such rule or practice was ever brought to Granick's attention.

ANGLIN J. (dissenting).—The defendants appeal from the judgment of the Court of Appeal for British Columbia, reversing the judgment of Morrison J., who held that the plaintiff was not entitled to damages for the death of her husband under the "Workmen's Compensation Act" of British Columbia, chapter 74 of the statutes of 1902.

The plaintiff brought her action under the "Employers' Liability Act"; but, at the trial she was obliged to abandon her allegations of negligence against the defendants and the trial judge thereupon dealt with the case as a claim under the "Workmen's Compensation Act." He found that the death of the plaintiff's husband was due to his own "wilful and serious misconduct," which precluded her claim for compensation. It was practically conceded at bar — and the authorities fully support the view — that there can be no appeal upon any question of pure fact from the decision of an arbitrator in proceedings under the "Workmen's Compensation Act." *Hod-*

dinott v. *Newton, Chambers & Co.*(1), at page 68; *George* v. *Glasgow Coal Co.*(2); *Clover, Clayton & Co.* v. *Hughes*(3). Where, instead of proceeding under that Act, a plaintiff brings an action to recover damages independently of it and the court in which the action is tried finds him not entitled to recover in such action, but, nevertheless, entitled to compensation under the provisions of the statute, although it dismisses the action, the court, if the plaintiff so elects, may proceed to assess such compensation and its certificate of the compensation awarded "shall have the force and effect of an award under this Act." (Section 2, sub-section 4.) If the trial judge had found the plaintiff entitled to compensation under the statute and had assessed such compensation his findings of fact would, in my opinion, be non-appealable, as are similar findings of an arbitrator made in a proceeding taken under the other provisions of the statute. Otherwise a plaintiff obtaining an award of compensation in this manner, although his recovery is absolutely the same, would be subject to an appeal essentially different from that given to the defendant where the plaintiff has proceeded and recovered compensation under the other provisions of the statute. I think the legislature did not intend that there should be such different rights of appeal under the same Act where the recoveries are substantially the same.

I am, therefore, of the opinion that the full effect intended by the legislature can be given to the provision that a certificate under sub-section 4, of section 2, "shall have the force and effect of an award under

(1) [1901] A.C. 49. (2) [1909] A.C. 123.
(3) [1910] A.C. 242.

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this Act," only by holding that where a plaintiff has obtained such a certificate the defendant's right of appeal is precisely the same as he would have had if there had been an award in his favour under the other provisions of the statute and questions of law had been dealt with by the judge on a submission by the arbitrator. This limited right of appeal appears to be given by section 4 of the second schedule "in any case where (the judge) himself settles the matter." The right to compensation being purely statutory, the limited right of appeal specially conferred excludes any right of appeal, which might otherwise exist under legislation of general application.

Should there be a broader right of appeal where, instead of awarding compensation, the judge has found the plaintiff disentitled to recover by reason of serious and wilful misconduct? Had proceedings been taken under the other provisions of the statute there could not have been an appeal upon any question of fact. Where the trial judge, having found that there is no liability independently of the "Workmen's Compensation Act," also holds that there is no liability under that Act, the proceeding is not expressly within the terms of sub-section 4, of section 2, of the statute and the concluding provision as to the force and effect of a certificate of compensation may not be strictly applicable. Nevertheless, in dealing with the plaintiff's claim under the "Workmen's Compensation Act" and determining the question of the defendants' liability, the functions of the trial judge, in my opinion, were much the same as if there had been no action and he had been acting as an arbitrator in proceedings instituted in the first instance under the "Workmen's Compensation Act,"

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except that it was superfluous for him to formally state questions of law involved for submission to himself, and for purposes of appeal he must be deemed to have dealt with such questions as if they had been so submitted. To hold otherwise, would, I think, be contrary to the spirit and the scope of the entire statute. *Hoddinott* v. *Newton, Chambers & Co.* (1), at page 59, *per* Lord Shand. This is a "case where (the judge) himself settles the matter." (Section 4, Schedule 2.) The right of appeal under this provision is expressly confined to "any question of law" and is the same appeal which is given where the judge deals with a question of law submitted for his decision by an arbitrator acting under the statute. There is, in my opinion, no other right of appeal. I, therefore, think that the defendants' right of appeal from the judgment of Morrison J. was confined to questions of law, or of mixed law and fact, and that the British Columbia Court of Appeal erred in dealing with this case as if the appeal were from a trial judge whose findings and inferences of fact were open to review.

Upon a perusal of the record I am unable to say that there was not some evidence upon which an arbitrator might reasonably base a finding that the plaintiff's husband had been guilty of wilful misconduct to which his injury was solely attributable. He was engaged on the morning of the day on which he was killed. That he had then been forbidden to use the elevator is abundantly proved. Whether the prohibition was absolute, or only "until he was acquainted with it" may be open to question. There is evidence in support of either view. If the prohibition was un-

(1) [1901] A.C. 49.

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qualified, the finding that Granick deliberately disobeyed it can scarcely be challenged. If it was qualified, Granick's silent acquiescence in the direction given him affords some evidence of his inexperience. He was again told by his companion, Morgan, in the course of the morning "to leave the elevator alone." His work kept him off the elevator. His duty was "to open and shut trap doors." Only five minutes before the accident occurred he was directed by Morgan to use a stairway, although his destination would have been reached more directly by using the elevator. From these facts taken in conjunction with the circumstances of the accident itself, assuming that the burden rested on the defendants of shewing that Granick's unfitness to operate the elevator continued up to the moment of the accident, I think a jury might reasonably infer that, notwithstanding its simplicity, he was not yet "acquainted with" the elevator and was, therefore, still subject to the prohibition against its use. That he was injured while attempting to use it seems sufficiently clear. I, therefore, think there was some reasonable evidence upon which a finding that the death of Granick was due to his own wilful misconduct might be based. Upon the weight of that evidence it is not within the province of an appellate tribunal to pass.

Neither am I prepared to hold that deliberate disobedience to a lawful instruction given by his employer involving danger to his life is not serious misconduct on the part of the workman. *George* v. *Glasgow Coal Co.*(1), at page 129 — if indeed this "question purely of fact" be open to review on appeal (*ibid.*, at page 128). This is not a case merely of

(1) [1909] A.C. 123.

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disobedience to a regulation of an employer designed to promote economy in the use of motive power or some convenience of management. *Johnson* v. *Marshall Sons & Co., Ltd.*(1). It is a case of the breach of an express direction of which the subject-matter "touches life and limb." *George* v. *Glasgow Coal Co.*(2), at page 130.

I am, therefore, with great respect, of the opinion that this appeal should be allowed with costs, the judgment of the Court of Appeal vacated with costs and that of Morrison J. restored.

Appeal dismissed with costs.

Solicitors for the appellants: *McPhillips & Tiffin.*

Solicitors for the respondent: *Burns & Walkem.*

(1) [1906] A.C. 409.

(2) [1909] A.C. 123.

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*Nov. 2.
*Dec. 23.

THE CAP ROUGE PIER, WHARF AND DOCK COMPANY ..... } APPELLANTS;

AND

THE HEIRS OF THE LATE HONOURABLE ANTOINE JECHEREAU DUCHESNAY ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to land—Possession—Prescription—Interruptive acknowledgment—Evidence.

The company claimed prescriptive title to a part of the bed of a small river on which D., the respondents' *auteur*, had been a riparian owner. D. had leased lands on the banks of the river to the company which, it was alleged, included the property in dispute. The only evidence as to interruption of prescription consisted of a letter by the company to D. enclosing a cheque in payment for "use of your interest in Cap Rouge River this year," with an indorsement by D. acknowledging receipt of the funds "with the understanding that the navigation of the river is not to be prevented."

Held, reversing the judgment appealed from (13 Ex. C.R. 116), Girouard and Idington JJ. dissenting, that the memorandum was too vague to serve as an interruptive acknowledgment sufficient to defeat the title claimed by the company.

APPEAL from the judgment of the Exchequer Court of Canada(1), allotting to the respondents the sum of $800, with interest, from and out of the amount awarded as compensation for property expropriated

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

(1) 13 Ex. C.R. 116.

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by the Crown for the purposes of the National Transcontinental Railway.

On an information by the Attorney-General of Canada, on behalf of the Crown, against the parties to the present appeal to have the certain wharves, timber coves and riparian lots, including the lands in question, vested in the Crown and compensation therefor ascertained, the value of the whole property to be expropriated was fixed at $40,000 and, in the court below, the remaining question to be decided was whether or not the Duchesnay heirs were, at the date of the expropriation, in 1906, entitled to compensation in respect of six-tenths of an acre of the property forming part of the bed of the Cap Rouge River. The heirs claimed the property in dispute in virtue of a seignioral grant, in 1652; at high tide it was completely covered with water, but at low tides the area above mentioned was uncovered; the value was fixed at $800. The company claimed the property in dispute, having held possession of the whole area as owners since 1857, while it was contended by the heirs that it had been held by the company as tenants of their *auteur* under a lease which was still subsisting in 1877. On 21st June, 1877, the manager of the company wrote the following letter to the late Honourable A. J. Duchesnay: "Enclosed please find cheque for $60 for use of your interest in Cap Rouge River this year. Can you oblige by letting me know, from old deeds or otherwise, where my line is between you and the property I bought on the Cap Rouge Hill. I would be willing to make all the fence at my expense if you will be kind enough to have the lines hunted up." Written across this letter was the following, signed by A. J. Duchesnay: "Received the sum of sixty dollars as

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mentioned in the note, with the understanding that the navigation of the river is not to be prevented. — Another receipt sent. — In a few days I shall be able to give you the description of the property which Messrs. Atkinson (former managers) had at Cap Rouge." The learned judge of the Exchequer Court held that the effect of this letter was to interrupt prescription in favour of the company and awarded the value of the lands in dispute ($800), to the Duchesnay heirs.

The material questions on this appeal are discussed in the judgments now reported.

G. G. Stuart K.C. for the appellants.

Flynn K.C. and *E. T. Paquet* for the respondents.

Arthur Fitzpatrick for the Attorney-General of Canada.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed with costs for the reasons stated in the judgment of Anglin J.

GIROUARD J. (dissenting).—I am of opinion that this appeal should be dismissed for the reasons stated in the court below.

DAVIES J.—I agree in the opinion stated by my brother Anglin and that the appeal should be allowed with costs.

IDINGTON J. (dissenting).—I think this appeal should be dismissed with costs. I agree with Mr. Justice Cassels' reasoning. The test he applies to the

effect of the receipt as a piece of evidence that would have answered any action brought to recover the premises in question is, to my mind, on this evidence as a whole unanswerable.

The evidence relied upon to furnish any answer does not go far enough and only gives rise to a suspicion that there may, after all, have been existent at the time some further explanation or evidence thereof lost through lapse of time. The onus of answering the case, the receipt shews, rested upon the respondents.

DUFF J.—It is hardly disputed that the appellants entered into corporeal possession in 1857, or that the *animus rem sibi habendi* was sufficiently evidenced by the character of the occupation then assumed.

This state of facts is met by the respondents with an allegation that an interruption of this possession occurred in 1877. Since there was no rupture of the continuity of the appellants' physical occupation, the respondents, on this point, can only succeed by proving an express acknowledgment of title in them, or by adducing evidence unmistakably evincing an intention to recognize such a title. The evidence they produce is a letter addressed to M. Duchesnay by the appellants, dated the 21st June, 1877, containing this sentence:

> Enclosed please find cheque for $60, for use of your interest in Cap Rouge River this year.

This document does not appear to me to imply any admission respecting the *extent* of M. Duchesnay's interest; how then can it be said to contain an acknowledgment that within his interest was comprised the property in dispute? With that property the docu-

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ment does not connect itself; and it is, consequently, inefficacious for the purpose of establishing an interruption of the appellants' possession of it.

ANGLIN J.—Subject to an alleged interruption founded on a letter of their manager, dated the 21st of June, 1877, the evidence in the record, in my opinion, satisfactorily establishes the prescriptive title of the appellants to the property in question in the present appeal. This letter is, in part, as follows:

Hon. A. J. Duchesnay, Quebec. Quebec, 21 June, 1877.

Sir,—Enclosed please find cheque for $60 for use of your interest in Cap Rouge River this year. * * *

Yours truly,
J. Bowen, Jr.

Without evidence that M. Duchesnay had no interest in the river other than that in question in this action the allusion in this letter to "your interest in the Cap Rouge River" is, in my opinion, too vague and indefinite to warrant ascribing it to the property now claimed by the appellants and, without more, treating their prescriptive title as defeated by "interruptive acknowledgment."

Les lettres ont donné lieu à bien des contestations, parcequ'il est rare qu'elles aient la précision requise en droit. Laurent, vol. 32, *n.* 128.

But when produced by the respondents, this letter bore upon it this memorandum, presumably in the handwriting of the late M. Duchesnay:

Received the sum of sixty dollars as mentioned in this note; with the understanding that the navigation of the river is not to be prevented. 22 June, 1877.

Ant. J. Duchesnay.

Another receipt sent.
A. J. D.

It has also been proved that the interests of the Hon. A. J. Duchesnay in Cap Rouge River were not confined to the property in issue. The appellants were, indeed, lessees of some of his other interests and paid him rental therefor. These latter facts alone, in my opinion, suffice, in the absence of any evidence that the appellants ever paid rent for the property now in question, to render it not improbable that the letter of the 21st of June referred to such other interests.

But the indorsement,

> with the understanding that the navigation of the river is not to be prevented—

seems to me to make it still more doubtful that the "interest in Cap Rouge River" to which the writer of the letter of the 21st of June had reference was the property in question in this action. This wharf was of such a character that its use for legitimate wharfage purposes while necessarily involving some interference with navigation would not prevent it. As owner of interests in another part of the Cap Rouge River the seigneur Duchesnay leased to the appellants the right to boom or store logs. This right might be so exercised as to prevent navigation and the stipulation in the memorandum "that the navigation of the river is not to be prevented" indicates that the rental of which receipt is acknowledged was in respect of an interest of this character.

In my opinion the respondents have not satisfied the burden which was upon them to make out a case of interruptive acknowledgment.

It is, therefore, unnecessary to consider the other important and difficult question, to which so much argument was devoted at bar, viz., whether the *fundus* upon which the wharf in question is erected properly

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forms part of the bed of the Cap Rouge River, or should be regarded as part of the bed of the River St. Lawrence.

I am, with great respect, of the opinion that the appeal should be allowed with costs and that judgment should be entered in the Exchequer Court for the appellants also with costs.

Appeal allowed with costs.

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

Solicitor for the respondents: *E. J. Flynn.*

J. H. RODD (PLAINTIFF) .....APPELLANT; 1910

AND

THE MUNICIPAL CORPORATION OF THE COUNTY OF ESSEX (DEFENDANT) ..... RESPONDENT.

*Nov. 23.
*Dec. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Statutory duty—County officers—Office accommodation—Discretion—Mandamus.

The courts should not interfere by mandamus with the reasonable exercise by a County Council of its discretion in selecting the place in the county at which an office shall be provided for the County Crown Attorney and Clerk of the Peace.

Judgment of the Court of Appeal (19 Ont. L.R. 659) affirmed.

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

The plaintiff, as County Crown Attorney and Clerk of the Peace for the County of Essex, applied for a mandamus to compel the municipality to provide him a proper office. In his statement of claim he set out the fact that Windsor is by far the most important place in the county, and that an office there instead of at Sandwich, the county town, would be the most convenient for the public; also that the office had been at Windsor for many years prior to 1908, when the

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

(1) 19 Ont. L.R. 659.

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County Council refused to continue it and provided and could provide none at Sandwich.

At the trial Falconbridge C.J. held that the allegations in the statement of claim were proved while those in the statement of defence were not; that suitable offices could not be provided at Sandwich; and that the plaintiff was entitled to a mandamus to compel the corporation to provide one at Windsor. This judgment was reversed by the Court of Appeal.

Wigle K.C. for the appellant. By the Ontario "Municipal Act" certain officers of the county must reside in the county town. No such provision is made as to the County Crown Attorney and Clerk of the Peace, and the maxim *expressio unius est exclusio alterius* applies. See *Morgan* v. *Crawshay*(1).

If the corporation fails in its duty to provide a proper office for these officials they may do so themselves at its expense. *Lees* v. *County of Carleton*(2).

A. H. Clarke K.C. for the respondent.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Anglin.

GIROUARD J.—I would dismiss this appeal for the reasons given in the court below.

IDINGTON J.—It is important that the records of which the Clerk of the Peace is custodian, should not only be safely kept from risks of fire but in such orderly manner as to be readily accessible to whom-

(1) L.R. 5 H.L. 304. (2) 33 U.C.Q.B. 409.

soever their inspection may concern. For this purpose alone a vault in the court house would seem the best arrangement.

It is necessary also that offices in the court house should be available in connection therewith to serve the same officer as Clerk of the Peace and County Crown Attorney whilst discharging his duties in connection with the sittings of the several courts at which he must attend in the court house.

Under the peculiar conditions that have developed in Essex, where the largest city therein is two miles from the court house, it is not to be expected that any man, who would be a desirable incumbent of the office, should stay in the court house continuously.

On the one hand the people who wish to see him at other times than on the occasions of a court sitting, would have to travel two miles out of their usual business resort to transact a piece of business that may not require ten minutes of attendance.

On the other hand, the officer is generally a man in such active practice that he cannot afford to inconvenience his general clients and himself by staying two miles from the centre of business in the county.

An allowance for a share of office rent in Windsor to supplement the periodical use of some offices in the court house is not a very large item, and the refusal by respondent's council to do what had long been done for many years in that regard, is not to be commended.

However regrettable it may be that the respondent's council have not seen their way to act otherwise, and in some such way as I have indicated as a reasonable solution of the difficulties, I do not see how we can help appellant.

The law does not seem to have been yet put in such

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shape as to enable us to interfere with the jurisdiction of the county council in the matter.

If we allowed the appeal and granted a mandamus the court could only execute it so far as to enforce the furnishing of accommodation in or near the court house, which has been offered and rejected.

It is not to be supposed that the council are acting in bad faith in the offer made and, though not as expressly continued in their pleadings as it might have been, I doubt if we should be justified in assuming as necessary a mandamus limited to an office in or near to the court house.

The sort of office so far provided in the court house is entirely inadequate.

I think the appeal must be dismissed.

DUFF J.—The appellant, Mr. Rodd, is the County Crown Attorney and Clerk of the Peace for the County of Essex, and the municipal corporation of that county is bound to provide him as the incumbent of these offices with proper office accommodation under section 506 of the "Municipal Act" of Ontario.

The county town of Essex is Sandwich. Mr. Rodd resides and carries on the practice of his profession in Windsor. The County Council profess their willingness to provide office accommodation for Mr. Rodd at the court house in Sandwich. The learned Chief Justice of the Court of King's Bench, who tried the action, held that there is no place in the court house or in the county town which is suitable or which can be made suitable for the performance of the official duties of Mr. Rodd, who, indeed, before the commencement of the action, had informed the council that he would not occupy an office in Sandwich.

I think the Court of Appeal rightly dismissed the action, because I do not think the evidence warrants the conclusion that the County Council might not in a reasonable exercise of their discretion decide that the plaintiff in his official capacities ought to be domiciled in the county town. That being so, it follows, of course, that a refusal to provide an office in Windsor accompanied by an offer to furnish accommodation at Sandwich does not necessarily amount to a refusal to perform the duty of providing "proper offices" in accordance with the enactment mentioned.

In view of the position taken by Mr. Rodd criticism of the accommodation actually furnished at Sandwich appears to be irrelevant. A mandatory order at the suit of the plaintiff directing something which the plaintiff has from the outset declared would be useless to him would involve a startling disregard of the considerations which govern the court in the exercise of its discretionary powers; and there can be no remedy in damages first because there has been no refusal to provide accommodation at Sandwich, and secondly, because if there had been, the plaintiff, whose action, if any, is an action on the case(1), cannot be said to have suffered any harm through the failure to furnish accommodation which admittedly he would not have used.

ANGLIN J.—I agree in the view that, having regard to the provisions of section 506 of the "Consolidated Municipal Act of Ontario," the selection of the place at which it shall provide an office for the Crown Attorney and the Clerk of the Peace rests with the

(1) *Mayor of Salford* v. *County Council of Lancashire*, 25 Q.B.D. 384, at p. 391.

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County Council, and while the courts may compel the performance of the duty of making the selection, where a conscientious judgment has been exercised by the body to whom that duty is committed, the court will not substitute its sense of fitness for that of such body. Judicial interference might be warranted if it were shewn that the discretion of the County Council had not been exercised "in a manner fair, candid and unprejudiced." Upon the evidence, such a case has not here been established. Having regard to the fact that some of his duties render it necessary that the Crown Attorney should have an office in the county court house, it is impossible to say that in determining that any office which it should provide must be in the court house, the conduct of the council was "arbitrary, capricious or biassed." *Rex* v. *Askew* (1).

It is not contended for the appellant that he is entitled to have two offices provided for him at the public expense. If it be necessary for the discharge of some of his duties, as is admitted, that the Crown Attorney should have an office in the court house, however desirable it may be that he should also have an office in Windsor, the statute does not, I think, impose on the County Council the duty of providing it.

Although it would appear from their judgments that the learned judges of the Court of Appeal regarded the right of the appellant to an office in the City of Windsor, at the expense of the County of Essex, as the only substantial question in this action, it is now urged that the right of the appellant to a *proper* office in Sandwich, (which it has been found the County Council failed to furnish for him,) was also in issue. This right is asserted in the statement of

(1) 4 Burr. 2186, at p. 2189.

claim, and is repeated in the reasons against appeal in the Court of Appeal. The prayer for relief covers it. The finding of the learned Chief Justice of the Court of King's Bench that the office provided in the county court house was unsuitable and inadequate, is well supported by the evidence, and has been affirmed in appeal. The statutory duty of the council to provide a proper office, etc., is clear. If there were nothing more in the case, assuming that a private action for such relief might be maintained by the appellant, his prayer for a mandamus requiring the County Council to provide him with a *proper* office should perhaps be acceded to.

But mandamus is a discretionary remedy which will not be granted merely to enforce some abstract right so as to entail upon the defendant expense and trouble without any substantial benefit or advantage accruing therefrom to the plaintiff. To the remedy of mandamus the maxim *lex neminem cogit ad vana seu inutilia peragenda* applies. *The King* v. *The Bishop of London*(1). Moreover, notwithstanding that an applicant may have made out a case of strict legal right, in the exercise of its discretionary power the court will consider his motives, and if not convinced of their propriety, will withhold relief. *The Queen* v. *Liverpool, Manchester and Newcastle-upon-Tyne Railway Co.*(2). Antecedent demand and refusal must also be made clear.

The plaintiff gave the following evidence at the trial:—

I may say frankly that I told the County Council, I think in the June session a year ago, that it was not a proper place for me to perform the duties of my office, that I could not do it properly living

(1) 13 East 418, at p, 420(*n*). (2) 21 L.J.Q.B. 284.

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in Sandwich, and it would be useless for them to provide any office here if they intended me to perform, if I was expected to perform, the duties of my office properly. I could not do it here at all; I would not come; that was the truth of the matter. I told them I would not come here and I would not do it for my own sake, and it would not be proper so far as my office is concerned. My presence in Windsor, so far as my duties are concerned, is imperative.

In view of this attitude of the plaintiff, the discretion of the court will, in my opinion, be properly exercised in refusing the mandamus for which he asks. His apparent failure to press this part of his claim before the Court of Appeal renders this course all the more proper.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wigle & Rodd.*

Solicitors for the respondent: *Clarke, Bartlet & Bartlet.*

THE GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC AND THE MARITIME PROVINCES (DEFENDANT) ..... APPELLANT;

AND

ELIZABETH A. TURNER (PLAINTIFF) ..... RESPONDENT.

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*Nov. 28, 29.
*Dec. 23.

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

Benefit association—Life insurance—By-laws and regulations—Transfers between lodges—Member in good standing—Regularity of affiliation—Payment of dues and assessments—Evidence—Presumption—Waiver.

Where the constitution of a benefit association provides that members shall not be transferred from one lodge to another unless all dues and assessments have been paid, up to and including those for the month in which the application for affiliation is made, the fact that, upon such an application, a member was transferred from one lodge to another involves the presumption as against the association that the transfer was regularly made when the member was in good standing and in accordance with the regulations.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Court of Review, which reversed the judgment of the Superior Court, District of Montreal, at the trial, and maintained the plaintiff's action with costs.

The late J. A. Farlinger was a member of Valleyfield Lodge and, in January, 1894, entered into a con-

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

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tract of life assurance with the Order, for the benefit of his wife, for $2,000, on the assessment plan. In December, 1905, he applied, in accordance with the rules of the Order, for a "clearance card" or certificate which would entitle him to have his membership transferred to another lodge, known as the Longueuil Lodge. By the Constitution of the Order no such certificate could issue nor could such a transfer be effected unless the member requesting it was in good standing and had paid all dues and assessments up to and including those for the month in which his application was made. He received the necessary certificate from the defendant and, on the 2nd of June, 1906, applied for affiliation and was transferred to the Longueuil Lodge. He paid his dues and assessments to that lodge, from month to month, up to the time of his death on the 19th of November, 1906. The claim by his widow, the plaintiff, was resisted by the Order on the ground that at the time of the transfer, on 2nd June, 1906, Farlinger had not in fact been a member in good standing as he was then in arrears for dues and assessments which should have been paid to or through the lodge to which he had previously belonged; that he was under suspension at the time of his death, and, consequently, that, by the conditions of the policy, the Order was relieved of obligation to pay the amount of the insurance. The plaintiff's action was dismissed at the trial in the Superior Court, District of Montreal, but that judgment was reversed on an appeal to the Superior Court sitting in review. The judgment now appealed from affirmed the judgment of the Court of Review.

The issues on the present appeal are stated in the judgments now reported.

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T. P. Butler K.C. and *Aimé Geoffrion K.C.* for the appellant.

Atwater K.C. and *J. Wilson Cook* for the respondent.

The Chief Justice.

THE CHIEF JUSTICE.—I am disposed to agree with the trial judge that the October assessment was not paid and the deceased was not a member in good standing at the time of his death. I am confirmed in this impression by the failure of the respondent to produce the receipts for July, August, September and October, and the attempt to make a payment after her husband's death. The month for which each of these payments was made must have appeared on the face of these receipts. The presumption is that they were in the possession of the respondent with the policy, and, if not, their loss has not been accounted for nor explained satisfactorily. The highly technical nature of some of the features of the defence, such as the denial of liability on the contract because made in the first instance with the Ontario lodge, and the fact that the deceased is alleged secretly to have joined a lodge in that province, is calculated to prejudice one against the meritorious part of it. The evidence as to suspension in November, 1906, is not as satisfactory as it should be. On the whole I think the appeal should be allowed but do not dissent as the two intermediate courts of appeal have come, on this question of fact, to a contrary conclusion in which my learned brothers concur.

GIROUARD J.—I am of opinion that this appeal should be dismissed with costs for the reasons stated in the court below.

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DAVIES J.—I agree that the appeal should be dismissed with costs for the reasons stated by my brother Anglin.

Idington J.

IDINGTON J.—The deceased, Farlinger, having received the letter of the 4th July, 1906, telling him he could "forward the next and future assessments" to the financier of Longueuil Lodge, and, in the same letter, a certificate of his transfer to said lodge which could only issue on the faith of all pending and past assessments having been paid, must be taken to have made such payments and to have relied thenceforward upon that and the direction as to the next assessments, unless it is established all this was clearly erroneous. The dates of his later payments are in accord therewith.

If we are to assume these dates are respectively applicable to prior months, then his insurance, at least twice if not three times, had so elapsed that he could have been reported as in default, yet that does not seem to have been done till the 9th of November, 1906.

And, curiously enough, on the 20th of November, 1906, a postal card was addressed to him by the financier notwithstanding this reported default, reminding him his assessment No. 11, *i.e.*, for 1st November, would be due on the 28th, and requesting him to pay "before that date, in order to avoid suspension," when in fact, if report well founded, he was already under a suspension from which he could only be relieved by being able to satisfy onerous specified conditions.

The man died on the 19th of November. There is

nothing in all this late report and the sequel thereto directly in law affecting the issues raised.

But, when we are asked to reject the strong case made by the facts above stated and upon which the courts below, other than the Superior Court, have rested judgment, we must ask ourselves if we can because, and simply because, the numbers of the assessments for which the same financier, making his grotesque mistakes just referred to, gave credits, can be held to overbear the case made. I think not. I may suspect that there being so many irregularities the affiliation of deceased with Longueuil Lodge was also founded on an irregularity. In fact, that is what is now in effect, though not admittedly so, claimed to have taken place.

We are asked to hear the evidence of the Grand Recorder to shew that a payment made in June was in respect of what was due for May, and thus leave a pending assessment, on the 1st of June, unpaid and outstanding at the time he was admitted to the Longueuil Lodge, notwithstanding the express prohibition apparent on the face of his clearance card against such a thing being done.

In answer to the motion to admit here and now such evidence, I do not think, even if we have the power to do so (relative to which I say nothing), it would be in accordance with the due administration of justice to exercise such a power.

And, on the case as it stands, I think the appeal should be dismissed with costs.

DUFF J.—At the trial it was assumed, and on that basis argument before this court proceeded, that the Longueuil Lodge, in its reception of the deceased, John

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Augustus Farlinger, as a member, was governed by the provisions of article 188 of the constitution of the society. By the provisions of that article he could not become a member without first paying all the "dues and assessments" for, *inter alia,* the month in which his application was made. It was admitted at the trial that his application was made on the 2nd of June; and, the fact of his election is, therefore, *primâ facie* evidence that the June payments were made on that date at the latest. So far (as against the society) the presumption of regularity in their proceedings will carry us.

This *primâ facie* case has not been met; and, as four subsequent payments were made, it follows that the last of them must be attributed to the month of October, and, consequently, that Farlinger was in good standing at the date of his death.

ANGLIN J.—At the opening of this appeal the appellants applied, under section 98 of the "Supreme Court Act," to be allowed to supplement the evidence in the record by a further examination of one Patterson, Grand Recorder of the Grand Lodge, A.O.U.W. of Quebec, who had given evidence at the trial. Assuming that section 98 confers power on this court, in a proper case, to entertain such an application — having regard to its history, its collocation and the cases in which it has been considered, I think it does not — in the exercise of a sound discretion the present motion should be refused.

The purposes of the proposed re-examination of the witness would be to establish that, when he was received into Longueuil Lodge on the 2nd or 4th of June, 1906, the deceased, Farlinger, still owed the

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assessment which fell due on the 1st of June. The materiality of this question was made apparent in the plaintiff's factum prepared for the Court of Review. The basis of the judgment of that court was its holding that Farlinger had paid this assessment before his admission into Longueuil Lodge. Again in the Court of King's Bench, the principal contest was about this point and the opinion of the judges of that court, confirming the judgment of the Superior Court in Review, proceed on the specific finding that Farlinger had paid the June assessment before his election to Longueuil Lodge. Either in Review or in the Court of King's Bench the appellants might have asked to be permitted to supplement their proof as they now desire. Certainly in Review, and, I think, also in the Court of King's Bench, their application, if made, could have been entertained and given effect to. Articles 1208 and 1248, C.P.Q. No such application was made. In these circumstances, if this court had the discretionary power which the appellants invoke, their application would be entirely too late. Moreover, the evidence which it is now sought to introduce might have been given at the trial. No sufficient excuse is made for the failure to adduce it then. Its materiality and importance upon the distinct issue raised by the fifth paragraph of the plaintiff's declaration should have been apparent. For these reasons, if clothed with such a discretionary power as the appellant invokes, the court should refuse to exercise it on this appeal.

The ground on which the appellant resists the payment of the plaintiff's claim is that, at the time of his death, on the 19th November, 1906, Farlinger was properly under suspension for non-payment of the

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October assessment. He paid assessments to Longueuil Lodge on the 3rd July, the 2nd August, the 31st August, or the 6th September (it is not quite clear on which date this payment was actually made), and the 5th of October. If he had paid his June assessment before admission to the lodge his payment on the 3rd of July was of the assessment for the month of July; and, in that case, his payment of the 5th of October was of the October assessment, and he was not in default and was not legally suspended.

At bar, this case was treated as within article 188 of the Constitution of the Grand Lodge of Quebec. I shall presently deal with the matter on the assumption that this article applies.

Farlinger had been a member of Valleyfield Lodge, which had been dissolved. His transfer was effected not upon a card issued from this defunct lodge, but upon a clearance card issued by the Grand Recorder under article 213 which expressly provides for such a case. A perusal of articles 185-189 shews that article 188 is not in terms applicable. It deals only with the case of a clearance card issued by the local lodge of which the applicant for election had been a member. It requires that before electing as a member a person so transferred the lodge to which he has applied for admission shall ascertain by inquiry from the local lodge which granted his clearance card that

> all lodge dues and assessments have been paid by the brother holding the card up to and including the month in which the application is made.

The constitution contains no corresponding provision governing the case of the transfer of a member of a defunct lodge under clearance card issued by the Grand Recorder. The card issued by that officer to Farlinger contained these clauses:

That he must pay all assessments for which he is liable, to the Grand Recorder of the Grand Lodge of Quebec, A.O.U.W., *until he is elected* a member of some subordinate lodge of the order.

That no lodge has any right to accept this card after it has expired, nor to elect the member holding this card until officially notified by the Grand Recorder, signing this card, that all *pending* and past assessments have been paid.

This latter provision is, I think, at least open to the construction that, before electing Farlinger as a member, Longueuil Lodge should have obtained from the Grand Recorder an official notice that he had paid all past assessments and the assessment which was then, *i.e.*, at the time of his election, "pending." If so, the very fact of his election on the 2nd or 4th of June, which is conceded, raises a strong presumption —conclusive in the absence of proof to the contrary— that the June assessment had been duly paid before he was admitted to Longueuil Lodge.

But, assuming that, in the absence of any other corresponding provision in the constitution governing Farlinger's case, article 188 applies and that Longueuil Lodge, before electing him, was only required to satisfy itself that he had paid the assessment for the month "in which his application was made" and all prior assessments, upon the evidence in the record the result must be the same.

The Superior Court in Review and the Court of King's Bench have both found that Farlinger made application for admission to Longueuil Lodge on the 2nd of June. The evidence supports this conclusion. It includes the following letter:

MONTREAL, June 4th, 1906.

J. A. Farlinger, Esq.,
Morrisburg, Ont.

Dear Sir and Bro.:

In accordance with your letter of 2nd inst. I have arranged for your transfer to Longueuil Lodge, No. 21. The Financier of that

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Lodge is A. P. Pigeon, No. 1595 Ontario St., Montreal, to whom you can forward *next* and future assessments, also lodge dues of 40c. per month, which includes your capita tax.

I enclose your receipt, also certificate indorsed as being transferred to Longueuil Lodge.

Yours fraternally,

A. T. PATTERSON,

Grand Recorder.

On examination, Mr. Patterson said:

Q. Then the statement in paragraph number five of the plaintiff's declaration to the effect that on the 2nd of June, 1906, the said Farlinger requested that he be transferred to and made a member of the Longueuil Lodge, Number 21, which said request was granted, and said transfer duly and properly made, is correct? A. Yes, as far as I know.

There is no other evidence in the record bearing upon the date of Farlinger's application for admission to Longueuil Lodge.

For the appellant it is contended that the provisions of the constitution cannot have been complied with if Farlinger was admitted on the 2nd or 4th of June on an application made on the 2nd of June. They, therefore, maintain that it must be assumed that this application was in fact made in the month of May. No doubt, in the ordinary course of events, some days would elapse between the receipt by a lodge of an application for transfer and the election of the applicant. But, as pointed out by Mr. Justice Archambault, there is nothing in the requirements of the constitution which would prevent an election within a few hours of the receipt of the application, where the Grand Recorder's certificate that all assessments due, including that of the current month, have been paid by the applicant, is immediately available. In the present instance, Farlinger appears to have made his application through the Grand Recorder himself, who happened to be also a member of Longueuil Lodge.

This would, no doubt, facilitate the taking of the requisite steps preliminary to a regular and valid election. We have no evidence of the actual procedure followed by Longueuil Lodge. The appellant had that evidence in its own hands and should have furnished it if it would have shewn an application by Farlinger earlier than in June. Since it is quite possible that making application on the 2nd of June Farlinger could have been duly elected on that day or on the 3rd or 4th of June without violation or disregard of any provision of the constitution, there is no ground for the conclusion, urged by the appellant, that his application must have been made in the month of May, notwithstanding the indication of Mr. Patterson's letter and his oral testimony above quoted that it was made in June.

Not only is it impossible on the evidence before us to say that the Superior Court in Review and the Court of King's Bench were clearly wrong in holding that the application of Farlinger was made on the 2nd of June—as we must be prepared to do if we would reverse them: *Demers* v. *Montreal Steam Laundry Co.* (1); on the contrary, from that evidence, in my opinion, no other conclusion can legitimately be drawn.

If article 188 of the constitution was applicable either by analogy, or by reason of some practice of the order, under the maxim *omnia præsumuntur rite esse acta,* it must be assumed that before electing Farlinger Longueuil Lodge ascertained that all dues and assessments had been paid by him up to and including the month in which his application was made. In the absence of convincing proof to the contrary (the record contains none at all) this suffices to establish

(1) 27 Can. S.C.R. 537.

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that Farlinger had paid his June assessment before he became a member of Longueuil Lodge. If that be the case, his subsequent payments were applicable to the months in which they were respectively made—treating that of the 31st August or the 6th of September as having been made in September. It follows that he duly paid his October assessment and that, at the time of his death, he was not in default and not under suspension, but was a member of the order in good standing.

The appeal fails and must be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *T. P. Butler.*
Solicitors for the respondent: *Cook & Magee.*

THE SOVEREIGN BANK OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

DANIEL McINTYRE (DEFENDANT) ... RESPONDENT.

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*Dec. 1, 2.
*Dec. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Evidence—Burden of proof—Sale of bank stock—Allotment to shareholders—Shares refused or relinquished—Sale to public—Authority—R.S.C. [1906] *c.* 29, *s.* 34.

M. was sued by a bank on a promissory note alleged to have been given in payment for a portion of an issue of increased stock. He pleaded want of consideration and non-receipt of the stock. On the trial evidence was given of a resolution by the bank directors authorizing the allotment of the new issue to the then shareholders of whom M. was not one, and counsel for the bank admitted that there was no resolution alloting it to anybody else. A verdict in favour of the bank was set aside by the Court of Appeal.

Held, Idington and Duff JJ. dissenting, that the onus was on M. to prove that the stock was issued to the public without authority and such onus was not satisfied.

Held, per Idington and Duff JJ., that such onus was originally on M. but the evidence produced, and the said admission of counsel had shifted it to the bank, which did not furnish the requisite proof.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of a Divisional Court by which the verdict for the plaintiff at the trial was maintained.

The facts will be found in the opinions of the judges on this appeal.

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

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Claude Macdonell K.C. for the appellant.
J. M. McEvoy K.C. for the respondent.

THE CHIEF JUSTICE and GIROUARD J. agreed in the opinion stated by Davies J.

DAVIES J.—This was an action brought upon a promissory note given by the defendant to the bank for $1,380 payable on demand.

The defendant pleaded amongst other defences want of consideration and that if any such note was given by him

it was given conditionally for stock in the bank which he had never received, and that he was not to pay the said note.

The defence that he was not to pay the note arose out of a conversation, at the time of the giving of the note, between defendant and one Karn, a local manager of the bank, who had induced defendant to purchase the stock for which the note was given. Some general statements were made by Karn to McIntyre at the time he signed the note to the effect that he never would be called upon to pay it, but the bank was no party to any such promise directly or indirectly, and knew nothing of it.

As a matter of fact, it appears that Karn and McIntyre agreed to go into the purchase of this stock as a speculation, and Karn, who was urging McIntyre to go into it, gave the assurance, which is not unusual in such cases, that if he gave the note he would never be called upon to pay. Both parties expected the stock to rise in price, in which case they intended to sell and take the profits. I only mention this defence and these facts because the impression made upon my mind from the reading of the evidence was

that they constituted in McIntyre's mind the real and only defence he had.

The defence relied upon in this appeal was that the necessary evidence to shew a right in the bank to sell these shares was wanting, and that under the circumstances the onus of such proof lay upon the bank.

I am of the opinion, concurring with the trial judge, the Divisional Court and Mr. Justice Meredith of the Court of Appeal, that the onus of such proof lay entirely upon McIntyre and that nothing transpired to change that onus.

It seems clear to me that these shares sold to McIntyre formed part of certain shares which had been allotted by the bank to its shareholders and not taken up by them. They were then held by the bank and might be at any time

offered for subscription to the public in such manner and on such terms as the directors prescribed.

Sub-sec. 2 of sec. 34 of "Bank Act."

I think it a fair inference from the correspondence and documents put in evidence that Karn had, acting on behalf of certain applicants in London for such shares, amongst them the defendant for ten shares, applied to the bank for them. The application itself is not forthcoming, but on the 19th April, 1906, Mr. Snyder, the inspector of the bank, wrote to Karn, the local manager at London, saying:

We are in receipt of yours of the 13th and have drawn on you to-day for $9,300 in payment of 67 shares at $140, distributed as follows.

Then follow nine names with the number of shares stated for each name, amongst them D. McIntyre, defendant, ten shares.

The evidence leaves no doubt upon my mind whatever that McIntyre had agreed with Karn to pur-

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chase these ten shares; that Karn had, acting as his agent, applied to the bank for them at the rate of $140; that the application had been granted, the certificates for the shares forwarded, and that McIntyre had, after such certificate had been received, signed a note of hand for the amount of the purchase price of the stock which was afterwards renewed by the demand note for $1,380 sued on. A statement of McIntyre's current account with the bank from May, 1906, to September, 1908, was put in evidence by McIntyre and made part of his case. It shewed amongst other things that on 1st June, 1906, McIntyre was charged with $1,400 *presumably,* from his admission that he had no other dealings with the bank to which this debit could be attributed, the price of this stock, ten shares at $140, and that on July 14th, he was credited with $1,365.30 under the head of discount which it was shewn was the discount of the $1,380 note sued on. McIntyre had, on June 30th, $1,365.30 standing to his debit, he having been previously charged with the $1,400, and this discount exactly squared the account to that date.

I mention these details and use the word "presumably" because it was impossible to get any clear definite answer to any material question from Karn adverse to McIntyre's interest. In almost every case where he was asked questions as to facts which it seemed he should, as former local manager, have remembered, he fell back upon the time-honoured answer, "I don't remember." It is needless to say that he has long since ceased to be an official of the bank and that he admitted being a friend of McIntyre's.

Notwithstanding the sad loss of memory alike by Karn as by McIntyre, there is sufficient evidence of record in the books and correspondence to prove the

material facts relating to the actual purchase of these shares.

Subsequently to giving his note for the shares, the bank from time to time forwarded to the London agency cheques for the quarterly dividends declared on its stock. McIntyre received his dividend cheques, payable to his order, indorsed them, paid some into the agency of the bank in London where they were placed to his credit, and cashed others elsewhere, using the moneys for his own purposes. No less than five of these quarterly dividends were so received and disposed of by McIntyre. In the end, closing up this bank account of his which he himself put in evidence, he on September 28th, 1908, withdrew by cheque the small balance of $20.30 then standing to his credit.

His own evidence and admissions, coupled with the evidence reluctantly given by Karn, together with the bank books, convince me beyond any doubt that McIntyre did agree to purchase these ten shares for 140; that Karn as his agent applied to the head office of the bank to purchase them; that McIntyre knew of the receipt at the London agency of his scrip or certificate for such shares, that he gave his note in payment of the cost of the shares and for five successive quarters subsequently received his dividend cheques for the dividends payable in respect of the shares.

I think the facts as proved and admitted on all these points quite inconsistent with the assumed ignorance of McIntyre respecting them, and that the real facts are that he bought the shares with full knowledge, hoping for a rise in their price and depending upon his friend Karn's assurance that he never would be called upon to pay his note.

There remains only the legal question as to which

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party the onus rested upon of proving that the bank did not hold any stock available for sale to McIntyre.

On this question I think the onus rested upon the defendant as the maker of the promissory note sued on given for the stock, and that he has not discharged it. He has not called any of the bank directors or given any evidence to shew that the shares purchased by him were not shares which were available for subscription by the public. The onus lay upon him of shewing that there were no such shares and that the directors had not prescribed the manner and terms on which they should be offered to the public. The certificate of the issue of the stock to the plaintiff, the evidence of Snyder, the inspector, the correspondence between the head office and the branch at London, all combine to shew that there was such available stock. If he wished to rely upon the absence of authority on the part of the directors for its sale to the public, surely the duty lay upon him of giving some evidence on the point.

Then it is contended that the admission of the counsel for the bank at the trial that there was no resolution in the books specifically allotting these ten shares to McIntyre and that the allotment resolution was confined to shareholders, changed the onus of proof to the shoulders of the bank.

I do not agree to any such proposition. Sub-section 2 of section 34 of the "Bank Act" provides that

> any of such allotted stock not taken up by the shareholders to whom the allotment has been made within six months from time when notice of allotment was mailed to his address or which he declines to accept, may be offered for subscription to the public in such manner and on such terms as the directors prescribe.

It was not necessary under this section, in offering stock to the public, to go through the formal methods provided for in the Act for allotting new stock which

the bank may issue *pro ratâ* amongst the shareholders. It was only necessary that the directors should prescribe generally the "manner and terms" on which the stock not taken up by shareholders might be sold to the public. Once that was done and communicated to the proper officer of the bank a legal sale could be made.

No "allotment," in the sense in which the Act uses the term, was necessary to be made to the public purchasers of such stock and when the counsel used the language he did admitting there was no resolution allotting the ten shares to McIntyre, he did not admit that there had not been a *bonâ fide* sale of such shares made by the bank on the terms prescribed by the directors, and was evidently not so understood by the trial judge.

Everything was done by the bank in its books, its stock ledger, its certificate of the issue of the stock, its enclosure of the same to the purchaser, its continuous payment of dividends to the purchasers, to shew that there had been a *bonâ fide* sale of ten shares of stock to him.

If McIntyre wished to shew that the directors had not given the necessary authority for such sale, the onus lay upon him of shewing it, and in my opinion that onus he has not discharged.

IDINGTON J. (dissenting).—The only consideration pretended to have been given for the note sued on was the sale of ten shares of stock in the appellant bank.

There had been a written application made by respondent for that number of shares on terms rejected by appellant and thereby everything relative to that

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proposal is, so far as the present issue is concerned, eliminated.

When we find that application had been so altered in the bank as to substitute in pencil the price now claimed for that entered originally and other evident irregularities existing relative to the dealings now in question we may suspect much as to the conduct and purposes of all concerned therein, but in the view I take all that may be put aside.

It is admitted that all the stock the appellant had to dispose of was, at a meeting of the directors on the 31st March, 1906, allotted to the shareholders of record on the books of the bank and to others in such a way that we have to consider all the provisions of section 34, but especially here sub-section 2 of section 34 of the "Bank Act," to see how a sale of stock could become effectual to respondent who was not a shareholder. That sub-section is as follows:

> 2. Any of such allotted stock which is not taken up by the shareholder to whom the allotment has been made, within six months from the time when notice of the allotment was mailed to his address, or which he declines to accept, may be offered for subscription to the public, in such manner and on such terms as the directors prescribe.

In the minutes of the directors' meetings we have a number of resolutions passed on the said date. But we have nothing passed by the directors then or at any time dealing with the question of stock not taken up by the shareholders to whom allotted, unless in what I will hereafter refer to.

We are told, and it is not contradicted, that the minute book was in court at the trial and resolutions extracted therefrom which I will hereafter refer to.

During respondent's examination as a witness the following admission was made:

> Q. Did you ever get any notice that there was any stock allotted to you? A. No.

Mr. McEvoy:—I ask you now, Mr. McKillop, under the notice to produce, to let me have the resolution of the directors allotting this stock to Mr. McIntyre, if you have it; I asked you to produce it on the examination for discovery?

Mr. McKillop:—There is a general resolution allotting it to the shareholders in proportion.

His Lordship:—That you produce?

Mr. McKillop:—Yes, my Lord.

His Lordship:—It is admitted that there is no resolution allotting it to McIntyre?

Mr. McKillop:—Yes, my Lord.

Mr. McEvoy:—It is admitted there was no resolution allotting it to anybody but shareholders; that is the admission, Mr. McKillop?

Mr. McKillop:—Yes.

To Mr. McEvoy:—Q. You had nothing to do with that Sovereign Bank stock before this? A. No, I had not.

Mr. McEvoy:—I ask you now to produce, under the notice to produce served, the acceptance book, shewing where Mr. McIntyre signed to accept those ten shares of Sovereign Bank stock; let me see the book, please, in which he signed?

Mr. McKillop:—We cannot find either the power of attorney to accept, or the book.

Counsel for appellant must be taken to have been as usual quite candid with the court. I at least am quite sure he was. His statements imply not only that there was no record of any allotment of stocks to respondent, either in the narrowest sense or in the wide sense in which the learned trial judge, the Divisional Court and the Court of Appeal each refer to the possible transaction upon which to found the alleged consideration for the note in question.

It seems to me, therefore, quite clear that there never was anything done by the directors that would or could have supported a binding sale of the stock in question to the respondent.

It is as plainly enacted as words can make it, in the sub-section quoted, that any such sales as could have taken place of shares failing to be taken up by any of those to whom allotted could only have been made

in such manner and on such terms as the directors prescribe.

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Not only is there the admission of counsel for appellants as to the non-existence of any such record of allotment, in the sense used by all concerned, but there appears on the stock register produced this entry of particulars relative to this very stock: "New stock allotted March 31, 1906."

Respondent's title was thus made to appear on the stock register as that of an allotment on that date. This is not merely descriptive, for it is as it were the root of his title.

But besides this we have the allotment made by a resolution that fixed the prices to be paid at $130 for each share and the time given to pay the premium of thirty per cent. up to the tenth of April.

And the letter of the 19th of April purporting to enclose certificates of stock of that date (of which that said to cover respondent's ten shares was one) refers to one of the 13th of April, as what is being answered.

The directors must, on the hypothesis of a valid foundation for this stock certificate, have prescribed sometime between the 31st of March and the date of the certificate "the manner and terms" upon which it was to issue.

And we are asked to presume not only that it was so done, but the improbable thing that it was done (if it could legally so be done, which I much doubt) before the tenth of April when the option to others had expired.

And we are asked further to presume either that the bank directors transacted such important business without putting it in the minute book, or that such a record which must have been on the minute book (close after that extracted and put in this case)

escaped the attention of all those engaged in the trial of this case. In other words, we are asked to presume that the very thing needed in law to maintain a contention, struggled for in many curious ways by appellants' counsel, was not resorted to though there at his hand.

For it is to be observed respondent's case was not left severely alone at the close thereof, when in its weakest state, as it might well have been, but appellants strove to shew its officers had done everything needed in law.

Nor does the story end here. The resolutions of the 31st March recite that the capital stock of two million dollars had been increased to four million dollars, that 16,250 shares had been issued and allotted, leaving 23,750 shares for allotment, of which 8,125 shares were then allotted to shareholders.

And that business having been, in order to comply with the law, disposed of, it was resolved that the remaining 15,625 shares of the unissued shares should be allotted to the shareholders

> at the rate of one hundred and thirty ($130) per share, and further that any of said shares so allotted, which have been or shall hereafter be relinquished or refused by the shareholders entitled thereto, shall be issued and allotted to the Dresden Bank of Berlin, Germany, or its nominees, at the said price of one hundred and thirty ($130) dollars per share

payable as specified.

What does all this mean? This last clause seems to be a specific dealing with the shares relinquished and may be taken as an express prescribing within sub-section 2 above quoted.

I am not concerned with the regularity or legality of the mode adopted for disposing of the business, or conclusively holding that the relinquished shares

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lastly dealt with related to all the allotments of that date.

I am merely concerned with the creation thereby of a state of facts that rendered it unnecessary for respondent or his counsel to look further for evidence shifting the onus resting on his client.

It seems to me in the highest degree improbable in face of such a course of conduct and policy of the directors in relation to the business in hand, that it could all be reversed and another course of conduct and policy in accordance with the statute, have been so taken as to render the issue of share certificates on the 19th of April, to any but shareholders, legal.

The presumed celerity of action and reaction involved therein is too great even for stock gamblers, much less staid bank directors, as these must be presumed in absence of evidence to the contrary to have been.

It is, in face of this, rather absurd to rely on a bit of evidence given by the inspector of appellants as to shares having been relinquished at some time not specified, but possibly and probably months or so later than the 19th of April. It is absolutely inconceivable (if the statement was intended to refer to a date anterior to the 19th of April) that it was not so put and demonstrated. It is idle to say the demonstration did not rest on him, for it was what he was in fact attempting to do.

The conclusion I reach is not only that there is left no ground for such presumption as the learned trial judge proceeded upon, but that in fact no such foundation as the law requires ever existed for transferring to respondent any title to the shares alleged

to have been sold, and hence the whole ground for the alleged consideration for the note in question fails.

One cannot have much sympathy with the respondent, but it is of the highest importance that bank directors should discharge their duty according to law and in a satisfactory manner.

So far as I can see there never was legal foundation for the certificate issued in respondent's name, and there was an issuing of certificates of stock at one hundred and forty dollars ($140), concurrently with a pending proposition to another party to take all such at one hundred and thirty ($130).

Of course this concurrent disparity or inequality did not necessarily exist if we assume everything in the business involved was all despatched within three days, *i.e.*, between the 10th and the 13th of April. We must proceed upon the ordinary and not the miraculous when driven to draw inferences or rely on presumptions.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I think this appeal should be dismissed. The onus is of course upon the respondent to establish the defence of want or failure of consideration. On this the controversy at once narrows itself to the point whether the professed allotment of shares evidenced by the entries of the 19th April in the stock register and the certificate of the same date was the act of the bank or merely that of some person acting without authority.

To summarize briefly in chronological order the admitted facts. There was an application by McIntyre for shares at $130 in January. In March the capital stock of the bank was increased to $4,000,000.

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On the 31st of that month there was an allotment to the shareholders of the whole of the unissued shares under section 34 of the "Bank Act." On the 19th of April McIntyre's name was entered on the share register as the holder of ten shares; and a certificate was issued of the same date declaring him to be the holder of that number of fully paid-up shares, which, with others, was forwarded to Karn, the bank's agent at London, on the same day. Karn then debited the London branch in account with the head office with $1,400 as the price of these shares at $140 a share, and on the 1st of June this sum was charged against McIntyre in the books of the bank. On the 14th of July or thereabouts McIntyre gave his note for $1,400; and, as I think the evidence sufficiently shews, he both understood and intended it to be for the price of these shares.

The application of January was admittedly not acted on. The view of the facts put forward by the bank is that the letter of the 19th of April forwarding the share certificate to London was in response to an application made by Karn on behalf and with the authority of McIntyre for ten shares at $140; that this application was accepted and that McIntyre had notice of the acceptance and of the entry and certificate in his favour at the time he gave his note on the 14th of July. That, as I understand, was the case primarily made by Mr. Macdonell, with, however, the alternative, that in any event McIntyre had notice at the time of giving his note that these shares had been allotted to him and stood in his name and that the note was given for the purchase price of them. In either view if the officers of the bank acted without authority in accepting Mc-

Intyre's offer on the one hand, or in appropriating shares to him by entry in the share ledger and by issue of the certificate, McIntyre's note was given without consideration and the appeal must fail. Upon this issue of authority or want of authority I agree with the majority of the Court of Appeal in thinking that, though the onus was originally on McIntyre the evidence and the facts admitted at the trial was sufficient to shift the burden of evidence to the shoulders of the bank and that burden has not been sustained.

The nominal capital of the bank was originally $2,000,000 divided into shares of $100. Before the 31st of March, 1906, 16,250 of these shares had been allotted to shareholders and on that day resolutions were passed by the directors under the authority of section 34 of the "Bank Act" allotting the residue (23,750 shares) of the bank's capital to the existing shareholders at $130 per share. McIntyre was not a shareholder and consequently could not participate in the benefit of this general allotment. Section 34, however, sub-section 2, contains a provision authorizing the directors to offer for public subscription any shares offered to shareholders under the authority of the section which may be refused or not accepted; and it is under the authority of this provision that the sale to McIntyre is said to have taken place.

It is said, and it may be conceded, that on the 19th of April, when McIntyre's name was entered in the share register as a holder of shares, there were some shares available for disposal under this provision. The directors, and the directors alone, however, had authority to offer these shares to the public. They and they alone had authority to fix the "terms" and the "manner" of subscription. In the absence of

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measures taken by them prescribing the manner and terms of such disposal any attempt to sell them must be a mere nullity—however regular in form and though evidenced by never so many certificates and entries in the stock registrar and payments of dividends; for the authority conferred upon the directors by section 34, sub-section 2, is one of that class of powers the exercise of which cannot be delegated. *Howard's Case*(1); *Cartmell's Case*(2); *Re Pakenham Pork Packing Co.*(3). The evidence bearing upon the point was, of course, entirely in the hands of the bank; and in view of the following passage extracted from the record I do not think it is open to the bank to contend that the authority of the directors had ever been given:

Mr. McEvoy:—I ask you now, Mr. McKillop, under the notice to produce, to let me have the resolution of the directors allotting this stock to Mr. McIntyre, if you have it; I asked you to produce it on the examination for discovery?

Mr. McKillop:—There is a general resolution allotting it to the shareholders in proportion.

His Lordship:—That you produce?

Mr. McKillop:—Yes, my Lord.

His Lordship:—It is admitted that there is no resolution allotting it to McIntyre?

Mr. McKillop:—Yes, my Lord.

Mr. McEvoy:—It is admitted there was no resolution allotting it to anybody but shareholders; that is the admission, Mr. McKillop?

Mr. McKillop:—Yes.

To Mr. McEvoy:—Q. You had nothing to do with that Sovereign Bank stock before this? A. No, I had not.

Mr. Macdonell in his ingenious argument found it necessary to minimize the effect of this conversation, and his suggestion was that the whole sense of the passage is limited to this—that the shares received by McIntyre were part of the totality of shares allotted

(1) 1 Ch. App. 561. (2) 9 Ch. App. 691.
(3) 12 Ont. L.R. 100.

to the shareholders by the resolutions of the 31st of March. In support of this view he mainly relies upon the suggestion that the words "allot" and "allotment" when applied to the disposal of its share capital by a bank subject to the "Bank Act" are words of technical import which signify the operation of appropriating or offering shares to shareholders under the first part of section 34. These terms, it is argued, are meaningless as applied to the disposal of shares refused or not accepted by existing shareholders after such an appropriation or offer to them under section 34, and consequently could have no application to a transaction between the bank and McIntyre touching the acquisition by him of any shares returned or not accepted by shareholders to whom they had been allotted by the resolutions of the 31st of March.

There is here, I think, some error as to the common meaning of the terms in question as well as the sense in which they are employed in the "Bank Act." The terms "allot" and "allotment" are not technical terms. "An allotment of shares," says Stirling L.J. (then Stirling J.) in *Spitzel* v. *The Chinese Corporation*(1),

> Broadly speaking, is an appropriation by the directors or the managing body of the company of shares to a particular person. The legal effect of the appropriation depends on circumstances. Thus it may be an offer of shares to the allottee, or it may be an acceptance of an application for shares by the allottee; but of itself an allotment does not necessarily create the status of membership. The allotment may be, and probably generally is, such as to give a title to the shares the moment the allottee communicates his acceptance of it to the company whose directors make the allotment, but it seems to me that the allotment may be subject to a condition—as, for example, that the allottee should not only indicate acceptance, but perform some other act, such as payment of a sum of money. In other words, I think that a company may offer specified shares to A.B. on

(1) 80 L.T. 347, at p. 351, in 1899.

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the terms that the title of A.B. should not arise until he had paid a sum of money to the company, and, this being so, a contract may provide, as I think, that the allotment shall be subject to conditions.

It is in the sense indicated by the first sentence of this passage that the term "allot" is used in the Dominion "Companies Act," R.S.C. (1906) ch. 79, sec. 46, in articles 5974, sub-sec. 1, and 5976, R.S.Q.(1), and in the same sense it was used in section 26 of the Ontario "Companies Act," p. 10, R.S.O., 1897, ch. 191 (since repealed); that is also the meaning attached to the term when used in reference to the disposal of the shares of provincial companies governed by statutes modelled upon the English "Companies Act, 1862."

It does not appear to be open to doubt that this is the signification of the term in section 34 of the "Bank Act." That section directs that when it is proposed to dispose of any of the

> original unsubscribed capital stock or of the increased stock of the bank

the shares shall first be offered to the shareholders. The existing shareholders are to have a pre-emption; the first step in the operation is to "allot" or appropriate the shares to the shareholders, but it is plain that this is only a conditional appropriation and that no title passes until the offer has been accepted. The operation in other words is precisely the second of the two kinds to which Stirling L.J. refers. It does not, of course, follow that the term "allot" is not equally to be applied to the act of the proper authority in accepting an application or in appropriating shares in response to a subscription. Parliament has applied the word to a transaction to which according to well understood usage among those conversant with the

(1) See *Common* v. *Matthews*, Q.R. 8 Q.B. 138, at p. 141.

management of incorporated companies, it is properly applicable; but I should think it very far-fetched to infer from the language of this section that there is anything unusual in employing the term — in speaking of bank shares — according to the whole of its commonly understood purport.

Indeed, the record in this action affords us conclusive evidence that those responsible for the management of the bank in question understood the term to be applicable to the appropriation of shares to a purchaser or subscriber under the second sub-section. The second of the resolutions of the 31st of March expressly authorizes the disposition of shares under the second sub-section—shares that is to say which should be "refused" or "not accepted" by shareholders to whom they were allotted by that resolution—in this phraseology:

and further that any of said shares *so allotted* which have been or shall hereafter be relinquished or refused by the shareholders entitled thereto, shall be issued and *allotted to* the Dresden Bank of Berlin, Germany, *or its nominees,* at the said price of one hundred and thirty ($130) dollars per share, payable as follows.

There can be no question in face of this resolution that the advisers of this bank did not use the word "allot" in the restricted sense it is now proposed to place upon it. Indeed, it is obvious from this document that in their view the apt word for describing the operation of appropriating surrendered shares under that sub-section was that very word.

Such then being the sense of this term in its ordinary signification and according to the usage of this bank what meaning is to be attributed in the passage from the record quoted above? In what sense was it used by counsel for McIntyre? In what sense was it understood by counsel for the bank? There

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can, of course, be no question that when counsel asked for the resolution allotting shares to McIntyre he had not in mind the resolution of the 31st of March which affected only existing shareholders of whom McIntyre to everybody's knowledge was not one; there can be as little doubt that counsel for the bank could not have so understood him; but the point is put beyond question by the last question and answer in which it is agreed that there is no resolution *allotting* shares to *anybody but shareholders*. We may put aside as pure subtlety the distinction between an allotment specifically made by the directors and one made under the authority of a general resolution passed by the Board; no such distinction was in anybody's mind. There was then no resolution giving authority for the entry of McIntyre's name in the register or the issue of the certificate of shares; none authorizing the acceptance of Karn's application on behalf of McIntyre if we proceed on the assumption that there was such an application. Mr. Justice Maclaren says, and with him the Chief Justice of Ontario agreed, that

> it was admitted at the trial that the only resolutions of the directors regarding the stock now in question were the two resolutions of the 31st March.

This, I think, is palpably involved unless we are to reduce the whole of this episode to mere fatuous trifling.

The bank's case appears also to have been put upon the ground that having accepted dividends McIntyre is estopped from disputing his status as a shareholder.

Estoppel, where there is no record and no deed, which is the case here, is a rule of evidence by which a person whose words or conduct have misled another

into acting to his prejudice upon the assumption of the existence of a non-existing state of facts is prevented in a court of justice from disputing the actuality of that state of facts. What conduct of McIntyre misled the bank? The bank knew the facts. McIntyre did not know them. McIntyre acted upon the representation that he was a shareholder and on that basis of fact accepted the dividends. I can only say that the contention is one which I do not understand.

Then it is said that the bank could not dispute the status of McIntyre as a shareholder and consequently McIntyre must also be bound. I am not satisfied in view of section 34 that the bank could not set up the absence of authority from the directors. But conceding it could not, that could only be upon the ground that the bank had estopped itself from denying authority in fact. As the discretion of the directors under section 34(2) could not be delegated, the act of any officer assuming to perform the function of the directors would be incapable of ratification; *Gibson* v. *Barton*(1); and there is indeed no suggestion of ratification in fact by any proved act of the board. Since estoppel is the only ground upon which the bank could be held notwithstanding want of authority in fact, one does not see how that can help the bank against McIntyre. The effect of the estoppel is simply to preclude the bank from proving the facts. That cannot prevent McIntyre from proving the facts. There is, of course, the widest possible distinction between a void contract or a nominal contract which for want of assent on one side is no contract, but the validity of which one of the parties is estopped from disputing and a contract

(1) L.R. 10 Q.B. 329, at p. 337.

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which is voidable in the sense of being rescindable but valid until rescinded. Such transactions as those last mentioned may cease to be impeachable by a change of circumstances alone. Change of circumstances alone not involving a true consent could not produce a contract out of that which never was a contract because of want of consent by one of the nominal parties.

Appeal allowed with costs.

Solicitors for the appellant: *McKillop & Murphy.*
Solicitor for the respondent: *J. M. McEvoy.*

LESTER W. DAVID (DEFENDANT) ....APPELLANT; 1910

AND *Oct. 10. *Dec. 7.

EDWARD F. SWIFT AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Construction of contract — Condition precedent — Arbitration and award—Right of action.

A contract for the sale of timber limits contained a guarantee by the vendor that the quantity of timber thereon at the time of the sale would prove equal to that shewn in a statement annexed and a covenant that he would re-pay to the purchasers the amount of any shortage found in proportion to the price at which the sale was made. In another clause, provision for arbitration was made in case of dispute as to the amount of any such shortage but it did not in express terms deprive the purchaser of the right to recover any claim for shortage until after an award had been obtained.

Held, affirming the judgment appealed from (15 B.C. Rep. 70), Idington J. dissenting, that an award by arbitrators had not been made a condition precedent to recovery for the amount of any deficiency in the quantity of timber guaranteed to be upon the limits.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the decision of Mr. Justice Morrison, at the trial, and directing a new trial to be had between the parties.

The action was to recover $250,000 for deficiency in the amount of timber on certain lands under a

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

(1) 15 B.C. Rep. 70.

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guarantee contained in a written agreement between the parties for the sale by the defendant (appellant) to the plaintiffs (respondents), of timber limits, in British Columbia, wherein the defendant guaranteed that the quantity of timber thereon, as shewn by a statement annexed to the agreement, was true and accurate, it being made a condition of the contract that the timber should "at least run in quantity to the number of feet shewn in the attached statement." In the clause of the contract, which immediately followed the clause containing the guarantee, it was provided:—

"Fourth. Second parties (plaintiffs) are to have until September 1st, 1907, to cruise and verify the figures on the attached statement of April 30th, 1907, regarding the quantity of timber on said various tracts, and in event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented in the attached statement, first party (defendant) is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of timber estimated to be on said tracts as appears in said attached statement bearing date of April 30th, 1907.

"It is further agreed that in event second party fail to find the quantity of timber on said tracts represented by the statement of April 30th, 1907, attached hereto, and said first party fails to agree on a basis of settlement concerning such shortage, then and in that event an arbitration committee composed of three men, one named by each of the respective parties hereto, and the two thus named agreeing on and naming a third, which arbitration committee will and shall have full power to settle the matter regarding shortage,

and whose action and decision in the matter shall be final.

"In event the two parties so named as the arbitration members fail for any reason to agree on or name a third party within thirty days after their appointment on the committee, then and in that event the judge of the District Court of New Westminster, District of British Columbia, shall name the third party, and decision by any two of said committee above referred to shall be considered and treated as the decision of the whole and accepted as final."

The plaintiffs claimed that the timber set out in the schedule to the agreement did not reach the quantity represented therein and claimed a refund in respect thereof. The defendant contended that the plaintiffs could claim no shortage until the matter went to arbitration and an award had been made according to the terms provided in the paragraph of said agreement above quoted.

At the trial Mr. Justice Morrison considered that the settlement of the shortage by arbitration was a condition precedent and dismissed the action. On appeal by the defendant the Court of Appeal for British Columbia ordered a new trial, with costs in the Court of Appeal and all costs thrown away by the abortive trial in the court below. From this judgment the defendant appealed to the Supreme Court of Canada.

Lafleur K.C. for the appellant.

Nesbitt K.C. for the respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal for the reasons given in the court below.

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DAVIES J.—The question raised in the appeal is whether on a true construction of the contract made between the parties and sued upon in this action there arose a legal obligation on the defendant's part to pay plaintiffs certain monies, or whether the obligation or liability to pay was dependent upon an award first having been made in plaintiffs' favour under a clause in the agreement providing for a reference to arbitration.

I agree generally in the reasoning and in the conclusions of the Court of Appeal for British Columbia, as expressed by Mr. Justice Galliher.

The question resolves itself into a finding of the intention of the parties as expressed in their agreement.

Is the true meaning of the agreement such that no liability or obligation to pay arose on the part of the defendant unless and until an arbitration had been held and an award made in plaintiffs' favour. In other words, was the finding of such an award a condition precedent.

It is unnecessary to refer to authorities from *Scott* v. *Avery*(1), down to date, as the answer to the question depends in each case upon the language the parties have used in their contract.

The rule cannot, I think, be better stated than it was by the Lord Chancellor Herschell in *Caledonia Insurance Company* v. *Gilmour*(2):

> The question is not whether, where a contract creates an obligation to pay a sum of money, it is a good answer to an action to recover it that disputes have arisen as to the liability to pay the sum and that the contract provides for the reference of such differences to arbitration, but whether, where the only obligation created is to pay a sum ascertained in a particular manner, where, in other

(1) 5 H.L. Cas. 811. (2) (1893) A.C. 85, at p. 90.

words, such ascertainment is made a condition precedent to the obligation to pay, the courts can enforce an obligation without reference to such ascertainment.

In my judgment the obligation to pay under the first part of clause four was complete in itself and enforceable in the courts. The obligation of the defendant to pay for the shortage found on the cruising to exist was not made conditional on a finding of such shortage or other finding by the arbitrators. Such arbitration and award as is provided for was not made a condition precedent to the obligation to pay.

The latter part of section four providing for an arbitration in the double event of their being a shortage of timber and the defendant (vendor)

failing to agree on a basis of settlement concerning such shortage

whatever these words may mean, doubtless intended that there should be an arbitration between the parties in case of dispute which "would settle the matter with regard to shortage," but the language used providing for such arbitration falls far short of making the arbitration and award a condition precedent to the defendant's obligation to pay for such shortage.

No express words either taking away the right to sue in the courts to recover the shortage or making the arbitration a condition precedent to such right are used, nor are any words used from which, in my judgment, it can be reasonably concluded that it was the intention of the parties to make the defendant's (vendor's) obligation to pay for the shortage conditional on there having been first an arbitration and an award under it.

IDINGTON J. (dissenting).—The appellant bought from respondents a block of shares in a saw mill company.

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The value of these shares depended on the assets of the company.

The assets consisted largely of timber limits of which there were five or six specified classes and an estimate based on such classification was set forth in a schedule annexed to the written contract the parties entered into for carrying out the bargain and sale of the said shares.

The total was accepted no doubt as basis of approximate value that the shares would have.

It might happen, however, that the estimate was too high.

Whether it was or not in no way affected the stated terms of the bargain and sale which was concluded and made to appear in the first two paragraphs, as if quite independent of the right to abatement of price if justice demanded any on account of the estimates having been placed too high.

The agreement was set forth in a long written contract which was divided in the operative paragraphs into thirteen different paragraphs each intended as far as possible to deal with and dispose of its subject-matter as a whole.

The third paragraph states that the appellant was

> to give a satisfactory guarantee to second party that the quantity of timber on the different tracts of land as shewn by the statement of the Fraser River Saw Mills, Ltd., corporation, under their statement of April 30th, 1907, copy of which is attached hereto and made a part hereof, is true and accurate, it being the intention and made one of the conditions of this trade that the timber shall at least run equal in quantity to the number of feet shewn in the attached statement.

This paragraph almost does, but does not altogether give the guarantee.

It seems expressly to avoid giving any covenant or anything upon which an action might be founded — and why so ?

It seems to me clear that the draftsman abstained because an action was not to be given or any chance thereof, unless and until the machinery in the following paragraphs provided had been first applied.

I see with this introduction to the fourth paragraph declaring for a guarantee, but abstaining from giving it more clearly than I would from reading paragraph four by itself, that the fourth paragraph as a whole constituted the kind of guarantee that was to be given.

It was a most complex problem the parties had thus to have resolved for them if within the time named a shortage could reasonably be claimed.

It was clearly the honest purpose of both that the appellant's cruisers should produce for comparison if need be with the schedule a report of results of the cruising and then both sides, if need be, should attempt to agree, but failing agreement the reference provided was to take place and an award got before any liability to an action could arise.

Stress was laid by respondents on the fact that the first part of paragraph four shews the party of the first part is to repay the second part "in just proportion, etc."

But surely what consequences had ultimately to flow from a shortage had to be stated some place, and when we find the principle of procedure pointed out in the next line, and in the very next sentence the procedure for fixing and settling "the matter of shortage," it does seem to me that to hold the first part quite independent, and the next merely collateral and not necessarily interdependent, the true intention of the parties is frustrated.

A consideration of the entire scope and purpose of

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paragraphs three and four, seem to me to point to a creation of a liability only when everything provided had been done to weigh and measure that liability.

The action was, I think, for these reasons, properly dismissed.

The appeal should be allowed with costs.

May I be permitted to add that decisions of other cases are of little help. But of the cases cited and distinguished by Mr. Justice Galliher's judgment, several seem to me, I say it with great respect, rather hard to reconcile with the result arrived at, if comparison of phraseology can ever serve one.

DUFF and ANGLIN JJ. concurred with Davies J.

Appeal dismissed with costs.

Solicitors for the appellant: *Bowser, Reid & Wallbridge.*

Solicitors for the respondents: *Davis, Marshall & Macneill.*

THE JOHN GOODISON THRESHER COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

THE TOWNSHIP OF McNAB (DEFENDANT) ..... RESPONDENT.

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*Nov. 29, 30.
*Dec. 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Statute—Construction—Ontario "Municipal Act"—Bridges—Crossing by engines—Condition precedent—R.S.O. (1897) *c.* 242—3 *Edw. VII. c.* 7, *s.* 43—4 *Edw. VII. c.* 10, *s.* 60.

R.S.O. (1897) ch. 242, as amended by 3 Edw. VII. ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60, provides as follows:—

"10. (1) Before it shall be lawful to run such engine over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.

"(2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts. R.S.O. 1887, ch. 200, sec. 10.

"(3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damage resulting to the flooring or surface of such bridge

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or culvert as aforesaid. 3 Edw. VII. ch. 7, sec. 43; 4 Edw. VII. ch. 10, sec. 60."

Held, affirming the judgment of the Court of Appeal (19 Ont. L.R. 188), Fitzpatrick C.J. and Girouard J. dissenting, that the strengthening of a bridge or laying of planks over it is a condition precedent to the right to run an engine over the same, and any engine crossing without observing such condition is unlawfully on the bridge and liable for injury resulting therefrom.

Held, also, Fitzpatrick C.J., and Girouard J. dissenting, that planks required by sub-sec. 3 over a bridge or culvert were not intended merely to protect the surface from injury by contact with the wheels of the engine or machinery passing over it, but was also to guard against the danger of the flooring giving way.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment of a Divisional Court by which the verdict for the plaintiffs at the trial was maintained.

The issues raised for decision on the appeal are sufficiently stated in the above head-note.

Robinette K.C. and *J. M. Godfrey* for the appellants.

William White K.C. and *W. M. Douglas K.C.* for the respondent.

THE CHIEF JUSTICE (dissenting).—I am of opinion that this appeal should be allowed for the reasons stated by Chief Justice Moss.

GIROUARD J. (dissenting) was of the opinion that the appeal should be allowed.

DAVIES J.—This was an action brought against the defendant municipality for damages sustained by reason of a traction engine less than 7 tons in weight be-

(1) 19 Ont. L.R. 188.

longing to the plaintiff falling through a bridge of the appellant municipality which was alleged to have been so insufficiently constructed as not to have been able to carry such traction engine safely across.

The defendant municipality counterclaimed for damages caused to the bridge by the illegal and improper action of the plaintiff in attempting to take the engine across the bridge without complying with the statutory requirements in that regard.

Both here and in the Court of Appeal the case was argued upon the findings of facts of the trial judge which were accepted by both parties. These findings so far as they are necessary to refer to in the view I take of the case were that the stringers of the bridge were inadequate to carry the weight (about four tons) that would come upon them from the rear wheels of the engine in question, but that the use of planks as required by the statute when taking such an engine across the bridge would have added to the sustaining power of the stringers sufficiently to have enabled them to have carried the weight of the engine in safety.

The trial judge and a minority of the Court of Appeal held that the provisions of the statute were intended simply as a means for the protection of the surface of the bridge, and not for the purpose of strengthening its carrying capacity, and that failure to comply with these requirements in such a case as this did not relieve the municipality from what would otherwise be its responsibility.

The judgment of the majority of the court was to the effect that compliance with the conditions set forth in the proviso of the statute was in the nature of a condition precedent to the user of the bridge by such

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traction engine, and that failure to comply with them before and when taking the traction engine across, made such user an unlawful one.

The statute referred to is chapter 242 of the Revised Statutes of Ontario, 1897, as amended by 3 Edw. VII. ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60.

Section 10 of the said Act as amended provides as follows:

> 10 (1) Before it shall be lawful to run such engines over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.
>
> (2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts. R.S.O. 1887, ch. 200, sec. 10.
>
> (3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damages resulting to the flooring or surface of such bridge or culvert as aforesaid. 3 Edw. VII. ch. 7, sec. 43; 4 Edw. VII. ch. 10, sec. 60.

The conclusion I have reached is that the construction of the statute by the majority of the Court of Appeal was the right construction, that the provisions of sub-section 3 as to the precautions to be taken by the person in charge of the traction engine before taking it across the bridge were obligatory and a condition precedent to the right to take the engine across, and not having been observed the engine was on the bridge unlawfully.

The intention of the statute, so far as engines eight

tons in weight and over are concerned, is clear beyond dispute. The persons in charge must, before crossing the bridges and culverts, strengthen them at their own expense to enable them to bear safely the weight of such engines. The third sub-section, while declaring that these provisions should not apply to engines used for threshing and other defined purposes of less than eight tons in weight, went on to provide other duties and obligations which were to be observed as well by these special classes of engines if they were taken across bridges or culverts as by any other engines. It says *before crossing* any such bridge or culvert it shall be the duty of the person in charge of the engine to lay down planks, etc. No language could be stronger or clearer. But it is contended that the object of this planking is further on clearly set out, that it has nothing to do with the strengthening of the bridge, and that its neglect in view of the finding of the trial judge with regard to the inadequacy of the stringers of this bridge to carry the weight which the rear wheels of the engine brought to bear on them is of no importance.

The argument is weighty and there is no doubt the language of the proviso is not as apt and clear as it might well have been.

I do not agree, however, with the contention that the object of the proviso was simply and only the protection of the surface of the bridge from being injured. The proviso went much further than that, and was, to my mind, clearly intended to protect the planks of the bridge from being broken through by reason of the great weight (some four tons in the case of the engine in question), which the rear wheels, if they passed directly over the planks, would necessarily bring

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to bear on them with all the possible consequences which might follow, and so it stipulated as a condition of the crossing of the bridge by any such engine for the laying down of these longitudinal planks, along and over which the engine wheels should pass. The obvious effect of these longitudinal planks would be by distributing the weight carried not only to protect the surface of the flooring from being torn, worn or scratched, but to minimize the danger of the planks of the flooring being broken through by the enormous weight to which they would be subjected if the wheels passed over them in direct contact with them. These provisions and statutory obligations placed upon the engine driver before using the bridge were conditions precedent to the right of user, and were obligatory upon him. Their primary object may have been the protection of the surface of the flooring of the bridge or culvert from injury, but that was not their only object, as I have shewn. Compliance with these statutory conditions incidentally strengthened the bridge's carrying power and the special finding in the case before us is that if observed it would have so strengthened the bridge in question as to have prevented the accident.

The two findings must be read together. That which holds the stringers of the bridge to have been inadequate to bear the weight of the engine when carried over the bridge without compliance with the statutory conditions is neutralized by the holding that compliance with the conditions would have ensured safety.

I would dismiss the appeal with costs.

IDINGTON J.—I am, with great respect, unable to comprehend how a man can recover damages suffered

by him from doing that in an illegal manner which if done in a legal manner would have caused him no injury.

The finding of fact that if the bridge in question had had the planks laid upon it by appellant as required by the statute, it would have been of sufficient strength to have ensured safety, seems to me to be an impassable barrier to the appellant herein.

I think the statute clearly prohibits any use of such bridges for the purpose attempted by appellant, unless and until the provisions of the statute are complied with. It seems idle to argue, as persistently pressed upon us, that the object of the legislature was merely to preserve to the municipality a right of action instead of preserving a bridge for the public use.

Some practical men in the legislature understood quite well what they were about in this regard, even though it did take some time in a struggle extending over a great many years preceding the various amendments to the "Act to authorize and regulate the use of traction engines on the highways," to get this indifferent expression of a duty that they well understood was needed to be imposed in prohibitory terms.

The amendment, it may be observed, relates to culverts as well as bridges. It would entail needless expense to make all these safe for an eight-ton load likely to be needed only once or twice a year, when a simple and not very burdensome measure of precaution on the part of those to be so served, at such rare intervals, might avoid that expense.

I agree so fully with the reasoning of Mr. Justice Garrow that I need not enlarge further here, merely to repeat what is well stated.

Yet I may be permitted to add that it may be a

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question whether or not negligence, as American authorities have it, is as accurately descriptive of the legal barrier in appellant's way as to say simply that what was done being illegal, therefore appellants doing it directly led to its injury, and hence that there is no foundation for its action.

The appeal should be dismissed with costs.

DUFF J.—I think the action should be dismissed because I think the findings of the learned trial judge shew that *mishap* was caused by the failure of the plaintiffs' servants to perform the conditions under which alone they were entitled to take the engine upon the bridge. The question presented turns, in my judgment, upon the effect to be given to the phrase "flooring or surface" in the context in which it is found. The view of the learned trial judge was that the object of the enactment was to provide protection for the surface of the platform constituting the travelled highway against injury by contact with the wheels of vehicles of the kind dealt with; and that in the phrase quoted "flooring" adds nothing to the meaning conveyed by "surface."

The phraseology used to describe the injury which the bridge is to be protected against ("injury" * * "from the contact of the wheels") does undeniably suggest that the legislature had the protection of the surface very clearly in its view and desired to emphasize it. The question, however, at this point is: Can the object of the section be taken to be limited to that? Are we really justified in treating "flooring or surface" as equivalent to the surface of the flooring?

The construction put forward by the appellant mainly rests upon the words "caused by the contact with the wheels." But the statute is not making provi-

sion against the effects of mere contiguity of the surface of the wheels with that of the floor; the contact contemplated is that of wheels resting or moving upon the bridge and carrying the weight of the engine; and it is every injury arising from contact in such circumstances that is provided against. Let us suppose boards broken by a smooth-wheeled engine; why is that a kind of injury not within this language? To hold so would effect the obliteration of the word "flooring"; are we justified in obliterating it? The legislature might be justly concerned with protecting the surface of such floors from defacement. But why not also in protecting the boards and the frame supporting them from breaking under the strain of a heavy load. One can quite understand the legislature assuming that the main superstructure of bridges would be sufficient to support such a weight; but the fact that they have done so affords no basis for presuming an intention to expose every bridge floor in the province to the same test. While, no doubt, the section presents an inviting field for controversy, I do not think the doubtful phrases relied upon afford a satisfactory ground for refusing to attribute their full significance to the concluding words "for all damage," etc.

The meaning of the word "flooring" as applied to a bridge is indicated clearly in the following passages and unquestionably in the absence of a controlling context includes such longitudinal joists as that which gave way in the accident in question here:

> The timber frame-work of floors is called "naked flooring." It is of three kinds—single, double and framed. Single flooring consists of a series of joists stretching across the whole void from wall to wall, without an intermediate support. The flooring boards are laid on the top of these, and the ceiling of the lower story fixed to the under

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side. Double flooring consists in laying binding joists across the floor about six feet apart, crossed above by bridging joists, and also crossed below by the ceiling joists. Framed flooring is provided with girders or beams in addition to the binding, bridging and ceiling joists. 3 Encyclopædia Americana "Carpentry."

The flooring is so arranged as to constitute a platform adapted to the character of the traffic carried over it, and forms a subsidiary part of the superstructure; but the main superstructure is that which carries the distributed weight of the floor and its load, transferring it to the supports on either side. 2 Nelson's Encyclopædia, p. 287.

Double flooring (see Plate XXIV., fig. 8, Nos. 1 and 2, and Plate XXV., fig. 3) consists of three distinct series of joists, which are called binding, bridging and ceiling joists. The binders in this are the real support of the floor; they run from wall to wall, and carry the bridging joists above and the ceiling joists below them. Binders need not be less and should not be much more than 6 feet apart, that is, if the bridging or flooring joists are not inordinately weak. 4 Ency. Brit., p. 482.

In this view it is not necessary to consider many of the questions that occupied a good deal of attention at the argument.

Appeal dismissed with costs.

Solicitors for the appellants: *Cowan & Towers.*

Solicitor for the respondent: *J. E. Thompson.*

JOHN M. GARLAND, SON AND COMPANY ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF EDWARD O'REILLY, DECEASED (DEFENDANTS) ..... APPELLANTS;

AND

ELIZA O'REILLY (OR PETRIE) (PLAINTIFF), AND JOSEPH O'REILLY AND WILLIAM O'REILLY, EXECUTORS OF THE ESTATE OF THE SAID EDWARD O'REILLY, DECEASED (DEFENDANTS) RESPONDENTS.

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*Nov. 30; Dec. 1.
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*Feb. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Donatio inter vivos—Ante-nuptial contract—Gift to wife—Payment at death of husband—Institution contractuelle—Onerous gift.

An ante-nuptial contract provided that "in the future view of the said intended marriage he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting hereof * * * the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him the said Edward O'Reilly." The parties were married and on the death of the said O'Reilly his wife claimed the right to rank on his estate as a creditor for the said sum of $25,000 which claim was contested by the general body of creditors who had all become such after said contract was made.

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

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Held, affirming the judgment of the Court of Appeal (21 Ont. L.R. 201) that this clause in the contract must be construed as a *donatio inter vivos* creating a present debt in favour of the future wife, payment of which was deferred; that, in the absence of proof of fraud, such a contract could not be attacked by subsequent creditors; and that the wife was entitled to rank on the estate for the amount of said gift.

Held, per Girouard J., that the donation was one *"a titre onéreux."*

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

The only question to be decided on this appeal was the construction of the clause of Edward O'Reilly's will which is set out in the above head-note. The plaintiff, Mrs. O'Reilly, had judgment in her favour in all the courts below.

Casgrain K.C. for the appellants.

Lafleur K.C. and *Chrysler K.C.* for the respondents.

THE CHIEF JUSTICE.—This is a claim for $25,000 filed by a wife on the estate of her deceased husband to whom she was married at Aylmer, in the Province of Quebec, on the 26th of June, 1889. The marriage contract produced in support of the claim was made at the same place on the twenty-second of the same month. The husband died on the 30th of December, 1907, leaving children issue of the marriage. The widow's claim to rank *pari passû* with them is contested by the appellants on behalf of themselves and all other creditors of the deceased. The claims of all these contesting creditors arose after the marriage

(1) 21 Ont. L.R. 201, *sub nom. O'Reilly* v. *O'Reilly.*

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contract was made and registered in the proper registry office. It was found by the trial judge: First, that O'Reilly, the husband, was insolvent at the time of his marriage and at his death; secondly, that when the contract was made there existed no intent to defraud either existing or future creditors.

On these facts two questions have been argued before us; one of law depending upon the construction of that clause in the marriage contract upon which the claimant relies; the other a mixed question of law and fact which involves the status of the contesting parties to impugn the validity of the gift made by the deceased to his wife. The clause in the marriage contract runs as follows:

Fourthly.—And in the future view of the said intended marriage, he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed, and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting thereof: 1st, the household furniture now owned by the said Edward O'Reilly and that which may be hereafter acquired by him by any title whatsoever, to be, the said household furniture, held, used and enjoyed by the said Miss Eliza Petrie as her own absolute property for ever. 2ndly, the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him, the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him, the said Edward O'Reilly; and, in the event of the said Miss Eliza Petrie departing this life before the said Edward O'Reilly, but there being children issue of the said intended marriage at the death of the said Miss Eliza Petrie, the said sum of money shall be held in trust by the said Edward O'Reilly, or his heirs, executors, administrators or assigns for the sole benefit of all the children issue of the said intended marriage and shall be paid unto them share and share alike as they shall attain the age of majority; it being expressly understood that should she, the said Miss Eliza Petrie, depart this life before him, the said Edward O'Reilly, and should there be no children issue of the said intended marriage at the death of the said Miss Eliza Petrie, then the said gift shall become null and void as if it had not been made; and provided further, that the said sum of money (said gift), or any portion thereof shall not be liable for the debts of the said Miss Eliza Petrie, nor in any way liable to seizure therefor.

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The effect of such a clause in a marriage contract made under the civil law of the Province of Quebec is the first question to be determined. The widow contends that it is to be construed as a gift of present property (*donatio inter vivos*), and that as a result of her subsequent marriage she became forthwith her husband's creditor for the sum of $25,000, the payment of the debt only being deferred to the date of his death, if he should predecease her. (It is not necessary to consider the rights of the children.) The creditors contesting say, on the other hand, that in terms this clause purports to be merely a gift of future property—a gift made in contemplation of death, or, as it is sometimes called in the civil law, an *institution contractuelle,* translated by Mr. Justice Anglin in the court below, very happily, I think, as "a contractual institution of heirship." If this latter construction of the clause prevails, then all further consideration of the second question is unnecessary for the very obvious reason that a gift of future property carries with it, in the absence of any stipulation, the obligation on the part of the donee to pay the debts due by the donor at the time of his death; and, as the deceased was then insolvent, the claim of the widow to rank *pari passû* with the other creditors must be dismissed. Rambaud, Code Civil (9 ed.), vol. 2, page 270, says:

> Dans la donation des biens à venir le donateur ne fait que disposer des biens qu'il laissera à son décès, dans l'état où ils se trouveront; et par suite il ne se dessaisit pas actuellement et irrévocablement des biens donnés. Il reste, au contraire, propriétaire de ces biens; il peut les grever de servitudes et d'hypothèques; les aliéner a titre onéreux; il peut aussi contracter de nouvelles dettes qui, si elles n'ont pas été acquittées par lui, resteront à la charge du donataire. Mais il ne peut pas faire de nouvelles dispositions à titre gratuit, qui puisse préjudicier aux droits de celui-ci. La loi ne lui permet que des dons ou legs de sommes modiques, à titre rémuneratoire.
>
> Il en résulte que le donataire ne devient pas propriétaire des biens

donnés, ni même créancier sous une condition suspensive; sa situation est celle d'un héritier futur.

The question was very ably argued for the appellants and is most interesting; but, in the last analysis, our obvious duty is to ascertain the common intention of the parties to the contract, giving to the particular words they used for the purpose of expressing that intention their natural meaning. Rambaud, vol. 2, pages 269 and 270, defines a gift of present property and a gift made in contemplation of death in these words:

> La donation des biens présents est celle qui se rapproche le plus des donations ordinaires. Ainsi le donateur se dessaisit actuellement et irrévocablement des biens donnés au profit du donataire; il ne peut plus les grever de servitudes et d'hypothèques, les aliéner à titre onéreux ou à titre gratuit; en un mot, le donataire en acquiert la propriété actuel et irrévocable, d'où le nom de donation de *biens présents* qui lui a été donnée.
>
> * * * * * * *
>
> La donation de biens à venir est celle par laquelle la donateur s'oblige à transmettre au donataire tout ou partie des biens qu'il laissera à son déces, en se depouillant du droit d'en disposer pour l'avenir à titre gratuit, en faveur d'autres personnes.
>
> La donation de biens à venir est aussi appelée *institution contractuelle. Institution*, parce qu'elle se rapproche du testament, en conferant au donataire un droit sur la succession; *contractuelle*, parce qu'elle se rapproche du contrat, par le concours de volonté qu'elle suppose chez les deux parties.

Applying to the clause under consideration these definitions which set out very accurately and plainly the distinctive character and legal effect of each of these two dispositions in a marriage contract, we are, in my opinion, driven irresistibly to the conclusion that it must be construed in favour of the claimant. The terms used express as clearly as possible the intention on the part of the donor to create a present obligation. The future husband declares that in view of the intended marriage he *hath given, granted and confirmed and*

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by these presents doth give, grant and confirm unto his future wife, who accepts: 1. The household furniture; 2. The sum of $25,000. Language could not be found to express more clearly the intention to create a *debitum in presenti,* and that intention is not in any way qualified by the following words which fix the death of the donor as the time when the payment of the sum given is to become due and demandable. Taken altogether the words used clearly create an unconditional obligation to pay at a determinable future time fixed by the occurring of an event which is certain to happen. Rambaud, vol. 2, at page 158, says, after enumerating the essential elements of a donation *inter vivos*:

> Peu importe, sous ce rapport, que la donation soit pure et simple, ou que l'exécution en ait été reculée jusqu'à une epoque déterminee, et même, à la mort du donateur. En effet, le terme ne met obstacle ni à la translation immédiate de la propriété, ni à la naissance immédiate de l'obligation; il ne fait que retarder l'exécution du droit.

If I have given to this provision of the marriage contract its proper legal construction the widow by reason of the marriage contract and her subsequent marriage became a creditor of her late husband and is entitled *primâ facie* to be collocated *pari passû* with the other creditors on his estate. The validity of the gift as against the contesting creditors now remains to be considered. The nature of the contract with respect to its gratuitous or onerous character was much discussed here and in the courts below where there has been on this point some difference of judicial opinion. There is much to be said on both sides. It might be argued, possibly, that, on a true construction of all the provisions of the marriage contract, the gift of $25,000 should be held to constitute a conventional dower which is not in law deemed gra-

tuitous; but it is not necessary for me to decide this difficult question now as, in my opinion, the appellants have no status on the facts to impugn the validity of the gift. They are subsequent creditors and the trial judge found that, although the deceased O'Reilly was insolvent at the time of his marriage and at the time of his death, no intention to defraud existed when the marriage contract was entered into. Under such circumstances on what ground can the appellants ask that the contract be set aside? If we take the measure of the claimants' rights as fixed by the Quebec Code, we find that the avoidance of a contract may be asked for when it is made by the debtor with intent to defraud his creditors and that actual injury results to that creditor. (Art. 1033, C.C.) There must be the *animus* and the *eventus* as in the revocatory action (*action Paulienne*) of the Roman law. The right to attack such a contract is limited, however, by the Code to those creditors whose claims arose previous to the transaction impugned, art. 1039, C.C., and the reason for the limitation is obvious. Whoever incurs an obligation renders all his property, present and future, liable for its fulfilment (art. 1980, C.C.), and the property of a debtor is the common pledge of his creditors. The common pledge of the creditors is the property which their debtor has at the time he incurs his obligations towards them, and that which he acquires during their currency. If, having contracted with his creditor on the faith of his possessions, the debtor subsequently diminishes that creditor's security by fraudulently dealing with his estate, the creditor is injured and to that extent can complain. Subsequent creditors are not in the same position. The estate of their debtor was when the claim arose dimin-

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ished to the extent of all the obligations lawfully contracted by him before that time. Rambaud, *ibidem*, page 336; Langelier, vol. III., page 436; and Mignault, vol. V., page 294.

It must be remembered that there is no article in the French Code which corresponds with our article 1039. As Planiol says, commenting upon article 1167 C.N., in vol. II. (5 ed.), at page 109:

> Cet article, qui est un des plus importants et des plus pratiques du Code, équivaut à une simple mention de l'action; la loi nous avertit que l'action Paulienne existe toujours; elle ne nous en donne point la réglementation. Pour toutes les questions que cette action soulève, nous en sommes donc réduits à la tradition, c'est-à-dire presque uniquement aux textes romains.

It was to supply this omission in the French Code and to provide rules for the protection of the rights of creditors that articles 1033-1034 of the Quebec Code were originally enacted. (First Report of Codifiers, page 14.) The Commissioners say:

> These rules are of obvious necessity; for imputed fraud against third persons is a fruitful source of litigation and there is no class of rights upon which well defined rules are more required.

And they add:

> There are but three of the articles in which a deviation has been made from the acknowledged law.

And article 1039, C.C., is not one of the three. That article expressly declares that no contract can be avoided by reason of anything contained in section VI. of the Civil Code at the suit of a subsequent creditor.

I have carefully examined the cases to which we have been referred, and *Ivers* v. *Lemieux*(1) is the only one in which the effect of article 1039 of the Civil Code was considered. In that case the deed

(1) 5 Q.L.R. 128.

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was set aside not because the effect of it would be to prejudice subsequent creditors generally, but because the object of the parties at the time they made their contract was to defraud the particular creditor who attacked the deed. Casault J., speaking for the court of review, composed of Meredith C.J., Stuart J., and himself, a very strong court, says, at page 131:

La preuve établit que l'acte attaqué par le demandeur *avait précisement pour objet de dépouiller le défendeur* de ses biens afin d'empêcher le demandeur d'exercer un recours contre eux, ou, pour employer le langage de la mère de l'opposant, pour permettre au défendeur de plaider et de soutenir un procès *sans gaspiller son butin.*

The same observation applies to *Perreault* v. *La Parroise de la Malbaie*(1), which is referred to by Langelier. I do not wish, of course, to be understood as holding that if an intent to defraud the particular creditors attacking the deed is proved that the principle *fraus omnia corrumpit* would not apply. In any event the positive finding of the trial judge, concurred in by the provincial courts of appeal, that, on the facts, there was no intent to defraud rebuts the presumption created by article 1034, C.C.

On the whole I would dismiss with costs.

For the rule laid down by the French commentators, I refer to Beaudry, vol. I., "Obligations," no. 689; Planiol, vol. II., nos. 312 and 313; Dalloz, '91, 1, 331; Dalloz, '93, 2, 470; Dalloz, Code Annoté, art. 1167, nos. 131 *et seq.*, and specially no. 138.

GIROUARD J.—On the 22nd day of June, 1889, in the Village of Aylmer, in the Province of Quebec, before Dumouchel, notary, the respondent, Eliza Petrie, and Edward O'Reilly, both domiciled in Aylmer, made

(1) 14 R.L. 338.

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a marriage contract, which was followed by the celebration of their marriage; and, in that marriage contract the parties stipulated separation as to property, and the future wife renounced to the community of property and also all dower; and, finally, the future husband made a gift to his intended wife in the following terms:

> Fourthly. And in the future view of the said intended marriage, he, the said Edward O'Reilly, for and in consideration of the love and affection and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting hereof: First, the household furniture now owned by the said Edward O'Reilly and that which may be hereafter acquired by him by any title whatsoever, to be, the said household furniture, held, used and enjoyed by the said Miss Eliza Petrie as her own absolute property forever. Secondly, the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him, the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him, the said Edward O'Reilly.

It is contended that this stipulation constitutes only an *institution d'héritier* to take effect after the payment of the debts of the donor, if any, and only after his death, and, also, subject to the condition that the wife survived him.

In this case the wife has survived the husband; but he has not left sufficient property to pay his debts in full and the above mentioned sum of twenty-five thousand dollars. Therefore she claims the right to rank on his estate as a creditor.

It is difficult to understand how this agreement can be considered otherwise than as a donation. The marriage contract calls it a "gift"; and, should the wife die before her husband, he agrees to keep the said sum of money "in trust" for their children, to be paid unto them as they shall attain the age of majority.

It seems to me that this stipulation is not only a donation, but a donation *à titre onéreux*. The deed must be read as a whole, each clause being duly weighed, to carry out the intention of the parties. The gift is made not only "in consideration of the love and affection and esteem," but also "in the future view of the said intended marriage" which is to be celebrated after the wife has renounced the advantages of community of property and of dower (art. 1038, C.C.); and for that reason article 1034 of the Civil Code does not apply. Finally, the creditors contesting the claim of Mrs. O'Reilly are all creditors posterior to the said marriage contract and, therefore, are not in a position to contest the validity of her claim; art. 1039, C.C.

During the lifetime of the husband no claim could be made; but, after his death, it becomes exigible, "due and demandable," as expressed in the said marriage contract.

I am, therefore, of opinion that the appeal should be dismissed with costs.

DAVIES, IDINGTON and DUFF JJ. concurred in the opinion of the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *MacCraken, Henderson, McDougall & Greene.*

Solicitors for the respondent Eliza O'Reilly: *Christie, Greene & Hill.*

Solicitor for the respondents, Executors: *M. J. Gorman.*

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*April 3.

HIS MAJESTY THE KING (DEFENDANT) ..... } APPELLANT;

AND

EMIL ANDREW WALLBERG (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Public work—Work dehors contract—Acceptance by Crown —Payment—Fair value.

W. was contractor with the Crown for constructing a car and locomotive repair plant at Moncton, N.B., and was subject to the orders of the government engineer. By order of the engineer and with no contract in writing therefor he constructed sewers and a water system in connection with said works, and on completion of his contract the Crown accepted the additional work and agreed to pay its fair value, but not the amount claimed, which was deemed excessive. The Department of Railways referred the claim to the Exchequer Court and, by consent, it was referred to the Registrar of the court to have the damages assessed, the order of reference providing that "the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit*." The Registrar fixed the amount at $53,205, as the fair value of the work reasonably executed on a somewhat different plan. The judge of the Exchequer Court added $39,000 to this amount, holding that the Crown had admitted the authority of the engineer to order the work to be done, and that W. was entitled to the actual cost plus a percentage for profit. On appeal by the Crown:

Held, Anglin J. dissenting, that the judgment appealed against (13 Ex. C.R. 246) was not warranted; that the Crown had not admitted the authority of the engineer, but expressly denied it by pleadings and otherwise; that all W. was entitled to be paid was the fair value of the work to the Crown and the amount allowed by the referee substantially represented such value.

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

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APPEAL from a decision of the Exchequer Court of Canada (1) varying the report of the registrar on a reference to ascertain the amount due to the plaintiff for work done by him and accepted by the Crown.

The facts of the case are sufficiently stated in the above head-note.

Tilley and *Friel* for the appellant.

Nesbitt K.C. and *Harold Fisher* for the respondent.

THE CHIEF JUSTICE.—I agree with Mr. Justice Duff. No contractual relation existed between the parties when the works in question were executed and there was no liability in the Crown to pay for them when completed.

The power, except in certain cases, to make contracts which are binding upon the Crown is limited by section 36 of the "Public Works Act" (R.S.C. ch. 39), to such as are executed under the direction of the Governor in Council and it is not contended that any such contract was ever entered into between the parties, or that this case comes within the enumerated exceptions. The authority of the engineer to contract for the works, or any part of them, is expressly denied in the second paragraph of the statement of defence. It does not even appear that the Minister, or the Deputy Minister, sanctioned or was aware of the instructions given by the engineer.

The Crown, having profited by the work which was done upon property belonging to the Crown, the Minister of Railways agreed to refer the claim to the Exchequer Court under the powers conferred upon him by 50 & 51 Vict. ch. 16, sec. 23, and the important

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question we are asked to determine upon this appeal is: Assuming that the Crown avails itself of the statutory provision in question for the purpose of ascertaining what it is fair the Crown should pay for work done without its authority upon its property, and of which it has received the benefit, is it competent for the Court of Exchequer to measure the moral voluntary obligation of the Crown, without its consent, by what the work in question, proceeding by extravagant and unreasonable methods, has cost the person who did it, plus a profit thereon to that person, ignoring altogether the value of the work to the Crown, and declining to apply any measure which requires the reasonable and economical performance of the works?

To this question there can be but one answer. The Crown was under no legal liability, on the facts as proved, to pay for the work; and the measure of the voluntary obligation assumed by the reference to the Exchequer Court under the statute must be the value of the work to the Crown.

It has been argued that the scope of the inquiry was widened by the order of reference made by the judge to the registrar, and that the duty of the latter was under that order to ascertain the fair value or price of the works in question allowed on a *quantum meruit* basis. This contention cannot be maintained, I say it with all deference. The Minister referred the claim to the Exchequer Court for adjudication but without the admission contained in paragraph five of the statement of defence there would be no liability whatever on the part of the Crown and there should have been no reference to the registrar. The liability of the Crown is to be measured and the power of the judge to refer the claim is limited, therefore, by the scope of the admission which is to the effect that, the Minister

of Railways, having accepted and taken over the works on behalf of His Majesty, is willing to pay the fair value of the same; and it is not to be presumed that the judge intended to exceed his authority or to add to the moral, voluntary obligation of the Crown without its consent. The registrar, giving to the terms of the reference their plain meaning when read with the defence, reported the fair value of the works to the Crown, if proceeded with economically and reasonably. Reversing this decision, the judgment appealed from(1) allows to the respondent the cost of the work, plus a profit, without regard to its value to the Crown. If the language used in the order referring the matter to the registrar was susceptible of the construction put upon it by the judgment of the Exchequer Court on appeal, then I am of the opinion that the learned judge, in making such an order, exceeded his jurisdiction, which was limited expressly by the reference under the statute and the defence and could not be extended by counsel for the Crown. To permit the basis of liability in cases referred by the Minister under the statute, 50 & 51 Vict. ch. 16, sec. 23, to be extended by consent of counsel would lead to abuses, which it is not difficult to foresee. For the reasons given by Mr. Justice Duff, I do not think that it was intended by the order of reference to substitute for the fair value to the Crown the amount expended by the respondent, plus a surplus to him.

I am of the opinion that the appeal should be allowed with costs.

DAVIES J.—It seems to me this appeal must be disposed of largely, if not altogether, upon the construc-

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tion put upon the order of reference made herein by the Court of Exchequer to the registrar of that court.

The action was brought by the plaintiff, respondent, for payment of certain works carried out by him in connection with the Intercolonial Railway property at Moncton.

These works comprised a main sewer, branch sewers, a water-system, all connected with certain buildings which the plaintiff, respondent, had contracted with the Crown to build for the railway.

No contract had been entered into or authorized by the Crown for the construction of the works in dispute, but the plaintiff claimed that they became necessary in connection with the construction of the buildings which he had contracts for, and that the chief engineer, Mackenzie, of the Intercolonial Railway, who had been appointed to supervise and control these contracted-for works on behalf of the Crown, had authorized him to construct the sewer and water system in question.

The plaintiff contended that the works as completed by him had been accepted and taken over by the Minister of Railways and Canals of Canada, and he claimed payment for the same either as extra work done by him under his contracts with the Crown, or, in the alternative, for work and labour done and materials supplied by him at the request of the Minister of Railways and Canals.

It seems quite clear that the claim for payment as extra work under the contracts could not be maintained, and no question arises on this appeal on that ground.

It was also equally clear under the evidence that the only authority which the plaintiff had for doing the work sued for was that of the chief engineer.

The Crown, in its statement of defence, denied having entered into any written or other contract with the claimant for the execution of the work sued for; and also denied having authorized the chief engineer, Mackenzie, to contract for the same.

The fifth paragraph of the defence reads as follows:

The Minister of Railways has accepted and taken over the said works on behalf of His Majesty and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.

After issue was joined on these defences, an order was made by consent of counsel for both parties,

that it be referred to the registrar of this court for inquiry and report to ascertain the value of the works executed by the plaintiff referred to in the statement of claim, and in respect of which this action is brought.

And,

that the amount to be ascertained shall be the fair value or price thereof on a *quantum meruit*.

The registrar entered upon the inquiry and took an immense mass of evidence. In reaching his conclusion he stated in his report that

the only question now to be determined, the Crown having accepted and taken over the works, is the fair and reasonable value so to speak of the said works.

After a very full and careful review of the evidence, the registrar reported in favour of allowing the plaintiff $53,205.65, which he held was

not only a fair and reasonable value, but a very liberal price to any ordinary contractor.

On appeal to the Exchequer Court from the report of the referee, the learned judge held that the registrar had proceeded upon a wrong principle in reaching his findings. The learned judge held as follows:

There being no written contract making Mackenzie the sole judge, the Crown is not bound by his report as to the amount due. But

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the *Crown does admit his authority in ordering the works.* To my mind it would be manifestly unfair to the contractor in the face of what has taken place and in the face of this judgment to act on the evidence of other engineers who endeavour to shew that Mackenzie might have adopted a different plan which would have cost less. It seems to me the case must be viewed *from the standpoint of the works being executed on the plans of Mr. Mackenzie* and *accepting his plans then a quantum meruit.*

Now, if I could reach the conclusion that the reference meant an admission of Mackenzie's authority to order the works and an acceptance of his plans, I should have no hesitation in agreeing with the learned judge's conclusions. The plaintiff, once he proved that he had obeyed the orders of a person authorized by the Crown to give them, and had, in doing so, expended a certain amount of money in the completion of the works, would be entitled to rely upon those facts as the best evidence of what he was entitled to receive, namely, the full amount of his expenditure plus 15 per cent. for his contractor's profit in terms of Mackenzie's orders to him.

There might, of course, be some deduction from this for improvidence or recklessness or extravagance in carrying out the orders if such were clearly proved, but apart from that, nothing remained for the referee to do but ascertain what the works Mackenzie ordered the plaintiff to do cost him and report that as the amount he should recover, plus 15 per cent. contractor's profit.

The finding of the learned judge was the logical outcome of his construction of the order of reference. He says, p. 282:

> I think on the evidence as a whole the plaintiff *should be paid the amount found as due by Mr. Mackenzie.*

I am not able, however, to agree in his construction of this order of reference. It places the Crown in the

position of "admitting Mackenzie's authority in ordering the works," that is, of admitting that which upon the record the Crown distinctly denied, and on which denial the Crown's claim to reduce the plaintiff's demand largely depended.

The Crown in its pleadings denied that the works were done under any written or other contract with the plaintiff, or that Mackenzie had authority to order them to be done.

But the Crown went further and said in its fifth plea, that, as the Minister of Railways had accepted and taken over the works, the Crown was

> willing to pay the fair value of the same, but not the excessive claim of the plaintiff.

It was under this plea that I take it the consent to the reference was given, and it is with respect to the admitted willingness of the Crown to pay the fair value of the works because of their acceptance and because of that only, that the terms of the reference must be construed.

In construing the order of reference I do not think we should either ignore the plea of the Crown consenting to the payment of the fair value of the work because the Crown had accepted it and taken it over, or the plea specifically denying Mackenzie's authority to order the works to be done. Nor are we justified in ignoring the fact that the works in question were constructed by the plaintiff in direct defiance of the provisions of the statute relating to public works. The sole and only ground upon which the Crown in its plea consented to pay the fair value of the works was that they had been accepted and taken over. To read into the order of reference an admission of Mackenzie's authority to order the works is really to give away the

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Crown's defence altogether and reduce the reference down to one of mere form.

The work sued for was done without any contract and in fact in direct violation of the provisions of the statute law. That fact must have been perfectly well known to such an experienced contractor as the plaintiff, and he was equally responsible with Mackenzie for the illegality of the entire proceedings and construction of the works. He knew there was no tender and that not even the sanction of the Department of Public Works had been obtained for these works.

The Crown did not agree to a reference because the contractor had carried out works which its chief engineer had authority to order. In fact it denied explicitly any such authority, and on the record before us it must be taken that Mackenzie had not any such authority.

The Crown agreed to the reference because, as said in its plea, it had accepted and taken over the work, and was willing to pay the fair value of the same. It was this fair value of the works which was intended to be referred and nothing else.

It was certainly not such fair value estimated on the assumption that Mackenzie had authority to order them and to direct the manner and mode in which they should be constructed.

I can quite understand the equity of position taken by the defence in saying, it is true the Crown did not order or authorize these works for which you claim payment to be constructed, and it is equally true that their construction has taken place in direct violation of the provisions of the statute requiring tenders to be called for, but the Crown is in the position of a person who finds his property improved by works

which he did not order, and for which he did not agree to pay. The Crown, under the circumstances, however, has accepted the work. It might be said that the Crown had hardly an alternative choice between acceptance and rejection. It was under the circumstances almost obliged to accept. But having so accepted and taken the benefit, it was just that payment should be made of the fair value of the work. But such a consent cannot involve an obligation to pay more for the unordered work than its fair value to the Crown so accepting. The reference was not to find out what, under the peculiar circumstances of the case, the works did cost the contractor, but what their fair value was if they had been constructed as they should have been.

Disagreeing, therefore, as I do, with the basic principle upon which the learned judge reached his conclusions, and agreeing substantially with that on which the Registrar proceeded and made his report and valuation of the work, I am unable to find anything in the record to justify interference with his findings of fact, and would allow the appeal with costs and confirm the report of the referee.

IDINGTON J.—The conflicting points of view taken by Mr. Justice Cassels and the Registrar of the Exchequer Court require us in this appeal to solve the question of which is right in the construction of the order of reference.

It is not pretended now, though it once was, that the appellant ever in fact authorized the works for which the respondent claims to be paid.

In the course of carrying out contracts, let to respondent for the erection of shops at Moncton for the

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Intercolonial Railway service, he and the chief engineer of that road conceived that a sewer and branches leading thereto and also water-pipes, might become serviceable for said shops.

Instead of bringing this under the notice of the Minister responsible for such expenditure as the execution of such works would involve, the chief engineer improperly and illegally took it upon himself to direct respondent to carry out the execution of such works. The contractor, from what we are told of him by his counsel relative to his knowledge, intelligence and wide experience, must have known of the need for, and entire absence of, authority to give such an order.

This proceeding attracted public attention before the unauthorized work was quite finished. Yet respondent never presented his claim till some months after these works were finished. This action is the result.

In answer to the statement of claim making a case for extras under said original contracts, the appellant pleaded denying any contract or authority in any one to direct such works and that they were not extras under said contracts.

Thereafter is the following plea:

5. The Minister of Railways has accepted and taken over the said works on behalf of His Majesty and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.

Upon this plea issue was joined and an order of reference was made by consent as follows:

2. This court doth order that it be referred to the registrar of this court for inquiry and report and to ascertain the value of the works executed by the plaintiff referred to in the statement of claim, and in respect of which this action is brought.

3. And this court doth further order that the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit*.

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The costs were also left to the disposal of the registrar. The registrar has reported and therein said as follows:

> The Crown having accepted and taken over the works, stands in the position of a person who employs another to do work for him without any agreement as to his compensation, and in such a case the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit—*quantum meruit*.

In the result he has refused to allow for more than he has found as fact these works could have been executed in the place and within the time necessary for their construction and fixed the sum due on that basis at $53,205.65.

On appeal Mr. Justice Cassels has reached the conclusion, although as already stated absolutely and specifically denied in the pleading, that "the Crown does admit his" (*i.e.*, the engineer's) "authority in ordering the works." And as a consequence thereof he arrives at the conclusion that the engineer having directed, as he himself avows, that to be done which would comprehend each step taken, no matter how fruitless in value to the appellant, everything paid by respondent as part of such proceedings must be repaid him with fifteen per cent. profit added thereto, and has substituted the sum of $92,305.48 for that allowed by the registrar.

With great respect I am quite unable to accept any such conclusion.

I am unable to see how, when a party, as explicitly as is done here, denies authority, he can be held to have admitted it.

I am unable to draw any such admission by way of inference from the enforced or almost enforced occupation or possession by him of the works built without

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authority and an expressed willingness to pay for their fair value.

Nor am I able to see how when he has agreed to refer the question of value to any judicial officer to determine that value, he can be presumed to have, by adopting the language used here, implied in such adoption some technical meaning not necessarily involved in the language and which the attendant circumstances so clearly excluded.

If the Crown intended to pay for these works not what they are or were worth, but what they cost, I see no need for a reference.

I cannot impute to the law officers of the Crown on the motion for reference or at the trial of such an issue, such an obvious absurdity, or the bad faith it must imply towards the Crown entitled to be guarded against making any such admissions, lest doing so might lead to just such conclusions as reached by the learned judge.

In other words, the language is just that used where excess of authority may have happened, yet the proprietor ought to pay that which justice demands from him, thus driven by force of circumstances to accept results and use them.

The only implication of authority is that which the law implies in order that the fair value of that used, and only so far as used, may be paid for, but never extends to or reaches any abortive efforts in producing the thing used.

In this particular case, the paragraph, in addition to the preceding words, relative to ascertaining value, was clearly to express this idea, and to shew that no such refinement of meaning, as might in its absence be contended for, was to be implied. For example, on

the one hand, the works when disconnected from the building, might be held to be of little value, and on the other hand, their value when used in connection with the appellant's buildings might be almost inestimable, apart altogether from what it might have cost to have them properly constructed.

To deduce from the authority so plainly denied such consequences as appear in this case seems an absolute denial of justice.

Two illustrations may be given here of how far the learned judge's construction of the order of reference carries him.

Proceeding in a reckless way, indeed quite in keeping with the recklessness characteristic of the proceedings throughout, the chief engineer instructed the contractor to begin the main sewer through property neither had a right to enter upon, or so far as I can see either ever could have supposed he had a right to enter upon. The contractor says he spent thereon something over seven hundred dollars ($700) when one of the owners drove them off. Forced from that place the engineer and contractor abandoned that work and proceeding, and turned their attention elsewhere to the locality where the sewer was finally placed.

The expenses of this unwarranted work are included in the sum allowed in the learned judge's judgment.

Again the work was delayed in a most unwarranted manner if to be ended in 1906, as it might have been done.

The contractor having delayed beyond his instructions, began in September with a force entirely inadequate for the purpose of completing even a substantial

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part of the work before the winter frosts set in, which everybody is agreed forbid the prudent continuation of such work.

This feeble force dug out unevenly along the entire line of the proposed main sewer, leaving deep holes likely to catch water and produce cavings in here and there.

The contractor's own foreman speaks of this as follows:

> Q. How much of the main sewer was done when you took hold? A. How much had been done?
>
> Q. Yes? A. Well, they had done that much that if I had been taking the contract I would have taken it for less money than when I commenced.
>
> Q. Try that again? A. If you want to understand it more thoroughly, all the work they had done I considered a detriment at that time.
>
> The Registrar: Q. In what way? A. In this way, that as the stuff where they had scooped it out in holes had filled in with soft stuff off the banks, and slid right in there, there was no chance for the water to get away from that hard pan or get through it; it was in sort of basins.
>
> Mr. Friel: Q. You mean by using the teams? A. It had not kept it level.
>
> The Registrar: Q. By leaving a knoll? A. Yes, where they would go up over and down; that run in and was filled up with stuff, and you could not shovel it or do anything with it.
>
> Q. You would not have done it in that way? A. No, sir, I would not; I would have kept it so that it would have drained.

Counsel for respondent quite properly points out that all this 1906 expenditure in the proper place did not much exceed two thousand dollars ($2,000). And according to the lordly way in which it seems government engineers and contractors are entitled to look at things, that is a mere trifle. He forgets that it is not only the direct expenditure which is involved, but the wretched condition in which it left the entire work when spring came and the work had to be done over again.

Counsel overlooks the direct expenses of excavation and removal of this earth that is shewn elsewhere in the evidence to have caved in, and but for the condition created by bungling, would never have needed removal. Exactly how much that was, no one in the evidence in this case tells. He omits also to measure how much the results of this bungling hindered next year the prosecution of the work. No one can accurately tell that either.

It is, on the other hand, evident that a portion of the work done in 1906 could not have been rendered useless by the winter frosts. The best I can do is to say the amount of loss direct and indirect to cover this bungling far exceeds what counsel suggests and the problem is, if accuracy is to be reached, almost insoluble on the evidence before us. The respondent made no effort to solve it. Why should he if he has only to shew how much money he paid out and become thereby entitled to be repaid so long as the chief engineer says "yes"?

The rule laid down in the judgment appealed from relative to the *quantum meruit* to be applied, simplifies things and measures that by what the chief engineer may be supposed to have tolerated even though not specifically directed. It is, that whatever expenditure the chief engineer chooses to pass as in his opinion proper to be paid, must be paid, unless it is shewn he fraudulently passed it.

Respondent's counsel very prudently receded apparently from this position so far as to say that anything improvidently done could not be claimed.

His concession was more apparent than real, for he strenuously contended for the entire amount allowed and a good deal more including every dollar of all I have so far referred to.

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It comes back to this, that this improvident expenditure so severely condemned by respondent's own witness and foreman, has been allowed on the supposition that the chief engineer's orders, conduct and opportunity to object, yet not doing so, have to be taken just as if he were substituted for the appellant or His Minister. The result reached is quite logical if the learned judge's construction of the order of reference is correct.

These illustrations shew the absurd consequences of such interpretation. That, of course, can have no place if the order clearly means what the learned judge puts on it. But we are face to face with the fact that no one during the reference took that position. It is one thing to say that the evidence of value given by the engineer is well worth considering in estimating a *quantum meruit*. It is entirely another thing to say that the order means an admission of his authority. In the latter case there was no need for expert evidence or the long expensive inquiry joined in by both sides. I cannot think this would have ensued if the parties conceived that the order meant what the learned judge holds.

Nor can I accept such construction. I must, therefore, examine the whole case so far as to see if the referee's findings are or are not correct.

Roughly speaking the total discrepancy between the results arrived at by the learned judge and the referee amounts to thirty-nine thousand dollars ($39,000) and that, speaking again in the rough, is distributable over the several works as follows: Twenty-three thousand dollars on the main sewer. Three thousand five hundred dollars on the branch sewers, and twelve thousand seven hundred dollars on the put-

ting in of the water pipes, which were supplied or paid for by the appellant besides.

In other words, the branch sewers have had added to their estimated actual value, nearly thirty per cent., the main sewer seventy per cent., and the putting in of the water pipes nearly one hundred and fifty per cent.

It is to be remarked that the greatest discrepancy exists just where the greatest blundering or worse, according to the evidence, was made most apparent. These I will revert to in detail before concluding.

The water-works were over a mile long, and the main sewer over half a mile, according to respondent's evidence. The length of the branch sewers I am unable to fix as definitely.

This great excess of alleged cost over value in regard to a commonplace job of constructing a sewer only 2,880 feet long, of which eighty feet was a cedar box pipe at the outlet, is something so striking that I have been led to read and carefully consider every bit of evidence given by respondent or on his behalf, as well as the greater part of that given on behalf of appellant, to see if I could find any reasonable explanation for such results other than gross mismanagement or probable error on the part of all or some of those concerned in the execution of the work.

Q. I think you said the excavation was hard pan; is that correct? A. The excavation on top of the soil was a layer of peat, pretty nearly black, and that went down a foot or a foot and a half or two feet deep. Then below that was a clay for a few inches or so, a clay that seemed to be a little softer, and we got below that and got into a harder clay, and a large number of small pebbles and boulders; and you got deeper, and as you got deeper right straight along to the extreme depth, it grew harder, and the boulders grew larger, and more of them, and the soil grew harder to handle, harder to pick.

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Nothing very extraordinary one would say if permitted to use common knowledge.

And to make clear what is involved in the word "boulders" we find the foreman engaged in 1906 speaks as follows:

> The Registrar: Q. What sized boulders would they be, varying from what size to what size? A. Well, now, the boulders would be —I do not know as I—I never managed one, but there were some there that we chained out, and a great many the men took into the scrapers, and they would be quite a size.
>
> Q. Those that you chained out could be drawn by one team of horses? A. Yes, sir, any of them could be drawn by one team.

Next year's foreman speaks of sometimes four horses being used to pull one out, but he fails to say how often.

Some witnesses who never saw the work in its execution dwell on veins of sand, and others who worked at it, speak of occasional veins of sand, or pockets of sand, but are very indefinite as to the extent of all that.

I suspect respondent knows a great deal more of the subject than all these other witnesses put together, yet he fails to put the stress they try to do upon that point of nature of soil.

And when any of those knowing better than he by reason of having done the work, come to speak definitely or as definitely as they could be induced to, we find one serious spot 1,100 to 1,200 feet from the lower end of the sewer.

When this point was reached the banks by reason, it is said, of this sand and gravel, began to give way and induced the men to try shoring, in which they failed. Regarding that question of shoring I will deal later on.

I am only now trying to describe the character of the soil as the evidence gives it.

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In addition to what I have stated there are a good many general allusions to sand mixed with clay forming a part of the soil, but definite or exact statement is hard to find save that when water touched the mixed soil it was difficult to handle, and to this I will refer when I come to speak of the water question.

I desire first to call attention to the proofs of cost.

As to whether these entire works actually cost what the respondent claims, I have the gravest doubt.

The main works executed under the contracts were going on at the same time (save in winter, when much of the water-system was done) and some six hundred men were employed thereon at times.

The men on these works now in question were liable from time to time to be called off to parts of the contract works. There was no time-keeper specially detailed for these works. There was no superintending staff of any kind, specially set apart to look after them. The division of time and material was, by reason of the want of system that prevailed, liable to become at many stages badly done. I do not say it was with one common staff impossible, but there occur at many stages of the doing so with this staff many chances for gross mistakes.

When we are told there never was an account opened in the ledger for these works during the two years they were in progress, and that the accounts which afterwards were made up and are now submitted were of such tracing as could be done from the invoices as marked at the time and the time sheets, it is impossible not to feel it was a most unbusinesslike way for handling the expenditure of so much money.

When we find the original slips on which the time was entered were kept until after each pay-day, and

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then destroyed, how can we have implicit confidence in what was done? If it was necessary to keep a check of that kind on file to meet the labourer and any of his possible objections, surely it was quite as important to have done so to satisfy the final paymaster.

Again as to the method, sometimes we find an alleged checking over with the foreman from day to day, yet we have not all the foremen called.

We have a foreman saying he kept a book and returned it into the office. Why so, if the time-keeper had taken it?

And when we find the respondent claiming one-fifth or one-fourth of the salary of his superintendent as against these works, though they only formed of the whole a twelfth part or less; claiming to be paid 20 per cent. of profit in face of a bargain with the chief engineer for 15 per cent. profit; claiming for weather wear on a concrete mixer standing over two years for works that should not have taken more than six months, at the outside; claiming for work done in Winter at rates involved in so doing it in excess of what it would have cost in Summer, according to an overwhelming weight of testimony, when there existed no necessity for doing it in the Winter time at all, and we find so doing it might have been for his indirect advantage in keeping men there, although work ceased on the contracts, I am not disposed to place unbounded confidence in the loose methods I have referred to as sure to result in the greatest attention having been paid by all concerned to save the pockets of the ultimate paymaster.

There were three time-keepers, of whom the first is said to have since died. The two others were examined. Jones, the next, says he came in June, 1907, and his evidence is very unsatisfactory.

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He hesitates and seems not to understand many questions so simple that if the man had been doing the work for months he should easily have answered. He does not strike me as dishonest, but as just the sort of man to make a bad bungle of his work of keeping and distributing time so kept in the way we are asked to believe it was kept and distributed. His self-contradictions in this regard do not tend to my putting implicit confidence either in what he is got finally to say or results derived from such a source. Yet it must have been he who kept time if it was kept during the summer of 1907, in which the greater part of the main sewer-work was done.

Gass, the next in order, came on the 11th of November of that year. He seems to have been, though inexperienced and a lad of only nineteen at the time he entered, of a brighter stamp than Jones. He had to depend in a way not quite clear upon one Manuel, who also kept time of some Italians employed. And Manuel is not called.

The whole system, if it can be called so, was at the mercy of the honesty of the foremen, and we have only the evidence of some of these engaged on the main sewer, but none of those on the other work.

We have that of Kitchen, under whose handling of the work in 1906 we have seen something.

Then we have the evidence of Godfrey, who was in charge of the main sewer-work in 1907, until the 20th of October of that year, when he left.

We have the evidence of a stable boss and a carpenter on the same work, all of which is not very important.

On such evidence and such methods I could not give with confidence I was right, any such award as

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the judgment appealed from if I were to adopt the cost to the contractor as the basis for payment.

But it is said the chief engineer is honest and he approves.

It is not necessary to enter upon this issue further than to point out that he is human, that he made a tremendous mistake in so far forgetting his duty and loyalty to those he served as to presume to make a bargain he had no authority or colour of right to make. If he by any possibility could have supposed this was an extra within the ambit of the execution of the contracts he had the supervision of, then the schedule prices ought to have governed him.

If the schedule prices were not appropriate he had no right to substitute anything else. The moment he made a bargain he had no authority to make, he placed himself in a situation where his duty and his interest conflicted.

Whether from that cause or from other causes he certainly was mistaken either in his former evidence with which he was confronted, or in what appears herein.

He is not to be taken as a disinterested witness in this case.

He no doubt is a busy man and liable to err through want of time to investigate details. And I am quite sure, on the evidence, he never had personal knowledge of all these details, or investigated them.

He assumed and erroneously supposed till a late period some one on behalf of appellant kept time, and then suggested it being done with results not very clear, or at all to be relied upon.

Then we are asked to take the evidence of other experts, because eminent in their profession, who are

called by respondent and say these expenses are reasonable.

For myself an expert has no more weight when speaking of matters within the range of ordinary human reason and apprehension as the subject-matter here is, than any other man when he fails to bring home to my mind as probably correct the reasons he gives and the explanation he offers relative to the matter he speaks of.

I need not enter into detail why such evidence as referred to, given on respondent's behalf, does not appeal to me herein, further than to say a close examination of the grounds therefor and reasons given for it fails to convince me that they are right or ever got seized of the actual facts in detail of which they spoke, or from which they pretended to make the deductions they presented.

If they had confined themselves to saying it was possible or even probable such expenditure might be reasonably made, I could understand their position, though it might not have been very definite in its results.

And we have this further crucial test that when called in rebuttal after hearing Mr. Chipman and Mr. Ker, Mr. Holgate did not condescend to tell the court wherein the plan or method of construction these gentlemen suggested was impossible of execution, though he admitted it an ideal method under some conditions or circumstances. And when he says the work was impossible of construction by such methods, I prefer to believe Mr. Chipman, whose experience in this class of work vastly exceeded anything he seems able to pretend to. He has chosen another field for his professional ability.

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Mr. St. George did give a reason and only one reason relative to the main part of the work, and that was that the ground was wet. And on a minor point as to the putting in of the concrete, he suggests the width of the trench rendered Mr. Chipman's plan impossible to put it in without frames.

In this he overlooked Mr. Chipman's theory that the trench should never have been so wide. The referee has allowed for the excavation to a greater width than Mr. Chipman deemed necessary, and assuming he has allowed the work for frames used, that part of this expert's evidence is thereby answered so far as bearing on the issue of *quantum* before us.

It seems to me the entire issue as between the experts is thus reduced to a question of the wetness of the ground where the main sewer was constructed.

The difficulty from this cause of handling the work is what all the witnesses dwell upon.

Mr. Chipman explained that if there was water it had to be taken care of. He told how. He explained why it did not seem difficult.

The railway embankment cut off the water from the large area of lowland on which the shops were being erected and it could not get across till reaching a certain culvert at a distance from the main sewer.

The chief part of the sewer was thus out of reach of water from that source. It seems highly improbable (I infer from what he says), that any underground condition so existed as a conductor under the railway track. It would, I suppose, affect its stability. At least his explanation of the situation is unchallenged.

Then, if water came from other sources it had to be drained away, and if need be pumped away. He

did not seem to expect this, but properly assumed the possibility, though improbable, of need for much pumping.

Not a word from either of these experts of respondent to shew that was impossible unless at an expense of say twenty thousand dollars, which this work cost beyond what it is said to be worth.

They deal in generalities. Face to face with this simple, or at least apparently simple, problem, they give no reason to shew why it was insurmountable at a moderate cost.

I find, further, on this subject of water the following from the report of the referee:

At page 338 witness Godfrey further states he would not *let the water go down the ditch.* And Mr. Peter Archibald, a well-known civil engineer of great experience, heard on behalf of the plaintiff, tells us also at page 256:

> The surface drainage was not kept out of the trench, and the water came in, and you could not expect anything else but slurry when you left the surface water in.

Mr. Mackenzie tells us, at page 256, that "the first thing that had to be done in doing that work was to get the water off from the vicinity of the buildings." And that seems to explain a great deal.

Then as to the shoring of the ditch, when dried by proper drainage, however provided, they fail utterly to shew why shoring could not have succeeded. The evidence shews it was only tried at one place, although a witness who could tell little about it says two places.

At this one place already referred to as 1,100 to 1,200 feet from the lower end of the sewer it was tried when, I infer, evidently too late, as the bank had shewn signs of breaking. It was done by men without ex-

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perience. The problem does not seem to have engaged the attention of respondent or the chief engineer or others of experience.

The foreman, who tells of this attempt, says:

> Q. During the work were any of the railway officials there? A. I think Mr. Mackenzie was there occasionally.

The truth seems to be that the best plan never was considered by any one of experience.

There is not one of the entire outfit employed directly to do so and who had the execution of the work in charge that had experience of the kind necessary to do it economically.

Respondent and the chief engineer do not seem to have turned their minds in that direction.

Mr. Chipman is a man evidently of that wide experience in this class of work that lends weight to his evidence. It reads as that of one who knows whereof he speaks, and who is perfectly candid. It appeals to one's reason and common sense in a way that the evidence of some others does not.

The referee saw and heard all these men giving their evidence, and I think he evinced the experience needed to appreciate it correctly. And I think he has done so.

As to the other work there was evidence relative to the cost of sewer building in Moncton, and of excavating for and laying water-works pipes that shews the cost thereof in that locality does not exceed what Mr. Chipman estimates it should, and is well within what the referee has allowed.

Respondent's own contract there for the city confirms this.

The doing of the work in winter was inexcusable on all the evidence. To allow for that increased cost

is what there can be no excuse for unless we substitute Mr. Mackenzie for the Minister who is responsible therefor.

The evidence of Mr. Edington, the local engineer for Moncton, relative to the cost of executing work there for either water-pipes or sewers, is that of a man who knew the local conditions better than any one else unless respondent, and probably than he also. Compare what he states and Mr. Chipman and others say as to necessary cost of such work, and it seems impossible to accept as reasonable the gross extravagance, to put it mildly, involved in the enormous price by which respondent's charges exceed every estimate given upon or in relation to a common every day sort of work.

As the referee says the evidence bearing on the branch sewers work is most meagre.

There occur to me only two possible things the referee may not have allowed for. One is the question of interest during the execution of the work. Interest after its execution he has dealt with on a proper legal basis, and the learned judge agrees therein. But in executing any such work as this no doubt the contractor is usually paid by progress estimates which save him some outlay of interest. Mr. Chipman's figures probably proceeded on such conditions.

Again, the carpenter work involved in making frames for cement or putting in shoring according to Mr. Chipman's plan may have been overlooked. I am in doubt whether these elements of cost are covered by his allowances or by Mr. Chipman's estimates if the nature of the soil needed heavier timbers than under usual conditions.

The strength of timber needed for shoring a small part of the main sewer might have exceeded the usual

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thing. If the experts had directed their minds to this point one could have understood them. To say it was impossible is entirely another story.

I incline to think what the referee allowed beyond Mr. Chipman's estimates would cover all these minor things I refer to.

If there has been any oversight of them I have no doubt they will be readily rectified. If not respondent's case is to blame.

The evidence maintains the referee's findings and should not now be disturbed for any such doubts as I may have.

I think the appeal should be allowed with costs.

DUFF J.—On the proper construction of the order of reference I think the question referred for investigation was the "fair value" of the completed sewerage and water-systems mentioned in the pleadings. By that I think is meant the value to the Crown, but the value estimated with regard to the circumstance that the construction of these systems was a necessary work; in such circumstances the completed work would be worth to the Crown just what it would cost to reproduce them in the usual way, that is to say, to have them constructed under a contract entered into after a proper opportunity had been given for the presentation of competitive tenders. I do not know any other way of ascertaining such cost than estimating the reasonable cost of such works when executed in a provident way.

I disagree with the learned trial judge's construction of the order, for several reasons. In the first place the statement of defence shews that the Crown disputes liability, and denies that the works were exe-

cuted under its authority. It then proceeds (par. 5) as follows:

5. The Minister of Railways *has accepted and taken over the said works on behalf of His Majesty and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.*

It is under this paragraph, and this paragraph alone, that the reference was directed. It is, of course, clear that what the Minister declares his willingness to pay for, is the works "accepted and taken over," What were the works "accepted and taken over"? Surely the completed sewerage and water-systems. I do not think any other meaning can fairly be attributed to the paragraph. Then turning to the order of reference; paragraphs 2 and 3 are as follows:

2. This court doth order that it be referred to the registrar of this court for inquiry and report and to ascertain the value of the *works executed by the plaintiff referred to in the statement of claim, and in respect of which this action is brought.*

3. And this court doth further order that the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit.*

What are the "works executed by the plaintiff referred to in the statement of claim"? Can there be any doubt that these works are the "sewerage and water-system" referred to in paragraphs 4, 5 and 6, in which the foundation of the claim is set forth? Then the "works" of which the value is to be ascertained being the sewerage and water-systems as completed by the respondent and taken over by the Minister, it appears to me that *quantum meruit* must be construed as applied to this finished production, and not necessarily to the energy expended and materials used wastefully or otherwise in attaining the result. If I am right in these views the judgment of the learned trial judge cannot be sustained on the ground upon

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which he has placed it, and it is necessary, therefore, to consider the question whether the conclusions of the registrar are supported by the evidence before him.

It is, of course, undeniable that it would be a circumstance of great importance if it appeared that the work done was really done under the direction of Mr. Mackenzie, the chief engineer of the Intercolonial Railway. Neither Mr. Mackenzie's general competence nor his good faith has been directly impugned; and we may take it that both Mr. Mackenzie and the respondent are for the purposes of this case free from any imputation of dishonest collusion. No such charge was directly made, and for my part I decline to give any countenance to the motion that litigants may get the benefit of suggestions of indirect dealing without taking the responsibility of making their charges in plain, unmistakable terms. I was strongly impressed on the argument with the idea that the learned registrar had failed to give due weight to the contrast between an opinion attested by actual approval of the work as done on the ground by an engineer in a position of responsibility and opinions given by experts necessarily resting upon an assumed state of facts which they could not in the nature of things verify for themselves. A careful examination of the whole evidence has, however, convinced me that there are many circumstances detracting from the importance which might normally be attached to Mackenzie's connection with this work. The arrangement between Mackenzie and the respondent was according to the both of them that Wallberg was to be paid his actual expenditure plus 15 per cent. as profit. This arrangement was not only unauthorized, but in

direct contravention of a public statute as Mackenzie knew. No specifications were prepared and no plan (except one of grades) until after the completion of the works. No provision was made for checking expenditures. No accounts were given or asked until the work was complete. The respondent was left entirely with regard to all these matters to his own devices and no information of the arrangement was given to the Department until the respondent's account was sent in. The supposed supervision by Mackenzie indeed as regards everything required to safeguard the interests of the Department becomes—when one examines the evidence—a myth. In face of these facts I do not think Mackenzie's approval of the respondent's methods mainly given *ex post facto* can be regarded as carrying that weight to which in happier circumstances it might have been entitled. I repeat, I suggest no dishonesty or conscious wrongdoing, but I cannot credit him with such an appreciation of his responsibilities arising out of the transaction with the respondent as might have been expected.

The learned registrar is, I think, fully justified in his conclusion that there was quite sufficient evidence of mismanagement to lead to the conclusion that the actual expenditures as presented by the respondent could not be accepted as reliable evidence of the fair cost of the work executed according to proper methods. The respondent's foreman, Godfrey, says that when he came to the work in June, 1907, what had already been done was in such a state that it was actually a detriment. The chief difficulty to be encountered was the presence of water in the excavations; and the evidence is overwhelming that the course adopted was obviously calculated to aggravate, as it did aggravate,

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that difficulty; and there was, moreover, ample evidence to shew that the methods of construction were needlessly expensive.

As to the amount allowed by the registrar, although on some particular points one might, if one were treating the question as *res nova* have taken a different view, I am not satisfied that on the whole or in any important particular he has failed to do justice to the respondent's claims.

ANGLIN J. (dissenting).—The principal question for determination in this appeal is whether the basis on which the learned judge of the Exchequer Court has dealt with the plaintiff's claim, or that adopted by the registrar upon the reference to him, is correct. Having regard to the fact that the plaintiff's rights rest entirely upon the consent of the Crown, that question must, in my opinion, be determined by a proper interpretation of the terms in which that consent is couched. It is contained in two documents—the plea of the Attorney-General, and the order of reference. The material paragraph of the statement of defence is as follows:

> 5. The Minister of Railways has accepted and taken over the said works on behalf of His Majesty, and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.

The order of reference contained these provisions:

> 2. This court doth order that it be referred to the registrar of this court for inquiry and report, and to ascertain the value of the works executed by the plaintiff referred to in the statement of claim and in respect of which this action is brought.
>
> 3. And this court doth further order that the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit*.

As the latter document defines with some particularity the basis on which "the fair value" is to be ascer-

tained, for which in the former the Crown expressed its willingness to pay, I think that, if there be a difference between them, the basis on which the plaintiff's claim is now to be dealt with must be sought in the terms of the order of reference, rather than in those of the plea. As a consent order, the order of reference is binding on the Crown as a party defendant. No step has been taken to set it aside. No attack has been made upon it as having been procured by fraud or misrepresentation, or as the result of mistake, nor has there been any repudiation of the authority of counsel for the Crown to consent to it in the very terms in which it issued. As I view it, the only question open on this appeal is—under the order of reference on what basis should the registrar have disposed of the plaintiff's claim.

The Crown, seeking to uphold the finding of the registrar, maintains that the actual value of the completed work *in sitû*, constructed in the most economical method feasible, is the basis of compensation contemplated; the plaintiff contends that the fair cost of the works in the circumstances in which they were in fact executed, plus a reasonable profit, is what the order of reference required the registrar to ascertain. If the former view be correct, I am quite unable to understand why the clause of the order numbered 3 was inserted. Its presence in the order, in my opinion, renders the position taken by the learned counsel for the Crown quite untenable, and fully supports the view of the learned judge of the Exchequer Court that "the fair value or price" should be determined on the basis of the fair cost of the works as executed (excluding extra expense incurred through any negligence or fault of the contractor), plus a reasonable

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profit to him. I agree in the learned judge's appreciation of the relative value of the evidence of experienced men "who were present on the ground and saw the actual state of affairs," and that of expert "witnesses testifying after the completion of the work." In the absence of any evidence of fraud or collusion on his part with the contractor, the testimony of an engineer occupying Mr. Mackenzie's position is certainly entitled to the greatest weight, and it would require strong proof against it to justify putting it aside. The registrar has expressly found that there was neither fraud nor collusion on the part of Mr. Mackenzie; and the fact that he is still retained as chief government engineer adds not a little to the value of his evidence.

So far as the course taken by the contractor was determined by the plans furnished him by the engineer, or by his directions, no fault or negligence should, in my opinion, be attributed to him. So far as the manner of carrying on the work was left to his own judgment and discretion, the contractor must be answerable for any excess in cost owing to the adoption of improper or extravagant methods.

An attempt was made in argument to impugn the reliability of the evidence as to the time-keeping upon the work. I think that attempt failed.

It was also contended that the respondent should be disallowed the sum of $708.76 "expended for the work on the so-called false start." This work was done by the contractor under the instructions of Mr. Mackenzie, but was discontinued and abandoned under similar instructions, because the Crown's title to the land upon which it was done was challenged. It forms no part of the works "accepted and taken over" on

behalf of His Majesty, and if the plaintiff's right were dependent upon that fact, this item must be disallowed. But although it is not separately and specifically mentioned in the statement of claim, the cost of it is included in the expenditure for labour and materials which go to make up the sum of $105,940.15 claimed by the plaintiff. As one "of the works executed by the plaintiff referred to in the statement of claim and in respect of which this action is brought," I agree with the learned judge of the Exchequer Court that the work on this false start is covered by the order of reference.

Much stress was laid in argument upon the extravagant cost of the work done by the plaintiff. On the evidence in the record, and especially that of Mr. Mackenzie, the responsibility for any excess in the cost of the work properly done under his directions—if there be any—must rest with him and not upon the contractor. I agree with the learned judge of the Exchequer Court that it would be manifestly unfair to the latter to hold that he must suffer for having carried out plans and followed the instructions of the government engineer. This consideration, I think, having regard to the terms of the order of reference, determines in the plaintiff's favour the claims made on behalf of the Crown for deductions from the cost of the works on account of an alleged excessive width of the excavations.

As to the prices per yard to be allowed for the various portions of the works, I find myself unable to say that the view of the learned judge of the Exchequer Court is erroneous.

But the evidence of Godfrey, a witness for the plaintiff and his own foreman, discloses a somewhat

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serious mistake made by the plaintiff in opening up too great a length of excavation at once instead of excavating in short sections. This appears to have much increased the difficulties in handling the surface water —serious enough under most favourable conditions— and to have resulted in some work being rendered useless and in the subsequent taking out of material being made more troublesome and costly. The method of excavating was apparently left entirely to the judgment of the contractor. For this mistake responsibility cannot be placed on Mr. Mackenzie's shoulders. The learned judge of the Exchequer Court appears to have overlooked this matter; at all events he does not seem to have taken it into account.

From the report of the registrar it is not possible to gather what would be a fair deduction to make from the amount allowed to the plaintiff by the learned judge, to cover the cost of labour of which the benefit was actually lost because of the plaintiff's mistake in excavating for too great a length of sewer at once, and the increase in the cost of subsequent work due to the same cause. I think it would not be satisfactory to attempt to fix this amount by a study of the voluminous evidence before us without the assistance of argument. Unless the parties can agree upon the amount by which the sum fixed in the judgment of the Exchequer Court should be reduced in respect of these matters, the case should go back to the registrar in order that he may inquire and report upon it. If the parties can agree, the finding of the Exchequer Court may be varied accordingly; if not, it should be varied by deducting from it the amount which shall be ascertained to be proper upon the reference to the registrar.

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Having regard to the 5th paragraph of the statement of defence, to the order of reference, and to the terms of the memorandum of the Minister of Railways under which the claim of the plaintiff was referred to the Exchequer Court "for adjudication," I cannot accede to the contention of counsel for the appellant that the learned judge erred in directing a judgment declaratory of the plaintiff's right to recover from the Crown the amount which the Crown had formally expressed its readiness to pay and had asked to have determined. With the effect of this adjudication we are not concerned.

Neither can I accept the view of the appellant's counsel that the registrar's report was not appealable.

Appeal allowed with costs.

Solicitor for the appellant: *Jas. Friel.*

Solicitor for the respondent: *Harold Fisher.*

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*March 8, 9.
*April 3.

JOHN REDDY (PLAINTIFF).....APPELLANT;

AND

GEORGE R. STROPLE (DEFENDANT).RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Deed of land—Description—Ambiguity—Admissions.

In an action for trespass to land both parties claimed title from the same source and the dispute was as to which title included the locus. The deed under which S. claimed contained the following as part of the description: "Then running in an eastwardly direction along the said highway until it comes to a crossway in the public highway and running in a southerly direction until it comes to the waters of Broad Cove." There were two crossways in the highway and S. contended that the first one reached on the course was indicated and R. that it was the second lying a little farther west.

Held, reversing the judgment of the Supreme Court of Nova Scotia (44 N.S. Rep. 332), Idington and Duff JJ. dissenting, that to run the course to the first crossway would take it over land not owned by the grantor; that there were other difficulties in the way of taking that course; that S. had apparently for many years treated the second crossway as the boundary; and what evidence there was favoured that view. The construction should, therefore, be that the crossway mentioned in the description was the second of the two.

APPEAL from a decision of the Supreme Court of Nova Scotia(1) reversing the judgment at the trial in favour of the plaintiff.

The question at issue on the appeal is stated in the above head-note.

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

(1) 44 N.S. Rep. 332.

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Newcombe K.C. for the appellant.

Gregory K.C. for the respondent.

The Chief Justice.

THE CHIEF JUSTICE.—I agree with Sir Louis Davies; the appeal should be allowed.

DAVIES J.—I concur with the reasoning and conclusions of Justices Graham and Longley in the court below, and would allow this appeal and restore the judgment of the trial judge.

The case turns largely upon the construction to be given to the language of the description in defendant Strople's deed dated February, 1886. That deed was from the widow and heirs of the late James Reddy and conveyed to the defendant "twelve acres more or less" of fifteen acres owned in his lifetime by James Reddy. A triangular piece of $2\frac{3}{4}$ acres at the northeast corner was omitted, and it is contended on the part of the plaintiff that the little piece of land in dispute about made up the balance of the 15 acres. I think it clear beyond reasonable doubt that the person who drew the description in defendant's deed had before him the description in the late James Reddy's deed, and that the changes made in the language used in the defendant's deed were made to exclude that triangular $2\frac{3}{4}$ acres and the disputed land.

The description in James Reddy's deed of the land in dispute read,

thence eastwardly on the margin of the said public highway until it comes to a stake standing in a heap of stones; thence due south nine rods crossing the said highway to the head of Broad Cove aforesaid at its N.W. angle.

In defendant's deed that was changed to read

then running in an eastwardly direction along the said highway *until* it comes to a crossway in the public highway and running in a southerly direction until it comes to the waters of Broad Cove.

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The change made in the line was clear. The old description ran along the highway to a "stake standing in a heap of stones" and thence to the head of Broad Cove at its N.W. angle. The description in defendant's deed ran along the highway eastwardly until it came to a crossway and then not to the N.W. angle of Broad Cove, but simply to the waters of the Cove.

As a fact there were two "crossways" in the highway and this fact has given rise to the dispute. The heap of stones up to which the line ran in James Reddy's deed lay, it is said, about midway between the two crossways.

The majority of the court below held that by the true construction of the description in Strople's deed the line ran along the highway past the first crossway to this heap of stones and then to the waters of the bay. The reason for so continuing this line past the first crossway and on to the heap of stones was that such a course did not do violence to the description as it was a "southerly direction" and that unless such a construction was adopted the line from the first crossway to the waters of the Bay would necessarily run through another man's land and embrace part of that land in the lands conveyed to Strople. But such a construction ignores altogether the limiting word "until" in the description. The line is to run

> in an easterly *direction along the highway until* it comes to a crossway,

and then in a southerly direction to the waters of the bay. That seems clearly to shew that it was not to run along the highway past the "crossway" intended as the natural boundary mark to

another natural mark not referred to, but apparently deliberately omitted from the description.

All these difficulties are avoided by construing the "crossway" mentioned in the description to refer to the second crossway lying a little further south.

Such a construction accords with that put upon it by the parties themselves just after Strople got his deed when the boundary fence was put up by Strople with the consent of the Reddys. It avoids any difficulty such as holding that the parties intended the line from the highway to the waters of the Bay to run across and include within the land conveyed part of another man's land, and it gives Strople the full area professed to be conveyed to him.

I do not wish to be understood as saying that the mere fact of the line crossing another man's land would be conclusive against adopting it if the language of the description was clear and certain that such line was intended. But where, as in this case, there were two crossways and it is uncertain which is meant, if the adoption of one leads to such difficulties and anomalies as I have referred to, and that of the other leads to no difficulties at all, but accords with the construction the parties themselves seem soon after the deed to have adopted, I have no difficulty in concluding that the latter construction is the true one.

IDINGTON J. (dissenting).—One James Reddy died intestate. His heirs either had disposed of all but the land sold to respondent, or thought they had done so, thirty years or more before this contest arose.

One Michael Reddy, who knew, I infer, a great deal more about what he on behalf of the heirs had to sell and intended to sell than we ever can know, sold re-

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spondent a piece of land which was supposed to be the last that the heirs had.

Henry Reddy pretends he shewed the now disputed line to Strople, but does not pretend to have bought the disputed land. He seems rather in the position of the man who had removed his neighbour's land marks, as it were, taken possession of his lands for nothing and for long years refused to recognize anybody's rights therein. And if I had to choose between his story and that of the others, I should not be too hasty in implicitly relying upon him. His evidence shews how dangerous it is to depart lightly from the express language in a deed.

I infer from what appears in the description that one Henry Reddy had before this grant to Strople, got two and three-quarter acres of what James Reddy left.

After payment of the price by Strople a deed pursuant to such sale was made on the 27th of February, 1886, by said heirs to him.

The description in that deed shews, by its reference to the course which cuts off two and three-quarter acres of the block which formerly belonged to James Reddy and runs along the lands of Henry Reddy for nine and a half chains, what the parties were doing. Taking several successive courses not disputed, it runs till, using the words,

> and then running in an eastwardly direction along the said highway until it comes to a crossway in the public highway, and running in a southerly direction until it comes to the waters of Broad Cove, etc.

The appellant contends there is another crossway on the same highway further on and that this southerly divergence whatever it implies must be from the second instead of the first crossway.

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But why so? What right to carry the course being run along the highway, any further than the express language permits?

One argument says: Oh, if you turned out suddenly at that first crossway and tried to reach Broad Cove you would cross another man's land and include part of that in the deed.

Suppose it did, was that the first time another's land has been mistakenly included in a description? We have imported herein a good deal of evidence inadmissible on any theory but that of ambiguity in the deed. How can it be pretended there is any ambiguity? If "southerly" must be held to mean due south, as some contend (but I do not admit, and the surveyor's evidence says it does not mean), the line will reach Broad Cove and following the remaining course along that cove to place of beginning, the description is complete and no ambiguity exists.

The deed thereby covers and purports to convey land that is now believed to have belonged to another. But this very deed by its description includes in any way it is read, the public highway just as much as it does this other man's land.

The deed may cover error, but not ambiguity. The ambiguity is created by those who import into the express language that which it does not permit of, by carrying the course along the highway beyond the point at which that course ceases.

Any possible ambiguity arises from the use of the word "southerly" and is confined to that course alone from the point where the preceding course ended.

Now let us try to bear in mind and see if we can understand what the people framing this deed were about.

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James Reddy's heirs when represented by Michael Reddy in this transaction, had no other land there to sell but what admittedly is covered by the deed, and this quarter of an acre of beach of no particular value, but forming beyond doubt part of the same inheritance.

Are we to suppose it was designed to exclude from the sale this worthless bit? For what purpose was it to be excluded ?

A southerly course from the first crossway to the point on Broad Cove to which the land belonging to James Reddy's heirs extended, is undoubtedly what the parties had in view.

The surrounding circumstances all point to that as the meaning of "southerly." And such a line may, if intended to be a straight line, erroneously include a few feet of another man's land.

For reasons I have already assigned, how can that affect the matter ?

Giving effect to the evident purpose of the parties as gathered from the surrounding circumstances, no doubt can exist that it effectuated their purpose by connecting the first crossway and the extreme south-westerly point of the Reddy land touching the cove.

But is it absolutely necessary in view of these circumstances to say that "southerly" must be taken in an absolutely straight line ?

I think there is, if I may be permitted to say so, great good sense in the view that Chief Justice Townsend in the court below holds as to this course deviating slightly to avoid the inclusion of another man's land.

Again what is to be said when we find that for twenty-three years after the deed to respondent these

heirs never appeared to imagine they had any land there.

In the case of *Van Dieman's Land Co.* v. *Marine Board of Table Cape*(1), at page 98, Lord Chancellor Halsbury:

> The contemporaneous exposition is not confined to user under the deed. All circumstances which can tend to shew the intentions of the parties whether before or after the execution of the deed itself may be relevant, and in this case their Lordships think are very relevant to the questions in debate.

If ever parties granting manifested their intention the heirs of James Reddy did in this case. They assumed for over thirty years partly before this deed and chiefly after that they had no concern in this land.

If we turn to respondent's intention, we find he cropped for some years beyond the line he is now sought to be restricted to, and when he fenced gives reasons for placing it where he did and then kept bars in it for access to the land in question and used the land in question from time to time for purposes of hauling in sea-weed and drift wood and is corroborated in these regards.

The next neighbour never interfered, and when his acts seemed to indicate a purpose to interfere, like a man of sense he said it made no difference to him and he made no contention.

I need not follow at length the manifest absurdities in giving way to the second crossway contention.

It is easy to see how the error in description arose if respondent is to be believed, and such evidence is for this purpose admissible.

Clearly his evidence is admissible as fixing the point of the first crossway as point of the southerly

(1) [1906] A.C. 92.

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divergence. And if believed I do not see how that point can be departed from.

But he goes further and tells that Michael Reddy shewing the boundaries of what he sold said there was a corner stake, near that point, of a pile of stones and a stake in it. Being unable to find the pile of stones they took the crossway as substantially at the point from which to run southerly to the cove.

When this dispute arose then a surveyor took the most westwardly point of land Reddy's heirs had on the cove and sighted a line from there that led to the discovery of this very pile of stones and a stake.

I do not use this to shew that it is to govern, but confirmatory of what respondent says did happen and misled the parties at the time.

I cannot think there ever was a conventional line. Much contradiction exists as to that agreement. One side professes it settled everything, and the other that it settled it only if found to be correct. This latter condition is denied. A few questions and answers from the evidence of appellant near the close of the case settles that to my mind. He was recalled and says:

Q. Referring to that agreement you signed in the house, you did not see any sketch of the surveyor? A. No.

Q. Did you know he had a sketch? A. No.

Q. Did you know he was going to make a sketch? A. He said he was going to make a plan, that is what he said.

Q. "Reference may be had to the plan," that was the plan you had in mind that he was to make after he went home? A. All that I know is that he said he was going to make a plan. I supposed the plan would be a plan of the land.

Q. It was the particular plan that he was to make when he went home that agreement was referring to? A. He did not say when he was going to make it. He said he was going to make a plan.

Q. That was the one referred to in the agreement was the one he

was going to make? A. I supposed it would be a plan of all the land he was going to make.

Q. At all events you knew there was to be a plan made in connection with that agreement? A. He said that he was going to make a plan.

Q. Did you understand there was to be a plan made or not in connection with that agreement? A. I supposed when he said he was going to make a plan that he would make one.

Q. In connection with that agreement? A. I could not say.

What was this plan for if all was ended? Who was to pay for it? What does he mean? It seems to me this evidence is inconsistent with the theory of a fence existent and a fence to be so many feet from it as a finality of a dispute.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting).—The controversy in the action out of which this appeal arises turns upon the true construction of a conveyance dated 27th February, 1886, made between the heirs of one James Reddy and G. R. Strople, the respondent, of a parcel of land described therein in these words:

A certain lot or parcel of land, situate and being on the north side of Broad Cove, in the Township of Manchester, in the County of Guysborough, aforesaid, and being part of Lot number one, in Hallowell's Grant. Bounded as follows: Beginning at a white birch tree on the north side of Broad Cove, aforesaid, and near a small brook, from thence crossing the public highway and running a due course north until it comes to a stake in a heap of stones, against Henry Reddy's line, a distance of eleven chains, and from thence in a northwesterly direction along Henry Reddy's, until it comes to a stake in a stone pile, a distance of nine and one-half chains, and from thence in a west, southwesterly direction until it comes to a maple tree, and continuing on from that until it comes to the public highway, and then running in an eastwardly direction along the said highway until it comes to a crossway in the public highway, and running in a southerly direction until it comes to the waters of Broad Cove, and thence in an eastwardly direction along the

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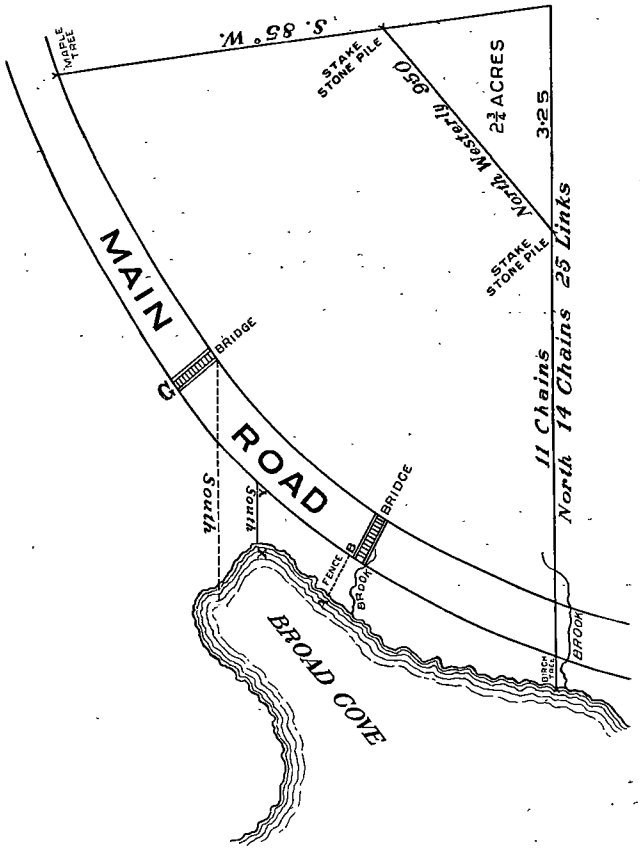
waters of Broad Cove, until it comes to the place of beginning, containing by estimation 12 acres, more or less.

This description may be conveniently followed by referring to the subjoined sketch.



The property in dispute lies between the main road and the shore of Broad Cove and is bounded on the east by the line AB, and on the west by the line XY. The respondent alleges that this piece of land is included in the tract embraced on the above description and this the appellant denies.

At each of the points marked G and B there is a

"crossway" — by which term is designated a small bridge carrying the travelled road across a narrow stream or ditch; and the crucial point in the controversy is whether the first or second of these bridges is that which is referred to as the "crossway" in the description quoted. If the first, then it is hardly disputed that the parcel in question is included in the description, but if not then that parcel is clearly excluded.

Applying the accepted canons of construction I do not think there is any difficulty in construing this deed. The difficulty, if I may say so, appears to have arisen from overlooking the rule — which, it may be observed, is a rule of law — that where parties have reduced their transaction to writing (and especially where the law requires the transaction to be expressed in writing) the words of the written instrument themselves construed with such aid as may be legitimately obtained from extrinsic circumstances are conclusively taken to express their intention.

There is a further rule which must be applied in this case, and that is, (I state it in the words of Coleridge J., in *Shore* v. *Wilson*(1), at page 525), that where the language used in the deed in its *primary meaning is unambiguous,* and that meaning is not excluded by the context, and *is sensible with reference to the extrinsic circumstances,* then such primary meaning must be taken conclusively as that in which the words are used.

There can, I think, be no doubt about the primary meaning of the words used in this description in so far as they affect the point in dispute. The deed

(1) 9 Cl. & F. 355.

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directs you to trace your boundary in an "easterly direction along" the public highway

until it comes to a crossway in the public highway and running in a southerly direction until it comes to the waters of Broad Cove.

I agree with the appellant that *primâ facie* this description requires you to change your direction when you come to the crossway; and I think that "running in a southerly direction until it comes to the waters of Broad Cove" *primâ facie* means that the line is to be run in the same direction until the destination is reached and that the direction is south. On these points I agree, I say, with the appellant's contention and with the view of the learned dissenting judges in the court below. The effect of the description then is this: In laying out the boundary you are to go along the highway in an easterly direction *until you come to a "crossway"* and then you are to turn south. There is no ambiguity about that as it stands. It means as plainly as words can express it that when you come to a "crossway" you are to change your direction and turn south. Can it affect your course in the least that having come to a "crossway" you are told that there is another crossway further on? Obviously it cannot; because you are to turn south when you come to a crossway, and you have come to a crossway. It is quite clear then that here there is nothing in the nature of an equivocation. It is quite clear, I mean, when one remembers that the essential feature of an equivocation is, as Lord Chancellor Cairns said in *ter* v. *Charter* (1), at page 377, that the description shall be "equally applicable *in all its parts*" to two persons or two things. The suggestion is that a boundary

(1) L.R. 7 H.L. 364.

traced by turning south at the first crossway and a boundary traced by turning south at the second crossway are things to which this description is *equally applicable*. That is obviously not so because it is plain that the deed having directed you to turn south when in passing along the highway you meet a crossway, you are departing from the plain terms of the direction when having met a crossway you, instead of turning south, proceed easterly until you meet a second "crossway." Nobody intending you to go on to the second crossway would think of giving the direction contained in this description. There is, therefore, nothing in the nature of equivocation.

Are then the words of this description according to which the boundary proceeds southwards from the first crossway "sensible with reference to the extrinsic circumstances." The only difficulty suggested is that a boundary so traced encloses property which at the date of the conveyance was not the property of the grantor. It is said that there is a presumption that the grantor did not intend to convey what he did not own and that this is sufficient to justify a departure from the primary meaning of this perfectly unambiguous description and the adoption of the second "crossway" as the point of divergence. The contention necessarily involves this that within the meaning of the rule of construction I have stated the words of an unambiguous description in a conveyance are not in the primary meaning "sensible with reference to extrinsic circumstances" when it appears that the parcel described includes some property to which the grantor had no title. That is a proposition for which no authority was cited for the reason, no doubt, that no authority giving it the slightest countenance can be dis-

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covered; it is a proposition quite irreconcilable with principle.

No conveyance by a vendor without title can, of course, pass a title. But at common law certain conveyances operated as it was said to convey an estate "by wrong"; and in such cases, speaking broadly, if the person making the conveyance afterwards acquired the property the title passed, as it was said, by estoppel; that is to say, the vendor was by his conveyance estopped from denying that he had a title at the time it was made. A statutory grant, it is true, has not the same effect; but in such grants there is usually, or, at all events, frequently, a covenant for further assurance or an unqualified covenant for title which if the grant were for valuable consideration would in the absence of some countervailing equity be equally effective to prevent the grantor from retaining the property as against the grantee if he should afterwards acquire it. What is the purpose of unqualified covenants for title ? Of covenants for further assurance ? To hold upon some such presumption as that suggested that a description otherwise perfectly clear is to be altered to exclude property to which the grantor had no title is simply to tear up the deed. But I need not pursue the argument into its details; the point is quite settled by the authority of a decision of this court. As Strong C.J. said delivering the judgment of the majority of the court in *Barthel* v. *Scotten*(1), at page 370:

> it matters nothing in a case of this kind whether the grantor had or had not title to all he assumed to convey; we are to construe the description according to the language of the instrument abstracted from all considerations as to title.

(1) 24 Can. S.C.R. 367.

The result, however, seems equally clear if we seek to gather the intention of the parties not (as the law requires) from the language of the deed, but as if the question of intention were at large — to be ascertained from an examination of all the facts in evidence. One thing the evidence establishes, I think, is that Strople understood he was getting the property which then belonged to the estate of James Reddy, a small part of the estate having previously passed to Henry Reddy.

The evidence of Henry Reddy is relied upon by the appellants, but two circumstances corroborate Strople in my view conclusively. First, there is no suggestion of any reason why this small disputed piece of land was omitted from the sale to Strople, and secondly, it is hardly conceivable that rational people intending to make the second crossway the point of departure would have used the language we find in the deed.

The claim to a conventional boundary clearly fails. The evidence establishes that no concluded agreement was reached.

ANGLIN J.—With respect I would allow this appeal and would restore the judgment of the learned trial judge for the reasons given by Mr. Justice Graham and Mr. Justice Longley. I should not have thought it necessary to add anything to what they have said had a different view not been taken by some of my learned brothers. On this account I shall refer briefly to the evidence.

The words of the description in the Strople deed,

running in an easterly direction along the said highway until it comes to a crossway in the public highway,

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primâ facie refer to the first crossway met with in the highway, and only serious difficulties in the application of the description as a whole, if the reference be so taken, can justify their being referred to any other crossway. But when the evidence discloses that the next line of the boundary as described in the deed will, if run from this first crossway, necessarily include a considerable piece of land which the grantor did not own, the presumption against an intention thus to deal with a neighbour's property necessarily puts one upon inquiry whether the first crossway was really the point of departure from the line of the highway which the parties intended. When it is found that a little farther on there is a second crossway — if anything more marked and noticeable than the first — and that a line run from it in the designated direction will without any difficulty reach the place indicated in the description as its terminus, the doubt becomes very grave and a case at least of equivocation or latent ambiguity is well established. We then properly look to the circumstances to solve the doubt thus raised.

On the one hand the defendant swears that it was all the land owned by Jas. Reddy which he bought (a triangular piece of the property, $2\frac{3}{4}$ acres, he admittedly did not buy), and that, at the time he was purchasing, Michael Reddy, since deceased, pointed out to him the first or western crossway as the point where the boundary would cross the highway and turn southerly. On the other hand Henry Reddy swears that it was he who put the defendant in possession of his property, and that in doing so he indicated to him the second or eastern crossway as the point at which his boundary turned southerly from the highway to the water. He also says that the heirs of James Reddy

retained, between the highway and the beach, a piece of the land owned by James Reddy which had been fenced in with his, Henry Reddy's, adjoining property. In this conflict of testimony the acts of the parties must be looked to in the hope that they may aid in ascertaining where the truth lies.

The defendant admits that since he bought it his land has been separated by a fence from the property occupied by Henry Reddy, and later by Samuel Pyle. This fence, put up by the defendant, was never at all near the line which he now asserts to be the boundary. It was first placed—Henry Reddy says by his permission — about 50 feet west of the second crossway; some fifteen years ago it was moved back by the defendant — Henry Reddy says upon his instructions — to the line of the brook at the second crossway. After he moved the fence back to the brook Strople ceased "cropping" the 50 feet of land immediately west of it. While admitting these facts Strople denies having received the permission and instructions of Henry Reddy to which the latter deposed.

Samuel Pyle partly corroborates Henry Reddy as to the reservation of a piece of land by the heirs of Jas. Reddy. More cogent corroboration is given by the departure in the description in the Strople deed from that in the deed to Jas. Reddy, the earlier part of which was obviously followed in Strople's deed. Strople's deed names a new point of departure from the highway and it does not fix the point at which the boundary strikes the waters of the cove as it was fixed in Jas. Reddy's deed. It is very difficult to explain these changes on the hypothesis that Strople's agreement was to buy the whole of Jas. Reddy's land, except the $2\frac{3}{4}$ acre triangular piece in the northwest corner —

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no more and no less. Strople's explanation of them — that when Michael Reddy indicated the boundary to him they could not find the pile of stones and stakes beside the highway mentioned in Jas. Reddy's deed — is certainly inadequate in view of the ease with which this monument appears to have been discovered when the surveyor, Mr. Taylor, was brought down 23 years later "to run the line." Strople's explanations as to the placing of his boundary fence at and near the second crossway are equally unsatisfactory.

Mr. Taylor, who gave evidence for the defendant, says that when he was called in to run the line there appeared to be "doubt" in Strople's mind whether the second crossway "was not the right bridge." Taylor does not say that Strople then pointed out the first crossway to him as that mentioned in his deed or shewn to him by Michael Reddy when he was purchasing as the point of departure of the boundary line from the highway. On the other hand Strople says he did, on this occasion, shew the first crossway to Taylor, Henry Reddy, John Reddy, Samuel Pyle and Stephen Pyle, as the crossway mentioned in his deed. Yet he admits that after he had done this he signed a memorandum accepting the fence at the second crossway as his boundary, "if it was the correct line."

All this evidence, in my opinion, affords substantial proof that for many years the defendant treated the second crossway as the true point of departure of his boundary from the line of the highway. His certainty, when giving evidence at the trial, that it was from the first crossway that his boundary turned southerly, would seem to have been a mere doubt when Mr. Taylor was called in — a doubt so slight that he

signed an agreement placing the point from which his boundary turned southerly, at least conditionally, at the second crossway. While he may not be bound by this agreement to the line of the second crossway as a conventional boundary, his execution of it is not the act of a man who was certain that he had, when purchasing, been shewn the first crossway as the point where his boundary left the highway. George Strople's conduct at and since the time of his purchase, in my opinion, affords evidence more reliable than his testimony at the trial as to what were shewn him as, and what he really understood to be, the boundaries of the land he bought. It is, I think, reasonably clear that, until the dispute which precipitated the present litigation arose, all the parties interested acted on the assumption that the defendant's boundary followed the highway easterly until it reached the second crossway, when it turned southerly to the waters of the cove.

In view of these facts and of the difficulties involved in running a line southerly from the first crossway to the waters of the cove, I resolve the equivocation in the description in the Strople deed by determining that it was the second crossway and not the first which was intended by the words, "until it comes to a crossway." The person who prepared the Strople deed probably had not in mind the existence of the first crossway. This sufficiently accounts for his use of the words, "until it comes to a crossway," to indicate the second crossway and affords an explanation much simpler than, and quite free from such difficulties as are involved in, that suggested on behalf of the defendant, who, in order to avoid carrying his boundary line across the lands of a stranger, would continue it easterly along the highway beyond the first crossway

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until it reaches the stake and pile of stones mentioned in James Reddy's deed, situate about midway between the first crossway and the second, and would then turn it southerly to the waters of the cove along the line defined in the James Reddy deed — thus reverting to the description from which a distinct departure was made, apparently deliberately, in preparing the description of the land he purchased. Instead of turning southerly from the first crossway, to which it runs in a southeasterly direction, the boundary, as now proposed by the defendant would continue to follow the line of the highway, deflecting more to the east, and, after running in this direction about 100 feet, turning abruptly to the south. That the words of the description in Strople's deed — "and running in a southerly direction until it comes to the waters of Broad Cove" — designate a single straight line, I think, admits of no dispute. The device to which the respondent is driven, to obviate including part of Pyle's property in his deed, is not only inconsistent with the departure which that deed makes from the description in the James Reddy deed, but involves changing the single straight line defined in his own deed as running southerly from the first crossway to the cove, into two lines, one almost at right angles to the other, and the first of them running easterly, not southerly, the deflection at the first crossway being northward rather than southward as the call of the deed requires.

The only admissible solution of the equivocation or latent ambiguity raised by the evidence of the actual conditions on the ground appears to me to be to take the second crossway as the point of departure from the highway.

The appeal should be allowed with costs in this

court and in the court *en banc,* and the judgment of the learned trial judge should be restored.

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Appeal allowed with costs.

Solicitor for the appellant: *J. A. Fulton.*

Solicitor for the respondent: *D. P. Floyd.*

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*March 23.
*April 3.

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM TOMS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Damages—Negligence—Physical injuries—Mental shock—Severance of damages.

T. was riding in a street car when it collided with a train. He was thrown violently forward on the back of the seat in front of him, but was able to leave the car and walk a short distance towards his place of business when he collapsed and was taken home in a cab. He was laid up for several weeks and never recovered his former state of health. On the trial of an action against the Railway Co. one medical witness gave as his opinion that the physical shock received by T. was the exciting cause of his condition, while others ascribed it to a disturbed nervous system. Negligence on the part of the company was not denied, but the trial judge was asked to direct the jury to distinguish, in assessing damages, between the physical and nervous injuries, which he refused to do.

Held, affirming the judgment of the Court of Appeal (22 Ont. L.R. 204), that the trial judge properly refused to direct the jury as requested; that the injuries to T.'s nervous system were as much the direct result of the negligence of the company as those to his physical system, and he could recover compensation for both; and that in any case it was impossible for the jury to sever the damages. *Victorian Railway Commissioners* v. *Coultas* (13 App. Cas. 222) distinguished.

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

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

(1) 22 Ont. L.R. 204.

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The facts of the case are stated in the above headnote.

Glyn Osler, for the appellants, referred to *Victorian Railway Commissioners* v. *Coultas*(1).

Masten K.C. for the respondent was not called upon.

THE CHIEF JUSTICE.—This case is distinguishable from *Victorian Railway Commissioners* v. *Coultas*(1). In that case the condition from which the complainant was suffering was due to fright alone. Here there was impact resulting in some physical injury, however slight, to the respondent. The question at issue between the parties at the trial, as I understand it, was whether the jury should be directed to apportion the compensation allowed so as to distinguish between that which was attributable to injuries resulting from nervous shock and that properly attributable to physical contact. I would have thought it too clear for argument that where a person suffers physical injury, however slight, damages might also be claimed for the fright occasioned thereby. It would appear somewhat difficult to distinguish between the injury caused to the human frame by the impact and that resulting to the nervous system in consequence of the shock, the shock and the physical injury being both the result of the same accident. The nature of the mysterious relation which exists between the nervous system and the passive tissues of the human body has been the subject of much learned speculation, but I am not aware that the extent to which the one acts and reacts upon the

(1) 13 App. Cas. 222.

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other has yet been definitely ascertained. Those who are interested will find a learned discussion of the whole subject by Paul Bert in his book where he discusses the role played in the human system by what he calls "la grande sensitive." I do not think that many of the jurors who usually try damage cases have had their attention directed to this abstract subject which, as Bert says, has baffled the scientists for ages. For my part it is difficult to understand how a person should not be allowed to recover for an injury to the nervous system resulting from fright which frequently alone produces physical injuries of the most serious character. But we are not concerned with that question now. Here the fact of physical injury is established beyond all doubt, and, that fact once admitted, I cannot find the line of demarcation between the damage resulting to the human being by reason of the fracture of a limb or the rupture of an artery and that which may flow from the disturbance of the nervous system caused by the same accident. The latter may well be the result of a derangement of the relation existing between the bones, the sinews, the arteries and the nerves. In any event the resultant effect is the same. The victim is incapacitated and in consequence suffers damages, whether the incapacity results from the physical injury alone or the physical injury with the nervous shock superadded.

I would dismiss with costs.

DAVIES J.—After hearing counsel for the appellant we did not deem it necessary to call upon respondent's counsel to sustain the judgment appealed from.

The respondent sued the railway company for damages arising out of injuries he claimed to have been

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caused to him while being carried as a passenger on one of their street cars which, through the negligence of their servants, came into collision with a railway train.

The shock of the collision threw the respondent, as he stated in his evidence, from where he was sitting "right over to the back of the next seat," which would be the seat facing him.

No physical result of the collision upon the respondent was noticed by him until he had left the scene of the accident and was proceeding towards his employer's office. He then, however, "suddenly collapsed," was conveyed to his home in a cab and for many weeks was unable to resume with any continuity his usual employment.

There were some slight apparent bruises on respondent's body, but none apparently serious.

The opinion of Dr. McPhedran, who was called on respondent's behalf, reached from listening to the evidence and accepting the history of the case as given to him by the respondent, was "that the physical shock that he suffered excited the condition that he was suffering from," that he did not think he was suffering "purely from a mental effect created on his mind," but thought "the physical effect was the exciting cause," and he described the respondent's condition as traumatic neurasthenia.

Some medical evidence was given by the defendants which did not agree with that of Dr. McPhedran, and the trial judge was requested when leaving the case to the jury, to ask them to separate the plaintiff's injuries "as between the physical injuries and the nervous ones."

The learned Chief Justice who tried the case, in my

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opinion very properly refused to impose upon the jury what under the evidence was an almost, if not altogether, impossible task. He said:

> I was requested to put a question to you to separate the injuries as between the physical and the nervous injury. I declined to do that for one reason — a very sufficient one — amongst others that that question of physical injury is one of very doubtful meaning. There was not any great physical injury in the sense that there were any bones broken, or any great bruising or abrasion of the surface; but there may be a physical injury of a serious nature which is not indicated by any external mark. So, therefore, I leave the whole question to you to say what damages he ought to recover for the injury, if you think he has sustained any.

An attempt to divide the damages in the manner suggested would, it seems to me, have involved the merest speculation.

The demand at the trial to have the damages so assessed and divided was pressed at the trial and afterwards in the Court of Appeal and in this court on the assumed application to this case of the principle supposed to have been determined by the Judicial Committee of the Privy Council in the case of *Victorian Railway Commissioners* v. *Coultas*(1). The headnote of the case as reported seems correctly to state what was really decided:

> Damages in a case of negligent collision must be the natural and reasonable result of the defendants' act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote.

In delivering the judgment, their Lordships say:

> Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending

(1) 13 App. Cas. 222.

the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

The rule laid down by their Lordships as to the proper measure of damages to be allowed has not been called in question so far as I have seen, but the legal proposition stated that

damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock,

cannot under such circumstances as their Lordships were considering

be considered a consequence which in the ordinary course of things would flow from the negligence of the gate-keeper,

complained of in that case, has been the subject of much comment and adverse criticism alike in subsequent judicial decisions of the English and Irish courts, as also of those of Australia and of many text writers of recognized authority.

In the case of *Dulieu* v. *White & Sons*(1), at page 676, Mr. Justice Kennedy thus refers to this decision of the Privy Council:

In that case the principal circumstances were that the appellants' gate-keeper negligently invited the male plaintiff and his wife, who were driving in a buggy, to enter the gate at a crossing when a train was approaching, and, though there was no actual collision with the train, the escape was so narrow and the danger so alarming that the lady fainted and suffered a severe nervous shock, which produced illness and a miscarriage. The Colonial Court had entered judgment for the plaintiff for the amount found by the jury at the trial of the action brought against the appellants for negligence. The Privy Council reversed this decision. The principal ground of their judgment is formulated in the following sentence: "Damages arising from

(1) [1901] 2 K.B. 669.

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mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper." A judgment of the Privy Council ought, of course, to be treated by this court as entitled to very great weight indeed; but it is not binding upon us, and, in venturing most respectfully not to follow it in the present case, I am fortified by the fact that its correctness was treated by Lord Esher M.R. in his judgment in *Pugh* v. *London, Brighton and South Coast Railway Co.*(1) as open to question; that it was disapproved by the Exchequer Division in Ireland in *Bell* v. *Great Northern Railway Co. of Ireland*(2), where, in the course of his judgment, Palles C.B. gives a reasoned criticism of the Privy Council judgment, which, with all respect, I entirely adopt; and, lastly, by the fact that I find that the judgment has been unfavourably reviewed by legal authors of recognized weight, such as Mr. Sedgwick (on Damages (8th ed.), p. 861), Sir Frederick Pollock (The Law of Torts (6th ed.), pp. 50-52), and Mr. Beven (Negligence in Law (2nd ed.), pp. 76-83).

This court would possibly feel itself bound, notwithstanding all this adverse criticism, in a case where the facts were strictly analogous to those under consideration in *Victorian Railway Commissioners* v. *Coultas*(3), to follow that decision. But I do not think they would be disposed to in any sense enlarge the principle underlying that decision or apply it to facts so essentially differing from those there considered as the facts do in the case now before us. Here there was a violent collision brought about by the negligence of the defendant railway company and occasioning injuries to a passenger being carried by that company.

There was sufficient medical and other evidence to justify the jury, properly directed as in my judgment they were, in holding that the plaintiff had sustained injuries arising from the shock or collision. Unless

(1) [1896] 2 Q.B. 248. (2) 26 L.R. Ir. 428.
(3) 13 App. Cas. 222.

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the trial judge should have directed the jury to "divide the physical damages from the mental shock," there was no misdirection and could be no complaint as to the damages assessed.

I do not think any such direction would, under the circumstances, have been proper, nor am I able to see how any such division could have been made by the jury without entering into the domain of absolute conjecture.

If the railway company by the negligence of its servants causes a collision between two trains or cars which results in injuries to one of its passengers, they are admittedly liable for all such damages as are the reasonable and natural result of their negligent acts. I am quite unable to understand why injuries to the nervous system should be excluded from consideration in assessing such damages. Such injuries are as much the reasonable and natural results of the negligence which causes or is responsible for a railway collision or accident as physical injuries, such as broken bones, crushed or bruised or lost limbs, or loss of sight or hearing or other physical sense. The nervous system is just as much a part of man's physical being as the muscular or other parts and equally, if not more, important. In all cases the question of material injury having been caused the passenger or injured one must be a question of fact. Bodily injuries are not necessarily observable and cannot always be diagnosed or defined with legal accuracy or precision. But the results or effects may be perfectly well known and describable. Many of what are called physical injuries are altogether internal and not even to modern medical science observable. Indeed, the worst injuries are too often such. Injuries may consist of broken bones,

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crushed or torn muscles or sinews, injured or ruined eye-sight, hearing or memory. These can, with some approach to certainty, be observed and described. But injuries may, as we all know, be not physically observable, and may result in a complete or partial collapse of the nervous system. In the latter cases, the results are frequently more deplorable and injurious to the unfortunate man than are the injuries physically observable or ascertainable with medical certainty. Medical men may call the results by what scientific term they please. But if they are such as incapacitate the injured one from earning his living or enjoying life as he was accustomed to, or subject him to constant or intermittent attacks of pain or incapacity, is the negligent carrier to be excused from liability because it may be successfully contended that the injurious results are wholly or partially to the nervous system and are not observable on the physical system? True, it is, there is danger of simulation, and in some cases of possible self-deception, resulting in imaginary ailments and claims. But in any and all cases they must in the last analysis be reduced to questions of fact for the court and jury to determine. The danger from simulation or imaginary claims may call for the closest and most exhaustive examination, but would not justify the court, in cases where the liability of the company for damages was established, in exonerating the negligent company from liability.

All I am contending for is that actionable negligence on a carrier's part resulting in injuries arising out of a collision or impact extends as well to those injuries which may be classed under the head of, or as the result of, nervous collapse or prostration, as to those of a strictly physical character. It is, of course,

essential that the injuries, whether nervous or physical, should be the natural and reasonable result of the carrier's negligence, but the mere fact of these injuries being physical or nervous cannot affect the liability. The ease with which in the one case the damages are capable of being ascertained, and the difficulty which in the other case may frequently arise, cannot be made the test of liability. That test must be based upon the negligence causing the collision or accident, and the proof of the alleged injuries being a natural and reasonable result from such negligence.

We are not obliged in such a case as the one before us to apply the rule as to remoteness of damages adopted in the *Coultas Case*(1) to the facts the Judicial Committee had before them. I do not think we would be justified in doing so, as the cases can be so easily and satisfactorily distinguished. In yielding to the defendant's contention we would be giving a dangerous and improper extension to the rule there laid down, which, as I understand the decision, was confined to "damages arising from mere sudden terror unaccompanied by any actual physical injury." I have no hesitation in holding that the trial judge and the Court of Appeal were right, and that this appeal should be dismissed.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J.—The respondent was a passenger on a car on the appellant company's railway when it came into collision at a level crossing with a locomotive en-

(1) 13 App. Cas. 222.

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gine of the Grand Trunk Railway Co. The only point in controversy at the trial related to the question of damages. The respondent's evidence, which in this respect was not contradicted or seriously attacked, was to the effect that when the collision occurred he was seated and in the seat nearest the motorman, but facing the rear end of the car; that having noticed people hurriedly leaving the car he was turning to look forward to see the cause of the disturbance when the collision occurred as the result of which he was thrown violently forward and across the back of the seat opposite to that in which he was sitting. He further said that, without assistance, he got off the car and after walking some distance, to use his own words, "he simply collapsed" and could go no further. He took another car to the office, where he was engaged as bookkeeper, but feeling he was unfit to work went home and called in a physician. He was unable to return to his duties for five weeks and between the time of the accident (October, 1908) and the trial (March, 1910), there were 37 weeks during which he was unable to work. He said that immediately after the accident he suffered "pains all over his body," and that he then — at the trial — "was a wreck." He had pains all over his limbs.

> My shoulders, my legs, my feet and up to the knees as a rule are like in cold water. I have no energy or will-power to do anything scarcely.

Prior to the accident the respondent, who was 68 years of age, had, according to his own statement, enjoyed the normal health of a man of his years.

The medical testimony was given by two witnesses, one called by the respondent and one by the appellants. The effect of the evidence of Dr. McPhedran,

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called by the respondent, was that he was suffering from neurasthenia, the result of a nervous shock which might have been due, and in his opinion was due, to the physical jar described by the respondent as received in the collision. There was no express testimony that the respondent had experienced any fright. When asked at the trial what his sensations were, he said: "I thought I was going to be smashed up." Then in answer to a question from the learned trial judge, "I suppose you had not much time for sensations?" he said: "There was no time to think." On his examination for discovery the respondent stated that his illness was due to "nervous shock"; and at the trial he admitted that "so far as he knew" his answers given on that examination were "practically true."

Dr. Johnson, the medical witness called by the appellant, did not dispute the opinion of Dr. McPhedran that the same neurasthenic condition might arise from the physical shock to the system caused by such a jar as that experienced by the respondent, but stated that when examined by him some time before the examination made by Dr. McPhedran, the respondent was not suffering from neurasthenia and there were no signs of any injury to his nervous system.

The learned trial judge was asked to direct the jury in estimating the damages to distinguish between the injury suffered by the respondent in consequence of the shock to his nervous system in so far as it arose from fright and the injury due to the physical jar; and the appeal is based on the refusal of the learned Chief Justice to give such a direction.

I think that the learned Chief Justice was right in this refusal. The only evidence on the point, the uncontradicted evidence of Dr. McPhedran, was quite

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positive to the effect that it would be quite impossible to distinguish a neurasthenic condition caused by fright from such a condition caused by physical jar. The same condition might be produced by either cause. That being the case — assuming there was evidence of fright sufficient to entitle the jury to say that the respondent's condition might in some degree be due to mental disturbance — it is quite clear that the jury would have no means whatever of apportioning the consequences as between the two concurring causes and to direct them to do so would simply be directing them to go through a process which as a tribunal, acting judicially and therefore reasonably, they would be incapable of doing. There was, however, in my judgment no evidence which would justify the jury in attributing the respondent's condition to the direct effect of mental disturbance. The respondent himself is unable to give (and quite naturally) any very accurate account of his mental experiences during the critical moment. His statement that his illness was due to "nervous shock" is quite consistent with the notion that its exciting cause was purely physical; and his statement that he "expected to be smashed up" does not seem necessarily to imply any such mental disturbance as would affect his physical condition.

The medical witness for the company did not say, and it is clear that on such vague evidence he could not say, that mental shock experienced by the plaintiff arising from an expectation of being injured would account in any degree for the injury his nervous system sustained. It is obvious that having another circumstance, the physical jar, which would definitely account for that condition it was impossible to say

that a state of mind so indefinitely described had anything whatever to do with it.

In these circumstances it is quite clear that the learned trial judge would have erred if he had suggested to the jury that they should attempt to ascertain and designate some definite proportion of the damages suffered as attributable to the plaintiff's state of mind.

In this view of the case it is quite unnecessary to analyze closely the decision of the Privy Council in the *Coultas Case*(1).

I do not think there is anything in that case remotely countenancing the contention that where there is a physical blow sufficient to account for nervous conditions which might also have been produced by fright, if there was fright, accompanying the blow — that in such a case the jury must attempt the absolutely impossible task of separating the results arising on the one hand from the physical impact from those arising from mental disturbance on the other.

ANGLIN J.—In view of the manner in which the *Coultas Case*(1), and the doctrine for which it is supposed to stand have been dealt with in recent English and Irish decisions, it should, I think, be followed only in cases in which the facts are indistinguishable from those there considered by the Judicial Committee. We are not bound by the views expressed by the Ontario Court of Appeal in *Henderson* v. *Canada Atlantic Railway Co.*(2), and if they imply any extended application of the principle of the *Coultas Case*(1), I must, with deference, decline to adopt them. The

(1) 13 App. Cas. 222. (2) 25 Ont. App. R. 437.

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decision of this court in the *Henderson Case*(1), does not at all affect the question now before us. I respectfully concur in the statement of Palles C.B. in *Bell* v. *Great Northern Railway Co.*(2), at p. 442:

> I am of the opinion that as the relation between fright and injury to the nerve and brain structure of the body is a matter which depends entirely upon scientific and medical testimony it is impossible for any court to lay down as a matter of law that if negligence causes fright and such fright in its turn so affects such structures as to cause injury to health, such injury cannot be a consequence which in the ordinary course of things would flow from the negligence unless such injury accompany such negligence in point of time.

I agree with Garrow J.A. that

> no one can object to the general principle enunciated at p. 225 (of the judgment of the Judicial Committee in the *Coultas Case* (3)) that the "damages must be the natural and reasonable result of the defendant's act; such a consequence as in the ordinary course of things would flow from the act;"

but I am unable to understand the argument for the appellants that the damages sought to be recovered in the present case are not a natural and reasonable result of the negligence charged against the defendants. The *Coultas Case*(3) should not, in my opinion, be held to preclude recovery where there has been actual impact to which a jury might not unreasonably ascribe the injuries complained of, or where, without actual impact, a passenger being carried by a common carrier has, through the negligence of such carrier, sustained a serious mental or nervous shock due to fear of immediate personal injury to himself from such negligence (*Dulieu* v. *White*(4)), the injurious physical consequences of which have been established and have been sufficiently shewn to be the result of that negligence.

(1) 29 Can. S.C.R. 632.
(2) 26 L.R. Ir. 428.
(3) 13 App. Cas. 222.
(4) [1901] 2 K.B. 669, at p. 675.

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There was in the present case no evidence upon which the jury could be asked to distinguish between damages sustained by the plaintiff because of purely mental injury, and damages which he sustained from physical injury due to mental or nervous shock. The right to recover for injury of this latter class is established by many English and American authorities, and, in the circumstances of the present case, it is not precluded by the decision of the Privy Council in the *Coultas Case* (1).

There certainly was evidence that the plaintiff had suffered and was suffering actual physical injury, whether its cause was mental or physical shock, and there was also evidence, as pointed out by Garrow J.A., that his condition was due in part at least to actual physical shock. In either aspect he was entitled to recover, and the learned Chief Justice of the King's Bench was, in my opinion, fully justified in declining to ask the jury to refine between mere mental injury and physical injury due to mental shock, or between the latter and physical injury due to physical shock. Indeed, since physical injury, whether due to mental or to physical shock, would entitle the plaintiff to damages, there could be no object in drawing the latter distinction.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Masten, Starr, Spence & Cameron.*

(1) 13 App. Cas. 222.

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*March 23.
*April 3.

SAMUEL R. CLARKE (DEFENDANT) . . APPELLANT;

AND

JAMES GOODALL (PLAINTIFF) . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Nature of action—Equitable relief—"Supreme Court Act," s. 38(c)—Appeal from referee—Final judgment.

Where a statement of claim discloses only a common law cause of action and the cause was so dealt with at the trial the facts that the indorsement on the writ indicates a claim for equitable relief and that the trial judge, in ordering a reference to assess the damages, reserved further directions do not make it a judicial proceeding in the nature of a suit in equity within the meaning of sec. 38(c) of the "Supreme Court Act."

The judgment of the Court of Appeal varying the report of the referee directed to assess the damages for the plaintiff in an action is not a final judgment from which an appeal lies to the Supreme Court of Canada.

APPEAL from the judgment of the registrar sitting as a judge in chambers who affirmed the jurisdiction of the court to entertain the appeal in this cause.

The judgment of the registrar was as follows:

THE REGISTRAR.—This is an application under Rule 1 for an order affirming the jurisdiction of the Supreme Court to hear this appeal. The facts of the case as disclosed by the appeal book in the Court of Appeal are as follows: On the 27th March, 1909, the respondent, Goodall, caused to be issued a writ of

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

summons out of the High Court of Justice at Toronto against the defendant, indorsed as follows:

"The plaintiff's claim is to have it declared that the plaintiff is entitled to receive from the defendant 20,000 shares fully paid up and non-assessable of the capital stock of the Lawson Mine, Limited, and for an injunction to restrain the defendant from selling, assigning, transferring, encumbering, or otherwise disposing of or dealing with his shares of the capital stock of the said company until he shall have transferred said 20,000 shares to the plaintiff, and from selling, assigning, transferring, encumbering or otherwise disposing of or dealing with the certificate for 371,094 of said shares in his favour now deposited with the accountant of the Supreme Court of Judicature in pursuance of the judgment entered in the action now or lately pending in this court wherein Murdock McLeod and others are plaintiffs and Thomas Crawford and the said defendants and others are defendants."

On this writ an interim injunction was granted until the 10th May next by the Hon. Mr. Justice MacMahon, on the 29th March, restraining the defendant from disposing of the shares of stock in question. On the 2nd April, 1909, a consent order was obtained dissolving the injunction upon payment into court to the credit of the cause of the sum of $5,000 to stand as security to satisfy the plaintiff's claim. On the 4th May, the statement of claim was filed, which alleged that an agreement had been entered into on the 14th December, 1908, between the plaintiff and defendant by which the defendant, in consideration of an advance to the amount of $5,549.12, upon which there was interest due, bringing the claim up to $6,500, agreed to pay $1,500 in cash and deliver 20,000 shares

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of stock in the Lawson Mine, Limited. Plaintiff then alleged that defendant, in fraud of the plaintiff, attempted to sell his stock in the Lawson Mine without first setting apart the 20,000 shares belonging to the plaintiff, and in the 15th and 16th paragraphs stated as follows:

"15. The defendant having conceived the design of cheating the plaintiff out of his 20,000 shares of stock in the Lawson Mine, Limited, falsely and fraudulently made claim that under the said agreement of 14th December, 1908, the plaintiff was to hold the aforesaid 20,000 shares of stock in said company only as a security for the repayment of the sum of $5,000, and interest, and not as the absolute owner thereof.

"16. In order to carry out his said fraudulent design in breach of his said agreement with the plaintiff, the defendant paid to the plaintiff the sum of $5,100 in alleged settlement of his indebtedness to the plaintiff and endeavoured to transfer and to make a good title to the said 20,000 shares of stock to some one else and to deprive the plaintiff of his right, title and interest therein and thereto."

The pleading concluded by the plaintiff claiming "that it be declared that under the agreement of the 14th day of December, 1908, the plaintiff was entitled to receive from the defendant, 20,000 non-assessable shares of stock of the Lawson Mine, Limited, or a 250th interest in the Lawson Mine, as the absolute purchaser and owner thereof.

"2. That it may be declared that the plaintiff is entitled to receive payment out of court of the said sum of $5,000 and accrued interest and that the said sum with accrued interest may be paid out to him."

To this the defendant pleaded, amongst other

things, that the agreement above mentioned was given on the understanding on the part of both that it should only become operative when assented to by one Thomas Crawford, and that the said Thomas Crawford never assented to the agreement, and the same thereby became inoperative.

Upon this issue the action went down for trial before the Hon. Mr. Justice Riddell, who gave judgmen on the 26th October, 1909, whereby he declared the agreement valid and subsisting and referred the cause to the official referee of the court to assess the damages which the plaintiff had sustained by reason of the breach of the contract, and reserved further directions and costs until the referee should have made his report. The referee made his report on the 8th April, 1910, assessing the damages at $8,000. From this an appeal was taken by the defendant before the Chief Justice of the Common Pleas, who reduced the damages from $8,000 to $5,200. The plaintiff then appealed to the Divisional Court where the damages were increased to $6,700, and subject to this variation the report was confirmed. The judgment of the Divisional Court was affirmed by the Court of Appeal, and the defendant now proposes to appeal to the Supreme Court.

The nature of this action as disclosed by the statement of claim which asks for a declaration of the rights of the parties under the agreement in question, the circumstance that the relief asked for by the writ is an injunction, and the form of the judgment itself, which reserved further directions and costs, a provision under the old practice only found in decrees of a court of chancery, all in my mind abundantly establish the fact that this is a case

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which, under the old distinction which obtained between actions in law and equity, could only have been brought by bill in chancery; and if I am right in the view as to this preliminary point, the determination of the present application does not, in my judgment, afford any difficulty.

Practically the sole question discussed before me was whether or not the judgment proposed to be appealed from is a final judgment, the assumption being that if not a final judgment, no appeal would lie. But this view overlooks the provisions of section 38, subsection (*c*) of the "Supreme Court Act," which provides for an appeal to the Supreme Court in cases, whether the judgment was final or not, where it is given "in any action, suit, cause, matter or judicial proceeding in the nature of a suit or proceeding in equity originally instituted in any Superior Court, in any province of Canada other than the Province of Quebec." The section of the statute uses the word "judgment," not "final judgment," and the expression "judgment" is interpreted in section 2 of the Act as including any judgment, rule, order, decision, decree, decretal order or sentence thereof, when used with reference to the court appealed from.

The present case is not one in which an appeal to the Supreme Court is excluded by virtue of section 48, because the judgment below, as above pointed out, exceeds the sum of $1,000, and in my opinion therefore this is undoubtedly a case in which the court has jurisdiction by virtue of section 38, sub-section (*c*) of the Act.

The case of *Booth* v. *Ratté*(1) is a decision of this court, the nearest in character to the present application that I have been able to find. The action was in-

(1) 21 Can. S.C.R. 637.

stituted in the chancery division of the High Court of Justice, plaintiff claiming damages against several mill owners for obstructing the Ottawa River by throwing sawdust and refuse into it from their mills; and also a mandatory injunction restraining the defendants from continuing their unlawful acts. The judgment at the trial was in favour of the defendants; but on a re-hearing, judgment was given for the plaintiff, declaring that the defendants were guilty, and the plaintiff entitled to recover damages for the wrongful acts in the pleadings mentioned, with a reference to the Master to inquire and state the amount of damages. The original judgment declaring the plaintiff entitled to damages from the defendants was appealed through the Ontario courts, and finally confirmed by the Privy Council. The reference then went on before the Master. An appeal taken from his report was affirmed by the Court of Appeal, and a further appeal to the Supreme Court of Canada was dismissed.

It is true that in this case no question of the jurisdiction of the court seems to have been raised, but the reason for this is obvious, in that the relief claimed for in the action was one which originally could only have been given in a court of equity, and therefore it was considered that the appeal would lie whether the judgment was final or not.

In addition to *Booth* v. *Ratté*(1) there have been some other cases in the Supreme Court where the judgment or order complained of was from an officer of the court to whom a reference was made at the trial. These are *Doull* v. *McIlreith*(2); *McDougall* v. *Cameron*(3); *Grant* v. *Maclaren*(4), and *Bell* v. *Wright*(5).

(1) 21 Can. S.C.R. 637.
(2) 14 Can. S.C.R. 739.
(3) 21 Can. S.C.R. 379.
(4) 23 Can. S.C.R. 310.
(5) 24 Can. S.C.R. 656.

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The motion to affirm the jurisdiction is therefore granted. Costs in the cause.

Owen Ritchie, for the appellant. This is not a case in equity. In such a case damages could only be awarded if an injunction issued or specific performance was decreed. See *Ferguson* v. *Wilson*(1); *Lewers* v. *Earl of Shaftesbury*(2); *Patch* v. *Wyld*(3).

The judgment appealed against is not a final judgment. *Ville de St. Jean* v. *Molleur*(4); *McDonald* v. *Belcher*(5).

G. F. Henderson K.C. for the respondent. That the case is one in equity appears from *Bozson* v. *Altrincham Urban District Council*(6).

As to final judgment see *Rural Municipality of Morris* v. *London and Canadian Loan and Agency Co.* (7); *Baptist* v. *Baptist*(8).

THE CHIEF JUSTICE.—I would allow the appeal from the registrar with costs; the motion to affirm jurisdiction is dismissed with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Duff.

IDINGTON J.—Section 38, sub-section (*c*), of the "Supreme Court Act," is relied upon as giving jurisdiction to hear this appeal.

As the appeal proposed is from Ontario, it is upon

(1) 2 Ch. App. 77.
(2) L.R. 2 Eq. 270.
(3) 30 Beav. 99.
(4) 40 Can. S.C.R. 139.
(5) [1904] A.C. 429.
(6) [1903] 1 K.B. 547.
(7) 19 Can. S.C.R. 434.
(8) 21 Can. S.C.R. 425.

the latter part of said sub-section alone that the question raised must turn.

It reads as follows:

from any judgment in any action, suit, cause, matter or judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any superior court, etc.

We must avoid confusing the subject-matter of equitable jurisdiction with the proceedings in a purely common law action, by means of forms borrowed from courts of equity.

It is not the incident of any form or procedure which originally was a feature of a suit in equity, and which by reason of the progress or development of legal procedure has become a common mode of furnishing common law relief that is to determine what is here meant.

We must find the cause existent upon which a bill in equity might have been founded to invoke the equitable jurisdiction.

Now have we that presented in this case as launched?

It seems, in this branch of it which has been followed, to be an action purely and simply for breach of contract, and we have a judgment upon that contract awarding damages for breach of it and a reference to assess same.

It is to be observed, and not for an instant overlooked, that there was nothing else thenceforward in these proceedings than that which happens daily in many such actions as are purely of common law origin.

It matters not that there were used in executing this judgment many of the forms of procedure borrowed from the practice of the courts of equity. That does not change the nature of the suit, action or proceeding.

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The process of adopting the chancery forms of procedure for common law actions, began with the tentative adoption by the "Common Law Procedure Act" of mandatory orders, was enlarged by the "Administration of Justice Act" and thereafter by the passage of the judicature Acts. When the process first began it did not enlarge the jurisdiction of the Courts of Chancery.

What took place was the mere adoption and application of some of its methods of justice without driving the suitor to that court.

It was in the early stages of this development in Ontario that this court was created, and it was probably relative thereto and anticipatory of its outcome, as well as to the condition of things in other provinces, that the peculiar phraseology of this section was adopted.

I have no manner of doubt that the words "suit, action or proceeding" were used relative to the enforcing of some right or giving of relief which could only have been at one time got in courts of equity.

It, therefore, seems to me clear the word "proceeding" was not intended any more than the word "action" to extend the jurisdiction given by this part of the sub-section, beyond giving appeals in those cases arising out of an equitable cause or ground of suit in equity.

I do not overlook the fact that mixed up with this common law action there appears another cause in the statement of claim setting forth threatened fraud needing equitable relief by way of injunction.

This branch of the case, however, seems to have dropped out of sight and no longer to have been pursued.

It is a case of common law cause of action and a cause for a suit in equity joined in the same statement of claim of which one seems to have been by mutual understanding dropped, and the other retained and followed by steps which are of an interlocutory character, and so remain until the final judgment is entered up, and unfortunately, or perhaps fortunately, for the would-be appellant that entry must take place in a court from which no appeal lies here.

I think the motion must be allowed with costs.

DUFF J.—The registrar has upheld the jurisdiction of the court to entertain this appeal upon the ground that the judgment appealed from is a judgment in a suit or proceeding in the nature of a suit or proceeding in equity within section 38(*c*) of the "Supreme Court Act." The words of the section are these:

> (*c*) In an action, suit, cause, matter or other judicial proceeding originally instituted in any superior court of equity in any province of Canada other than the Province of Quebec, and from any judgment in any action, suit, cause, matter of judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any superior court in any province of Canada other than the Province of Quebec.

It is, I think, indisputable that this enactment contemplates two distinct classes of equitable proceedings; that is to say, proceedings which fall within the category of suits or actions and proceedings which are not suits or actions, but which are comprehended within the phrase, "cause, matter or proceeding."

I do not think it was intended to give a right of appeal in respect of any judgment upon an application for an injunction or receiver, for example, in a purely common law action. The judgment, to be ap-

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pealable must be given either in an action or suit in the nature of an action or suit in equity or in a proceeding (not in an action) of the same nature. The right of appeal can consequently be sustained under this provision only if the action out of which the appeal arises was in the nature of a suit in equity. The test of that appears to me to be not the character of the pleadings as originally delivered still less the nature of the claim as indorsed on the writ of summons, but rather the character of the action as actually tried. It is a common experience that the pleadings being moulded to suit the evidence or rather assumed to be so moulded an action may at the trial undergo a complete transformation under the practice as established by the Judicature Acts. It is to the nature of the action as it is in substance finally tried that we must look to ascertain its character for the purpose of applying this section.

The action we are concerned with was treated by the learned trial judge as an action for damages for breach of a contract to deliver shares, and it is clear that although an injunction was claimed the circumstances at the commencement and at the close of the action were such that there was no equity upon which a claim for an injunction or other distinctively equitable relief could properly be founded. In such circumstances a court of equity would, of course, have had no jurisdiction to award damages.

There was, it is true, a declaration of the plaintiff's rights under the contract upon which the action was founded; but such a declaration where it would not have been within the power of the court to award consequential relief would never have been made by a court of equity any more than by a court of common law. In

such circumstances relief of that character can now be given under the statutory authority conferred by the Judicature Acts, but it can be given in all classes of actions and does not fall within the category of equitable relief. *Chapman* v. *Michaelson*(1), at pp. 242 and 243. The action was, therefore, not an action in the nature of a suit in equity and the only question remaining is whether the judgment was a final judgment. That it was not is made perfectly clear by the decision of the Court of Appeal in *Cummins* v. *Herron*(2). There (in an action by a riparian proprietor to restrain the pollution of a stream and for damages) at the hearing an inquiry as to damages was ordered and further consideration reserved. The chief clerk having certified to the amount of the damages a motion to vary the certificate was adjourned into court to be heard with the further consideration of the action. On further consideration the motion to vary was refused and judgment was given for the sum awarded by the chief clerk with an injunction. It was admitted that the substantial question in the action was disposed of by the chief clerk's certificate, but it was held that the judgment in so far as it dealt with the motion to vary was interlocutory.

There can be no doubt, Jessel M.R. observed during the argument, that such an order is interlocutory whatever its results may have been.

In giving judgment the Master of the Rolls said:

The appeal from the refusal to vary the certificate is now too late and must fail. As the whole merits of the case were decided by the chief clerk's certificate the appeal from the order on further consideration must also be dismissed.

(1) [1909] 1 Ch. 238. (2) 4 Ch. D. 787.

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Mr. Henderson very properly called our attention to the decision of the Court of Appeal in *Bozson* v. *Altrincham Urban District Council*(1). In that case the action was dismissed by the order appealed from; the decision has, I think, no relevancy to the question before us on this appeal.

ANGLIN J.—This is an appeal from an order of the Registrar of this court affirming its jurisdiction to entertain an appeal from the judgment of the Court of Appeal for Ontario, disposing of an appeal from the report of a referee to whom the assessment of damages was referred. The registrar was of the opinion that this action falls within the purview of section 38(*c*) of the "Supreme Court Act," and that an appeal to this court therefore lies. Although as originally framed in the writ this was an equitable action, the statement of claim discloses merely a common law cause of action for damages for breach of contract, and the trial was proceeded with on this basis. Only common law and statutory relief is claimed. I have little doubt that in framing sections 36 and 38 of the "Supreme Court Act," Parliament did not contemplate that the equitable procedure of a reference to ascertain damages with a reservation of further directions might be resorted to in common law actions.

It is to be regretted that solely owing to the course taken at the trial of referring the question of damages and reserving further directions in this common law action a party claiming to be aggrieved should be deprived of a right of appeal to this court, against the assessment of damages, whether it is sought to

(1) [1903] 1 K.B. 547.

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attack merely the quantum of the allowance or what is probably of greater importance, the principle which formed the basis of the assessment. But as the statute stands we appear not to have jurisdiction to entertain this appeal because the action is not an action in equity or in the nature of a suit in equity (section 38(*c*)), and the judgment *a quo* is not a final judgment (section 36).

The appeal from the registrar must be allowed with costs and the motion to affirm jurisdiction must be dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellant: *Shilton, Wallbridge & Co.*

Solicitors for the respondent: *Cassels, Brock, Kelly & Falconbridge.*

1911

*March 22.
*March 24.

HALIFAX BOARD OF TRADE.....APPELLANT;

AND

GRAND TRUNK RAILWAY COMPANY OF CANADA.....RESPONDENT.

(HALIFAX RATES CASE.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Appeal—Leave by judge—Jurisdiction of Railway Board—Doubt as to decision of Board.

A judge of the Supreme Court of Canada will not grant leave to appeal from the decision of the Board of Railway Commissioners on a question of jurisdiction if he has no doubt that such decision was correct.

MOTION for leave to appeal from a decision of the Board of Railway Commissioners on a question of jurisdiction.

The Halifax Board of Trade applied to the Board of Railway Commissioners complaining that the Grand Trunk Railway Co. unjustly discriminated against the port of Halifax and in favour of other Atlantic ports in its differential rate of one cent per 100 pounds on all traffic between Halifax and Montreal and points east of Montreal.

The Board held that it was without jurisdiction to entertain the application for the following reasons.

The "Railway Act" provides that "where the provisions of this Act and of any special Act passed by the

*PRESENT:—Mr. Justice Anglin.

Parliament of Canada relate to the same subject-matter" those of the special Act shall prevail, and the Board was of opinion that the Act 62 & 63 Vict. ch. 5, confirming an agreement between the Grand Trunk Railway Board and the Government of Canada in respect to freight rates between Montreal and Halifax overrides the provisions of the "Railway Act" in respect to discrimination in rates. The Board of Trade then applied to Mr. Justice Anglin for leave to appeal from such decision of the Railway Board.

Code K.C. supported the application.

Biggar K.C. contra.

ANGLIN J.—Application for leave to appeal from a decision of the Board of Railway Commissioners, dismissing a complaint of the Board of Trade of Halifax against the Grand Trunk Railway Co., on the ground that the jurisdiction of the Board of Railway Commissioners over the subject-matter of the complaint is ousted by section 3 of the "Railway Act," which provides that

> * * * Where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the special Act shall, in so far as is necessary to give effect to such special Act be taken to override the provisions of this Act.

In granting leave to appeal under sub-section 2 of section 56 of the "Railway Act" a judge of this court should be satisfied not only that a question of the jurisdiction of the Railway Board is involved, but also that there is some reasonable doubt as to the soundness of the decision which it is sought to impugn.

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Anglin J.

By an agreement entered into between Her late Majesty, represented by the Minister of Railways and Canals, and the Grand Trunk Railway of Canada, on the 1st of February, 1898, it is amongst other things provided that the rate over the Intercolonial from Montreal to Halifax shall be, on all classes and special classes of freight received by it from the Grand Trunk Railway, one cent per 100 pounds over the rates between Montreal and St. John over the Intercolonial Railway, or between Montreal and Portland over the Grand Trunk Railway. By the agreement the Grand Trunk Railway Company bound itself to route *via* the Intercolonial Railway all traffic received by it west of Montreal and billed for points reached by the Intercolonial Railway. This agreement was confirmed by statute of the Dominion of Canada, 62 & 63 Vict. ch. 5. By section 2 it is provided that

> It shall be lawful for Her Majesty and for the company to do whatever is necessary to the carrying out on Her part, and on its part, of all the provisions contained in the main agreement to the true intent and meaning thereof.

In order "to give effect" to this "special" legislation, which is enacted with special reference to the Grand Trunk Railway and its operation(1), it is necessary to treat it as overriding *pro tanto* the provisions of the "Railway Act" against discrimination in rates, assuming that upon the merits, but for the provisions of the agreement and the statute ratifying them, a case of unjust discrimination might be established. "Railway Act," section 315, sub-section 4. I think this case is readily distinguishable from *Grand*

(1) "Railway Act," sec. 2(28).

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HALIFAX BOARD OF TRADE v. GRAND TRUNK RY. CO.

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Trunk Railway Co. v. *City of Toronto*(1). The subject-matter of the special legislation in this case is the rates of tolls between different localities — precisely the subject-matter dealt with by section 315, sub-section 4 of the "Railway Act." If, but for the special legislation, the extra charge of one cent per 100 pounds for carriage to Halifax would amount to an unjust discrimination, it is obvious that the special legislation is inconsistent with the general provision of the "Railway Act." Both may not stand together; both may not operate without either interfering with the other. *Tabernacle Permanent Building Society* v. *Knight*(2), at page 302. In order to give effect to the complainant's contention the Railway Board must either compel the Grand Trunk Railway Company to charge for freight destined for Halifax from any point on its line west of Montreal one cent less per 100 pounds for its transport to Montreal than it charges for carrying the same freight from the same point to Montreal if billed to St. John, or it must override the special Act of Parliament and compel the Intercolonial Railway to accept for freight received at Montreal from the Grand Trunk Railway billed to Halifax the same tolls as it charges for freight received from the Grand Trunk Railway billed to St. John. The Board certainly would not have jurisdiction to make the latter order against the Intercolonial Railway, which is excluded from the operation of the "Railway Act"(3). To make the former order against the Grand Trunk Railway Company would not only be unfair to that railway company — a consideration to which I should perhaps not now attach weight — but would

(1) 42 Can. S.C.R. 613. (2) [1892] A.C. 298.
(3) "Railway Act," sec. 5.

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involve a breach of the provisions of section 315 of the "Railway Act" as to equality of tolls.

I entertain no doubt whatever that the decision of the Railway Board, that it was without jurisdiction to entertain the complaint of the Halifax Board of Trade was correct. I am, therefore, of opinion that their application for leave to appeal should be refused with costs.

Leave refused with costs.

THE CANADIAN RUBBER CO.

1909

*Nov. 4, 5.

v.

KARAVOKIRIS.

Negligence—Injury to employee—Disobedience—Enforcing rules of factory—Verdict against weight of evidence—Misdirection—New trial—Costs.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal(1), which affirmed the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was maintained with costs.

The action was brought by the respondent against the company for the recovery of compensation for injuries sustained by him while employed in their factory. The jury found that the company was at fault for laxity in the enforcement of its regulations made to secure the safety of employees and that the plaintiff had contributed to the accident which occasioned the injuries sustained by him by disobedience to the orders given to him in pursuance of those regulations. The jury estimated the damages to the plaintiff at $3,500, made a deduction of $2,000 therefrom on account of the fault which they attributed to him and returned a verdict against the company for $1,500. Upon this verdict judgment was entered against the company by the trial judge and this judgment was affirmed by the Court of Review.

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

(1) Q.R. 36 S.C. 425.

1909

CANADIAN RUBBER CO. v. KARAVOKIRIS.

The principal grounds urged by the company on their appeal to the Supreme Court of Canada were that the jury had been misdirected by the trial judge and that the findings and verdict were against the weight of evidence.

After hearing counsel on behalf of the parties, on the appeal, the Supreme Court of Canada directed that a new trial should be had between the parties, that there should be no costs allowed on the appeal to the Supreme Court of Canada, and that the costs in the courts below should follow the event of the new trial.

Appeal allowed without costs.

T. Chase Casgrain K.C. and *Heneker K.C.* for the appellants.

Barnard K.C. and *Jacobs K.C.* for the respondent.

FRANCIS G. GALE (DEFENDANT) . . . . APPELLANT;

AND

MARCELLIN BUREAU (PLAINTIFF) . . RESPONDENT.

1910
*Nov. 15.
1911
*Feb. 21.

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

Rivers and streams—Industrial improvements—Raising height of dam—Nuisance—Damages—Expertise and arbitration—Right of action—Measure of damages—Practice—Future damages—Pleading—New objection raised on appeal—Prescription—R.S.Q., 1888, *arts.* 5535, 5536—*Arts.* 2242, 2261 *C.C.*

The provisions of the statutes respecting the improvement of watercourses in the Province of Quebec, permit the raising of the height of dams erected by proprietors of lands adjoining streams; this right is subject to the liability to make compensation for all damages resulting to other persons from such works.

The mode of ascertainment of such damages by the arbitration of experts provided by article 5536 of the Revised Statutes of Quebec, 1888, does not exclude the right of action to recover compensation in the courts.

In such cases the measure of damages is the amount of compensation for injuries sustained up to the time of the action; they ought not to be assessed once for all, *en bloc*, but recourse may be reserved in regard to future damages arising from the same cause.

Per Idington and Anglin JJ.—Objections based upon provisions of enabling statutes which have not been set up in the pleadings nor relied upon in the courts below cannot be entertained upon an appeal to the Supreme Court of Canada. *Hamelin* v. *Bannerman* (31 Can. S.C.R. 534) followed.

Per Anglin J.—An action, brought in 1908, for recovery of damages in respect of injuries occasioned by improvements executed in 1904, upon works constructed many years before that time, is not subject to the prescription of thirty years; nor can the prescription provided by article 2261 of the Civil Code be applied where the action has been commenced within two years from the time the injuries complained of were sustained.

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

1910

GALE v. BUREAU.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Saint Francis, by which the plaintiff's action was, in part, maintained with costs.

The appellant (defendant) was the owner of mills and factories, at Waterville, Que., in connection with which he also owned a dam, which had been erected in the Coaticook River about the year 1856, and, in 1904, he made improvements to the dam and placed flash-boards upon it which slightly increased its height and had the effect of penning back the waters of the stream so as to flood the lands of the plaintiff and cause the destruction of his bridge and the drowning of some of his cattle during the Spring and Summer of the year 1907. In the year 1908, instead of availing himself of the method provided by article 5536, R.S.Q., 1888, for ascertaining the amount of damage and abating the nuisance, the plaintiff brought an action in the Superior Court for the District of Saint Francis to recover compensation for the injuries he had thus sustained, in consequence of the raising of the dam, which was maintained, in part, by the trial judge who refused, however, to make an assessment of the damages resulting from the works once for all, *en bloc,* allowed only compensation for the injuries sustained up to the time of the action and reserved to the plaintiff any recourse which he might have for future damages arising from the same cause. This judgment was affirmed by the Court of King's Bench which also held, on the appeal by the defendant, that he had acquired no prescriptive rights in respect of the dam by user for a period of over thirty years. The defence had not set up the provisions of the statutes respect-

ing the improvement of watercourses, but, on his appeal to the Supreme Court of Canada, the defendant took the objection that the right of action for damages sustained as the result of the works in question had been taken away by the effect of articles 5535 and 5536, R.S.Q., 1888.

The questions at issue on the appeal are stated in the judgments now reported.

Lafleur K.C. and *C. D. White* for the appellant.

Panneton K.C. and *LeBlanc* for the respondent.

THE CHIEF JUSTICE.—From time immemorial, under the French civil law, the proprietor whose land borders on or is crossed by a running stream had the right subject to certain restrictions, to use the waters of that stream for certain limited purposes. By statute 19 & 20 Vict. ch. 104, consolidated, in 1861, as chapter 51, C.S.L.C., and, in 1888, as article 5535, R.S.Q., and, in 1909, as article 7295, R.S.Q., those proprietors were authorized to improve such watercourses for industrial purposes subject to the payment of such damages as might result from these improvements to other persons, to be ascertained by experts. That the plaintiff (respondent) suffered damage by reason of the construction of the defendant's (appellant's) dam must, I presume, be admitted here in view of the concurring judgments below. Nor is it open to us, for the same reason, to reconsider the amount of such damages, if they were properly assessed. The only question we are now called upon to decide is with respect to the mode of assessing those damages. They were not assessed by experts as provided by the

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The Chief Justice.

statute, and the question is: Should we hold that, if the regulations or formalities fixed by the statute for the purpose of ascertaining the damages resulting from the exercise of the right to make improvements are not observed, the party injured is without a remedy in the courts on the assumption that such was the intention of the legislature? This question arose for the first time in the Quebec courts, as far as I have been able to ascertain, in 1869, in the case of *Nesbitt* v. *Bolduc*(1), 1 Loranger, Civil Code, p. 140, No. 25, and it was then held that the recourse given by the statute is not exclusive, and the remedy by direct action in a competent court is not taken away. That case was followed in *Emond* v. *Gauthier*(2); in *Breakey* v. *Carter*(3); in *Cie. de Pulp de Mégantic* v. *Village d'Agnès*(4); and in *Leclerc* v. *Dufault*(5). It would seem rather a hazardous undertaking to interfere with such a well settled jurisprudence, especially as there is no provision in the Quebec Municipal Code for the appointment of experts by the warden of the county, as the statute requires, if the parties should fail to agree. It may be also that the damage to be recovered arises with respect to property situate within the limits of a town or city municipality where there would be no warden, the municipal organization of Quebec differing in this respect from that which, I understand, exists in other provinces. The warden in the Province of Quebec is the head of the county council which is composed of the mayors in office of the local municipalities subject to the provisions of the Municipal Code (arts. 246, 247 M.C.); and that code does not apply to cities and

(1) 15 R.L. 513 note.
(2) 3 Q.L.R. 360.
(3) 7 Q.L.R. 286.
(4) Q.R. 7 Q.B. 339.
(5) Q.R. 16 K.B. 138.

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towns; (art. 1). To reverse, therefore, on the ground that the damages were not ascertained by experts, as the statute provides, might mean that the injured party would be without any recourse. The effect of the reservation in the judgment of the right to the plaintiff to claim damages which may arise in the future is well understood by those familiar with Quebec procedure, but does not call for consideration on this appeal. I may, however, say that the course followed by the trial judge in limiting the damages to those found to have been actually sustained has the sanction of the highest authority. Sourdat, Nos. 110 and 132 bis.

I would dismiss the appeal with costs.

DAVIES J. agreed with Duff J.

IDINGTON J.—The Parliament of old Canada enacted what still remains part of the statute law of Quebec, as follows:

5535. Every proprietor of land may improve any watercourse bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, works and machinery of all descriptions, and, for this purpose, may erect and construct in and about such watercourse all the works necessary for its efficient working, such as flood-gates, canals, embankments, dams, dykes and the like.

Following this clause are a number of provisions for determining by means of arbitration the amount of compensation due those damnified by exercise of said power.

Disregarding the arbitration proceedings provided by the Act, the respondent brought an action complaining of appellants having, in A.D. 1903, raised this dam constructed, it is assumed, but not proven,

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Idington J.

in an exercise of this statutory power nearly half a century previously.

The appellant takes the ground now, for the first time, that the dam was constructed in the lawful exercise of said statutory power, and all he has done being, therefore, legal, no action can be founded upon acts done within the exercise of such power, and he alleges if any remedy exists it must be found in the arbitration proceedings provided in such case by the said Act.

The appellant will not admit, though the learned trial judge has found as a fact, that this dam was raised, as respondent's pleadings allege, still higher than when constructed.

Assuming, however, the fact of such increased height in the dam, the first question we would have to ask, if we had to solve all the questions raised, would be whether or not this statutory power, which does not embody any express right to exercise it from time to time, can be repeatedly exercised and added to.

However that may be I am quite sure that any person thus relying upon a statute must plead it and bring himself within its protection. I cannot find anything of that sort in the appellant's pleadings to give him even a colour of right to set up now for the first time this new defence.

The respondent has relied upon the case of *Hamelin* v. *Bannerman*(1), as an answer to this new defence. I think the point is well taken.

I do not think the reply of appellant's counsel trying to distinguish that case from this by reason of that turning upon an arbitration provided for in a

(1) 31 Can. S.C.R. 534.

deed and this being upon a statute, meets the point taken.

An arbitration, as a condition precedent, if properly framed may be as effectual an answer to an action as can well be, and yet, when so, it must be pleaded or claimed as defence before the case reaches here.

The principle upon which that case went was the need for this. The principle applies here just as well and is so well known it does not need authority.

The profuse denials in appellant's pleas might have been, as sometimes happens, forgotten, as the real issues to be tried and new ones started at the trial, threshed out there and afterwards, so that the case tried differed so much from that upon which issue was joined, as to enable us to give effect to a point tried in fact though not pleaded.

The pleading could be amended to conform to the actual issues really decided.

That is not this case. The pleading in defence is all denial or relates to original construction and in no way pretends to claim a right to increase the height. Indeed, the pleas bearing upon the right of original construction need much charity to extend them to cover rights acquired under this statutory power. And, for aught that appears, the dam may have been built before the statute.

The respondent has only had damages assessed up to the trial, and I hardly see how he could recover more from a defendant who seems to have inadvertently done what is complained of. The fact is the case has been ended in the only way it should, on the findings of fact and as pleaded, be ended.

The appeal should be dismissed with costs.

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DUFF J.—The authority conferred by article 7295, R.S.Q., 1909, appears to be sufficient to justify the alterations in the appellant's dam which took place in 1904. I think it is too narrow an interpretation of that enactment to hold that such alterations are not permitted when occasion for them arises. The language itself is sufficient to create such authority and the obvious purpose of the legislation — to enable the proprietors of land to utilize waterways passing through or by it, in the operation of mills and machinery — seems to require that the words should be read without any such restriction upon their ordinary meaning.

The determination of the other points is ruled by the authority of *Breakey* v. *Carter*(1). The effect of that decision (by which this court is bound) is that the right given by article 7295, in so far as it justifies the penning back the waters of a stream upon the upper riparian proprietors, is to be regarded as a right of servitude to which is attached an obligation to indemnify the proprietor who is prejudiced by the exercise of it. In that view there appears to be no reason why the exercise of this statutory right should not, from time to time, as damage thereby accrues, give rise to a right to claim the correlative indemnity.

The decision mentioned also meets the objection that the respondent's right to compensation is limited to that ascertained in the manner pointed out by the statute.

There may be difficulties in reconciling the decision on this point with the generally recognized rule, that where a right of compensation is given by a statute and by the same enactment extra-judicial machinery

(1) Cass. Dig. (2 ed.) 463.

is provided for ascertaining the amount, the matter of compensation is not cognizable by the courts until, at all events, the amount has been fixed in accordance with the statutory method. This, however, is only a rule of construction which must, like all such rules, yield where a contrary intention appears; and it is possible that the difficulties of putting into operation the machinery provided by this statute are sufficient to support the inference that the legislature did not intend, in this case, to exclude recourse to the courts.

At all events, whatever view one might have been disposed to take, had the question now presented itself for the first time, the decision of this court, sanctioned moreover by the subsequent re-enactment of the statute in identical terms, is conclusive of the point on this appeal.

ANGLIN J.—The plaintiff, Bureau (respondent) sues to recover for the flooding of his farm, caused, he alleges, by a dam owned by the defendant and in part due to the raising, in the year 1904, of the height of this dam. His original claim was for $3,053.50 — $800 in connection with a bridge, $200 for cattle destroyed, $2,000 for damages to the land once for all, and $53.50 for a surveyor's expenses in making measurements and preparing a plan shewing the flooded lands for use on the trial.

The Superior Court rejected the first two items as insufficiently proved, and allowed the plaintiff $100 damages for injury to his land due to the raising of the dam up to the date of the commencement of the action, and $53.50 for the expenses of the surveyor, and the cost of the plan prepared by him — refusing to assess damages once for all because the works which

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Anglin J.

actually caused the damage allowed for are not permanent in character and the damages themselves are variable, but reserving to the plaintiff a right of recourse for future damages. From this judgment the plaintiff appealed to the Court of Review seeking to have the amount awarded to him increased and claiming assessment of damages once for all. His appeal was dismissed(1) and he has not further pursued it.

From the judgment thus affirmed the defendant appealed to the Court of King's Bench on the ground that there had been no increase in the height of the dam in 1904, that he had acquired a prescriptive right to flood the plaintiff's lands by thirty years' user of the dam and that the compensation or damages, if the plaintiff is entitled to recover, should have been estimated once for all as demanded in his declaration. His appeal was dismissed, the majority of the court holding that damage by additional flooding owing to increased height of the dam was sufficiently established by the evidence; that the prescription of thirty years relied upon had no application to the claim for such damages; and that it was competent for the court, while declining to assess compensation or damages once for all as claimed by the plaintiff, to award damages in respect of injury suffered prior to the bringing of the action.

On his appeal to this court the defendant takes the following grounds in his factum:

First.—The statute provides a special way of assessing the damages, and the respondent must proceed in that way, and not by an action before the courts.

Secondly.—Even if the right of action is not taken away by the statute, it is extinguished by the prescription of 30 years.

Thirdly.—The compensation or damages should have been estimated "once for all" as contemplated by the statute, and as prayed for by respondent in his declaration.

(1) Q.R. 36 S.C. 85.

The trial judge found that the height of the dam was slightly raised in 1904 — so much the defendant's expert almost admits — and, upon conflicting evidence, he also found that the effect of this increase in height was that the lands of the defendant were flooded more extensively and for longer periods after the year 1904 than they had been theretofore. These findings of fact have been affirmed by the Court of King's Bench. Though impugned at bar, they are well supported by the evidence and should not, in my opinion, be disturbed by this court.

That the provisions of articles 5535 and 5536, R.S.Q. (1888), preclude any right of action for such damages as the plaintiff sustained by reason of the increase made in the height of the dam appears not to have been urged by the defendant in the provincial courts. This objection has been raised upon this appeal — probably because of a suggestion in the dissenting judgment of Mr. Justice Trenholme. Apart from that formidable difficulty (*Hamelin* v. *Bannerman* (1)), and whatever view might be taken upon this question were it *res integra,* for me it is concluded against the appellant by the decision in *Breakey* v. *Carter* (2), which, notwithstanding the observations of Taschereau J. in *Jones* v. *Fisher* (3), at page 525, for reasons fully stated in *Stuart* v. *Bank of Montreal* (4), at pages 541 *et seq.,* I regard as not open to review in this court.

It is obvious that the prescription of thirty years relied upon by the appellant has no application to the plaintiff's claim in respect of injuries sustained as a result of the raising of the dam in 1904. I fully ap-

(1) 31 Can. S.C.R. 534, at p. 540.
(2) Cass. Dig. (2 ed.) 463.
(3) 17 Can. S.C.R. 515.
(4) 41 Can. S.C.R. 516.

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Anglin J.

preciate Mr. Justice Lafontaine's difficulty(1) in concurring with the learned trial judge in holding article 1608 C.C., applicable, by analogy, to the plaintiff's claim. The judgment in review points out the clear distinction which exists between the facts of the present case and those upon which the claim in *Breakey* v. *Carter*(2) was held by this court to fall under article 1608 C.C. The judgment in *Breakey* v. *Carter* (2) appears to be also opposed to the applicability to the present case of article 2261 of the Civil Code. But if articles 2261 and 2267 C.C., apply, and if, although these articles have not been pleaded, under article 2188 C.C., the court should of its own motion supply the defence and hold that the plaintiff's right of recovery is limited to damages sustained within two years before the date of his writ — 3rd February, 1909, — (*Breakey* v. *Carter*(2)) — they do not help the defendant. The learned trial judge has in effect found that the plaintiff sustained his only real injury in 1907 — of course in the Spring and Summer of that year — and the allowance of $100 was no doubt in respect of that injury which occurred within two years before action. Article 2261 C.C., if pleaded would, therefore, not be an answer to that part of the plaintiff's claim in respect of which he recovered judgment.

The appellant contends that if the plaintiff has a right of action it can only be for an indemnity once for all, and that having brought his action in this form he should not be allowed to recover in respect of past damages only, with reservation of rights in regard to future damages. I incline to agree with the view of Mr. Justice Archambault that the court had

(1) Q.R. 36 S.C. 85, at p. 87. (2) Cass. Dig. (2 ed.) 463.

the right to grant damages for the past and to refuse, at present, to allow or to assess them for the future. But I think we are not now concerned with that question. The plaintiff's claim was for damages once for all. He has been allowed only $153.53. He appealed unsuccessfully to have this amount increased. He is not pursuing this claim further in the present action. The dam may be lowered and the plaintiff may sustain no further actionable damages. He may never bring another action. If he does and if it be found that he has sustained further loss, as a result of the defendant's work of the year 1904, it may then be necessary to determine whether he is entitled to a second assessment of damages and to consider the value and the efficacy of the reservation of his right of recourse in respect of future damages made by the trial judge. But, at present, the plaintiff has a judgment for damages to which upon the evidence he appears to have been entitled, whether his claim should be regarded as confined to past damages or as necessarily including full indemnity for the past and future exercise of a servitude in respect of his lands by the defendant. With any future right of action which he may have we are not presently concerned.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cate, Wells, White & McFadden.*

Solicitors for the respondent: *Panneton & Leblanc.*

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*March 3.
*March 7.

THE NORTHWEST THRESHER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

SARAH ELIZABETH FREDERICKS (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Homestead lands—"Land Titles Act," 6 Edw. VII. c. 24; 8 Edw. VII. c. 29 (Sask.)—Exemption from seizure—Registered incumbrance—"Exemptions Ordinance," N.W.T., Con. Ord., 1898, c. 27.

Homestead lands, exempt from seizure under execution by the North-West Territories "Exemptions Ordinance," are not affected by any charge or incumbrance in consequence of the registration of writs of execution against the homesteader under the provisions of the "Land Titles Act" of the Province of Saskatchewan, 6 Edw. VII. ch. 24, sec. 129, as amended by 8 Edw. VII. ch. 29, sec. 10; consequently, the transferee of such lands under conveyance from such homesteader acquires them free and clear of any incumbrance resulting from the registration of such execution. Judgment appealed from (3 Sask. L.R. 280) affirmed.

APPEAL *per saltum* from the judgment of Newlands J., in the Supreme Court of Saskatchewan (1), maintaining the plaintiff's action with costs.

The appellants recovered judgment against one Fredericks, who was the owner of homestead lands, exempted from seizure under execution by the North-West Territories "Exemptions Ordinance" (Con. Ord.,

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

(1) 3 Sask. L.R. 280.

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1898, ch. 27, sec. 2, sub-sec. 9), and caused a writ of execution against the lands of their judgment debtor to be registered in the Land Titles Office under the provisions of the "Land Titles Act" of Saskatchewan, 6 Edw. VII. ch. 24, sec. 129, as amended by 8 Edw. VII. ch. 29, sec. 10. Subsequently, Fredericks transferred his homestead lands to his wife, the respondent, and, upon issuing the certificate of title to her, the registrar indorsed thereon a memorandum that the title to the lands was subject to a charge or incumbrance in consequence of such registered execution. The respondent, thereupon, brought the action for a declaration that the execution did not constitute any charge or incumbrance upon the lands in question and for an order that the indorsement so made by the registrar should be removed from her certificate of title. At the trial, Mr. Justice Newlands maintained the plaintiff's action, and held that the writ of execution did not charge lands exempted from seizure, that the transferee acquired the lands free from any charge thereon in consequence of the registration of the writ of execution, and directed the registrar to remove the memorandum of incumbrance from her certificate of title. The defendants obtained leave, by order of the registrar of the Supreme Court of Canada, sitting as judge in chambers, to appeal direct from the judgment of the trial judge.

Mackenzie K.C. for the appellants.

George F. Macdonell, for the respondent, was not called upon for any argument.

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NORTHWEST THRESHER CO. v. FREDERICKS.

Idington J.

The judgment of the court was delivered by

IDINGTON J.—The exemption, by law, of the lands here in question freed them, and was intended to free them, from the operation of any writ of execution against the lands of the appellants' debtor. The debtor was, therefore, entitled to dispose of them as he saw fit. Hence the respondent was entitled to receive a conveyance thereof from the debtor as free from the operation of such writs of execution as he was to hold them. It follows that she became entitled to have the certificate of title cleared from any such apparent charge.

We are, therefore, under no necessity of passing upon the other questions raised by the appellants' counsel.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Mackenzie, Brown & Co.*
Solicitors for the respondent: *Black & Hilliar.*

ANDREW FINSETH (PLAINTIFF) .....APPELLANT; 1911

*Feb. 28.
*March 21.

AND

THE RYLEY HOTEL COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Liquor laws—"Liquor License Ordinance," ss. 37 and 57—Cancellation of license—Jurisdiction of judge—7 Edw. VII. c. 9, s. 14 (Alta.).

The provisions of section 57 of "The Liquor License Ordinance" (Con. Ord., 1898, ch. 89), confer upon a judge of the Supreme Court of Alberta power to direct the cancellation of liquor licenses which have been obtained in violation of sub-section 3, of section 37, of that ordinance as amended by section 14 of "The Liquor License Amendment Act, 1907," 7 Edw. VII. ch. 9, of the Province of Alberta.

APPEAL from the judgment of the Supreme Court of Alberta setting aside an order by Harvey J., by which a license issued to the respondents for the sale of malt and spirituous liquors was directed to be cancelled.

Special leave for an appeal to the Supreme Court of Canada was granted on application (1); the questions raised on the appeal are stated in the judgments now reported.

C. A. Grant for the appellant.

H. H. Parlee for the respondents.

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

(1) 43 Can. S.C.R. 646.

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FINSETH v. RYLEY HOTEL CO.

Davies J.

GIROUARD J.—I agree in the opinion stated by my brother Davies.

DAVIES J.—The sole question involved in this appeal is whether or not, under section 57 of the "Liquor License Ordinance" for Alberta, the judge of the Supreme Court of the province had jurisdiction to hear a complaint that the license had been obtained in violation of section 37 of the ordinance.

The contention on the part of the licensee, sustained by a majority of the court of appeal, was that the "violation of any of the provisions respecting licenses" referred to in section 57, should be read and construed as referable only to those sections of the ordinance which fall under the sub-title "licenses," and that the whole of section 37, under the third subsection of which the trial judge proceeded, related to procedure only.

I am unable to take the view of the statute which prevailed with the majority of the court of appeal, and concur in that taken by Stuart J. and by the judge who heard the complaint, now Chief Justice Harvey.

Section 57 gives jurisdiction to the Supreme Court over complaints that a

> license or transfer *has been obtained* by fraud or in violation of any of the provisions respecting licenses.

It would seem, therefore, that the jurisdiction given to the court is limited to violations of any of the provisions of the ordinance with respect to *obtaining* licenses, and does not apply to violations subsequent to the granting of the licenses.

Section 37 provides that a license shall not be granted to any person who has not obtained a recommendation in writing from at least twenty of the forty

householders nearest in a direct line to the proposed licensed premises, and also provides for the time when it must be signed, and for verification of the signatures.

Sub-section 3 reads as follows:

(3) No application for a new license shall be entertained in respect of any hotel or wholesale premises not situated in a city or town; or in respect of any hotel license in a village containing less than forty dwelling houses or in any place containing less than forty dwelling houses within an area not greater than 960 acres.

This section 37 is found in that part of the Act containing a sub-title "Applications for Licenses," and it is contended, and has been held, that section 57 giving jurisdiction over complaints that the license attacked had been obtained "in violation of any of the provisions respecting licenses," does not extend to this section 37, but must be confined to the sections 12 to 23 under the sub-title "Licenses." It is, in my judgment, a narrow and improper construction so to limit what appears to me to be the fair and obvious meaning of section 57. That section, in my judgment, relates to fraud and violation of the provisions of the act antecedent to the granting of the license. It covers all cases where it is shewn that a license has been obtained either by fraud or in violation of any of the provisions of the ordinance, including section 37.

The latter section comes as well within the words "any of the provisions respecting licenses" as do the sections 12 to 23.

Our attention was also called to section 48, giving the Board of License Commissioners power at any time to cancel licenses in certain specified cases. I do not see any necessary conflict between the powers of the Board under this section and that of the court under section 57.

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The jurisdiction of the latter is limited to the cancelling of licenses obtained either by fraud or in violation of pre-requisite provisions, compliance with which was necessary to obtain the license.

That of the Board seems confined to the violation, after the granting of the license, of conditions which the ordinance makes the continuous existence of, or continuous compliance with, necessary.

I would allow the appeal with costs here and in the court appealed from, and affirm the jurisdiction of Harvey J. to make the order in question.

IDINGTON J.—It seems to me that the plain terms of section 57 of the "Liquor License Act" conferred upon the learned judge who acted, power to cancel as he did the license in question, issued in violation of the provisions of the Act respecting licenses.

I am unable to follow the reasoning given for interfering with his exercise of this power.

Even if the court below had, as I much doubt, any power to interfere with his decision, it seems to me upon the facts that the decision is not well founded.

The appeal should be allowed with costs.

DUFF J.—The "Liquor License Ordinance" of the North-West Territories (still in force in the Province of Alberta) enacts by section 37:

A license shall not be granted to any person to sell intoxicating liquors outside of incorporated cities or towns who has not first obtained the recommendation in writing in form B.

(2) Such recommendation must be signed within the period of sixty days immediately prior to the day it is so received by the territorial treasurer and the justice, notary or commissioner before whom the same is signed shall certify the date upon which each person signs such recommendation.

(3) No application for a new license shall be entertained in

respect of any hotel or wholesale premises not situated in a city or town; or in respect of any hotel license in a village containing less than forty dwelling houses or in any place containing less than forty dwelling houses within an area of not greater than 960 acres.

And by section 57:

If within sixty days from the granting of a license or a transfer of a license any person deposits with the clerk of the Supreme Court for the judicial district wherein the licensed premises are situated $10 as security for costs, together with a complaint (verified by affidavit) that the said license or transfer has been obtained by fraud or in violation of any of the provisions respecting licenses, on application the judge may by means of an originating summons investigate and summarily hear and dispose of the complaint and may direct the cancellation of the license or dismiss the complaint and award costs in the same way as costs are awarded in proceedings in the Supreme Court.

Upon an application to Mr. Justice Harvey under the last mentioned provision for the cancellation of a license alleged to have been obtained by the respondents "in violation" of section 37, sub-section 3, the learned judge directed the cancellation of the license. On appeal it was held by the full court that the authority conferred by section 57 would not support the annulment of a license for non-compliance with the requirements of section 37(3). This view is based upon two grounds. First — that the provisions of the last mentioned section are directory merely; and secondly, — that the phrase "provisions respecting licenses" denotes those provisions only (sections 12-23(*a*)) to be found under the title "Licenses."

As to the second of these grounds the phrase "provisions respecting licenses" in its *primâ facie* meaning certainly includes all such provisions and the context indicates an intentional reference to all provisions which it is ordained that an applicant shall observe as a prerequisite to procuring the grant of a license. There is nothing, moreover, in

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the character of the provisions found under the title mentioned as compared with those to be found, for example, under the title "applications for licenses" which suggests a reason for supposing that the jurisdiction given by section 57 was intended to be limited to cases of non-observance of the first mentioned provisions, and I think there is no satisfactory ground for so limiting it.

As to the first of the grounds upon which the court below proceeded the language appears to me to be very clear. "No application * * * shall be entertained" unless a certain state of facts exists — appears to be a sufficiently plain way of expressing the intention that the existence of that state of facts is to be an essential condition of the right of the applicant to have his application considered. It is not very relevant to say that the legislature has in other cases enacted that the grant of a license contrary to a particular provision shall be void. It may be that in the absence of some such provision as section 57 persons attempting to impeach the grant of a license on the ground that the conditions laid down in section 37(3) were non-existent would encounter obstacles almost if not quite insurmountable; it was probably (in part, at least,) to avoid such difficulties that section 57 was enacted.

Counsel for the respondents relies upon section 48, suggesting that such cases as this would fall within the cognizance of the commissioners under that section. It is sufficient to say that the authority of the commissioners to act under section 48 is, by the express terms of the section, exercisable with reference to the state of affairs existing at the time of its exercise; the section confers no authority to cancel a

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license by reason of the fact alone that a "violation" of the Act has been committed in obtaining it.

ANGLIN J. agreed with Duff J.

Appeal allowed with costs.

Solicitors for the appellant: *Bishop, Grant & Delavault.*

Solicitors for the respondents: *Boyle, Parlee & Co.*

1911
*March 27.

THE CANADIAN PACIFIC RAILWAY COMPANY AND THE CANADIAN NORTHERN RAILWAY COMPANY ..... APPELLANTS;

AND

THE REGINA BOARD OF TRADE... RESPONDENT.

(REGINA RATES CASE.)

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Appeal—Setting down for hearing—Form of submission—Defining questions of law.

The Supreme Court of Canada will not entertain an appeal under section 56(3) of "The Railway Act," R.S.C. (1906), ch. 37, unless some specific question is stated, or otherwise defined, in the order granting leave to appeal made by the Board of Railway Commissioners for Canada which, in its opinion, is a question of law.

MOTION to extend the time for the inscription for hearing of an appeal on leave granted by the Board of Railway Commissioners for Canada under section 56 (3) of the "Railway Act."

The circumstances in which the application was made are stated in the judgment now reported.

Larmonth for the motion.

Orde K.C. contra.

Coram Anglin J., in Chambers.

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CANADIAN PACIFIC RY. CO. v. REGINA BOARD OF TRADE.

ANGLIN J.—A motion to extend the time for setting down an appeal from an order of the Board of Railway Commissioners, leave to appeal having been granted by the Board on the ground that the application before it involved questions of law. The questions of law in respect of which the Board has given leave are not stated or otherwise defined in its order granting leave. The statute clearly contemplates that the Board shall, before granting leave to appeal, determine that any question upon which an appeal to this court is allowed is a question of law. This involves the idea that the leave of the Board shall be given in respect of one or more specific questions, which should be stated, or otherwise sufficiently defined, in the order granting the leave. It is not for the parties, under a general order for leave to appeal, to raise such questions as they may wish to prefer, as questions of law; neither is it for this court to decide whether any question raised upon an appeal is or is not a question of law. The statute confers this power and imposes this duty upon the Board whose decision upon it is not open to review. Because the order of the Board granting leave to appeal did not specify or define, by reference or otherwise, the question or questions of law in respect of which leave to appeal was given, this court, in June last, refused to entertain an appeal in the *"Gatineau Valley Railway Case."** Following that judgment, the present motion

**The Canadian Pacific Railway Co.* v. *City of Ottawa Residents.*—This case came on for hearing before the Supreme Court of Canada on the 15th of June, 1910. On the case being called, the court took objection to the form of the submission of the case by the Board of Railway Commissioners and, after consultation, delivered the following opinion: "The majority of the court is of the opinion that we cannot hear the appeal at the present time, at least, as the Board of Railway Commissioners has not submitted any question which, in the opinion of the Board, is a question of law."

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must be refused. If, however, on application the Board sees fit to make an order giving leave to appeal in respect of specific questions which in its opinion are questions of law, this motion may be renewed.

Application refused.

THOMAS ALLEN .....APPELLANT; 1911

AND *March 28.
*March 31.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal law—Trial for murder—Improper admission of evidence—New trial—Substantial wrong or miscarriage—Criminal Code, s. 1019.

By section 1019 of the "Criminal Code" it is provided that "no conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected or that something not according to law was done at the trial, * * * unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

Held, reversing the judgment appealed from (16 B.C. Rep. 9), Davies and Idington JJ. dissenting, that where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shewn that it did, in fact, so operate, and although the evidence which was properly admitted at the trial warranted the conviction, the court of appeal may order a new trial.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the conviction of the appellant, at the trial, on an indictment for murder, upon a reserved case stated by the judge who presided at the trial.

The case reserved is stated in the judgments now reported.

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

(1) 16 B.C. Rep. 9.

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J. A. Ritchie for the appellant.

McKay K.C. for the respondent.

The Chief Justice.

THE CHIEF JUSTICE.—I did not intend to add anything to what I said when judgment was rendered on this appeal; but in deference to the learned opinions of my dissenting brothers I will endeavour to state the reasons for the conclusions I reached.

The appellant, a soldier in garrison at Victoria, B.C., was tried, at the last Autumn assizes, on the charge of murdering his captain, one Peter Elliston; and, having been found guilty, was sentenced to be hanged. Subsequently, on the application of counsel, the learned Chief Justice, who presided at the trial, reserved a case for the opinion of the provincial Court of Appeal. The point reserved is stated in these words:

> At the said trial the accused gave evidence on his own behalf, and during his cross-examination by Mr. Aikman, the counsel for the Crown, the following occurred as appears by the transcript of the evidence hereto made by the official stenographer present at the said trial, at page 100 thereof:—
>
> Mr. Aikman: Q. You remember Corrigan giving his evidence in the Police Court, don't you?
>
> A. Yes, sir. Well I remember some of it, sir. Most of it was given in a very low tone of voice, sir.
>
> Q. Do you remember him saying this, in answer to a question of, what did Allen say, the answer was, "He threatened Captain Elliston, he said old Peter should be in charge of a ranch instead of a body of men."
>
> A. Well, now, sir, that is an expression that I would not be guilty of using.
>
> Q. That is not the question; I ask you if you remember him saying that?
>
> A. No, sir.
>
> Q. You don't remember him saying that?
>
> A. Oh, I remember him saying that, sir, in his evidence that morning.
>
> Q. Then he was asked this question: "Did he say he was done

an injustice; give his words? (A.) He said he was treated harshly by Captain Elliston; he said he had a bullet for Captain Elliston; and every bullet had its billet, and he had one that would find its mark." Do you remember him saying that?

A. No, sir, I don't remember him saying that; but I can say from that, that is all nonsensical. No man of common sense * * *

Q. We will see that later.

Mr. Davie: I object to that evidence being introduced here. The evidence of that man was taken at the preliminary inquiry, and it has not been shewn that he is absent from the country. It is only an indirect way of getting that evidence in.

The Court: Unless you can produce Corrigan to be cross-examined himself, why should you use this evidence here?

Mr. Aikman: I am just testing this witness's veracity and trying to test his memory.

Mr. Davie: I submit he has no right to mention those statements.

The Court: No, I do not see what the point is. You must test him by standard methods.

No further allusion was made to this matter by either the counsel or myself.

The Court of Appeal decided, Mr. Justice Irving dissenting, that the evidence objected to, although improperly admitted, in the opinion of the Chief Justice and Mr. Justice Galliher, did the accused no substantial wrong, there being abundant legal evidence of guilt. From that decision this appeal is taken.

All the judges below find that there was ample evidence that the prisoner killed Captain Elliston and in that opinion we concur. The question to be determined, however, is with respect to the admissibility of the testimony quoted in the reserved case and its effect upon the verdict.

It cannot be doubted that depositions taken at the preliminary inquiry before a magistrate are not admissible in evidence at the subsequent trial of the accused on the same charge, except in certain events; and when, on the happening of those events, such depositions are admitted they must be produced in their entirety to the court so that the accused and

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the Crown may have the benefit of all they contain. It is also, I submit, undoubted law that, while, in the circumstances of this case, a prisoner might be asked on cross-examination if he had made previous threats against the life of his victim, the jury cannot, under pretence of cross-examination for any purpose, be informed either directly or indirectly by the Crown prosecutor that a witness examined at the preliminary inquiry into the charge upon which the prisoner is tried swore at that investigation that the prisoner had made such threats, unless that witness is produced or his deposition given at the preliminary investigation is properly admissible as evidence. The learned Chief Justice of the provincial Court of Appeal, with whom Galliher J. concurred, describes what happened at the trial on the cross-examination of the prisoner, in these words:

> It appears that one Corrigan was a witness and gave evidence at the preliminary investigation before the police magistrate. Corrigan was not called at the trial, nor did the Crown comply with the conditions precedent to its right to use Corrigan's evidence. Nevertheless, counsel for the Crown asked the accused man, who went into the witness box on his own behalf, whether Corrigan had not, in his evidence in the Police Court, made a statement that he (Allen) had made threats against Captain Elliston of a very serious nature. *It was sought in this way to get before the jury damaging statements made by Corrigan in the Police Court.* This evidence ought not to have been permitted to reach the jury. The course pursued is not in accord with the best practice of officers of the Crown charged with the administration of justice. The argument advanced before us that counsel was entitled in this way to test the credibility of Allen, cannot, in my opinion, be accepted.

With all this I agree. The only question as to which a doubt existed in my mind at the argument, was whether the improper admission of this evidence was an irregularity so trivial that no substantial wrong or miscarriage was thereby occasioned, there

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being other sufficient evidence of guilt. The majority in the court below thought that the irregularity was trivial, that no harm was done the prisoner and that by reason of the provisions of section 1019 of the Canada Criminal Code the appeal should be dismissed. That section is in these words:

1019. No conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial.

My difficulty is to say to what extent the jury, or any one of them, may have been influenced by the questions put to the prisoner on cross-examination by the Crown prosecutor. There are many reported cases in which convictions have been quashed on the ground that illegal evidence was admitted — often reluctantly, in view of the clear guilt of the accused. The law on this express point was laid down quite recently in England by the Court of Criminal Appeal in *Rex* v. *Fisher*(1). Speaking for the court, Channel J. said:

In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this court, the conviction cannot stand.

This case was subsequently formally approved in *Rex* v. *Ellis*(2), at page 760.

The English Act(3) is in these words:

The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury

(1) [1910] 1 K.B. 149. (2) [1910] 2 K.B. 746.
(3) 7 Edw. VII. (Imp.), ch. 23, sec. 4.

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should be set aside on the ground that it is unreasonable *or cannot be supported having regard to the evidence*, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

There are, obviously, verbal distinctions which can be made between the English Act and the section of our code. The English statute enacts that the appeal shall be allowed in a certain number of enumerated cases — including that of a verdict *which cannot be supported having regard to the evidence* — and that in any others the appeal shall be dismissed. As appears by the citation from *Rex* v. *Fisher*(1), that statute has been construed by the Court of Criminal Appeals to mean that the conviction must be set aside where improper evidence has been admitted — even if having regard to the whole evidence there is sufficient to support the verdict. This is now the settled rule notwithstanding the proviso to the English Act that the appeal may be dismissed even if the point raised might be decided in favour of the appellant if the court considers that no substantial miscarriage of justice has occurred. Our section 1019 is practically to the same effect. It provides that no conviction shall be set aside if it appears that some evidence was improperly admitted unless some substantial wrong or miscarriage of justice was thereby occasioned. The underlying principle of both is that, while the court has a discretion to exercise in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no sub-

(1) [1910] 1 K.B. 149.

stantial wrong or to occasion no miscarriage of justice; and what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here — the existence of previous threats — and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner? It may well be that in our opinion sitting here in an atmosphere very different from that in which the case was tried the evidence was quite sufficient, taken in its entirety, to support the verdict, but can we say that the admittedly improper questions put by the Crown prosecutor and the answers which the prisoner apparently very reluctantly gave did not influence the jury in the conclusion they reached? We must not overlook the fact that it is the free unbiassed verdict of the jury that the accused was entitled to have.

Despite all the changes made in recent years in the procedure in criminal and quasi-criminal cases, the classic saying of Lord Hardwicke still holds that

> it is the greatest consequence to the law of England and to the subject that these powers of the judge and jury are kept distinct, that the judge determines the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England.

In this case the Crown prosecutor first asked the prisoner if he remembered that Corrigan gave his evidence in the Police Court; and, when this was admitted, then he proceeded to ask him if he remembered that he (Corrigan) then swore that the prisoner had threatened Captain Elliston, saying:

> Old Peter should be in charge of a ranch instead of a body of men.

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This question being also answered in the affirmative, the prisoner was asked if he remembered that at the preliminary investigation Corrigan swore that he (the prisoner), speaking of the murdered man had used these words:

> He (the prisoner) said he was treated harshly by Captain Elliston; he said he had a bullet for Captain Elliston; and every bullet had its billet, and he had one that would find its mark.

This question was not answered, counsel for the prisoner having intervened to object. In putting this question, the Crown prosecutor appears to have read from the deposition given by Corrigan before the police magistrate.

What must have been the impression necessarily conveyed to the jury by those proceedings? The prisoner was pressed to admit: First, that Corrigan was examined as a witness at the preliminary investigation before the police magistrate; secondly. The Crown prosecutor stated that being so examined he, Corrigan, testified that the prisoner had made against the life of the deceased the threat quoted above. The result was that a material portion of a deposition taken before the police magistrate was given to the jury without the conditions of the Act being complied with; and that the jurors were told by the Crown prosecutor in effect that a witness not produced and whose absence was not accounted for had at the preliminary inquiry sworn to threats made by the accused against the life of his victim. In my judgment, the proceeding, objectionable as it is in this regard, is made more objectionable by the fact that only extracts from the evidence was produced and that it does not appear whether or not Corrigan was cross-examined as to the alleged threats, so that it is impossible for us to say

whether all that occurred between the prisoner and Corrigan, on the occasion when the threats are said to have been made, was before the jury. On the plea of not guilty the defence was that the murder was committed under an insane impulse which was irresistible. Whether it is an inference from the McNaghten rules that irresistible impulse is a sufficient defence, I am not called upon to say, but certainly evidence of previous threats made by the prisoner against the deceased would be a most effective answer to a plea of not guilty to a charge of murder; and I say, with all deference for the opinion expressed by my colleagues for whose long experience and wide knowledge I have the greatest respect, that to permit such threats to be proved in the way attempted here would be to adopt "a new and arbitrary method of trial," and to dismiss the appeal we must ignore the well-settled rule that in a criminal case the verdict is to be founded exclusively upon such evidence as the law allows.

It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitæ*. To say that we are in this case charged with the duty of deciding the extent to which

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the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused in a capital case of the benefit of a trial by jury. The law on this express point was laid down by the Judicial Committee of the Privy Council in 1893 in *Makin* v. *Attorney-General for New South Wales*(1), when Lord Chancellor Herschell said:

> It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict and to shew that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction transfers from the jury to the court the determination of the question whether the evidence — that is to say, what the law regards as evidence — established the guilt of the accused. The result is that, in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the court. *The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.*
>
> It is impossible to deny that such a change of the law would be a very serious one, and the construction which their Lordships are invited to put upon the enactment *would gravely affect* the much-cherished right of trial by jury in criminal cases. The evidence improperly admitted *might have chiefly affected the jury to return a verdict of guilty*, and the rest of the evidence which might appear to the court sufficient to support the conviction *might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses.* Yet the court might, under such circumstances, be justified, or even consider themselves bound to *let the judgment and sentence stand.* These are startling consequences.
>
> * * * * * *
>
> Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the judge to consider, in arriving at their verdict, matters which ought not to have been submitted to them. In their Lordship's opinion, *substantial wrong would*

(11) (1894) A.C. 57, at pp. 69, 70.

be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence.

In that case the enactment in question was the statute of New South Wales, 46 Vict., No. 17:

Provided that no conviction or judgment thereon shall be reversed, arrested, or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice.

On the whole I am of opinion that the appeal must be allowed, the conviction quashed and a new trial directed, on the ground that important evidence, which, in the circumstances, was inadmissible, was put in by the Crown and this evidence may have influenced the verdict of the jury and caused the accused substantial wrong, and that is the opinion of the majority.

DAVIES J. (dissenting).—I am not able to agree with the conclusion reached by a majority of the court to grant a new trial in this case.

The ground as I understand upon which the new trial has been granted is the wrongful admission of evidence at the trial which may have occasioned substantial wrong to the prisoner, Allen.

He was indicted on a charge of having murdered Captain Peter Elliston, and pleaded not guilty. The fact of the killing by the prisoner was proved by the Crown, and the defence, the only one in fact which could under the evidence have been set up, was, as stated by his counsel to the jury, that at the time the prisoner

committed the offence he was void of sane consciousness and was temporarily insane.

Counsel for the prisoner frankly admitted at the argument before us that no other defence than that

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of temporary insanity was or could have been under the evidence advanced or sustained.

The jury found the prisoner guilty thus negativing his only defence and after a careful perusal of the evidence given at the trial, I am unable to see how reasonable men could have reached any other conclusion. The question comes before us whether any evidence was improperly admitted or "something not according to law done at the trial," which in our opinion occasioned some substantial wrong or miscarriage to the prisoner on the trial.

The jurisdiction of the court acting as a court of criminal appeal is defined and limited by the Criminal Code. The 1019th section reads as follows:

> 1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

The prisoner tendered himself as a witness and gave evidence on his own behalf. In the course of his evidence replying to the question of his own counsel: "Tell the jury what you know of this affair," said:

> Well, I am afraid I shall be able to tell them very little, because I am of opinion that the man who left here, that is Corrigan — Corrigan came here the same as Trimby, with a manufactured statement, he was not prepared at the time, apparently, and he came along here with a rambling statement at the preliminary investigation; and I am of opinion that Corrigan deserted as a consequence of being afraid to stand the cross-examination that he might have been subjected to.

Later on in his evidence he said that he had

> a very strong suspicion that the man Corrigan knows more about this, sir, than anybody else, and that is the reason he deserted;

something tells me, sir, that that man Corrigan acted crooked on that morning.

Having made these broad insinuations against Corrigan, who was a deserter and supposed to be away out of the province, he was naturally cross-examined with reference to his statements, and the following appears in the case reserved by the Chief Justice who tried the case, as having occurred during the cross-examination:

Mr. Aikman: Q. You remember Corrigan giving his evidence in the Police Court, don't you?

A. Yes, sir. Well I remember some of it, sir. Most of it was given in a very low tone of voice, sir.

Q. Do you remember him saying this, in answer to a question of, what did Allen say, the answer was, "He threatened Captain Elliston, he said old Peter should be in charge of a ranch instead of a body of men."

A. Well, now, sir, that is an expression that I would not be guilty of using.

Q. That is not the question; I ask you if you remember him saying that?

A. No, sir.

Q. You don't remember him saying that?

A. Oh, I remember him saying that, sir, in his evidence that morning.

Q. Then he was asked this question: "Did he say he was done an injustice; give his words? (A.) He said he was treated harshly by Captain Elliston; he said he had a bullet for Captain Elliston; and every bullet had its billet, and he had one that would find its mark." Do you remember him saying that?

A. No, sir, I don't remember him saying that; but I can say from that, that is all nonsensical. No man of common sense * * *

At this stage objection was taken by the prisoner's counsel to the cross-examination as being an indirect way of getting in the evidence of Corrigan given at the preliminary inquiry and the objection being sustained by the Chief Justice, the cross-examination on the point was dropped.

I think myself the manner in which the Crown prosecutor framed his questions objectionable and that

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the Chief Justice was right in sustaining the objection. It is obvious, however, that the statements made by the prisoner in his examination-in-chief quoted above fully justified cross-examination, and that if there had been none legitimate comment might have been made at its absence. The substance, however, of what took place is that the prisoner admitted having heard Corrigan state that he, the prisoner, "had threatened Captain Elliston," but denied that he heard him state that prisoner had made the specific threat counsel mentioned in his second question. The nature of the general threat which he admitted having heard Corrigan state he, prisoner, had made is not stated, and as to the specific threats he denied having heard Corrigan's assumed statement respecting them.

It cannot be successfully argued in these circumstances that any material evidence was admitted improperly or in fact that any evidence at all was admitted. The Chief Justice at once ruled against admitting the evidence.

The utmost that can be argued is that the incident amounted to something which was "done at the trial not according to law," and which might have substantially prejudiced the prisoner.

I have already stated that in my opinion the form of the questions was objectionable, and my concurrence in the Chief Justice's ruling with regard to them at the trial.

The question remains: Did the putting of such questions, in the circumstances and in view of the character of the defence raised, occasion substantial wrong or miscarriage to the prisoner?

The duty of determining whether the facts which happened did or did not occasion such substantial

wrong rests under the statute upon the court. In my judgment unless we are able to find that some substantial wrong or miscarriage was so occasioned we are without any jurisdiction to interfere with the verdict of the jury.

The statute was passed for the purpose of putting an end to the judicial scandals occasioned by courts feeling themselves obliged by authorities and precedents to give effect to trivial errors or mistakes at criminal trials either with respect to the reception or rejection of evidence, the conduct of the trial or the charge or rulings of the trial judge, quite irrespective of the fact whether these errors or mistakes occasioned substantial wrong or injustice to the prisoner or not.

Under the code as it now stands, all this is changed, and the court is forbidden to set aside any conviction or to grant a new trial unless in its opinion some substantial wrong or miscarriage was occasioned by the alleged errors or mistakes in respect to the evidence, or the conduct of the case or the ruling or direction of the trial judge as prescribed in the section.

In order to discharge my duty in that regard I have, as I have stated, read most carefully the entire evidence with the result that I am unable to reach the conclusion that the occurrence or incident objected to or the manner of putting the questions objected to could have occasioned the prisoner any substantial injustice.

I had written my reasons out more fully on this branch of the case, but in view of the fact that a majority of the court have reached the conclusion that a new trial should be had, I thought it better to state my conclusion generally, without going into the evidence in detail.

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We were pressed with the opinion expressed by the Judicial Committee of the Privy Council in the case of *Makin* v. *The Attorney-General for New South Wales*(1), at pages 69 and 70, as to the proper construction of a section of the "Criminal Law Amendment Act" of that colony, conferring power upon the Supreme Court on a stated case to deal with convictions of prisoners, etc., and containing a proviso

> that no conviction should be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice.

Although in view of the decision reached by them that the evidence objected to in that case was admissible, it became unnecessary for the determination of the appeal to decide upon the true construction of this proviso, their Lordships thought it right, in the special circumstances, to state their opinion that

> the language used in the proviso was not intended to apply to circumstances such as those now (then) under consideration; that is cases of the wrongful reception of evidence. Their Lordships after giving reasons for their opinion added: "That there is ample scope for the operation of the proviso without applying it in the manner contended for," (and that) "they desired to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury.

I have already given my reasons for thinking why it is impossible to suppose that the improper manner in which the questions objected to in this case were framed and put or the answers the prisoner made to them could under the defence raised have had any influence on the verdict of the jury.

But what I desire to point out is the radical difference between the language of the New South Wales

(1) [1894] A.C. 57.

statute and ours. Ours expressly and explicitly refers to cases where some evidence was improperly admitted or rejected, or *something not according to law done* at the trial, and declares that in such cases unless the court is of the opinion that some substantial wrong or miscarriage was thereby occasioned on the trial no new trial should be directed or conviction set aside. There is no such language or anything analogous to it in the New South Wales statute upon the construction of which the Judicial Committee gave their opinion, and no room in my humble judgment for applying that opinion to our statute. Its language is so explicit, so definite, so clear, as to leave no possible doubt in my mind of its meaning.

The Supreme Court of British Columbia in 1897, in the case of *Reg.* v. *Woods*(1), construed this section of the code now under review in accordance with the views I have expressed. So also did the Appeal Court of Ontario in the case of *Rex* v. *Sunfield*(2), where it was held that although evidence of threats made by the prisoner in respect of another person was improperly admitted, yet in the opinion of the court no substantial wrong or miscarriage of justice having been occasioned thereby, the conviction should not be set aside or a new trial directed.

For these reasons I am of the opinion that the appeal should be dismissed.

IDINGTON J. (dissenting).—The appellant was indicted for and convicted of murder on a trial wherein the prosecution presented against him such a mass of evidence, that the learned trial judge was constrained

(1) 5 B.C. Rep. 585. (2) 15 Ont. L.R. 252.

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to describe it in his charge to the jury as overwhelming, on the first issue raised by the plea of not guilty.

At the close of the case for the prosecution, the counsel for the accused opened his client's case thus:

> The evidence I will deduce will be to shew that this man at the time he committed the offence was void of sane consciousness and was temporarily insane. In order that all the evidence may be before you enabling you to come to a proper conclusion, it is my intention to submit the prisoner to you, in order that he may be examined. That is his wish, and he will now take the box.

The accused was accordingly sworn on his own behalf.

In the course of giving his evidence he spoke of one Corrigan, a fellow soldier, in a way to cast suspicion upon him. Amongst other things he referred to this man as follows:

> Q. You might tell the jury what you know of this affair?
>
> A. Well, I am afraid I shall be able to tell them very little because I am of opinion that the man who left here, that is Corrigan — Corrigan came here the same as Trimby, with a manufactured statement, he was not prepared at the time apparently, and he came along here with a rambling statement at the preliminary investigation; and I am of the opinion that Corrigan deserted as a consequence of being afraid to stand the cross-examination that he might have been subjected to. * * *
>
> That is all, sir, because I had strong suspicion of Corrigan. * * that that man Corrigan acted crooked on that morning. Because you see, sir, Corrigan was in hospital with me a few weeks previous to this in the month of July, and nobody else was in then but Corrigan and me.

In the cross-examination there arose an occurrence, no doubt due to these references, which appears in the reserve case submitted to the Court of Appeal in British Columbia, and by way of appeal is now before us.

In the reserve case the learned Chief Justice who presided at the trial, introduces his statement of the conviction by these words:

2. The fact of the killing by the prisoner was proved by the Crown, and the defence set up by the prisoner (namely, temporary insanity caused by over-indulgence in alcohol) not having been established to the satisfaction of the jury," etc., etc.

In presenting the point desired to be raised the learned Chief Justice gives the following part of the cross-examination, to which I have already alluded:

Mr. Aikman: Q. You remember Corrigan giving his evidence in the Police Court, don't you?

A. Yes, sir. Well I remember some of it, sir. Most of it was given in a very low tone of voice, sir.

Q. Do you remember him saying this, in answer to a question of, what did Allen say, the answer was, "He threatened Captain Elliston, he said old Peter should be in charge of a ranch instead of a body of men."

A. Well, now, sir, that is an expression that I would not be guilty of using.

Q. That is not the question; I ask if you remember him saying that?

A. No, sir.

Q. You don't remember him saying that?

A. Oh, I remember him saying that, sir, in his evidence that morning.

Q. Then he was asked this question: "Did he say he was done an injustice; give his words? (A.) He said he was treated harshly by Captain Elliston; he said he had a bullet for Captain Elliston; and every bullet had its billet, and he had one that would find its mark." Do you remember him saying that?

A. No, sir, I don't remember him saying that; but I can say from that, that is all nonsensical. No man of common sense * * *

Q. We will see that later.

Mr. Davie: I object to that evidence being introduced here. The evidence of that man was taken at the preliminary inquiry, and it has not been shewn that he is absent from the country. It is only an indirect way of getting that evidence in.

The Court: Unless you can produce Corrigan to be cross-examined himself, why should you use this evidence here?

Mr. Aikman: I am just testing this witness's veracity and trying to test his memory.

Mr. Davie: I submit he has no right to mention those statements.

The Court: No, I do not see what the point is. You must test him by standard methods.

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Then the learned Chief Justice submits that with the following remark:

> No further allusion was made to this matter by either the counsel or myself. Mr. Davie urges that this occurrence entitles the prisoner to a new trial, notwithstanding all the evidence adduced, and the question for the court is whether or not this contention is right.

It is somewhat difficult to understand how this can be held of any consequence in this case.

Counsel for the appellant frankly puts it that it is not the reception of evidence he complains of, but merely the form of the questions put by the Crown officer, containing something impliedly, it is said, sworn to elsewhere.

The relative importance or insignificance of anything of that kind must be measured by the attendant circumstances of each case and the possible bearing it may have upon the issues that have been raised.

It certainly does not seem to me to be law that one accused and giving evidence on his own behalf can be permitted to use the occasion in order to traduce others and mislead a jury by such insinuations as this witness chose to introduce in his evidence, and the Crown officer be forbidden to elicit from him the motive for his conduct in making such allegations as I have quoted.

For that purpose the Crown officer would have been perfectly justified in order to shew the animus of the accused in making such insinuations; to have adverted to the circumstances of Corrigan appearing as against the accused in the preliminary investigation and the tenor of his evidence there, and that accused learned or knew thereof, and that this, no doubt, gave rise to such counter charge as made by the accused. He was entitled to have elicited from the witness, and

did thus elicit from him, ample motive for his making the insinuations he did. The accused in cases where he creates thus the occasion for a Crown officer resorting to what might otherwise have been dangerous ground to enter upon, has no right to complain of the necessary consequences of his own acts as a witness. He has no greater right than another witness except so far as given by statute.

The accused did not hear, though present, the later statement, and his denial being the only evidence before the court and jury, as to whether or not such a statement ever had been made, must have been taken, and no doubt was taken, as conclusive.

Again, as to the first statement as to threat or fact, it was simply a repetition of what others had already sworn to on the trial herein.

Neither statement in the case can be said to have had any effect relative to the main issue of fact as to which the defence had then practically been abandoned by this appellant's counsel.

For that reason it might have been as well that the matter had been avoided entirely by the Crown officer. And, unfortunately, when he was asked by the court why he pursued this line of cross-examination, he gave a reason that does not seem to me as tenable as that I have suggested as clearly available. But this reason he assigned can have no bearing upon the substantial right to shew the animus of the accused.

Is it because a wrong reason is given or weaker ground than he might have insisted upon is taken by a Crown officer, that the accused should have his discharge, or be granted a new trial ?

There was no objection taken to these questions

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as should have been by counsel for the accused if he intended to object, or ever supposed his client likely to suffer from these questions or answers thereto.

And when taken a moment or two later, it was clear to the jury and every one else that the learned Chief Justice had stamped this course of inquiry as null.

It seems further (from the request he made at the close of his charge, for any objections thereto, and counsel for accused signifying he had none), to be clear that if he had attached the slightest importance to the circumstances now complained of, he would have asked for a direction to the jury relative thereto.

It may be observed that the only issue before the court and jury at this stage of the inquiry was that of the insanity of the accused.

In relation to that the Crown officer suggested that he had asked these questions as a means of testing the memory of the accused, and seeing that he had sworn to a complete lapse of memory of what occurred at the time of the shooting, what was amiss in this that took place shortly after being applied as a test? Beyond that the jury, if they ever thought of it again, could only reasonably apply the answers as tests of memory. And so far from militating against the accused, the result may have tended the other way.

The appeal in criminal cases like this where no motion was made in arrest of judgment, rests upon section 1014 of the Criminal Code, sub-section 2. And that is confined to questions of law

> arising either on the trial or on any of the proceedings, subsequent, or incidental thereto, or arising out of the direction of the judge.

I doubt much if the mere statement of a question unobjected to, as here, can be said to be a question of law arising at the trial.

I do not overlook the fact that in an English case where a grave miscarriage had taken place without objection, the right to have a case reserved was held not to be taken away by reason of omission to object.

It is one thing in the case of a grave misconception of the conduct of an entire trial, or a great part thereof, to relieve the accused from the ordinary result of a failure to object, and quite another, where the very unimportance of the error caused both court and counsel to overlook it, at the close of a two days' trial.

But where is the practice to end, if such trivial incidents as in question here, happening unnoticed, can warrant a new trial or discharge ?

For example, hearsay evidence as apparent in this case, despite the efforts of the court and counsel, may creep in. Is that to be taken as a matter of law in any case, proper to reserve a case upon, and a new trial or discharge result ?

Let us turn to section 1018 of the Criminal Code, for there, coupled with section 1019, our duties herein are defined. It (section 1018) reads in such a way as to imply there had been a ruling from which an appeal has been taken. How can that be said in regard to every inadvertence that the most competent trial judge may happen to permit, and where no call has been made for a ruling ?

Where the matter is so grave that either he must be taken to have misapprehended the entire nature of the business he was about, and hence to have erred or have permitted others to err, it may well be argued that there has been a ruling which rendered the omission to object of no consequence.

But what is there here ?

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A correct interpretation of section 1019, however, is the most important thing we have to deal with herein. It reads as follows:

> 1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial; provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

To give this section an interpretation such as to allow this appeal, is not only tantamount to an evasion or abandonment of all responsibility such as has been cast by the plain wording of the section, upon the appellate courts of Canada, but also a direction to every trial judge at a criminal trial, then or after the trial, to reserve a case in every instance of the occurrence of something of the like unimportant nature happening on a criminal trial, in order that the accused be acquitted or tried again.

The language of the section is of such a comprehensive and imperative character, that clearly the appellate courts were expected to be strong, and act with that strong hand that would protect the interests of society, and the due administration of justice whilst guarding the rights of the accused.

It is impossible in any single case to draw the exact line of duty that will reach every case, if the appellate court is to assume the responsibility and discharge the duty the section evidently contemplates.

Of course it is not only possible, but easy, to draw the line if we are content to say in this and every other case, that it is impossible to say that any and every thing done, however insignificant, as here, may not have had some effect on a jury.

The case of *Makin* v. *The Attorney-General*(1), is relied upon and has been referred to in several cases since. I will not dwell upon the curious features of that case, or the language of the judgment, but may be permitted to say that some people seem to have misinterpreted it if my reading of it is correct.

If we examine all the authorities from it down to the latest, neither in it nor in any other case has any court gone to the length, or nearly the length, we are asked to go herein.

But we have it interpreted by later authorities in a way that seems quite consistent with the due working out of this section of the Code.

I do not attach so much importance to the difference of language in the various Acts on which cases have arisen, as some do. But I may say ours is the most restrictive of any, in permitting the setting aside of a conviction. I think we must have regard to the object of the Act, and guard alike the just rights of the accused, and the danger of reducing the administration of justice to a farce.

Experience on this side of the Atlantic has been, from a variety of causes, so different from the experience an English judge has had in his own country, as to render it necessary to take with caution general expressions of such judges in disposing of the cases so far reached under similar legislation. Possibly they have not felt as yet in England the evil this section guards against.

We certainly are not expected, using the language of Lord Alverstone, C.J., in *Rex* v. *Dyson*(2), at page 457, to transfer

(1) [1894] A.C. 57.

(2) [1908] 2 K.B. 454.

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from the jury to the court the determination of the question whether the evidence established the guilt of the accused.

His suggestion in the same case resting upon the construction of the "Criminal Appeal Act, 1907"(1), sec. 4, sub-sec. 1, is that the said

> proviso is intended to apply to a case in which the evidence is such that the jury must have found the prisoner guilty if they had been properly directed. It does not apply when the evidence leaves it in doubt whether they would have so found.

In the later case of *Rex* v. *Norton*(2), at page 501, the court uses the expression "would," not "might," instead of "must" relative to the jury and its possible or probable discharge of its duty.

I am unable to say that either word, standing alone, can satisfy my mind. I assume either "must" or "would" implies the assumption that due regard be had to the discharge of their duty by the jury as really what is meant by either expression in each of these judicial opinions. In this case we ought not to have, in light of either expression, the slightest difficulty. The only issue raised is as to an occurrence at the stage of this trial when inquiry was being made relative to the insanity of the accused. It seems absurd on the evidence adduced to suppose that any sane jury could have honestly come to the conclusion that the accused was at the time in question insane. We must bear in mind the legal presumption of sanity, and that the onus of insanity at the time rested upon the accused.

There is not a shred of evidence that goes so far as to bring the accused within the range of any legal definition of insanity, save that the evidence bearing on the long-continued drinking of the accused, might

(1) 7 Edw. VII. ch. 23. (2) [1910] 2 K.B. 496.

render one suspicious of its having brought on delirium tremens or alcoholic dementia. And not only did the accused fail to prove it had, but the only expert who saw him and could speak relative thereto, and had ample opportunity to enable him to speak, is emphatic in saying he had neither.

An acquittal in face of such evidence and none on the other side, able to bear the test of our law relative to insanity and its relation to responsibility in law, would have shocked every sensible man who had heard this evidence.

I have read it all to be quite sure of my ground in this case.

On the whole of it excluding any effect flowing from the Crown officer's statements in question, it was the bounden duty of the jury to convict.

To decide this case in a way to support this appeal means to my mind the imposing as a legal duty on every trial judge in a criminal case to note the most trifling irregular omission or occurrence liable to happen on any trial, and reserve a case on such foundation for an appellate court, and the imposing on such court the duty of discharging the accused or directing a new trial.

It would render the insanity plea very popular. For what bearing in the mind of any man could the above statement of counsel, for it is that which is here complained of, ever have had in determining the question of this man's sanity ?

I think the appeal should be dismissed.

Since writing the foregoing, I am surprised by the judgment of the majority of the court, placing the allowance of the appeal on the ground of the improper admission of evidence.

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My note on the bench was this:

Mr. Ritchie confines whole to the point of the counsel having stated in putting the questions the facts of statement having been sworn to in Police Court.

DUFF J.—I agree with the Chief Justice.

ANGLIN J.—I think it is incontrovertible that the references made by counsel for the Crown, when cross-examining the defendant, to the Police Court depositions of the absent witness Corrigan were improper. *North Australian Territory Co.* v. *Goldsborough, Mort and Co.*(1), at page 385. Without laying a foundation under section 999 of the Criminal Code, which was not done, these depositions were inadmissible in evidence. The effect of the course taken by counsel for the Crown was to place before the jury a part of this inadmissible evidence which bears directly upon a question vital to the defence.

That the deceased had been killed by the defendant was practically not contested, the only serious defence set up being that, at the time the homicide was committed, the prisoner was not legally responsible because his mental condition was such, owing to the effect of intoxicants, that he was then incapable of criminal intent. If upon the evidence legally admissible the proper conclusion was that the effect upon the prisoner of liquor, though taken voluntarily, was such that, when he shot Captain Elliston,

his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury,

(*Rex* v. *Meade*(2), at page 899; *Rex* v. *Blythe*(3), at

(1) [1893] 2 Ch. 381. (2) [1909] 1 K.B. 895.
(3) 19 Ont. L.R. 386.

page 395) — that it produced a condition, mental or physical, inconsistent with the inference that his act was intentional, intent or premeditation being of the essence of the crime (Russell on Crimes (1 Can. ed.), 88) — that temporal mental derangement at the time of the commission of the offence was the result (*Rex* v. *Baines,* noted in Wood-Renton on Lunacy, p. 912) — a verdict of acquittal, or perhaps of manslaughter (*Reg.* v. *Doherty*(1), at page 308), should be the result. But if the defendant had really formed a previous determination to resent a slight affront in a barbarous manner, "his mental state due to intoxicants might furnish no excuse:" *Rex* v. *Thomas*(2), at page 820. Upon this question of premeditation — malice aforethought — which is of the essence of the crime of murder, evidence of previous threats by the accused against the deceased is most material. Proof of such threats would go far to destroy the contention that his act was excusable because the use of liquor had reduced him to such a condition that he was unable to restrain himself from committing the act, or was deprived of the power of forming any specific intention; *Reg.* v. *Monkhouse*(3), at page 56. It is obvious that such threats, if shewn, would not improbably lead a jury to discredit the only defence relied upon in this case.

If Corrigan's deposition had been received in evidence at the trial without compliance with the requirements of section 999 of the Criminal Code, I entertain no doubt that there would have been a mistrial. The reading of such a material extract from it as was put to the prisoner on his cross-examination by counsel

(1) 16 Cox C.C. 306. (2) 7 C. & P. 817.
(3) 4 Cox C.C. 55.

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for the Crown, accompanied as it was by the statement that he was reading from the testimony of Corrigan at the preliminary investigation, was quite as mischievous — quite as prejudicial to the accused — as its formal reception in evidence could have been. "Something not according to law was done at the trial." (Criminal Code, sec. 1019.) The learned trial judge did not, either then, or in subsequently charging the jury, tell them that they must disregard the alleged threats to which Corrigan had deposed — if indeed such a direction from him would have cured the mischief. *Loughead* v. *Collingwood Shipbuilding Co.*(1).

The fact that in his evidence in chief the deceased had spontaneously referred to Corrigan's previous testimony, challenging its accuracy and even hinting that Corrigan himself was not free from suspicion in connection with the murder, in my opinion did not at all justify counsel for the Crown in placing before the jury, under the guise of questions in the cross-examination of the prisoner, material extracts from Corrigan's deposition. An effective cross-examination might easily have been conducted without resort being had to this indefensible practice.

Neither can I agree with the learned Chief Justice of the Court of Appeal of British Columbia that the conduct of the Crown counsel could not have prejudiced the interests of the defendant because there was no evidence proper for submission to the jury on the question of his irresponsibility at the time of the homicide. The evidence in support of this defence may have been slight. Since this case must go before another jury I refrain from discussing the question

(1) 16 Ont. L.R. 64.

further than to say that there was in my opinion enough for submission to the jury — enough to entitle the prisoner to have the jury pass upon the issue raised by him, unaffected by matter not properly admissible in evidence.

But it is said on behalf of the Crown that under section 1019 of the Criminal Code the conviction should not be set aside unless the court is satisfied that the jury *must* have been influenced in reaching their verdict by the matter improperly put before them. There being other evidence sufficient to support the conviction, it is manifestly impossible to say that the jury *must* have acted upon, or were in fact influenced by, the matter which now forms the subject of the appellant's objection. On the other hand, it is equally impossible to say that the minds of the jury *may* not have been, or were not in fact, affected prejudicially to the appellant by matter so pertinent to the main issue before them — impossible indeed to say that it may not have been this matter which with some juryman turned the scale against the defendant.

I cannot accept the construction of section 1019 urged on behalf of the Crown. So construed, as pointed out in *Makin* v. *Attorney-General for New South Wales*(1), it would in effect substitute the court for the jury in

> the determination of the question whether the evidence — that is to say what the law regards as evidence — establishes the guilt of the accused.

If Parliament had meant to effect such a startling change in the law, language much more explicit would certainly have been employed. The Lord Chancellor in the *Makin Case*(1) said:

(1) [1894] A.C. 57.

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In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

Although the express reference to the improper admission of evidence made in section 1019 of our Code, as one of the grounds upon which a verdict may be impeached, is not found in the New South Wales statute dealt with by the Judicial Committee in the *Makin Case*(1), the direction of both Acts is substantially the same, viz., that the appellate court shall not set aside the verdict unless for some substantial wrong or miscarriage of justice. In our statute the court of appeal is required in certain specified cases not to interfere unless in its opinion some substantial wrong or miscarriage was occasioned by the error complained of; in the "New South Wales Act" interference is prohibited, *whatever the ground of objection to the verdict,* unless for some substantial wrong or other miscarriage of justice. I fail to find any ground of real distinction between these statutory provisions. *Reg.* v. *Woods*(2) was on this point, in my opinion, wrongly decided; and I am, with respect, unable to accept the view stated by Moss C.J.O., in *Rex* v. *Sunfield*(3), at page 258, that under section 1019 of our Code the appellate court

> is placed in a position quite different from that occupied by the court in the case before the Judicial Committee.

The correct construction was put upon section 1019 of our Code by Dubuc and Killam JJ., in *Reg.* v. *Hamilton*(4), the head-note to which is misleading, and by

(1) [1894] A.C. 57.
(2) 2 Can. Crim. Cas. 159.
(3) 15 Ont. L.R. 252.
(4) 2 Can. Crim. Cas. 390.

Osler J.A., in delivering the judgment of the Ontario Court of Appeal, in *Rex* v. *Brooks*(1).

"A substantial wrong" is "occasioned thereby on the trial" when counsel for the Crown improperly places before the jury, as having been sworn to, statements which may influence them adversely to the accused upon a material issue.

Although section 4, sub-section 1, of the English "Criminal Appeal Act of 1897" does not so closely resemble section 1019 of our Criminal Code as does the New South Wales provision dealt with by the Privy Council, it is not dissimilar and English decisions upon it are of value because they shew that the principle of construction acted on in the *Makin Case*(2) should be applied in the interpretation of statutory provisions similar to that there dealt with. *Rex* v. *Dyson*(3); *Rex* v. *Fisher*(4), at page 153; *Rex* v. *Norton*(5), at page 501; *Rex* v. *Ellis*(6), at page 764.

In my opinion there must be a new trial of this case.

Appeal allowed.

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(1) 11 Can. Crim. Cas. 188.
(2) [1894] A.C. 57.
(3) [1908] 2 K.B. 454.
(4) [1910] 1 K.B. 149.
(5) [1910] 2 K.B. 496.
(6) [1910] 2 K.B. 746.

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*Nov. 10, 11.
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*April 3.

THE TOWN OF WESTMOUNT (PLAINTIFF) ..... } APPELLANT;

AND

THE MONTREAL LIGHT, HEAT AND POWER COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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

Assessment and taxes—Construction of statute—Words and phrases—"Terrain"—"Lot"—Immovable property—Charter of the Town of Westmount—56 V. c. 54, s. 100.

Section 100 of the statute of the Province of Quebec, 56 Vict. ch. 54, referred to as "The Westmount Charter," authorized the town council to levy assessments "on every lot, town lot, or portion of a lot, whether built upon or not, with all buildings and erections thereon." The words used in the French version of the statute were, "*toute terrain, lot de ville ou portion de lot.*" The by-law enacted in virtue of the statute purported to impose a tax upon "all real estate" within the municipality, and under the by-law the property of the company, respondents, consisting of their equipment for the transmission of gas and electric currents installed upon and under the public streets, squares, etc., of the town, was assessed as subject to taxation and described on the rolls as "gas-mains and equipment, poles, transformers, wires, etc." In an action by the municipal corporation for the recovery of the amount of taxes claimed in virtue of the by-law and assessment:

Held, Idington J. dissenting, that neither poles carrying electric wires nor gas-mains, and their respective equipments, placed on or under the public streets, etc., of the town, can be deemed taxable real estate within the meaning of the word "terrain" used in the French version, nor of the word "lot" used in the English version of the provisions made by section 100 of the statute, 56 Vict. ch. 54 (Que.). Judgment appealed from (Q.R. 20 K.B. 244) affirmed.

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

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TOWN OF WESTMOUNT v. MONTREAL LIGHT, HEAT AND POWER CO.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

The plaintiff brought the action to recover from the defendants the amount of the taxes imposed upon their electric installations and gas-mains placed upon and under the public streets, etc., of the town in virtue of the by-law, mentioned in the head-note, enacted by the municipal corporation. The municipal corporation claimed the right to assess and levy taxes upon the property in question under the provisions of its charter of incorporation, 56 Vict. ch. 54 (Que.), amended by the Quebec statute, 58 Vict. ch. 54, whereby the name of the municipality was changed to "The Town of Westmount." The action was maintained by the trial judge in the Superior Court, District of Montreal, but that judgment was reversed by the judgment now appealed from. The questions at issue upon the appeal are stated in the judgments now reported.

Beaudin K.C. and *Boyer K.C.* for the appellant.

R. C. Smith K.C. and *Montgomery K.C.* for the respondents.

THE CHIEF JUSTICE.—This is a claim for taxes imposed upon certain poles, wires, transformers, gas-mains and other appliances for the transmission of light and power operated and controlled by the respondents in and through what was, at the time this action was instituted, the Town of Westmount. The respondents own no buildings of any kind within the

(1) Q.R. 20 K.B. 244.

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municipality and their main plants, gas and electric, are beyond its confines. They have no property or interest in the land which they use or occupy and pay nothing for such use and occupation. They are mere licensees of parts of the streets of the town, on which they erect their poles to stretch their wires or under which they carry their gas-mains. The property in the streets, which are admittedly not liable to assessment or taxation, remains vested in the corporation.

The town's charter, 56 Vict. ch. 54 (Que.), authorizes the making of by-laws to impose an assessment on

every lot, town lot, or portion of a lot with all the buildings and erections thereon.

The by-law passed under the authority of this Act purports, however, to impose a tax upon "all real estate" (a term of wider meaning), in the municipality. It is sought to justify this departure because of the difference between the French and English texts of the statute. In the former, the word "terrain" is used to describe that which is to be subject to taxation; and in the English text the word used is "lot." Neither term is a translation of the other; both are to be construed as if they were original expressions. Whichever word is used, whether it be "terrain" or "lot," poles and wires and gas-mains certainly cannot be described as "terrain" and, according to the ordinary use of the word "lot," it cannot be held to designate land in an open and public street. "Terrain," according to Bescherelleainé, means

espace de terre considéré par rapport soit à l'usage qu'on en fait ou qu'on en peut faire, soit à l'action qui s'y passe.

There is no "espace de terre" in question here. That which the by-law purports to reach, assuming merely

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for argument that it is *intra vires*, is the taxable real estate situated within the limits of the town. The respondents' property, which is alleged to be subject to taxation, is described in the municipal collection roll as "gas-mains and equipment, poles, transformers, wires, etc." The poles and gas-mains may by reason of their being fixed to the soil be immovables (Beaudry I., p. 38, no. 40, *in fine*), but they certainly do not come within the description of any of the words used in the Act. The "Cities and Towns Act" now in force in the Province of Quebec, under which, however, the appellant takes no power, authorizes the councils of cities and towns to impose and levy taxes on every "immovable" in the municipality. Art. 5730, R.S.Q., 1909. The appellant has no such power, unless we are willing to hold that the words "lots, town lots and parts of a lot," or the word "terrain" are the equivalent of "immovable property." To justify such a conclusion it would be necessary to wipe out the distinction, well understood in the civil law, between property immovable by nature or by destination or by the object to which it is applied. Art. 375, C.C. The term used in the Municipal Code is taxable real estate. Arts. 489 and 986, Mun. C.

Can the poles, wires and gas-mains be assessed as erections on a lot? If the street on which the poles are erected or under which the gas-mains are laid is not a lot, the taxing power does not exist. If, on the other hand, the street might accurately be described as a lot, as it is admittedly exempt from taxation, how could the poles and mains be assessed as distinct and separate from the lot on which they are erected? The statute does not provide for the assessment of the

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erection as something distinct and separate from the lot on which it is erected. The statute says:

> The council may impose and levy assessment on every lot, town lot or portion of a lot, whether built upon or not, with all the buildings and erections thereon.

How is the assessment of the building or erection to be made distinct and separate from the lot? Finally, as I have already said, those things which are assessed are described in the collection roll as "gas-mains and equipment, poles, transformers, wires, etc.," without reference to the object (the street) to which they are attached.

I would dismiss the appeal with costs.

DAVIES J.—I concur with the reasons for judgment given by the Chief Justice. I also agree with the reasons given by my brother Anglin for distinguishing the case of *The Consumers' Gas Company of Toronto* v. *The City of Toronto*(1).

IDINGTON J. (dissenting).—The question raised by this appeal is the taxability of the portions of respondents' immovable property acquired by respondents by virtue of legislation enabling such acquisition in the portions it occupies of the streets and of lands under the streets of appellant.

The question turns upon the meaning to be put upon section 100 of the charter of appellant, being 56 Vict. ch. 54 (Que.), with the force given it by other legislation to be referred to and by the light shed upon said section and legislation by the decision of this court in *Consumers' Gas Co. of Toronto* v. *City of Toronto*(1), upon similar legislation and taxing statutes.

(1) 27 Can. S.C.R. 453.

The charter of the appellant has, by virtue of the enactments in article 4178 of the Revised Statutes of Quebec, 1888, the whole of chapter one in which it is found, relative to town corporations, incorporated therein, unless so far as expressly excluded.

The said section 100, directly in question herein, is as follows:

> 100. The council may make by-laws to impose and levy: (1) An assessment on every lot, town lot or portion of a lot, whether built upon or not, with all buildings and erections thereon, not to exceed one cent in the dollar of the actual value of such property, as entered on the assessment roll of the town, for which assessment the owner thereof shall be personally liable.

The difficulty in this case lies in the meaning of the words "every lot" used in the above English version by a legislature expressing its intention in two languages.

A preliminary inquiry is thus started regarding the meaning of this section by reason of finding the French version as follows:

> (1) Une cotisation, dont le propriétaire est personnellement responsable, sur tout terrain, lot de ville ou portion de lot, etc., etc.

The words "every lot" can hardly be said to be a happy translation of "tout terrain" or the latter words a fair translation of the former as usually understood. Yet I am inclined to think the literal meaning of the one helps us to understand the sense in which the other is used.

Speaking with the greatest deference on the subject of the possible or probable meaning that may have become attached to the word "lot" common to the two languages in use, yet having in each some entirely different shades of meaning, I doubt if Mr. Beaudin's ingenious suggestion that lands becoming taxable by severance from a seigniory having originated the use of the word "lot" relative thereto, can be safely relied

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upon as furnishing a definite solution of the problem before us.

I pass to the wider sense in which I think the solution rests. In passing I may remark I have given due consideration to article 4 of the Civil Code, and also the clause of the Act enacting the Revised Statutes of Quebec, 1888, relative to conflict of language in the English and French copies of it, as well as the broad question of how in the case of conflict of meanings apparent in any Act of the Legislature of Quebec, between the two languages in which the statutes are expressed, the matter should be dealt with.

The interpretation clause I refer to has regard only to the general scope and purpose of the Acts consolidated.

Article 4 of the Civil Code does not, in express terms, solve the question, but implies by its inclusion of "French and English" copy as to what is to be held authentic, that due heed is to be given to both.

I am inclined to think the purview of the Act itself must be kept in view, and the selection of the version to be adopted in case of conflict, ought to be that which will best effect the purpose of the Act looked at as a whole.

For the present I apply these suggestions, and bear in mind the possible shades of difference in the meaning of the terms "every lot" and "tout terrain." If the French version governed it would seem to be impossible to deny the taxability of the land in question.

Reverting to the subject of other legislation bearing upon this section 100, we find there are certain classes of property specifically exempt by chapter one, I have referred to. It may thus be implied that all

other land is taxable, and if so this land is clearly taxable.

There is, I must say, a curious feature of the charter in this regard which seems to imply that article 4500, R.S.Q., giving these exemptions has been substituted by something else. I am unable to find any such substitution. I think, therefore, the force of the implication derivable from these exemptions is not derogated from as article 133 of the amended charter implies and speaks of in case of a substitutional enactment.

If, again, we turn to the chapter incorporated in the charter save what does not touch this, we find in article 4501, R.S.Q., a provision for railway companies reporting their "assessable lands" and that, in default in article 4502, R.S.Q., we find the valuators directed, if the return is not made in time, to assess

> all the immovable property belonging to the company * * * in the same manner as that of any other ratepayer.

There certainly is here implied that all other immovable property of other ratepayers, including respondents, is to be assessed.

It seems to be, therefore, that the clear implication that the express exemption carries, as well as this there found relative to railways, must mean that all immovable property other than that expressly exempted is taxable.

And that this property here in question is immovable property there would seem to be no doubt, and hence in these implications assessable.

This quality of property acquired under statutes enabling the use of streets or lands on which they rest lies at the bottom of the question to be solved herein.

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I will hereafter refer to the meaning of the phrase "every lot," but now proceed to a consideration of decisions by which we must be governed. They rest upon statutes creating, as the respondents' charter and concessions got thereunder do, proprietary interests in lands over which streets existed. A comparison of such cases and statutes with this case and the statutes upon which the title of the respondents rests to the property it has in the streets or ground thereunder, in question, is most instructive.

The technical meaning of the terms used in the respective Acts conferring upon the corporate bodies in question in said precedent cases, their respective properties in streets, in either the said English or Canadian cases, which I am about to refer to, might have warranted entirely different conclusions to have been reached.

It is urged in each class of such cases that the property or right of property acquired in the streets, was an easement, and hence not taxable as land.

It was, therefore, urged that the taxable quality of the property could not fall within the meaning of the respective taxing statutes involved.

It seems to me also that there was more to have been said in any of such cases for those seeking exemption so far as related to the taxable quality of the respective properties acquired by virtue of being land, than for the respondent's claim herein.

One of the leading cases is the *Metropolitan Railway Company* v. *Fowler*(1). It rested upon Geo. III. ch. 5, sec. 4, enacted before railway tunnels or gas-pipes in a public street were within the range of ordinary human vision. When we

(1) (1893) A.C. 416.

have regard to these facts and the further facts that the said statute was careful to enumerate a great variety of specific real property subject to become liable to taxation as well as to use the general terms such as "lands and tenements" and "hereditaments" and that such terms were so placed in the section as to afford an argument for restricting them to the specific subjects named, said case and other such cases in England give, what is needed herein, an illustration of how statutes may and ought to be interpreted in order that the obvious purpose thereof may be executed.

In the same manner following that and other authorities (of which some rest upon other taxing statutes) so well collected in the judgment of the learned Chancellor Boyd in disposing of the case of *Consumers' Gas Co. of Toronto* v. *City of Toronto*(1), in support of the right to tax plaintiff's gas-mains there in question, is it not competent for us to hold the property of respondents now in question taxable land, within the meaning of the charter of the appellant ?

In the first place let us assume that taxable interest in the land must be something other than a mere servitude, and inquire whether or not that which the respondent has got by virtue of the powers conferred upon it, is servitude or not.

It does not seem to me that it falls within the definition of servitude in the Civil Code. Indeed, it did not seem to be argued that it did so.

And if we look at the opinion of the late Chief Justice of this court in the *Gas Consumers' Case*(2), in which the majority of the court agreed, we find that

(1) 26 O.R. 722. (2) 27 Can. S.C.R. 453.

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opinion very pronounced in relation to the nature of the right there acquired by virtue of a similar statute declaring it could not be called an easement.

Without adopting servitude and easement as in every respect interchangeable terms, or on every point of operation co-extensive, the general nature of the right either term stands for is in its inherent legal quality so much like the other that for the present purpose we may assume the opinion I refer to as deciding that phase of the question.

In comparing the acts of incorporation of the Consumers' Gas Company and the New Gas Company of Montreal and the Montreal Gas Company, the predecessors, and so to speak the progenitors of the respondents, and the powers given them and the amendments that aid in giving the rights the respondents had conferred upon them in regard to invading the streets and taking possession of parts of the soil therein and thereunder for their own use, I am unable to distinguish the quality of property thus acquired in part of the soil in and under parts of appellant's streets, from that acquired by the other company in and under part of the soil in Toronto's streets.

The right of property in each case was and is derivable from the legislation which gives it in each case, subject to some slight differences in the mode of being permitted to acquire, or conditions under which it is to be acquired, but in no way affecting the essential character or quality of the property once acquired.

Such being the case, I must hold we are governed thus far conclusively by the judgment in the *Consumers' Gas Company of Toronto* v. *City of Toronto* (1).

(1) 27 Can. S.C.R. 453.

The ownership of the soil in the street in either case makes little difference, save in this, that the title in the soil may or may not have been acquired by the municipality in either given case.

Article 4616, R.S.Q., under which appellant's rights exist, says:

> The right to use as public highways all roads, streets and public highways is vested in the then respective municipal corporations * * * except so far as reserved, etc.

The Toronto streets fall under legislation that seems at first blush slightly more favourable to the idea of the title in the soil passing to the municipality.

The Act there vested the highway in the municipality. But after all it was only the highway and not of necessity the legal estate that vested.

Whatever difference there may be seems against the respondents rather than otherwise.

It is possible in either case a title may be acquired as in opening new streets by purchase.

We are left here absolutely uninformed as to the facts bearing upon this point in the present case. We are referred to authority that expresses opinion on the general rule of law in municipalities in Quebec in this regard.

This particular municipality can, as a creature of statute, only have that given it thereby.

We are thus far from reaching the effect sought in the contention, set up in vague terms, that as the municipality owned the streets there was no room for other ownership in the soil thereunder or any part of it.

But after all, setting up the previous title, whatever it may have been, is entirely beside the question, for the real question is, whether or not the legislation

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acted upon had not subtracted from that ownership a part thereof, and given that part to another to have and hold in legal form liable to taxation, within the meaning of the taxing statute.

I am, therefore, having shewn the nature of this title in part of said lands over which streets ran, as a taxable possibility, only concerned to shew that the Toronto streets as regards the taxability of gas-mains if placed under them by a company, were in that regard as remote from being subject to taxation, as it is possible to urge for these respondents.

The Ontario law exempted, at the time the *Consumers' Gas Company's Case*(1) arose, by express language "every public road and way or public square" from assessment.

Yet this court saw its way to tax the gas-main under such "public roads and ways." In the case in hand no such distinct exemption occurs. I am not assuming from this that the appellant's roads or streets as such are any more taxable than those which were thus exempted.

I do say, however, we have a pretty decided difference as against respondents for them to overcome in view of the decision I am referring to.

Not only was the language which vested the highway in the municipality stronger than we have to deal with, but that was expressly exempted and the mode of levying the rate in due course of law as provided for there, seemed a barrier to interpreting the statute in the way it was.

And yet that interpretation was reached by having due regard to the substance of things and disregarding

(1) 27 Can. S.C.R. 453.

the semblance of mere words that did not touch the substance.

I am thus brought to the point of whether similar mains so placed under similar legislation having been found clearly taxable, as part of the land, the mains now in question can be held to have been covered by the language of article 100 already quoted at the outset.

Let the words "every lot" be looked at in contradistinction to the words that follow, "town lot or portion of a lot." What meaning have they ? If we suppose "town lot" means the same thing, then we have no possible use for the words "every lot." Therefore we have an assessment only of town lots or other lots. If we confine the assessment to what is usually designated by the term "town lot," we will have one that omits the larger field spaces that no doubt exist in this suburban town.

In short, we have, by such an interpretation, the assessment reduced to an absurdity. We must assign some meaning to the phrase "every lot" if we can. If we turn to the Century Dictionary, for example, we find of the many meanings "lot" is capable of, this:

> A portion or parcel of land; any piece of land divided off or set apart for a particular use or purpose; as a building lot; a pasture lot; all that lot, piece or parcel of ground (a formula in legal instruments).

Or if we turn to Murray we find substantially the same.

Is there anything to prevent us from assigning to it the like meaning relative to the lot of land that piece of land occupied by the mains in question ? Is there not intended to be expressed simply all ground, or all lands, comprising amongst others the parcel of land that the mains occupy ?

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If it does not mean all lands, what can it mean ? If we consider the French version, surely that is what the words do mean, and are intended to signify.

If we have not the interpretation clause of the Ontario "Assessment Act" to assist, have we not quite as comprehensive a term to which we must, if possible, assign a meaning, and which cannot well be assigned anything but the, if possible, still more comprehensive term "all lands."

There was a good deal said in argument as to the buildings referred to in the clause in question, which neither helps nor hinders any one here.

But I may be permitted to suggest that the reference to buildings is no doubt to shew that *primâ facie* they are for general purposes of assessment to be taken as part of the property here defined to be so intended in contra-distinction to the provision in another place made for assessing for special purposes the land, exclusive of the buildings.

I may, before concluding, observe, that the late Chief Justice in the *Consumers' Gas Company Case* (1), sets out four sections of the Ontario "Assessment Act," which it may be said made his task easier than this submitted to us. Do they, or any of them contain anything to distinguish that Act and decision from this ? Of these sections, 6 is but a variation of words expressing the like provision to that in the appellant's charter making all taxable property assessable. This does not help either way.

Section 7 he relies on is but a statutory declaration of what is to be implied in legislation of this character. For all the authorities so profusely collected in re-

(1) 27 Can. S.C.R. 453.

spondents' factum to demonstrate that all property of the same kind must be in reason treated alike in assessing, go to shew that this property which is of the same kind or legal quality as that which beyond doubt is taxable, ought to be assessed if justice is to be done.

The respondents' whole effort is to escape the substantial application of the fundamental principle upon which for purposes of a mere side issue they have so elaborately relied.

Returning to the four sections the late Chief Justice selected as helpful, section 9 cannot avail here.

Now, does the interpretation clause, section 2, quoted by him, help or hinder in arriving at a conclusion here, and drive us to distinguish this case from that?

I cannot see that it affects the matter at all. For the substance and the fundamental principle upon which that judgment proceeds is clearly that the kind of property the respondents have in the mains and support thereof, is real estate, in other words, the land I have found above.

I conclude from the foregoing considerations that the mains in question are taxable.

Is there a possibility of making a distinction in principle when we come to consider the poles set in the soil of the streets and all they carry? I think not. I am helped in this regard by the express disapproval in the Consumers Gas Company's case, of the case of *The Toronto Street Railway Co.* v. *Fleming*(1), which had held a street railway, though affixed to the land, not taxable.

I am clearly of a different opinion, however, as to

(1) 37 U.C.Q.B. 116.

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the meters, and I incline to hold the same, as to the service pipes, that they, so far as laid upon private property for the temporary service thereof, cannot be looked upon as in the same class of property as the mains or the poles and wires.

Are these possible of severance in the assessment ? And if not, how does that affect the validity of the assessment ?

As to the first year's assessment another question arises. Has there ever been for that a proper assessment ? I certainly would have been glad to have had exchanged for practical considerations bearing on this kind of question, some of the elaborated learning in the respondents' factum on points hardly disputable.

Clearly respondents were called upon, if an error, to distinguish, if they could, the personal from the real estate, in the first year's assessment, and in default of there being any attention paid thereto, I think now the assessment must be taken as relative to assessable property.

I may observe that the information to be put in the assessment roll and thus in the schedules delivered, is by article 4499, R.S.Q., to be what the council directs. No direction is shewn that would render such a brief though, I think, most unsatisfactory statement, improper much less illegal in a way leading to nullification.

I would deduct from the amount allowed by the learned trial judge such sums as the assessing of meters produced, and if any like item can be deducted relative to the service pipes or connections, clearly only personal property, it ought to be done.

After I had drafted my foregoing opinion, the

parties were asked to produce a plan of the appellant city. Waiving for the moment my objection to that course as undesirable and irrelevant, especially so when the plan bears a date later than appellant's incorporation, I may say the suggestion made relative thereto induces me to say that any consideration of numbers of lots on a plan of any date must be a false guide to the meaning of this statute.

Each of these numbered tracts of land when divided or subdivided must have new streets carved thereout. Are these new streets to become forever taxable ? And existing streets might need to be closed or diverted and is the land over which the streets ran to be forever free from taxation ? Certainly not any more than I hold these parts expropriated by the respondent are to be or remain so.

Subject to the said modification I would allow the appeal, and with costs here and in the court of appeal.

And if in any way a reference can be profitably directed as to the service pipes, I would direct it to be had.

DUFF J. concurred in the opinion stated by the Chief Justice.

ANGLIN J.—If I did not think this case distinguishable from *Consumers' Gas Co. of Toronto* v. *City of Toronto*(1), I would apply that decision, although not satisfied that, if the question was *res integra,* I should reach the conclusion that the Toronto gas-pipes were assessable as land or real property under the Ontario "Assessment Act" of 1892. In my opinion,

(1) 27 Can. S.C.R. 453; 23 Ont. App. R. 551.

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however, there is a clear distinction between the provisions of that statute, which were under consideration in the *Consumers' Gas Company's Case*(1), and those of the charter of the Town of Westmount, formerly Côte St. Antoine, 56 Vict. (Que.) ch. 54, which is now before the court.

The Ontario Act contained a provision that

all property in this province shall be liable to taxation subject to the following exemptions:

None of the exemptions had any bearing on the *Consumers' Gas Company's Case*(1). The "Westmount Act" contains no similar provision. It authorizes,

an assessment on every lot, town lot, or portion of lot, whether built upon or not, with all buildings and erections thereon,

or, according to the French version,

une cotisation * * * sur tout terrain, lot de ville, ou partie de lot, soit qu'il y existe ou non des bâtisses, avec tous bâtiments et constructions dessus érigés.

The Ontario statute enacted that

All municipal local or direct taxes or rates shall * * * be levied equally upon the whole ratable property real and personal of the municipality;

and "real property" was thus defined:

"Land," "real property" and "real estate" respectively shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty, and all trees or underwood growing upon the land and land covered with water, and all mines, minerals, quarries, and fossils in and under the same except mines belonging to Her Majesty.

Under this provision it was held that the gas-pipes of the Consumers' Gas Company placed under the streets of the City of Toronto were liable to assessment as real property.

(1) 27 Can. S.C.R. 453.

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I make no distinction between gas-pipes laid under the streets and poles erected in the streets to carry electric wires or lamps.

By the Ontario "Assessment Act," the purpose of the legislature that all property not exempted should be liable to taxation was expressly declared. With the aid of the clause defining "real property" the court thought that the gas-pipes in question — which were undoubtedly "property in the province" and as such were expressly declared to be liable to taxation — should be deemed real property rather than personal property — the two classes into which all property appears to have been divided by the statute for purposes of assessment.

In the "Westmount Act" the subjects of taxation are confined to "every lot, town lot or portion of lot," and "buildings or erections thereon." I have stated that the "Westmount Act" contains nothing to indicate that it was the purpose of the legislature that all property in the municipality should be assessable. There is no definition of the words "terrain" or "lot" to extend their meaning or application. This statute is upon these grounds, in my opinion, clearly distinguishable from the Ontario "Assessment Act" of 1892, and *The Consumers' Gas Company's Case*(1), therefore, does not rule the appeal now under consideration.

Unless the land itself on or in which it is placed be a "lot, town lot or portion of lot," any erection on or in it is not assessable under the provision of the Westmount charter. The land occupied by the defendants' poles is not itself assessable because it does not come within the descriptive words of the statute. The word "lot" is used in contra-distinction to "town lot"

(1) 27 Can. S.C.R. 453.

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and probably signifies a parcel of land owned privately, but not laid out in town lots — certainly not a public highway. In construing the word "terrain" in the French version, we cannot overlook the use of the word "lot" in the English version as its equivalent. "Terrain" is here used in contradistinction to "lot de ville" and, like the word "lot" of the English version, means a lot or parcel of land which is not a town lot. Compare article 709 Municipal Code.

It may be that, as counsel for the appellant so strongly contended, the poles, etc., of the defendants are immovables. But the right to tax immovables is not conferred by the statute. Because the things which the municipality asserts the right to tax are not, in my opinion, within the "literal construction of the words" of the charter defining the subjects of assessment — and that is the construction upon which the taxpayer has a right to stand: *Pryce* v. *Monmouthshire Canal and Railway Companies*(1), at pages 202-3 — I have reached the conclusion that they are not taxable. Having regard to the well-known rule formulated by Lord Cairns in *Partington* v. *Attorney-General*(2), at page 122, cited by Mr. Justice Carroll, the letter of this taxing Act may not be extended because the court may think it would be more equitable that the property in question should be assessable or even that the spirit of the statute requires it. See, too, *Tennant* v. *Smith*(3), at page 154; *Horan* v. *Hayhoe*(4), at page 290.

For these reasons I think this appeal fails and must be dismissed with costs.

I reach this conclusion without reference to the

(1) 4 App. Cas. 197.
(2) L.R. 4 H.L. 100.
(3) [1892] A.C. 150.
(4) [1904] 1 K.B. 288.

plan of the Town of Westmount produced after argument at the request of the court.

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Anglin J.

Appeal dismissed with costs.

Solicitors for the appellant: *Boyer & Gosselin.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*

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*Feb. 23.
*April 3.

THE CANADIAN RAILWAY ACCIDENT INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

ANDREW JOSEPH HAINES, ADMINISTRATOR OF THE ESTATE OF F. L. HAINES, DECEASED (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Accident insurance — Condition of policy — Notice — Tender before action—Waiver.

The condition of a policy insuring H. against death by accident required that notice of death should be given to the company within ten days thereafter, and it was provided that if the insured met his death while under the influence of intoxicating liquor the company should be liable only for one-tenth of the amount of the insurance. The insured disappeared on the 21st of November, 1908. When last seen on the evening of that day he was apparently under the influence of intoxicants, and, on 3rd April, 1909, his dead body was found in the river in an advanced state of decomposition, death having been, in all probability, caused by drowning. After the finding of the body the plaintiff gave notice of death to the company and furnished proofs as required. The company refused payment and, before action, tendered to the plaintiff one-tenth of the amount of the insurance payable under the policy as full settlement therefor. The company pleaded this tender in their defence to the action and made proof thereof at the trial.

Held, that the tender made by the company was a waiver of the condition requiring notice within ten days of death and also an admission of liability by the company; and, Anglin J. dissenting, that, as the company had failed to shew that the deceased came to his death while under the influence of intoxicating liquor, the plaintiff was entitled to recover the full amount of the insurance. Judgment appealed from (20 Man. R. 69) affirmed.

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

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Mathers C.J., at the trial, and maintaining the plaintiff's action with costs.

The circumstances of the case appear in the headnote and the questions at issue on the appeal are stated in the judgments now reported.

Wallace Nesbitt K.C. for the appellants.
W. H. Trueman for the respondent.

THE CHIEF JUSTICE.—This appeal should be dismissed with costs. See S.V., 1904, 1, note at page 388.

DAVIES J.—During and at the close of the argument I entertained doubts whether the finding of the trial judge, confirmed by the Court of Appeal, that the defendants, appellants, had failed to prove the defence that the deceased came to his death while under the influence of intoxicating liquor, could be sustained.

I am not able, however, to satisfy myself that this finding of the two courts is so clearly wrong as to justify me in reversing it and in allowing the appeal on that ground.

On the other ground, of want of notice, I concur in holding that the proof of the tender of $100 before action and the payment of the amount into court amounts to an admission of the cause of action and to a waiver of the notices required by the policy before action.

IDINGTON J.—In my opinion the finding of the learned trial judge that the appellants had not success-

(1) 20 Man. R. 69.

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CANADIAN RAILWAY ACCIDENT INSURANCE CO. v. HAINES.

Idington J.

fully met the onus of proof resting upon them to shew that deceased came to his death through intoxication, ought not to be disturbed.

The evidence was far from conclusive. I might suspect much — might assume suicide — I might even suspect the deceased was thrown into the river and thus drowned. None of these are proven.

In my view it is unnecessary to pass any opinion upon the effect of the conditions or any of them.

The defendants did not merely plead as the rule relied upon provides, payment into court, but pleaded a tender before action and payment into court of the amount so tendered.

It could not prove such a plea by proving a conditional tender as it now says in argument was what was intended.

A tender without prejudice is no tender. It could not be brought in evidence and ought not to have been attempted to be brought in evidence unless clearly abandoning then and there the without prejudice part.

The defendants clearly intended to get the benefit of an unconditional tender, and proved it for that purpose.

In doing so they waived the conditions relied upon.

They cannot now be heard to say they waived it only in part.

It was quite competent for the court below to have amended the pleading to conform with the evidence and if the court has not done so I think it ought now to be taken to have so intended and directed.

The appeal should be dismissed with costs.

DUFF J.—It is not disputed that the deceased, Frederick Lorne Haines came to his death by "ex-

ternal violent and accidental means" within the meaning of the policy on which the action was brought. The defences of the company were two: First, that notice of the death of Haines was not given within ten days after it occurred as required by the strict tenor of the sixth proviso; and, secondly, that the injuries from which he died happened while he was under the influence of intoxicating liquors. This last mentioned fact if established would bring into operation "Part G." by which is provided that, in such circumstances, the sum recoverable shall be one-tenth of the maximum amount payable under the policy; and this sum ($100) was paid into court with a plea of tender accompanied by a denial of liability.

Haines was last seen in Winnipeg (where he resided with his mother) on the 21st of November, 1908. At about 7 o'clock in the evening of that day he was in a state of deep intoxication and, at 9 o'clock, he was observed on the street by a number of people, and although manifestly under the influence of liquor he was then, as the learned trial judge expresses it, "capable of taking care of himself." On 3rd April, 1909, his dead body was taken out of the Red River at Winnipeg in an advanced state of decomposition. An autopsy disclosed no marks or indications of violence, death having been caused seemingly by suffocation from drowning. These facts do not appear to me to lead to the inference that the deceased came to his death while "under the influence of intoxicating liquors." It has been said often enough that the question whether a plaintiff has acquitted himself of the burden of proof in respect of an allegation of fact is not a question to be tried by a rigorous application of the canons of scientific inference. It is not necessary that the evidence should be such as to de-

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monstrate the conclusion. But the conclusion must have some more legitimate warrant than conjecture, surmise, guess. I agree with the learned trial judge and the majority of the Court of Appeal that, in this case, the inference the company asks us to draw can not properly be held to arise from the facts in evidence.

As to the first defence I am unable, with respect, to agree to the construction of the proviso proposed by the respondent. I think the terms are unmistakable, and I do not think we can justly assume that the parties left out of contemplation a contingency so obviously possible as that of death from accident remaining undiscovered until after the lapse of the prescribed period for giving notice of it. We must, I think, take it that the parties did deliberately intend the manifest result of the language used, viz., that in certain readily conceivable events (of which the contingency which has happened was one) the policy should become an honour policy.

But I think the respondent is entitled to succeed upon the ground that the appellants are precluded from taking advantage of this proviso. It was proved by them at the trial that, before the action was brought, they tendered the sum of one hundred dollars as payable under the policy. This tender as mentioned was pleaded and the sum tendered was paid into court. The plea did not admit, but on the contrary was accompanied by a denial of liability. The tender, however, appears not to have been qualified by any such denial. The effect of it, in the circumstances, was, I think, an unqualified admission that the defendants were liable upon the footing that the plaintiff was entitled to recover the amount payable under "Part G.," that is to say, the amount payable on the assumption that when his death occurred

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Haines was under the influence of intoxicating liquor. What then is the effect of this tender upon the rights of the parties? The sixth proviso unquestionably expresses a condition — whether a condition precedent requiring notice and proof of loss as essential elements of a cause of action based upon the policy, or a condition subsequent causing a right of action complete at the moment of death to be defeated in default of notice and proofs. It is immaterial for the purpose of this case which of these is the more accurate view of the legal effect of the clause. In either case one cannot doubt that the stipulation that the rights under the policy shall be "void" or "invalidated" is intended, in accordance with the interpretation which, by inveterate practice, has been put upon such stipulations, to declare that these rights shall be "void" at the election of the company. There are numerous authorities in which similar clauses in various classes of contracts, leases, charter parties, sales of lands and of goods have been held to confer on the party for whose benefit they were framed the option of treating or not treating the rights of the other party as at an end. The decision of the Court of Sessions in *Donnison* v. *Employers' Accident and Live Stock Ins. Co.*(1), is an illustration of the application of the principle to a clause declaring the giving of notice to be a condition precedent to a right of action upon an accident insurance policy.

Now, the rule is perfectly settled that if you have a clause of that type and the event has happened upon which under the terms of the clause the one party is entitled at his option to insist that the other party's rights have lapsed — and if, after that event has hap-

(1) 24 Ct. Sess. Cas. (4th. Ser.) 681.

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pened, the party in whom the right of election is vested do any act involving a recognition of the other party's rights as still subsisting and do it with a knowledge of the facts that entitle him to say that these rights have been terminated — then the doing of such an act is a conclusive election not to take advantage of the clause.

The offer mentioned appears to me to be such an act because it must be taken to involve a recognition of the company's liability under the policy — a liability which the company might have successfully repudiated by insisting upon the *strictissimum jus* under the clause in question. I should not wish to be misunderstood as holding that the company could not have made a tender which would not have involved such a recognition. I think it could. I think it is quite clear that the company could have said when making the offer — we are willing to pay this sum if you wish to take it, but we do not admit we are under any liability to pay you anything; we say that through failure to give notice you have lost any rights you might otherwise have had, but we treat the policy as an honour policy for $100. That would have been a tender and an unconditional tender because it would not have required from the claimant any admission — that is to say, the acceptance of that sum would not have involved any admission on his part — that he was not entitled to more. *Greenwood* v. *Sutcliffe*(1); *Scott* v. *Uxbridge and Rickmansworth Railway Co.*(2). But I think it is clear that the tender was not qualified in this way and that as made it involved a waiver of or an election not to insist upon the objection that no notice had been

(1) [1892] 1 Ch. 1. (2) 35 L.J.C.P. 293.

given; once made the election became, of course, irrevocable.

ANGLIN J. (dissenting).—While denying all liability under the insurance policy upon the life of the deceased Frederick Lorne Haines on the ground that proper notices of his death and proofs of claim were not given within the periods prescribed by the conditions of the policy, the defendants have also pleaded that the insured came to his death while under the influence of intoxicating liquors and that, by virtue of another condition of the policy, their liability, if any, is, therefore, limited to the sum of $100, one-tenth of the amount of the insurance. They have pleaded tender of this amount to the plaintiff and have given evidence in support of that plea. They have also brought the sum of $100 into court as sufficient to satisfy the plaintiff's claim, if any.

Upon the issue as to the condition of the insured at the time of his death there are no facts in dispute. Whether he was or was not then intoxicated is purely a matter of inference from the facts as deposed to and found. The learned trial judge was of opinion that the defendants had not discharged the burden of establishing that the accident causing the death of the insured occurred while he was under the influence of liquor. The learned judge dismissed the plaintiff's action on the ground of non-compliance with the conditions as to notice of death and proof of claim. The Court of Appeal reversed this judgment, holding that the tender made by the defendants was a waiver of the conditions as to notice of proof and, inferentially, agreeing with the trial judge on the question of the condition of the insured at the time of his death.

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CANADIAN RAILWAY ACCIDENT INSURANCE CO. v. HAINES.

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From this judgment Richards J.A. dissented, holding that the only proper inference from the evidence is that the insured was drowned while under the influence of intoxicating liquor.

While very loath to disturb a finding of a trial judge upon a matter of fact such as this, though resting solely upon inference, especially when that finding has been confirmed by a majority of the judges of a provincial appellate court, a careful consideration of the actual facts found by the learned trial judge and of the evidence upon which his findings were based has satisfied me that Mr. Justice Richards drew from them the correct inference when he said that:

> Every indication seems to me to point to the death having happened while the insured was under the influence of intoxicating liquor. Unless some person could be produced who saw the happening of the death and also noticed that the insured was then intoxicated to some extent I can imagine no stronger proof than that given.

I agree with the learned judge that the defendants have discharged the onus which lay upon them to prove their plea.

The appeal should, in my opinion, be allowed, and the judgment for the plaintiff should be reduced to the sum of $100. The defendants should have their costs in all the courts, against which the sum of $100 awarded to the plaintiffs may be set off. The money in court should be paid out to the defendants.

Appeal dismissed with costs.

Solicitors for the appellants: *Aikins, Fullerton, Coyne & Foley.*

Solicitors for the respondent: *Bonnar, Trueman & Thornburn.*

JAMES STRATTON (DEFENDANT) ....APPELLANT;

AND

THE REVEREND HERCULE LEANDRE VACHON AND RUSSELL WILSON, EXECUTORS OF JAMES FLANAGAN, DECEASED (PLAINTIFFS) ..... RESPONDENTS.

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*March 3.
*April 3.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Broker—Principal and agent—Commission on sale of land—Introduction of purchaser—Efficient cause of sale—Completion of contract by owner on altered terms.

An agent, instructed to secure a purchaser for lands, introduced a prospective purchaser who associated himself with other persons, whose identity was unknown to the agent, to carry out the purchase of the property. The individual thus introduced and his associates subsequently carried on negotiations with the owner personally which resulted in the purchase, on altered terms, of the property in question, together with other lands, by his associates alone while he retired from the transaction. The owner refused to pay the agent any commission on the sale on the ground that he had not been the efficient cause of the sale which was finally made as above stated.

Held, reversing, in part, the judgment appealed from (3 Sask. L.R. 286), that as the steps taken by the agent had brought the owner into relation with the persons who finally became purchasers he was entitled to recover the customary commission upon the price at which the property in question had been sold. *Burchell* v. *Gowrie and Blockhouse Collieries* ([1910] A.C. 614) applied.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), affirming the judgment of New-

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

(1) 3 Sask. L.R. 286.

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lands J., at the trial, by which the plaintiffs' action was maintained with costs and the defendant's counterclaim was dismissed.

The action was brought by the late James Flanagan to recover from the defendant, appellant, the sum of $5,578.33, the amount of a promissory note and interest, and was continued, after his decease, in the names of the present respondents as the executors of his last will and testament. The defendant deposited funds in court to abide the decision of the cause and also counterclaimed for the sum of $6,250, with interest, being his claim for a broker's commission on the price of sale of certain lands belonging to the late James Flanagan, in the City of Saskatoon, Sask., in respect of which he alleged he had rendered services, as the agent of deceased, by means of which the purchasers had been secured. At the trial, Mr. Justice Newlands found that the deceased had agreed to pay a commission to the defendant on his obtaining a purchaser for the property; that defendant had offered and recommended the property to one Moore and shewn him what was known as the "Western Hotel" (a portion of the lands sold), and that, through Moore, negotiations had taken place which resulted in the owner selling the whole property, including the hotel property, to two persons named Millar and Robinson, who had on other occasions entered into real estate transactions with Moore, and with whom Moore had associated himself in order to effect the purchase of the property in question. Moore had retired from the transaction before the completion of the sale and the owner had dealt with the actual purchasers personally and closed with them on terms somewhat different from those which he had

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mentioned to the defendant when instructing him to secure a purchaser. The learned trial judge, however, considered himself bound by the decision in *Beable* v. *Dickerson*(1), and dismissed the counterclaim, holding that Moore was not an agent. This judgment was affirmed by the judgment appealed from (2) Johnstone J. dissenting.

The questions raised on the present appeal are stated in the judgments now reported.

The appellant appeared in person.

Ewart K.C. for the respondents.

THE CHIEF JUSTICE.—There can be but little doubt as to the legal principles by which the rights and obligations of the parties to the agreement declared upon are to be ascertained. If the defendant, as he alleges, was an agent to find a purchaser for the property at a price to be fixed by the plaintiff when the purchaser came forward and that he did find a purchaser who did purchase, then the defendant would undoubtedly be entitled to his commission.

The admitted facts are that the plaintiff, an owner of real estate in the Town of Saskatoon, when about to leave that place to take up his residence elsewhere, instructed the defendant, a land agent, to sell his immovable property at a price to be fixed by the owner and that a sale was subsequently made. The trial judge found that the property would not have been sold if the defendant had not spoken to one Moore and upon his connection with the transaction as completed the result of this appeal largely depends.

(1) 1 Times L.R. 654.

(2) 3 Sask. L.R. 286.

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The Chief Justice.

The instructions to find a purchaser were given to the defendant towards the end of December, 1906, and Flanagan, the plaintiff, left Saskatoon about the 1st of January, 1907. On the 17th of the same month, Moore, of Lloydminster, who had entered into negotiations with the defendant for the purchase of other properties, was induced by defendant to consider the purchase of the plaintiff's property, which they visited together, and of these negotiations the plaintiff was informed. He was asked for his price, which was submitted to Moore, the latter, in the meantime, having told the defendant that he would either buy the property, which he considered very desirable, or find a purchaser for it. The conditions as to the cash deposit required by plaintiff being more onerous than Moore could assume, he introduced the property to two of his friends at Lloydminster, Millar and Robinson, who agreed to go into the venture with him and it was determined between them that negotiations would be opened up with Flanagan with a view to purchase. The chief object was to obtain a reduction in the amount required as a cash deposit. Moore, however, again found it impossible because of his financial situation to go on with the negotiations, which were, however, prosecuted to a successful issue — the difficulty as to the deposit having been got rid of — by his associates Millar and Robinson.

Could there be any doubt on these facts that if the sale had been made in the first instance to Moore alone, or in the second instance to Moore and his associates, that Stratton would have been entitled to his commission on the ground that he had executed his mandate to find a purchaser? And subsequently what happened to affect Stratton's claim ? The dis-

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The Chief Justice.

appearance of Moore as a purchaser after the purchase had been decided on could not affect any right then acquired by Stratton if some of the parties who had been introduced to the property through his medium completed the transaction as originally contemplated.

I quite agree with the trial judge that on all the facts the conclusion is that the sale would not have been made had Stratton not spoken to Moore in the first instance. But I go further, and hold that the relation of buyer and seller between Flanagan and Millar and Robinson was brought about by Stratton, and that he was the *causa causans* of the sale. The property was brought by Stratton to the attention of Moore, who was instrumental in inducing Millar and Robinson to consider it with a view to a purchase on joint account. The subsequent disappearance of Moore as a purchaser before the transaction was finally completed did not operate to destroy the right acquired by Stratton through his original introduction of the property to one of the three associates, two of whom completed alone the purchase begun with and through the man to whom it was introduced originally and who had undertaken then to buy it or find a purchaser for it.

I am of opinion, therefore, that Stratton is entitled to his commission on the sale of the hotel property and the appeal, to that extent, should be allowed with costs.

DAVIES J.—This appeal involved the question of the appellant's right to recover from the deceased Flanagan commission upon the sale of certain of the deceased's properties in Saskatoon.

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Davies J.

The trial judge found that Flanagan

> did agree to give defendant (appellant) a commission on his obtaining a purchaser for said property who would purchase the same at a price and on terms agreeable to him.

The property to which I think the above finding was intended to apply was the "Western Hotel" property, and, at any rate, I am clearly of opinion that it can only be sustained, on the evidence, with respect to that property, and that it is right as to that property.

The question which the trial judge answered against appellant was "that he was not the direct cause of the sale." The learned judge was of the opinion that

> to earn his commission he (the agent) must himself bring the purchaser and vendor together and he does not earn his commission if he does this through the medium of another party who is neither his agent nor the agent of the purchaser.

Under the inference he drew from the evidence on this point he dismissed plaintiff's claim.

The majority of the court of appeal upheld this judgment on the ground, as stated by Lamont J., that when Flanagan completed the sale there was no knowledge on Flanagan's part that the defendant had been in any way instrumental in securing Millar and Robinson as purchasers and that had he been aware that such was the case he might have protected himself as to the commission in fixing his prices, and that "the circumstances were not sufficient to put Flanagan on inquiry." The Chief Justice, as he says, "after very great hesitation" reached the same conclusion as Mr. Justice Lamont, while Johnstone J. dissented, holding that the real test to be applied in cases such as this was whether "the agent was the real efficient cause in bringing about the sale."

In the case of *Burchell* v. *Gowrie and Blockhouse Collieries Limited,* the Judicial Committee of the Privy Council held(1), that as the appellant in that case had brought the company into relation with the actual purchaser he was entitled to recover, although the company had sold behind his back on terms which he had advised them not to accept.

Lord Atkinson, in delivering the judgment of the Board, at page 625, says:

> The answer to the second contention (that the acts of an agent cannot be held to be the efficient cause of a sale which he has in fact opposed) is, that if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser, the agent has done the most effective and, possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work, and behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale.

The *knowledge* on the part of the vendor that the person with whom he completes the sale was introduced by the agent is not the test of his liability to pay commission, but the fact whether the agent's acts have really been the effective cause of the sale, and if the agent's acts have brought a person or persons into relation with his principal as an intending purchaser, and the sale is effected, the agent has done what he contracted to do and is entitled to be paid.

Now, in the case at bar there was a contract as found by the trial judge, applicable at any rate to the hotel property, which contract was still in existence at the time Flanagan sold to Millar and Robinson. I cannot doubt, under the evidence, that this sale was brought about by the negotiations which Stratton had

(1) [1910] A.C. 614.

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with Bramley-Moore, to whom he shewed the property, and who was willing to buy if he could raise the necessary cash payment. Bramley-Moore found himself unable to make the cash payment Flanagan at first required, and associated himself with Millar and Robinson as co-adventurers in the proposed purchase. He had previously intimated to Stratton that if he did not buy personally he would "place the property with friends of his." One of these latter saw Flanagan personally and agreed with him respecting the cash payment, but Bramley-Moore appears, for apparently private reasons of his own, to drop out and let his co-adventurers complete the purchase. But I cannot doubt that the action of these purchasers in buying was the direct result of the acts of Stratton in bringing the property to Bramley-Moore's attention and inducing him to associate himself with his friends Millar and Robinson as co-adventurers who were willing to buy if satisfactory terms could be arranged. Moore, it is true, did not give to Stratton the names of the friends with whom he intended to place the property if he himself was not able to purchase. He only spoke of them generally as persons with whom he "could place it." The arrangement made by these three amongst themselves acting upon the information and facts respecting the property brought to Bramley-Moore's attention by Stratton, was that the three should become joint purchasers of the property at the price stated by Stratton to Moore if a reduction in the amount of the cash payment required by Flanagan could be secured. The first suggestion as to this reduction in the amount of the cash payment was made by Stratton to Flanagan and was agreed to by the latter when he concluded the terms of sale with Millar and Robinson.

Now, surely, if Bramley-Moore had remained as one of the purchasing co-adventurers, Stratton would have been entitled to his commission, or if he had purchased without associating himself with any one else, the same result would have followed. The mere fact of his dropping out (from personal reasons of his own) from the concluded purchase, the vendees of which purchase were brought into relation with Flanagan through Stratton, cannot be a reason for depriving him of his commission. It is not so much the knowledge or absence of knowledge on Flanagan's part that Stratton had brought about the sale, as the fact itself that the sale had been effected to parties who were brought into relation with Flanagan through Stratton, that entitled the latter to commission.

The evidence of Bramley-Moore is clear that he told Stratton "he thought this Western Hotel the best proposition he knew of" and that "if he could not take it himself he could place it." That on his return to Lloydminster he

> agreed with Millar and Robinson that they should all three go into the deal together provided the cash payment was lower,

and that shortly afterwards "Robinson went to Saskatoon to investigate" (about the reduction of the cash payment I assume, as that was the only question open). That Robinson asked Moore to accompany him as he was to have been a partner, but that Moore had to go somewhere else and Robinson went by himself and completed the purchase in his own name and Millar's. Unless, therefore, the accidental fact of Moore having dropped out of the purchasing syndicate is enough to deprive Stratton of his right to re-

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cover commission, I cannot see how his claim can be dismissed.

It was suggested that the question of his right to recover commission was an afterthought of Stratton's consequent upon his being sued on a promissory note of his own by Flanagan. But Mr. Stratton has satisfactorily cleared that up and shewn by his evidence, repeated on his cross-examination, that when he drew the papers completing the sale he suspected the purchasers were Bramley-Moore's friends of whom he had spoken as possible purchasers and had inquired from Flanagan whether or not they were so, telling him that if they were he would claim his commission. Flanagan, it is true, successfully parried the inquiry, but when subsequently Stratton ascertained the fact to be as he suspected, he at once put forward his claim.

I would allow the appeal with costs in all the courts on the counterclaim for commission on the price for which the "Western Hotel" was sold, $70,000, that being the only property the sale of which was directly brought about by the acts of Stratton and with respect to which he was the efficient cause of sale.

IDINGTON J.—The only difficulty the courts below seem to have had in allowing a recovery was their inability to infer that deceased knew or ought to have known that the purchasers, Millar and Robinson, of Lloydminster, were two of the parties of whom appellant, without naming them, had informed deceased.

The learned trial judge by his findings on the disputed facts in favour of appellant has brushed aside some difficulties standing in his way up to this point, when he told deceased what he had done for him, and from which he expected a sale.

It seems that Lloydminster is about two hundred miles from Saskatoon. From what we are told it seems as if the sole business the buyers had in coming from the former place to the latter was solely relative to this hotel purchase. They closed with deceased exactly on the same terms as appellant had indicated to deceased what he thought would bring about a sale. All he wanted was a reduction of the cash payment from thirty thousand dollars to ten thousand.

Millar is described by deceased as one of his best friends, one whom he had known from childhood, but not as one that he had any reason to believe until this time of his coming to Saskatoon, at all likely to become a purchaser, nor does he suggest any other way than what appellant had told him for supposing his friend knew or might have come to know that the property was for sale.

Although much stress was laid upon the alleged fact that appellant's name was never suggested as the agent who had brought about the sale, we are not told how it did come about. We are not told anything to explain the remarkable coincidence of the coming on that mission at that time and its successful issue by deceased conceding the one point at which the progress of the purchase had stuck for a while. I infer what the courts below seemed unable to infer. I infer deceased either knew or had good reason to believe just what the evidence discloses, that these buyers were of the party appellant had spoken of to deceased.

Lloydminster is not one of those large cities in which duplicate sets of operators might suddenly be seized with the same thirst for the same property at or about the same time as appellant was waiting for them. And the deceased does not seem to have been

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lacking in worldly knowledge relative to real estate. Indeed, it seems remarkable how skilfully old friends could have avoided stumbling upon the curious fact that they had nearly closed the deal through appellant.

Of course the other deals made were not brought about directly by appellant, though incidentally the result of the $70,000 deal for the hotel.

I think the appeal should be allowed with costs here and in the Court of Appeal and of the trial of this counterclaim — and judgment be entered for appellant for $3,500 and said costs.

If the judgment against appellant has not been discharged of course this, so far as that is unsatisfied, must be set off.

DUFF J.—The legal rule governing this case is thus stated by Lord Atkinson delivering the judgment of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*(1), at page 624:

> There was no dispute about the law applicable to the first question. It was admitted that, in the words of Erle C.J. in *Green* v. *Bartlett* (1863)(2), "if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him." Or in the words of the later authorities, the plaintiff must shew that some act of his was the *causa causans* of the sale (*Tribe* v. *Taylor* (1876)(3), at p. 510), or was an efficient cause of the sale (*Millar* v. *Radford* (1903)(4)).

The material facts are that the property sold was placed in the defendant's hands to find a purchaser. Terms were mentioned, but they were not looked upon by either Flanagan or the defendant as anything but a

(1) [1910] A.C. 614.
(2) 14 C.B. (N.S.) 681.
(3) 1 C.P.D. 505.
(4) 19 Times L.R. 575.

basis of negotiation. In effect the arrangement between them was that the defendant if he got a purchaser on terms satisfactory to Flanagan was to get a commission. The defendant brought the property to the attention of one Moore, who said he would take the property himself or place it with others. The defendant then communicated with Flanagan (on the subject of terms) who put the cash payment at $30,000. Moore having been informed of this communicated with two persons in Lloydminster, Millar and Robinson, (with whom he had frequently been associated in real estate transactions,) and it was decided that they with Moore would make the purchase if the cash payment were reduced to $10,000. The first plan was that one of them should go to Vancouver to see Flanagan, but the visit was postponed for some weeks when they learned that Flanagan had returned to Saskatoon and Millar and Robinson decided to open negotiations with him there; Moore by this time having become involved in other transactions which prevented him from taking part in the purchase, Millar and Robinson proceeded to Saskatoon and in a few days bought the property for themselves alone. It appears to me on those facts to be sufficiently established that

the relation of buyer and seller was really brought about by the act of the plaintiff.

The determination of Moore and his associates to purchase if suitable terms respecting the mode of payment could be obtained was the direct and normal consequence of the introduction of the property to Moore. It is impossible to maintain the position that Moore's act in associating Millar and Robinson with him in the adventure must be regarded as *novus actus*

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interveniens. That a speculator in real estate having a property offered to him and thinking it likely to be a profitable purchase should associate with him others with whom he is in the habit of acting in such transactions is quite within the ordinary course of things; almost as much, indeed, as borrowing to provide the purchase money. It was, I think, hardly contended otherwise because I think it was not seriously disputed that if Moore had not withdrawn the connection between the defendant's introduction and the purchase would have been sufficiently direct. How then is the matter affected by the withdrawal of Moore? That itself is clearly not a new and independent instrumentality. Nobody suggests that the fact of his withdrawal had any effect in forwarding the transaction. There was, of course, the question of terms. But the terms mentioned to the defendant by Flanagan were, as I have said, intended only to be a basis of negotiation. There can, I think, be no doubt that the terms which Millar and Robinson proposed were terms which Flanagan from the first was willing to accept. I cannot see, therefore, on what ground it can be maintained that the sale was not "really brought about" through the defendant's introduction of the property to Moore.

ANGLIN J.—The facts are fully stated in the judgments of the Supreme Court of Saskatchewan, particularly in the very carefully prepared opinion of Mr. Justice Johnstone.

It having been found that the plaintiff's testator, James Flanagan, agreed to pay the defendant a commission if he should obtain a purchaser for his hotel property who would buy it at a price and on terms

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agreeable to him (Flanagan), and there being evidence to support this finding, the right of the defendant to recover on his counterclaim depends upon his having established that he did in fact procure such a purchaser.

Had the property been bought by Moore, to whom the defendant directly introduced it, or by any syndicate in which Moore was personally interested, the defendant's right to his commission would appear to be incontrovertible. *Burchell* v. *Gowrie Blockhouse Collieries, Limited*(1). The difficulty in the defendant's way is that, although Moore was originally interested with Millar and Robinson, he did not eventually become a co-purchaser with them. That the property was brought to their attention by Moore is not questioned; that Moore became interested in it through introduction of the defendant is equally clear: the question is whether, in bringing the property to the attention of Millar and Robinson, Moore, though in one sense actuated by a wish to subserve his own personal interests, should, nevertheless, not be held to have done so under circumstances which entitle the defendant to a commission from the vendor.

The finding of the learned trial judge — the force of which is certainly not weakened by the fact that his judgment was adverse to the defendant — was that Moore had

> told the defendant he would either take the property himself or obtain a purchaser for him.

The evidence establishes that the defendant informed Flanagan of his interview with Moore and of Moore's proposal to interest friends of his from Lloydminster

(1) [1910] A.C. 614.

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in the purchase. I agree with Johnstone J. that the circumstances warrant an inference, if that be necessary, that Flanagan had constructive, if not actual notice, that his purchasers were the Lloydminster friends whom the defendant told him that Moore hoped to interest in the purchase.

Had Moore, Millar and Robinson become the purchasers — whether immediately following the defendant's introduction of the property to Moore and the latter's communication with his then undisclosed coadventurers and upon the terms then discussed, or at a later period after a break in the negotiations and upon other terms to which the vendor was subsequently persuaded to assent — the defendant's right to a commission would have been unquestionable. It would then have been too clear for controversy that his introduction of the property to Moore would have been the "efficient cause" of the vendor obtaining his purchasers. I cannot see that this introduction ceased to be the efficient cause of Flanagan obtaining his purchasers and became merely a cause *sine quâ non* simply because Moore, owing to other business entanglements, found himself unable to resume or proceed with the negotiations with Flanagan which resulted in Millar and Robinson buying the property.

In my opinion the defendant has established that his introduction was the foundation upon which the negotiations which resulted in the purchase proceeded and without which they would not have proceeded. *Wilkinson* v. *Martin*(1). The relation of buyer and seller was really brought about by him, *Green* v. *Bartlett*(2), at page 685 — that is by his introduction, *Barnet* v. *Isaacson*(3).

(1) 8 C. & P. 1, at p. 5. (2) 14 C.B.N.S. 681.
(3) 4 Times L.R. 645.

But the effect of the defendant's intervention was confined to the sale of the hotel property, which brought $70,000. He was not efficiently instrumental in bringing about the sale of the adjacent lots for which Millar and Robertson paid Flanagan $55,000. On his own evidence the defendant is, in my opinion, not entitled to a commission on this part of the purchase.

It is not disputed that 5% is the usual commission paid in Saskatchewan and Alberta in respect of such transactions as that with which we are dealing.

The appeal should be allowed with costs in this court and in the full court of Saskatchewan and judgment should be entered for the defendant on his counterclaim for $3,500 with costs to be set off against the plaintiff's judgment for debt and costs.

Appeal allowed with costs.

Solicitors for the appellant: *Stratton & Jordan.*

Solicitors for the respondents: *Acheson & Shannon.*

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*March 6, 7.
*April 3.

BROOKS, SCANLON, O'BRIEN COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

RHINE FAKKEMA (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence — Employer and employee — Dangerous works — Defective system—Liability of incorporated company—Fault of employee.

An incorporated company carrying on dangerous operations is liable at common law for damages sustained by an employee in consequence of injuries occasioned by the use of a system which failed to provide a safe and proper place in which the employee could do his work; it is not relieved from this responsibility by the fact that the operations were superintended by a competent foreman. *Ainslie Mining and Railway Co.* v. *McDougall* (42 Can. S.C.R. 420) followed. Judgment appealed from (15 B.C. Rep. 461) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Murphy J., at the trial, by which the plaintiff's action was maintained with costs.

The plaintiff was employed by the company to operate an engine used for breaking jams in a logging slide constructed on the side of a mountain. The engine was placed at the foot of the chute, near the water where the logs were to be boomed; its position was changed from time to time, upon the orders of an ex-

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(1) 15 B.C. Rep. 461.

perienced foreman, and at the time of the accident by which the plaintiff received his injuries it was near the foot of the slide down which logs were coming with considerable speed. A log jumped the side of the chute and rolled down the mountain side breaking the plaintiff's leg and causing him other injuries while he was standing near his engine. The jury, without being asked to answer questions, found that the engine had been placed too near the chute and gave a verdict for the plaintiff, assessing damages at $4,500, for which judgment was entered at the trial. This judgment was affirmed by the judgment appealed from.

The questions raised on the appeal are stated in the judgments now reported.

Ewart K.C. for the appellants.

J. Travers Lewis K.C. for the respondent.

THE CHIEF JUSTICE and DAVIES J. were of opinion that the appeal should be dismissed with costs.

IDINGTON J.—This case is founded on the common law liability of an employer, for negligence in failing to take due care of his servant engaged in a highly dangerous occupation.

The jury under the direction of the learned trial judge, in a charge to which no objection was taken by appellant's counsel, found a verdict for plaintiff (respondent here) of $4,500 for which judgment was entered.

The Court of Appeal for British Columbia upon appeal taken there unanimously dismissed the appeal.

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The jury, without being asked questions, assigned as reason for their verdict

that the engine was placed too near the chute by the defendant company.

But, is there evidence that the company placed the engine thus needlessly and hence negligently ?

The appellant is an incorporated company and the business in question was left entirely to the superintendent and a foreman.

The placing of the engine, which the respondent was in charge of as engineer, was *their* work. It was the result of experiments in the course of working at that chute, placed where complained of.

The company's business was that of loggers. In course of such business this chute, some fifteen hundred feet long, was used for sliding logs down to the water's edge.

The placing of this engine (needed for occasional service in connection therewith) one day at one point and next day at another, would hardly seem to constitute, as a matter of course, a part of a system adopted by the company. It may have, in the language of Lord Cairns in *Wilson* v. *Merry*(1), provided "adequate material and resources" for the protection of the workmen under such circumstances as to render the mistake of the competent superintendent only the act of a fellow employee, and not in this regard of the company.

An examination of the authorities when we had to dispose of the *Ainslie Mining and Railway Co.* v. *McDougall*(2), relied upon by the Court of Appeal, did not satisfy me that the accidental mistake of a com-

(1) L.R. 1 H.L. Sc. 326. (2) 42 Can. S.C.R. 420.

petent superintendent or foreman if so supplied with adequate material and resources enabling him to do better, but failing through his negligence, could be attributed as a matter of course to the company.

It so happened in that case that there was evidence from which it might be inferred that the company did know and direct, or acquiesce in, what was done. It was not necessary to decide the point of the company's responsibility for negligence of a competent superintendent, supplied as suggested.

Is a company without knowing, or having the means of knowing, responsible in such a case for the negligence of the superintendent ?

In the case at bar the failure to raise directly, at any stage, the point in question, when coupled with the general verdict given, seems to preclude, even if it had been taken here, as it was not, the consideration and passing opinion upon such a point.

I agree in the dismissal of the appeal.

I only refer to this question to guard myself from being taken, by tacit consent, as agreeing in the suggestion that the case cited conclusively decides the law as in the way apparently assumed in the judgment of my brother judges in that case.

A decision is binding only so far *as necessary to the decision* of the case.

With every respect for my brother judges, I do not think the decision carries the law further than it had previously gone in modifying the law laid down in *Wilson* v. *Merry*(1).

Yet it has been relied upon here and elsewhere as having done so.

(1) L.R. 1 H.L. Sc. 326.

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DUFF J.—The finding of the jury whether treated as a general verdict or as a special verdict is in effect a finding that the arrangement of the works taken as a whole was faulty by reason of the fact that the engine was placed too near the chute. I agree with the learned judges of the Court of Appeal that there was evidence to sustain this view. The questions arising are, — first; whether, in law, that is sufficient to cast a liability on the company, and — secondly; whether, on the undisputed facts, the proper conclusion is not that the proximate cause of the injury to the plaintiff was his own act in unnecessarily remaining in a place of danger.

This last contention was pressed upon us by Mr. Ewart with his usual ingenuity, but there appears to be evidence which, if believed by the jury, might properly lead to the inference that the plaintiff himself believed, on grounds not unreasonable, that it was his duty to be where he was. The plaintiff himself expressly states that it was his duty to be at the engine; and it was stated by another witness that he had been discharged from a similar position for not remaining at his post. In face of this evidence it cannot be successfully maintained, in the absence of a finding of the jury to that effect, that the plaintiff is disqualified from recovering by reason of contributory negligence. There is evidence again shewing that the plaintiff called attention to the danger and asked for protection. This happened the day before the accident occurred. In these circumstances it cannot be said, as a matter of law, that the plaintiff voluntarily assumed the risk of injury arising from the position in which he was placed. In my view, therefore, this contention fails.

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As to the first point, the employer is responsible according to the view of the majority of the judges in *Ainslie Mining and Railway Co.* v. *McDougall*(1), for the installation of a system of work which needlessly exposes his workmen to risk of injury.

I do not propose to re-state the grounds on which that opinion rests; they are sufficiently explained in the judgment of Mr. Justice Davies. In this case as I have said, the jury have, I think, in effect found all that is necessary to establish the proposition that the system inaugurated infringed this rule.

ANGLIN J.—The verdict returned in this case was, in my opinion, a general verdict. But whether it should be so regarded or should be deemed special findings, there was evidence to sustain it and it supports a judgment for the plaintiff at common law. The negligence found by the jury, if it should be regarded as based solely upon the placing of the engine, which it was the plaintiff's duty to attend, in a position unnecessarily dangerous, was a defect in original installation. If the verdict should be treated as resting upon the view that adequate protection was not provided for the safety of the plaintiff, while he was rightly and in the course of his employment in this dangerous place, it is a finding of a defective system. In either case the defendants are, in my opinion, liable at common law for the injuries sustained by their employee, the duty, of a breach of which the jury have found them to have been guilty, being a duty which they could not delegate so as to substitute liability under the "Employers' Liability Act"

(1) 42 Can. S.C.R. 420.

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for liability at common law in the event of injury resulting to an employee from failure to discharge it. *Ainslie Mining and Railway Co.* v. *McDougall*(1). The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Bowser, Reid & Wallbridge.*

Solicitor for the respondent: *C. M. Woodworth.*

(1) 42 Can. S.C.R. 420.

BELL BROTHERS AND A. W. CHAPMAN (PLAINTIFFS) ..... APPELLANTS;

AND

THE HUDSON BAY INSURANCE COMPANY AND THE HUDSON BAY INSURANCE COMPANY, LIMITED (DEFENDANTS) ..... RESPONDENTS.

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*March 7, 8.
*April 3.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Fire insurance—Policy—Conditions—Notice of loss—Imperfect proofs—Non-payment of premium—Waiver—Application of statute—Remedial clause—N.W. Ter. Ord., 1903 (1*st sess.*), *c.* 16, *s.* 2.

The premium on a policy of fire insurance was not paid at the time the policy was delivered but, on request, credit was given for the amount and a draft for the same by the insurance company, accepted by the insured, remained due and unpaid at the time the property insured was destroyed by fire.

Held, that, in an action to recover the amount of the insurance, the non-payment of the premium was not available as a defence.

The policy was subject to the statutory condition requiring prompt notice of loss by the insured to the company; by another condition the insured was required, in making proofs of loss, to declare how the fire originated so far as he knew or believed. Upon the occurrence of the loss, the company's local agent gave notice thereof to the company, and informed the insured that he had done so and that the company had acknowledged receipt of his notice. The insured gave no further notice to the company. Forms were then supplied by the company for making proofs of loss and they were completed by an agent of the company and signed and sworn to by the insured, the origin of the fire being therein stated to be unknown. On examination for discovery the insured stated that, at the time he signed the declaration, he entertained an opinion as to the origin of the fire, and the

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company's adjuster reported a similar opinion as to its origin. An adjustment of the amount of the loss was then proceeded with by the several companies carrying insurances on the property in which the defendant company took part, but, after payment by the other companies of their proportionate shares according to the adjustment, the defendants repudiated liability on the grounds of want of notice as required by the statutory condition and non-disclosure of the opinion entertained by the insured as to the origin of the fire.

Held, reversing the judgment appealed from (3 Sask. L.R. 219), that, in respect of both conditions, the default was the result of mistake on the part of the insured and, in the circumstances of the case, the provisions of section 2 of "The Fire Insurance Policy Ordinance," N.W. Ter. Ord., 1903, (1st sess.), chapter 16, should be applied and the insurance held not to be forfeited by reason of default of notice or imperfect compliance with the condition as to proofs of loss. *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (44 Can. S.C.R. 40) followed.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), affirming the judgment of Wetmore C.J., at the trial, by which the plaintiffs' action was dismissed with costs.

The circumstances of the case are stated in the head-note and in the judgments now reported.

Chrysler K.C. and *Travers Sweatman* for the appellants.

A. H. Clarke K.C. and *W. E. Knowles* for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed, but I will not dissent from the conclusion reached by the majority of the court.

DAVIES J.—I concur in the opinion stated by Mr. Justice Anglin.

(1) 3 Sask. L.R. 219.

IDINGTON J.—The appellants were insured for one year by the respondent against fire injuring or destroying a stock of goods in the Province of Saskatchewan. When the year was about to expire respondent's agent induced them to apply for insurance for another year and he delivered to them a policy of insurance for such second year. The premium was $66. They were unable to pay it. The agent on the 30th of September, 1907, in reporting to the head office this fact and the delivery to the appellants of the policy, asked if settlement could be postponed till the 7th of October. On the 1st of October, 1907, the head office replied:

> Your favour of the 30th ult. is to hand. We shall be pleased to grant Messrs. Bell Bros. extension of time to Monday, Oct. 7th, which we trust will be satisfactory.

And on the 15th of October the agent wrote as follows to head office:

> *Re* Bell Bros. No. 1024.
>
> Messrs. Bell have not yet paid their premium on the above. Collections are bad at present. Will you give them any further time or not? At any rate please write them and oblige.

And on the 16th of October came the following reply thereto:

> *Re* Policy No. 1024, Bell Bros.
>
> We are in receipt of your letter of the 15th inst., and note same. We enclose herewith draft which we have dated November 1st. Kindly take this to Messrs. Bell Bros. and have their acceptance of same and return draft to us by first mail. When the draft is paid we will send you cheque for your commission, which we trust will be satisfactory.

And on the 17th October the agent returned the draft which was dated 16th October, payable November 1st, for $66, duly accepted in letter saying:

> *Re* Bell Bros. No. 1024.
>
> Herewith is draft accepted by Bell Bros. *re* the above policy.

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The draft was payable at the Bank of Hamilton, Moose Jaw, and was indorsed to the Union Bank at Sintaluta, where it had been made payable.

On the 16th of November, 1907, the company wrote the following letter to appellants:

Re Premium Policy No. 1024, self.

On October 17th you gave us your accepted draft for the premium on the above policy amounting to $66. The draft was due on November 1st, but when presented for payment was not honoured. Kindly let us know why our draft was not honoured and state what disposition you wish to make of same.

And got reply dated November 18th, 1907, as follows:

Yours of the 16th to hand. We regret being unable to meet the premium on the insurance before now, but money has been very scarce, but we will do our best to remit you a cheque on the 25th of this month. We are sorry we have not had it before, but your agent said it would be all right if we paid it as soon as possible, which we will do, but we think the 25th would be as soon as we can promise it.

And to this the company replied as follows on the 20th of November:

Re Policy No. 1024, self.

We are in receipt of your letter of the 18th inst. and note what you say *re* payment of your draft in connection with premium on the above policy. If you cannot pay the full amount at this time we would be glad to receive a payment on account and trust the same will have your attention.

The policy has been outstanding for two months and we trust that you will let us have a remittance on account and the balance on the 25th of the month, as stated in your letter.

On the 26th of November, as result of the fire the agent wired:

Hudson Bay Ins. Co.,
Moose Jaw.

Bell Bros. store and contents totally destroyed by fire last night.
Albert Stauffer.

The company on the 26th of November replied as follows to the agent:

Re Loss Policy No. 1024, Bell Bros.

We are just in receipt of your telegram advising of loss under the above policy. Kindly let us have full particulars in this connection by return mail.

And on the 27th of November, 1907, the agent wrote as follows:

Re Loss Bell Bros. No. 1024.

This fire occurred on Monday night and the store and contents were completely destroyed. Three other buildings in the same row were also burnt.

The other insurance on store and contents are as follows:—

On stock—Occidental, $2,000.
Central Canada, $1,000.
On building—Central Canada, $1,700.
London Mutual, $1,500.

To this the company replied on 29th November, 1907, as follows:

Your letter of the 27th inst. with reference to Messrs. Bell Bros.' loss is to hand. We are enclosing herewith Messrs. Bell Bros.' application together with blank proof of loss form and would ask that you have the adjuster for the other companies look after our interests also.

The forms for proof of loss duly reached the appellants and were sworn to by one of them on the 3rd of December, 1907, and delivered then to the agent who took the oath of proof.

And about the same date the acting-adjuster inquired and apportioned the shares of the insurers relative to the loss as follows:

Apportionment.	Insures.	Pays.
A—8511, Central Canada	$1,000	$ 863.77
8652 and 8653, Occidental	2,000	1,727.54
1024, Hudson Bay	$2,000	$1,727.54
	$5,000	$4,318.85

and added thereto the following:

Fire started in the basement and although it is not definitely known, it is supposed to have been caused by the furnace.

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Assured seems to have been very well thought of in Sintaluta, and judging from the remarks of the other merchants in the town and my own impression of the character of the Bell Bros., I have no hesitation in saying that the fire was purely accidental.

The report from which I extract these particulars was dated 24th December, 1907, and was received at the head office on the 26th December, 1907.

On this state of facts respondents now contend there never was any insurance effected.

I cannot assent to such contention.

I cannot understand why a company accepting as a settlement the accepted draft for the amount of a premium for a year can now be heard to say there was no contract. Nor do I understand how anything I might add to the force of the foregoing can convince, if the correspondence does not, and the assenting to this adjustment does not convince.

Contracts such as the delivery of the policy and the acceptance by respondent of an accepted draft either as settlement for the cash premium or an independent consideration for the insurance were clearly within the competence of the insuring company to agree to and be bound by.

The company's managers do not seem to have imagined then or for a long time afterwards that they had not formed such a contract as these documents clearly evidence.

They held on to the accepted draft and could have sued and recovered thereon beyond a doubt.

This is not such a case as the reports of insurance cases are full of, where the local agent had attempted to accommodate a neighbour or client by taking his note for cash.

It is a solemn contract made by the head office armed with plenary authority.

It ought not to be frittered away by sophistries founded on the ambiguous language of the policy.

Holding these views I need not inquire as to the legal consequence alleged to be an estoppel founded upon the conduct of the insurers in assenting to the adjudication and apportionment of loss and thereby inducing the appellants to accept from each of the others who had become co-insurers a less sum than they each, but for such adjustment, presumably must have paid.

As full attention to this aspect of the case does not seem to have been paid in the courts below, I will not dwell needlessly upon it or pass an opinion thereon.

If, contrary to my view, the accepted draft is not to be looked at as in itself good consideration, then I fully agree with Chief Justice Wetmore there was a settlement of the premium. In other words there was a final contract that covered the period of the fire and bound respondents and still binds them unless they have some other means of escape such as I am about to consider.

The defence is set up that the notice required by paragraph (*a*), section 13, of the statutory conditions, had not been complied with.

This might have been arguable but for the decision of this court in the case we disposed of last session (*Prairie City Oil Co.* v. *The Standard Insurance Company*(1)), wherein we held that this requirement fell under the description of proofs of loss. We held such a defective compliance therewith as this was one the court was enabled by statute to relieve against.

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This decision was come to after the learned judge had disposed of this case, but it must be governed thereby in this appeal.

The only questions relative to it now are, whether or not the insurer's agent, who took the risk and as matter of common knowledge (partly recognized in the form of application for insurance used herein) is commonly looked upon as agent of both parties in such cases, whatever may be the legal relationship, having given notice of the loss in writing evidenced by a telegram and a letter to the company and received by it, such notice can be adopted by the insured by way of ratification or the courts can under the facts and circumstances relieve under the provisions of section 2 of the ordinance, which is as follows:

> 2. Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in the territories, as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with, or where, after a statement or proof of loss has been given in good faith, by or on behalf of the assured in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to and what are the particulars in which the same is alleged to be defective and so from time to time, or where for any other reason the court or judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof, or amended or supplemental statement or proof, as the case may be, shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into; but this section shall not apply where the fire has taken place before the coming into force of this ordinance.

I am inclined to the opinion that the acts of the insured (who were informed next morning after the fire by the agent what he had done relative to notice)

in adopting the methods of proof required by the insurers, and in complying with everything the agent and adjuster required on behalf of the company, might be held to have acted upon the presumption that such preliminary notice given by the agent was understood by the company to have been adopted by the assured and thereby in effect to have ratified its giving as if their act. Certainly most men informed, as these insured were, of notice having been sent and responded to as this was, would have supposed that the insurer had accepted it as sufficient.

But, however that may be, the circumstances are such as in the language of the enactment constitute a sufficient

> other reason the court or judge before whom a question relating to such insurance is tried or inquired into for which he or they may consider it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions.

I am of opinion this court is engaged in such an inquiry as contemplated and is authorized by said section to consider and declare or hold that if such part of the conditions has not been observed there exists or may exist "an imperfect compliance with such conditions" and to hold it to be considered inequitable that the insurance should be deemed void by reason thereof.

For my part I do hold that in the circumstances it would be inequitable to deem this insurance void by reason of said imperfect compliance with such conditions.

I may observe that it is not as suggested during argument an imperfect compliance with any single condition that is aimed at, but an "imperfect compliance with the conditions" of proof as a whole that the clear comprehensive language covers.

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It may be said the want of notice of a fire does not fall within these conditions of proof, but that is just what we have held in the *Prairie City Oil Company's Case*(1), as within the purview of the statute. And if omission to give that notice does so fall, clearly the omission of notice was the result of mistake arising from the insured being told when they called on the agent next morning, he had sent the notice and being confirmed in the belief of its sufficiency by the response it brought from the head office of the insurers. Either ratification already suggested or mistake seems to be the correct inference.

Another ground of defence taken is that, by statutory condition 13, the insured is required to make a declaration of loss and that, by sub-section 2 of said condition, he is to state

> when and how the fire originated so far as the declarant knows or believes,

and that, in making this declaration, the appellants did not disclose their belief anent the origin of the fire.

I am not disposed to treat this requirement lightly. Each case must stand on its own bottom.

There may be cases where it is of vital importance both to the insurers and the interests of justice to have the insured pinned down to a statement of his belief. I have considered everything adduced in this case upon the point, yet I fail to find how, in it, much importance can be attached to the omission, if such can be claimed.

The facts bearing upon the question are as follows. The company having, as already stated, sent the forms of proof, the declaration verifying the same was executed and sworn before the company's own agent.

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The form was printed with blanks to be filled in.

The part stating that the fire occurred, represents it as taking place at a time named, destroying the property as thereinbefore stated, and ends by these words, "said fire originated as follows:—Origin unknown."

The first part being printed, the words "origin unknown" are inserted, it is said and not denied, in the handwriting of the acting-adjuster who prepared the report above referred to, and from which I have already quoted the statement relative to the origin of the fire.

Seeing that the report from which I have already quoted, as to origin of the fire, was prepared about the same time as this proof of loss by the same man who filled in these words "origin unknown," I am at a loss to know why there can be much importance attached to the matter.

From whom did he get the information embodied in his report? Could he, if he found the insured reluctant to state exactly what the report shews, and been driven to get it elsewhere, have reported, as he does, as to the honesty of the insured?

Such a circumstance should have aroused suspicion at once.

As stated in argument, and not denied, the performance of all I have referred to as done by the adjuster, or acting-adjuster, for the company, was all actually done by the assistant and then put in the shape it now appears and was adopted, dated and signed by his principal.

What the respondents contend is that this declarant, one of the appellants, had refrained from telling his belief, till he was examined for discovery in this action.

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A comparison with what he says in such examination and what the report contains does not disclose to my mind any startling discrepancy. I infer the whole was told the acting-adjuster who, for brevity sake, wrote the fact in filling up the declaration and set forth the belief of fact in this report.

The adjuster says, as above quoted, it started in the basement, and although not definitely known it is supposed to have been caused by the furnace.

The other man says, in a multiplicity of words, such as the examination for discovery may have rendered necessary, the same thing with some speculative detail as to the clerk who fed the coal into the furnace having failed in care to feed the slacked coal in such a way as to avoid explosion.

Both are mere theories, and possibly both idle speculation.

But we find no such importance attached to the discovery when got as now urged; neither were the versions of belief found material or aught implied therein so. It needed no amended pleadings or change of base. Why ? The fair inference is the insurers had the information from the insured. Neither said clerk to prove neglect or fact nor the acting-adjuster to say he was misled, were called.

The defence on this head is reduced to the narrowest sort of technicality.

It is alleged to be a violation of the condition working forfeiture of the policy that the belief was not inserted in the proof.

The respondent company receiving defective proof was in duty bound by the terms of section 2, above quoted, if the omission to state belief was thought to be of the slightest consequence, or such could be seri-

ously attached thereto, within a reasonable time to have notified the insured in writing that such statement of proof was objected to, and in what particular it was alleged to be defective, or abide by the consequences of such neglect on their behalf as opening the way for the judicial relief the section permits against forfeiture ensuing as result of the omission.

The company chose to refrain from objecting and cannot now be heard to complain if the alternative is applied to the case.

It is suggested in the court below that it cannot now be inequitable to hold the parties to the terms of the contract.

With respect I submit that is a misconception of the whole enactment.

It was to prevent the inequities that arose from insisting upon the observance of insurance contracts and conditions contained therein, that the Ontario Legislature, by 38 Vict. ch. 65, enacted, as section 2, above quoted provided and authorized the Lieutenant-Governor of Ontario to appoint a judicial commission to frame just and reasonable conditions to which insurers should be restricted, saving the right to add thereto others liable to be held void if found by court or judge to be not reasonable or just.

The commission appointed pursuant to that statute reported the statutory conditions which have remained substantially the same in Ontario ever since.

This enactment of the Ontario Legislature and those statutory conditions have been found most beneficial and have been copied in the western provinces as appears by the ordinance referred to and dealt with at the time of the trial herein and in appeal.

They met a then existent condition of things of

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which the present case and the contentions set up herein remind those who can recall that far off time; just as if old familiar faces had come up for judgment.

The Court of Appeal for Ontario in the case of *Robins* v. *The Victoria Mutual Ins. Co.*(1), in 1881, fully considered this enactment relative to proofs of loss, and applied same in a way that has been followed ever since where such or the like enactment has prevailed. I do not think, even if we have the power to overrule such a jurisprudence of such long standing, we should depart therefrom for any light reason.

It rendered the insurance business in Ontario more respectable. It should be acted upon just as it has hitherto been acted upon, and applied to prevent wrong and injustice from being perpetrated in the name of contract.

It is not by any means the only piece of modern legislation that has had to be enacted and resorted to in order to avoid the unjust forfeiture of men's equitable rights by the condition named in the bond.

Instances of such like legislation relative to contracts both in England and in this country, were referred to in said case, and other cases in which the subject was discussed.

The relief we are entitled, and I think, bound, to give is to hold that it would be inequitable to permit the respondents to set up this condition as a defence after accepting, without objection, an imperfect compliance with the conditions, and adjusting the loss upon a basis that relieved other co-insurers from a part of their obligation, on the supposition that this company was bound by and agreeing to the adjust-

(1) 6 Ont. App. R. 427.

ment made, and after receiving, as I infer, from appellants in another form the very information respecting which they are assuming to be aggrieved herein by appellants omitting to give.

I think if need be the relief must be applied and hence it is unnecessary to pursue the question of whether or not there has in fact been an omission.

The ground for relief being, to my mind, clear, I prefer not to discuss and pass an opinion upon the other questions raised anent belief.

It is undesirable that expressions, however carefully framed, should be quoted to justify any possibly intentional omission on other cases that may arise.

I do not infer such was at all the character of the omission in this case.

And I should be loath to take away indirectly the right of insurers to insist in a straightforward manner on a full compliance with the conditions where deemed necessary.

The appeal should be allowed with costs here and in the courts below, and judgment be entered for the amount of the claim as settled by the adjuster, and interest.

DUFF J.—The respondent company resists the appellants' claim on three distinct grounds.

The first ground is that the policy never went into operation. This objection rests upon a term of the application expressed in these words:

> If the premium is not paid as herein agreed this insurance shall be held void until such settlement is made.

This term, it is contended, must be treated as incorporated in the policy as a condition of the insurance contract; the contention being based upon the

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second of the "statutory conditions" which reads as follows:

> After application for insurance, it shall be deemed that any policy sent to the assured is *intended to be in accordance with the terms of the application*, unless the company points out in writing the particulars wherein the policy differs from the application.

I do not think it is important to determine whether (if the rights of the parties were to be ascertained from a construction of the words of the application and the policy) this clause would have the effect of constituting the stipulation in question a part of the company's deed just as if it had appeared in the policy in so many words. Whether, on the construction of those documents, it ought or ought not to be regarded in that light I think the company is disabled from relying upon it. The stipulation appears, no doubt, to the lawyer's mind obscurely expressed and it cannot be denied that it lacks precision. I think, however, there is not much difficulty in penetrating to the intention beneath. The application contains an offer by Bell Bros. to enter into a contract with the company by which in consideration of a specified premium the company is to insure certain buildings against fire for the period of one year. No time is named for the payment of the premium; but in the absence of any provision upon the point I can entertain no doubt that the application must be taken to propose that the payment of the premium and the delivery of the policy shall be contemporaneous. The provision we have to consider is doubtless inserted to make it clear, and does, I think, make it clear, that should the premium not be paid at or before the delivery of the policy, the contract expressed in the application and the policy, notwithstanding the delivery of the latter, is not to go into operation until there has been payment or the

equivalent of payment. In layman's phrase, the "insurance is to be void until," etc., means, I think, that the contract of insurance is not to arise until the event contemplated happens; and so, although it is not material, I should think in laymen's phrase, "until such settlement is made" when used with reference to the contingency of the payment of a sum certain means until payment or the equivalent of payment.

In my view, the company cannot take advantage of this stipulation whether it be regarded as a term of the policy or not. If it is not a term of the policy then it is a condition, wholly ineffective at law, but in the absence of other circumstances enforceable in equity, to which the delivery of the policy is subject. If it became a term of the policy then any defence which might be based upon it would have been as effective in the one jurisdiction as in the other. In either view it does not afford a defence for the company; because, in my opinion, there is ample evidence of an enforceable agreement by the company that it should not be relied upon. The stipulation, as I have observed, makes the payment of the premium a condition of any contract arising between the parties. Therefore, under the application and policy standing alone no obligation arose in the absence of payment or its equivalent either on the one hand to indemnify against loss or on the other to pay for such indemnity. But the correspondence demonstrates the existence of an understanding between the parties that Bell Bros. were to be under an obligation to pay — involving, of course, a correlative obligation upon the company to insure. I do not think it necessary to go through the letters in detail. They seem to me to be only compatible with the hypothesis that for a perfectly good con-

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sideration (an undertaking on the part of Bell Bros. to pay the premium) the company had waived benefit of this stipulation.

This view accords with what the circumstances indicate to have been the intention of the parties. The policy was a renewal of an existing contract of insurance and it is quite improbable that it was in the contemplation of the parties that the property should be uninsured during the period for which credit was given to the insured.

The second objection is that the statutory condition requiring notice of the loss was not observed. The recent decision of this court in *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*(1), exempts us from the necessity of considering whether such a non-compliance with the conditions of the policy can be cured under the provisions of the statute. The enactment according to that decision applies to "notice of loss" wherever it applies to "proofs of loss." Such being the effect of the statute; — Is the failure to give notice attributable, in the circumstances of this case, to "accident or mistake" ? The evidence shews, I think, that it may properly be ascribed to a mistake on the part of the insured. The facts are that the agent through whom the insurance had been effected informed one of the appellants the morning after the fire occurred that he had forwarded notice of it to the head office of the company. I think the proper inference is that the appellants assumed this to be a sufficient compliance with the conditions of the policy either as having been done on their behalf or as being within the terms of the conditions. It is true the appellants were not asked to say whether they had

(1) 44 Can. S.C.R. 40.

acted under such a mistake, but I think the point was not really in dispute at the trial; and, since it is quite clear that the appellants never entertained the idea of allowing their claim to lapse, formal notice would unquestionably have been given had they thought it necessary.

The third objection is that the proofs of loss are defective as not containing a statement of the appellants' belief respecting the origin of the fire. The declaration contained a statement that the origin of the fire was unknown. The member of the appellant firm who made the declaration (on his examination for discovery) stated his belief to be that the fire had originated in an explosion of gas in the cellar furnace. It is said that this belief ought also to have been set forth in the declaration. I agree that a strict reading of the condition relied upon would require this, and I am not disposed to give any support to the suggestion that strict compliance with this condition might not be most material or that failure to state a belief actually held might not be a most substantial non-compliance with the terms of the contract. In this case, however, the non-compliance was, I think, not the fault of the appellants and the respondents have suffered no disadvantage by reason of it. The adjuster acting for this company prepared the declaration and it appears from his report that at that time or not far from that time he had become possessed of the conjecture that the fire originated as Bell thought it did. I have no doubt that Bell's failure to mention his belief in the declaration was due to the circumstance that the agent who filled in the form and presented it to him for signature treated the question as a question not of belief, but of fact. The form itself would convey the same impression. I think most

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people having this document presented to them would not unreasonably assume that what was required was a statement of facts bearing upon the origin of the fire. The "belief" of the declarant was probably nothing more than a conviction based upon the circumstance that he could find no other explanation of the occurrence. The facts bearing upon this point — the construction of the furnace, the course of the fire and so on — being known, to his knowledge, to the person who prepared the declaration, it would not occur to him to mention them. It is too much to expect from the appellants an appreciation of the point of view from which a belief presents itself as included within the category of matter of fact. I repeat I do not in the least doubt that the vast majority of people signing, as the appellant Bell did, at the behest of the company's agent, this declaration prepared by him, would have done so in the full assurance that they were omitting to deal with no point which the company desired to be dealt with. I am equally without doubt that the majority of people would have assumed and reasonably assumed that this form prepared by the company was not intended as a trap; but was prepared with a view to compliance with the conditions of the insurance contract and that in making the declaration required of them they would be sufficiently complying with those conditions. In the circumstances it does not seem fair as between these signatories and the company (who appear to have been apprised of everything of which the most precise observance of the condition would have informed them) that the latter should be permitted to take advantage of this default. If unfair to the appellants it would, I think, be inequitable within the meaning of the statute.

Mr. Clark quite properly pressed upon us the circumstance that the premium was not paid. That fact might, I agree, conceivably affect, and affect very materially, the question whether the company was acting unfairly in setting up technical defences such as these. In this case, however, it is not suggested that the default was due to wilfulness or gross negligence and that being the case I think such delay as occurred here is not a sufficient ground for withholding the absolution which the statute sanctions.

ANGLIN J.—The plaintiffs appeal from the judgment of the Supreme Court of Saskatchewan *en banc,* affirming the judgment of Wetmore C.J., dismissing their action to recover upon a fire insurance policy, dated the 17th of September, 1907, and issued for a term of one year.

Three defences are made to the plaintiffs' claim:—

(1) That they omitted to give notice of loss as required by statutory condition 13(*a*) of the policy;

(2) That the policy was void because the premium had not been paid when the loss occurred;

(3) That the proofs of loss were defective because the person who made them failed to disclose a belief which he entertained as to the origin of the fire.

(1) The circumstances of this case — the demand by the company for proofs of loss, their failure to object to the proofs, (furnished in good faith) on the ground that the requisite notice of loss had not been given, coupled with the fact that the company's manager objected to the loss on other grounds than for imperfect compliance with the conditions as to proofs, the adjustment with which they subsequently proceeded, the fact that they had prompt notice from

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their own agent of the loss and could have suffered no prejudice from the omission of the insured also to notify them, and the fact that the agent of the company informed George Bell, one of the insured, that he had so notified the company, from which Bell's evidence warrants the inference that he concluded that personal notice from himself was not required — bring it on this point within the decision of this court in *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*(1). Section 2 of the ordinance of the North-West Territories, 1903 (1st Sess.), chapter 16, corresponds with section 2 of chapter 87 of the Revised Statutes of Manitoba, 1902, dealt with in that case. The insured certainly gave notice of the loss when they sent in their proofs. The statute enables the court to relieve them in respect of default in delivery within the prescribed time as well as against forfeiture for insufficiency in the proofs. *Robins* v. *Victoria Mutual Ins. Co.* (2), at pages 440-1, 453-4.

Although they did not plead it, the plaintiffs invoked the aid of the statute at the trial. The foregoing facts were all before the learned Chief Justice and upon them he was urged to apply the statute in their favour. He refused to excuse their failure to give notice of loss, not because in his opinion the statute was inapplicable to a case of defective compliance with the statutory condition as to notice, but because he regarded the present case as one, not of imperfect compliance with the condition, but of "no compliance at all." The court or judge before whom the "questions relating to the insurance" were "tried or inquired into," therefore, had this issue before

(1) 44 Can. S.C.R. 40. (2) 6 Ont. App. R. 427.

him. He dealt with it, refusing to give the plaintiffs the benefit of the statute because, in his opinion, the circumstances which warrant the granting of relief under it had not been made out. In that view I am, with great respect, unable to agree. The question of the plaintiffs' right to relief under the statute having been raised and dealt with at the trial, I see no reason why this court should not give the judgment upon it which, in its opinion, the court below should have given — no necessity for, or advantage to be gained by, sending the case back in order that this question may be again canvassed in a trial court.

(2) The court *en banc,* differing on this point from the trial judge, held the policy void because the insured had failed to pay the premium before the loss. When delivering the policy the company did not exact payment of the premium. Subsequently it entered into correspondence with the insured pressing for payment of it, and at their instance from time to time gave them extensions of time. On the 17th of October the insured at the company's request accepted a draft in its favour for the amount of the premium. This draft was payable on the 1st of November. It was not paid at maturity. The company, nevertheless, continued to press for payment of the full premium without extending the term of the insurance beyond the 17th September, 1908. The two last letters in the correspondence prior to the loss were as follows:

Sintaluta, Nov. 18th, 1907.

The Hudson Bay Insurance Co.,
Moose Jaw.

Dear Sirs,—Yours of the 16th to hand. We regret being unable to meet the premium on the insurance before now, but money has been very scarce, but we will do our best to remit you a cheque on the 25th of this month. We are sorry we have not had it before, but your agent said it would be all right if we paid it as soon as

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possible, which we will do, but we think the 25th would be as soon as we can promise it.

Yours truly,

BELL BROS.

C.E.B. Nov. 20th, 1907.
K.M.

Messrs. Bell Bros.,
Sintaluta, Sask.

Re Policy No. 1024, self.

Gentlemen,—We are in receipt of your letter of the 18th inst., and note what you say *re* payment of your draft in connection with premium on the above policy. If you cannot pay the full amount at this time we would be glad to receive a payment on account and trust that same will have your attention.

The policy has been outstanding for two months and we trust that you will let us have a remittance on account and the balance on the 25th of the month, as stated in your letter.

Yours truly,

HUDSON BAY INSURANCE CO., LTD.,
Manager.

The loss occurred about seven o'clock in the evening of the 25th of November.

The defendants rely upon a clause of the plaintiff's application which reads:

> If the premium is not paid as herein agreed this insurance shall be held void until such settlement is made.

The application contains no agreement as to the time at which the premium is to be paid. The quoted condition can apply only to a policy upon which the premium is payable in advance. Where the policy issues on a credit basis of whatever duration, and whether definite or indefinite, the risk must attach from the date of issue. In that event the company is protected against having to carry the risk longer than it desires without having received the premium by the provision in the policy enabling it at any time to cancel the insurance. Having regard to the implication from the provisions of the policy for termination of

the risk, "if on the cash plan," or "if for cash," that the company did some business on other than a cash basis, and to the intention of the parties as evidenced by the delivery of the policy without exacting payment of the premium and the subsequent negotiations in regard to payment of it at a later date, I entertain little doubt that this policy issued, not on a cash basis, but on a credit basis. The fact that the company throughout asked for payment of the full year's premium, to which it would be entitled only on the assumption that the risk attached from the date of the policy, affords strong confirmation of this view. If the policy issued on a credit basis the condition cited from the application did not apply; the risk attached; and non-payment of the premium is not a defence to the plaintiffs' claim.

But if the policy should be held to have issued in the first instance on a cash basis, and if the condition in the application on which the respondents rely applied to the risk, the correspondence as a whole, in my opinion, sufficiently establishes a waiver of it by the company. It was not "a condition of the policy" and, therefore, might be waived by implication notwithstanding the provisions of condition No. 20. The taking of the draft of the insured for the full year's premium had the effect of causing the risk to attach (if it had not already attached) at all events during the currency of the draft. The condition in the application was a single condition. Once the risk attached under the policy it ceased to be effective and would not revive without an express agreement by the parties that it should revive. There is no evidence of any such agreement and it should not be inferred.

Moreover, the policy contains nothing which incor-

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porates the provisions of the application. The incorporating clause contained in the application itself has no referenec to the proviso or condition, with which we have been dealing, against the risk attaching until payment of premium. In my opinion when the loss occurred the policy was not subject to this term whether it issued on a cash, or on a credit basis.

For these reasons I think that non-payment of the premium by the insured is not available as a defence to the company.

(3) The learned trial judge found that George R. Bell, who was a member of the plaintiff firm and as such executed their proofs of loss, believed at that time that the fire was caused by an explosion in the furnace. Bell himself said he was satisfied immediately after the fire that "it was owing to the dusty coal that the furnace exploded" — that "in my own mind I was quite positive." This finding I think cannot be impugned.

The policy, by clause (*c*) of the 13th condition, required the assured to furnish to the company

> a statutory declaration declaring * * * (2) when and how the fire originated so far as the declarant knows or believes.

The form of proof furnished by the company to the insured after the fire, which he was asked to fill up and sign, contained the following paragraph:

> A fire occurred on the day of , 19 , about the hour of o'clock M., by which the property described by said policy and situate as therein named was destroyed or damaged as hereinafter set forth in detail, *said fire originating as follows:* .....

The agent of the company filled this in with the date and hour and at the end of the paragraph inserted the words "origin unknown" and George R. Bell signed and declared to it. He was probably

misled by this form. But, although he gave evidence at the trial, he did not say that this was the case. An estoppel is, therefore, not established. A provision in the proofs of loss precludes the setting up of a waiver. I incline, however, to the view that there was in this respect "an imperfect compliance" with conditions as to proof. It does not appear that the company has been in any way prejudiced by Bell's failure to state his belief as to the origin of the fire. The omission was almost certainly due to accident or mistake. Having regard to the facts mentioned in connection with the defence as to failure to give notice of loss, the plaintiffs are, in my opinion, entitled to relief in respect of this omission also under section 2 of the ordinance, N.W.T., 1903 (1st sess.), ch. 16.

It further appears that, with full knowledge that notice of loss had not been given by the insured and that their premium had not been paid, the defendants proceeded to adjust with the insured the amount of the loss and with the other companies interested the proportion of it which each should bear. This adjustment was, of course, gone on with on the footing that the defendants' policy was in force. It does not appear that the insured took part in the apportionment between the companies. But on the strength of this adjustment and apportionment, as the defendants must have known and intended that they should, the plaintiffs accepted from the other companies interested cheques for smaller sums than they would have been obliged to pay if the defendants were not liable to share the loss. Up to this time the defendants had not raised any question as to their liability to pay under their policy. Their whole conduct was consistent only with such liability. It is not clear whether

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the plaintiffs have so dealt with the other companies interested as to have released them from further liability. But that their position in regard to these companies has been materially and seriously altered by what has taken place scarcely admits of doubt. These facts would probably suffice to establish an estoppel precluding the defendants from now setting up that they were not liable under their policy because of the plaintiffs' failure either to pay their premium or to give notice of loss. *Mutchmor* v. *Waterloo Mutual Fire Ins. Co.*(1), at page 612. But this point it is unnecessary to determine.

For the foregoing reasons I would, with respect, allow this appeal.

The plaintiffs claim to be entitled to be relieved from the provision of the defendants' policy that, in the event of loss, the company shall not be liable for an amount greater than two-thirds of the actual cash value of the property covered by the policy at the time of loss. This provision and that dealing with the apportionment of such two-thirds' value between the insurers and co-insurers is contained in the body of the policy. The policy itself restricts the liability

as hereinafter provided to an amount not exceeding $2,000.

The contention of the plaintiffs is that the co-insurance clause is a variation of the conditions and is, therefore, not binding because not printed in ink different in colour from that in which the rest of the policy is printed, as is required in the case of variation of any of the statutory conditions. This objection cannot prevail. The insurance is in effect an insurance to the extent of two-thirds of the cash value of

(1) 4 Ont. L.R. 606.

the property not exceeding $2,000. The clause making the owner a co-insurer to the extent of one-third of the value of his property is in no sense a variation of the statutory conditions and is not subject to the provisions of the statute as to variation of such conditions.

The plaintiffs are entitled to judgment for the sum of $1,727.54, the proportion of the loss to be borne by the defendants according to the adjustment, with interest from the date at which this amount was payable according to the terms of the policy. They are also entitled to their costs of this litigation throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Allan, Gordon, Bryant & Gordon.*

Solicitors for the respondents: *Knowles & Hare.*

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*March 6.
*May 8.

JAMES M. JOHNSTON (SUPPLIANT) . . APPELLANT;

AND

HIS MAJESTY THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of right—Contract—Powers of Commissioners of the Transcontinental Railway—Liability of Crown—Construction of statute—3 Edw. VII. c. 71.

"The National Transcontinental Railway Act," 3 Edw. VII. ch. 71 (D.), does not confer powers upon the Commissioners of the Transcontinental Railway in respect to the inspection and valuation of lands required for the purposes of the "Eastern Division" of the railway; consequently, a petition of right will not lie for the recovery of remuneration for services of that nature.

Judgment appealed from (13 Ex. C.R. 155) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1) on the argument of points of law before trial by which the suppliant's petition of right was dismissed with costs.

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

M. G. Macneil, for the appellant.

Newcombe K.C., Deputy Minister of Justice, for the respondent.

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

(1) 13 Ex. C.R. 155.

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The judgment of the court was delivered by

DAVIES J.—This is an appeal from the judgment of the Exchequer Court(1) giving effect to the Crown's demurrer to the suppliant's petition of right, and dismissing the petition.

The petition was brought by certain valuators employed by the Commissioners of the National Transcontinental Railway to inspect and value lands and properties which the located line of the eastern division of the National Transcontinental Railway would cross through the City of St. Boniface, Manitoba, and to report on the same giving a separate valuation for each piece of land so to be crossed.

The determination of the rights of the suppliant to maintain the petition depends upon the powers vested in the Railway Commissioners appointed to construct and operate such eastern division of the railway.

If these commissioners are vested with powers over the damages for the lands located for the railway or over their settlement or adjudication, then, I think it obvious that there would be implied a power on their part to appoint valuators to report upon the proper compensation to be paid for each piece of land taken by them. It is obvious the commissioners could not do such work themselves over the thousand and more miles covered by the eastern division they were appointed to construct and operate. They would necessarily have to employ others to do the work; and, having done so, the work being within their powers, such persons would be entitled to either the agreed compensation, or, in the absence of such agreement, what would be fair and reasonable.

(1) 13 Ex. C.R. 155.

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As there is no allegation in the petition of any special authority having been given by the Government to the commissioners to do or have this work of valuation done, their powers to do so must be sought and found in the agreement for the construction of the eastern division, ratified and confirmed by 3 Edw. VII. ch. 71, or in that statute itself.

Turning first to the agreement we find the 5th and 8th paragraphs read as follows:

(5) The said eastern division shall be constructed by, and at the expense of, the Government, upon such location and according to such plans and specifications as it shall determine, having due regard to directness, easy gradients and favourable curves.

(8) The construction of the said eastern division shall be commenced *so soon as the Government has made the surveys and plans and determined upon the location thereof*, and shall be completed with all reasonable dispatch.

Then the 9th section of the Act reads:

The *construction* of the eastern division and the operation thereof, until completed and leased to the company pursuant to the provisions of the agreement, shall be under the charge and control of three commissioners, to be appointed by the Governor in Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of "The Commissioners of the Transcontinental Railway" and are hereinafter called "The Commissioners."

Section 13 relates to the *expropriation of lands* and reads as follows:

The commissioners may enter upon and take possession of any lands required for the purposes of the eastern division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

The scheme of the Act appears to be that construction shall be commenced so soon as the Government

has made the surveys and plans and determined upon the location of the line, and not before.

But section 13 gives the commissioners special powers with respect to entering upon and taking possession of "any lands required for the purposes of the eastern division" and laying them off by metes and bounds, and depositing plans which, when deposited, are to operate as a dedication of the lands to the public, and to vest the same in the Crown. All the powers necessary or reasonably incidental to the proper exercise of these statutory directions to the commissioners are within their jurisdiction. But it will be noticed the question of "the compensation" to which any one interested in the lands taken may claim or be entitled to is specially reserved. Nothing whatever is said as to the assessment or determination of the compensation by the commissioners or by any one appointed by them. The words used are

> saving always the lawful claim to compensation of any person interested therein.

Now, of course, the Crown could authorize the commissioners, or any one else, to adjust or settle these damages with the parties interested. It is not alleged or suggested the Crown did so, and the only question which appears to me to be open in the case before us is whether or not the statutory powers given the commissioners necessarily involve a power to value the lands taken for the located road.

Section 18 clearly relates, in my judgment, only to the work of constructing the eastern division by tender and contract as provided for in the previous sections 16 and 17. The chief engineer would have nothing whatever to do with the certifying to any such work as that of valuing of lands taken.

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The conclusion I have reached, however, is for the reasons stated, that the powers of the commissioners under the statute do not embrace the valuation of any lands within the located line of the eastern division of the Transcontinental Railway and that, consequently and unless and until special power for them to undertake such work was given to them by the Governor in Council, their action in respect to the same would be *ultra vires*.

This petition was one brought to recover the charges of the petitioner with respect to the valuation of the located line through the City of St. Boniface. That is the construction I put upon the language of the second paragraph of the petition, and it is the one adopted and put forward by the petitioner's counsel at bar.

The individuals damnified by their lands having been taken or injured have their lawful claims to compensation specially reserved to them, and they can either settle amicably with the Government or its authorized agent or enforce their rights in court.

No special authority having been given to the commissioners, the valuation of the lands taken is not covered by the power to construct and operate the road.

The appeal should be dismissed.

IDINGTON J. (dissenting).—If we interpret this petition as the Judicial Committee of the Privy Council directed that in the case of *McLean* v. *The King* (1) should be, a trial must be had of the facts.

Instead of construing, as of old, the pleading most strongly against the pleader, that court, on appeal,

(1) 38 Can. S.C.R. 542.

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directed, though the case is unreported, that, if upon any reasonable construction of the petition, a cause of action could be proved, then the suppliant would be entitled to succeed on the demurrer. This petition alleges, if so treated, enough to induce a trial of the facts.

It is not necessary for the suppliant or plaintiff in any case to set up more than to shew a cause of action.

If there happens to be, as it is said exists here, a condition that liability to pay, for that sued for, must be measured by what someone else says, certified in a particular manner, then that is matter of defence of which the defendant may or may not avail himself.

In this case it may be a matter of inference from the nature of the services performed and the nature of the statutory powers by virtue of which the work in respect of which recovery is sought was directed, that the certificate of the commission, or some officer connected therewith, necessarily must be produced as evidence before the suppliant can succeed.

It does not occur to me that such a question necessarily arises upon demurrer. And it does not occur to me so absolutely clear as suggested, that the statute permits no payment for such a claim as sued for herein unless certified. Clearly contractors are, by section 18 of the Act, so tied down, but — Is the appellant a contractor within the meaning of that section ?

As the learned judge of the Exchequer Court says, in his opinion judgment, and the parties admit here, the argument below travelled beyond what strictly was raised by the demurrer and the appellant seems desirous of a decision as if this point relative to a

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certificate of the commission being needed had been raised on the demurrer, perhaps, in view of the peculiar nature of the case and the course it has run, it may be thought no great harm could arise by expressing an opinion.

It would be, I submit, a bad precedent and an unsatisfactory way of disposing of a point in the case, when its whole story having been unrolled, it might appear in quite a different light.

On the question raised by the learned judge as to his jurisdiction, I cannot agree in his conclusion; and an order dismissing the petition on that ground is, I submit, not well founded.

No one ventured to suggest this commission was, in law, less representative of the Crown, as a statutory agent or governmental device for constructing a railway, than was that under and by means of which the Intercolonial Railway was constructed.

Such cases as arose in the course of the existence of the Intercolonial Railway Commission raising analogous points, or giving opportunity therefor, in this court, do not seem to have suggested the difficulty found herein.

It seems to me this court, in disposing of such cases assumed, as of course, that a petition of right founded on some obligation arising in the execution of said work would, as a matter of course, be triable in the Exchequer Court.

Indeed, I should not be at all surprised if it could be demonstrated, as a matter of fact, that the experience derived from the execution of that work was a factor in leading to the founding of the court.

So far as I can see the purposes of each commission are of an identical character. They differ in

details of machinery furnished in the creating statute for the execution of the work. They differ also in this, that the ultimate destiny of that constructed under and by virtue of such respective bodies is somewhat different.

But in the chief feature of each the purpose to be attained and mode of its attainment are almost identical.

Each was designed for the construction of a work to become a property of the Crown. In the early case the property was to be operated by the Crown. In this latter case it is to be leased by the Crown to a railway corporation. The basis for rental is to be the cost of construction. In that cost such items as that here in question are included. To preserve evidence of and determine disputes relative thereto is part of the commission's duty. Their duty in the first place is to pass upon the expenditure for certain parts of the work — but not all.

The members of the commission are in this case, as were those in that other, removable by the Crown.

There does not seem to me to be in the statute aught that necessarily constitutes this commission the proper body to sue.

Indeed, such restrictions as appear upon the right to receive payment on contracts, without being certified to or approved of by this body, seem repugnant to the conception of the commission ever having been intended to be subject to action for aught done in the discharge of its duty.

It seems almost inconceivable that these functions of defendant, of superintendent or of judge, and of owner and paymaster, should be all intentionally vested in the same body. So far as the statute clearly

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expresses the extent of duty relative to passing upon the execution of work, it seems confined to the claim of the contractors with the Government.

I say nothing of the liability of the commission for a departure from its duty. That might give rise to questions of another nature relative to which I refrain from passing opinion.

It seems to me we must observe the rule laid down by Lord Campbell and later adopted by Lord Blackburn in the *Mersey Docks Trustees* v. *Gibbs*(1), at page 118, and applied since in reaching a conclusion upon questions of a cognate character relative to the liability of corporate bodies created in like cases.

The expression of that learned judge, speaking, of course, relatively to liability in only one phase of such subject, was that it must be determined upon a true interpretation of the statute under which the body is created.

I cannot feel much doubt in regard to the liability of this commission.

It was not empowered to own, to control or lease this road. It was not even empowered to let the contracts for its construction.

It was created to meet the exigencies of a particular enterprise, of a vast and complicated character, for and in respect of specific purposes, relative thereto, and when its functions in these regards had been fulfilled its operative existence is to cease.

Its general character is that of being for these limited purposes the agent of the Crown.

Since I hold these views, it seems I must conclude

(1) L.R. 1 H.L. 93.

that this appeal must be allowed with costs, and appellant be given a chance to have his case tried.

Appeal dismissed with costs.

Solicitors for the appellant: *Elliott, Macneil & Deacon.*

Solicitor for the respondent: *J. B. Coyne.*

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*Feb. 23.
*May 15.

WILLIAM LAIDLAW (DEFENDANT) . . . APPELLANT;

AND

TREVOR J. VAUGHAN-RHYS (PLAINTIFF) . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Timber license—Crown lands in British Columbia—Real estate—Personalty—Contract—Sale—Exchange — Consideration — Payment in joint stock shares—Vendor's lien—Evidence—Onus of proof—Pleading and practice.

A sale of rights under licenses to cut timber on provincial Crown lands in British Columbia is a contract for the sale of interests in real estate, and the timber berths are subject to a vendor's lien for the unpaid purchase money.

The doctrine of vendor's lien for unpaid purchase-money is applicable to every sale of personal property over which a court of equity assumes jurisdiction. *In re Stucley* ((1906) 1 Ch. 67) followed.

In order to protect himself against the enforcement of a vendor's lien, a defendant relying on the equitable defence of purchase for value without notice is bound to allege in his pleadings and to prove that he became purchaser of the property in question for valuable consideration and without notice of the lien. *In re Nisbett and Potts' Contract* ([1905] 1 Ch. 391; [1906] 1 Ch. 386), followed. *Whitehorn Brothers* v. *Davison* ([1911] 1 K.B. 463), distinguished.

(Leave to appeal to the Privy Council was refused on the 29th of July, 1911.)

APPEAL from the judgment of the Court of Appeal for British Columbia reversing the decision of Morrison J., at the trial, and maintaining the plaintiff's action with costs.

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

The action was brought against the present appellant and two other defendants for the declaration and enforcement of a vendor's lien upon certain timber limits, held under licenses from the Government of British Columbia, which had been transferred to the said appellant by the other defendants.

The circumstances of the case and the questions in issue on the appeal are stated in the judgments now reported.

Wallace Nesbitt K.C. and *Coutlée K.C.* for the appellant.

Travers Lewis K.C. for the respondent.

THE CHIEF JUSTICE and DAVIES J. agreed in the opinion stated by Duff J.

IDINGTON J.—The respondent alleges in his amended statement of claim, and the appellant's pleading admits that he was at all the times in question herein the lawful holder of timber licenses issued by the Province of British Columbia on the 24th day of September, 1907.

He alleges a sale thereof to one Clarry and claims to be entitled to enforce his vendor's lien in respect of $2,500, balance of the purchase-money.

The agreement of sale under which the respondent claims is peculiar in this, that it sets out at first a consideration of $5,000 and then proceeds to provide conditionally that shares of the value of $2,500 in a proposed corporation to be created should be given in addition to the said sum of $5,000.

It provides that the amount of said shares should abate proportionally to any deficiency found as the

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result of cruising to exist in the specified quantity of timber.

A question not free from doubt is raised of whether or not here can exist a vendor's lien in respect of an exchange of land for shares of unascertained value in a concern to be created in the future.

The phraseology of the provision is ambiguous. It may be read as a bargain that the shares must be of the value of $2,500, or that the contemplated price of the land sold is $5,000 plus $2,500 for which the shares are to be accepted in lieu of the $2,500 balance.

To solve ambiguity in a document it is competent to look at the acts of the parties immediately before and after the conclusion of the bargain to ascertain its meaning.

Surrounding circumstances may be considered to remove ambiguity. The gist of the question to be determined is whether or not there was an intention to abandon any claim to a vendor's lien or to form a contract inconsistent with its presumed existence.

The proposal was made by letter written on the 9th of November, 1907, by the respondent from Vancouver, to Clarry, at Toronto, and a deed of conveyance carrying out in part the sale was made on the 21st of November, 1907, by Chandler, of Vancouver, who held the property in trust for the respondent. If we make allowance for the distance the parties were apart, the deed may be almost taken as immediately following the offer, and, in truth, the final and formal expression of the concluded bargain.

It certainly must have been executed before the cruising could have taken place and before the suggested alternative of delivering shares instead of paying money was determined.

That deed expressed the consideration to be $7,500.

Reading both documents can there be a shadow of doubt that such was held by the parties to be the actual price of the property, but with an added term that if shares were delivered within a given or reasonable time they must be accepted in lieu of $2,500 which, *primâ facie,* according to the terms of the deed, was to be cash.

The fact that one Myers, first proposed to be the person, on whose report the matter was, finally, to be dependent was substituted by one Jarvis shews, at least, that some things transpired between the parties which renders it unsafe to rely too much upon the exact terms of the written offer to the exclusion of the deed which must, I submit, be taken as the final expression of the consensus of the parties.

And this more especially so when we find, as we do, that it was understood a deed was to be executed and delivered as an escrow as a means of carrying out the understanding of the parties and this deed is an instrument pursuant to the final decision or expression of the will of the parties.

Then we have the following statement in the fourth paragraph of the respondent's statement of claim:

> At the request of the plaintiff and in accordance with the directions of the defendant Clarry, the said E. R. Chandler executed a proper assignment of the said timber licenses to the defendant, Clarry, and the same were, on or about the 21st day of November, 1907, delivered to the defendant, Clarry, who, thereupon, paid the plaintiff the sum of $5,000, but the balance of the purchase price, namely, $2,500, to be paid by the delivery of the said twenty-five shares in the said B.C. Pressed Brick Company, was not paid to the plaintiff.

This is admitted in the appellant's defence and thus there seems to be an end to any dispute of the

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possible meaning I have ventured to put on the original offer or that coupled with the deed.

Unless we are to fritter away justice by over-refinement, I do not think we should allow the appellant to withdraw from the position this admission puts him in.

All this is followed by a suit against Clarry to enforce payment of the balance of $2,500, and judgment for the plaintiff therefor, on the 29th of March, 1909.

The deed under which the appellant claims is dated the 2nd of April, 1909, and from the said Clarry to him. I will, presently, deal with its peculiarities.

I merely note the date and, for the present, pass on to consider its relation to this branch of the case I have been and am dealing with.

Now, can a man, resting upon a bargain made in face of the concurrence of the parties, thus finally adjudicated between them, claim to put any other interpretation upon the meaning of their bargain than all these things imply ?

What right has he to say it was not for cash, but on other terms than thus adjudged before his intervention ?

It is further said, however, that the subject-matter of the sale was such that a vendor's lien could not, in law, exist. In that aspect, whether a volunteer or not, the appellant is quite within his right in making such a contention.

For no matter how weak his right or title may be he is attacked by virtue of the alleged legal existence of a lien which is not the creation of the will of the parties. It is a thing that may be waived by a vendor but is given quite independently of his will in any other sense than as to a question of intention to waive it.

It can usually only thus arise without intention in respect of a transaction entirely relative to real estate.

Liens on chattels (having no relation to realty) sold are gone the moment possession has changed. Other liens may arise from the express or implied intention of the parties.

In regard to real estate dealings a vendor's lien arises in favour of the vendor independently of such considerations.

Can this sale of a license to cut timber mean anything but a sale of real property ?

In principle it seems clear. In some cases the bargain may be relative to the price of timber when cut and, hence, have no relation to the land. I think confusion apt to arise, and has in some cases arisen, out of a non-observance of this distinction.

I can see no room here for doubt or difficulty.

I find, moreover, that, in *Mitchell* v. *McGaffey*(1), Chancellor Blake, as far back as 1858, decided a lien arose out of such a transaction as a sale of the right to cut timber.

His test there, put in the first sentence of a well-reasoned judgment, was, could specific performance be decreed of such a bargain, and his deduction from the authorities that it could, and other consequences follow, seem to me unanswerable.

This case was not cited to us. *Scott* v. *Benedict* (2), decided in this court, and of which only a note is reported in our reports, was cited.

Tracing its history back to 5 Ontario Reports, at page 1, we find there a divided court and those

(1) 6 Gr. 361.

(2) 14 Can. S.C.R. 735.

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holding no lien existed do not rely upon any such doctrine as suggested here, but upon the peculiar circumstances of that case. No doubt the same reasons led to the decision noted in the reports of this court (1). Other cases cited have equally no bearing upon this point.

Nor can I find anything in the distinction sought to be made out of these licenses by the Crown being renewable from year to year for twenty-one years. The presumption is in favour of renewal and, if not cancelled, that the right continues. There is no evidence of interruption and, hence, the lien attaches to the right subject to the liability to such interruption.

I conclude that, on principle, a lien may arise upon a sale of such an interest as now in question.

This brings me to the defence set up of a purchase for value in good faith and without notice.

There is no evidence given to support it. The respondent's pleading certainly does not; and the deed to the appellant, alleged to have been put in by the respondent, does not. It refers to some previous indenture of the month of February. What that is, I have no knowledge of. I tried, in argument, to find out. It was said to be clear, on the reading of the pleadings. Now, in the pleadings, we have the following statement of the appellant's defence:

> 9. The said defendant says that, on the 2nd of April, 1909, he bought and received a transfer of all the interest of defendant, Clarry, in the said timber-licenses and paid valuable consideration therefor, and the said defendant claims to be the owner of the said timber licenses.

We have no reference to the indenture of February which that of April purports to assign or to be made

(1) 14 Can. S.C.R. 735.

in pursuance of. I can find nothing in the record to define or make clear what that of February may be.

The respondent's pleadings merely charge the defendant Clarry had sold or pretended to have sold to the appellant and sought to get his deed registered.

How that renders this curious deed appellant has put in evidence any more definite I am unable to say. It shews what an intangible thing the respondent has been contending against, indeed a mere cloud on his right.

All these references to that matter I should have put aside but for one thing, and that is the claim the appellant's counsel makes to proof furnished by admission in this deed of payment for some property the deed relates to. It may be for that in question or something else.

It seems to me, therefore, this defence fails.

Again, it was suggested in argument, that, inasmuch as the respondent's deed, on its face, shews an acknowledgment of the receipt of consideration, though proven to be untrue, the respondent is estopped from shewing that.

There is no evidence appellant ever saw this deed or was led to rely upon it.

I think the appeal must be dismissed with costs.

DUFF J.—I think the fair inference from the facts in evidence is that the sale as finally concluded was a sale for $7,500 cash. That being the case it is not necessary to consider whether a lien or charge would arise in favour of the vendor as security for the performance by the vendee of an agreement to deliver shares in a company to be formed as part of the consideration for the purchase where the subject-matter

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and circumstances of the sale justify the presumption that the expectation of all parties was that the property sold should be available for sale in the hands of the vendee. We were furnished by counsel with a list of authorities upon the point, but it is desirable, I think, to refrain from expressing any opinion upon it until a case arises requiring the determination of it. Mr. Nesbitt based the appeal upon two grounds; the first being that the subjects of the sale in question were not land; and that a vendor's lien attaches to that description of property only. It is not, I should think, seriously open to doubt that the interests created by the instruments transferred from the vendor to the purchaser were interests in land. But the immediate point is, quite irrespectively of that, settled by the decision of the Court of Appeal in *Re Stucley*(1). The principle of that decision is stated thus by the present Master of the Rolls, then Cozens-Hardy L.J., at pages 83 and 84:

> But it has been argued that a vendor's lien is limited to land, and does not extend to personal estate. Now, there is the distinct authority of the Court of Appeal, in *Davies* v. *Thomas*(2), to the contrary; and, that being so, I do not think it necessary to go back to the earlier authorities, nor to discuss the principles upon which those authorities were decided. I see no reason, in principle, why the doctrine should not apply to every case of personal property in which the court of equity assumes jurisdiction over the subject-matter of the sale.

The point of substance in the appeal is whether the property is bound by the respondent's lien in the hands of the appellant, who says he is a purchaser for value without notice of the lien.

On this point I agree with the court below that, in order to avail himself of that position as against

(1) (1906) 1 Ch. 67. (2) (1900) 2 Ch. 462.

the vendor's claim, Mr. Laidlaw was bound to allege and prove that he was a purchaser for value and a purchaser for value without notice of that claim. The question of the incidence of the burden of proof in such cases has recently been before the courts in *Re Nisbett and Potts' Contract*(1). The substance of the decision as affecting that question is thus stated, by Cozens-Hardy L.J., in the last mentioned report, at page 410:

> But, what must he prove in order to claim this exemption? He must prove that he is a purchaser for value of the legal estate without notice. If in the old days, he had simply pleaded, "I am a purchaser for value," such a plea would have been demurrable; he would have had to go further and allege and prove that he was a purchaser for value without notice, and he must do the same at the present day.

Since the argument Mr. Nesbitt has called our attention to the decision of the Court of Appeal in *Whitehorn Bros.* v. *Davison*(2). The effect of this decision is that, where the purchaser of personal chattels (who has acquired them under a contract voidable because of fraud practised by him in the matter of the purchase) pledges or re-sells them, the seller, in order to establish his right to avoid the sale as against the pledgee or subsequent purchaser must prove that the latter has taken them with notice of the fraud or otherwise than in good faith. The reasoning upon which this decision is based has, I think, no application whatever to the question before us. Where a purchaser of chattels procures the delivery of them to him by fraud, his fraud may affect the transaction in one of two ways. If, for example, the owner has been deceived as to the

(1) (1905), 1 Ch. 391; (1906), 1 Ch. 386.

(2) (1911), 1 K.B. 463.

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identity of the person with whom he is dealing and, in fact, never intended to pass the property to that person, then no title passes. Speaking generally in such a case the purchaser cannot pass a title to a third person; *Cundy* v. *Lindsay*(1). Where, on the other hand, there is an intention to pass the property, but that intention has been brought about by the collateral fraud of the purchaser, then a title does pass, but it is a title voidable at the option of the seller. In such a case it is settled law that the seller may assert his right to avoid the contract against the author of the fraud, against volunteers claiming under him, or against purchasers for value acquiring otherwise than in good faith. But when the seller seeks to assert his right he must, of course, as plaintiff, make out his case, and, as against persons other than the author of the fraud, he must shew either that they were volunteers or that they were acting in bad faith. All this is beside the question upon which we have to pass. The lien of a vendor is an equitable interest in the property itself. Persons acquiring subsequent interests which come into competition with the vendor's interest can displace the latter only by shewing some superior equity. The subsequent acquisition of the legal estate, in itself, gives no superiority even when it is acquired for value. The person relying upon it must go further and prove something else before he can successfully claim to occupy a higher position than that of the vendor standing on his lien. One thing he may do is to shew that at the time he paid his purchase-money he had no notice of the existence of the lien. But, if he is rely-

(1) 3 App. Cas. 459.

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ing upon his position as purchaser for value without notice he must prove that defence in its entirety.

ANGLIN J. agreed with Duff J.

Appeal dismissed with costs.

Solicitors for the appellant: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitors for the respondent: *Smith & Woodworth.*

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*May 2.
*May 5.

CLEOPHAS ST. AUBIN (DEFENDANT) . APPELLANT;

AND

NARCISSE BIRTZ DIT DESMARTEAU (PLAINTIFF) ..... } RESPONDENT.

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

Appeal—Jurisdiction—Débats de compte—Issue on reddition—Amount in controversy.

An action (taken in the Province of Quebec) was for an order directing the defendant to render an account and, in default of *reddition*, the plaintiff claimed $1,000. By the judgment appealed from the *reddition de compte* was ordered and, in default of compliance with the order, the defendant was condemned to pay the plaintiff the amount of $1,000 demanded.

Held, that the controversy was limited to $1,000 and the Supreme Court of Canada had no jurisdiction to entertain an appeal. *Bell* v. *Vipond* (31 Can. S.C.R. 175) distinguished.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was maintained with costs.

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

Gervais K.C. supported the motion to quash the appeal on the ground that the controversy involved in the cause affected merely the rectification of the accounts between the parties and the claim by the

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plaintiff for the amount of $1,000, and, consequently, that no appeal could lie under the provisions of the "Supreme Court Act" respecting appeals from the Province of Quebec.

St. Jacques, for the appellant, contended that, in the circumstances of the case, an appeal would lie, and he cited *Bell* v. *Vipond*(1).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The respondent moves to quash for want of jurisdiction. This is an action to reform an account (*en réformation de compte*), in which the plaintiff alleges that his interest in the sum with respect to which the new account is claimed amounts to $1,000. By the conclusions of the declaration it is prayed that the defendant should be ordered to render an account and, in default of his doing so, that he be condemned to pay the said sum of $1,000. The judgment of the court below orders an account and, in default of compliance with the order, the defendant is condemned to pay the sum of $1,000.

On these facts I am of opinion that the amount in controversy is the amount with respect to which the plaintiff claims an interest to have the account corrected, viz., $1,000, which sum is not within the appealable limit; and the motion to quash should be granted with costs.

I distinguish this case from the case of *Bell* v. *Vipond*(1). In that case an account was filed pursuant to the judgment of the court and, on the discussion of the account, the conclusions of the original

(1) 31 Can. S.C.R. 175.

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declaration were amended and the plaintiff's demand increased to an amount exceeding $2,000. See *per* Taschereau J., at page 176:

> The plaintiff, by a contestation of that account, claimed to be entitled to an amount which, though not specified, yet, by his allegations, clearly amounted to a sum exceeding two thousand dollars, withdrawing expressly the alternative conclusion of his declaration for one thousand dollars.

The motion is allowed with costs.

Appeal quashed with costs.

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THE UNION BANK OF CANADA (DEFENDANT) ..... APPELLANT; *Feb. 24. *May 15.

AND

FELIX McHUGH (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Construction of statute—N.-W. Ter. Con. Ord., 1898, *c.* 34—*Extra-judicial seizures—Chattel mortgage—Sale through bailiff—Excessive costs—Penalty—Waiver—The "Bank Act," R.S.C.*, 1906, *c.* 29, *s.* 91—*Interest—Contract—Excessive charges—Settlement of account stated—Voluntary payment—Surcharging and falsifying—Reduction of rate—Removal of mortgaged property—Negligence—Measure of damages.*

The parties to a chattel mortgage may waive the provisions of the third section of the North-West Territories Ordinance, 1898, ch. 34, in respect to the expenses of the seizure and sale of the mortgaged property. *Robson* v. *Biggar* ((1907) 1 K.B. 690), followed. Judgment appealed from (3 Alta. L.R. 166) reversed.

Where interest in excess of the rate of seven per cent. per annum has been voluntarily paid upon the settlement of accounts stated between a bank and its debtor, the amount so paid cannot be recovered back from the bank by the payer. In respect of unsettled accounts between a bank and its debtor, charges of interest in excess of the rate limited by section 91 of the "Bank Act," R.S.C., 1906, ch. 29, made in virtue of an agreement between the parties, should be reduced to the rate of seven per cent. per annum upon the surcharging and falsifying of such accounts. Judgment appealed from (3 Alta. L.R. 166) affirmed, Idington J. dissenting.

Where loss occurs to mortgaged property in consequence of want of reasonable care in its removal from the place of seizure to the place at which it is sold under the authority of a chattel mortgage, the proper measure of the damages recoverable by the mortgagor is the amount of depreciation in value caused by the negligent manner in which the removal was effected. In the

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present case, the evidence being insufficient to justify the assessment made by the trial judge, it was referred back to have the damages properly assessed. Judgment appealed from (3 Alta. L.R. 166) varied, Duff and Anglin JJ. dissenting.

APPEAL from the judgment of the Supreme Court of Alberta(1), reversing, in part, the judgment of Beck J., at the trial(2).

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

Ewart K.C. and *Walsh K.C.* for the appellant.

C. C. McCaul K.C. for the respondent.

THE CHIEF JUSTICE.—This appeal should be allowed as to the penalties. The cross-appeal should be dismissed. As to the rate of interest the judgment should be confirmed. The judgment of the court below should be varied by directions that, on a reference back to assess the damages, the measure of damages to be allowed should be the depreciation in value, if any, of the horses caused by the manner in which they were driven from the ranch to the place of sale. The whole should be with costs in favour of the appellant.

DAVIES J.—I agree that this appeal should be allowed as to the penalties and the judgment below confirmed as to the rate of interest allowed to the bank and that the cross-appeal should be dismissed. I agree with the reasoning of Duff and Anglin JJ. on these two questions of the non-liability of the appellant for the penalties prescribed by the Consolidated Or-

(1) 3 Alta. L.R. 166. (2) 2 Alta. L.R. 319.

dinance of the North-West Territories, 1898, ch. 34, and as to the right of the appellant, notwithstanding the provisions of section 91 of the "Bank Act," R.S.C., 1906, ch. 29, to retain the rate of interest on the basis of voluntary payment made by the respondent to the bank, which the court appealed from allowed.

As to the question of damages, I am unable to find any evidence justifying the amount at which the trial judge assessed them. In exercising the power of seizure and sale under the mortgage the bank was, of course, obliged to act reasonably in the circumstances. In driving the horses from the ranch to the place of sale their duty was to take reasonable care of the animals and not to over-drive them; and, for any damages caused by such breach of duty, the appellant would, of course, be liable. The necessary evidence to justify the recovery of any such damages as those assessed by the trial judge was wanting in this case. It seemed to me to be purely guess-work. On this question of damages there should be a reference back to the court below to assess the damages and the measure of such damages should be the depreciation in value, if any, of the horses caused by their having been improperly driven from the ranch to the place of sale.

IDINGTON J.—The respondent and another owed the appellant bank, and, on the 28th of May, 1907, gave a chattel mortgage upon a large number of horses and other chattels to secure the sum of $36,233, which was the sum supposed on that date to be due from them to said bank.

On or about the 6th of July, 1908, the bank mana-

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ger at Calgary instructed by letter one Smith to take possession of the horses and cattle and employ such men as necessary to round up or hold the stock of which sales were to be made.

This was done under a power of sale in the mortgage.

It is not denied that the respondent was in default and the mortgage enforceable by this means.

The horses taken possession of were found some fifty or sixty miles from Calgary and undergoing medical treatment known as "dipping" under the supervision of the veterinary authorities for the district.

The horses numbered from three hundred and fifty to four hundred and there were several hundred cattle also to be taken care of.

Before the horses could be taken out of quarantine and got into any shape for selling advantageously some weeks elapsed.

There were over three hundred taken to Calgary and finally entrusted to the Alberta Stock Yards Company in that city, to be sold. They were sold there.

After the sale of horses the assistant-manager of appellant at Calgary wrote the following letter to the respondent's solicitors there:

Calgary, Alta., September 9th, 1908.

Messrs. Reilly & McLean,
Calgary.

Dear Sir,—I am in receipt of your letter of the 8th instant and now beg to hand you statement shewing total receipts and expenses of the different sales of horses held on account of McHugh Brothers:

August 14th—163 head for	$ 8,920.50	
Less expenses and 3½ per cent. commission..	375.50	
Net result		$ 8,545.00

August 21st—177 head for	$12,278.00	
Less expenses and 3½ per cent. commission..	503.20	
Net result		$11,774.80
Horses sold to Frank McHugh	$ 985.00 off	$10,789.80
Cash, $750, note	235.00	
August 28th—85 heads for	5,094.00	
Less expenses and 3½ per cent. commission	194.00	
Net result		$ 4,899.05
September 3rd—64 head for	$2,665.00	
Less expenses	120.75	
Net result		$ 2,544.25

With regard to the sale of cattle I might say that we are advertising a sale to be held at Strathmore on the 24th of this month.

Yours truly,

(Sgd.) C. F. PENTLAND,
Asst.-Manager.

Without asking for any further explanation this suit was brought for penalties under the ordinance I am about to refer to and for damages done the horses in the course of driving them to Calgary and for an account.

The North-West Territories Consolidated Ordinance, 1898, ch. 34, provides for fees, etc., to be taken in respect of distress or seizure made either by landlords or under chattel mortgage. Section one deals with the former and section two deals with the latter.

We are only directly concerned here with section three, which enacts:

If any person making any distress or seizure referred to in sections 1 and 2 of this ordinance shall take or receive any other or greater costs than are set down in the said schedule, or make any charge whatsoever for any act, matter or thing mentioned in the said schedule and not really performed or done, the party aggrieved may cause the party making the said distress or seizure to be summoned before the Supreme Court of the judicial district in which the goods and chattels distrained upon or seized or some portion thereof lie and

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the said court may order the party making the distress or seizure to pay to the party aggrieved treble the amount of moneys taken contrary to the provisions of this ordinance and the costs of suit.

The schedule is as follows:

SCHEDULE.

1. Levying distress $1.00
2. Man in possession, per day 1.50
3. Appraisement, whether by one appraiser or more, two cents on the dollar on the value of goods up to $500, and one per cent. on the dollar for each additional $500 or fraction thereof up to $2,000, and one-half per cent. on all sums over that amount.
4. All reasonable and necessary disbursements for advertising.
5. Catalogue, sale, commission and delivery of goods, three per cent. on the net proceeds of the goods up to $1,000 and one and one-half per cent. thereafter.

Now, it is to be observed this enactment does not deal with things outside the schedule and that does not pretend to cover the maintenance of or the removal of and fitting for sale of any such thing as stock when seized.

The power of seizure and sale in the mortgage is in that regard as follows:

And upon and from and after taking possession of such goods and chattels it shall and may be lawful, and the mortgagee, and each or any of them, is and are hereby authorized and empowered at his or their discretion to sell the said goods and chattels or any of them, or any part thereof, at public auction or private sale on the premises hereinbefore described, or elsewhere as to them or any of them may seem meet; and from and out of the proceeds of such sale in the first place to pay and reimburse all such sums and sum of money as may then be due by virtue of these presents, and all costs and expenses (including the costs (if any) of the solicitor of the mortgagee) as may have been incurred by the mortgagee, in consequence of the default, neglect or failure of the mortgagors in payment of the said sum of money with interest thereon as above mentioned, or in conquence of such sale or removal as above mentioned, or in consequence of failing in the performance of any of the covenants or agreements herein contained, and on the mortgagors' part to be performed and kept, and in the next place to pay unto the mortgagors all such surplus as may remain after such sale and after payment of all such sum or sums of money and interest thereon as may be due by virtue of these presents at the time of such seizure and after pay-

ment of the costs, charges and expenses incurred by such seizure and sale as aforesaid.

It seems abundantly clear that there is no substantial conflict between this and the penal enactment in section 3 and the schedule. It is true that there is room to argue that the language of the prior sections forbids any charges save and except as in the schedule, but there is no sanction annexed thereto save that in section three.

To my mind it is quite impossible, if we have regard to the law governing the construction and application of penal enactments, to read this one as extending to anything beyond the excessive taking of fees for the specified subjects named in the schedule.

Section four of the ordinance used the words "fees or costs."

The history of the legislation shews its purpose was such as to fix and limit the fees for specified services. And the enactment covers only excess thereof and acts not really performed or done, yet charged for.

Then, again, these enactments are not of such a general character, embodying a public policy that would render a contract anticipating their operation and providing against same as between parties concerned, illegal and therefore void.

The general purview of the legislation demonstrates this. The penalty can only be sought by an aggrieved person. How can a free person who has specifically agreed that these provisions shall not be applicable to a contract he has entered into be an aggrieved person under said section ?

At all events how can such a person, desiring to protect his own business and property from ruin in

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case a distress has to be made, not contract for any and every thing to be done outside the said schedule and its operation ?

Suppose a distress made by or with one man only, and no feed for stock so distrained, is this one man foreshadowed in the schedule to keep the stock without feed or drink ?

Is it to be illegal for tenant or mortgagor to bargain with the distrainor for either feeding or transportation to a suitable market ?

If not illegal after the seizure, what makes it, or can make it illegal to contract for and in anticipation thereof ?

But the absurdity of the contention appears when we consider the case of the landlord under section number one, and the law binding such an one distraining to proper treatment of stock when seized and to hold the chattels for specified terms before he can sell.

I should not have supposed this argument needed, but for the finding of the court below that this penal enactment leaves no room for the operation of the powers of removal and re-payment of the costs thereof even when expressly contracted for as above.

In my opinion such is not the law. The reasonable and necessary cost for the care and maintenance, and transportation, of the stock seized were all impliedly within the contemplation of the parties to the mortgage in question, and I think contracted for.

So holding, — what case is made out for adjusting a penalty ? The charges under the schedule seem blended with other expenses contracted for. How can a court pass judgment without knowing if the schedule has been transgressed ? What has happened and is in evidence in support of this penalty ?

How can we draw any inference such as cases like *Dickenson* v. *Fletcher*(1), for example, require to be drawn before penalties can be enforced ?

A statute may by its terms indicate that a *mens rea* is not essential to subjecting one to a penalty, but is this one of that nature ?

The appellant has not as yet taken anything; for the respondent confessedly on this evidence was when rendered this account indebted for a balance so great that all these charges even if trebled were negligible. It is not as if the debt were wiped out and a balance clearly coming to the respondent, but for the appellant insisting on keeping it.

The mortgagor is suing for an account and, without waiting to see the result of that account, the court has directed an inquiry to be made to see if by any possibility there can be found some ground for inflicting this penalty. Where is there any precedent for such a proceeding ?

So tender has the court ever been as to penalties, it has refused to aid in the discovery or grounds for inflicting them. The cases of *Hunnings* v. *Williamson* (2), and cases and principles there cited and discussed shew the attitude the courts have held and ought to hold relative to such analogous inquiries as therein treated of. How can such an inquiry be made with due regard to the observance of the principles of the law as laid down there, or what result can we reach but that such an inquiry and direction is improper ? The ordinary account and inquiry is quite proper, but it cannot be had for such a purpose or

(1) L.R. 9 C.P. 1. (2) 10 Q.B.D. 459.

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indeed efficiently conducted when hampered by such a pursuit.

I think the appeal should be allowed with costs.

A cross-appeal has been taken relative to a claim for damages found by the learned trial judge and set aside by the court of appeal and a reference directed in respect thereof.

I do not think we should interfere with this exercise of discretion in disposing of the trial judgment. The evidence does not warrant our reversing the court of appeal and restoring the trial judgment.

And when we look at its mode of disposing of the future trial it is a mere matter of procedure that is involved.

Indeed, in that regard it seems akin to the case of *Union Bank of Halifax* v. *Dickie*(1).

I agree, however, that the measure of damages referred to is not stated accurately.

The damages should be confined to and measured by the difference between the price for which the horses were sold, and what they should have been sold for, if they had been driven with due care, from the place where seized or held to Calgary.

As framed the judgment may permit of some other result than that of an allowance for damages caused to the horses by over-driving or an improper mode of conducting the transportation from one point to the other.

And there should be added to this or striken out of the bank's claim for expenses, any expense incurred in caring for and resting them longer than might have

(1) 41 Can. S.C.R. 13.

been necessary if they had not been over-driven or improperly driven. It is the depreciation and loss (if any) solely attributable to these causes that had to be considered on the inquiry and borne by the bank.

Another question raised is the taking of accounts between the parties. The court of appeal has interfered, erroneously, I think, with the disposition of such matters by the learned trial judge. That might have been improved, but this judgment in appeal seems worse.

There is no reason for treating a bank differently from other parties.

So far as the parties have settled their accounts from time to time they should be bound by that settling of accounts, even if there be covered thereby an allowance for a greater rate of interest than the rate recoverable by an action at law.

It is quite competent for the customers of a bank to agree to pay any rate of interest named. And when they have paid what they have promised they are bound by the payment and cannot recover it back any more than in the case of any other voluntary payment.

There is no law enabling the recovery back.

The payment by way of any settlement and striking of a balance clearly understood between the parties is good both in law and morals and ought not to be disturbed.

The parties surely must be taken to have stated their accounts up to the date of the last mortgage.

It is not clear how much further settlements proceeded, but if had, as likely, at each renewal of notes or otherwise, they must be respected even if including charges for interest beyond seven per cent. per annum.

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In the absence of definite evidence in this last regard, I would have the taking of accounts to begin with 28th of May, 1907, accompanied with a direction to observe duly stated accounts, if any, since that date, and that same be not disturbed merely because of a greater rate of interest having been charged than would be recoverable by an action.

The agreement of the parties so far as executed must not be disturbed for any other reason than fraud or mistake.

I do not understand fraud to be charged at all, and, that being out of the question now, the possibility of mistake is all that is left. And in regard to mistake the onus is always on the party to a settled or stated account claiming error to state it and prove it.

No one should be lightly deprived of this right and I would, therefore, feel inclined to give, as the learned trial judge gave, the right to impeach any stated account between the parties, and direct that upon proof of error the same be rectified, but in carrying out the rectification the calculations of interest shall proceed upon the basis of the general rate of interest, which defendant from time to time purported to charge. There is much force in the point made that no clear case of impeachment of the stated accounts was made by evidence at the trial. But the learned judge might have formally reserved this part at the outset. I think, though he did not do so quite according to the usual practice, his wishes might well be respected.

In so far as settled or stated accounts have not put an end to the question of the rate of interest to be charged or chargeable, a question arises upon this mortgage of May, 1907, which provided for eight per cent. interest, which is beyond the rate for which the bank can recover by action.

It is contended that the covenant is, therefore, void. I cannot see how it can be sued upon. Indeed, it is not claimed that it can serve for a recovery of eight per cent. But cases have been cited, which, it is urged, manifest that it is good for seven per cent.

None of the cases cited, when examined, so meet this condition of things we have to deal with as to produce such a result. It was not argued that the covenant was not intended to be read as referring to anything but the eight per cent. rate in the proviso for redemption. The language is not as express as the redemption proviso, to which it is a sequel, but obviously means such interest as therein provided for.

It is, therefore, to be treated as simply a covenant to pay eight per cent. The statute by its legal effect says that kind of contract is not one upon which the bank can recover. To read this covenant otherwise and as implying an alternative of the legal limit, seems against all principles of construction.

It is a cutting in two of that which in its very terms forbid such a thing being done. And if it can be read merely as a covenant to pay interest, that would mean interest according to the usual legal acceptation of the term.

If no action will lie on the covenant, what is the condition of things ?

It is clear from the nature of the transaction and the business of the parties that they intended that interest should be paid.

The covenant being set aside as invalid for purposes of this recovery, can it be looked at at all as evidence of the intention that interest should be paid ?

Can there be any doubt if a customer overdraws his account interest can be charged upon money so lent ?

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Is it because it is payable on demand ? If so, then could it be recovered without demand, or before demand ?

I cannot find it can be rested upon any satisfactory basis except the implied contract to pay interest by reason of the nature of the transaction and the universal understanding that such an implication is a term of the contract thus formed between the parties as banker and customer.

In *Marshall* v. *Poole*(1) it was held when goods were sold and delivered upon an agreement to pay by a bill due at a future day, and no such bill was given, interest ran from the date at which the bill should have fallen due, because it would have carried interest from such due date if it had been given.

It seems to rest upon nothing but an implied agreement; for interest would not in the then state of the law run on the price of the goods, but for that agreement giving room for such an implication.

Besides, I incline to think the covenant may be looked at for the purpose of settling the question of whether in fact it was a gratuitous loan, or to bear interest.

If an action cannot be founded upon the covenant it may be said the instrument cannot be looked at for any purpose.

Does not the principle upon which some of the cases cited from Leake, page 556, where the instrument is used for a collateral purpose, support this suggestion, that the covenant, though illegal, may form some evidence of the relation of the parties.

The subject is a difficult one, not fully argued, but

(1) 13 East 98.

though doubting, I conclude interest was an implied term of the contract of loan.

It was contended that the elementary principle that an express contract excludes an implied one, excluded the implication of interest in this case.

That, however, is beside the question, for if there was merely a void covenant, I fail to see how it could exclude anything.

If interest is to be allowed, at what rate ?

It is suggested that the statute, which is expressed as follows:

> The bank may stipulate for, take, reserve or exact any rate of interest or discount, not exceeding seven per centum per annum, and may receive and take in advance, any such rate, but no higher rate of interest shall be recoverable by the bank

enables a recovery at seven per centum. I cannot so read it. Indeed, it seems to me rather a far-fetched construction.

If good for anything it must mean that seven per centum is to be the rate in all cases of money due or accruing due to a bank, unless where an express contract exists between a bank and its customer fixing another rate.

I cannot assent to any such consequences as within the purpose of the legislature.

I think, therefore, the rate, where not provided for and disposed of by what I have already said, must be five per cent. This was and is the ordinary rule where a contract exists to pay interest, as I find, without stating its rate and is fixed by section 2 of the "Interest Act" for all such cases.

It is quite likely when all the facts are disclosed as to renewals, etc., it is only as to past due debts that there can be any question herein. And in such

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cases, of course, the usual damages on a five per cent. basis must be allowed.

It is to be observed that the learned trial judge allowed five per cent., and the only complaint made in the cross-appeal upon which this issue turns, is the raising of the rate by the appellate judgment to seven per cent., and hence cross appellant can hardly complain if interest allowed at five per cent.

I preferred, notwithstanding that ground, to investigate the matter, and see if I could rest it upon what the law gives the parties independently of the slip in the notice.

I think the appeal should be allowed with costs; and the cross-appeal allowed on the question of interest, but disallowed on the question of restoring the judgment for damages, and the form of judgment be varied so as to better define the operation of the sphere of the reference by measuring the alleged damages as above indicated. The cross-appeal having only succeeded in part should be disposed of as thus indicated without costs.

The judgment as it stands better be rescinded and framed anew on the lines necessary to effectuate the taking of the accounts between the parties, on the lines indicated by the majority of the court and the basis of the indebtedness being assumed (until a later settlement (if any) appear) to be that stated in the last chattel mortgage, subject to such impeachment for error in any of the items constituting the amount thereof and the accounts being surcharged and falsified; and that the clerk in taking the reference shall, if he find any later settlement of the accounts as a whole, confine the taking of accounts to the dealings subsequent to the latest of any such settlements, and

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subject to the corrections of errors in like manner as above directed. A general declaration better be made directing him not to interfere with any allowance in the past of interest based on what the parties have agreed to, except for error in calculation, but where no agreement exists to take the account, it ought, in my opinion, to be on the basis of five per cent. per annum, as rate of interest to be allowed.

DUFF J.—Three questions are raised by this appeal. First, as to the effect of the Consolidated Ordinance of the North-West Territories (1898), ch. 34. There is no reason, I think, why a person employing a bailiff, or the person on whom the incidence of the charges ultimately falls, should not be at liberty to waive the benefit of the statute: *Robson* v. *Biggar*(1). Since the mortgage in question contemplates obviously that the mortgagee shall, when acting under the power of sale, make such expenditures as may reasonably be necessary for the proper care of the mortgaged property and for obtaining the most satisfactory results, I think we may properly imply an assent on the part of the mortgagor to such waiver by the mortgagee where, in the circumstances, it would be reasonable. That it was reasonable in the circumstances of this case cannot be disputed.

Secondly. — With respect to section 91 of the "Bank Act," R.S.C., 1906, ch. 29, I think the governing words of this section as regards its effect upon the obligations of the parties under a contract providing for the payment to a bank of a higher rate of interest than seven per cent. are these: "no higher rate of interest shall be recoverable by the bank."

(1) (1907) 1 K.B. 690.

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Where a sum in excess of the amount exigible according to that rate has been paid the circumstances of the case must determine whether that excess is or is not recoverable from the bank by the payer. I think the allowance made in the court below on the basis of voluntary payment is right and ought not to be disturbed.

Thirdly.—As to damages. The duty of the mortgagees in exercising the powers of taking possession and selling was to act reasonably. That involved, in the circumstances of this case, the duty of taking reasonable care of the appellant's cattle while on the way to the place of sale.

There was evidence that they failed in this duty, and sufficient evidence, I think, to support the finding of the trial judge as to the quantum of damages. On this point, I should allow the appeal and restore the judgment of the learned trial judge with this variation, viz., that the sum awarded as damages be allowed to the plaintiff in the mortgage account.

ANGLIN J.—In my opinion the Consolidated Ordinance of the North-West Territories (1898), ch. 34, is not applicable as between a chattel mortgagee, who sells through a bailiff, and his mortgagor. It is substantially a re-enactment of the English statute, 59 Geo. III. ch. 93. The preamble to this latter Act makes it reasonably clear that such a case would not fall within its purview. Although the territorial ordinance lacks this preamble, having regard to its history, to the unsuitability and incompleteness of its provisions and to the fact that the original Act, which deals only with landlords' distresses, appears to have been designed for the protection of the landlord as

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well as of the tenant against extortionate charges by bailiffs, I am satisfied that this legislation was not intended to govern such a case as that now before us.

But if it were, *quisque potest renunciare juri pro se introducto.* The mortgagor for whose protection the statute was passed could waive its provisions if he so desired. *Robson* v. *Biggar*(1). By the clause in the defendant's mortgage authorizing it to reimburse itself for

> all costs and expenses * * * incurred by the mortgagee * * * in consequence of sale or removal

of the mortgaged property, having regard to the nature of such property, the mortgagor must be taken to have sanctioned the outlays made by the mortgagee so far as they were reasonably necessary and proper for the care and disposition of it. Apart from the objection to them based on the statutory tariff the reasonableness of the charges made has not been challenged. The mortgagor has, in my opinion, by his agreement waived any right which he might otherwise have had to object to them because in excess of the tariff prescribed by the ordinance. The appellant is, therefore, entitled to a reversal of the judgment of the provincial appellate court in so far as it has been held liable to pay to the plaintiff

> treble such sum as may have been taken by the defendant for costs and charges in excess of the costs and charges allowed under the ordinance respecting distress for rent and extra-judicial seizure.

The plaintiff cross-appeals against the judgment of the court *en banc* setting aside the award of the learned trial judge in his favour for $2,800 for dam-

(1) (1907) 1 K.B. 690.

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ages for negligent driving of the plaintiffs' horses from their ranch to Calgary and for improperly selling them while suffering from the effects of such driving. I think there was clear evidence of negligence in the driving of the horses and of consequential injury to the plaintiff and sufficient evidence upon which the amount of the damages sustained might be estimated without merely guessing. There was evidence upon these issues which could not have been withdrawn from a jury. While it may be that, if ourselves assessing damages, we should not have allowed as large a sum as was awarded by the learned trial judge, if that award had been the verdict of a jury, I cannot understand on what principle it could be set aside as unsupported by evidence; neither would it, in my opinion, be deemed so clearly and grossly excessive that an appellate court would be justified in ordering a new trial on that ground. The finding of a trial judge resting upon oral evidence

> is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. *Lodge Holes Colliery Co.* v. *Wednesbury Corporation* (1), at page 326.

The trial judge in this case gave no reasons for his assessment. The court *en banc*, though not informed as to the basis on which the learned judge proceeded in arriving at the amount and unable to discover any method by which such an amount could properly be arrived at, should not have set aside the assessment unless, if it had been the verdict of a jury, it must have been set aside as clearly unwarranted by the evidence — in fact a mere guess, or as based upon an improper measure of damages, or the consideration of matters which

(1) [1908] A.C. 323.

should not have been taken into account. *Phillips* v. *London and South Western Railway Co.*(1). This, in my opinion, could not properly have been done. I would, therefore, restore the finding of Beck J. that the plaintiff is entitled to the sum of $2,800 for damages sustained through negligence of the defendant or its agents. But the plaintiff is not presently entitled to a judgment for this sum; his only right is to have it set-off against the defendant's claim in the taking of the mortgage account.

In the view I have taken it is not necessary to discuss the basis on which damages should be assessed by the referee under the direction of the provincial appellate court for a reference to ascertain them. I merely desire to say that as to what should be the basis of assessment I concur in the views of my learned brothers who are of opinion that the trial judge's assessment should not be restored, but that this reference should be had. Perhaps it is not surprising, in view of the rule which it prescribed for the ascertainment of the plaintiff's damages, that the provincial appellate court was unable to discover any method by which the sum allowed by Mr. Justice Beck could properly be arrived at.

The plaintiff further cross-appeals against the allowance to the bank of interest at 7 per cent. up to the 31st of December, 1904, at 8 per cent. from that date to the 28th of May, 1907, and at 7 per cent. thereafter. The allowance at 8 per cent. during the period specified rests on the basis of voluntary payments made by the plaintiff to the bank on the footing of an account stated when the second mortgage was executed on the 28th of May, 1907. I cannot find any

(1) 4 Q.B.D. 407; 5 Q.B.D. 78.

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reason for disturbing this direction. Neither do I disagree with the direction for the allowance of 7 per cent. during the other periods.

The "Bank Act," R.S.C., 1906, ch. 29, sec. 91, provides that:

> The bank may stipulate for, take, reserve or exact any rate of interest or discount, not exceeding seven per centum per annum, and may receive and take in advance, any such rate, but no higher rate of interest shall be recoverable by the bank.

I cannot understand the purpose or effect of the concluding clause of this section, unless its office is to define and express the consequence which a contract by a bank for a rate of interest in excess of 7 per cent. shall entail. The section itself is in form not prohibitive, but enabling. Its effect is not that the bank's contract for a rate of interest exceeding 7 per cent. is illegal, but that as to the excess it is *ultra vires*. Parliament has seen fit to express the consequence, viz., that the higher rate of interest, that is, the rate in so far as it exceeds a rate of 7 per cent., shall not be recoverable by the bank. This is, in my opinion, the proper construction of this important provision of the "Bank Act." If it had been intended to make any contract in which a bank should stipulate for more than 7 per cent. illegal and to deprive it of all right of recovery thereon, I cannot but think that Parliament would have expressed that intention in language very different from that which it has in fact used. I would, therefore, confirm the judgment in appeal upon this point.

Appeal allowed in part and cross-appeal dismissed with costs.

Solicitors for the appellant: *Walsh, McCarthy & Carson.*

Solicitor for the respondent: *H. W. McLean.*

HIS MAJESTY THE KING (PLAINTIFF) ..... } APPELLANT;

AND

JANE MARY JONES (DEFENDANT) ... RESPONDENT.

1911
*March 8.
*May 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of land — Compensation — Transcontinental Railway Commission — Jurisdiction — "Railway Act" — "Exchequer Court Act," sec. 2(d) — 3 Edw. VII. c. 71.

"The Transcontinental Railway Act," 3 Edw. VII. ch. 71, does not expressly empower the commissioners to deal with compensation for land taken for the railway, and section 15 giving them "the rights, powers, remedies and immunities conferred upon a company under the 'Railway Act'" does not confer such power.

The Transcontinental Railway is a public work within the meaning of section 2, subsection (*d*) of "The Exchequer Court Act," and proceedings respecting compensation for land taken for the railway may be taken by or against the Crown in the Exchequer Court.

Judgment of the Exchequer Court (13 Ex. C.R. 171) reversed.

APPEAL from a judgment of the Exchequer Court of Canada (1) dismissing the information of the Attorney-General of Canada on the ground that the court had no jurisdiction to entertain it.

The purpose of the information filed on behalf of His Majesty was to obtain a declaration that certain land belonging to the respondent taken for the Eastern division of the National Transcontinental Railway were vested in the King and to have the compensation therefor awarded.

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

(1) 13 Ex. C.R. 171.

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The learned judge of the Exchequer Court held that under the provisions of "The Transcontinental Railway Act" and those of "The Railway Act" relating to expropriation of land the compensation for land taken for the purposes of the Transcontinental Railway must be ascertained by arbitration under "The Railway Act" and the Exchequer Court has no jurisdiction in the matter. The Crown appealed.

Newcombe K.C., Deputy-Minister of Justice for the appellant.

The respondent did not appear.

THE CHIEF JUSTICE.—I agree in the opinion stated by Sir Louis Davies.

DAVIES J.—This is an appeal from the judgment of the Exchequer Court dismissing the information fyled by the Attorney-General of Canada for a declaration that certain lands taken for the Eastern Division of the National Transcontinental Railway were vested in the King, and that certain compensation should be awarded therefor to the owner (defendant).

The learned judge reached the conclusion that the Exchequer Court had no jurisdiction to entertain the information on the ground that the damages for the lands taken must be determined by proceedings on behalf of the Crown or the commissioners under the clauses of the Railway Act, R.S.C. 1906, ch. 37, relating to *the taking or using of lands and compensation and damages,* sections 172 to 215.

I have already had occasion to consider this question generally in the appeal of *Johnstone* v. *The King* (1), in which I reached the conclusion that so far as

(1) 44 Can. S.C.R. 448.

damages or compensation for the taking of lands located by the Government for the Eastern Division of the Transcontinental Railway are concerned the commissioners were without jurisdiction to deal with them. Section 13 of the "Transcontinental Railway Act," 3 Edw. VII. ch. 71, relating to the expropriation of the lands required for the Eastern Division of that railway enacts that the deposit of the description and plan of the lands taken in manner therein provided

shall act as a dedication to the public of such lands which shall thereupon be vested in the Crown saving always the lawful claim to compensation of any person interested therein.

The question at once arises where and how is that lawful claim to be prosecuted ? If I am right in my holding in the case above referred to that the whole question of the adjustment and settlement of these land damages is *ultra vires* the commissioners, then it seems clear that section 15, which is relied upon as giving them jurisdiction to have these damages adjusted and settled under the land compensation clauses of the "Railway Act," would have no application. That section giving to the commissioners

the rights, powers, remedies and immunities conferred upon a company under the "Railway Act"

does so only

in so far as they are applicable to the said railway and in so far as they are not inconsistent with or contrary to the provisions of this Act.

These conceded rights, powers, etc., clearly relate only to matters over which the commissioners have jurisdiction given to them. Once it is conceded that they have no jurisdiction or power in the matter of land damages over the located line of the Eastern Division of the Transcontinental Railway, then the argument

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that section 15 can be invoked to give them such jurisdiction must fail. That section can only be invoked over matters and in cases where jurisdiction exists in commissioners *aliunde*.

The scheme of the general railway Act and that of the Eastern Division of the Transcontinental Railway relating to damages are entirely different. Under the general railway Act the company cannot enter upon and take possession of the lands until the damages are adjusted and either paid or tendered. Under the "Transcontinental Railway Act" the mere fyling of the plans and descriptions operates as a dedication of the lands to the public and a vesting of them in the Crown

saving always the lawful claim of interested parties to compensation.

I cannot see how it is possible for the commissioners to take the necessary steps under the general railway Act to have the damages ascertained by the statutory arbitration proceedings, if they are without jurisdiction on the subject-matter.

The only remaining question is whether the Exchequer Court had jurisdiction under the Act constituting it and the Act respecting the expropriation of lands, chapter 143, Revised Statutes of Canada.

The latter Act, section 2, sub-section (*d*), defines a public work to mean and include *inter alia*

the works and properties acquired, constructed * * * at the expense of Canada, or by the acquisition or construction * * * of which any public moneys are voted and appropriated by Parliament and every work required for any such purpose.

The "Exchequer Court Act," ch. 140, R.S.C., sec. 20, gives that court exclusive jurisdiction over

(*a*) every claim against the Crown for property taken for any public purpose.

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I agree with the contention of Mr. Newcombe that no adequate interpretation of these words can exclude the Eastern Division of the National Transcontinental Railway.

I think the only reasonable conclusion to be drawn from reading the "National Transcontinental Railway Act" and the agreement it ratifies and confirms is that the Eastern Division of that railway is a public work in the course of construction by the Government, but through the agency of the commissioners to the extent to which they are by statute authorized. It is a public work vested in the Crown, constructed at the expense of Canada, or for the construction of which public moneys have been voted and appropriated by Parliament within the meaning of section 2 para. (*d*), of the "Expropriation Act," and the procedure taken by the Crown in fyling this information to determine the claim against the Crown for the lands taken falls within the language of the 20th section of that Act, and the claim itself is one coming, in my judgment, within sub-section (*a*) of section 20, of the Act constituting the Exchequer Court and defining its jurisdiction over

> every claim against the Crown for property taken for any public purpose.

Altogether I entertain no doubt that the jurisdiction of the Exchequer Court covers the claim made and think the appeal should be allowed and the jurisdiction of the court affirmed.

IDINGTON J.—In this case some of the questions raised relative to the jurisdiction of the Exchequer Court are substantially the same as in the case of *Johnstone* v. *The King*(1), heard a few days ago.

(1) 44 Can. S.C.R. 448.

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I need not repeat here my reasons given there for holding the Crown and not the commissioners liable.

There are two other questions of an entirely different character raised herein touching the jurisdiction of said court to hear this case.

This is the case of an information filed at the suit of the Crown, seeking a declaration of title in the Crown in respect of certain lands taken from respondent, for the purposes of the right of way of the National Transcontinental Railway, and to have the compensation due the respondent therefor determined.

The respondent is not concerned apparently in what form this may be tried. As I understand the learned judge's reasoning it is that the statute under which the lands have been entered upon and taken incorporates so much of the "Railway Act," including its expropriation clauses, as to constitute arbitration proceedings, therein provided for, the exclusive means of determining the measure of compensation; and that even if such be not the case the Exchequer Court is not given authority to deal with such cases.

If anything can be clear in law it is quite clear that the Crown's representatives who took possession of the lands in question could not justify such a proceeding by virtue of anything in the "Railway Act."

How then can the provisions of that Act be applied in this case ?

That Act provides for the expropriating party filing in the registry office plans sanctioned by the railway commission, defining what land is to be taken or power intended to be exercised with regard to the lands in question, and making a tender of

compensation, and then only after all this giving to the owner or interested party a notice.

If the land to be taken is required for the railway for right of way as claimed by the plan, there must be a certificate of an engineer accompanying the notice.

Other powers than those strictly relative to lands to be taken for right of way may also be, by leave of the Board of Railway Commissioners, exercised by way of expropriation.

All done under the "Railway Act" in these regards requires the sanction of the said board.

I cannot find that the board has any authority to deal with the project in question herein, save conditionally in respect of specified things which do not touch the power of the Crown or its commissioners relative to the taking of lands as herein.

It seems as if the powers to be exercised, and alleged in this information to have been exercised, by the commissioners under the Act now in question relative to the taking of lands and the mode of taking are incompatible with the powers furnished by the "Railway Act" for any like purpose.

The very foundation for the proceedings to take and compensate according to the methods prescribed by the "Railway Act" cannot exist in regard to this project. I fail to see how the rule of law relative to pursuing a remedy prescribed by an enabling statute can have given a semblance of authority for the Crown to pursue or apply the "Railway Act" to compensate for what has been done in question here.

The Act under which the Crown's commissioners are proceeding enacts by section 13 thereof, as follows:

The commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record

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a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

I see nothing in the "Railway Act" or in this Act to suggest that a part of the one can be dovetailed into the other so as to constitute a specifically prescribed method provided by Parliament for the coherent execution of the power and consequent determination of the amount of compensation to be given for the exercise of this power.

The provision of section 3 of the "Railway Act" incorporates its provisions with any special Act and the interpretation of "Special Act" is quoted in the judgment appealed from to shew that the road in question herein is one of such special Acts.

But section 3 provides that

the provisions of the special Act shall in so far as it is necessary to give effect to such special Act be taken to override the provisions of this Act,

i.e., the "Railway Act."

The expropriation provisions in the "Railway Act" seem by the said section 13 of this special Act to be overridden thereby.

It is to be observed also that the national transcontinental scheme is of such a composite character that we must guard against being supposed to express any opinion of any of the provisions bearing on other sections of that work than the one before us.

What the Crown's commissioners have done under said provision seems to have effectually vested the lands in question in the Crown and however satisfactory and convenient it may be to have the court de-

clare it properly done, it stands as complete, subject to the right to compensation.

The commissioners of the Crown are of right in possession by section 13 above quoted.

I cannot find or hold that the express provisions of section 15 have any relation to this subject-matter now under consideration.

When once we have concluded, as I do, that the method prescribed as suggested by the learned judge does not apply, what is our next duty ?

Whether or not that right to compensation can be enforced elsewhere than in the Exchequer Court, is not part of our present inquiry.

Our next inquiry must be to ascertain if the powers thus exercised having been thus completed, can the Exchequer Court be asked to fix the compensation due respondent by reason thereof?

I am not concerned with what is possible as the measure of compensation in one court as distinguished from what may be fixed in another. I am only concerned to know if, this expropriation having been accomplished, indemnity can be got in the Exchequer Court.

That question is within a narrow compass.

The Exchequer Court Act, sec. 20, provides as follows:—

20. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

It seems clearly to follow from what I have already said that these two sub-sections cover all that is necessary to give the court jurisdiction.

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Indeed, if I am right in my interpretation of section 13, quoted above from the "National Transcontinental Act," it seems too clear for argument that the above section 20, subsection (*a*) is sufficiently comprehensive.

Moreover, if this property so taken as above set forth, to form a part of the railway in question, and to become the property of the Crown, is not taken for a public purpose, it would be difficult to find one that has been.

Indeed, in face of section 13, above referred to, and this section 20, just now quoted, when we read its exclusive terms it seems hard to find room for the argument relative to the "Railway Act" having any application to this matter.

Nor do I see any reason for our resorting to the "Expropriation Act" in its relation to the question of jurisdiction. It may or it may not furnish the proper measure of damages to be adopted, or be applicable in any way. I repeat, all that is something that at present does not concern us.

I think the appeal must be allowed.

DUFF J.—I agree in the opinion stated by Sir Louis Davies.

ANGLIN J.—I agree that this appeal should be allowed. There should be no costs.

Appeal allowed without costs.

Solicitor for the appellant: *E. L. Newcombe.*

Solicitor for the respondent: *W. B. Chandler.*

THE ALBERTA RAILWAY AND IRRIGATION COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

HIS MAJESTY THE KING, *ex rel.* THE ATTORNEY-GENERAL OF ALBERTA (PLAINTIFF) ..... RESPONDENT.

1911

*March 2, 3.
*May 15.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF ALBERTA.

Irrigation works—Nuisance—Obstruction of highways—Duty to build and maintain bridges—Construction of statute—61 *V. c.* 35, *ss.* 11, 16, 37.

By "The North-West Irrigation Act, 1898" (61 Vict. ch. 35), it is provided, (sec. 11*b*) that irrigation companies should submit their scheme of works to the Commissioner of Public Works of the North-West Territories and obtain from him permission to construct and operate the works across road allowances and surveyed public highways which might be affected by them; that (sec. 16) his approval and permission for construction across the road allowances and highways should be obtained prior to the authorization of the works by the Minister of the Interior of the Dominion, and, (sec. 37), that during the construction and operation of the works, they should "keep open for safe and convenient travel all public highways theretofore publicly travelled as such, when they are crossed by such works" and construct and maintain bridges over the works. The commissioner was the local officer in control of all matters affecting changes in or obstructions to road allowances and public highways vested in the territorial government "including the crossing of such allowances or public highways by irrigation ditches, canals or other works." The commissioner granted permission to the appellants to construct and maintain their works across the road allowances and public highways shewn in their ap-

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

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plication "subject to the provisions of section 37 of the said North-West Irrigation Act," without imposing other conditions.

Held, reversing the judgment appealed from, (3 Alta. L.R. 70), the Chief Justice and Idington J. dissenting, that the absolute statutory duty in respect of the construction and maintenance of bridges imposed by section 37 of "The North-West Irrigation Act, 1898," relates solely to highways which were publicly travelled as such prior to the construction of the irrigation works, and that, as no further duty was imposed by the commissioner as a condition of the permission for the construction and maintenance of their works, the company was not obliged to erect bridges across their works at the points where they were intersected by road allowances or public highways which became publicly travelled as such after the construction of the works.

Per Davies and Duff JJ.—In construing modern statutes conferring compulsory powers, including powers to interrupt the exercise of public rights, questions as to what conditions, obligations or liabilities are attached to, or arise out of the exercise of such powers, are primarily questions of the meaning of the language used or of the proper inferences respecting the legislative intention touching such conditions, obligations and liabilities to be drawn from a consideration of the subject-matter, the nature of the provisions as a whole, and the character of the objects of the legislation as disclosed thereby.

NOTE—Leave to appeal to the Privy Council was granted, 20th July, 1911.

APPEAL from the judgment of the Supreme Court of Alberta (1), affirming the judgment of Scott J., by which the action was maintained.

The action was brought, on behalf of the Government of the Province of Alberta, to compel the defendants to erect and maintain bridges across their irrigation canal at certain points where it crossed road allowances and highways which had not been publicly travelled as such prior to the construction of their irrigation works. The trial judge entered judgment, *pro formâ*, in favour of the plaintiff and the Supreme Court of Alberta, on an appeal, affirmed the decision. The judgment now appealed from

(1) 3 Alta. L.R. 70.

ordered that the company should erect the bridges or "abate and keep abated the nuisance created through the interruption of public travel by the maintenance and operation of their said irrigation canals across the said road allowances at the points * * * mentioned respectively, so that the said original road allowances respectively, having been adopted and now being used (save as to those portions extending for a short distance on each side of the said points respectively) as highways by the public, may be conveniently travelled by the public."

The questions at issue on the appeal are stated in the judgments now reported.

Ewart, K.C., and *E. F. Haffner,* for the appellants.

S. B. Woods, K.C., for the respondent.

THE CHIEF JUSTICE (dissenting)—I agree in the opinion stated by Mr. Justice Idington.

DAVIES J.—I agree in the opinion stated by Mr. Justice Duff.

IDINGTON J. (dissenting)—This case is within a narrow compass, yet to understand it properly we must bear in mind the governmental and other condition of things in the North-West Territories, before and at the time of the appellants receiving their charter of incorporation, and the concession of water now in question.

These vast and almost uninhabited territories, after being acquired by Canada, in 1870, were legislated for by Parliament and within such legislation

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ruled by officers appointed by the Dominion Government.

Legislative as well as administrative powers were delegated from time to time by Parliament or, within lines it laid down, by the Government to the council or councils which, in time, thereby grew to be representative assemblies, or partly so, concurrently with the powers of the executive council proper.

All the details relative to this development except the one or two features directly bearing on this case may be passed by. In the delegating of these local powers from time to time the legislation therefor was not always as well expressed or the powers as well defined as they might have been. In the rapid changes thus made some confusion was apt to arise, as we will see presently, in the carrying into execution of the legislative and administrative purposes of the parent and delegated powers.

This vast territory was from its acquisition being rapidly settled. To promote that settlement the lands were surveyed from time to time, according to a plan which, speaking generally, divided the land into sections of a mile square and left for the use or creation of future highways, road allowances of a chain in width, between each of these sections, so that each section was surrounded by a road allowance.

It would be as well also to bear in mind that the Canadian Pacific Railway Company was entitled to select each alternate section in the whole stretch of country from east to west and forty-eight miles wide, which were to be free from taxation for a long period.

It was, I may observe, from the earliest period of this rule, as these enactments relative to this company shew, hoped to carve out provinces each with

autonomy like that of the other provinces of Canada, and that municipal institutions should, when settlement required them, be created by each of such provinces.

There had been, as the arid, or periodically arid, character of parts of the country became known, various legislative plans adopted for meeting this obstacle in the way of settlement and improvement.

These plans, saving rights acquired under them, were set aside by the "North-West Irrigation Act, 1898." Section 4 of this Act enacted that there should be deemed to be vested in the Crown

> the property in and the right to the use of all the water at any time in any river, stream, watercourse, lake, creek, ravine, canon, lagoon, swamp, marsh or other body of water.

This Act covered all such water in the North-West Territories, except in specified districts, and prohibited the diversion of it, saving by those having prior rights or licenses under this Act.

The water might be used for domestic purposes on the land where found, but its use for irrigation had to be acquired by means of licenses to be issued to individuals or companies from the Department of the Interior.

A comprehensive scheme is laid down in the Act and powers are given the Minister of the Interior for making regulations to carry it out.

The Commissioner of Public Works of the North-West Territories has, in any case, to be memorialized by any one desiring a license to divert and use such water.

The preliminary requirements to be observed by any of such memorialists as apply for a license for diverting, or diverting and carrying, a less quantity

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than twenty-five cubic feet of water per second, are of a simpler nature than those asking concessions respecting that or any greater quantity.

But the party applying for a license for the greater quantity had, in applying, to observe the same preliminary terms and conditions specified for an application for a license for the less quantity and in addition thereto a great deal more.

These several requirements are set forth in sections 11 and 12 of the Act.

I assume the prescribed mode of application set out in these sections was complied with.

Amongst other things these sections required, was an application, under section 11, sub-section (*b*) of the Act, which is as follows:—

(*b*) an application on forms provided by the commissioner, for the right to construct any canal, ditch, reservoir, or other works referred to in the memorial, across any road allowance or surveyed public highway, which may be affected by such works.

The following is the form used by the appellants in making their application, so far as shewn in the case herein:—

Lethbridge, January 31, 1899.

To the Commissioner of Public Works,
Regina, Assa.

Sir,—We beg to inform you that we have made application to the Minister of the Interior, under the provisions of the North-West Irrigation Act, for permission to divert water from the St. Mary River, on the south-east quarter of section 36, township 1, range 25, west of the fourth meridian, for irrigation purposes, and to construct the canals, ditches, reservoirs and other works necessary for the utilization of such water.

We have received the authorization for the construction of the works in question, but would point out that in completing such construction it will be necessary to cross the road allowance, or public highway, and we therefore beg to apply for permission under the North-West Territories and Dominion Lands Act to construct and maintain the canals, ditches and reservoirs across the road allow-

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ances or public highways at the places indicated in the accompanying plan, the necessary bridge or bridges at these points being constructed and maintained by us as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act.

Your obedient servant,
THE ALBERTA IRRIGATION COMPANY,
Per C. A. MAGRATH, Superintendent.

The concluding words "as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act" are evidently misplaced. The sentence seems rather long for the clear expression of its purpose. These words at the end, in one way of treating the sentence, are nonsense, and hence mere surplusage.

But giving them a meaning they were evidently intended to bear, as if they had been inserted after the words "point out" near the beginning of the sentence, they are comprehensible.

In any way we may treat them (unless we are to assume there never was a comprehensible application made as required by the Act, and, hence, the whole concessions given by the commissioner void)—Can we read the notice without imputing to the applicant the express tender of an undertaking to construct and maintain the necessary bridge or bridges at the points indicated on the plan?

The only points indicated are the crossings of each road allowance or public highway.

Had there been some selected from these and specially designated, such designation might have excluded the remaining crossings; but as it is, the proffered undertaking can only mean all. No doubt the parties concerned so understood the undertaking to be and acted accordingly.

This is, if possible, still clearer when we turn to

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sub-section (*d*) of the same section 11, which is as follows:—

(*d*) a plan, in duplicate, on tracing linen, shewing in detail all headworks, dams, flumes, bridges, culverts or other structures to be erected in connection with the proposed undertaking,

and ask its meaning.

We find applicants thereby required to furnish along with the memorial a plan of the bridges to be constructed on the proposed work. And on turning to those filed with this application we find two distinctly different bridge plans.

One is evidently intended to meet the statutory requirement of section 37, to which I will again refer, and the other is a twelve-foot bridge. What is this twelve-foot bridge for? Is its draft or plan not to meet this very requirement of sub-section (*d*) and its construction to fit the proffered undertaking contained in the application? What other meaning can it have?

Are we to discard all these things because the western man in a hurry had not taken time to revise his form and allowed the projector to write his requisition and undertaking on a clearly defective form?

It is a form that refers to some Act which I cannot discover, and which certainly is not the true title of this Act. We must treat the application as designed to meet the requirements of the Act, or as a nullity, for the parties had no power save when acting in conformity with the statute.

If we treat this application as null, what rights can appellants have? They are bound by the statute to apply on a form provided by the commissioner who impliedly must have had the instructions and regula-

tions of the Minister of the Interior for a guide, as the express power is given him by section 51 to prescribe the forms to be used.

I see no insuperable difficulties either in the way of our maintaining the rights of the appellants or the rights of the Crown, when we have regard to the considerations already adverted to and the nature of the business the parties had in hand.

The commissioner could not be endowed by the North-West Council or the Legislative Assembly which defined his duties, with power to deal with such a subject, regardless of the purposes of the Dominion.

The forms were to be provided by the commissioner, but the power in section 51 shews the forms were to be framed by the Minister.

It is true the commissioner was given by the Legislative Assembly in the year preceding the passing of the "Irrigation Act, 1898," power to deal with questions affecting changes in, or obstruction to, roads

including the crossing of such road allowances or public highways by irrigation ditches,

but this of necessity must be referable to Irrigation Acts which, as already noted, were swept away by this Act of 1898.

It is conceivable, however, that in referring to him by section 16 of this latter Act, the granting of a certificate, regard was had to the local legislation.

Now what did the commissioner do in response to this application? He granted the permission but the certificate thereof shews no reference to the proffered undertaking.

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Surely that must be read as an assent to the application on the terms offered.

It seems rather a strong thing to presume that he intended to reject the terms proffered, which were so very onerous for the applicant, and so directly for the benefit of the public and governments he represented.

To do so would seem like a betrayal of the trust reposed in him.

I can draw no such inference. Nor do I see the slightest ground for such an implication.

The certificate ends by using the words

> subject, however, to the provisions of section 37 of the said North-West Irrigation Act.

It is urged this impliedly relieved the applicants from the comprehensive words of the undertaking. How can that be so? It but repeats what the statute had imposed and could not be dispensed with by this officer. The applicants and he were both bound by that statutory provision which by its terms pre-supposes a travelled highway. It is the case of mere road allowances he had, and we have, to deal with.

It may be admitted, for argument's sake, a crossing of a road allowance was subject to his judgment, as, for example, at a point where the configuration of the ground was such as to render a highway impossible. That might be a case for his dispensing with a bridge.

He could, for such or other good reason, have dealt with crossings, not covered by section 37, but yet within his power, in a way that might by his manner of selection perhaps have given rise to the application of the maxim *expressio unius est exclusio alterius* relied on, and thereby relieved the applicant in regard to other places within this power. Then

this argument might have had great force if so applied to the necessary crossings under his control.

How that can apply here I cannot understand. I cannot see how any expression relative to something else than that within his power and so being dealt with by him can have any bearing on the matter. It seems to me clear that all that was meant by this reference to section 37 was of abundant caution and does not affect the matter one way or another.

And when we find nothing done to alter the plans submitted for two kinds of bridges the undertaking stands good.

It seems this application and the certificate were printed forms likely in use for another Act, and hence clumsy of expression relative to this, yet these words

> the necessary bridge or bridges at these points being constructed and maintained by us

have a terseness and force that cannot be set aside.

They are the language the statute provides should be supplied by the commissioner for the applicant to use, and we are not idly to assume he departed from the requirement of his own implied demand according to the statute, merely because he did not reiterate same in his assent.

And I find a printed form in the case before us which suggests an evident explanation for the peculiarity of ending this appellants' application seems to wear.

In this form a blank space is left for receiving the name or designation of the party on whom the burden of building bridges and maintaining them was to be cast.

In that blank when used by the appellants (as ap-

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plicants) the word "us" was written in, no doubt by its officer, and it reads in the copy used for this case as if no pause or punctuation ever could have been needed. Hence if this surmise or inference be correct, appellants' neglect to punctuate is entirely to blame for the present misleading shape which the end of their application assumes.

The limited nature of the commissioner's powers relative to these road allowances and public highways, does not seem to me to have conferred any jurisdiction to destroy either a public highway or a road allowance or authorize any one else to do so. His jurisdiction was entirely of a preservative character.

It is evident that the construction of a canal forty-eight feet wide as proposed in the one case, or of sixteen feet wide as proposed in the other of those instances presented for our consideration, of necessity certainly had, unless provided against, this result of destruction and not preservation.

I do not think the commissioner ever supposed he was assenting to such destruction, nor do I see how we can fairly impute such kind of assent to him, in face of the accepted proposal providing for all the necessary bridges over road allowances or public highways.

Nor can his adding from abundant caution the reference to the statutory provision section 37, which is entirely applicable to other cases than road allowances, justify such an inference.

The express language of the application refers to "road allowances or public highways," whilst section 37 clearly refers only to travelled public highways, and deals not with mere road allowances. The application does not restrict its undertaking to build

bridges only at public highways either then existent or by future development to become, before construction, public highways.

Nor should we forget that concessions of this kind given the appellants are to be restricted, and the authority therefor restricted, within what is clearly and explicitly expressed or by implication as clear as if so expressed.

The intrusion involved in the execution of such works without clear authority, upon parts of the Crown domain consecrated as these road allowances were for a specific purpose, would be as illegal as if they had been fenced off by the appellants without clear and explicit authority.

Either such works, including such consequences without express authority from the dominant power, must be held illegal and liable to abatement, or their continuation regardless of the tender of sufficient necessary bridges to overcome the consequences of such intrusion must be held illegal; and abatement must follow, unless the tender thereof which induced the grant be fully implemented.

I might let the matter rest here but perhaps I ought not to pass in silence other points pressed in argument.

The attempt to import section 37 into the application in substitution for the section 11, sub-section (*b*) already referred to as therein, seems without foundation.

The elaborate, and I respectfully submit, irrelevant argument to prove that the term "road allowances" means only public highways, leaves them as distinctly different as ever. Every public highway may be on, or be loosely referred to as a "road allow-

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ance." But every road allowance is not a public highway; yet when it becomes such, will need a bridge over such canals as in question here, and when, and so often as necessity therefor arises, the undertaking is to become from time to time operative.

Let us bear in mind the condition of things already briefly referred to, as existing in the country in question and the claim in argument that this building and maintaining of bridges involves enormous expense.

The more the expense is magnified the less force favourable to the appellants does any argument derived from expense appear to have.

If the section 37 of the statute is the only authority to be observed, and the only means out of the difficulty, there would seem to have been innumerable crossings by way of bridges and approaches to be constructed when the district got settled. And at whose expense? And for whose benefit but those holding lands thus irrigated?

It seems impossible to suppose that Parliament intended to supplement this concession by assuming the burden.

If local taxation is the only source left, the upland landholder deriving no benefit might have to pay thus for the man on the level plain. And until Canadian Pacific Railway lands had become taxable the burden in some districts covered by this legislation would probably fall on a fractional part of a district concerned only with the need for bridges and perhaps having none of the irrigated lands within its jurisdiction.

If the cost of bridge building is borne by the water company then the charge finally falls on those who

are paying for the use of the water and receiving the benefit thereof.

Every improvement helps even those not directly benefited. Yet taxation for others' benefit does not tend to promote settlement, and its incidence does not compensate. The Canadian Pacific Railway construction apparently conferred direct benefit on everyone within the range of the part exempted from taxation, yet common knowledge tells us its repetition of exemption from taxation most unlikely in 1898, for a purely private enterprise like this.

It may be said these things have nothing to do with the interpretation of the statute. I agree; nothing of statutes and contracts must be construed in such a manner as to lead to absurdity.

But these things constitute the conditions and surrounding circumstances that so evidently must have been present to the minds of those who asked in no doubtful terms for a concession, but were granted it in terms alleged to be ambiguous.

Again it is said some bridges have been built by the Alberta Government. What does that amount to? It is said to have been done under protest. But whether so or not the circumstances are not at all of the same character as of a man who has made a grant being met by his own acts thereafter as interpretative of his intention relative to an ambiguous term of the grant.

The province was created after all these happenings now in question, and it may well be that somebody had blundered. We have only too much apparent in this case of how errors may occur in transacting government business in a country where conditions relative thereto are rapidly changing.

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The great effort in argument seemed to be addressed to the proposition that section 37 must govern all that was ever conceivably within the range of the commissioner's business vision, or powers in law, to impose.

What can such a proposition lead to? When we reflect that this Act was equally applicable to the possibly common case of the farmer or farmers in need of water for irrigation purposes, applying for a license therefor.

The grant prayed for in such case may involve the crossing (by means, for example, of a pipe or ditch of a capacity to carry only what a pipe of three inches or three feet in diameter might carry) of one or more road allowances not yet become travelled highways.

Who is to determine the question of the right to cross such road allowances and the terms upon which the leave is to be given? And by what procedure is such a determination to be reached?

At each step in the proceedings up to the officer who finally grants the permission to cross such road allowance, the man and the officer in each such case are identical with those who had to be consulted to certify and to do all leading to the granting and to grant such permission as was given to the appellants.

Yet we have two or three things urged upon us herein as if undoubted law, that if acted upon would lead to extraordinary results in the operating of this Act in this connection.

One is thus stated in the appellants' factum:—

> The "necessary" bridges were, of course, those which were rendered necessary by the statute under which the application was made. And that the Commissioner of Public Works so understood, is shewn by the language in which he couches his permission:—"sub-

ject, however, to the provisions of section 37 of the said North-West Irrigation Act."

It would have been quite irregular for the commissioner to impose any condition not warranted by the Act. He did not do it. And it may fairly be assumed that the company did not voluntarily assume any such liability.

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The contention means, if it means anything, that the only thing the commissioner could do in the case of the farmers requiring permission for a pipe of a capacity of three inches or three feet in diameter across a road allowance or travelled highway, was to require they should build a bridge as provided for in section 37, or put the Public Works Department or other public authority to the expense of providing for all time a culvert for the sole benefit of such grantees.

It first assumes that an officer empowered to act on behalf of the Crown, can never stipulate for anything conditional to his consent unless his power has been expressly clothed with a provision enabling the public to be so protected. And in the next place it assumes that a grant obtained by virtue of such condition is perfectly good. In other words, the grantee can repudiate, and by his repudiation acquire something he never could have got but by breach of faith.

I cannot accept such a doctrine as law. Such a grant has been obtained either by fraud or mistake, if the officer had no right to stipulate; and work constructed thereunder must be liable to abatement.

It is further to be observed that said section 16 of the Act requiring a certificate as stated above, contains all the legislation of the Dominion relative to the commissioner's power or duties in connection with the subject now in question. Certainly there is thus afforded the amplest scope for him so far as that legislation is concerned. And when we have regard

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to the power conferred by the above-mentioned enactment of the assembly, how can it be said he had no power to impose any conditions or stipulate for anything the public weal required at his hands in the discharge of his duty.

How can it be said he was confined to observing or to the stipulating for the observance by others of section 37 in the Act? He had no power relative thereto. He could not dispense with its operations for an instant. It bound him and it bound the promoters, and still binds appellants. And to assume as a mere matter of course he was doing so, seems either idle, or that we are to assume he was an idle and useless functionary.

If he had no power beyond the limits of this section 37, which is plain and expresses a purpose that becomes operative under certain conditions and not otherwise, why should there be a reference to him at all?

Again, it seems as if the man or company demanding a right of way across a road allowance dedicated to the public use when the district had not yet become so settled as to have any need for a bridge, must as an initial step have imposed by the commissioner upon him or it, the burden of needlessly constructing a bridge such as section 37 specified, or nothing.

It is unnecessary in this view to consider the question of want of authority, or semblance thereof, respecting the subsidiary undertaking secondly in question herein.

Any questions as to the mandatory form of the judgment directing building of bridges where no authority may exist for the constructing of the works necessitating same, can be met by modification there-

of, if the respondent be so advised as to ask herein for same.

It is competent for the respondent to waive the extreme right he may have to relief, and accept in any conditional form found advisable, a judgment within and subject to such conditions.

I would allow such amendment in this regard by way of variation as the respondent may desire and be advised.

Meantime I would dismiss the appeal with costs.

DUFF J.—The appellants, the Irrigation Company, have established irrigation works in Alberta under the authority of the "Irrigation Act of 1898." Their works include canals or open ditches which intersect roads now used for public travel at different places, and the controversy that has given rise to the action is upon the question whether the appellants are or are not under an obligation to provide bridges for the accommodation of the traffic at these places.

The appellants do not dispute that they were and are obliged to make provision for the passing over their works of the traffic upon highways which had actually been in use for public travel before those works were constructed across them. They admit that section 37 of the Act imposes that duty; but they deny that any duty is incumbent upon them to provide for traffic upon highways that were not so used until after the construction of the works — in which category the roads in respect of which this controversy arises are admitted to be. It is disputed by the appellants that, at the time of the construction of these works, these roads were, in law, public highways. I do not think it necessary to decide that point, and

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for the purposes of this case I shall assume in favour of the Crown that they were.

The Crown rests upon two distinct grounds: 1st, that as a condition of the permission (necessary under the statute) to cross the highways in question, the appellants were required to enter into (and did so) an obligation to construct such bridges as should be necessitated by their works; and 2ndly, that the right derived from the statute of constructing their works over a given highway was in every case burdened with a co-relative duty to make provision for the passage of public traffic over the parts of the highway affected by the exercise of the right whenever such provision should be reasonably demanded by the requirements of that traffic.

The second of these contentions may be conveniently considered first. The learned judges of the full court of Alberta have unanimously upheld this contention, basing their view mainly upon the authority of a series of decisions of which the latest is *Hertfordshire County Council* v. *Great Eastern Railway Co.* (1).

I do not think it necessary to discuss these decisions in detail. As I read them they are not inconsistent with what I take to be a settled principle in the construction of modern statutes conferring compulsory powers, including powers to interrupt the exercise of public rights; namely, that the question of what conditions, obligations or liabilities are attached to or arise out of the exercise of such powers is primarily a question of the meaning of the language used or of the proper inferences respecting the legislative intention touching such conditions, liabilities and ob-

(1) [1909] 2 K.B. 403.

ligations to be drawn from a consideration of the subject-matter, the nature of the provisions as a whole and the character of the objects of the legislation as disclosed thereby.

The statute in question was a re-enactment of a statute passed in 1894, with some changes not without a bearing on the construction of the Act. The parent enactment made provision for the construction of irrigation works under the authority of the Governor-General in Council according to plans to be approved by the Minister of the Interior. In 1897, a representative "Legislative Assembly" was for the first time constituted for the North-West Territories. The legislative authority vested in the assembly was subject to the control of the Dominion Parliament; but, broadly speaking, extend to the same subjects as those assigned to the provincial legislatures and an executive was established responsible to the assembly. When in the following year, 1898, the "Irrigation Act" was re-enacted, its provisions were changed to suit the altered circumstances. The memorial praying for authority to execute irrigation works and the plans of such works were to be filed at Regina in the office of the Commissioner of Public Works—a member of the executive of the territories; the documents were to be examined by the engineer-in-chief of the territories, and the approval of the chief engineer was one of the conditions which the Act required to be observed before the execution of the works could be authorized by the Minister of the Interior.

The changes touching the matter of the interference with highways are important and significant.

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The Act of 1894 contained (section 31) a provision in these words:—

> Any person or company constructing any works under the provisions of this Act shall during such construction keep open for safe and convenient travel all public highways theretofore publicly travelled as such, when they are crossed by such works, and shall, before water is diverted into, conveyed or stored by any such works extending into or crossing any such highway, construct, to the satisfaction of the Minister, a substantial bridge, not less than fourteen feet in breadth, with proper and sufficient approaches thereto, over such works; and every such bridge and the approaches thereto shall be always thereafter maintained by such person or company.

There was a further provision requiring the information forwarded to the Minister to contain a description of bridges at highways and farm crossings, but otherwise no express mention of the subject of highways. The Act of 1898 reproduced the first mentioned section as section 37; but it further required as a condition of a grant of authority by the Minister that the consent of the territorial Commissioner of Public Works to the construction of any work across any road allowance or surveyed public highway that might be affected by such works, should first be obtained. It is to be observed that road allowances became vested in the territorial executive and assembly before 1898; and that the phrase "surveyed public highways" refers to highways transferred under the authority of statute to the territorial government by the Government of Canada.

The duty of dealing with obstructions to road allowances and public highways vested in the territorial government was specifically placed upon the Commissioner of Public Works by an ordinance of 1897 (No. 17); and the same ordinance provided for the appointment of a deputy-commissioner, who should also be chief engineer.

I do not think that, in view of these provisions, an intention can be imputed to Parliament to impose an absolute obligation such as that which it is now sought to fasten upon the company in respect of highways and road allowances to which section 37 does not apply; the general effect of the provisions of the Act seems rather to be that Parliament has left in the hands of the territorial authorities the protection of the interests of the public in such highways and road allowances; and consequently, to ascertain the obligations of the irrigation company in this respect, we must look to what passed between the company and the territorial commissioner at the time the permission to construct across highways was granted. The respondent relies upon the words of the company's application. It will be convenient to set out in full this application and the formal certificate of permission to cross road allowances issued by the Commissioner of Public Works of the territories; and they are as follows:—

Lethbridge, January 31, 1899.

To the Commissioner of Public Works,
Regina, Assa.

SIR,—We beg to inform you that we have made application to the Minister of the Interior, under the provisions of the North-West Irrigation Act, for permission to divert water from the St. Mary River on the south-east quarter of section 36, township 1, range 25, west of the fourth meridian, for irrigation purposes, and to construct the canals, ditches, reservoirs and other works necessary for the utilization of such water.

We have received the authorization for the construction of the works in question, but would point out that in completing such construction it will be necessary to cross the road allowance, or public highway, at the points indicated on the general plan herewith, and we therefore beg to apply for permission under the North-West Territories and Dominion Lands Act to construct and maintain the canals, ditches and reservoirs across the road allowances or public highways at the places indicated in the accompany-

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ing plan, the necessary bridge or bridges at these points being constructed and maintained by us as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act.

Your obedient servant,
THE ALBERTA IRRIGATION COMPANY,
Per C. A. MAGRATH, Superintendent.

Canada,
North-West Territories,
Department of Public Works,
Regina, March 15, 1899.

This is to certify that the Alberta Irrigation Company, having been authorized under the provisions of the "North-West Irrigation Act" to divert water from the St. Mary River on the south-east quarter of section 36, township 1, range 25, west of the fourth meridian, and to construct the necessary canals, ditches, reservoirs, and other works for the utilization of such water for irrigation purposes, is hereby granted permission, under the provisions of "The Public Works Ordinance" relating to road allowances and public highways, to construct and maintain the canals, ditches, reservoirs or other works forming part of such authorized system, across the road allowances or public highways at the point or points shewn by the plans filed by the said The Alberta Irrigation Company in the Irrigation Office, subject, however, to the provisions of section 37 (31 struck out) of the said North-West Irrigation Act.

(Sgd.) J. H. ROSS,
Commissioner of Public Works.

It is argued that there is to be found in these two documents read together an undertaking on the part of the company to construct and maintain such bridges as might from time to time become necessary to furnish proper accommodation for public travel upon the highways crossed by the company's works. I do not think this is the natural construction of these documents. The company appears to me to be proposing to construct and maintain a bridge or bridges at such places as shall be nominated by the commissioner, or, in other words, to be submitting itself to such conditions as in this respect the commissioner may think fit to impose; and, in granting the

application, the commissioner restricts himself to requiring a compliance with section 37. To my mind, it is not easily conceivable (if the view of the commissioner had been that the company was entering into the large undertaking now attributed to it) that he would have refrained from noticing the undertaking in the document in which his permission is expressed. Moreover, any doubt arising upon the meaning of these documents as touching this point, when read by themselves, would appear to be settled in favour of the company by the subsequent conduct of the parties. Paragraphs 14 and 15 of the statement of defence shew that bridges were built and have been maintained by the governments of the North-West Territories and Province of Alberta, upon road allowances intersected by the company's canals, since the granting of this permission; and until very recently no claim has been made upon the company by any of the governments concerned in respect of the cost of constructing or maintaining these bridges. That, in the absence of some other explanation—and none is forthcoming — seems to shew conclusively that the territorial Commissioner of Public Works did not understand the company to have entered into any such obligation as would support the claim made in this action.

I think the action fails.

ANGLIN J.—This action comes before us in the form of a special case upon pleadings and admissions settled between the parties. The question in controversy is whether the appellants are or are not obliged to erect bridges at points where their canals or irrigation ditches intersect road allowances or surveyed

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public highways which have become publicly travelled roads only since the construction of the works.

The appellants constructed their works under the authority of the "North-West Irrigation Act, 1898," 61 Vict. ch. 35, (D.), to the provisions of which the powers conferred on them were made subject by section 16 of their original Act of incorporation, 56 Vict. ch. 69, (D.).

A study of the "North-West Irrigation Act, 1898," has satisfied me that Parliament therein provided fully and exhaustively for the crossing by irrigation ditches of all highways and road allowances, and for the protection of public interests therein. Whether, as argued by Mr. Woods, the "public highways theretofore publicly travelled as such" dealt with in section 37 are confined to old trails still in use, jurisdiction over which had not been transferred to the Legislature of the North-West Territories, but was still vested in the Dominion Department of the Interior, or whether, as contended by Mr. Ewart, they also include road allowances and surveyed highways which are in actual use for public travel at the time of construction and over which the local legislature had been given jurisdiction and control (60 & 61 Vict. ch. 28 (D.), secs. 18 and 19; 55 & 56 Vict. ch. 15 (D.), sec. 6), it is incontrovertible that, by the words "any road allowance or surveyed public highway," clause (*b*) of section 11 is made applicable to all highways and allowances for roads which irrigation ditches may cross and which are not covered by section 37. It would therefore seem to be not only unnecessary, but inadmissible to seek for implied obligations on the part of licensees operating under the statute in regard to the crossing of highways or

road allowances other or greater than those imposed by its provisions. By section 37, Parliament has imposed upon the licensees an absolute obligation in regard to every public highway publicly travelled as such before the construction of their works to provide against interruption of safe and convenient travel after, as well as during construction. The existing conditions of travel with which this section deals involve the necessity of some such provision as it makes for bridging. But in the case of a highway which, although surveyed, was not actually in public use before the works were constructed, and in the case of a mere road allowance shewn upon a plan of survey—whether it should be regarded as a highway in law or merely as a reservation which might, at a later period, become a highway — the necessity for bridging and the kind of bridge which might be requisite would obviously depend upon the nature of the surrounding country, the likelihood of the surveyed highway or road allowance coming into public use, the character of the traffic for which provision might be necessary, and other considerations upon which it would be eminently proper that a responsible and well informed local official should exercise his judgment.

These surveyed highways and road allowances having been placed under the control of the local legislature, that body by the "Public Works Ordinance of 1897" (No. 17, secs. 3 and 8) provided for the appointment of a Commissioner of Public Works for the North-West Territories who should be a member of the executive council, and it empowered him to

> deal with all questions affecting changes in or obstruction to any road allowance or public highway which has been vested in the North-West Government for public use, including the crossing of

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such allowances or public highways by irrigation ditches, canals or other works.

It is to this responsible officer that, under clause (*b*) of section 11 of the "Irrigation Act," the petitioner for a license must present his application

> for the right to construct any canal, ditch, reservoir or other works * * * across any road allowance or surveyed public highway;

and it is his permission to so construct such works which must be certified to the Dominion Minister of the Interior before he may be asked to authorize the construction of the works (section 16). As to existing travelled highways, section 37 makes provision for the protection of public interests; as to surveyed highways and road allowances not publicly travelled before the construction of the works, those interests are protected by the powers vested in the local Commissioner of Public Works, whose permission to carry the works across such highways and road allowances the applicant for a license must obtain before he can procure the Minister's authorization to proceed with construction. It follows that to the discretion of this member of the local government is entrusted the duty of making such provision as may be requisite and adequate for the protection of the rights of the public in regard to surveyed highways and road allowances not actually travelled as public highways before his permit is obtained. It is his duty to

> deal with all questions affecting changes in or obstructions to

such highways or road allowances, including the crossing of them by these irrigation ditches. To his judgment Parliament has committed the determination of the circumstances in which permission to cross should be granted or withheld; to his discretion it has entrusted the duty of fixing the terms and con-

ditions upon which such permission shall be given. When application is made to him for a permit, he must decide what obligations, present and future, the applicant should assume for the protection of public interests, present and future, in the then untravelled highways or road allowances the crossing of which he is asked to sanction.

Parliament has thus made a rigid provision (section 37), where conditions permitted of that being done; and an elastic and adaptable provision where the conditions rendered rigidity unsuitable and undesirable. But in these two provisions the whole subject of the crossing by irrigation works of highways and road allowances, whatever their character, and of the protection of public interests in the matter of travel is, in my opinion, exhaustively dealt with. I therefore conclude that the appellants, who were, of course, obliged to comply with the provisions of section 37, would have been required, in regard to surveyed highways and road allowances to which section 37 does not apply, to submit to and carry out such terms for the protection of the public interest therein as the Commissioner of Public Works when granting them permission to carry their works across such highways and road allowances might have seen fit to impose.

At some points where road allowances which were to be crossed would, owing to physical difficulties, be unlikely to become travelled roads (par. 16 of the statement of defence, which is admitted) it might be manifestly unnecessary and unfair to exact the construction of bridges; at others the settlement of the adjacent territory might depend entirely upon the success of the irrigation undertaking and it might

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well be deemed only reasonable that the owners of lands thus rendered arable should by municipal taxation, or that the state, which would be greatly benefitted, should, out of public revenues, provide such bridges as might become necessary for public travel. In fact the public advantage from the appellants' works as a whole might be so great and their construction so costly, and yet so desirable, that it might well be deemed fair and proper entirely to relieve the company undertaking them from the burden of providing crossing facilities for public travel. All these matters Parliament no doubt intended that the commissioner should consider when dealing with applications for permission to cross highways.

That the protection of public interests in highways or road allowances yet untravelled should be confided to the care and judgment of the member of the local government presiding over its Department of Public Works is not only not surprising, but seems to be a natural sequence of the transfer of jurisdiction and control over them to the local legislature, and of the action of that body in making it the duty of that member of the local executive to

> deal with all questions affecting changes in or obstruction to any road allowance or public highway * * * including the crossing of such road allowances or public highways by irrigation ditches, canals or other works.

It is contended that the cutting through highways which the crossing of them by irrigation canals entails is, in reality, a "closing up" of such highways and that power to authorize the closing up of roads is reserved to the Lieutenant-Governor in Council. 60 & 61 Vict. ch. 28, sec. 20 (D.). But the "closing up" which is thus provided for is what occurs where the right of public travel over land reserved

as a road allowance or a surveyed highway is entirely taken away and such land is, or may be devoted exclusively to other purposes, whether a substituted or diverted road is or is not provided (see 61 Vict. ch. 32, sec. 5 (D.). The interruption of public travel occasioned by the cutting of an irrigation canal or ditch through it is rather "a change in or obstruction to the road allowance or highway" which gives rise to "questions"—*e.g.* what provision will be suitable in the changed circumstances to overcome the obstruction? The public right of way over the part of the road or allowance crossed by the canal is not wholly destroyed or taken away, as it is in the case of the "closing up" of a road: it is merely obstructed or interfered with, and must in the future be exercised in a different manner and by the aid of artificial means. The manner in which it should be exercised and upon whom the burden of providing the necessary means should fall are *inter alia* "questions" with which the legislature has made it the duty of the commissioner to "deal;" and Parliament has placed persons seeking to exercise rights conferred by the "North-West Irrigation Act"—including corporate bodies created by itself for that purpose, such as the defendants — under the control of the local commissioner in regard to the crossing of surveyed highways and road allowances not theretofore publicly travelled by making his permission to carry the works across them a pre-requisite to obtaining from the Minister of the Interior the necessary authority to construct such works.

That it was the deliberate policy of Parliament to place in the hands of a local official the power and the responsibilty of determining what provisions for the

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protection of public interests should be made in connection with the construction of works which the "Irrigation Act" empowers the minister to authorize is further indicated by the clause (section 16) requiring examination and approval of applicants' memorials and of their plans of projected works by the chief engineer and surveyor of the local Department of Public Works as a further preliminary to the grant by the minister of authority to construct such works.

The controlling powers of the commissioner must be exercised at the time his permission to cross highways and road allowances is applied for. As I read it that is what the statute provides; and it is only reasonable that it should be so. It must be of the utmost importance to a company undertaking the construction of irrigation works involving an investment of a large amount of capital that it should know what obligations to the public it is obliged to assume. This does not necessarily mean that the commissioner must immediately determine and specify with precision what bridges the company shall build. But he must define the obligations to which it will be subject —both present and future. He may require it to undertake to provide bridges, either merely at stated points, or, as will frequently be necessary, immediately, or within defined periods, at specified points, and in the future at such other points as he may in his discretion from time to time determine. The company, with this knowledge of the obligations which it must assume, if construction goes on, will be in a position to decide whether it can safely proceed with its project. As I construe the provisions of the "Irrigation Act," the terms or conditions imposed by the Commissioner of Public Works when granting his

permit for the crossing of highways and road allowances shewn on the plans of the works filed with him, as required by section 11, are (subject always to the provisions of section 37) the only terms and conditions to which in this matter the rights of the company subsequently obtaining authorization to construct such works from the minister under section 16 are subject. When the commissioner has granted his permit, except as to the enforcement of such terms as it contains or as may have been imposed by him as a condition of its being granted, he is functus. The statute contains no other provision under which such obligations may be created; and, in my opinion, it is equally conclusive against the existence of the suggested common law duty on the part of the company to build bridges over its canals which the commissioner has not, when granting his permit, required it, or reserved the right to require it, to construct.

The permit of the commissioner for the crossing shewn on the appellants' original plan imposed no condition except the observance by the company of the provisions of section 37. It was suggested in argument that the commissioner may have assumed that under section 37 the company would, whenever travel should require it, be bound to erect bridges at all points where its works cross road allowances or surveyed highways. This is scarcely conceivable; and were it the fact no obligation on the part of the company in respect of highways not within section 37 would ensue.

But, for the respondent, it is urged that in their application for the commissioner's permit the appellants undertook to build bridges at every point where their canals or ditches should cross road allowances

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or public highways. The appellants' letter on which this contention is based followed a form prescribed by the Minister of the Interior. It reads as follows:

LETHBRIDGE, January 31, 1899.

To the Commissioner of Public Works,
Regina, Assa.

SIR,—We beg to inform you that we have made application to the Minister of the Interior, under the provisions of the North-West Irrigation Act, for permission to divert water from the St. Mary River on the south-east quarter of section 36, Township 1, Range 25, west of the Fourth meridian for irrigation purposes, and to construct the canals, ditches, reservoirs and other works necessary for the utilization of such water.

We have received the authorization for the construction of the works in question, but would point out that in completing such construction it will be necessary, to cross the road allowance or public highway, at the points indicated on the general plan herewith, and we therefore beg to apply for permission under the North-West Territories and Dominion Lands Act to construct and maintain the canals, ditches and reservoirs across the road allowances or public highways at the places indicated in the accompanying plan, the necessary bridge or bridges at these points being constructed and maintained by us as provided by sub-section (*b*) of section 11 of the North-West Irrigation Act.

Your obedient servant,

THE ALBERTA IRRIGATION COMPANY,
per C. A. Magrath, Superintendent.

The reference at the conclusion of this document to sub-section (*b*) of section 11 presents some difficulty. As it stands it is meaningless. Counsel for the appellants suggested that this clause of the statute is referred to by mistake and that the reference should have been to section 37. Counsel for the respondent would transpose this concluding phrase and place it at the beginning of the letter.

The bridges prescribed by section 37 are to be of a uniform width of 14 feet. The fact that the bridge plan filed by the company shews designs for bridges of 12 feet in width as well as of 14 feet makes it reason-

ably clear that the company contemplated at least the possibility of its being required to build other bridges than those for which section 37 provides. Although the form used is certainly full of mistakes, I do not think the reference in it to sub-section (*b*) of section 11 was inserted in mistake for a reference to section 37.

Neither can I yield to the suggestion of Mr. Woods. As introductory to the letter the phrase in question would be ungrammatical and inaccurate. It would find its proper place in the second paragraph of the letter between the word "and" and the word "we." If it may not be inserted at this point it must be rejected as entirely meaningless and unintelligible. But with it or without it, and wherever it is placed, the letter has the same meaning and effect.

The words

> the *necessary* bridge or bridges at these points being constructed and maintained by us

may have reference either only to bridges prescribed by section 37, or to those bridges and, in addition, to such bridges at other points of crossing as the commissioner should deem it necessary to require as a condition of granting the permit sought. In view of the fact already alluded to that a design for bridges 12 feet wide is shewn on the bridge plan filed by the company with the commissioner, and of the scope of the powers and duties of the commissioner, as I understand them, in regard to granting his permission to carry irrigation canals or ditches across highways or road allowances, I think the latter is the proper construction. The allegation in the 16th paragraph of the statement of defence (which is admitted) that it was unlikely that some of the road allowances to be

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crossed by the company's canals would ever become public roads and the fact that the Government of the North-West Territories has at different times constructed bridges at points where the company's canals crossed highways then in use but which had not been publicly travelled prior to the construction of the works (par. 14, statement of defence) precludes the contention that the company in its letter of application undertook to construct a bridge at every point where its filed plan shewed that any of its canals or ditches cross a highway or road allowance. Moreover, if that were the intention, the word "necessary" before the words "bridge or bridges" in the letter, would be superfluous. I read this letter of the company as an undertaking on its part to construct, in addition to the bridges imperatively prescribed by section 37, bridges at other points where its plans shewed that highways or road allowances were to be crossed if the commissioner should deem them necessary and should direct their construction, either when granting his permit or subsequently, pursuant to a reservation of his right to so direct, contained in or made when his permit was granted. The permit actually granted to the appellants limited their obligation in regard to bridges to a compliance with section 37: they were relieved from any duty to construct other bridges presumably either because the commissioner thought other bridges would not be necessary, or because, having regard to all the circumstances, he concluded that any other bridges which might become necessary should be built at the public expense.

During argument the suggestion was made that the company might have carried its canals through tunnels under the highways which they cross, and

that having chosen a method of "crossing" unnecessarily involving interruption of public travel they must be taken to have done so subject to the burden of providing such means as their action has rendered necessary for the restoration of this public right. No such case is made upon the pleadings. The plans filed by the company and approved by the chief engineer and surveyor shew an open canal. No provision is made for tunnels or culverts under highways. The plans filed make express reference to necessary bridges. The permit granted by the commissioner is to carry the canals "across" not "under" road allowances and highways. Crossing by open canals or ditches appears to be expressly sanctioned; "crossing" by means of tunnels or culverts, assuming its practicability of which there is no evidence, would probably be unauthorized and illegal.

With regard to the crossing in township No. 6, it was urged that the appellants had not obtained a permit for it from the commissioner. No such permit is produced and the admission is made that the exhibits filed included

all the material documents that have ever come into existence.

There is, however, in evidence a certificate from the chief engineer of the Department of Public Works of the North-West Territories given under section 16 of the "North-West Irrigation Act, 1908," that permission had been granted to the appellants by the commissioner to construct their works across this road allowance or highway in township No. 6. If necessary, a verbal permission from the commissioner might be presumed as the foundation of this certificate. The statute does not require it to be in writ-

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ing. But a sufficient answer to this ground of claim appears to be that no such issue is raised on the pleadings settled by the parties.

For these reasons, I am, with great respect, of the opinion, that the defendants are not under any obligation to construct bridges across their canals at the points in question. Their appeal should be allowed with costs in this court and in the court *en banc,* and this action should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Griesbach & O'Connor.*
Solicitor for the respondent: *Charles R. Mitchell.*

WILLIAM HENRY COY (DEFENDANT) . APPELLANT; 1911

AND *Mar. 24, 27. *May 15.

AUGUST POMMERENKE (PLAINTIFF) ..... RESPONDENT.

AND

WILLIAM POPE BATE, WILLIAM J. H. MURISON AND WILLIAM H. DEVEBER ..... DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Sale of land—Principal and agent—Secret profit by broker—Participation in breach of trust—Implied partnership—Liability to account—Purchaser in good faith—Disclosure of suspicious circumstances—Cross-appeal—Parties—Practice.

C., being aware that B. was an agent for the sale of certain lands, entered into an agreement with him for their purchase on joint account in his own name, upon the understanding that they should each be owners of one-half of the lands and share profits equally upon a re-sale. B. transferred one-half of his interest to M., who gave valuable consideration therefor with knowledge, at the time, of B.'s agency for the sale of the lands. Shortly after the conveyance of the lands by the owner, P., to C., they were re-sold to another person at a large profit, and P., having discovered the nature of the transactions, brought action against B., C. and M. to recover the amount of the profits which they had realized upon the re-sale of the lands.

Held, affirming the judgment appealed from (3 Sask. L.R. 417), Fitzpatrick C.J. and Anglin J. dissenting, that the agreement between B. and C. was a partnership transaction; that C. thereby became subject to the fiduciary relationship existing between B. and P. in respect of the sale of the property; that he was dis-

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

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qualified as a purchaser of the lands which were the subject-matter of B.'s agency, and that he was equally responsible with B. to account to P. for the profits realized from the re-sale of the property.

In regard to M. it was held, also affirming the judgment appealed from, Idington J. dissenting, that as the evidence did not shew that he was other than a *bonâ fide* purchaser for valuable consideration he was under no obligation to account for profits realized upon the sale of the interest in the lands acquired by him under the transfer from B.

Quære.—On the appeal by C. against the judgment declaring him liable to account for illegitimate profits on the transactions in question, had the Supreme Court of Canada jurisdiction to entertain a cross-appeal by P. to obtain recourse against M. who had been exonerated in the court below and was not made a party to the appeal taken by C.? *McNichol* v. *Malcolm* (39 Can. S.C.R. 265) discussed.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1) by which the judgment of Johnstone J., at the trial(2), was varied.

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

At the trial, the plaintiff's action against the defendants Bate, Coy and Murison (purchasers under the deed of the lands in question from him to Coy), was maintained with costs, and dismissed with costs in regard to DeVeber, who had become purchaser on the re-sale of the property. The defendants Coy and Murison appealed to the Supreme Court, *en banc,* and, by the judgment now appealed from, the judgment at the trial was affirmed in regard to the condemnation against Coy, but was reversed in regard to Murison and the judgment against him was set aside with costs.

The appeal by Coy sought no relief against either Bate or Murison, and neither of them was made

(1) 3 Sask. L.R. 417; *sub nom.* *Pommerenke* v. *Bate.*

(2) 3 Sask. L.R. 51.

a party on his appeal to the Supreme Court of Canada. The plaintiff, however, attempted to obtain relief against the judgment of the Supreme Court of Saskatchewan in so far as it dismissed his action against Murison and, in that respect to have the judgment of the trial court restored.

Chrysler K.C. for the appellant.

Straton for the respondent.

J. Travers Lewis K.C. for defendant Murison, on the cross-appeal.

THE CHIEF JUSTICE (dissenting on the main appeal).—I agree in the opinion stated by Mr. Justice Anglin.

DAVIES J.—At the close of the argument I was strongly of opinion that the judgment appealed from was right and that the appeal and the cross-appeal should both be dismissed. Owing to there being a difference of opinion as to the proper conclusion to be drawn from the evidence, I have gone through it carefully, and my study of it has only tended to confirm the opinion I formed when the argument closed.

I think the transaction between Bate and Coy for the purchase of the land in the name of Coy, but for the benefit of Bate and Coy alike, was a partnership transaction, pure and simple. It was not like the ordinary purchase of a piece of land by two persons in their joint names, each holding a several interest which he could dispose of as he pleased, and where each party had a right to partition.

This purchase was made as the facts shew as a

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speculation with the view of a speedy re-sale. The fact that Bate was the agent for sale of Pommerenke was well known to Coy, who stipulated at the time he entered into the bargain that he (Coy) should share in Bate's commission on the sale of his principal's land. An agreement in writing was entered into between the two partners (and conspirators) providing not only that they should be equal joint-owners of the land, but

> that they should share equally on all profits made on a sale of the same or any part of same, and should each be liable equally for any liabilities in connection with the purchase or sale.

This agreement for the sale was taken in Coy's name alone, and the agreement as to the mutual interests of Bate and Coy in the purchase was post-dated, no doubt to deceive any inquisitive parties into the belief that Pommerenke's agent, Bate, had first completed a sale to Coy and then afterwards re-purchased an interest *bonâ fide* in the lands.

I am satisfied that both parties knew a fraud was being committed upon the owner in the purchase of the land by his agent, Bate, in Coy's name, but for their joint benefit. It is conceded that if the principal, Pommerenke, had discovered the fraud practiced upon him by his agent, Bate, in which Coy participated, before the lands had passed into the hands of an innocent purchaser he could have had the contract of sale rescinded. As he was too late in discovering the fraud to do that it is in my opinion still open to him to make both Bate and Coy restore their illegitimate profits. Bate has not appealed from the judgment against him. The evidence of Coy and Bate alike satisfy me that the land was purchased as a speculation, with the intention of reaping in the near future a rich harvest

through a re-sale, an intention more than realized, and that it was a partnership transaction and intended to be such, both parties sharing alike in the agent's commission and in the net profits; and entering into it with full knowledge of all the facts.

Agreeing, as I do,with the court of appeal on this being the proper conclusion to be drawn from the proved facts, I cannot see any room for doubt that Coy, equally with Bate, is accountable with the plaintiff for the profits made by the partnership in the re-sale of the lands to DeVeber, an innocent purchaser for value.

The authorities, if any were needed, are marshalled in the judgment of the court of appeal, delivered by Mr. Justice Brown, and need not be repeated by me. I adopt his reasoning and would dismiss the appeal with costs.

As far as Murison is concerned I also think the judgment of the court of appeal correct. He stood in an entirely different position from Coy and I agree with the court of appeal that

> the plaintiff had not brought home to Murison any knowledge that Bate was a joint-purchaser with Coy from the plaintiff, or that there had been any breach of trust on his part.

I share with my brother Anglin the grave doubts he has expressed whether the appeal of the respondent Pommerenke from the judgment dismissing the action as against Murison is properly before the court. Murison was not made a party to the main appeal taken by Coy, and is not before us as a party to that appeal. Coy has no interest whatever in the relief sought by Pommerenke against Murison in the cross-appeal, nor has he anything to do with the plaintiff's case against Murison. Murison is brought here, not

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by the appellant Coy, but by the respondent Pommerenke, who does not appeal from the judgment dismissing the action against Murison nor give the necessary security for costs which such an appeal would involve, but seeks to have the judgment in Murison's favour reversed on a notice under rule 100 of this court. I am inclined to think the decision relied upon by Mr. Straton in support of this method of cross-appeal of *McNichol* v. *Malcolm*(1) is not applicable to parties standing in the relative positions of Pommerenke and Murison on these pleadings and appeals.

The facts in that case of McNichol were that McNichol and the Standard Plumbing Company were both defendants in an action for damages brought by Malcolm against them. The plaintiff had obtained a judgment at the trial against both defendants. The Court of appeal confirmed the judgment against McNichol and dismissed the action as against the Standard Plumbing Company. McNichol appealed to this court making his co-defendants respondents on his appeal. It was there held that the plaintiff, respondent, Malcolm was entitled to cross-appeal by notice against the defendant, respondent, the Plumbing Company, in order to have the verdict against them at the trial restored.

The facts of that appeal, I think, fairly distinguish it from this which is an attempt on the part of Pommerenke by way of cross-appeal to bring forward a claim he made in the action against Murison, in which claim the main appellant Coy has no interest.

On the merits, however, and without deciding the point of practice my judgment is that the cross-appeal

(1) 39 Can. S.C.R. 265.

against Murison should be dismissed with costs for the reasons given by the court of appeal.

IDINGTON J. (dissenting on the cross-appeal).—The questions raised in this case are whether or not an agent can, with the assistance of others, buy the property of his principal upon the understanding with each assistant for a division of the profits, to be got by a re-sale, being made between him and each of such others aiding in the purchase; and he or these others be free from liability to account for the profit so made.

Like many other legal questions they are almost answered by a full statement of the facts and the application of a few elementary principles.

The respondent owned a piece of land in Saskatchewan, supposed to be about two hundred and thirty-three acres. One Bate, after several ineffective attempts, induced him, by a letter of the 31st of March, 1906, to agree that Bate should, as agent, sell upon commission said land at the highest price obtainable, but not for less than thirty dollars an acre, and get a commission of five per cent. for the first $1,000, two and a half per cent. for the balance up to $30 an acre, and ten per cent. on such sum as realized over $30 an acre.

Appellant and Bate occupied the same office in Saskatoon, and Bate verbally offered him this land for $35 an acre, and appellant says he verbally accepted it.

Then Bate sent, the same day, the 31st of March, 1906, respondent who lived in Minnesota, the following telegram:

> Sold thirty-five per acre, third cash, deposited, balance four years, mailing agreements and cash according to instructions, on receipt of acceptance wire confirmation.

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No cash had been paid as represented, nor was any agreement then mailed.

On the 2nd of April, 1906, a telegram from respondent to Bate as follows:

> Confirm sale of two hundred and thirty-three and fraction acres at thirty-five per acre,

was received at the telegraph office in Saskatoon, at four minutes past eight in the evening of that day.

Whether it was delivered that evening or next morning is doubtful. But it seems clear that the next step taken was Bate calling on Murison, agent of a bank with which Bate had dealings, early on the morning of the 3rd of April.

Bate's evidence of this is as follows:

> Q. How did you come to make up your mind? In what way—what circumstances ?
>
> A. On the morning of the 3rd passing down to my place of business I called on Mr. Murison. I told him the evening before that I had sold this land to Mr. Coy and we were talking about that and other matters. On the morning of the 3rd, I think it would be before the bank was opened, and talking with Mr. Murison, discussing matters in general, the prospects of a purchaser making anything out of his purchase, and Mr. Murison was of the opinion that this investor was threatened in his investments and there might be a reasonable chance for this property being sold at an advance before very long, and the outcome of our conversation was that I was recommended to ask Mr. Coy if he would allow us to buy a half interest from him.
>
> Q. What did you do in consequence of this ?
>
> A. I went to see him and asked if he would let me have a half interest.
>
> Q. What was the result of that ?
>
> A. He was surprised that I should ask such a question and asked where I was getting the money, and I told him that Mr. Murison had suggested it — that it had been suggested in our conversation, and Mr. Murison was willing to help me to finance a quarter interest and he himself would take a quarter interest and thus become joint purchasers in a half interest from Coy. Mr. Coy objected to having anything to do with Murison.
>
> Q. What did you do as a result of this ?
>
> A. It was agreed between Coy and myself that if I would pur-

chase a half interest from him myself and Murison not appear in it he would make no objection.

Q. Was the agreement put in writing ?

A. Not at that time.

Although he pretends in this to have told Murison the evening before, the latter does not refer to it so as to corroborate him. His cross-examination indicates he did nothing till seeing Murison on the 3rd. In other respects their story seems to conform with the fact of the despatch being received and pondered over by him, before seeing either appellant or Murison. And it seems clear from the evidence of them all that it was only after seeing Murison and arranging with him to see the appellant that the latter saw the telegram. He was asked again, and says:—

Q. Did Mr. Coy want to take all of this property ?

A. Certainly, he wanted to take it all.

Q. Why did he not ?

A. Just because I asked in pursuance of that conversation Mr. Murison and I had, if he would sell us a portion of it.

Later he says as follows:

Q. In your examination for discovery you say that Coy objected to Murison and you shoulder the whole responsibility ?

A. No, he preferred to have another man to deal with.

Q. He did not want to have Murison's responsibility as well ?

A. He did not want to have anything to do with Murison.

The story of appellant on his first hearing of this confirmatory telegram on the 2nd of April, is as follows:

Q. When did he first tell you about receiving this confirmation wire ?

A. On the morning of the 3rd of April in the forenoon.

Q. What else took place at the time he told you he had received the confirming wire ?

A. When he came in he said he had heard from the owner confirming the price of the land, but, he says, I want it to be understood that I am to have a half-interest, and, of course, I kicked against it. I remonstrated; I would not agree. I told him he was not in a position to go into a deal of this kind, and I did

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not want him in; that I did not think he was treating me fair; that he had quoted the price at $30 and had raised it to $35, and now he made it a condition that I could only purchase half of it, and I had not decided the matter any way. I told him what I thought about him; at the time I believed what he told me. He assured me he was the sole agent for the owner.

Q. Was Murison's name brought up ?

A. I asked him how he was going to manage it in view of his financial standing, and he told me Murison was a friend of his and he would furnish the money.

He proceeds to tell that Bate in answer to these and other remonstrances said if he (Coy) would not take the half interest, he, Bate, would turn it over to others who would purchase with him and that it seemed to him (Coy) as if he must submit to such terms as Bate offered, or lose the chance of anything. He did not even know the name of the owner, so much unfinished was Bate's business as agent.

After taking some hours to consider the matter and consult friends, he finally agreed with Bate to buy jointly with him.

The details of the sordid business may be passed. It ended in the following writing being signed by both:

We, William H. Coy and William P. Bate, both of the town of Saskatoon, real estate agents, having jointly purchased from August Pommerenke, of Good Thunder, Minnesota, the N. half of section 34, Tp. 36, R. 5, W. 3rd M., 233 acres, more or less, on agreement of sale dated April 3rd, 1906, and having paid jointly the first payment thereon,

AGREE AS FOLLOWS:

1. That the title to the said land shall remain in the name of William H. Coy.

2. That the said William H. Coy and William P. Bate shall be joint owners of this land equally in all profits made on sale of any part thereof, and are each liable equally for any liabilities, in connection with the purchase or sale thereof.

Signed in duplicate this 5th day of April, 1906.

Witness: E. L. Townsend.

W. H. COY.
WILLIAM P. BATE.

The commission Bate was to get divided between them so far as this half-interest extended, by Bate agreeing to be satisfied with half of what respondent would have to allow. And appellant the same afternoon gave Bate his cheque for $1,246, being for half the cash payment going to respondent on this half-basis plus this half commission; and the appellant signed the agreement for sale and purchase as if he were sole purchaser and respondent the sole vendor.

On the same day Murison discounted Bate's note in the bank for $400, to help him to make up his share of cash for the other half of the cash payment and gave his own cheque of $623.25, being for a quarter of such cash payment plus the amount of his share of the commission Bate was supposed to be earning on the same basis as appellant had been dealt with.

Then, to accompany the agreement of purchase a draft was got from the bank of which Murison was agent for $2,408 to remit to Pommerenke the cash payment of one-third, less Bate's commission, and the curious can figure out the allowance for bank charges on the draft.

But the honest man forgot the excess commission for the part of the price over $30 an acre.

And to shew his great fidelity to his principal, when this was pointed out he explained his reason thus:

Q. In that case you told Mr. Coy about the five and two and a half per cent., and not about the ten per cent ?

A. No, I could not.

Q. Why did you not tell him ?

A. If I had told him that the whole sale would have been thrown out. I had still to see Pommerenke's interest through.

Q. You were afraid the whole thing was going to fall through if you told him that ?

A. Yes.

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Q. That was in conversation on the 3rd, that this commission was mentioned ?

A. Yes.

Q. So that at that time you did not have the thing so completely closed that Coy could back out if he wanted to do it ?

A. One can always throw away.

The writing above quoted shews that he and appellant considered each other partners, and in his examination for discovery put in as evidence, he refers to Murison as his partner.

Q. On what, Mr. Bate, on the whole land ? Who was interested in that land at the time the money went ?

A. We were all interested.

Q. When you say all, what do you mean ?

A. Murison and I and Coy.

Q. And that was the first payment Pommerenke got ?

A. Yes.

The defendants Bate and Murison entered into the following agreement:

SASKATOON, SASK., April 4th, 1906.

William H. Coy, of Saskatoon, being owner under agreement to purchase from August Pommerenke, of Good Thunder, Minn., the N. half of Section 34, Tp. 36, R. 5, W. 3rd M., 233 1-3 acres, and having purchased from the said W. H. Coy a half-interest in the said land (title remaining with W. H. Coy for the time being) on an agreement made between myself and W. H. Coy whereby I am entitled to receive one-half of all profits made on sale of the said land or any part of it, and whereby I am also liable for one-half of all future payments and charges in connection with the purchase and sale of the said land.

I agree to sell to W. J. Holt Murison, banker, of Saskatoon, for value received, one-half of my interest as above, he being now entitled to receive one-fourth of all profits and bear one-fourth of the charges on account purchase and sale of the above land.

(Sgd.) WILLIAM P. BATE.

Saskatoon, April 4th, 1906.

These several agreements between the parties are by reason of the dates they bear confusing. They may have been made purposly so or by accident.

The learned trial judge finds they were, in fact, all

made on the same day. I think he is correct in substance. Whatever dates they bear they evidently represent the transactions as arranged and concluded on the 3rd of April, 1906. Possibly time did not permit of them all being signed on that date and hence the confusing dates.

It is clear respondent was entirely ignorant of them, and was kept from knowing of them till after the property had been re-sold, as it was, for $125 an acre, in the beginning of August following; and he had been paid the following November the balance and given a deed to the appellant. The parties fell out and had some litigation over the fruits of their ill-gotten gain. Then one of them had the impudence to ask respondent for a ratification to overcome the defect in title to the profits this breach of trust produced.

He then sued to recover the profits unaccounted for to him, and the learned trial judge in a well considered judgment, gave judgment for the plaintiff against each of the several parties for his share of said profits.

Bate did not appeal. But Murison and Coy did, and the court of appeal held Coy and Bate liable, but relieved Murison by dismissing the action against him. And Coy now appeals here, and Pommerenke cross-appeals as against Murison.

In this cross-appeal objection is taken to the jurisdiction, and I will deal with that point hereafter.

Meantime, I will consider the law applicable to the case as it stands on these facts relative to each of the parties. It is well to bear in mind that Bate had concluded no sale or indeed a legally binding bargain of any kind until the agreement of purchase had been executed by appelant and that was not done until

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after Bate had completed with each of his fellow adventurers the bargain for contributions on a settled basis for a division of burdens and for a corresponding division of profits.

The appellant's counsel put forward as his chief argument the interpretation he asks to be given the letters of Bate when tendering his valuable services to respondent. He contended the retainer of Bate was only to find a purchaser, and when that was done his duty ended, and he was as free as any other man to re-purchase. I cannot put the interpretation contended for even an Bate's letters, and we have not the letter from respondent to Bate authorizing the sale. His evidence states it to have been

> to go ahead and sell these lands for the highest price obtainable, etc., etc.,

and Bate's version of it does not differ materially from this.

But in any way one can look at the facts, there was no sale of any kind, that either respondent or appellant could have relied upon until the corrupt bargains now complained of were reached.

Neither party knew who the other was or where he was. No description of the land was given in the telegram, and, in short, nothing to bind the purchaser to be found, or respondent either, unless he was to be held by his assent, induced by a lying telegram, to something that had only a nebulous existence.

It seems simply impossible to maintain any such contention in face of these facts I have stated. It would relieve Bate as well as the appellant, but the former has had the good sense not to try to be so; since he knew the law. It would be needless to quote law to condemn Bate herein, but as there seems to be

a misapprehension of an agent's true position and, consequently, that of those dealing with him, it is necessary to have an accurate statement of the law. Fortunately we have it on undoubted authority. In *Parker* v. *McKenna*(1), at page 125, Sir G. Mellish L.J. in dealing with the question of how far an agent for sale is precluded from purchasing from his own purchaser the property which he is entrusted to sell, says:

> In my opinion, as long as the contract remains executory, and the trustee or agent has power to enforce it or to rescind or alter it, as long as it remains in that state he cannot re-purchase the property from his own purchaser, except for the benefit of his principal. It appears to me that that necessarily follows from the established rule that he cannot purchase the property on his own account.

If we had sought to frame the law to fit the facts which surrounded this bargaining between Bate and his partners, how could it have been more accurately expressed to shew that his position was a false one, and the contracts made with him were founded on a fraud and, until full disclosure to respondent, it was obviously so to the minds of both appellant and Murison, if they had chosen to exercise ordinary business sense and rectitude of purpose.

Appellant's contract seems at first blush the more gross of the two, for he plainly writes himself down as the partner of this unfaithful agent; and avowedly the commission was divided and he believed himself let in on the ground floor by paying half of it for or on account of his half.

But there is a feature of his conduct that deserves at least a passing notice. He bowed to what seemed to him the inevitable if he was to get any interest in

(1) 10 Ch. App. 96.

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the sale. He bribed this agent by allowing him as the reward of his breach of faith, one-half the profits expected to be made, plus or minus, as one looks at it, half the commission.

The law relative to such a case is well expressed by A. L. Smith L.J., in *Grant* v. *Gold Exploration and Development Syndicate,* in appeal(1), at page 244, as follows:

> The case in this court of the *Salford Corporation* v. *Lever*(2) is a clear authority that where an agent, who has been bribed to do so, induces his principal to enter into a contract with a person who had paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies; he may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss which he has sustained by reason of entering into the contract without allowing any deduction in respect of what he has recovered from the agent under the former head, and it is immaterial whether the principal sues the agent or the third person first. This is the head-note of this case, and it accurately describes what was decided thereon.

The law applied here would render the transaction one in which the respondent on this ground alone would have been entitled to sue the agent for the bribe he got, in other words, the profits he made, and also the appellant and him for the damages suffered. It is answered he suffered no damages because at the time of the transaction this land was not worth more in the open market than the respondent got; yet each gave more, to the extent of the half commission at least, than the net money sent him. Besides the mode of reasoning is entirely fallacious. The fact is the bribed agent had no authority in law at all to make such a sale, and the appellant knowing this, and joining in it, never got any valid agreement of sale as against the respondent.

(1) [1900] 1 Q.B. 233. (2) (1891) 1 Q.B. 168.

The result was he had no agreement which in law he could have enforced against the respondent; see *Williams* v. *Scott*(1); *Delves* v. *Gray*(2); and cases cited there, if authority needed for so plain a proposition of law.

And this was the legal position of the matter and the relation of the appellant and respondent at the time when the former made a re-sale of the property and got the profits respondent was entitled to.

It was then, or later, by a continued concealment of the facts, that the respondent was thereby induced to convey the property to appellant and soon after which he reconveyed the land to another who was equally innocent with respondent of the facts.

Surely then is the time when the acts of the appellant and Bate had borne final and definite fruit and the legal wrong was committed upon which damage should be assessed. Until then perhaps no damages could be properly assessed. So long as able to restore the property undeteriorated and undepreciated in value, could he not answer any suit by a tender thereof and costs ?

I am prepared to hold that such is the legal position of both Bate and appellant and that the damages as a result might well have been assessed jointly against them, both on the basis of the entire profits of all concerned being the measure thereof.

But it appears to me there is another and a broader ground upon which the right of relief against appellant may well rest. Bate, by his contract, above set out, with the appellant, constituted himself the constructive trustee of respondent and Coy equally

(1) [1900] A.C. 499. (2) (1902) 2 Ch. 606.

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became so thereby, also such, if the terse language of Lord Thurlow be good law, as undoubtedly it is, in *Hall* v. *Hallet*(1), at page 139, when he says the court will

> turn Hallet and Scrase (the nominal purchaser there) into trustees for the benefit of the family,

and liable to have his agreement or any deed to him rescinded and hence becomes accountable for all the profits he, or he and his confederates, might make and did make.

It is apparently conceded that if this agent's duty had not ended before the bargain between the agent and the appellant was made and reduced to writing as above, the contract for purchase or deed if given appellant would have been rescindable, but it is persistently urged that when the land passed into the hands of the defendant DeVeber, who took for value and without notice, the respondent had practically no remedy as against any one but the agent.

This is put in two ways. First, it is said the only remedy would be damages assessable as of the date of the bargain. That view I have dealt with. Next, it is said there was no fiduciary relation between the appellant and respondent, and that the cases shew such relation is the basis of the right of recovery of profits an agent may have made.

So is fiduciary relation the basis of the right to recover in most cases of undue influence. There can be no doubt that appellant put himself in the position of a constructive trustee of this property, just as much as if his partner Bate had induced this result by undue influence. The respondent had not, as I have

(1) Cox Ch. 134.

already shewn, become bound in law, and if the deed had been executed and passed to appellant the title on the day before he made the sale with such profits, he could have been compelled to return the property. The court never found itself in such a case so impotent that it could one day thus remedy a great wrong and the next day be powerless to do so. In such cases it proceeds by reaching the proceeds and specially so if the money in the court, as it is said to be herein. The reported cases where proceeds had to be reached in third parties' hands, are not so numerous as those of reconveyance or rescission being found on adequate remedy. The principle, however, is undoubted, and the remedy is identical with what was exercised in the *Imperial Mercantile Credit Association* v. *Coleman* (1) as against Knight; in *Bagnall* v. *Carlton*(2), at page 408, as against C. F. Richardson. But as between the principal and the agent, and latter's nominee, see *McPherson* v. *Watt*(3), at pages 264 and 265; and *Charter* v. *Trevelyan*(4), and its sequel *Trevelyan* v. *Charter*(5).

The law on this subject is well stated in Lewin on Trusts (12 ed.), pages 207, 214, 567, 798, 1099 *et seq.;* Godefroi on Trusts (3 ed.), page 416, but perhaps most aptly by Fry J. in the undue influence case of *Bainbrigge* v. *Browne*(6), at pages 196 to 197, where he says:

> Then the next point which arises is this, against whom does this inference of undue influence operate? Clearly it operates against the person who is able to exercise the influence (in this case it is the father) and, in my judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity thereby created, or

(1) L.R. 6 H.L. 189.
(2) 6 Ch. D. 371.
(3) 3 App. Cas. 254.
(4) 11 Cl. & F. 714.
(5) 9 Beav. 140.
(6) 18 Ch. D. 188.

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with notice of the circumstances from which the court infers the equity.

And I can find no distinction in this regard between undue influence and any other improper means of getting from a man his property. I am not saying it need be rested only on this, or dealt with only in this way, for *In re Gallard*(1) shews how Vaughan-Williams J. found his way to assess damages when he could not justly set aside the whole transaction.

Besides, though the court has in some cases, as in the *Salford Corporation* v. *Lever*(2) case, not found it clear as to the form of action which might lie, whether for damages or for money had and received, some suitable means in law has always been found to remedy such wrongs. But the form of remedy chosen in a given case may limit the extent of relief.

And again the evidence would well warrant a finding that each of these defendants, Murison and Coy, knowingly aided the agent to commit the breach of confidence his principal had placed in him and thus became responsible for the results of such fraud.

The court of appeal has seen its way to relieve Murison, but I cannot agree in the reasons given therefor.

In the judgment of Mr. Justice Brown, speaking for the majority of the court, he says:

> The fact that Murison was aware that Bate had been an agent for the plaintiff in the sale to Coy is not sufficient, it seems to me, to charge Murison with the knowledge that he (Bate) was the purchaser jointly with Coy from the plaintiff. To make Murison liable it must be shewn that he was aware that Bate was secretly purchasing from his principal, or that fiduciary relations between them still existed.

How can it be said that Murison did not know that the fiduciary relations between respondent and Bate

(1) (1897) 2 Q.B. 8. (2) [1891] 1 Q.B. 168.

had still existed when the latter was in the very act of continuing to a close the discharge of his duty as an agent when collecting from Murison his contribution to the cash payment, and at the same instant he was discounting a note to help Bate to make up his share of same cash. Is it conceivable he was so stupid as not to realize what was being thus done and he taking part in ? Or is it conceivable he was not shewn the telegram which it was clearly Bate's mission to the bank so early in the morning of the 3rd to shew, and see if he could get some aid either to contrive against both Coy and Pommerenke, as they did, or financial assistance to carry out what he had already contrived?

If he saw the telegram it told the whole story. He has not seen fit to deny seeing it. And even Bate will not deny shewing it to him. Or how can it be supposed, if Coy was as well able as Bate says he was, to carry the whole load, Murison could imagine he was going to give up half to Bate and himself ?

And are we to suppose a bank agent so blind to the business side of such a transaction as not to inquire in what shape the agreement of sale was, and how he was to be secured for the advance he was making, and the future payments he was undertaking ? And then there is much one cannot help suspecting relative to the blindness as to, or forgetfulness of all the details.

He paid on the identical basis appellant did, which included the division of the commission.

Now he tenders an affidavit by way of laying foundation for a new trial in which he pretends this was an oversight.

Is it conceivable that at the stage things had reached when he gave his evidence under commission,

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he had not yet discovered the bearing of what he now professes was a mistake ?

I rather think there was a mistake of some kind as to this commission, but the mistake is not to my mind in the sense Murison suggests.

For the basis of his dealing was to take with Bate the half of what Coy got.

And the tenor of Bate's evidence, as friendly as possible, goes to shew Bate was the emissary of Murison. Are we to take it for granted he reported nothing of what was said relative to Coy's dislike for having Murison as a partner.

And if told what was the result ? As a business man he needed Coy's sanction and the safety it would carry. But he was content to take the document from Bate which appears above and where does that leave him ?

Clearly he was only entitled to claim such share of the profits as were coming to Coy through Bate. It was for profits he bargained and to be got from a man who had no right to any, and was accountable for them to respondent alone.

Why should any court step in to aid him and frustrate the righteous claim of another ?

The judgment of the learned trial judge was right so far as it went, and Murison is not entitled to be relieved from it.

He may be thankful he has only that limited judgment against him, for the learned trial judge might well have held he was the man to blame for the whole of this disagreeable business. His plain duty, as well as that of appellant, was, if desiring to buy, to have disclosed to the respondent what Bate, his agent, proposed.

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Possibly he might have given either a chance if thus properly treated.

I need not repeat what I have already assigned as reasons against Coy. But may say, barring the bribing feature, not quite so applicable here, the reasoning applies as against Murison.

A question of jurisdiction is raised by Murison's counsel relative to the hearing of this cross-appeal.

The appellant having launched his appeal against the respondent, he in turn gave notice by way of cross-appeal pursuant to rules 60 and 61.

This notice was moved against before me, in chambers, and relying upon the principle upon which *McNichol* v. *Malcolm*(1) had proceeded, and *Pilling* v. *The Attorney-General for Canada,* unreported, must have proceeded, the motion was dismissed.

No appeal was taken from this order, but Murison's counsel now takes the point that the court has no jurisdiction to entertain, as against Murison, a cross-appeal thus founded.

Whatever may be said of the interpretation put upon rule 60, it is somewhat difficult to understand wherein the want of jurisdiction consists.

Section 51 of the "Supreme Court Act" is as follows:

> The court may dismiss an appeal or give the judgment and award the process or other proceedings which the court, whose decision is appealed against, should have given or awarded.

Section 52 enables granting a new trial even if put upon the ground that the verdict was against the weight of evidence.

What do these sections mean ? Has the court no jurisdiction to grant a new trial herein as desired

(1) 39 Can. S.C.R. 265.

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below by Murison, except as between parties named by appellant, unless a substantive appeal for that purpose has been taken ?

That result would be one of the many absurdities implied in holding we have no jurisdiction to hear anything involving Murison.

The language giving jurisdiction is express and ample enough to cover getting aside or varying in any way the judgment of the court appealed from. Why should the jurisdiction be frittered away ?

The judges are empowered by section 109 to make rules for regulating the procedure of the court and the bringing of cases before it from courts appealed from or otherwise and for the effectual execution and working of the Act and the attainment of its intention and objects. This is one of those rules so made for such purposes. But the court has no power to limit its jurisdiction. It can only makes rules conformably to the executing of its jurisdiction. Of course, if parties do not conform to these rules they may have no right to invoke the jurisdiction. That is another matter, but does not touch the jurisdiction. And this rule 60 so far from implying any limitation of jurisdiction assumes it to exist and provides for overcoming even the irregularity of a non-compliance with its terms. How can the question of jurisdiction be raised upon such a rule ? But the point has been expressly passed upon by the court in the case of *Town of Toronto Junction* v. *Christie*(1), where the appeal was from an award and the amount was increased though no cross-appeal notice given.

The late Chief Justice, Sir Henry Strong, pointed out and dealt with this question in clear and com-

(1) 25 Can. S.C.R. 551.

prehensive terms, holding that it was not because the court had no jurisdiction to hear without the notice, but that it was usually fair to require the notice, but entirely in the discretion of the court. The earlier case of *Pilon* v. *Brunet*(1) deprived respondent, who had lodged his substantive appeal and not proceeded by way of notice as rules provided, of any costs but such as latter simple method would have incurred.

It may be said these are only cases between the same parties, but as touching questions of jurisdiction wherein lies the difference? The rights of an appellant in a judgment cannot be disturbed any more than those of any other party to the suit without jurisdiction. And if an appellant had got on one branch of his case, say one cause of action, a judgment, and failed in another and distinct cause of action, is it to be said, on an appeal in the latter, not touching the former, he cannot be attacked without a substantive appeal? And that a cross-appeal notice is not enough?

The purpose of the order was to lessen the costs of such a proceeding and so simplify matters that once an appeal has been launched and the whole case before the court, the simple method the court provides for executing the purpose of the Act and enabling the judgment the court should have given, to be given, is reached thereby.

This principle of acting was adopted in the *McNichol* v. *Malcolm* case(2), and if doing so had stretched the jurisdiction of the court, surely the Judicial Committee of the Privy Council would have granted instead of refusing, as it did, leave to appeal(3).

(1) 5 Can. S.C.R. 318. (2) 39 Can. S.C.R. 265.
(3) 39 Can. S.C.R. vii.

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Then, as pointed out in my judgment disposing of the Chamber motion herein, the decision of the unreported *Pilling Case,* clearly disposed of the question not only of jurisdiction, but of practice. The brief of authorities submitted in that case by counsel moving to quash shew the grounds taken were on the interpretation of the rule and the peculiar nature of the case which I am about to refer to and had no reference to the "Supreme Court Act."

Counsel for Murison suggests now that the appeal in that case was from the Exchequer Court, and hence by the Attorney-General, and hence the motion to quash could not prevail.

It is true it was from the Exchequer Court and by the Attorney-General, but it is just as true (as an inspection of his notice shews) that he neither intended to avail himself of section 84 of the "Exchequer Court Act," nor to pursue any other right than given by rules 60 and 61. The motion was merely that on the hearing of the appeal, which two out of five men affected by a judgment of that court had taken to this court, he (the Attorney-General) would urge that both the appellants and three others who had rested content with the result, and were seeking no relief, should have the judgment as to them all, so varied as to affect each though interested only as to separate amounts; and resting on independent rights, originating, however, in the same cause of complaint.

None of the conditions to be observed in this special right of appeal were, so far as I can find, ever thought of as applicable or observed.

How then can the fact of the Crown having had another right of appeal, which it did not exercise, and could not exercise, save by observing the conditions, affect the matter ?

This court has no power to dispense with statutory conditions precedent to an appeal by the Crown or any one else. Security is only one term from which the Crown may be free. Time and mode binds as others are bound.

I repeat, everything in that case involved the right and power to hear, on a cross-appeal motion, an appeal against those not connected in any way with the main appeal.

Besides it was an extreme exercise of the power.

The proceeding was a winding-up one and each of these five men proved his claim therein, by *primâ facie* proof, and had the case rested there I should have felt the cross-appeal by way of motion could not reach them.

I was only persuaded in that case that by reason of an issue having been framed and tried so far as I could find out, wherein all five joined and made common cause, they fell under the usual practice adopted by the court. All this, including my difficulty, appears in my own opinion judgment in the case.

The case was appealed from here and though leave was refused to appeal on all points save this lastly mentioned point; as to which leave was given.

That is entirely another matter from the question raised here, but does bear directly on the statement and argument presented here.

If the proceeding in the case had been aught but a cross-motion appeal, how could any court have ever supposed there was a want of jurisdiction to hear it? If it had been the substantive appeal the Attorney-General is suggested in this argument to have taken or relied on, how could any one have ventured to ask the Judicial Committee to grant leave on the ground

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of want of jurisdiction ? Yet it was granted because of the ground I suggest, not the ground taken here.

Moreover, in the case of *Bulmer* v. *The Queen* (1) this court refused to hear an appeal taken by the Crown because the proceedings had not conformed to the requirements of these rules 60 and 61, and thus disposes of the argument from another point of view.

It may also be observed that in the case of *Johnston* v. *Town of Petrolia* (2), as an interpretation of the rule claimed to be substantially the same as rule 60, the court exercised the power in the rule to allow the appeal. And the *Cavander's Trusts Case* (3), closely examined does not even touch the practice here questioned. The appellant here was, and is much or might be much affected by respondent Pommerenke's claim against Murison. Is Coy prepared altogether to share the burden for Murison ?

I have no doubt of the jurisdiction to hear the cross-appeal and rectify the error below.

I think the appeal should be dismissed with costs, the cross-appeal allowed with costs, and respondent have his costs in the court of appeal, and the learned trial judge's judgment be restored.

DUFF J.—I think there is sufficient evidence to support the finding of the court below that Coy was a partner of Bate in the purchase and that Bate's commission was divided between them as a part of the profits of the partnership. Coy thus came under a fiduciary relation to Pommerenke in respect of the sale and the legal result of this relation was to disqualify him from purchasing the lands which were the

(1) 23 Can. S.C.R. 488. (2) 17 Ont. P.R. 332.
(3) 16 Ch. D. 270.

subject-matter of the agency without the consent of Pommerenke. He stood, I think, in the same position as Bate. He would be liable to account as Bate was. I think Murison is not implicated in the same way. In his case the proper inference seems to be that drawn in the court below, namely: that he was unaware of the true relation between Coy and Bate, and being unaware of the impropriety of their conduct could, of course, incur no disability on account of his failure to disclose it to Pommerenke. As against Murison, an innocent purchaser, I do not think Pommerenke can deny the authority of Bate to sell.

The appeal and cross-appeal should be dismissed with costs.

ANGLIN J. (dissenting on the main appeal).—Upon the evidence it is well established that the defendant Bate, without the vendor's knowledge, acquired an interest in the property in question while still holding a fiduciary position as vendor's agent, and that he made use of that position to compel his co-defendant Coy to allow him to acquire such interest. Apart from any question of fraud, Bate is, on well-known principles, accountable to the plaintiff for whatever profit he has made upon the re-sale of the property. Against the judgment holding him liable to so account he has not appealed.

It is equally clear that there was an entire absence of bad faith on the part of the defendant Coy, who appeals from the judgment of the Supreme Court of Saskatchewan holding him likewise accountable to the plaintiff for profits made by him on the re-sale of the property. Bate was the sole agent of the plaintiff. Coy had through him agreed to purchase the property

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wholly for himself, at the price at which it was eventually bought, before there was any suggestion that Bate should take an interest in it. His offer had been submitted by Bate to the plaintiff and had been approved and accepted by him. Apart from the Statute of Frauds, and possibly notwithstanding its provisions, Coy had an enforceable contract to purchase. With matters in this position Bate pressed Coy to allow him to acquire a half interest in the purchase. Coy was unwilling to do so; but, upon Bate insisting, fearing that, if he refused, Bate might dispose of the property to another purchaser, he yielded, and agreed to take a half interest only, giving the other half interest to Bate, and stipulating that Bate should give him one-half of the commission which he was to receive from the plaintiff. It is quite clear that Coy had no idea of doing anything which would injure the plaintiff. His conduct is not open to any suggestion of fraud or dishonesty. His fault lay in permitting Bate to become a co-purchaser with him, knowing that Bate was concealing from his principal the fact that he was acquiring an interest in the property.

The learned trial judge and the majority of the learned judges in the court *en banc* have held Coy accountable to the plaintiff for the profit made by him on the re-sale to DeVeber on the ground that he and Bate became partners in the purchase from the plaintiff. It may be that if Coy and Bate were really partners in this transaction, notwithstanding the views upon which the decisions in *Stroud* v. *Gwyer*(1), at page 141, and *Macdonald* v. *Richardson*(2), at page 88, were based, on the authority of such cases as

(1) 28 Beav. 130. (2) 1 Giff. 81.

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Flockton v. *Bunning*(1), and *Imperial Mercantile Credit Association* v. *Coleman*(2), the defendant Coy would be accountable to the plaintiff for profits made by him on the re-sale of the property.

But upon the facts in evidence Coy and Bate were, in my opinion, not partners. Notwithstanding the stipulation that the vendor's commission should be divided between them, they were merely co-purchasers who became co-owners or tenants in common of the property. There was no evidence of any intention on the part of Bate and Coy to become partners; each was at liberty without the consent of the other to transfer to a stranger his own interest in the property; each had a right to partition; Lindley on Partnership (7 ed.), pp. 26-7; neither was an agent of the other, *Bullen* v. *Sharp*(3). This case is, therefore, distinguishable from that of *The Imperial Mercantile Credit Association* v. *Coleman*(2), relied upon in the provincial courts. As co-owner with Bate, Coy did not hold towards the plaintiff even a constructive fiduciary position, to which it is said the rule that "a trustee shall not profit by his trust," does not apply. Lewin on Trusts (11 ed.), p. 1159-60.

The view so powerfully stated by James L.J. in *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha and Telegraph Works Co.*(4), at page 526, that

> any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court,

is, of course, incontrovertible. That the principal whose agent has been tampered with, if he comes to

(1) 8 Ch. App. 323 *n.*
(2) L.R. 6 H.L. 189.
(3) L.R. 1 C.P. 86.
(4) 10 Ch. App. 515.

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the court before rights of innocent third parties have intervened, is entitled to have the contract set aside is equally clear. Nor can a co-purchaser with an agent of the vendor who has bought surreptitiously successfully oppose rescission: *McPherson* v. *Watt* (1), at page 276. If rescission is impossible because the plaintiff has not come to the court in time, or is not sought, he may, says Lord Justice James, have such other adequate relief as the court may think right to give him.

While this is not a case of the agent of the vendor being bribed in the sense in which bribery is ordinarily understood — not a case in which the "other principal" sought in any way to influence the conduct of the agent to the prejudice of his own principal, it is a case in which there was surreptitious dealing between the agent and the other principal. Transactions of that sort are so dangerous — it is so often impossible to ascertain the real truth of the circumstances which surround them, that the prohibition of them by courts of equity is absolute; and where rescission is asked and is possible they will not inquire whether the principal has or has not sustained a loss. Neither does his right to recover from his agent any profits made by him at all depend on that fact. *Parker* v. *McKenna* (2), at page 118.

But I know of no ground on which a co-purchaser in the position of the defendant Coy can be held accountable for profits made by him on a re-sale. If Coy had bribed Bate to sell to him at a figure lower than the agent, if honest, could have got for his principal, his liability, as pointed out by Mr. Justice Newlands, citing *Grant* v. *Gold Exploration and Develop-*

(1) 3 App. Cas. 254. (2) 10 Ch. App. 96.

ment Syndicate (1), rescission being impossible, would have been to pay damages to the vendor for any loss sustained by him by reason of entering into the contract of sale. If the liability of the fraudulent briber is limited to damages — if he is not held accountable for profits, *a fortiori* an innocent co-purchaser, who is not a partner, may not be held so accountable.

Whether without proof of actual fraud on the part of Coy he would be required to pay damages to the plaintiff, had it been shewn that he secured the property at a figure below its market value at the time he purchased it, need not now be considered. The evidence is overwhelming that the plaintiff got for his property all that it was then worth, all that any agent, however energetic or scrupulously honest, could have been expected to obtain for him. I agree with Mr. Justice Newlands that the plaintiff has failed to establish a case against the defendant Coy and am of the opinion that Coy's appeal should be allowed with costs in this court and in the provincial appellate court, and that the action against him should be dismissed with costs.

The case of the defendant Murison, against whom the plaintiff has preferred what he calls a cross-appeal, is still clearer. While the trial judge thought that Murison acquired his interest with knowledge that Bate and Coy were co-purchasers from the plaintiff, the full court thought the evidence consistent with the view that, when Murison acquired his interest, he was unaware that Bate was really a purchaser from Pommerenke and may have believed that he was a sub-purchaser from Coy after the latter had bought from the plaintiff. Although not by any means satisfied

(1) [1900] 1 Q.B. 233.

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that if I had been sitting in the provincial appellate court I would have reversed the finding of the trial judge on this question of fact, neither has a perusal of the evidence convinced me that the view expressed by Brown J., concurred in by the Chief Justice of Saskatchewan and not dissented from by Mr. Justice Newlands, is so clearly erroneous that I would be justified in reversing their judgment — *Demers* v. *Montreal Steam Laundry Co.*(1). But in any case the defendant Murison is entitled to succeed on the same ground as the defendant Coy. He was not a partner of, but merely a co-purchaser with Bate. While he might possibly have been liable to the plaintiff for damages, if any, he is not accountable to him for profits made on the re-sale of the property.

This conclusion as to Murison is satisfactory because I more than gravely doubt whether the appeal of the respondent Pommerenke from the judgment dismissing the action as against this defendant is properly before the court. Murison was not made a party respondent to the main appeal taken by Coy. He is not before the court as a party to that appeal. The appellant Coy had no interest whatever in the relief sought against Murison. He has nothing to do with the plaintiff's case against Murison. Pommerenke gave Murison what purports to be a notice, under rule No. 100 of this court, of his intention to contend on the hearing of the main appeal that the decision of the provincial appellate court should be varied by restoring the judgment of Johnston J., holding Murison liable to account to him for the profits made by him on the re-sale of the land to DeVeber. In his factum

(1) 27 Can. S.C.R. 537.

he prefers his appeal against Murison as a cross-appeal. He has not given the security required by section 75 of the "Supreme Court Act." I very strongly incline to the view that it is not competent for a respondent by a mere notice under rule 100 to bring before this court a person not a party to the main appeal, and to claim against him relief in which the original appellant is not interested. As pointed out by Osler J.A., discussing the corresponding Ontario rule in *Begg* v. *Ellison*(1), at page 269,

> the word "parties" as here used must mean persons who are parties to the action or proceeding in question on the appeal.

The same learned judge says in *Johnston* v. *Town of Petrolia*(2), at page 335, quoting the language of Jessel M.R. in *Re Cavander's Trusts*(3),

> an appeal on a point which does not affect the original appellant cannot be a cross-appeal. * * * It cannot have been intended to enable the respondent to bring forward in this way a case with which the appellant has nothing to do. If he has a case of that kind he must give notice of appeal.

The case of *McNichol* v. *Malcolm*(4) was relied upon by Mr. Straton; and the case of *Pilling* v. *Attorney-General* (not reported), in which the judgment of this court was delivered on the 15th of February, 1910, has also been called to our attention. Without expressing any opinion upon the conclusions reached in these cases I would point out that they appear to be distinguishable from that now before the court. In *McNichol* v. *Malcolm*(4) the notice under rule 100 was given to a person, who, although no relief was claimed against him in the main appeal, had been made a respondent to it. He was, therefore, already

(1) 14 Ont. P.R. 267.
(2) 17 Ont. P.R. 332.
(3) 16 Ch. D. 270.
(4) 39 Can. S.C.R. 265.

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before the court. In *Attorney-General* v. *Pilling*, although the three parties to the proceedings, Lawson, Hasseltein and Bloom, who were not parties to the main appeal, were held to be affected by the relief granted on the cross-appeal, they were in the same interest as the appellant on the main appeal and they had joined with him in the pleadings in the action. That was not an attempt by a respondent by cross-appeal to bring forward a case with which the main appellant had nothing to do. This is.

If rule 100 bears the construction which counsel for the plaintiff Pommerenke seeks to have us put upon it, I am inclined to think that it would be *ultra vires* of the judges of this court to enact it, inasmuch as it would confer a right to launch and maintain what is in reality an independent appeal without complying with the provisions of section 75 of the "Supreme Court Act."

But, in view of the conclusion which I have reached on the merits of the attempted appeal from the judgment dismissing this action as against Murison, it is not now necessary to determine the question whether the plaintiff's so-called cross-appeal has or has not been properly launched. I allude to it merely that it may not appear that I have assented to the regularity of the procedure which has been adopted.

The cross-appeal, so called, should be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *John Milden.*

Solicitor for the respondent: *James Straton.*

LOUIS RIOPELLE (PLAINTIFF).....APPELLANT; 1911

*March 15.
*May 15.

AND

THE CITY OF MONTREAL (DEFENDANT) .....} RESPONDENT.

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

Municipal corporation—Building by-law—Dangerous constructions—Abatement of nuisance—Condition precedent—Notice—Order to repair—Demolition of structure—Trespass—Forcible entry—Tort—Damages—Construction of statute—Montreal city charter—37 Vict. c. 51 (Que.).

In the exercise of extraordinary powers conferred by legislation authorizing interference with private rights all conditions precedent to the exercise of such powers must be strictly complied with prior to the performance of acts which, if done without special authority so conferred, would be tortious.

In virtue of authority conferred by the legislature the municipal council enacted "The Montreal Building By-law" making regulations in respect of dangerous structures and providing that if, after notice by the inspector of buildings, the owner of any such structure should fail, as speedily as the nature of the case might require, to comply with the requisition in such notice, the inspector might order its demolition and, upon default of demolition within the time specified in the order, he might cause the structure to be demolished. The inspector gave notices to the plaintiff with respect to his buildings, alleged to be dangerous, but failed to give him definite orders with regard to the nature of the demolition required and, subsequently, entered upon the plaintiff's property and demolished the buildings on his default to comply with the requisitions contained in the notices.

Held, Davies J. dissenting, that the conditions prescribed as necessary before the exercise of the right of forcible entry and demolition of the structure had not been fully observed, and

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

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that, in consequence of omission strictly to comply with the conditions, the municipal corporation was responsible for the damages sustained by the plaintiff through the unauthorized destruction of his property.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was dismissed save and except as to the amount of $394, awarded to him, with costs.

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

McAvoy K.C. for the appellant.

J. L. Archambault K.C. for the respondent.

THE CHIEF JUSTICE.—This is an action of damages for trespass to land. It is admitted that the servants of the corporation defendant (respondent here) entered upon the plaintiff's (now appellant's) property against his will and there demolished a building in course of erection. The forcible entry is justified on the ground that the building was defectively constructed with improper materials and by incompetent workmen; that the respondent had legal authority for what it did, and that it acted throughout in conformity with the directions or allowance of the legislature. There is no evidence of imminent danger or of immediate and urgent necessity for the protection of the public and the respondent does not base its defence to the action on that ground. Certain sections of the municipal charter, to which I will later more fully refer, were invoked in the written pleadings and at the argument here to justify the proceedings of the municipal employees.

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Since the statute, 5 Richard II., st. I., ch. 7 (1389), it is a criminal offence to enter, in a manner likely to cause a breach of the peace, upon the property of another (sections 102 and 103 of the Criminal Code).

It is true that if the buildings in course of erection by the plaintiff on his land were in such a state as to constitute a nuisance it would have been permissible for any one having a sufficient interest to take such steps as were necessary to abate the nuisance. The conditions subject to which this right may, in English law, be exercised are stated with admirable clearness by Adrien Gérard in his recent book on "Les torts ou délits civils en droit anglais," at pages 355 and 356:

> Avec l'"abatement of nuisance" nous revenons à une question touchant la propriété immobilière. La "nuisance" consiste à causer préjudice à autrui en le troublant dans la jouissance de sa propriété; le propriétaire peut alors détruire l'état de fait qui lui cause préjudice, et c'est ce qu'on nomme "abatement of nuisance."
>
> Si l'état de fait préjudiciable a son siège, sa cause, sur le terrain d'autrui, le propriétaire lésé par la "nuisance" doit d'abord sommer son voisin d'en faire disparaître la cause; puis, s'il n'agit pas, peut pénétrer sur son terrain pour se faire justice à soi-même. Si, par exemple, mon voisin construit sur son terrain une maison qui fait obstacle à l'exercice de mon droit de passage, je dois d'abord le sommer de la démolir, et s'il l'obtempère pas, je puis la faire démolir, pourvu que je ne lui cause pas de dommage inutile et que je ne trouble pas la paix publique. Remarquons, cependant, que ce n'est pas là un procédé à conseiller, qu'il est toujours dangereux de pénétrer ainsi sur le terrain d'autrui pour se faire justice, et qu'enfin nous ne trouvons pas de décision moderne sur ce point.

Pollock, "Torts," says, at page 421:

> It is a hazardous course at least for a man to take the law into his own hands and, in modern times, it can seldom, if ever, be advisable.

In the Province of Quebec the law does not permit a citizen to do justice to himself. "Il n'est pas permis de se faire justice à soi-même" is still the law there. M. Demogue in the "Revue Trimestrielle" of 1898, at

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page 690, writing of a then recent judgment in the Cour de Cassation, says, however,

> un arrêt de la chambre des requêtes semble vouloir ramener le vieil adage qu'on ne peut se faire justice à soi-même à une portée raisonnable; on ne doit pas faire d'actes troublant l'ordre matérial, pouvant occasioner des rixes, des luttes, mais le surplus reste permis.

Article 529 of the Civil Code lays down the rule as to the limits within which it is permitted to interfere with the property of one's neighbour. I may cut the roots of my neighbour's tree which grow into my land, but, contrary to the rule of English law (*Earl of Lonsdale* v. *Nelson* (1)), I may not touch the branches of the same tree that grow over my property. The most I can do is to call upon my neighbour to remove the branches.

The municipality does not pretend to have, in the circumstances of this case, the right to enter upon the plaintiff's property, except in so far as authority to do so is found in its charter. Before referring to the provisions of that charter it may be proper to state that there are certain general principles which should be kept in mind. When the law invests a person with authority to do an act which, if done without express legal sanction, would be an offence, the conditions subject to which the act is authorized must be complied with literally. In other words, where the legislature has thought fit to direct the doing of something which but for that direction or authority would be an actionable wrong it is incumbent on the party who professes to exercise the power conferred by the statute to prove beyond all doubt that he strictly complied with the conditions subject to

(1) 2 B. & Cr. 302; 26 R.R. 363, at p. 370; and see *Lemmon* v. *Webb*, [1895] A.C. 1.

which the power has been conferred. The statute relied upon by the respondent provides very clearly, as I shall point out, that the alleged wrong-doer should first be warned and required to abate the nuisance complained of; and it is only after notice and refusal that entry on the land to abate the nuisance can be permitted.

The city is authorized by 37 Vict. ch. 51, sec. 123, sub-sections 51 and 52, and subsequent amendments, to make by-laws to provide for the inspection of all buildings and to require the demolition of any that may endanger the lives of the citizens; and, by-law No. 107 was passed under the authority of that statute. It is there provided (section 56) that when an inspector finds, by actual survey of the premises, that any structure is in a dangerous state he should, after taking preliminary steps for the protection of passers-by, cause *notice in writing to be given to the owner of such structure requiring him to take down or to repair it, as the case may require;* and, if the owner fails to comply as speedily as the nature of the case permits with the notice, the inspector may order him to take down or demolish the building, in whole or in part. The by-law further provides that in cases of improper construction which do not come within section 56 the owner may, after notice from the inspector, be summoned before the recorder and there condemned to the penalty provided by section 103 of the by-law. Two different proceedings are, therefore, contemplated; — one applicable to the case of a dangerous structure which imperils the safety of the public; the other referable to the case of a building which is being defectively constructed and which may, when completed, become a source of danger. In the first

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case the inspector may enter upon the premises and there take such steps as are necessary to prevent the imminent danger; but, when the complaint is that the building is being defectively constructed without, however, danger of immediate injury being done, the offending owner is liable to be proceeded against for a pecuniary penalty before the Recorder's Court. In either case notice must previously be given to the owner and that notice should be so framed as to give him full information of the nature of the complaint against him and of the proceedings which it is intended to adopt. And this appeal must succeed because the notices required by the statute were not given.

The building in question was demolished on the 17th of August, 1898, and the notices given are to be found printed at pages 356 to 362 of the case on appeal, and at page 3 of the respondent's factum.

The first notice was given on the 7th of March, 1898, requesting the appellant to make certain changes in the building which are set out in detail and the owner is informed that, in default of compliance with that notice, he will be proceeded against for the penalty provided by the by-law. I quote the terms of that notice.

> Vous êtes en conséquence requis d'avoir à remédier à ces défectuosités dans les quarante-huit heures à compter de la signification du présent avis, à *défaut de quoi vous serez poursuivi et encourrez la pénalité imposée par le dit règlement.*

This notice was followed by three other notices, dated respectively the 20th of May, the 20th of June, and the 8th of August. The concluding words of the notices of the 20th of May and 8th of August are as follows:

Vous êtes en conséquence requis d'abbatre, démolir, reparer ou renforcer la dite maison, *suivant qu'il en sera requis*, etc. * * * à défaut de quoi vous serez poursuivi et encourrez la pénalité imposée par le dit règlement,

and no further information as to what was required by the inspector was given to the appellant. The notice of the 20th of June is somewhat more definite; but it also concludes with the words

à défaut de quoi vous serez poursuivi et encourrez la pénalité imposée par le dit règlement.

Proceedings were taken on this notice in the Recorder's Court and the appellant was condemned, under section 103, to pay a fine for having neglected to conform to the instructions of the inspector. On appeal, the judgment was, subsequently, set aside.

The chief reason why I feel, most reluctantly, constrained to allow this appeal is that no such notice as the statute requires was given by the inspector. The vague words used in the notices of the 20th of May and the 8th August, served on the appellant and on which the inspector acted, are:

vous êtes en conséquence requis d'abbatre, démolir, réparer, etc. * * *suivant qu'il en sera requis.*

The appellant is not told whether he is to take down the building, to alter it in part, or, simply, to strengthen it. A notice couched in such vague and uncertain terms does not give to an owner the information as to the defects found in the building which the inspector requires him to remedy, and which the statute contemplates, before the civic officials may venture to exercise their exorbitant right to enter upon the property of a citizen and, with force, demolish his buildings. In its terms the notice leaves the owner under the impression that the particular

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thing the inspector requires to be done will be subsequently indicated to him. The words used are:

> Vous êtes en conséquence requis d'abattre, démolir, reparer ou renforcer la dite batisse, *suivant qu'il en sera requis.*

Could anything be more indefinite, vague and uncertain ? It would appear as if it was intended merely to puzzle and embarrass the owner.

As my brother Duff says, "this is a case in which form is substance." The principle at issue is of the highest importance, affecting the right of property. It would be extremely unwise to establish in this court a precedent which might be invoked by every municipal officer to justify the right to enter upon the property of private citizens and there demolish their buildings on the ground that they are, in his opinion, defectively constructed. The legislature has, in the case of the respondent, thought wise to give the city officials very large powers, it is true, but it has coupled with the exorbitant right conferred a duty to give notice, and that duty must be literally and strictly complied with.

The appeal must be allowed and the record sent back to the court below to assess the damages. I am confident, however, that, in assessing those damages, the trial judge will have in mind the suggestions made by my brother Anglin, which have the full approval of this court.

An interesting note by Planiol, to Dalloz, 1905, 1, 298, gives a valuable suggestion as to the rules that should be followed in cases like the present, where the defendant acted honestly but under a mistaken apprehension as to its rights; and the conduct of the plaintiff is far from being commendable.

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DAVIES J. (dissenting).—This appeal is one without any merits whatever. The only point argued, or indeed arguable, was that the notices given to the appellant requiring the demolition of the building complained of as constituting a public danger were not sufficiently full or explicit.

I have reached the conclusion that the judgment of the trial judge and that of the court of appeal on this point were correct and think, therefore, that this appeal should be dismissed.

From the time he began the erections complained of until their demolition by the civic authorities the appellant's actions and conduct in connection with the building were utterly indefensible and an open and flagrant repudiation of all civil control over him or his building operations. He refused to recognize as binding upon him the by-laws of the city respecting the construction of buildings within its limits. He declined to take out a permit for the erection of the buildings and proceeded with their erection without such permit. The evidence clearly established the fact that not only was their construction not in conformity with the by-laws and regulations but that they were constructed with bad and rotten materials and in an improper and defective manner, and at the time they were ordered to be demolished, as stated by Mr. Justice Lavergne, they "constituted an imminent danger to the public."

In point of fact the evidence satisfied the courts below and satisfies me that the buildings demolished by the city officials were of the most imperfect and faulty description, and that to allow them to remain in the condition in which they were on the 6th of August, 1898, when the last and final notice was given

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to the appellant, or to allow the appellant to continue them to completion, would be dangerous not only to those who might occupy them, but also to the public using the street on which they fronted. Three independent surveyors appointed by the Recorder's Court to examine the condition of the buildings for the information of the court reported that:

> the faults in construction and defects in materials used in this building are so flagrantly in violation of the city building by-law and of all rules for safe building that we are of the opinion that it should be condemned as a public nuisance, and we have no hesitation in recommending that, in the interest of public safety, it be entirely demolished.
>
> The internal supports and joists of floors and roof are not properly placed and are not of a sufficient strength.
>
> Nearly all the timbers used are unsound and rotten and wholly unfit for use.
>
> The portion of the front, marked F. B. H. I. J. K., on the drawing, is carried to a greater height than allowed by the by-law, and much higher than is safe for plank-framing. About one-half of this portion of the building is carried on three slight posts, marked L. M. N., which are quite insufficient in strength for the load they have to sustain, and do not rest upon proper foundations.

The findings of fact of the trial judge and of the court of appeal are substantially in accordance with the report of the surveyors and represent, in my opinion, the proper conclusion to be drawn from all the evidence.

I am glad to have been able to concur with the courts below in holding that the notices to the appellant requiring demolition of these dangerous structures were sufficient, because, apart from this one technical question, the appeal is without merits of any kind whatever.

There was nothing arbitrary or high-handed in the proceedings taken by the civic authorities to compel the demolition of this "public nuisance." The amplest possible notice was given to him of the danger

the buildings were to the public and the necessity for their demolition, and it was only when and after he defiantly refused to comply with these notices that the buildings were demolished and the nuisance abated.

As my colleagues, however, think the notices insufficient, and have allowed the appeal and remitted the case for another trial, I feel somewhat at a loss to understand how, in the circumstances and facts with reference to the utterly bad and dangerous condition of the buildings at the time when they were demolished, any damages could be awarded other than merely nominal ones.

If it could be shewn that the manner of demolition was negligent, and in itself caused damages, I can understand these being assessable as against even a technical wrong-doer. But, if the facts, as proved at the first trial, with respect to the utterly faulty and dangerous condition of the buildings, are accepted, what real damage was sustained by the appellant in consequence of their demolition? If the buildings did not fall from their own inherent defects they would certainly have, for the public safety and as constituting a public nuisance, to be demolished either by the appellant himself or by the public authorities after a further order complying with the by-laws had been made.

Demolition was necessary and inevitable. To justify the city authorities in demolishing the building better and fuller notices than those given were, it is held, required. But there cannot be any doubt whatever that the condition of the buildings and the manner in which and the material with which they were being constructed was so bad and indefensible

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that the buildings, in their then state, constituted an imminent danger to the public which it was alike the right and the duty of the city authorities to have removed. The manner in which they proceeded, so far as the notices are concerned, is held to have been technically wrong and not to afford complete justification for the demolition; but if all the facts and conditions demanded demolition; if, under these facts, it was the duty of the city to have the nuisance abated — if demolition was inevitable any way — then, surely, a failure technically to comply with the form of notice would not justify any damages beyond nominal ones, unless, indeed, as I have said, the manner in which demolition took place was, in itself, improper and negligent and so caused damages to the owner.

IDINGTON J.—Certainly the appellant who disregarded the safety of others and defied the law for securing such safety, is not an object of sympathy; yet one of the surest means of inducing law breakers to respect the law, is to have it administered in a due and orderly manner according to the methods prescribed for enforcing it.

The law touching the questions raised herein is almost entirely comprehended in two sections of the respondent's charter and two sections of by-law No. 107 resting thereon and passed by respondent's council.

The two sub-sections of section 140 of the charter (1) are as follows:

58. To prescribe and define the duties and powers of the inspector of buildings and to authorize him and such other officers as may

(1) 52 Vict. ch. 79 (Que.).

be appointed by the council for that purpose, to visit and examine, in the performance of their duties, as well the interior as the exterior of any house or building;

59. To authorize the said inspector to demolish any house or building that may endanger the lives of the citizens; and to cause such house or building to be temporarily vacated, if he deems it necessary; and to do and perform such work of repair as he may deem necessary for the safety of the structure, and to authorize the recovery, from the proprietor, of the cost so incurred.

The by-law I have referred to contains the following:

Sec. 56. Whenever the inspector finds by actual survey of the premises that any structure (including in such expression any building, wall, chimney or other structure and anything affixed to or projecting from any building, wall or other structure) is in a dangerous state, the inspector shall cause the same to be shored up or otherwise secured, and a proper board or fence to be put up for the protection of passengers; and he shall cause notice in writing to be given to the owner of such structure requiring him to take down, demolish, secure or repair the same as the case may require.

Sec. 57. If such owner fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the inspector may order him to take down, demolish, repair or otherwise secure, to the satisfaction of the said inspector, such structures or such part thereof as appears to the said inspector to be in a dangerous state, within a time to be fixed by said inspector; and in case the same is not taken down, repaired or otherwise secured within the time so limited, the said inspector may, with all convenient speed, cause all or so much of such structure as is in a dangerous condition, to be demolished, repaired or otherwise secured, in such manner as may be requisite; and all expenses incurred by the said inspector in so doing may be recovered by him from the owner of such structure in any court having jurisdiction in the matter.

Then follow these sections, one of which is applicable to the case of an owner who cannot be found, which is not this case.

The next two sections are as follows:

Sec. 59. If in erecting any building, or in doing any work to, in or upon any building, anything is done contrary to any of the provisions of this by-law, or anything required by this by-law is omitted to be done, in every such case, the inspector shall give to the builder engaged in erecting such building, or in doing such work, notice in writing requiring him, within forty-eight hours from the

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date of such notice, to cause anything done contrary to the provisions of this by-law, to be amended, or to do anything required to be done by this by-law, but which has been omitted to be done.

Sec. 60. If the builder to whom such notice is given makes default in complying with the requisition thereof within the time specified in such notice, he shall incur the penalty provided in section 103 of this by-law.

The only remedy contemplated by these sections 59 and 60, seems to be to give notice and in default a prosecution for the penalty. Section 61 is as follows:

Sec. 61. In all other cases not hereinbefore specified, where the inspector may detect any imperfection, improper construction or defect, by which any building or any part thereof, may become dangerous to the public safety, either by fire or otherwise, he shall immediately notify the owner of such building to repair or remove such defects or imperfection within a reasonable delay to be specified in the notice, and in default of the said owner complying with said notice, he shall be liable to the penalty provided in section 103 of this by-law.

This section seems to have no sanction as an alternative to that of a penalty and may as well be eliminated from our present subject of consideration.

These references to sections 59, 60 and 61, are solely for the purpose of appreciating correctly the bearing of the notices given by the inspector to appellant relative to the business in hand.

Before considering the notices given and effect thereof let us try to correctly apprehend first what the true import of sections 56 and 57 may be.

Let us assume that the inspector found by actual survey of the premises that the structure was in a dangerous state, did he act as section 56 of this by-law required ? Did he shore the building up or otherwise secure it ? Or put a proper board or fence to protect passengers ?

None of these acts are conditions precedent to exercising the authority to demolish, but they indicate

the nature of the danger to be avoided thereby; and which must exist as a condition precedent to the exercise of such authority.

It indicates moreover the deliberate judgment required to be taken in such an emergency. Demolition is a desperate remedy and only to be resorted to in cases such as this when neither altering nor repairing nor strengthening can avail, and, in such alternative, only when the man on whom the obligation rests to do so makes clear default after having been duly ordered to do some such specific thing as the inspector's survey justifies him in ordering.

What is the "dangerous state" to be found before acting? Is it a dangerous state with regard to passers-by on the street or elsewhere that people have a right to go or are permitted as of apparent right to go? Or is it the prospective danger arising from fire or possibly unsanitary conditions as regards the habitation of the building?

All that section 59 of the statute seems to contemplate as ground for demolition is that the building "may endanger the lives of the citizens." And the by-law can go no further. Its attempted execution of the purpose of the statute must be restricted within the express authority of the statute.

The inspector or other authority named may, as section 56 of the by-law signifies, be properly authorized to do as specified.

Now, what are the facts relative to this building which has been demolished? And what was done?

The structure was unfinished, incapable of occupation, and hence it cannot properly be said to have endangered the lives of those in it.

And as there are two, and only two possible ways,

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by which the statute seems to contemplate a danger; one to the citizens generally, and the other to the occupants, any special danger to workmen engaged in its erection seems beyond the purview of the enactment.

It would seem, therefore, as if a "dangerous state" relative to passers-by on the street or possible lanes where people were accustomed to go was all that could be considered by way of justifying demolition in this particular case.

Did the inspector feel under need of shoring it up? If so, he does not seem to have acted upon his convictions in that regard.

I cannot find he either did that or fenced it in or placarded it as dangerous, and these were his instructions by the by-law.

And if it was in a dangerous state, when did it become so, and what measures did he take to protect the citizens? A notice was served in March, clearly inapplicable and indeed only indirectly relied upon.

Another notice was served on the 20th of May, 1898. That pretends to rest on sections 56, 57 and 61 of the by-law number 107, but ends up as follows:

> Vous êtes en conséquence requis d'abattre, démolir, réparer ou renforcer la dite maison, suivant qu'il en sera requis, immédiatement, à compter de la signification du présent avis; à défaut de quoi, vous serez poursuivi et encourrez la pénalité imposée par le dit règlement.

That clearly does not point to demolition, but to a prosecution for a penalty imposed by the by-law.

And an abortive prosecution ensued.

On the 20th of June, 1898, a more specific notice is given, but rests only upon sections 59 and 61, which I have already shewn are outside the scope of demolition, and sections 12 and 14 still further beyond same

scope and the notice like its predecessors only threatens prosecution for penalties under the by-law.

It seems pursuant to this the appellant was prosecuted with some greater success than on the first occasion.

On the 9th of August, 1898, he is served with a notice addressed to him in the following terms.

Monsieur:—

Avis vous est, par les présentes, donné que la bâtisse sur votre propriété, portant le numéro 755, du plan cadastral et généralement connu sous le numéro civique, avenue Hôtel-de-Ville et rue St. Norbert, quartier St. Louis, de la cité de Montréal, et présentement, est dans une condition dangereuse, et cela en contravention aux sections 56, 57 et 61 du règlement No. 107 de la dite cité de Montréal.

Vous êtes en conséquence requis d'abattre, démolir, réparer ou renforcer la dite bâtisse, suivant qu'il en sera requis, dans les 24 heures, à compter de la signification du présent avis; à défaut de quoi, vous serez poursuivi et encourrez la pénalité imposée par le dit règlement.

The clerk serving this made a note that Riopelle answered he would not demolish.

There does not seem to be in this any implication that he would not do one or other of the other alternatives presented to him.

I need not pursue the further steps taken or the facts which might, if a proper notice had been served, have given rise to considerations relative to demolition.

I cannot think that such an autocratic power as this ever was intended to be executed by means of such an ambiguous series of alternatives as this notice presents.

The man may have been as wrong-headed as you please, but surely the form of notice might at this fourth attempt have become a little more specific.

It is simply the same from first to last, a threat of prosecution for the penalty incurred.

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Now, how can such a vague threat resting upon three sections by no means relative to an identical offence or species of remedy be a proper foundation for an act of demolition such as this ?

But more than that the man was actually prosecuted in the Recorder's Court as threatened in June by the like notice, and then for the first time there appears in an architect's report something in detail pointing out on the 6th of August at a trial where he was convicted, what were the defects from which, if the building continues as it was, or proceeded to its completion on such a plan, might render it dangerous to the public.

It is suggested this report was read as part of the evidence in the Recorder's Court in appellant's presence, and that hence these details as ground of complaint can be imported into the effect to be given the notice of the 8th of August.

Clearly the proper thing for the inspector to have done was when armed with this report to have made a proper use of it by his deciding how much of this defective building could be rectified by reparations or strengthening and what of each was to be attributed to either branch of his notice and if action was required to be taken thereunder respectively.

A puzzling alternative notice such as given was unjustifiable if demolition was intended.

A forty-eight hour's notice of demolition, when alterations could have been made and charged to the appellant, producing probably at a moderate cost quite as effective a remedy for the protection of the passing citizens who travelled the streets or adjacent lanes, would also have been unjustifiable. What did this notice mean ? It was vague and misleading and

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in light of its several predecessors of the same sort quite insufficient to found demolition upon. It was the same old threat of prosecution for penalty.

The demolition was not ordered in such a specific manner begotten of such a specific necessity or requirement as seems to me can alone justify it in law.

And the alternatives presented were not so specified as both statute and by-law express and imply ought to have been made clear before resorting to demolition.

I think appellant entitled to recover, but am embarrassed to find exactly the lines upon which an inquiry as to damages may proceed.

I am clear upon one point, that a man who builds a house not in conformity with but in violation of the law, has not a house that can be estimated as worth its cost, or worth anything as if a finished building. Hence he has no right to reckon upon rents as part of his damages.

I should say the defects pointed out by the architects may be a guide yet may not.

I rather incline to think the proper way to estimate his damages would be to consider just how much of the structure could have been used and made conformable to the by-law by discarding the parts clearly useless as in violation of the building regulations.

And then having ascertained that, estimate its value as it stood, and deduct from that the value of the material left after the demolition. The balance should be the damages to be allowed.

If the conclusion to be reached is that there was, to begin with, no value if these lines were to be proceeded upon, or in other words, no structure that could be rendered conformable to the requirements of

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the building regulations, then there was no value, and in such case the damages should be assessed, if any exist, at the difference between the material as left and what a prudent owner might have rescued, if necessary for him to have demolished.

If nothing in that, then the only thing the appellant can be entitled to, would be damages for the illegal entrances upon his premises and costs of this suit and this appeal, as well as the appeal in the court below.

The unfortunate delay in reaching an end to this litigation will make it difficult to proceed upon such lines as I have indicated. The act having been found illegal, it would be the part of wisdom for the parties to agree upon a sum upon the lines indicated as properly payable, and have it inserted in this judgment as an end of the matter.

Thirteen years old hasty happenings ought to have got so cooled by this time as to render this last method appear reasonable to all concerned.

The appeal should be allowed.

DUFF J.—This is one of those cases in which a public authority having the power on certain conditions to do acts which otherwise would be an invasion of private property fails to observe the prescribed conditions upon which alone the power is exercisable. In such cases, to use the well-known words of Lord Halsbury, "form is substance," and the municipality by their unauthorized destruction of the plaintiff's property have brought themselves under a liability to pay the damages the plaintiff has suffered by reason of their act.

In estimating these damages it would be necessary,

of course, to take into consideration all the circumstances. The premature destruction of a building which the authorities had the power to destroy on proper notices being given and which they had decided was one that ought to be destroyed might very well appear to a court not to be the occasion of any great loss to the owner. This, as well as other considerations suggested by the evidence, will no doubt be present to the mind of the court when assessing the damages to be awarded. There should be a new trial on the question of damages.

ANGLIN J.—With reluctance, because the conduct of the appellant was wholly indefensible and most provoking to the city officials, who appear to have been considerate and indulgent to him almost to a fault, I find myself obliged to concur in allowing this appeal, on the ground that the *order,* prescribed by section 57 of by-law No. 107 of the City of Montreal as a condition precedent to the right of the building inspector to demolish an offending structure, was never made. The "notice in writing" prescribed by section 56 was apparently given by him to the appellant several times — on the 7th March, the 20th May, the 20th June and the 8th August. No doubt the official thought he had fully complied with the requirements of the by-law. But its scheme is that a notice shall first be given to the owner of the obnoxious structure requiring him "to take down, demolish, secure or repair the same as the case may require" (section 56), and that, in the event of non-compliance with such notice, the inspector shall then *order* the owner to do what he deems requisite within a time to be fixed by him; and it is only upon disobedience to this order

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that the inspector is authorized himself to execute it; (section 57).

The power conferred on this municipal officer is somewhat extraordinary, yet it seems not to be greater than is needed for such a case as that now before us. But legislation which places the citizen and his property so completely under official control should be utilized with great caution. If the courts did not insist that the conditions imposed by such a by-law upon the exercise of the powers which it confers should be fully observed, and that the procedure for which it provides should be strictly followed, though designed as a salutary measure for the protection of public interests, it might easily be made an instrument of oppression destructive of personal liberty — any person whose property is interfered with has a right to require that those who interfere shall comply with the letter of the enactment so far as it makes provision on his behalf: *Herron* v. *Rathmines and Rathgar Improvement Commissioners*(1), at page 523, *per* Lord Macnaghten.

I have little doubt that the notice of the 8th August, which fixed twenty-four hours as the delay within which the plaintiff was required to conform to it, was meant by the inspector to be an order under section 57 of the by-law. But it was in form merely a notice, and the building was not subject to demolition by the inspector until an order, made by him after non-compliance by the owner with a notice previously given by him, had been disobeyed.

For these reasons I feel constrained to allow this appeal and to remit the action to the Superior Court for assessment of the plaintiffs' damages.

(1) [1892] A.C. 498.

It by no means follows that, because his buildings have been demolished without full compliance with the provisions of the municipal by-law, the appellant is entitled to recover as damages their full cost price. He succeeds upon a technical ground. The buildings would appear to have been flimsily and defectively constructed.

If on the 8th August an order under section 57 had been made and served on the plaintiff, instead of a notice under section 56, it would seem probable that he would have had no cause of action against the city. In these circumstances, if the inspector, upon fully complying with the conditions of the statute, would have been within his right in demolishing the plaintiff's buildings as he did, and if the demolition was carried out with reasonable care, a court properly advised would award comparatively small damages. If, on the other hand, the buildings as erected could have been made to fulfil the requirements of the municipal building by-law and could have been put into such a condition as would render them safely habitable, while their demolition might not be justified, the cost of such repairs, alterations and additions as would be necessary to make them safe and in conformity with the requirements of the by-law should be taken into account in assessing the plaintiff's damages. Again, it may be that only partial demolition was necessary. All these matters should be carefully considered in estimating the damages which the plaintiff is entitled to recover. Moreover, it should not be forgotten that he built without a permit. If the character of his buildings was such — if they were so radically and fundamentally bad that he would not be entitled to a permit for them whatever alterations he

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made in them, however he strengthened and improved them, they had no real value and he sustained no substantial damages by their demolition, unless indeed it was so carried out that reckless and unnecessary injury was done to the building materials.

The appellant is entitled to his costs in this court and to his costs already incurred in the provincial courts. The costs of the assessment of damages will be dealt with in the Superior Court.

Appeal allowed with costs.

Solicitors for the appellant: *McAvoy, Handfield & Handfield.*

Solicitors for the respondent: *Ethier & Co.*

THE CITY OF WOODSTOCK (PLAINTIFF) ..... APPELLANT;

AND

THE COUNTY OF OXFORD (DEFENDANT) ..... RESPONDENT.

1911
*May 15.
*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—City and county—Separation—Agreement as to assets—Subsequent discovery of funds not included—Action for city's share.

In 1901 the Town of Woodstock was incorporated as a city and in February, 1902, the City and the County of Oxford entered into an agreement, ratified by their respective by-laws purporting to settle all questions between them arising out of the erection of the town into a city. This agreement was acted upon until December, 1907, when the city, claiming to have discovered the existence of a fund of $37,000, collected from the ratepayers of the several municipalities composing the county, which had not been considered in the settlement, brought action for its share of said fund, but did not ask for rescission or modification of the agreement.

Held, affirming the judgment of the Court of Appeal (22 Ont. L.R. 151) that in the absence of fraud or mutual mistake the agreement was a bar to such action.

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

The facts of the case are sufficiently set out in the above head-note.

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

(1) 22 Ont. L.R. 151.

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CITY OF WOODSTOCK v. COUNTY OF OXFORD.

Idington J.

Watson K.C. for the appellant.

Bicknell K.C. and *S. G. McKay* for the respondent.

The judgment of the court was delivered by:

IDINGTON J.—The appellant was created by 1 Edw. VII. ch. 75, a city. Section 6 of that Act provided as follows:

> 6. The provisions of the "Municipal Act" relating to matters consequent on the formation of new municipal corporations, and the other provisions of the "Municipal Act" aforesaid shall, except so far as herein otherwise provided, apply to the said corporation of the City of Woodstock in the same manner as if the said town had been erected into a city under the provisions of the "Municipal Act."

It became the duty of the parties hereto upon said Act coming into effect to take steps for adjusting by agreement or arbitration all matters affecting their respective interests in respect of the assets in which they might have had a joint interest and of the obligations for the indebtedness due by the county and incurred for the common benefit.

They agreed in writing as to all these things, and as to the current expenses relative to the administration of justice, maintenance of buildings, use of and maintenance of the poor-house and of the registry office for the then next five years.

The appellant alleging, five years afterwards, a discovery of what was patent to everybody who cared to read at the time, viz., of an accumulation of surpluses arising out of annual levies, which might well have been taken into account in this adjustment and charged to the county in reduction of the county debt, before apportioning the share of it to be borne by each, has sued herein to recover what it alleges to have been its share of moneys so levied as to produce such surplus.

It is manifest that the agreement was, as on its face it purports to be, a settlement of the financial arrangements between the county and the city, as required by the "Municipal Act."

The "Municipal Act" certainly contemplated that no such outstanding claim should remain unsettled for a year, much less five or six years.

In the absence of fraud or mutual mistake, the agreement must stand as an insuperable barrier to opening up such a matter.

From the day it was duly executed it concluded both parties as to any such outstanding claim unless rescinded or reformed.

There is no case made by the pleadings for rescission, and no case made by the evidence for reformation.

In adjusting matters such as this comprehensive agreement deals with, there is always much to be yielded on each side at every step, and it is looked at in the spirit of compromise by all fair-minded men so engaged. How can we, or any court, say what the result would have been if the committee room had been placarded with the annual statements shewing all this, now claimed to be a discovery? The result might have been a trifle less on account of annual contribution of appellant to the debt, and a larger contribution on some of the other things bargained for.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. H. Nellis.*
Solicitors for the respondent: *McKay & Mahon.*

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*March 9, 10.
*June 1.

CHARLES S. O. CROCKETT (PLAINTIFF) ..... APPELLANT;

AND

THE TOWN OF CAMPBELLTON (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal corporation—Water service—Statutory authority—Construction of statute—Water for domestic, fire and other purposes—Motive power—Discretion of council.

The charter of a town (50 Vict. ch. 58, sec. 6 [N.B.]) provides that "the town council of Town of Campbellton are hereby authorized and empowered to provide for the said town a good and sufficient supply of water for domestic, fire and other purposes."

Held, per Fitzpatrick C.J. and Duff J. (Idington J. contra, Davies and Anglin JJ. *dubitante*), that the statute empowers the municipality to furnish water for the use of the customer in working a printing-press.

The town council, by by-law, fixed the rates to be paid for water including "printing presses, one service, 1¼ pipe or less, per year, $30." C., proprietor of a newspaper and printing establishment, connected his premises with the water mains by a two-inch pipe and received water for a year for his motor, paying said rate therefor. He then continued the use of the water for some months when the council passed a resolution that newspaper proprietors should be notified that the supply would be cut off at a certain date, which was done. C. brought an action for damages to his business.

Held, per Idington J.—The Council had no authority to make the contract with C.; there was no authority in the absence of a special contract with the town, to place a two-inch service pipe for receipt of water; and if the municipality had power to enter into this agreement it was under no duty to exercise it.

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

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Per Fitzpatrick C.J. and Duff J., that the municipality having entered upon the service of the appellant's motor was bound to continue it unless and until the council in the *bonâ fide* and reasonable exercise of its discretion thought it desirable to discontinue it in the interest of the inhabitants as a whole.

Per Davies and Anglin JJ.—If any contract existed it was one under which C. was entitled to a supply of water for his motor so long as the town council should, in its discretion, deem it advisable to continue it. There was no evidence to warrant the jury's finding that the council was guilty of negligence and exercised its discretion *malâ fide*.

Per Fitzpatrick C.J. and Duff J.—The circumstances disclosed were such as to warrant a finding of unfair discrimination against C., but the damages awarded were excessive.

Judgment ordering a new trial (39 N.B. Rep. 573) affirmed.

APPEAL from the judgment of the Supreme Court of New Brunswick (1) setting aside the verdict for the plaintiff and ordering a new trial.

The facts of the case are sufficiently stated in the above head-note.

O. S. Crockett, for the appellant.

Teed K.C., for the respondent.

THE CHIEF JUSTICE.—I agree in the opinion stated by Mr. Justice Duff.

DAVIES J.—I agree with my brother Anglin.

IDINGTON J.—It is to be regretted that the law of New Brunswick did not, when judgment was given in appeal (though since changed), permit of the court of appeal dismissing an action when there existed no sufficient evidence to warrant a verdict for any of the alleged causes of action. It had then no alternative but to grant a new trial.

(1) 39 N.B. Rep. 573.

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The action is founded upon the supposed capacity of a municipal corporation created by a special Act, to contract in such a way as to bind it for a term of a year or more to supply water for a motor in an industrial establishment and that it had effectually become so bound.

The limit of its legal capacity in regard to water supply is contained in the following words from section 6 of said charter:

> The town council of the Town of Campbellton are hereby authorized and empowered to provide for the said town a good and sufficient supply of water for domestic, fire and other purposes, etc.

I cannot read these words as in law empowering such undertakings as are necessary to implement all that is implied in the alleged power to supply this motive power. If the power exists relative to a small machine does it not in absence of any limitation exist as to all the possible manifold operations of water power? Where is the limit? Such powers are never presumed to have been conferred unless the purpose to do so is made clear by the legislative language used.

When this difficulty was suggested counsel fell back upon the expression "franchises of the company" which appears in the Act enabling respondent to acquire a water-supply system owned by a local company.

It certainly was necessary in order to put an end to the power of the company in the town that the latter should acquire the franchises.

That was an expedient measure far from enabling when accomplished to use all of such franchises.

To acquire for purposes of extinction is one thing and for purposes of using is quite another.

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The power to use cannot be implied from anything in the enactments before us. And as to the nature or extent of such franchises there is nothing to shew what they were.

Such being the foundation of the town council's power it passed a by-law determining what tolls were to be taken by it for the use of water it might supply.

One item is as follows:

> Printing presses, one service, 1¼ pipe or less, per year, $30.00.

This cannot create a power out of nothing. But the town council had power to pass by-laws. The power was limited to what was needed

> in order to *secure to the inhabitants of the said town an abundant supply of water and electricity,*

section 21 of 60 Vict. ch. 58.

This does not seem to favour the contention that the power extended to a supply of motive force relative to industrial operative machinery.

The town council, it is said, though not shewn how, had appointed a committee that went under the name of water and something.

We are told in argument, and it is not denied, that there is no evidence in this case defining the powers of this committee. So we are left to infer, if we can, from its name, that it must have had ample power to bind the town. It acted in some way. I am not sure that it ever was quite unanimous, or a majority so, as to this business. And it is urged that out of the divergent views its members presented to the court of what did transpire something must be made, for this committee kept no records and made no written reports of its transactions.

One thing we are quite sure of. A two-inch ser-

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vice pipe was put in connecting this appellant's premises with the respondent's mains, and a year later the town got thirty dollars.

What right such a committee had to put in a two-inch pipe service when the only boundary of authority they would seem to have was this by-law fixing rates; yet that made no provision of rate for more than an inch-and-a-quarter pipe.

It is said the full capacity of this pipe was not used. I am quite willing to assume that as perfectly true and do so assume.

But it is obvious that this two-inch service-pipe was the only record we have to guide us as to the result of the agreement. It must be taken as the limit of what was from day to day tendered for use and usable if desired.

In the by-law it is expressly declared as follows:

> For purposes not mentioned herein, or for larger services than above named, or for peculiar circumstances, special agreement to be made with the town council.

When the year in question had expired nothing further was done in way of agreement.

The appellant continued without any further payment or tender of rates until his supply was cut off as complained of, or determination thereof was arrived at, though such rates were payable on the first of the months of March, July and November. Two of these gale-days had passed before this water was finally shut off.

On the 11th of December, 1906, the town council decided the water should be cut off from this motor

> in one week's time from date, on account of the very low pressure of water.

Notice of this was given the appellant next day.

The resolution was rescinded on the 18th of December, but on the 26th of February, 1907, the council resolved that the proprietors of newspapers using water for motor purposes should

be notified that the water for their water motors will be shut off on the first day of April next.

Such is the alleged contract and breach thereof for which damages are sought.

Where is the contract? What power existed to make it? What authority had those placing a two-inch service pipe there for appellant's use in face of the express prohibition of the by-law unless and until an express agreement had been made with the town council for such special contract? Since when has the law implied any right in any one to say that his mere continuation of enjoyment after expiry of the first term implies any further fixed term for its enjoyment? The law does not in any such case imply any such thing unless and until there has been something done from which an inference of purpose and agreement can be drawn.

The case of master and servant, *Beeston* v. *Collyer* (1), relied upon, illustrates how such an inference may, after years of continuation in service and payment for fixed periods of time, on fixed days, during successive years, be drawn therefrom.

When no authority nearer than this can be found for the contention, it seems needless to argue further.

Then it is said the very resolution cutting off for a specific reason, and rescinding it next week, can found such an inference and fix a term of one year as having been agreed upon. It seems impossible to hold such to be the law in any case.

(1) 4 Bing. 309.

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CROCKETT v. TOWN OF CAMPBELLTON.

Idington J.

And where, as here, the whole proceeding was irregular and no binding contract ever had been made of the special nature involved, the claim as founded upon contract is hopeless.

Then, was there any duty devolving upon respondent to supply water for power; or supply power derived from use of water in any way ?

I cannot find that there ever existed any power in the respondent to enter upon such an enterprise. In the entire absence of such power there could be no duty to do so.

And even if there could be said to have existed a power enabling the respondent to do such a thing, there could not exist any duty in law to exercise it. If such an exercise of a given power ever was contemplated, certainly there exists in the statutes no express and imperative duty to exercise it, nor is there anything in the legislation and conditions presented for our consideration that can warrant us in holding any legal implication of such duty to exercise the power had arisen.

There being neither contract nor duty the claims for negligence and alleged malice all fall with these other claims.

The appeal must be dismissed with costs.

DUFF J.—I think the proper inference from the various provisions of the statute empowering the municipality to maintain a water-works' system is that having entered upon a particular service for any of the authorized purposes the municipality is bound to make such provision for that service as may reasonably be required unless and until the council of the municipality in the *bonâ fide* and reasonable exer-

cise of its discretion thinks it desirable to discontinue it in the interests of the inhabitants as a whole. That a service such as that furnished the appellant was within the contemplation of the Act seems hardly open to doubt; "domestic, fire or other purposes" is a phrase which in its literal meaning embraces — nobody would dispute — the purpose to which the appellant was devoting the water supplied to him. "Other purposes," it is said, is to be construed *ejusdem generis*. But what is the *genus* which comprehends the purpose of fire protection as well as everything denoted by the comprehensive words "domestic purposes," and at the same time excludes the working of a motor? I have heard no attempt to answer this question. There appears to be nothing in the objection that a by-law was required. The existence of a by-law might in such circumstances be inferred. *City of Victoria* v. *Patterson*(1), at pages 623 and 624.

The question then is, was there evidence of *malâ fides* fit to be submitted to the jury? It is a point upon which I have a good deal of doubt. But if they accepted the plaintiff's story, as they evidently did, the jury might not improperly have thought the conduct of the members of the council from first to last only explicable upon the hypothesis of actual ill-will towards the plaintiff. On that hypothesis the circumstances were such, I think, as to support a finding of unfair discrimination against him.

I am not able, however, to escape the conclusion that the damages awarded are excessive; and on that question there should, I think, be a new trial. I do

(1) [1899] A.C. 615.

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Anglin J.

not enter upon the question in detail as that becomes unnecessary in view of the opinion on the other points taken by the majority of the court.

ANGLIN J.—In my opinion, if any contract was established by the plaintiff it was a contract under which he was entitled to a supply of water for his motor at the rate of $30 per annum so long as the municipal council of the defendant town should in its discretion deem it advisable to continue such supply. I agree with McLeod J. that there was no evidence to support a finding of any other contract.

Neither can I accede to the contention that the defendant owed to the plaintiff a statutory duty to supply him with water power for his motor at all times and regardless of the effect upon the domestic, fire and other similar services of the municipality. I doubt whether the defendant was compellable to furnish water for any such purpose, however great the supply available. But, if it was, the only construction of the statute under which it operated which seems to me at all reasonable is that the municipal council was within its rights in cutting off such a service as that which the plaintiff enjoyed whenever in its judgment to continue it would, or might be prejudicial to the supply requisite for domestic, fire and other similar purposes.

I agree with McLeod J. that there was no evidence to warrant a finding against the defendant of negligence, or of *mala fides* in the exercise of its discretionary power to discontinue the service in question to the plaintiff.

With regret that, under the law in force in New Brunswick when this action was dealt with, it appears

to be not possible finally to dismiss it(1), I concur in the order for a new trial and would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *O. S. Crockett.*

Solicitor for the respondent: *W. A. Trueman.*

(1) Sup. Ct. Act, s. 51.

1911

*March 23.
*June 1.

THE CROWN LIFE INSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

CATHERINE IDA SKINNER (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Final judgment—Action for commissions—Reference—Reservation of further directions and costs.

In an action against an insurance company for agent's commissions on policies and renewals the trial judge gave judgment for the plaintiff, ordered an account to be taken and reserved further directions and costs. His judgment was affirmed by the Court of Appeal.

Held, Fitzpatrick C.J. dissenting, that the decision of the Court of Appeal was not a final judgment from which an appeal would lie to the Supreme Court of Canada.

MOTION to quash an appeal from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff.

The plaintiff, as executrix of her husband, who had been an insurance agent, sued the Crown Life Ins. Co. for commissions on policies and renewals alleged to have been earned by said agent. The company denied liability and counterclaimed for money claimed to be due them from the agent. The trial judge gave judgment for the plaintiff, ordered a reference to take an account and reserved further direc-

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

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tions and costs. The Court of Appeal having sustained this judgment the company sought to appeal to the Supreme Court of Canada. The respondent, plaintiff, moved to quash the appeal.

G. F. Henderson K.C. for the motion.

Mowat K.C. contra.

THE CHIEF JUSTICE (dissenting).—In my opinion the motion to quash this appeal should be dismissed with costs.

DAVIES J.—I take no part in the judgment on this motion, being interested.

IDINGTON J.—The question is raised of our jurisdiction to hear this appeal. The learned trial judge found that the plaintiff (now respondent) was entitled to an account and directed a reference to take such account and report, and reserved further directions and subsequent costs, and the Court of Appeal upholds the judgment.

Can it be said that this is a final judgment ? The answer appears in the following cases; *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*(1), where an order to enter speedy judgment was held not a final judgment, as the clerk had to compute the amount. *The Ontario and Quebec Railway Co.* v. *Marcheterre*(2), where the Court of Queen's Bench for Lower Canada had quashed an appeal to that court from the Court of Review, and it was held such judgment, though ap-

(1) 19 Can. S.C.R. 434. (2) 17 Can. S.C.R. 141.

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parently concluding the parties' rights, was not such a final judgment as the "Supreme and Exchequer Courts Act" designated such.

The claim was for five thousand dollars. The plaintiff had been found, as here, entitled to recover and a reference directed to determine the damages, but no report thereon at the time of this attempted appeal.

The Bank of British North America v. *Walker* (1), where a judgment overruling demurrer held not final. *Griffith* v. *Harwood*(2), where a judgment affirming the dismissal of a plea of prescription held not final when other pleas on the record undisposed of. *The Canadian Pacific Railway Co.* v. *The City of Toronto*(3), where it was held that a ruling by a master on the reference as to title was not a final judgment.

These are not, by any means, all, but specimens illustrative, in many ways, of the view this court has taken of the words "final judgment.' '

And in each of these cases, and in others of like kind, there could not be a doubt but that, in a more or less extensive sense, the rights of the litigants had been finally bound; yet the judgments were not final in the sense held to be the meaning in the "Supreme and Exchequer Courts Act" and, hence, no appeal could lie.

Another case was *The City of Toronto* v. *Metallic Roofing Co.*(4), where the court rendered a judgment which I thought then, and still think, was in conflict with the foregoing cases.

(1) Cass. Dig. (2 ed.) 214, 425.
(2) 30 Can. S.C.R. 315.
(3) 30 Can. S.C.R. 337.
(4) 37 Can. S.C.R. 692; Cam. S.C. Prac. 17; Cout. Cas. 388.

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So matters stood till *Wenger* v. *Lamont*(1), which was a case of a judgment and reference to take accounts and this court held no appeal could lie.

In that case the judgment of reference was not quite the same as in this case, but, on the other question of the amount involved in the controversy, that could be no doubt that, outside the record, it was shewn, as the late Mr. Justice Girouard pointed out in dissenting, the evidence so far as taken at the trial disclosed a case involving more than a thousand dollars.

The judgment not being final, I am not much concerned as to amount.

I think this motion should be allowed with costs.

DUFF J.—It seems to me to be very clear that the judgment in this case is not a final judgment as that phrase has been interpreted in this court and in the courts in England for the purpose of deciding controversies respecting the right of appeal. *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*(2); *Ex parte Moore*(3), *per* Brett M.R., at pages 633 and 634.

ANGLIN J.—I am satisfied that the judgment from which it is sought to appeal is not a final judgment within the meaning of sub-section (*c*) of section 2 of the "Supreme Court Act," as interpreted in the decisions of this court.

It was not suggested that, although it be not a final judgment, there is a right of appeal from it under any other provision of the statute.

(1) 41 Can. S.C.R. 603. (2) 19 Can. S.C.R. 434.
(3) 14 Q.B.D. 627.

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Anglin J.

The motion to quash therefore prevails.

There is nothing which can be regarded as amounting to a special reason for granting leave to appeal.

The respondent is entitled to her costs of the application.

Motion refused with costs.

Solicitors for the appellants: *Hodgins, Heighington & Bastedo.*

Solicitors for the respondent: *Millar, Ferguson & Hunter.*

R. SID SMITH (DEFENDANT).....APPELLANT; 1911

*May 16.
*June 1.

AND

THE GOW-GANDA MINES, LIMITED AND OTHERS (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Joint stock company—Allotment of shares—Surrender by allottee—Unpaid calls—Transfer—Waiver.

S. subscribed for shares in a mining company, was notified of allotment of the same and paid the amount due on a first call as agreed. Later he notified the company that he withdrew his subscription and refusing to pay further calls was sued therefor. It turned out that when S. subscribed for the stock all the shares had been allotted by the company and those given to him had been obtained by surrender from one of the original allottees.

Held, that under the Ontario Companies Act, when stock has been allotted by a company, the only case in which the directors can regain control of it, is that of forfeiture for non-payment of calls. As in this case there was no forfeiture, the company did not legally own the stock allotted to S. and could not compel him to pay for it.

Held, also, that the provision in said Act that stock on which calls are unpaid cannot be transferred, is imperative and cannot be waived by the company.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the trial judge in favour of the plaintiffs.

The facts of the case are stated in the above headnote.

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

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Hellmuth K.C. and *Ziba Gallagher* for the appellant.

Smyth K.C. for the respondents.

The Chief Justice.

THE CHIEF JUSTICE.—This is an action for calls upon stock of the respondent company for which it is alleged the appellant subscribed. It is admitted that the appellant signed a certain subscription agreement but he denies that the shares for which he agreed to subscribe were ever allotted to him. The action was maintained by the trial judge and his judgment confirmed on appeal. Other defences were set up; but the sole question to be considered in this appeal is: Was the appellant ever a shareholder of the respondent, liable to pay the calls for which this action is brought? The inquiry is, on the evidence did the company ever do that which it was entitled to do, if it was really meant to make the appellant a shareholder? It is important to bear in mind that the action is not for breach of an agreement to take stock, but for moneys due by the appellant for calls made in respect of shares of the respondent company. The claim, therefore, is based on the assumption that the appellant is the holder of certain shares of that company and is in arrears for calls made on those shares. The appellant could become shareholder in one of two ways:

1st. By the allotment of shares from the company through the board of directors.

2ndly. By a transfer of shares to him by a shareholder.

There can be no doubt that at the time of his subscription, as found by the trial judge, all the shares were allotted to other subscribers and that there was

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The Chief Justice.

no stock at that time which the directors could allot to the appellant under the subscription agreement. The judgments below, however, proceed on the ground that appellant's subscriptions were taken in lieu of subscriptions of former subscribers to whom allotments were made but who were allowed to withdraw and whose stock was allotted or re-allotted to the appellant.

To maintain those judgments on the facts of this case it would be necessary to hold that a shareholder to whom stock has been allotted may be relieved of his obligations by the consent of the board of directors. Unless forfeited for non-payment of calls the directors have no control over shares that have been allotted. The title to those shares is fixed and the company cannot substitute any one for the allottee, and there is no pretence that there was a forfeiture here. Title of course can be acquired by transfer, if all the calls then due on the stock transferred have been paid; but here there were unpaid calls due by the original allottee and there is in addition no evidence that any transfer was executed to the appellant or that he ever heard of, or was asked to accept, any transfer.

I would allow this appeal with costs.

DAVIES J. concurred with the Chief Justice.

IDINGTON J.—I cannot see how, having due regard to the provisions of the "Ontario Companies Act," it can be held that after a call had been made on allotted stock and whilst such call remained unpaid, the respondent company could allot stock to some one else and hold him liable as if he had duly sub-

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scribed for such stock, no matter how anxious he was to get stock or the man called upon was to get rid of what he had been allotted.

Nor can I see how a bargain forbidden by the statute can be converted into a bargain for something the parties never contracted for with each other.

I think it is impossible to attribute appellant's subscription, for a certain number of shares only offered out of a specified block of stock, to a subscription for some other stock neither party had contemplated as in the market. Even if it could have been, contrary to the intention as evidenced by the documents, there has been no call made in respect of it.

It is a contract between the parties that is sued upon, but it is one that is subject to and can become operative only within certain statutory limitations.

The appeal should, I think, be allowed only with such costs throughout as the appellant might have been allowed to tax had he from the start confined his contention in defence and counterclaim to the neat point involved in this appeal. And I think he should be ordered to pay the respondents the costs throughout of and incidental to all other contentions set up by him in his pleadings and in the trial and in appeal below and here, such costs to be set off *pro tanto* against the amount he is entitled to recover on his counterclaim and (if need be) costs taxed to him.

DUFF J.—I think Mr. Hellmuth's contention is unanswerable. The directors had not the slightest intention of allotting to Smith any of the 300,000 shares of the nominal capital which had not already been allotted. Smith had no intention of applying

for such shares. Smith expected to receive, when he made his application, and the directors intended to give him, when they professed to make him a shareholder, a part of the 700,000 shares which, under the existing arrangement, it was understood should be issued.

In fact the whole of this 700,000 shares had been allotted to other persons; and what the directors intended to do and believed they were doing was to cancel the allotments of some of these shares and re-allot them to Smith. They did not profess and had no intention to forfeit these shares for non-payment of calls. They acted upon the assumption, which, of course, nobody disputes was a mistake on their part, that having allotted a part of their share capital to a person who thereby became a shareholder they could by the consent of that person cancel the allotment and by that process acquire full power to deal with the shares as a part of the unissued capital of the company. This, it is perfectly clear, they could not do. As to the suggestion that Smith may be treated as a transferee holding under transfer from the previous allottees, that suggestion must fall to the ground for two reasons: 1st, there was no transfer in fact and Smith's application was an application to the company for an allotment of shares; and 2ndly, it seems to me to be perfectly clear that there is a statutory prohibition against the transfer of shares upon which calls are unpaid. The argument that the statutory provision is directory merely or can be waived by the directors is, in my opinion, inadmissible for the short reason I put to Mr. Smyth in the argument, viz., the statute declares the shares themselves in such circumstances to be non-transfer-

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Anglin J.

able; so long as any such call remains unpaid they are *extra commercium.*

ANGLIN J.—Section 54 of the "Ontario Companies Act, 1907," declares shares upon which a call duly made remains unpaid and which have not been forfeited for non-payment to be non-transferable. This provision, it is, in my opinion, not competent for the company or its directors to waive or to override. This section differs essentially from section 16 of the English "Companies Clauses Act," 8 Vict. ch. 16, which merely disentitles a shareholder to transfer such shares as of right; *Ex parte Littledale*(1), and from the not unusual provision that directors may decline to register a transfer of shares made by a person indebted to the company (R.S.C. 1906, ch. 79, sec. 67). It impresses temporarily upon the shares themselves the character of non-transferability. Declared by section 48 to be

> transferable subject to such conditions and restrictions as by this Act * * * may be prescribed,

shares are, by section 54, expressly made non-transferable,

> until all previous calls have been fully paid in, or until declared forfeited for non-payment of calls.

The company can deal with shares in this position only by taking the forfeiture proceedings prescribed by section 56, or, in the case of mining companies, by selling them under section 144. No step was taken under either of these sections.

(1) 9 Ch. App. 257.

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The shares which the defendants undertook to "allot" to the plaintiff were in this position. They had been underwritten and allotted to other subscribers. A call had been made upon them and notice thereof had been given, as provided by the underwriting agreement, through the trustees to whom it was made payable. This call was unpaid. The shares had not been forfeited. The subscription or application of the defendant was for shares included in and subject to the underwriting agreement and not for any other shares. He knew that the entire underwriting of 700,000 shares had been subscribed: he did not know that the entire 700,000 shares had been actually allotted.

Assuming that there was, or should be deemed to have been, a transfer of the 2,500 shares from the persons to whom they had been originally allotted to the plaintiff, sufficient if such shares were then transferable, the character of non-transferability impressed upon them by the statute while any call remained unpaid and they had not been forfeited rendered any attempt to transfer them abortive and ineffectual.

The incapacity of the company to accept a surrender of issued shares and to re-allot them is indisputable. Neither, in view of what was actually done and of the nature of the application or contract signed by the plaintiff, can the company be heard to say that he was allotted shares out of the 300,000 not covered by the underwriting agreement to which his subscription was attached and to the terms of which it was made subject.

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With respect, I would, for these reasons, allow this appeal.

Appeal allowed with costs.

Solicitor for the appellant: *Ziba Gallagher.*

Solicitor for the respondents: *Samuel King.*

THE FRANCIS KERR COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

ROBERT SEELY (PLAINTIFF) ..... RESPONDENT.

1911

*May 5, 6.
*June 1.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Lease—Water lots—Status of lessee—Riparian ownership—Access to lot—Injunction.

S. is a lessee under lease from the City of St. John of a water lot in the harbour, the F. K. Co. are lessees of the next lot to the south and there are other lots to the south between that of S. and the foreshore of the harbour. By his lease S. has a right of access to and from his lot on the east and west sides.

Held, that S. was not a riparian owner and had no rights in respect to the water lot other than those given him by his lease. Hence, he could not restrain the F. K. Co. from erecting a wharf on the adjoining lot which would prevent access to his from the south, a right of access not provided for in his lease.

Judgment of the Supreme Court of New Brunswick (40 N.B. Rep. 8) maintaining the decree of the judge in equity (4 N.B. Eq. 184, 261) reversed, Idington J., dissenting.

APPEAL from a decision of the Supreme Court of New Brunswick(1), affirming the decree of the judge in equity(2), enjoining the defendant company from erecting a wharf on their water lot in the harbour of St. John so as to cut off access from the south to the plaintiff's adjoining lot.

The question in issue on this appeal was whether or not the plaintiff, as lessee of water lot No. 2 in block "A" on the plan inserted below of lots on Sidney slip in the St. John harbour could restrain the defendant company, lessees of the adjoining lot No. 3, from erecting a wharf thereon in such a manner as to deprive the plaintiff of access to and egress from his lot on the southern side, not given him by his lease.

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

(1) 40 N.B. Rep. 8. (2) 4 N.B. Eq. 184, 261.

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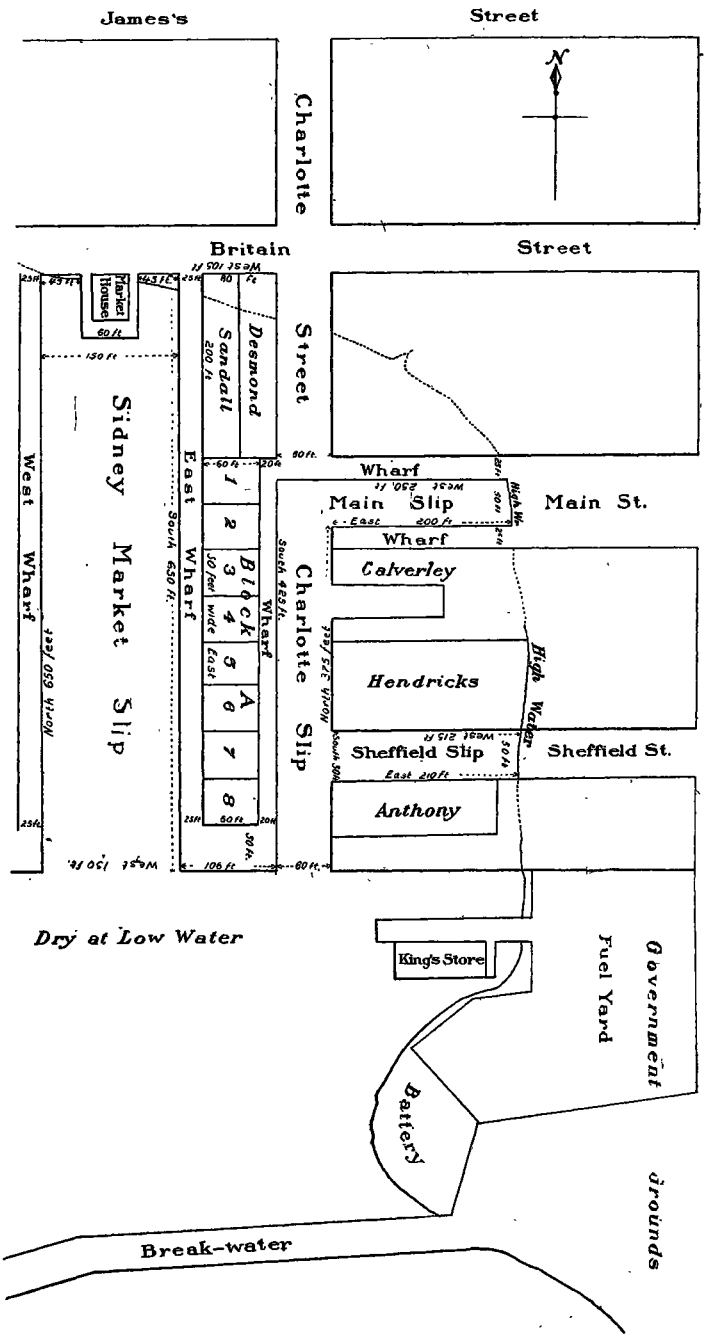
The plan referred to here follows.



The judge in equity held that the plaintiff was entitled to an injunction, which he accordingly granted. His decision was upheld by the full court, and the defendant company appealed to the Supreme Court of Canada.

Hazen K.C. and *J. B. M. Baxter K.C.* for the appellants.

Teed K.C. and *A. A. Wilson K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Anglin.

DAVIES J.—The underlying error pervading the judgment appealed from is, I venture respectfully to say, that of assuming the plaintiff, respondent, to stand in the position of a riparian proprietor and as such entitled to a right of uninterrupted access to his water lot along its southern boundary from the waters of St. John harbour.

In my opinion the plaintiff never was a riparian proprietor in any sense of the word. He was the lessee of the water lot No. 2 forming part of the "flats" so called in St. John harbour lying between high and low-water mark. No part of the *ripa* or bank of the shore was included within or touched the boundaries of his lease. All the lands leased to him were away below high-water mark, and between his land and the *ripa* or bank of the river there intervened other water lots. I lay much emphasis upon this because the judgment of Chief Justice Barker proceeds upon the assumption that the plaintiff, respondent, as lessee of water lot No. 2 possessed the

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rights of a riparian proprietor or rights analogous to them including uninterrupted access from the harbour to and along the *southern boundary of his lot.* The argument at bar for the respondent, plaintiff, proceeded and I think necessarily so upon the same lines.

In my judgment the respondent was not a riparian owner at all and possessed none of the special rights of a riparian proprietor as such. He was simply the lessee of a water-lot lying in the harbour of St. John, between high and low-water mark, and had just such rights and those only as were conferred by his lease or necessarily arose out of it. The appellant took that ground very properly and treated as entirely irrelevant to the controversy between the litigants in this case the mass of learning contained in the cases defining and establishing the rights of a riparian proprietor.

That being so what were the rights of the plaintiff, respondent, under his lease ? It is necessary in order to understand the contentions of the parties that the locations and boundaries of the plaintiff's lot should be clearly understood.

Both litigants are lessees from the City of St. John of water lots in the harbour of St. John. The defendants' lot lies immediately to the south of the plaintiff's. The south side-line of the plaintiff's lot No. 2 is the north side-line of defendants' lot No. 3. Originally these water-lots were laid off according to a plan approved of by the common council of the City of St. John, on the 26th October, 1836. This plan shews the *ripa* or bank of the shore, the streets running north and south to and from the shore, and those running east and west. The shore line north of the lots in question was a little south of Britain street.

The plan shewed two water-lots running south into the harbour a distance of two hundred feet from Britain street. To the east of these two lots ran Charlotte street into what was called Charlotte slip, and lying between Charlotte slip and Sidney-Market slip to the east, the plan shewed eight water-lots comprising what was called "Block A," and numbered from 1 to 8. The plan also shewed a contemplated wharf as running from Britain street into the harbour along the west boundary of all the water-lots, across the southern boundary of water lot No. 8 and then back northerly to Charlotte street. Thus the east and west ends of the two lots abutted on the contemplated wharf, which wharf would be bounded by the Sidney-Market slip and Charlotte slip respectively.

The scheme contemplated all the lots being bounded and enclosed by this wharf on the east, south and west sides, and except over and across this wharf there would be no access from any of these water-lots to the waters of the harbour. From this wharf there would be access to the waters of Charlotte slip on the east side and Sidney-Market slip on the west side.

In the year 1850 the city leased to one Sandall water-lots 1 and 2 of these water-lots shewn on the plan, for the term of twenty-one years. The lease described them as

> those two several lots known and distinguished on the plan of water-lots laid out by the city on the 26th October, 1836, as numbers 1 and 2 in the block of lots distinguished by the letter A, the said lots having each fifty feet front on a vacant space reserved for a wharf and highway of twenty-five feet wide on the east side of Sydney-Market slip, and extending back eastwardly continuing the same breadth, 60 feet, as exhibited on the said plan.

That is, the lots fronted on Sidney-Market slip on the vacant space reserved for a wharf, and extended back

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to a vacant space reserved for a wharf on west side of Charlotte slip. This lease contained a covenant from Sandall, the lessee, binding him to erect a strong wharf of the dimensions given

> along the whole front of the said lots on Charlotte slip and also another wharf along the eastwardly side of the said lots on Charlotte slip as exhibited on the plan,

and provided that both wharves were to be used as streets and public highways, and were for that purpose to be delivered up to the City of St. John for public accommodation reserving right to the lessee to demand and take all wharfage which might become payable for any ships or vessels lying, loading or discharging at the part of the wharf so built by the lessee on Charlotte slip aforesaid.

Some eight years afterwards Sandall having assigned his leasehold interest in water-lot one (1) to one McAvity, and having fulfilled apparently his covenant for the construction of the two public wharves on the east and west boundaries of both lots, and Charlotte street having been extended out into the waters of the harbour as far at least as the southern line of lot 2, a new arrangement was come to between the city on the one hand and the lessee Sandall and his assignee McAvity on the other. The old lease was surrendered up to the city and separate leases were given of the two lots. Lot No. 1 to McAvity and lot No. 2 to Sandall for the unexpired term of the old lease, namely, till 1871, or for a term of twelve years. The descriptions were modified to conform to the then existing conditions, and as Charlotte slip had been filled in and made part of Charlotte street, the lots were fronted and bounded on that street, and the twenty feet originally reserved for a

public wharf being no longer of any use as such was included in the new leases to McAvity and Sandall. Their lots were thus made eighty feet in depth fronting each fifty feet on Charlotte street and extending back to the east side-line of the wharf erected as a public highway on the east side of Sidney-Market slip. The description, however, carefully referred to the plans of the water-lots of the 26th October, 1836, in the same terms as used in the original lease.

As these leases expired new leases were given the lessees or their assignees or representatives for short terms, but in each and all of them the same reference was made to the plan of 1836, which continued to be as it was at the first incorporated in and made by reference a part of the leases.

In the year 1909, the appellants obtained their lease of water-lots 3 and 4 lying to the south of plaintiff's lot 2. No reference is made in the lease to defendants of the plan of 1836, which is referred to in all the plaintiff's leases.

The lands leased the defendants embrace practically water lots No. 3 and 4 as shewn on the original plan of 1836, and the description begins at the south-east corner of lot No. 2 and runs along the whole of its south boundary line. It contemplates a prolongation and broadening of the Sidney-Market wharf, as shewn on a plan attached to it, and leases more land in depth than is contained in plaintiff's lease.

This, however, does not in any way affect the question before us. It is most important to bear in mind that no complaint is made or is being dealt with of any obstruction of plaintiff's right of access to and from Sidney-Market wharf on the west side of his water-lot. Had there been any such interruption or

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stoppage of that right a different question altogether would have arisen. The sole and only question before us in this appeal relates to the plaintiff's claim of a right of uninterrupted access to and from the southern boundary of his water-lot No. 2.

Now it may well be asked: When and how did such right first arise or come into existence ? What created it ? Did the lease of 1850 or that of 1858 or any of the subsequent renewals do so ? If not, did the lessee plaintiff gain it by prescription or can it be held to have arisen in some mysterious way because, as it is alleged, the original scheme contemplated in 1850 as shewn by the plan of 1836, which is read into the lease of that date and the subsequent renewals, has since been abandoned by the city.

For my part, I pressed counsel on the argument on these points, but could not get what for me was any satisfactory answer, nor does the supplementary factum which they were permitted to file afford any such answer.

The learned Chief Justice, if I understand his reasoning correctly, seemed to think the rights of the plaintiff arose out of the new leases granted in 1858, on the surrender of the lease of 1850, because, as he puts it, the description of the lots leased in that later lease of 1858

> left the southern side of lot No. 2 of eighty feet open to the water as affording the only access by water the owner of that lot had to his property.

If the fact was as stated it might be a strong argument in support of the position plaintiff takes and which the Chief Justice indorses; but as I understand the facts and the situation they are altogether different. No one contends that under the lease of

1850 the plaintiff or his predecessor in title had any such right of uninterrupted access on his southern boundary as is now claimed by him. The right of access he had by that lease was not along his southern boundary at all. It was along his east and west boundaries where he had covenanted to build public wharves or highways over one of which he was to have the right to charge and collect wharfage, and his right of access to and from the harbour existed and was provided for. In one sense the language of the Chief Justice is correct, namely, that the only direct access from his own lot No. 2 to the waters of the harbour was on the south side of his lot. But surely the answer to that is that no such direct access to and from his south boundary ever was contemplated. The access which he was intended to have was not from his southern boundary, but from his east and west boundaries into the two slips, Sidney-Market slip and Charlotte slip, over and across the public wharves there. The plan shews that clearly and beyond doubt. It shews a public wharf surrounding all these lots and excluding access to the harbour excepting over this wharf. It shews lots 3, 4, 5, 6, 7 and 8 all lying south between plaintiff's lot and this contemplated wharf. This plan was referred to in such clear and distinct terms as made it a controlling factor in construing the lease of 1850. It is introduced in each succeeding new or renewal lease to the plaintiff and his predecessors in title. It shews clearly that no such right of direct uninterrupted access from the southern boundary of his lot to the waters of the harbour ever was intended or contemplated. Such a right, if conceded, would have effectually destroyed all the other water-lots. The changes made in the description of the lease in

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1858 did not in any way add to the plaintiff's previous rights of access on his southern boundary. Instead of bounding on the wharf to be built by him on the twenty feet of land lying between his lot No. 2 and Charlotte slip on the east, he was bounded on Charlotte street which had been extended and covered the slip. The lessee got that additional land lying between Charlotte street and lot No. 2 included in his lease of 1858. But in what possible way could this change agreed to by lessor and lessee add to or take away from the lessee's rights along his southern boundary ? I fail to see. His access to the harbour remained from his west boundary by way of Sidney-Market slip and on the east from the extension of Charlotte street. That access still remains, as far as we know, unimpaired. At any rate this action is not brought for any infringement or impairment of that right.

From 1858, when the lease of water-lot No. 2 was granted to the plaintiff, and down to 1909 when lot No. 3 was leased to the defendants the title to lot three remained in the City of St. John. That lot 3 bounded plaintiff's lot 2 on its entire southern side. As the owner of lot 3 it was the right of the city to build or use lot 3 as it pleased. If it chose to fill it up or otherwise use it so as to prevent access from the southern side of lot 2 to the waters of the harbour, it was clearly within its right to do so. Whether under the scheme contemplated by the plan of 1836 if such right was exercised a corresponding duty of extending the contemplated wharf along the east side of Sidney-Market slip in front of lot 3 would arise is an entirely different question and does not arise here. The only question before us is as to the claimed right of

uninterrupted access by the plaintiff to the waters of the harbour from the south side of water lot 2 leased to him.

As to the abandonment of this plan, which was suggested, I fail to see any sufficient evidence of it. The renewed and continuous introduction into all the leases of lots 1 and 2 given from 1850 down is cogent evidence against such abandonment. There was no covenant, express or implied, on the part of the city that the complete wharf would be built by it as shewn in the plan. The scheme contemplated was, I think, the leasing of the several lots 1 to 8 inclusive, and the construction of the wharf by the lessees just as in the case of the lessees of lots 1 and 2. The fact that no leases were given of lots 3 to 8 until 1909, is not of itself evidence of any abandonment of the original scheme. There is no evidence that any such lease was ever applied for or ever refused. The absence of any reference to this plan of 1836 in the lease to the defendants in 1909 is explained by the fact that the plan had been lost, but whatever inference of abandonment of the scheme of constructing a continuous wharf around the eight lots contemplated by the plan of 1836 might be drawn from the granting of the lease to the defendants in 1909 of the water-lots on the south side of the lot 2 leased to plaintiff, it could not possibly operate to confer upon the plaintiffs' rights of access which their own leases not only did not give them, but which, in my judgment, these leases read in conjunction with the plans incorporated in them clearly negatived.

The argument that any such right as that claimed by the plaintiff could have been under the facts of these successive leases gained by prescription was mentioned, but hardly pressed, by counsel and could not, in my judgment, be sustained.

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If there could, under the evidence, be held to have been an abandonment in 1909 when defendants' lease was given or, before that, of the original scheme of constructing a public wharf or highway around these lots connecting with the city streets such an abandonment could not possibly operate to confer upon the lessee of lot No. 2 rights such as these claimed herein not necessary for the enjoyment of his lot and not directly arising out of his lease. Whether in case such abandonment was proved and the defendants suffered any damage as a consequence a right of action accrued to them for such damages gives rise to a question which I do not stop to discuss, as it does not arise in this action.

The appeal should be allowed, the injunction dissolved and the action dismissed with costs in all the courts.

IDINGTON J. (dissenting).—The question raised by this appeal is whether or not the City of St. John, having demised to the respondent's predecessor in title a part of the foreshore in said city, has derogated from its grant by a lease to Francis Kerr under whom appellants claim.

The city was incorporated by royal charter on the 26th of July, 1785, and granted all the then ungranted land or ground whatsoever, covered or uncovered with water, and lying within the boundaries of said city and given

full power, license and authority not only to establish, appoint, order and direct, the making and laying out all other streets, lanes, alleys, highways, water-courses, bridges and slips, heretofore made, laid out or used, or hereafter to be made, laid out and used, but also the altering, amending, and repairing all such streets, lanes, alleys, highways, water-courses, bridges and slips, heretofore made, laid out or used, or hereafter to be made, laid out or used in and throughout the said City of Saint

John, and the vicinity thereof, throughout the county of Saint John hereinafter mentioned and erected, and also beyond the limits of the said city, on either side thereof, so always as such piers or wharves so to be erected, or streets so to be laid out, do not extend to the taking away of any person's right or property, without his, her, or their consent, or by some known laws of the said Province of New Brunswick, or by the law of the land.

This grant of incorporation, and of land and powers or privileges, was confirmed by 26 Geo. III. ch. 46 (3 L. & P. S., p. 3).

In 1836 the common council of the city took steps to frame a scheme for the utilization of a large part of the foreshore so granted. And a plan reported to the council by a committee was adopted, yet there seems a doubt as to the finality or legal effect thereof.

The report accompanying the plan recommended the leasing of lots laid out according to said plan when completed.

Their acts in regard thereto even if valid were liable to change. The city and those claiming under its leases or licenses, according to the plan, might be held bound thereby for the purposes of such leases or licenses. But a plan and the purposes of that day were not immutable. And the conduct of the city authorities as well as the public right to which I will hereafter advert, must all be borne in mind if we would determine this case aright.

This plan was somewhat extensive and evidently too ambitious for the time. The part of it we are concerned with may be described as a rectangular block, (105) one hundred and five feet wide by (650) six hundred and fifty feet in length, having on its north side a street called Britain street, running along and barely touching the foreshore. On the west side was a slip known as Sidney-Market slip, (150) one hundred and fifty feet in width, and (650) six hundred

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and fifty feet in length southerly from the said Britain street. On the east side the boundary was the extension of Charlotte street running at right angles to and south from Britain street two hundred feet to a wharf twenty-five feet wide which runs parallel with Britain street, and from the south side of that wharf to the southern end of the block (425) four hundred and twenty-five feet a slip to be known as Charlotte slip (60) sixty feet wide.

There lay south of it and other like blocks parallel to it a large tract of land only dry at low water. As the tide rolled in at high water the block in question would be covered by water to a depth of from ten to fifteen feet or more, if we assume the condition then the same as now. I infer such vessels as could, came in over it as of right to Britain street.

The plan proposed to divide this block as follows: Two lots one hundred feet long and together eighty feet wide fronting on Britain street and flanked by Charlotte street and marked by names of persons probably occupying them then. South of these lots there were to be laid out eight lots each fifty feet in width and sixty feet in depth, numbered from the north end to the south, one to eight. And on the east side of said lots so numbered, a strip was marked for a wharf twenty feet wide between Charlotte slip and the ends of said lots. On the west side of all of said lots a strip was marked for a wharf twenty-five feet wide running from Britain street to the southerly boundary of the block. And the whole south end of the block, between lot eight and the southerly side of the block was marked as if to connect both wharves by one of fifty feet wide.

This plan was filed in the office of the common

clerk and so remains, though mislaid at the time when this litigation began and for many years previously.

There does not seem to have been anything done with the property so plotted out till the year 1850, when the city demised to one John Sandall for twenty-one years to be computed from the 1st of May, 1849,

all those two several lots, pieces and parcels of land, beach or flats, situate, lying and being in Sidney ward in the said city and known and distinguished on the plan of water-lots laid out there by the said Mayor, Aldermen and Commonalty of the City of Saint John, approved of in common council, on the 26th October, A.D. 1836, and on file in the office of the common clerk of the said city by the numbers (1) one and (2) two in the block of lots distinguished by the letter "A," the said lots being each fifty feet front on a vacant space reserved for a wharf and highway of twenty-five feet wide on the east side of Sidney-Market slip and extending back eastwardly continuing the same breadth sixty feet, as exhibited on the said plan, with all and singular, the rights, members and appurtenances to same lots belonging or in any wise appertaining: to have and to hold * * *

Sandall covenanted within two years from said date to

erect, build and complete a good substantial and strong wharf of twenty-five feet wide and of such height as will allow the top thereof to be two feet above high water at the highest spring tides along the whole front of the said lots on Sidney-Market slip as aforesaid, and also within the time aforesaid, erect, build and complete another good substantial and strong wharf of twenty-five feet wide and of similar construction and height along the eastwardly sides of the said lots on Charlotte slip, as exhibited on the said plan. The said several wharves when completed to be used as streets and public highways and for that purpose to be delivered up to the said Mayor, Aldermen and Commonalty of the City of Saint John and their successors for public accommodation, he, the said John Sandall, his executors, administrators and assigns, nevertheless, being entitled to demand and have, receive, and take all wharfage and emoluments which may arise and become payable from any ships or vessels lying, loading or discharging at that part of the said wharf which may have been so built by him, the said John Sandall, his executors, administrators or assigns, on Charlotte slip aforesaid, for and during so long a time as he, the said John Sandall, his executors, administrators or assigns may continue to hold the lots and premises aforesaid by virtue of these presents.

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The lease provided that if Sandall put wharves, bridges, buildings or other improvements on these lots, such erections were to be valued at the end of his term and the city to have the option of paying same or re-letting the property to him for seven years by lease to contain the like covenants.

There seems to have been an interest in lot 1 assigned by Sandall to one McAvity, and in 1858, both surrendered to the city, and on the same day new leases made by the city to each of the parties so become interested.

The new leases are made to cover more ground. McAvity got lot one, and Sandall lot two, but the description comprising lot two is as follows:

> All that certain lot, piece and parcel of land, beach or flats, situate, lying and being in Sidney ward, in the said city and known and distinguished on the plan of water-lots laid out there by the said Mayor, Aldermen and Commonalty of the said City of Saint John, approved of in council on the 26th October, A.D. 1836, and on file in the office of the common clerk of the said city, by the number (2) two, in the block of lots distinguished by the letter "A," the said lot being fifty feet front on Charlotte street, extending back preserving the same breadth, eighty feet, or to the east side line of the wharf erected as and for a public highway on the east side of Sidney-Market slip, with all and singular the rights, members, and appurtenances to the said lot belonging, or in any wise appertaining: to have and to hold * * *

It is clear from this that the plan was so far departed from as to abandon the purpose of continuing Charlotte slip as such, and to constitute that space a street and the land demised is made to front on that street, and run back eighty feet to the wharf on the west side, to be used as a public wharf and highway, which, I infer, Sandall had constructed in accordance with his covenant to do so, before the surrender and new demises.

A curious feature of the case is that this public

wharf is now sixty feet wide, including the twenty-five feet in width thus erected, as I infer, by Sandall. When was it so widened, and by whom? Witnesses who do speak of the existence of this wharf refer to it as being in existence for fifty to fifty-five years. Collins, who worked in 1874 at the premises in question, says the public wharf was twenty feet, about, in width. I think the fair inference is that it had been extended to sixty feet wide shortly after that time, and indeed may have been so at the time of the granting of the last renewal leases in 1882. Since that, which would be for seven years, in fact there has been no further renewal made.

The new leases to McAvity and Sandall respectively, made in 1858, were to continue for the term of twelve years which exactly covers the residue of the twenty-one year term in the original lease to Sandall.

No one seems to have taken up the other lots in this block till Kerr got the lease I am about to refer to.

Meantime the Sandall lease has been renewed from time to time till 1882, and ever since has been assumed to be renewed by the conduct of the parties and payment of rent, for the space just described. The last term is now thus vested in respondent and unexpired containing covenants for compensation for improvements or renewals as first provided, unless the term may have become a yearly tenancy as to which no contention is set up.

All these successive lessees of lot two and the added easterly strip, have used, apparently as of right from time to time, the south end of the wharf erected on said lands as well as the westerly side for unloading vessels. The leases were clearly to enable the

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lessees to use the demised premises for the business of wharfingers and the like businesses needing access to and from the sea or tidal waters thereof.

It is, therefore, contended that the city's lease gives this right of access, and thereby it became appurtenant to said land and was so, when last demised "with the appurtenances" to the respondent or those under whom he claims.

In argument there are several ways that the grounds of such claim were presented. The right having been acquired by prescription was tentatively suggested; and then that a grant might be presumed after so long an exercise of the right; and finally that the plan was entirely abandoned and the case one of a demise of so much land clearly useful only for wharf purposes, and unloading and storage in connection therewith, and impliedly demised for such purposes, with two sides open to the sea the right of access must be presumed to have been intended as part of the grant made by way of demise. One means of access was alongside and over the public wharf and highway on the east side, and the other on the south open to the tidal flow of the sea.

As to prescription or presumption of a grant, it seems to me on reading the evidence and considering all the circumstances, and especially want of evidence of transfer from one lessee to another, it is idle to contend for either. They were each and all independent lessees claiming under the same landlord for brief periods. I think certainly this part of the history might have been made clearer.

The only arguable ground, as it seems to me, upon which the respondent's contention of right of access to the southerly side of lot two can be maintained, is

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some such ground as is stated in the ground last mentioned, or what was not precisely taken in argument, but may be a fair presentation of what was aimed at therein. It is this, that the departure from the plan in 1858 closing up Charlotte slip and thereby depriving the lessees of access for vessels on that side followed by so long a period of actual use by its lessees of the southerly access, and recognition thereof by the city, it must be taken to have intended, in making later renewals, and especially this last one, to have included this right of access to the south side as one of the appurtenances covered by the lease.

If there had never been framed any plan or scheme for developing this foreshore property, but the city in the exercise of its rights and powers over it acquired by the grant above quoted, had demised for wharf purposes this very land now held by respondent, and described it by metes and bounds after having appropriated, as in fact had been done in this instance, the lands adjoining the northerly and easterly sides, could it be said that thereafter the city could with impunity shut off access on both or either of the remaining sides ? Is it conceivable that such a proceeding could be held as a thing rightfully done, and that it was not a derogation from the grant ?

Something was said of there being no riparian rights in such a case, and it seemed to be supposed by this argument that when quit of that basis of right the appellants were freed from the law as laid down in the case of *Lyon* v. *Fishmongers' Co.*(1). The principle of law proceeded upon therein must surely be observed. The right of access in that case rested upon the riparian rights of the plaintiff. The right in this

(1) 1 App. Cas. 662.

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case rests upon the nature of the grant and the necessary implications therein, having regard to "the position into which the parties have placed themselves," as expressed by Cotton L.J. in the *Birmingham, Dudley and District Banking Co.* v. *Ross*(1), at page 308.

I am disposed to bear in mind in this connection in addition to the considerations noted by Chief Justice Barker, the peculiar nature of the title to and powers over the foreshore conferred upon the city by the grant to it.

The cases of *Attorney-General* v. *Burridge*(2), and *Attorney-General* v. *Parmeter*(3), as well as the case of *Mayor of Colchester* v. *Brooke*(4), at page 374, and other cases, shew that a grant such as this by the Crown is held subject to the general public right of passage, and cannot entitle the grantee to use the property in a way detrimental to the public.

There may be sanctioned by Parliament an alienation of the foreshore that may destroy any such public right.

But the original grant by the Crown in question here seems to have been such as those which were in question in the cases I refer to. And I doubt if the language of the statute confirming that grant added any more to its effect than if validly granted. It seems to have been simply of a confirmatory nature and possibly to overcome the difficulty akin to that suggested in the case of *The Queen* v. *Clarke*(5), relative to the powers of colonial governors.

Did it not leave the grant to be in effect simply what this court held in *Wood* v. *Esson*(6), resulted

(1) 38 Ch. D. 295.
(2) 10 Price 350.
(3) 10 Price 378.
(4) 7 Q.B. 339.
(5) 7 Moo. P.C. 77.
(6) 9 Can. S.C.R. 239.

from a grant by the Crown merely passing the title to the soil ? And if the grant is considered it seems to be no more than that, and a measure of conservancy which would, when confirmed, enable the exercise of a regulating power.

In argument the question was raised, but not fully argued, and I do no more now than point out that it is not to be lost sight of in considering the implications lying in such a lease so given.

The city shortly before this suit made a lease to Kerr, under whom appellants claim, of the land to the south side of that held by respondent. The lease is dated 11th of March, 1909, and demises

> all that certain piece and parcel of land, beach and flats situate, lying and being in Sidney ward, in the said City of Saint John and bounded as follows, that is to say: beginning at a point on Charlotte street extension three hundred (300) feet south of Britain street or at the south-easterly corner of lot No. 2, thence running in a westerly direction along the southerly end of Sidney-Market wharf one hundred and forty (140) feet, thence southerly along a prolongation of the line of the westerly side of said Sidney-Market wharf parallel to said Charlotte street extension one hundred (100) feet, thence easterly parallel to said southerly end of Sidney-Market wharf one hundred and forty (140) feet or to the westerly side of Charlotte street extension thence northerly along said westerly side one hundred (100) feet to the place of beginning, all as shewn within the red margin on the plan hereto annexed, with all and singular the rights, members and appurtenances to the said lot belonging, or in any wise appertaining: to have and to hold * * * for the term of ten years.

The appellants proceeded to erect on said premises thus demised a wharf. Thereupon this suit was instituted. Clearly the result of such erection if continued will be to shut out respondent from all access to the southerly side of his premises enjoyed for half a century, and impair the possibility of access to same on the westerly side, if not destroy it entirely.

Chief Justice Barker finds that its effect is to close up respondent's entire water-frontage.

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And save such possibilities as the access to the Sidney-Market slip, this seems absolutely so.

That slip was narrowed by the widening of the public wharf some thirty-five feet. It is left only one hundred and fifteen feet wide. Not only have we no evidence of this being of no public use for vessels, but we have the difficulty of the right of access across the added width to the wharf, making it sixty feet instead of twenty-five, across which to transfer freight from vessels to the respondent's property, if at all possible.

Can such a proceeding be held not to be in derogation of the city's grant? Can it be tolerated in law? Does it need authority beyond the principles of law expounded in the *Birmingham, Dudley and District Banking Co.* v. *Ross*(1), and the *Fishmongers' Case*(2), though the points involved here are not identical with those apparent in either of said cases to demonstrate that the respondent is not bound in law to submit to such deprivation of what is implied in the grant to him or those under whom he claims?

Whether we look at it technically as a derogation from the grant or as a breach of an implied covenant as suggested by Bowen L.J., in the *Birmingham Case* (1), the wrong seems flagrant. The later cases of *Aldin* v. *Latimer, Clark, Muirhead & Co.*(3), and *Cable* v. *Bryant*(4), may also be looked at for instances of the application of the principle of law expounded therein and authorities cited in them relative to it.

But those who profess to give this right to do so are by the very terms of their charter, if we look at

(1) 38 Ch. D. 295.
(2) 1 App. Cas. 662.
(3) [1894] 2 Ch. 437.
(4) [1908] 1 Ch. 259.

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its language, scope and purpose, conservators of the public right and in duty bound as such to see that those acquiring leases such as respondent has are enabled to carry on their business as wharfingers.

The only excuse offered is that the plan referred to plainly indicated that lots three and four marked thereon were to have been the subject of such leases as made of numbers one and two, and that these lots are comprised in the lease to appellants. True they are, and a great deal more, but so far from following the plan the numbers of lots are not even named in the lease, but metes and bounds are assigned which are absolutely at variance with the plan.

The plan has been departed from in almost every other material respect. Why not also by leaving a slip at the south end wide enough to serve the land in question, and something further south as was proposed to appellants?

The plan must be treated as abandoned if fair dealing is to prevail. It certainly cannot, as against respondent, be appealed to unless the city is prepared to abide by it, save in so far as the closing of Charlotte slip, evidently assented to by all parties concerned when converted into a street. If the plan with that exception had been adhered to the respondent would have the entrance and access originally contemplated. Now he is to be deprived thereof on the strength of the plan. And in the next place they claim the plan is fatal to the right of plaintiff, but deprive him of the plan.

Counsel took exception to the comparison by the court below of the right involved, to that in cases of lateral support in the soil for adjacent buildings.

But without entering upon that inquiry, I may

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say the comparison and illustrations were made by Lord Cairns (in quoting with approval Lord Wensleydale in *Chasemore* v. *Richards* (1)) in determining the *Fishmonger's Case* (2). I have already pointed out the analogy in principle involved there and here. It all comes back to what right of access must be implied in a grant in a given case. The grant of anything for a specific purpose surely implies that the grantor should not so use his property or power as to destroy entirely (even though done bit by bit) that which he has granted.

Appellants have failed so far to shew authority justifying their conduct, that counsel are driven to rely on the case of *Crook* v. *Corporation of Seaford* (3), which relates to an agreement relative to some marsh land, and was a case of specific performance in no way involving the rights of navigation or the accommodation therefor such as wharves.

As conservators of this harbour the city authorities are no doubt entitled to modify plans, but in so doing are not to deprive others of their rights.

The appeal should be dismissed with costs.

DUFF J.—I agree in the result.

ANGLIN J.—With very great respect for the learned Chief Justice and the judges of the Supreme Court of New Brunswick, I find myself unable to agree in the view which they have taken of this case.

It is, I think, unquestionable that under the original lease of lots one and two made to John Sandall

(1) 7 H.L.C. 349, at p. 382. (2) 1 App. Cas. 662.
(3) 6 Ch. App. 551.

in 1850 he took and held this property subject to the right of the city to lease or otherwise deal with the adjoining lots, Nos. 3 and 4, and the other lots in block "A" lying to the south for purposes which would deprive the lessee of lot No. 2 of any water-frontage along its southern limit. Although in 1858 there was a departure from the original plan of 1836 according to which lots 1 and 2 had been leased, in that provision was then made for converting the Charlotte street slip into a public street, the new leases which the respondent's predecessors then took establish their acquiescence in such departure and also sufficiently indicate that in other respects their rights as lessees of lots 1 and 2 were intended to be the same as they had been under the lease of 1850. That the city by the leases of 1858 forewent any of its rights in respect of lots 3 and 4 and the other lots in block "A" shewn on the plan of 1836 or subjected these lots to any such easement or servitude as the plaintiff asserts cannot, in my opinion, be successfully maintained. The leases themselves make it clear that the plan was to be adhered to subject to the necessary modification of it due to the conversion of the Charlotte street slip into a street. Throughout the subsequent renewal leases of lots 1 and 2 down to and inclusive of those under which the respondents now hold them (except that by an obviously clerical error 1856 is sometimes written for 1836) lots 1 and 2 are consistently described as lots in block "A" according to the plan of 1836, modified, of course, by the arrangement of 1858, which gave to the leased property an additional depth of 20 feet with a frontage on the Charlotte street extension in lieu of a frontage on Charlotte street slip. I, therefore, find nothing in the various documents under which the respondent asserts title, taken by themselves,

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which confers upon him any such right as he claims in this case.

Neither do I find in the circumstances existing at the time of the making of any of the several leases upon which the plaintiff relies, as disclosed in the record, anything which would, in my opinion, justify us in holding that the plan of 1836, which the parties deliberately embodied in these leases, as part of the description of the premises leased, should be put aside or ignored. The lease of lot 2 according to that plan, subject to the modification of 1858, excludes the idea that by virtue of it the plaintiff's predecessor in title acquired anything in the nature of riparian rights — anything which would now entitle him to require the city to preserve for him the water-access to the southern side of lot 2, which he had enjoyed merely because the city had not itself, or by any tenant or assign, exercised such rights as it possessed in respect of lot No. 3.

The evidence in the record is insufficient to establish a case of prescriptive acquisition of a right to have vessels come up to and lie against the southern face of the wharf built on lot 2 and of a consequent easement or servitude over lot 3, if indeed such a right could in the circumstances of this case be acquired by any mere user, however extensive or prolonged.

The terms of the charter of the City of St. John, confirmed by legislation(1), are wide enough to enable the city to lease lots 3 and 4 to the defendants for building purposes, as it had in the exercise of the same powers previously leased lots 1 and 2 to the predecessors in title of the plaintiff.

(1) 26 Geo. III. ch. 46.

By a clause of the charter (pages 1010-11) all

messuages, tenements, dwelling-houses, lots of ground and all other lands or grounds whatsoever, covered or uncovered with water, situate, lying and being within the said City of Saint John and the limits and boundaries thereof, saving all houses, lands, tenements and hereditaments held, enjoyed or legally claimable by subjects of the Crown) are vested in the Mayor, Aldermen and Commonalty of the City of St. John and their successors forever to be held "in free and common socage, as of our manor of East Greenwich, etc.

This description includes all the lots shewn on block "A" of the plan of 1836 and surrounding lands covered by water.

By another clause of the charter (p. 1014) the common-lands on the east side of the harbour are declared to be for the common use of the inhabitants of the city residing on that side of the harbour and it is provided that the rents, issues and proceeds arising by the sale or other disposal thereof shall be applied to the improvement, benefit and advantage of that part of the city and of the inhabitants thereof. The Mayor, Aldermen and Commonalty are also made conservators of the water of the river, harbour, and bay of the city (pp. 998-9) and have conferred upon them

the sole power of amending and improving the said river, bay, and harbour for the more convenient, safe and easy navigating, riding and fastening the shipping resorting to the said city;

and they are empowered

as they shall see proper (to) erect and build such and so many piers and wharves into the river as well for the better securing the said harbour and for the lading and unlading of goods as for the making docks and slips for the purpose aforesaid.

They are further empowered

to establish, appoint, order and direct the making and laying out of other streets, lanes, alleys, highways, water-courses, bridges and slips heretofore made, laid out or used or hereafter to be made, laid out and used and also to alter, amend and repair all such streets, lanes,

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alleys, highways, water-courses, bridges and slips * * * so always as such piers or wharves so to be erected or streets so to be laid out do not extend to the taking away of any person's right or property without his, her or their consent or by some known laws of the said Province of New Brunswick or by the law of the land.

The soil of the water-lots is therefore vested in the municipal corporation. As part of the common lands these lots are subject to the powers of the city to sell or otherwise dispose of them. The charter clearly contemplates that they may be leased. While private rights of property are expressly saved, the municipal corporation is empowered to construct, or to provide for the construction of slips, piers and wharves as it shall see proper, and in doing so it is empowered to interfere as far as may be necessary with the public right of navigation. The scheme of the plan of 1836 was within the powers conferred by its charter upon the City of St. John. In making the lease to the defendants of which the plaintiff complains the city, therefore, did not unwarrantably interfere with any public right, nor, as pointed out above, did it without sanction of law take from the plaintiff the private right or property of the loss of which he now complains. It could not take from him that to which he had no legal title.

The plaintiff's claim in this action and the judgment in appeal extend only to preventing the defendants injuring or obstructing the plaintiff's alleged

right of access to the waters of the harbour on the southern side of the plaintiff's wharf, or the privileges heretofore enjoyed by the plaintiff of laying and mooring craft, loading and unloading, and embarking and disembarking goods on the south side of the plaintiff's wharf.

The building of a wharf or other construction on the most easterly 80 feet of the premises which the city has purported to lease to the defendants and which

lie immediately along the southern frontage of lot No. 2 will effectually destroy the right which the plaintiff asserts. If the defendants cannot be prevented from building on this part of the premises leased to them this action must fail. The plaintiff presently makes no claim in respect of any erection which they have placed or may place on the westerly 60 feet of the premises lying immediately south of the east wharf of the Sidney slip. Indeed, if the defendants build upon the easterly 80 feet of their premises the plaintiff's access by water to the southern side of his existing wharf would be totally destroyed, and any erection on the westerly 60 feet could not further affect it. Whatever rights the plaintiff may have in respect of this latter parcel of land leased to the defendants, whether he is or is not entitled to have it utilized for the purposes of a public wharf and highway free from any buildings or other obstruction which would interfere with such use of it — whatever claim he may have against the city for damages based on any failure on its part to observe or fulfil its obligations to him in regard to the scheme defined by the plan of 1836, in my opinion he has not any right of access by water to the southern front of lot 2 such as would entitle him to the relief which he seeks in this action and which he has been accorded in the provincial courts. He has not made a case of prescriptive right; and the lease to the defendants, at all events as to lots 3 and 4 as shewn on the plan of 1836, involves no derogation by the city from its earlier deeds under which the plaintiff claims.

I would allow this appeal with costs in this court and in the provincial appellate court and would dismiss this action with costs.

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Appeal allowed with costs.

Solicitor for the appellants: *J. B. M. Baxter.*

Solicitor for the respondent: *A. A. Wilson.*

IN THE MATTER OF THE ONTARIO SUGAR CO.

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*Aug. 3.
*Aug. 4.

McKINNON'S CASE.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Winding-up Act—Leave to appeal.

Leave to appeal to the Supreme Court of Canada from a judgment in proceedings under the "Winding-up Act" will not be granted, though the amount in controversy exceeds $2,000, if no important principle of law nor the construction of a public Act, nor any public interest is involved, especially if the judgment sought to be appealed against appears to be sound.

MOTION for leave to appeal from a decision of the Court of Appeal for Ontario affirming the judgment of Meredith C.J.(1), who sustained the refusal of a referee to place S. F. McKinnon on the list of contributories of the Ontario Sugar Co. in process of liquidation under the "Winding-up Act."

The facts are fully stated in the judgment of Mr. Justice Anglin on the application for leave.

W. N. Tilley for the motion.

Wallbridge, for McKinnon, contra.

ANGLIN J.—The liquidator applies under section 106 of the Dominion "Winding-up Act" for leave to appeal to this court from the judgment of the Court of Appeal for Ontario, affirming the judgment of Mere-

*PRESENT:—Mr. Justice Anglin in Chambers.

(1) 22 Ont. L.R. 621.

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dith C.J.(1), who dismissed an appeal by the liquidator from the refusal of the referee to place the name of Mr. S. F. McKinnon on the list of contributories in respect of a sum of $5,000 unpaid on certain shares of the insolvent company. To the liquidator's claim McKinnon has pleaded, *inter alia,* that it is *res judicata* that he is not the holder of these shares. This plea is based upon a consent judgment dismissing an action brought by the company, in 1902, to recover from McKinnon the same sum of $5,000 in respect of unpaid calls. To the company's claim he then answered that he was not a shareholder and, alternatively, that the calls sued upon had not been regularly made. He also brought in a third party against whom he claimed indemnity. The judgment dismissing the action provided for the withdrawal of the claim against the third party.

In reply to the plea of *res judicata* the liquidator urges that since irregularity in the making of the calls would, if established, have been a sufficient defence to the company's action, the record does not shew a determination in McKinnon's favour of the issue whether he was or was not a shareholder.

In the present proceedings the regularity of the calls is admitted. Referring particularly to this admission, the learned Chief Justice of the Common Pleas held that it was sufficiently established that

> the ground upon which the respondent succeeded in the action was that he was not a shareholder in the company.

In delivering the unanimous opinion of the Court of Appeal the learned Chief Justice of Ontario makes special mention of the withdrawal of McKinnon's claim against the third party as indicating that it was intended that there should be "an end to all

(1) 22 Ont. L.R. 621.

claims upon the shares." I do not, however, understand him to reject the grounds upon which Sir W. R. Meredith based his judgment, but rather to add to them another leading to the same conclusion.

Looking at all the circumstances of the former action including those which appear to have received special attention in the provincial courts, and also the conduct of the company and its officers in regard to the respondent's status as a shareholder from the date of the judgment in 1904 down to the commencement of the liquidation in 1908 — he did not receive notice of the meetings or other proceedings of the company — I see no reason to doubt the correctness of the judgment against which the liquidator seeks to appeal.

That a consent judgment will support a plea of *res judicata* is conceded. Although contested by counsel for the applicant, the proposition that the court may look beyond the judgment and the pleadings to ascertain what issue was actually determined in an action, is well established by the authorities which the learned Chief Justices cite. The facts proper to be considered in this case make it reasonably clear that by the consent judgment the parties meant to dispose finally of the issue whether the defendant was or was not a shareholder in the plaintiff company. The judgment of which the liquidator now complains—I say it with respect—seems to me to be plainly right. Leave to appeal might properly be refused on this ground. *Lake Erie and Detroit River Ry. Co.* v. *Marsh* (1).

But, whether right or wrong, that judgment merely decides that from particular facts the proper infer-

(1) 35 Can. S.C.R. 197.

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ence is that by the consent judgment dismissing the company's action it was determined that McKinnon was not a shareholder. The proposed appeal raises no question of public importance. *Dominion Council of Royal Templars of Temperance* v. *Hargrove*(1). The affirmance or reversal by this court of the judgment of the Ontario Court of Appeal would not settle any important question of law or dispose of any matter of public interest. *Whyte Packing Co.* v. *Pringle*(2). These usual grounds for seeking leave to appeal are therefore absent.

I have not overlooked the fact that in section 48 (*e*) of the "Supreme Court Act," under which the cases that I have cited were decided, "special leave" is mentioned, while in section 106 of the "Winding-up Act," "leave" is the term used. But "leave" must be granted in the exercise of judicial discretion. Matters other than the amount involved in the appeal must be considered — and amongst them those to which I have alluded. Notwithstanding Mr. Tilley's able argument, unless leave to appeal to this court should be given as a matter of course in every case in which a substantial amount is at stake, I find no reason for granting the present application. Having twice appealed unsuccessfully, the liquidator has certainly discharged his whole duty. Although he has carried his case to the court of last resort in the province, his contention has not been accepted by a single judge. In a further appeal I see no prospect of any advantage to the insolvent estate, but rather a very great probability of its being involved in useless additional heavy expense. This litigation has been

(1) 31 Can. S.C.R. 385. (2) 42 Can. S.C.R. 691.

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already prolonged. The respondent should not lightly be subjected to the worry and the cost of further proceedings, which, so far as I can see, would serve no good purpose. This seems to be eminently a case in which the judgment of the provincial Court of Appeal should be accepted as final.

The motion will be dismissed with costs fixed at the figure usual in this court — $50.

Motion dismissed with costs.

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