REPORTS

OF THE

SUPREME COURT

OF

CANADA

REPORTER

C. H. MASTERS, K.C.

CIVIL LAW REPORTER AND ASSISTANT REPORTER

L. W. COUTLÉE, K.C., (QUE.)

PUBLISHED PURSUANT TO THE STATUTE BY

E. R. CAMERON, K.C., REGISTRAR OF THE COURT

Vol. 50.

CANADA LAW BOOK COMPANY, LTD.,
84 BAY STREET
TORONTO, ____ CANADA
1915

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. SIR CHARLES FITZPATRICK C.J., G.C.M.G.

" SIR LOUIS HENRY DAVIES J., K.C.M.G.

" JOHN IDINGTON J.

" LYMAN POORE DUFF J.

" FRANCIS ALEXANDER ANGLIN J.

" LOUIS PHILIPPE BRODEUR J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. CHARLES JOSEPH DOHERTY K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ARTHUR MEIGHEN K.C.

ERRATA ET ADDENDA.

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

Page 46, line 18, for "properly" read "probably."
" 107, line 19, for "comprised" read "compromised."
" 108, line 22, for "resource" read "recourse."
" 225, add foot-note reference to report of judgment appealed from, as follows: "15 Can. Ry. Cas. 35; 10 D.L.R. 300."
" 405, line 11, for "*Henney*" read "*Kenney*."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 49 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Alberta Railway Legislation, In re (48 Can. S.C.R. 9). Appeal to Privy Council dismissed without costs, 22 Oct., 1914. ((1915) A.C. 363.)

Beamish v. *James Richardson & Sons* (49 Can. S.C.R. 595). Leave to appeal to Privy Council refused with costs, 25th Nov., 1914.

Canadian Pacific Railway Co. v. *Chalifour et al.* (51 Can. S.C.R. 234). Leave to appeal to Privy Council granted, 8th July, 1915.

Hesseltine et al. v. *Nelles* (47 Can. S.C.R. 230). Appeal to Privy Council dismissed with costs, 20th Oct., 1914. ((1915) A.C. 355.)

Howard v. *Miller* (not reported). Appeal to Privy Council allowed with costs, 6th Nov., 1914. ((1915) A.C. 318.)

McKenzie, Mann & Co. v. *Eastern Trust Co.* (not reported). Appeal to Privy Council allowed with costs, 27th April, 1915.

Robinson v. *Grand Trunk Railway Co.* (47 Can. S.C.R. 622). Appeal to Privy Council allowed, 20th April, 1915.

Stecher Lithographic Co. v. *Ontario Seed Co. and Uffleman* (46 Can. S.C.R. 540). Appeal to Privy Council dismissed with costs, 9th Nov., 1914.

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CASES

DETERMINED BY THE

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ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

CHARLES E. YOCKNEY (DEFENDANT) ..... APPELLANT;

AND

JOHN ANDREW THOMPSON (PLAINTIFF) ..... RESPONDENT.

1914

*May 11, 12.
*May 18.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Registry laws—Manitoba "Real Property Act," ss. 100, 130—Agreement for mortgage—Caveat—"Interest in land"—Registration subject to incumbrance—Indorsement on instrument registered.

A mortgagee or incumbrancee of lands in Manitoba, subject to the "new system" of registration of titles, has such an interest in the lands as entitles him to file a caveat under section 130 of the "Real Property Act," R.S.M. ch. 148; consequently, where the owner of such lands, for valuable consideration, agrees to execute a mortgage thereon in favour of another person, the right thus obtained constitutes an interest in the lands, within the meaning of section 130, which may be protected by caveat in the manner therein provided; this right is not affected by the terms of section 100 of the "Real Property Act" limiting the effect of mortgages and incumbrances. The judgment appealed from (25 West. L.R. 602, 14 D.L.R. 332) was affirmed.

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

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Per Fitzpatrick C.J. and Idington and Anglin JJ.—Where a mortgage has been registered, under the "new system," indorsed by the registrar as being subject to the caveat of a person claiming the right to have a mortgage in his favour executed affecting the same lands, the mortgagee who has been so registered cannot afterwards claim priority over the right of the caveator.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment of Mathers C.J. at the trial(2), maintaining the plaintiff's action with costs.

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

H. F. Tench for the appellant.
Ewart K.C. for the respondent.

THE CHIEF JUSTICE agreed with Anglin J.

IDINGTON J.—The appellant had obtained a mortgage from his son upon some land which the son had agreed to mortgage to the respondent. To protect this agreement the respondent filed a caveat under the "Real Property Act" of Manitoba. The appellant then registered his mortgage and, as in duty bound, the registrar indorsed the following certificate thereon:—

At the request of the mortgagee this mortgage is registered subject to caveat 62347.

The issue raised is whether or not the appellant is under such circumstances entitled to have it declared that his mortgage has priority over the right of the respondent.

(1) 25 West. L.R. 602; 14 D.L.R. 332.

(2) 22 West. L.R. 863; 8 D.L.R. 776.

For the reasons assigned by the learned trial judge I think respondent was entitled to register his caveat and that the appellant cannot claim to have the same vacated and to have his mortgage prevail over the rights of the respondent in the premises.

The appeal should be dismissed with costs.

DUFF J.—The question on this appeal is whether a contract made by an owner of land in Manitoba, registered under the "new system," by which, for valuable consideration, he agrees to execute a mortgage on the land in favour of another will support a valid caveat under section 130 of the Manitoba "Real Property Act." That section is as follows:—

130. Any person claiming an estate or interest in land, mortgage or incumbrance, under the new system, may file or cause to be filed on his behalf with the district registrar a caveat, in the form in schedule "H" to this Act, forbidding the registration of any person as transferee or owner of, or of any instrument affecting such real estate or interest, or unless such instrument be expressed to be subject to the claim of the caveator.

The appellant contends that the beneficiary of such a contract, claiming to enforce his right to have a mortgage executed in accordance with it, is not a person claiming "an estate or interest in land" within this section. He puts his argument in this way:—The mortgage when executed would not, he says, operate as a transfer of "any estate or interest" in the land and, consequently, a claim to compel the execution of a mortgage is not a claim to any such "estate or interest." This argument is based upon section 100 of the Act, which reads as follows:—

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

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Duff J.

I think the contention should be rejected. The effect of section 100 was fully considered in *Smith* v. *The National Trust Co.*(1). It was there pointed out that, as regards land registered under the new system, title is consummated by registration and that the effect of section 100 is that the holder of a "mortgage or incumbrance" registered under the Act has not vested in him, in whole or in part, the registered title. The execution and registration of the mortgage, in a word, does not immediately effect any dismemberment of the mortgagor's registered title. In that sense the mortgagee has no estate or interest in the land.

I entirely agree, however, with the learned trial judge, that it is something very much like a contradiction in terms to say that a mortgagee, having the powers of sale and foreclosure vested in him by the statute together with other rights as to the possession of the land which the statute gives him, has not, in the broader sense of the words, an interest in the mortgaged land. I do not think section 130 can properly be limited to those cases in which the claim is a claim to be registered as possessor in whole or in part of the registered title. In other words, I do not think it can be properly limited to those cases in which an "interest" is claimed in the restricted sense in which "interest" is used in section 100.

I think the respondent is within the section.

ANGLIN J.—For the reasons which he assigns, I respectfully concur in the conclusion of Mathers C.J., affirmed by the Court of Appeal, that the plaintiff had, under his agreement, an interest in lot 38 within

(1) 45 Can. S.C.R. 618.

the purview of section 130 of the Manitoba "Real Property Act."

Though not as clear or precise in its designation of the nature and extent of the plaintiff's interest as might be desired, the caveat lodged by him states the date of the agreement under which he claims and the parties to it. It also gives the name and address of a firm of solicitors representing him for the service of notices, etc. Its sufficiency for the purposes of the "Real Property Act" was presumably passed upon by the registrar before it was accepted and filed. The registration of the defendant's mortgage is expressly made subject to the caveat. Having regard to all these facts, I am not prepared to reverse the concurrent judgment of the two provincial courts which held it to be sufficient.

I would dismiss the appeal with costs.

BRODEUR J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. F. Tench.*
Solicitor for the respondent: *J. E. Adamson.*

1914

*Feb. 19.
*May 18.

C. W. BURT (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF SYDNEY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Right of action—Protection of railway crossings—Construction of subway—Order-in-council—Apportionment of cost—Land damages—Injurious affection—"Nova Scotia Railway Act," R.S.N.S. (1900), *ss.* 178 *and* 179.

In the City of Sydney the Dominion Iron and Steel Co. and the Dominion Coal Co. owned railways passing along a public highway and intersected by the tracks of the Cape Breton Electric Railway Co. Under the provisions of secs. 178 and 179 of the "Railway Act" (R.S.N.S. (1900), ch. 99) an order-in-council was passed directing that the highway be carried under the said railway tracks, the Dominion Iron & Steel Co. to execute the work and the cost to be paid in a specific proportion by the City and the three companies and "that all the land damages be paid by the City of Sydney," B. owned land opposite the railway tracks and by the construction of the subway the sidewalk in front thereof was narrowed and altered and access to it changed. Claiming that his property was greatly depreciated in value thereby he brought an action against the City of Sydney for compensation therefor.

Held, that the "land damages" which the city was to pay would include damages for injurious affection such as B. claimed. But

Held, Fitzpatrick C.J. and Idington J. dissenting, that the city was not liable for such damages, B.'s only recourse being against the company which executed the work.

Judgment of the Supreme Court of Nova Scotia (47 N.S. Rep. 480) affirmed, Fitzpatrick C.J. and Idington J. dissenting.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the defendant.

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

(1) 47 N.S. Rep. 480.

The facts of the case are sufficiently stated in the above head-note. The only question on the appeal was whether or not the plaintiff had a right of action against the City of Sydney for injurious affection to his property by construction of a subway on a public highway in that city. The trial judge and the Supreme Court of Nova Scotia held that he had none.

Mellish K.C. for the appellant.
Findlay Macdonald for the respondent.

THE CHIEF JUSTICE (dissenting).—I would allow this appeal with costs.

IDINGTON J. (dissenting).—The appellant owns property in Sydney fronting on Victoria Street where a subway has been built which reduces the width of the street and leaves, for the length of the subway, a street of about half the width previously existing and in a manner changes the access to the appellant's property.

He claims that his property has been injuriously affected thereby and that respondent, whose council promoted the creation of this subway by an application to the Governor in Council to direct such work for the public safety as means of crossing two railways, is answerable to him for the damage thus done to his property.

The work was directed by the Governor in Council after hearing respondent and the representatives of the railway companies concerned and the work executed by the Dominion Iron and Steel Co., Limited, according to a plan annexed to the order-in-council.

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The terms of the order-in-council, material for our present consideration, are as follows:—

4. That the Dominion Iron and Steel Company, Limited, shall undertake the construction of the subway at the offer made by the Dominion Iron and Steel Company, Limited, viz., $35,000, and that the City of Sydney shall contribute $5,000; the Cape Breton Electric Company, Limited, and the Dominion Coal Company, Limited, each to contribute one-third of the remainder not to exceed the sum of $10,000, balance of cost of construction to be paid by the Dominion Iron and Steel Company, Limited.

5. That all the land damages be paid by the City of Sydney.

6. That detailed plans and specifications be submitted by the Dominion Iron and Steel Company, Limited, for approval by the Government.

The courts below have held that inasmuch as there was no land taken from the appellant, he has no remedy for anything in the way of his land being injuriously affected.

The order-in-council was founded upon sections 178 and 179 of the "Nova Scotia Railway Act" which are identical in terms with sections 187 and 188 of the "Railway Act of Canada," as consolidated in 1888, save in substituting the Governor in Council for the Railway Committee.

It seems to me that the first question raised is whether or not an action can be founded upon such an order. It is quite correctly stated in the judgment appealed from that the order-in-council cannot enlarge the claim for land damages which must rest upon the statute. But it has been decided in numerous cases that an action may be founded upon orders made under said sections 187 and 188 of the "Railway Act of Canada." The first was the case of the *City of Toronto* v. *The Grand Trunk Railway Co.* (1).

(1) 37 Can. S.C.R. 232.

The action upon the order in that case gave rise to much judicial difference of opinion.

Some able judges in the Court of Appeal seem to have hesitated to hold that in a case where the municipality had not applied to the Railway Committee it could be made liable to such an action.

It so happened in that case that municipal authorities had represented that the condition of things needed something to be done for public safety. This enabled some judges to hold the city liable; though doubting much the liability if that element were out of the case.

That case was followed by the special case of *In re Canadian Pacific Railway Co. and County and Township of York*(1), which had to be decided in part at least on the bare question of the right to bring an action upon such an order though the party to be held liable thereunder had taken no part in the proceedings before the Railway Committee.

The court held on the facts one of the municipalities could not be held a person interested, but the other was and that the action would lie.

Then the question came again before the Ontario courts in the case of *City of Toronto* v. *Canadian Pacific Railway Co.,* wherein it was sought to recover from the city the proportionate share of the cost of certain protective measures ordered by the Railway Committee of the Privy Council of Canada.

The learned trial judge in that case followed the foregoing decisions and his judgment was maintained by the Court of Appeal for Ontario.

Thereupon the city appealed to the Judicial Com-

(1) 25 Ont. App. R. 65.

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mittee of the Privy Council. The result is reported in *City of Toronto* v. *Canadian Pacific Railway Co.*(1), from which it appears that by that time former doubts as to the range and efficacy of such an order had disappeared and the only doubt raised was as to the constitutional power to make an order as against a municipality created by a provincial legislature and supposed until the earliest of these cases to be endowed only with such powers as its creator had given it and hence could not be used for any ulterior purpose as a means of taxing those within its limits.

The Judicial Committee overruled the objection and held the order valid and binding upon the city.

I am unable to distinguish in principle the ground proceeded upon in those cases from that invoked herein which is merely another application of the same principle to a slightly different state of facts.

In the last analysis it is simply a question of the jurisdiction of the Governor in Council within the sections relied upon to execute the purposes of the "Railway Act" by such an order as made.

The section neither expressly nor impliedly directs how the purpose is to be executed. Its object is plain. It may be said that there is an implication that the statutory method of expropriation alone can bound the operation of such an order. The language of Lord Macnaghten in *Corporation of Parkdale* v. *West*(2), to which I will presently advert, lends colour to such a proposition. But that was before the decisions I have referred to and legal history outlined therein.

It would, however, I submit, seem quite competent for the Governor in Council either to direct that the

(1) [1908] A.C. 54. (2) 12 App. Cas. 602.

procedure towards making the crossing should be according to the method laid down in the "Railway Act" whereby the arbitration proceedings provided thereby might be invoked and that all usually done before a railway is built, such as filing a plan or scheme, and that satisfaction be made the owner of land taken for damages, or security given therefor, before any proceedings taken; or that the work be done according to plans specified by the order and be paid for as specified and the land damages be determined as the law in such case may have provided and be also paid by any such party as the order should direct. If that party happened to be a municipality it might well be left in the case of a work to be done on or to improve its own streets to its exercising its power of negotiating with those concerned or resorting to its powers of expropriation or taking its chances of an action and directing accordingly.

Now of the four parties concerned in the execution of this work one only was selected to execute it according to the plan proposed and evidently as a contractor doing the work for a fixed price and each of the other three parties who were concerned was to contribute as directed to the cost the sums respectively allotted as its share of the burden.

Respondent in this respect was to pay some of the cost of execution and meet the land damages.

It certainly cannot be said that each of the railway companies was to be expected to file a plan and give notice thereof and have a separate set of arbitration proceedings to determine the amounts to be paid for land damages. And it cannot be said that one merely undertaking on behalf of itself and others the contract

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to execute the work was expected to assume the responsibility for a series of arbitrations with which it was to have no concern.

It was clearly intended that respondent should attend to, and I think the fair inference is that it did attend to, the business of meeting such claims as involved in securing the right of way, but in course of doing so failed to recognize such claim as appellant might have. It widened the street allowance first and thus ameliorated the condition of things sure to result from executing the work. Whether or not that amelioration was sufficient to meet reasonably the rights of appellant in street accommodation is very questionable.

The street is vested in the respondent which took steps to have it so widened. Evidently respondent thus aided in promoting the furtherance of the enterprise and took part in the wrong, if any, now complained of, by co-operating with those executing the work by lowering or altering the grade of its street. It admits as much though not admitting a prior determination to do so.

Having not only submitted to, but, actively as its minutes shew, promoted the making of the order and agreed to be governed by it, and actively acted upon the order in question and taken no steps to bring about the usual mode of acquiring lands and satisfying the claims of those damnified which it was by the terms of the order to have satisfied, can it in law say it is entitled to go free?

I have looked at a great many cases of actions founded upon the rights given by virtue of statutes and from the case of *Beckford* v. *Hood*(1), where it

(1) 7 T.R. 620.

was held that by virtue of the "Copyright Act" a man had acquired a right of property in his literary productions for infringement of which he had a right of action, down to the present time there have been a great many successful and unsuccessful attempts made to found actions upon some breach of duty created by a statute having been neglected or the statute intended to protect some one having been wilfully violated. As a result of these decisions I think it seems to be now the settled rule to look at the statute and determine in the language of Lord Cairns in the case of *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*(1), at p. 448, whether or not an action can be said to fall within the purview thereof. He said there, when asked to follow the law as laid down in the case of *Couch* v. *Steel*(2), after doubting the rule therein:—

> I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with the body of undertakers as to the manner in which they will keep up certain public works.

I ask now does it lie within the purview of this statute that an action is intended to be brought or may be brought founded upon the right created thereby?

As to the intention, I grant that for a new road and new enterprises crossing each other there is room to urge that the statutory method of expropriation is to be followed.

But as to the case of improved methods of crossing old roads where no new land is to be expropriated and

(1) 2 Ex. D. 441. (2) 3 E. & B. 402.

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where the proceedings indicated by the statute seem quite inappropriate and next to impossible, if not as I incline to think often absolutely impossible, to make them applicable and workable, is there no remedy by action founded upon the statute and the duties and rights founded upon and flowing therefrom?

It is this latter phase of what may arise any day on similar statutes that renders this an important case. The sections authorizing the order are evidently intended to apply to two entirely different conditions of things. And so far from the powers given being in any sense limited or bounded by the procedural methods of expropriation, the cases I have cited shew how much further the courts have gone than might be implied from the judgment in *Corporation of Parkdale* v. *West*(1), where, on the facts, the municipality's power to expropriate was impossible of application.

I have come to the conclusion that despite the neglect to adopt the methods provided by the statute, and impossibility of observing same, a case has arisen in which the right of action may be founded upon the statute and what has been ordered and done thereunder, for which respondent must answer.

I also think it may be well rested upon the active co-operation of the respondent with the railway companies in doing that which was wholly illegal; especially if the only methods by which such a work can be executed lawfully are for a railway company to file a plan, etc., as provided for in the case of a new work or extension of an old one to which such methods will apply.

(1) 12 App. Cas. 602.

The latter is not exactly my view, but rather the former. All I mean to say is that if these methods must be observed, then the respondent has wrongfully contributed, by the use made and permission given to use the street owned and controlled by it, to the detriment of the plaintiff in respect of his property.

In such case it would fall within *Corporation of Parkdale* v. *West*(1).

I should prefer to rest upon the ground that the section comprising both that to which the mode of expropriation given by the Act and that to which such methods cannot be applied, the duty created by statute and order thereunder, as between the parties hereto was violated or neglected by respondent and must be answered by it in way of damages.

The charter of respondent by section 248 vests the legal title of the street in it, by section 249 requires it to keep the streets in repair and by section 265 empowers it to see that anything needed for their protection be observed and measures of prevention of any injury thereto may be taken and especially that it be not encumbered in any way by structures of any kind or otherwise. Armed with these powers it neglected each and all of them. It had, moreover, very ample power to close up permanently "in whole or in part any road or street, or portion of a road or street within the town limits" and had comprehensive powers of expropriation and compensation.

Of course, all this and the bearing thereof herein is predicated upon the hypothesis that there is a claim for damages for injuriously affecting appellant's property.

(1) 12 App. Cas. 602.

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The language of Lord Macnaghten in *Corporation of Parkdale* v. *West*(1), is, though in an action against the municipality, clearly intended to demonstrate that there was in fact a case of a claim under the "Railway Act of Canada" as it appeared in the statute which existed before the consolidation of 1888.

Now under that act as it then stood it was much more difficult to found any claim for the injuriously affecting land than under the later Act from which the "Railway Act of Nova Scotia" seems to have been almost entirely taken.

The judgment of Lord Macnaghten, therefore, seems to put beyond doubt that in such a case as this the man whose lands are to be injuriously affected by executing a work which it is duly competent for the Governor in Council to direct, is not confined to the terms of the single section by virtue of which the Governor in Council acts, but that the whole Act must be looked at and read in a way that will execute its probable purpose.

In the "Nova Scotia Railway Act" there are sections 88 and 138 respectively identical with sections 92 and 144 in the "Canada Railway Act of 1888," which I repeat were more effectively framed to protect the owner of land injuriously affected than is to be found in the earlier acts which were before the court in *Corporation of Parkdale* v. *West*(1).

In that case the railway companies concerned and the municipality had all agreed and signed a memorandum of agreement which provided for the municipality undertaking the work. It alone was sued and unsuccessfully sought to justify under the order of the Railway Committee.

(1) 12 App. Cas. 602.

In many leading features that case and this are alike, but as respondent here did not, as defendant there, actually execute the work, that case does not by any means entirely cover this, but as to the measure of damages it seems in point so far as the judgment needed to go. There are many features in the facts of that case which render it of very doubtful help herein. For the work in question there was not wholly within Parkdale, but stretched into another municipality over which it had no control. There had been local legislation enabling the two municipalities to deal with the matter, but that was ignored in what was done. Yet as to the question of the measure of damages it seems a safe guide.

I have no doubt on the facts there the damages were very much more obvious than here and presented a case much more adaptable to fit the procedural features of the "Railway Act" relative to expropriation to the facts than can be done by what is presented in this case.

All that I have set forth above as within the powers of respondent if it had chosen to exercise them were, upon its peculiar facts automatically, as it were, eliminated from consideration in that case.

The law of Ontario also rendered it impossible for a municipality to destroy the property of landowners fronting upon a street without making compensation.

The charter of respondent gave it more invasive power in this regard than existed in the Village of Parkdale under the "Municipal Act of Ontario," and so far as lowering the grade of the street may be involved the damages recoverable may have to be in that regard measured by a less stringent rule than might have been applicable to Parkdale.

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This, however, is a minor point, not going to the gist of the action.

What I am concerned with is to demonstrate if I can that the Governor in Council acted within the power given and that it became the duty of each party falling within the scope of the order made, to do that which in law it could properly and lawfully do to carry out the order made and that if the respondent had exercised its numerous powers, it could have protected the street until those entitled to compensation had been satisfied or secured and that those entitled by virtue of their property being likely to be injuriously affected were of that class, and that unless and until either by the exercise of its own powers or the exercise by some one of the other parties concerned of a power lying within the power given it, the order of the Governor in Council remained inoperative save in so far as the implied duty thereunder cast upon the respondent to satisfy the claims for "land damages."

It overlooked this and thereby in effect disobeyed the order by which the Governor in Council had directed in that regard as above quoted.

Hence in my view this action must rest upon the statute and the possible duties that the directing power thereunder may impose.

I may repeat that in the alternative there seems a clear case of the respondent having not only neglected to preserve the street, but also joined in an attempt to destroy it unless protected by the authority of the order of the Governor in Council.

The respondent is clearly liable either for its failure to observe the terms of the order-in-council or for this violation of the terms of its charter imposing the duty to maintain the street.

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It is to be observed that the authority of the Governor in Council is by the amendment of 1898, now forming section 8 of the "Railway Act of Nova Scotia," sub-secs. (*h*) and (*i*), more direct and specific than that given the Railway Committee in the "Railway Act of Canada."

The sub-section (*h*) empowers the Governor in Council to direct relative to the construction of railways upon, along or across highways, and sub-section (*i*) empowers as to the compensation to be made to any person or company in respect of any work or measure directed to be made or taken, or the cost thereof, or the proportion of such cost to be borne by any person or company.

In the "Interpretation Act" applicable to this in the Revised Statutes of Nova Scotia, of which the "Railway Act" is one, a person is so defined as to include any body corporate, which the respondent is.

The order-in-council is not perhaps as clearly expressed as it might have been, but it certainly implies that the duty of compensation relative to land damages was imposed upon respondent.

Then section 14 provides that any decision or order made by the Governor in Council under said "Railway Act" may be made an order of the Supreme Court and be enforced in like manner as any rule or order of such court.

All these provisions coupled with the line of cases I have cited upon the right to bring an action to enforce an order of the Railway Committee under the "Railway Act of Canada" decided since the decision in *Corporation of Parkdale* v. *West*(1), somewhat differ-

(1) 12 App. Cas. 602.

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entiate the point of view to be taken here from that held in that case as to what may be the scope of authority implied in an order-in-council under the "Nova Scotia Railway Act."

It was suggested in argument by appellant's counsel that at least a declaration might be made by us which is not necessary or desired if the appeal can be maintained.

If we cannot maintain the appeal, I think we have no right to make any declaration, as this is not a suit for any such purpose even if such a suit is maintainable in a Nova Scotia court.

And, again, it has been suggested that the company constructing the subway are the wrongdoers and should have been parties defendant.

That company was a mere contractor to do the work and get certain compensation and there is no right by or through it to reach the respondent.

If that company and all the other companies concerned had been made parties along with the respondent, they might have answered that it was the duty of respondent alone to bear the burden of compensation for land damages.

If the respondent is liable at all, it can be held liable herein without such circumlocution which could lead nowhere.

In conclusion I may remark that the damages may be insignificant if heed is given to the powers of the city to close part of the street. The measure of damages should be reached by due consideration being given to the possibilities of what might have happened had the city exercised all its powers and the consequent damages in way of compensation in such case.

I think the appeal must be allowed with costs.

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DUFF J.—The controversy in this appeal turns upon the construction of certain sections of the "Nova Scotia Railway Act," sections 178 and 179, chapter 99, R.S. of N.S., and of a certain order-in-council made under the authority of these sections. A brief statement of the material facts will be necessary to shew the exact nature of the points in question.

The appellant is the owner of certain lands in the territorial limits in the City of Sydney, the respondent municipality. Railways of the Dominion Coal Company and the Dominion Iron & Steel Company cross a street within the municipality, known as the Victoria Road. The Cape Breton Electric Co. has a tramway in this road which, following its surface, formerly crossed these railway tracks by a level crossing. The crossing being dangerous, the Governor in Council on April 29th, 1911, made an order in the following terms:—

The Commissioner of Public Works and Mines in a report dated the 18th day of April, 1911, states that the Dominion Coal Company, Limited, and the Dominion Iron and Steel Company, Limited, have constructed and in operation certain railways in the County of Cape Breton to which chapter 99, Revised Statutes of Nova Scotia, 1900, is applicable.

That such railways so in operation pass over and across a highway within the limits of the City of Sydney in the County of Cape Breton, at a point known as the McQuarrie's Crossing;

That it has been represented to the Governor in Council that it is necessary and expedient for the public safety that such highway be protected;

That careful inquiry has been made in respect thereto, and in respect to the best means of affording such protection and as to the apportionment of the costs thereof, and all parties interested have been heard in respect thereto;

That it is necessary and expedient for the public safety and for removing and diminishing the danger arising from the position of the said railways and crossing that the said highway be carried under the said railways.

The Commissioner recommends that the necessary subway be ordered constructed in general accordance with the plans and

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specification submitted by the Dominion Iron & Steel Company, Limited, and referred to on the report of F. W. W. Doane, civil engineer, dated 14th September, 1910, and annexed to the Commissioner's report, but, however, with the following modifications and subject to such approval of the Governor in Council as to the further details thereon.

1. Modification of the sidewalk subway arch under the Dominion Coal Company railway to a span with girders, and reinforced concrete roof.

2. Leaving the south approach, including sidewalk grade, to the approval of the city engineer of the City of Sydney.

The Commissioner further recommends that, except as modified above, the report of the said F. W. W. Doane be adopted, and that the recommendation contained therein be carried into effect.

The Commissioner further recommends:—

1. That permanent pavement be not required to be laid in the said subway.

2. It shall be the duty of the Dominion Iron & Steel Co., Limited, and the Dominion Coal Company, Limited, to keep the street reasonably open for traffic during the construction of said subway.

3. That the expenses of a watchman from the first day of January, 1911, be paid by the parties interested, *i.e.*, the Dominion Coal Company, Limited, the Dominion Iron & Steel Company, Limited, the City of Sydney and the Cape Breton Electric Company, Limited, in equal shares until the traffic across the rails be diverted into the subway.

4. That the Dominion Iron & Steel Company, Limited, shall undertake the construction of the subway at the offer made by the Dominion Iron & Steel Company, Limited, viz.; $35,000, and that the City of Sydney shall contribute $5,000; the Cape Breton Electric Company, Limited, and the Dominion Coal Company, Limited, each to contribute one-third of the remainder, not to exceed the sum of $10,000, balance of cost of construction to be paid by the Dominion Iron and Steel Company, Limited.

5. That all the land damages be paid by the City of Sydney.

6. That detailed plans and specifications be submitted by the Dominion Iron & Steel Company, Limited, for approval by the Government.

7. That the stairway be roofed over and all parties interested pay an equal portion of the cost.

Pursuant to the order, the projected subway was constructed on Victoria Road underneath the railway tracks. The appellant's premises are situate on Victoria Road and the subway passes in front of them.

The result of the works was that the roadway of Victoria Road was lowered throughout the width of the subway and the sidewalk opposite the appellant's premises was altered and narrowed. The appellant in his action advances a claim for compensation in respect of the injurious affection of his premises by the construction of these works. In his statement of claim he based his claim to relief upon an allegation that "the parties interested in the order-in-council had constructed the subway in question in the years 1911 and 1912 and that in doing so they altered and lowered the grade of the street, changed the width of the street and the sidewalk opposite his property, thereby impeding access to that property from the street and bringing about a diminution in value and furthermore, that under the provisions of the order-in-council the respondent municipality was under an obligation to pay to the appellant compensation for his loss." In the alternative, the appellant charged that the respondent municipality had wrongfully altered the grade of the street, prejudicially affecting his property in respect of the access thereto from Victoria Road and diminishing the value of it. The answer of the respondent municipality was twofold. In substance it was alleged that the works in question were constructed (under authority of the order-in-council passed pursuant to certain provisions of the "Nova Scotia Railway Act") by the Dominion Iron & Steel Company, Limited, and that the municipality was not in any way responsible to the appellant for the acts of that corporation; that the clause of the order-in-council directing the City of Sydney to pay "land damages" did not give the appellant any direct recourse against the municipality and that the statement of claim disclosed no cause of action.

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The parties agreed that the question of the liability of the respondent municipality to plaintiff should first be determined on the pleadings and on certain admissions which are as follows:—

It is admitted in pursuance of the said order-in-council the Dominion Iron and Steel Company proceeded to make such subway in the years 1911 and 1912, before this action was brought.

It is admitted that said subway was built as shewn on plan M/a and had the effect on the street as shewn on the said plan.

It is admitted that the sidewalk in front of the plaintiff's property was altered and narrowed.

It is admitted that the access to the plaintiff's property has been changed by the building of the said subway.

It is agreed that the question of legal liability of the city on the admissions made at the trial and appearing on the pleadings be first decided, and in the event of the city being held liable that the damages be assessed at a later date.

The action came on for trial before Mr. Justice Ritchie, who held that the provision of the order-in-council respecting "land damages" was *ultra vires* and that the other grounds of liability put forward by the appellant were met by the fact that the subway was constructed by the Steel Company pursuant to the order-in-council under authority of statute.

In the full court the appellant's appeal was dismissed in part as appears in the judgment of Mr. Justice Meagher on the same ground as that taken by Mr. Justice Ritchie as well as on the further ground that the provision in the order-in-council assessing the "land damages" against the city must be read as only a provision apportioning the cost of the works amongst the parties interested and not as giving any right against the city to third parties.

I have come to the conclusion there is no answer to the last mentioned point taken in the judgment of Mr. Justice Meagher. Sections 178 and 179 of the "Nova Scotia Railway Act" are as follows:—

Sec. 178. Whenever any portion of a railway is constructed or authorized or proposed to be constructed, upon or along or across any street or other public highway at rail level or otherwise, the company, before constructing or using the same, or in the case of railways already constructed, within such time as the Governor in Council directs, shall submit a plan and profile of such portion of railway for the approval of the Governor in Council; and the Governor in Council, if it appears to it expedient or necessary for the public safety, may, from time to time authorize or require the company to which such railway belongs, within such time as the Governor in Council directs, to protect such street or highway by a watchman or by a watchman and gates or other protection — or to carry such street or highway, either over or under the said railway by means of a bridge or arch, instead of crossing the same at rail level, — or to divert such street or highway, either temporarily or permanently — or to execute such other works and take such other measures as under the circumstances of the case appear to the Governor in Council best adapted for removing or diminishing the danger arising from the then position of the railway, and all the provisions of law at any such time applicable to the taking of land by such company, and to its valuation and conveyance to the company, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Governor in Council under this section.

Sec. 179. The Governor in Council may make such orders and give such directions respecting such works and the executing thereof, and the apportionment of the cost thereof and of any such measures of protection between the said company and any person interested therein, as appear to the Governor in Council just and reasonable.

I am unable to agree with the view (assuming the works in question to have affected the appellant's access to his property from Victoria Road in such a way as to entitle him to claim a compensation from the railway company constructing the works, for injurious affection of his property under sec. 138 *et seq.*) that such compensation may not properly be the subject of apportionment as part of the cost of the works authorized under sec. 179, and I think the phrase "land damages" is wide enough to embrace, and was intended to embrace, compensation of the nature of that claimed by the appellant in this action. On the other hand (assuming the works were lawfully

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constructed under secs. 178 and 179) the plaintiff on well settled principles would have to look to some statutory provision or some contract for his right of compensation for injuries suffered by him in consequence of an undertaking carried into effect under the sanction of statute. I agree with the full court in thinking that section 179 does not invest the Governor in Council with authority to do more than apportion among the parties interested the cost of the undertaking and that such authority does not extend to the giving a right of action to persons entitled to compensation against anybody who is not exercising the powers conferred by the "Railway Act."

In this particular instance it was the Dominion Iron & Steel Company which was exercising its powers as a railway company under authority of section 178 and by the last paragraph of that section that company in exercising those powers was subject to all the provisions of the law relating to taking of land by a railway company. On it rested the obligation created by the "Railway Act" to compensate persons whose lands should be injured by the construction of the works. I think section 179 does not authorize the Governor in Council to extend this obligation to others and I think the order-in-council does not profess to do so. Assuming then the works to have been lawfully constructed, the position would be this: The appellant's right to recover compensation, if any, is against the steel company, and it is to have compensation determined in the manner provided for by the Act. But there is no right under the Act against the municipality.

The truth appears to be, however, that if the claim now put forward by the appellant is a well-

grounded claim the work never was lawfully constructed. The provisions of the "Railway Act of 1879" which were in question in *Corporation of Parkdale* v. *West*(1), were almost identical with the provisions of the "Nova Scotia Railway Act" relating to the construction of works which trespass upon or injuriously affect the lands of private persons, and it was there held by the Privy Council that before constructing a work having such effect, it was the duty of the railway company to take the necessary proceedings to ascertain and to pay the compensation provided for in the Act. That was not done in this case, and while it may be that the plaintiff would in consequence have a right of action for damages against the railway company, there is nothing in this record whatever to justify a finding that the city was in any way implicated in the wrongful acts of the railway company, in other words, there is nothing to shew that the municipality was a party to proceeding with the work without taking the necessary steps under the "Railway Act." One may suspect that the municipality, being the party chiefly interested, was in reality responsible for the taking of this course, but there is no admission to that effect, and there are no facts which would justify such an inference. I am not satisfied that the appellant could not after the completion of the structure, have taken proceedings to compel the railway to concur in the necessary steps for determining and to pay compensation when determined. That, however, was not done and I am unable to see on what ground his claim against the municipality can be sustained. It was not suggested on behalf of the appellant that the railway com-

(1) 12 App. Cas. 602.

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pany should be added as party-defendant and one must suppose that there is some good reason why proceedings were not taken against the railway company.

With a good deal of regret I find myself forced to the conclusion that the appeal must be dismissed on the short ground that the municipality is not shewn to have done any wrongful act; and as regards compensation, it is responsible only under the order-in-council and the provisions of the order-in-council are limited to giving to the railway company a right to claim contribution in respect to the cost of the work. There is no *vinculum juris* between the appellant and the municipality and no tort for which the municipality is responsible.

ANGLIN J.—This appeal presents three questions for determination:—

1. Are land damages part of the costs of the "works and the execution thereof" within section 179 of the "Nova Scotia Railway Act," Revised Statutes of Nova Scotia, ch. 99 ?

2. Are the sections of that Act which provide for payment of such damages in respect of lands not taken, but injuriously affected, made applicable to works ordered under section 178 ?

3. Is the City of Sydney directly liable to the plaintiff for whatever damages he has sustained ?

Having regard to the obvious connection between section 178 and section 179 and to the provisions of the former, I have no doubt that land damages are included in the costs of works dealt with in the latter.

The decision of the Judicial Committee in *Corporation of Parkdale* v. *West*(1), at pp. 611-12, with a re-

(1) 12 App. Cas. 602.

ference to section 138 of the "Railway Act," gives a conclusive answer in the affirmative to the second question.

The third question presents a little more difficulty. The order of the Governor in Council was authorized by sections 178 and 179, as well as by section 8(*i*) of the "Railway Act." By that order, granted on the application of the defendant municipality, and without which, because of interference with the railways, the works could not have been undertaken, while the railway companies were directed to construct them, the City of Sydney was required to pay "all the land damages" occasioned by them. These terms were accepted by the city and upon them the work was undertaken.

If the work was begun and prosecuted without application, or notice to treat to the plaintiff (secs. 138-141) (and that would appear to have been the fact in view of the contention of the defendant, made throughout this litigation, that there is no liability for damages sustained by the owner of land not taken, but only injuriously affected) their construction and the alteration in the level of the highway were as to him a trespass; and for that those who committed it, the railway companies, and not the present defendant, are liable, just as they would be, if they had entered upon and taken the plaintiff's land. *Corporation of Parkdale* v. *West*(1); *Inverness Railway and Coal Co.* v. *McIsaac*(2); *Hanley* v. *Toronto, Hamilton and Buffalo Railway Co.*(3).

(1) 12 App. Cas. 602. (2) 37 Can. S.C.R. 134.
(3) 11 Ont. L.R. 91.

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If, on the other hand, proceedings were duly taken, under sec. 138 *et seq.* of the "Railway Act," it is probable that only damages ascertained in accordance with those provisions are recoverable. But, however that may be, it would seem that the land damages, like other items of the cost, are payable in the first instance by the companies exercising the powers conferred by sec. 138 *et seq.*, with a right as to the land damages of indemnification against, or recoupment by, the City of Sydney under the terms of the order-in-council. That order made under sections 8(*i*), 178, and 179 of the "Railway Act," contemplated that the powers conferred by that Act should be made use of as the machinery by which the right to acquire, or to cause injury to, land should be exercised. Unless that procedure is followed it may be that there is no obligation upon the defendant municipality under the order-in-council. But in any case, I think the primary and the only direct responsibility to the plaintiff is that of the railway companies, either as trespassers, or as liable to pay compensation under the "Railway Act." Whatever may be the liability of the City of Sydney, if any, it is in my opinion not to the plaintiff, but to the railway companies by way of indemnity or contribution.

On this ground alone I would dismiss the appeal.

BRODEUR J.—The proceedings do not disclose any *lien de droit* between the appellant and the respondent.

The appellant claims that his property has been injuriously affected by the construction of a subway. It might be true; but who is the wrongdoer ? That is the railway company and not the respondent muni-

cipality; and the action then should have been brought against the company.

But the appellant says that he is entitled to proceed against the City of Sydney because, under the order-in-council which ordered the construction of the subway, that city was condemned to pay "land damages."

I have no doubt that the Lieutenant-Governor in Council could authorize or require the railway company to construct the subway. But the taking of any land required for the carrying out of the requirements of the order-in-council or any compensation for lands injuriously affected, should be determined under the ordinary provisions of the law. (Ch. 99, R.S.N.S., sec. 178.)

Arbitration proceedings should have taken place. Damages would have been assessed and then the City of Sydney could perhaps be held liable for those damages and compensation.

But until this is done, can the city be condemned to pay anything to a riparian owner of the subway? I don't see how in the circumstances of this case an action by a property owner should lie against the municipality.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *R. M. Langille.*
Solicitor for the respondent: *Findlay Macdonald.*

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*May 12.
*May 18.

THE THEATRE AMUSEMENT COMPANY AND OTHERS (DEFENDANTS)... } APPELLANTS;

AND

LOUIS B. STONE (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE PROVINCE OF ALBERTA.

Company — Disqualification of directors — Taking personal profit — Fraud—Illegal contract—Ratification—Right of action—Shareholder—Recourse by minority—Alberta "Companies Ordinance," N.-W. Ter. Ord. No. 20 of 1901—Construction of statute.

Where the directors of a joint-stock company organized under the Alberta "Companies Ordinance" (N.-W. Ter. Ord. No. 20 of 1901), have violated the provisions of article 57, Table "A," of that enactment, (as to vacating the office of directors,) the consequences involve not only the disqualification of the directors, but also give a right of action on the part of any shareholder for a declaration of such disqualification and for an account of the moneys improperly received by them as profits under contracts between them and the company. Such contracts, being prohibited by the ordinance, could not be ratified by a majority of the shareholders, as the matter is not one merely of internal management. *Burland* v. *Earle* ((1902) A.C. 83), distinguished.

The judgment appealed from (25 West. L.R. 905) was affirmed.

APPEAL from the judgment of the Supreme Court of Alberta(1), reversing in part the judgment of Harvey C.J., at the trial.

The action was brought, against the Theatre Amusement Company, Barney Allen, Julius Allen, Jay Junior Allen and a partnership firm known as The Canadian Film Exchange, by the present respond-

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

(1) 25 West. L.R. 905.

ent, a shareholder in the Theatre Amusement Company, who had also been a partner in the Canadian Film Exchange, but had retired from that partnership previous to the illegal contracts complained of by which the appellants, the Allens, being the remaining shareholders in the Theatre Amusement Company and its directors, had obtained profits improperly from the last-mentioned company. The plaintiff sought a declaration that, by their misconduct, the Allens had become disqualified as directors of the said company, for a refund to the company of moneys received by them as salaries, an account of the moneys improperly received by them, and the appointment of a receiver to carry on the business of the company. At the trial the learned Chief Justice decided that the salaries had been voted by the directors to themselves without proper authority, that they were liable to account to the company for profits made by them in dealing between the company and themselves, that the shareholders could ratify, if they wished, what the directors had done, and that, in the meantime, the court should not interfere because interference should be for the benefit of the company and not for that of a single shareholder whose interests were less than those of the defendants as holders of the majority of the stock. Consequently an order was made for the refund of the amount of the salaries in question, but the plaintiff failed on the other branches of his action. On an appeal to the full court, this judgment was varied by the judgment now appealed from by a direction that, unless a new trial was agreed to, there should be an accounting for the profits improperly obtained by the directors.

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The questions in issue on the present appeal are stated in the judgments now reported.

R. V. Sinclair K.C. for the appellants.

J. A. Ritchie and *Hannah* for the respondent.

THE CHIEF JUSTICE agreed with Idington J.

IDINGTON J.—The respondent and the three defendants, named Allen, owned in equal shares the corporate appellant and composed the partnership firm known as The Canadian Film Exchange. The interest of respondent in the latter concern was bought by the Allens, who continued the business.

The firm had, both before and after the respondent's retirement, sold goods to the appellant corporation, of which the Allens were the directors.

The ordinance under which the incorporation of the Theatre Amusement Company was procured prohibited the directors from doing so at a profit. And, so long as respondent was a member of the firm, they did not sell to the corporation at a profit.

So soon as respondent retired from the firm these directors alone constituting the firm charged a profit in the sales of goods of the same class supplied to the corporation. They admit doing so disqualified them as directors, but claim it was honest to do so and that respondent has, therefore, no remedy except by means of a suit in the name of the corporation, which their ownership of a majority of the stock rendered impossible. I think they are mistaken in their morals and law.

Their first practice of selling at cost price was

honest. As things then stood it cost them nothing to be honest.

The change from that to selling at a profit involved what was clearly illegal and a breach of trust. Their partner had a right to believe his trustees would not so change as to adopt illegal practices merely to beat him out of a fractional advantage.

I cannot say that their devious courses developed a very high standard of honesty. And I do not think, in law, the respondent is to be driven to trust to the honest voting of such fellow shareholders as his only hope of relief.

No one can question the law as laid down in *Burland* v. *Earle*(1), and the other like cases, but the extension of the doctrine to making it the systematic daily method of doing business so that those possessing the majority of the stock can so use their power and opportunity to drain the corporate body of all its sources of profit giving, and render dividends impossible, or the possibility thereof to be the measure of the rapacity of the directorate, is something not yet recognized in law. Yet such seems to be what is involved in the principle to be maintained in allowing this appeal.

Indeed, I am tempted to suggest that lest other honest men be also led astray by the like application of the apparently logical reasoning put before us on behalf of the appellants, and alleged to rest on such high legal authorities, the sooner every legislative body can obliterate from its incorporating Acts the power of any shareholder by his own vote to help himself to sell his property to the company in which he is

(1) [1902] A.C. 83.

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a shareholder, the better it will be for the moral health of the business community.

The appeal should be dismissed with costs.

DUFF J.—I think this appeal is disposed of by reference to article 57 of Table "A." That article declares the effect of a director entering into a contract with the company or being interested in a contract with the company; the effect is that the director becomes divested, as between himself and the company, of his *de jure* authority as director. If, therefore, the transactions in question are to be treated as contracts made between the directors and the company the effect of the very first transaction was to divest each of them of his authority as director. These persons having during this series of transactions continued to act in the capacity of directors they cannot, in my opinion, be allowed to say as against the company, or as against any shareholder of the company, that they were wrongfully in office, in other words, they cannot be permitted to deny that, in purchasing the goods in question, they were acting as agents for the company or that they are accountable, as such, for the profits. It is contended, however, that this is a position which only can be taken by the company itself. This contention rests upon an entire misconception of the effect of the articles of association of a company incorporated under the "Companies Act" of Alberta. The articles of association are binding upon the company, the directors and the shareholders, until changed in accordance with the law. So long as they remain in force, any shareholder is entitled, unless he is estopped from taking that position by some conduct of his own,

to insist upon the articles being observed by the company, and the directors of the company. This right he cannot be deprived of by the action of any majority. In truth, the articles of association constitute a contract between the company and the shareholders which every shareholder is entitled to insist upon being carried out.

ANGLIN J.—I would dismiss this appeal on two grounds.

The contracts complained of were in violation of article 57 of the Articles of Asosciation. N.-W. Ter. Ordinances, 1901, ch. 20, sch. "A." The penalty of disqualification for the offending directors is imposed by that article. But that does not exhaust the consequences of an infraction of its provisions. The making of such contracts by the directors was prohibited. They could, therefore, be ratified only by a unanimous vote of all the shareholders and not by any majority however great. The question is not one of internal management and, as such, subject to the control of the majority.

On the evidence, the changes in the dealings between the company and the partnership, known as the Film Exchange, after Stone had ceased to be a member of that partnership, whereby profits from those dealings resulted to the partnership, was a fraudulent breach of trust on the part of the directors which no majority of the shareholders could render binding on the company. Other than the films, as to which there is no complaint, the articles supplied by the partnership to the company would appear to have been purchased by the partnership for the very purpose of being re-sold to the company.

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On these grounds this case is distinguishable from *Burland* v. *Earle*(1), relied upon by counsel for the appellants.

BRODEUR J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Lent, Jones & Mackay.*
Solicitors for the respondent: *Hannah, Stirton & Fisher.*

(1) [1902] A.C. 83.

CHARLES S. BERGKLINT (PLAINTIFF) ..... } APPELLANT;

AND

THE WESTERN CANADA POWER COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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*Feb. 4, 5.
*June 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence—Dangerous works—Defective system—Careless management—Fault of fellow servant—Efficient superintendence—Employer's duty—Evidence—Action—Liability at common law—"B.C. Employers' Liability Act"—Pleading—Practice—Charge to jury—New trial.

To afford protection to workmen about to be employed on a ledge below, several of them, including the plaintiff, were directed by the defendants' foreman to clear loose rocks from the hillside and form a berm above the place where the work was to be done. The clearing was imperfectly performed, although the foreman was informed by some of the men that "it was all right." While plaintiff was at work on the lower ledge he was struck by rocks, which rolled down the hillside, fell over the cliff and sustained injuries for which he brought action to recover damages under the British Columbia "Employers' Liability Act" and at common law. It appeared from the evidence that it was customary to clear off such inclines or to erect pentices or barriers for the protection of the workmen on lower ledges, but not to do both, and there was evidence that on this hillside barriers were unnecessary and might be dangerous. At the trial the jury found that the defendants had been negligent "in not sufficiently clearing the face of the incline and placing barriers to prevent rolling stones and other debris from causing injury to the employees," and judgment was entered for the plaintiff. By the judgment appealed from (17 B.C. Rep. 443) the Court of Appeal dismissed the action, holding that the cause of the injury was the failure to clear the hillside sufficiently, which was due to the fault of the plaintiff and his fellow workmen.

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

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Held, that, having regard to the character of the work in which the plaintiff was engaged when injured, the employers' duty to provide reasonable protection for him could properly be delegated to a competent superintendent or foreman (furnished with adequate materials and resources), whose negligence would not render the employer liable at common law. *Wilson* v. *Merry* (L.R. 1 H.L. (Sc.) 326), applied. *Ainslie Mining and Railway Co.* v. *McDougall* (42 Can. S.C.R. 420), and *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (44 Can. S.C.R. 412), distinguished.

Per Fitzpatrick C.J. and Anglin J.—On the evidence, failure to clear the face of the incline sufficiently was due either (and most probably) to the negligence of the plaintiff and the workmen engaged with him or to that of the foreman and, consequently, a judgment against the defendants at common law was not justified. The finding that the omission to place barriers above the men working on the lower ledge was negligence is not supported by the evidence; if it were, such negligence would be that of the superintendent. The trial proceeded on the assumption that the works were in charge of a competent superintendent and foreman, having discretion and means to furnish all reasonable safeguards, and an admission to that effect was made at bar on the hearing of the appeal — consequently, the appeal should be dismissed.

Per Idington and Brodeur JJ.—The findings of the jury were sufficiently supported by evidence and warranted a judgment at common law.

Per Idington J.—The defendants were bound to allege and prove that they had delegated to a competent person the duty of providing proper safeguards and had furnished him with the means of doing so.

Per Duff J.—There was evidence upon which the jury might have found that the duty of providing proper safeguards had been entrusted to a competent person provided with the necessary means of doing so, but this was not admitted and the failure of the trial judge to leave this question to the jury caused a mistrial.

In the result a new trial was ordered, Idington and Brodeur JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment entered on the verdict of the jury at the trial, by Cle-

(1) 17 B.C. Rep. 443.

ment J., and dismissing the plaintiff's action with costs.

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

S. S. Taylor K.C. for the appellant.

Sir Charles-Hibbert Tupper K.C. for the respondents.

THE CHIEF JUSTICE agreed with Anglin J.

IDINGTON J. (dissenting).—I think we must accept the finding of facts by the jury which is as follows:—

The Foreman: Owing to the dangerous nature of the work, we, the jury, consider the defendant company guilty of negligence in not sufficiently clearing the face of the incline and putting in place barriers to prevent rolling stones and other debris from causing injury to the employees.

And we further consider that the plaintiff is entitled to $5,500 damages or compensation.

The decision in *Priestly* v. *Fowler*(1) did not abrogate the common law obligation resting upon the master in regard to the protection of his servant.

The result of that case as developed in the case of *Wilson* v. *Merry*(2), and at page 332, as stated by Lord Cairns, is to put the limitation upon that obligation, which appears as follows:—

But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence

(1) 3 M. & W. 1. (2) L.R. 1 H.L. (Sc.) 326.

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this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow workmen.

There is in the above verdict a finding which possibly relates to what may have been the negligence of a fellow servant. The appellant seems to have been subject to the direction of different people as occasion might arise. One of these was the foreman, Fraser, with whom on one occasion he was engaged in clearing the part of the bluff which all seem agreed needed looking after from time to time.

Now if it had been demonstrated beyond peradventure that the work done under Fraser or omitted to be done by his directions had been the cause of the accident it might well be argued that the negligence in question was that of a fellow servant.

But as I understand the jury they do not necessarily find so and do find that even if the fellow servant was negligent the damages therefrom would have been averted if there had been barriers to prevent even rolling stones and other debris from causing injury. We must bear in mind the evidence and charge of the learned trial judge in reading this verdict.

I cannot understand how, if that obligation to erect such barriers rested upon respondent and had not been observed, it can be absolved from the consequences of neglect thereof. The utmost that can be said in such case is that the respondent and its foreman were joint tort-feasors.

The respondent has neither pleaded nor proved that it fell within the limitation of its liability as defined by Lord Cairns.

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The statement of defence in paragraph 16 sets up the defence that the injuries in question were caused by the negligence of

fellow servants of the plaintiff engaged in common employment, to wit: The servants mentioned in the statement of claim, together with the plaintiff, neglected to properly clear off a certain hill above the place where the plaintiff was working at the time of the accident.

The 17th paragraph of the defence proceeds in a more elaborate manner to set forth the steps taken by Fraser, the foreman, and his men, including plaintiff, to clear the face of the hill above the spot where plaintiff and others were at the time of the accident engaged in drilling and the duty to render same safe thereby and then alleges that if, which is denied, the accident was caused by any substance, rock, gravel, stones or earth falling upon the plaintiff it was wholly due to the

neglect of plaintiff and his fellow workmen engaged in a common employment in omitting to take the necessary precautions so that the face of the hill above the ledge aforesaid where the plaintiff was working at the time of the said accident, was clear of all the above material and not otherwise.

How can this be said in any sense to answer the neglect to place the proper barriers protecting against such falling material reaching the plaintiff and others, which the statement of claim had alleged as neglect.

It is quite obvious that the neglect of the superintendent or manager or of respondent was nowhere pointed at either by express language or implication in these paragraphs.

There is nothing anywhere pleaded to answer the charge of neglect to erect a proper barrier save by the general denial of neglect which still left the onus of exoneration from *primâ facie* liability on respondent.

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Particulars of the neglect involved in paragraphs 16 and 17 were demanded and answered by delivery of so-called particulars alleging that they were as stated in paragraph 17 of the defence.

Such being the pleading what is there in evidence to exonerate the respondent by the limitations laid down by Lord Cairns as above ?

There is absolutely nothing save such inference as may be drawn from an engineer describing himself as manager. There is not a word to explain what was the extent of the authority given him by respondent. Where and what were "the adequate material and resources" placed at his command ? How could the jury say he was so furnished ? How can we say so in the absence of all evidence on that score ?

In one way of looking at such a matter the word "manager" and the control of men which he explains might justify the inference of authority to incur a trifling expense such as involved in some of the suggestions made by counsel, but the manager himself and others say these minor expedients in the way of a barrier would be worse than useless. That does not help the respondent in making out a defence.

There is evidence to the contrary also. But there is clear evidence that to effect an efficient protection by building the necessary barrier would involve an expense beyond the ordinary expenditure such as may necessarily be implied in the authority of a manager.

And there is evidence that only by such an erection could the adequate protection, found by the jury to be necessary, have been effectively provided.

I cannot close my review in this aspect of the case without quoting the evidence of Mr. McDonald, a con-

tractor of wide experience, called for respondent in rebuttal. He says as follows:—

Q.—And you say, if water is coming down it would be too expensive to remove all this earth and stones, and I understood you to say to Mr. Griffin that some extra precaution in the way of barriers could be erected ?

A.—No, I did not say that.

Q.—Do you say it cannot ?

A.—I said, if material was liable to be started rolling through natural causes up above that there might be something done in the way of extra precautions.

Q.—Yes, exactly. And you, of course, as a railroad contractor yourself, you have to provide against accidents ?

A.—We do all we can.

Q.—And always, of course, with your eyes to expenses ?

A.—With an eye primarily to the safety of the men.

Q.—But I say, also with an eye to the expenses ?

A.—Exactly, that is a factor.

Q.—And you, as a large railway contractor, such as you are, have a good many damage actions to contend with ?

A.—We do not have actions, we settle them all.

There is evidence of water coming down at times and of other causes of disturbance from which it may be inferred even if clearing done as well as Fraser says might well account for the accident and the need of a barrier. The reasons or excuses, given for none, were for the jury to consider.

I am not concerned with determining the question one way or another. I only desire to point out what a wide field of evidence there was before the jury bearing upon the subject and how it was quite competent for them to have reached the conclusion they did.

Primâ facie in a dangerous work there is an obligation resting upon the master to take due care for the protection and safety of his workmen and until that is discharged either by taking the due care needed or in the manner already pointed out by furnishing adequate material and resources as well as a competent manager, he must be held liable for negligence.

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It does not appear to me that in this case the obligation has been discharged in either way by respondent.

I need not dwell upon the decisions in this court. I do not think it is necessary for the purposes of this peculiar case to go as far as some of these decisions have apparently gone. Nor do I deem it necessary to define what may and what may not fall within the term system. Whatever may properly fall within that term must, I think, be found within the dictum of Lord Cairns, who did not find it necessary to go further in the exposition thereof, but left a wide field to be dealt with later, as it has been dealt with in many cases since. And within that lie such cases as this if the jury's view of very conflicting evidence be correct. There existed no barrier and no evidence was given to shew any one had the power to supply it.

It was properly the purpose of the respondent to pursue the policy indicated in Mr. McDonald's evidence above quoted of finding it cheaper to pay for accidents than furnish the material for adequate protection.

Our latest case thereon was that of *Waugh-Milburn Construction Co.* v. *Slater*(1), decided last November.

There is no room for applying the *volens* doctrine here unless we discard the case of *Smith* v. *Baker & Sons*(2), and the case of *The Canada Foundry Co.* v. *Mitchell*(3), or perhaps substitute our own judgment of fact for that of a jury.

I think the appeal should be allowed with costs.

(1) 48 Can. S.C.R. 609. (2) [1891] A.C. 325.
(3) 35 Can. S.C.R. 452.

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DUFF J.—The appellant was injured in these circumstances: The respondent company was engaged in making a large excavation (roughly, 300 ft. by 100 ft.) for the site of their dam at the outlet of Stave Lake, B.C. In carrying on this work the appellant, with some others, was clearing a narrow ledge on the face of the steep hillside, preparatory to settling a steam drill, when he was struck by a shower of gravel and rock that fell from the edge of the cliff and was thrown to the foot of the hill below and seriously injured.

The charge of negligence which was the principal subject of controversy was that of insufficient protection against the danger of falling rock and earth.

The usual practice was when the workmen were employed in drilling on the face of the hill for the foreman to send a party of workmen to make a "berm" above the place where they were about to be engaged; a "berm" being a cleared space (from which rocks and other material that might be a source of danger had been removed) extending back from the edge of the cliff a sufficient distance to secure such comparative immunity as could be obtained by this method.

On the part of the appellant it was alleged this method was in many places ineffectual and that complete immunity from this particular danger might be secured by placing a barrier or shield of logs in such a position as to intercept falling material.

At the trial the principal points of controversy were whether there was negligence in failing to adopt some such expedient as that just referred to, whether the plaintiff ought not to fail on the grounds of contributory negligence and assumption of risk; and, whether, assuming all these questions determined in

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his favour, the negligence leading to the injury was the negligence of a fellow servant for which the company would not be responsible.

I have come to the conclusion that there ought to be a new trial and I shall refer to the evidence no more than is absolutely necessary to elucidate my view of the law applicable to the case.

There can be no doubt that the work was of a dangerous character.

Mr. Haywood, the respondent's engineer, says:—

Q.—You mean to say you never had any timbers or logs or planks or anything of that sort at any time up there, up to the present day to protect the workmen from rocks rolling down on the workmen in that excavation ?

A.—I do not believe we did; we did have a kind of protection for the pipes against blasting.

Q.—I mean protection for the workmen ?

A.—I don't think so.

Q.—You could have protected them under the timbers, you could have had planks or logs placed so as to protect the workmen from the falling rocks ?

A.—*It was not practicable.*

Q.—But you did have planks over at the dump to prevent rocks from the skip falling down on the workmen ?

A.—I think you must be referring to the place where the skip was being hauled out over the top of the flume; we had a protection there but there was no reason for any timbers to protect the workmen.

Q.—Had you not at the top some protection ?

A.—We had a kind of shack.

Q.—I mean simply as a protection ?

A.—I do not remember what the protection was; it was not for the men working there, it was not necessary; it was protection for the plant. The men were not there when the blasts were going off.

Q.—You have seen stones or rock rolling down when the men were at work ?

A.—Very much so.

Q.—You knew it was a dangerous thing ?

A.—*The whole work was hazardous.*

Q.—You knew that vicinity was dangerous ?

A.—Yes, it was dangerous.

Q.—And you know it can be protected against ?

A.—*It cannot entirely be protected against.*

Q.—It can to a certain extent be protected against ?
A.—*I cannot say as it could.*

It was clearly the duty of the company, therefore, to take all reasonable precautions for the protection of the workmen engaged in this hazardous employment.

There was, moreover, evidence (see especially the evidence of Fraser, the foreman) entitling the jury to find that the provision of a shield such as that suggested in places where such protection might be required would not be an unreasonably extravagant measure.

In these circumstances the position of the respondents appear to have been this: They were not in my view (for reasons I shall presently give) under an absolute duty to see that reasonable care was taken to provide proper safeguards. The duty of the company (and of those exercising the general powers of the company, directors, executive committee, managing director as the case might be) would, I think, be discharged if they engaged some competent person whose duty it was to provide such safeguards and entrusted such agent with the necessary materials and invested him with the necessary authority to enable him to do so effectually. The duty of the agent to take such precautions might be expressly imposed upon him or it might arise impliedly from the terms or character of his employment, but if the company is to escape responsibility (assuming the work in these respects was not in fact superintended by the directors or others exercising the general powers of the company) it must appear that the provision of such safeguards was in fact the duty of some delegate expressly

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stipulated for or implied in the terms or nature of his engagement and that this delegate had been furnished with the necessary authority and resources to enable him to perform it. That is, in my opinion, the result of the decision of the Court of Appeal in *Young* v. *Hoffmann Manufacturing Co.*(1). In effect also it was the view expressed in *Canadian Northern Railway Co.* v. *Anderson*(2), in a judgment delivered by my brother Anglin and myself jointly.

I think it was a question of fact for the jury whether the duty of superintendence was in fact in this case retained by the directors or others having authority to exercise the general powers or whether, on the contrary, Mr. Haywood had such authority and resources at his command and was under a duty express or implied to use them in furnishing the suggested safeguards if such safeguards were reasonably necessary. And I think the learned trial judge in effect refused to leave this question of fact to the jury. For that reason there should be a new trial.

I cannot, however, leave the case without some reference to the grounds on which the appellant contends the judgment of the trial judge should be restored and the respondents contend that the judgment of the Court of Appeal should stand. On the question of *volens* and contributory negligence I do not think I ought to say more than this. While the evidence is far from satisfactory, I do not think it is a case for the exercise of the power of the court to enter judgment for the defendant. I think there was evidence to support the verdict and I am not sure that in considering the appellant's conduct the admission of the

(1) [1907] 2 K.B. 646. (2) 45 Can. S.C.R. 355.

foreman that the appellant "had practically no understanding of English" has been sufficiently attended to. His want of English should also be considered in appreciating the effect of his answers given on examination for discovery. He asserts that he understood few of the questions. As to the form of the verdict, its purport seems clearer when it is read in the light of Mr. Haywood's evidence quoted above, and of the judge's charge; so read, it would appear in both branches of it to impute negligence to the company itself rather than to the appellant's fellow workmen. All these matters, however, present difficulties and suggest additional reasons pointing to the desirability of a new trial.

Coming to the contention of the appellant that the respondent company's duty was an absolute duty to see that reasonable care was taken for the protection of its employees in this dangerous work.

My view of the case is that the fault — if there was fault — was a fault of management or superintendence of the operations in the prosecution of which Bergklint was engaged (the making of the excavation) and that the case falls within the actual decision of the House of Lords in *Wilson* v. *Merry* (1).

In that case the trial judge had instructed the jury that negligence in the construction of a scaffold under the supervision of the mine superintendent in such a way as to obstruct ventilation and thereby cause an explosion of fire-damp was negligence for which the owner was in law responsible, the erection of the scaffold being required in the ordinary course of the working of the mine; there being no question of the suffi-

(1) L.R. 1 H.L. (Sc.) 326.

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ciency of the system of ventilation as originally installed and no suggestion that the superintendent was incompetent. The House of Lords held that the instruction in question was erroneous.

In *Wilson* v. *Merry*(1), as well as in previous and subsequent cases a distinction is signalized between the duty of the master in relation to the safety not only of structures, but of arrangements that are relatively permanent such, for example, as the system of ventilation in a mine or the disposition of the parts of a plant occupying for a considerable period a fixed position and his duty as regards measures which are required from time to time to secure safety in the operations in which the workman is engaged and which must of necessity vary with the progress of work and changing times and places. This latter is treated as a duty of management or superintendence which the master may discharge by employing competent persons whose duty it is to perform it and supplying them with the necessary resources to enable them to do so. The following passages from the judgment in *Wilson* v. *Merry*(1) will illustrate my meaning.

Lord Chelmsford, at p. 336:—

> Although the learned judge in the course of his summing up, distinguished between "keeping clear and in good working order the ventilation arrangement or system, when completed, and defect or fault in the arrangement or system itself," yet he does not appear to have left it to the jury to decide whether the accident occurred through faulty ventilation or through casual obstruction in the ventilation, the latter of which appears from the evidence to be more likely to have been the case. But, supposing it to have been quite clear that the ventilation itself was defective, yet, if it occurred in the course of the operations in the pit, it ought to have been distinguished from "that system of ventilation and putting the mine into a safe and proper condition for working," which according to the opin-

(1) L.R. 1 H.L. (Sc.) 326.

ion of the Lord Justice Clerk, in *Dixon* v. *Rankin*(1), "it was the duty of the master for whose benefit the work is being carried on to provide." In the course of working the Houghhead pit it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This must be considered as part of the mining operations, and, therefore, even if the accident happened in consequence of the scaffold in the Pyotshaw seam having, under Neish's orders, been constructed so as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine; and if Neish and the deceased were fellow workmen, it would have been one of the risks incident to the employment in which the deceased was engaged.

Lord Colonsay, at pages 344, 345, 346, says:—

I think that there are duties incumbent on masters with reference to the safety of labourers in mines and factories, on the fulfilment of which the labourers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself; or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty; or failure to provide or supply the means of providing proper machinery or materials—may furnish grounds of liability; and there may be other duties, varying according to the nature of the employment, wherein, if the master fails he may be responsible. But on the other hand, there are risks incident to occupations more or less hazardous, and of which the labourer who engages in any such occupation, takes his chance.

* * * * * * *

It is not alleged that the general system of ventilation of the pit, as it had existed anterior to the erection of the scaffold, was not good, or that Neish was not a fit man to be placed in the position he occupied.

* * * * * * *

First: It deals, apparently, with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of a pit, for which in certain views the defenders might be regarded as liable, whereas it was a defect in the construction of a temporary structure erected by order of Neish for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defenders for the fault of Neish; but the distinction does not appear to have been adverted to.

(1) 14 Ct. of Sess. Cas., 2 Ser., 420.

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The same distinction is adverted to in the judgment of Lord Cramworth in the *Bartonshill Coal Co.* v. *McGuire*(1).

The general principle is broadly stated by Lord Cairns in *Wilson* v. *Merry*(2), at page 332, in the following passage:—

> But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master.

But this passage was construed in *Allen* v. *The New Gas Company*(3) (by the Court of Exchequer, Bramwell, Amphlett and Huddleston, BB., at p. 256), as laying down the rule that the owner must provide all that is necessary

> to carry on the business including premises reasonably safe for that purpose as, for instance, in case of a mine of a proper system of ventilation as pointed out by Lord Colonsay, in *Wilson* v. *Merry*(2).

In that case the injury had been the result of certain gates on the defendant's premises being in a dangerous state of disrepair. But a distinction between the master's duty in relation to the safety of structures in the first instance and his duty in relation to maintenance as a part of the duty of superintendence is suggested at page 256.

> There was no evidence to shew *that the premises of the defendants were dangerous, that the gates were defective in their original construction, or that they had not been perfectly safe when first put up.* If they had fallen into a state of decay, and had been per-

(1) 3 Macq. 300. (2) L.R. 1 H.L. (Sc.) 326.
(3) 1 Ex. D. 251.

mitted to remain in that state, it could scarcely be said that that was the act of the defendants, but must have been that of the persons whom they must have employed.

The same distinction is also adverted to by Lord Herschell in his judgment in *Gordon* v. *Pyper*(1), at page 26. The rule which makes the master responsible for reasonable care in providing a safe place to work, sufficient machinery and appliances and a safe arrangement, was applied by this court in *Ainslie Mining and Railway Co.* v. *McDougall*(2), and *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*(3). In these cases the breach of duty charged was the failure to make proper provision in the *first instance.* But the question whether maintenance of structures and of plant and machinery (as distinguished from the duty to make safe provision in *the first instance*) is to be regarded as a duty of management or superintendence that the master may discharge by employment of competent delegates is a question on which there has been a good deal of difference of opinion and which does not necessarily arise in this case.

That distinction apart I do not think the principle of absolute responsibility illustrated by the decisions just mentioned, can properly be applied to the circumstances of this case. The work undertaken by the respondents necessarily subjected their workmen to hazards of various kinds, among those being the danger to which workmen engaged in drilling on the hillside might be exposed from falling material. As the work progresses the conditions of it must necessarily change. Expedients which at one time or in one place

(1) 20 Ct. of Sess. Cas., 4 ser., 23.
(2) 42 Can. S.C.R. 420.
(3) 44 Can. S.C.R. 412.

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would be effective safeguards might in other places be only a source of additional peril; where the work is of such a character, and the nature of the precautions to be observed, or the safeguards to be provided, changes or may reasonably be supposed to change with the progress of the work, I think we are outside of the principle of the cases referred to and within the doctrine applied in *Wilson* v. *Merry*(1), as expounded in the passage quoted above from the speech of Lord Chelmsford.

There are two further points to be mentioned.

First.—It has been contended that by failing specifically to plead that the engineer was invested with authority and supplied with means to provide the necessary safeguards, the respondents have disentitled themselves from raising that defence. I think there was evidence to go to the jury on the question whether or not the duty to make the suggested provision for the safety of the workmen was one of the duties of his employment. I think the learned trial judge would have allowed an amendment if one had been asked for, had he not felt that he was bound by the authority of the *Fakkema Case*(2) to hold that the defendants could not divest themselves of responsibility for the exercise of due care by the engineer. On the other hand, considering the state of the pleadings, the respondents having alleged that the failure to clear the incline was due to the negligence of the appellant's fellow-servants and having omitted to set up the same answer to the allegation of negligent failure to provide a barrier, it would be a little extravagant to treat anything which occurred at the trial as amounting to an admission by

(1) L.R. 1 H.L. (Sc.) 326. (2) 44 Can. S.C.R. 412.

the appellant that the duty of making provision of the last mentioned kind was one of the duties cast upon the engineer. I was under the impression at one stage of the argument in this court that Mr. Taylor had admitted that duty was cast upon him in fact; but the intention to make any such admission of fact was afterwards disavowed and I have no doubt that my impression must have been due to a misconstruction of some concession made for the purposes of discussion.

The circumstances of the case are very special and on the whole I think justice will be best served by reserving all costs to abide the event of the new trial.

ANGLIN J.—The plaintiff was an employee of the defendants who were preparing a site for an extensive power plant at the outlet of Stave Lake, B.C. When injured he was engaged with two other workmen on a narrow ledge on a hillside in making ready a level place on which to stand a power drill. Some dirt and stones fell from above. One of the falling stones apparently hit the plaintiff, and, losing his balance, he fell to the bottom of the excavation, some 35 or 40 feet, sustaining serious injuries. He and his two fellow workmen had been instructed by the foreman, Fraser, to clear off all the loose rock and other material from the hillside above and to make the customary "berm" before commencing to work on the ledge, and they had been engaged from three to five hours in doing so. Before they began to work on the ledge one of these men, in the plaintiff's hearing, assured the foreman that the work above had been properly done. The accident happened after the men had been working on the ledge about twenty minutes.

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The negligence charged against the defendants was

(1) Failing to provide a guard or shield of planks to prevent rocks and other material falling on the men while at work on the ledge;

(2) Failing to provide a watchman to warn the men of falling material;

(3) Improper construction and operation of cable-lines carrying aerial trams causing loose rock and material to fall;

(4) Failing to clear away loose dirt and rock above and adjoining the excavation.

Most of the evidence was directed to the third item of alleged negligence; but it was ignored by the jury, who found that

> Owing to the dangerous nature of the work, we, the jury, consider the defendants guilty of negligence in not sufficiently clearing the face of the incline and putting in place barriers to prevent rolling stones and other debris from causing injury to the employees.

They awarded the plaintiff $5,500 damages.

On appeal this verdict was set aside on the ground that the evidence did not sustain it and the action was dismissed.

Upon the admitted facts "the failure to clear the face of the incline" would appear to have been ascribable to the plaintiff and his fellow workmen, although the finding of the jury would seem to be to the contrary and probably precludes the dismissal of the action on the ground of contributory negligence. If the jury was of the opinion that the foreman should have personally inspected the work above in order to see that it had been properly done before allowing the men to begin operations on the ledge, and that he was negligent in not having made such an inspection, that would be negligence of a fellow employee and would

not support a judgment against the defendants at common law. Moreover, lack of efficient superintendence or inspection is not amongst the grounds of negligence charged against the defendants.

On this branch of the jury's verdict we have the following evidence: Fraser, the foreman, asked the men if the work of clearing had been properly done ("Boys, are you sure that it is all right above ?") and was assured that it had been before the work on the ledge began. This is not questioned. One of the men, McKinnon, gives this evidence:—

Q.—In your opinion was everything made safe before you came down ?

A.—I was pretty well satisfied myself with the work we did.

Q.—With the work you did ?

A.—Yes.

Q.—Did you think it was safe for yourself, that is the point ?

A.—I never thought of any danger before the accident.

But on cross-examination, he says:—

Q.—When you came down from clearing the top of the hill you did not appreciate any danger after that, you did not think there was any danger ?

A.—No.

Q.—And you did not think—it would be fair to say that Bergklint would not think he was in any danger or appreciate any risk, would he ?

A.—No.

Q.—What occurred was something—the picking of stones away was not sufficient to prevent occurring—that is the way you would size it up, would you not ?

A.—Well, we thought we did everything we could do.

Q.—In the shape of picking away the stones ?

A.—Yes.

Q.—Now what loosened that stuff up there, do you think ?

A.—I have no idea.

Q.—The dirt around the brink of the hill, the small gravel and small stones were not actually shovelled away from the brink of the cliff, that is about it, is it not ?

A.—Yes.

Q.—If they had been shovelled away from the brink of the cliff and the bedrock made bare, it would be less dangerous ?

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A.—About two feet at the edge of the cliff.

Q.—If it had been made bare further back, it would have been less dangerous?

A.—I presume so.

Q.—You presume it would have been less dangerous down there?

A.—Yes.

McLean, the other workman, did not give evidence. From the plaintiff, who had been engaged in similar work in Sweden, we have this testimony:—

Q.—I call your attention to the notice of injury put in as exhibit 1, I think on the 21st of December, 1910, which was about a month after the accident, you state that this accident was due to loose pieces of rock, allowing loose rock to remain on the edge of the precipice under which you were working — just call his attention to this notice and I will follow it by another question. The statement in this notice that the cause of the accident was allowing loose rocks to remain on the edge of the precipice. Now what do you mean by that — I will put it as though I was speaking to the man — what you mean by that Bergklint is, that they did not sufficiently clear the edge of the hill above the ledge — what you mean by that is that the loose rocks and stuff were not sufficiently cleared from the edge of the hill above you?

A.—Yes.

Q.—Now is this answer correct? Reading from his examination for discovery at question 70, "Was it not always your custom in working on that class of work either in Sweden or at the works, to go up above the ledge and clear off the loose stone before you went down on the ledge to work?

"A.—Yes."

Ask him if that is a correct answer to that question?

* * * * * * *

Q.—Ask him that question, you can do it in your language — what is his answer?

The Interpreter: His answer is, that *when it was not too much work they cleared off the rock, but if it was too much work they put protection.*

* * * * * * *

Q.—Now the next one I wish to call his attention to is question 135 on the same examination: "But in Sweden you did the same sort of work, you cleared away the loose rock too?

"A.—Sure, all over, 3 or 4 yards."

A.—Yes.

Q.—Now 137: "You put this to him, Mr. Interpreter.

"A.—What I mean is that it was not cleared far enough back."

Q.—138. "Did you think so at the time ?

"A.—Just at this place it was not cleared away so far as it was in other places, on account of so little work to be done at this place."

Q.—139. "That was not my question. My question is did you think at the time when you were clearing it that you had not cleared it sufficiently ?

"A.—I don't think so."

* * * * * * *

Q.—Your idea, Mr. Bergklint, is, in short, that the accident was due to this insufficient clearing at the edge of the hill ?

A.—Yes.

* * * * * * *

Q.—Very well. Whatever the facts may be as to the reason — at any rate you now say, Bergklint, you say that the work on the ledge was to be very short, that you were not acting as helper but merely to assist on the ledge in making a place for the machine drill, that is true, is it not, Bergklint ? You knew you would be a very short time on the ledge when Fraser sent you to that part of the work and your work was simply to assist in preparing a place on the ledge for the machine ?

A.—Yes.

Q.—And notwithstanding his previous answer, the truth is, that he, McLean and McKinnon cleared off all the loose stuff or dangerous material that they could see — ask him that — if, as a matter of fact, that however wrong they were and no matter what he has hitherto said, the fact remains that the three of them cleared off the face of the hill of all the loose stuff they could see ?

A.—No, it was only the stones that were lying closest to the edge.

* * * * * * *

Q.—I understand the witness to say that is an incorrect answer to 55 — "As far as you could see you cleared off all loose rock ?

"A.—Yes."

Ask him if he swears to-day that he did not clear off all the loose rock that he saw ?

A.—At the edge we cleared off as many stones as we saw, but there were stones higher up the mountain.

Q.—There were stones higher up the mountain, and did you tell any one or suggest to any one there was any danger higher up the mountain ?

A.—No.

Q.—How long was he doing that clearing ?

The Interpreter: You mean, just on the ledge ?

Q.—In the whole clearing, how long was he clearing the hill above the ledge or any clearing that day ?

A.—Altogether I was about 5 hours.

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Q.—In clearing ?

A.—In clearing.

* * * * * * *

Q.—But passing that over, did you tell me on the 7th of March, this month, the following that you thought there was some danger of rock falling — that is question 149.

Q.—149. "You thought there was some danger of rock falling ?

"A.—I say — that at that time I didn't think a great deal about it — that there might be danger, but I took a chance and went down because I did not think it would take long."—This is just after you started, at the same time that McLean told you, you would have to go there.

Q.—147. "McLean said, that he thought it was allright and I ask you, if at that time you didn't think it was allright too ?

"A.—I didn't think so."

Q. 148. "But you said nothing ?

"A.—No."

Q.—149. "You thought there was some danger of rock falling ?

"A.—I say — that at that time I didn't think a great deal about it — that there might be danger, but I took a chance and went down because I did not think it would take long."

Q.—150. "I see. You didn't think that you would be there long enough for any trouble to happen ?

"A.—Yes, sir."

Did he give those answers ? What does he say so far ?

A.—I cannot recognize all this.

Q.—Will he deny on his oath he used that language which I read to him, on the 7th of March, this year, will he deny on his oath those questions were put to him and those answers were given — what does he say ?

A.—No, I cannot do it, I don't remember.

Q.—Now, whatever he said, the fact is, is it not, that he did not thing the clearing was sufficient when he went down, is that not the fact ?

The Interpreter: What was that ?

Q.—He did not think it had been sufficiently cleared away, all these stones and stuff when he went down on to the ledge, is that not a fact ?

A.—I saw all of them, that it was risky to work there.

* * * * * * *

Q.—Fraser sent him to assist in making a safe place to put the machine to be worked by McKinnon and McLean, and told him to assist McLean in clearing the hill and to bar down the rock so as to make a safe place for the machine ?

A.—Yes, they were going to make a safe place for the machine.

These extracts are somewhat lengthy. Yet it seems to be scarcely possible to state the plaintiff's position fairly without giving them. Some of them apply as well to the other branch of the jury's finding.

Upon all this evidence it is, I think, abundantly clear that on the first branch of the jury's verdict the judgment at common law cannot be maintained. Indeed, a verdict finding contributory negligence, if not *volens,* could not have been held to be at all unreasonable. But the jury have negatived these defences and their verdict upon them is probably conclusive.

It remains to consider the failure to

place barriers to prevent rolling stones and other debris from causing injury to the employees,

found by the jury to amount to actionable negligence. It is doubtful whether the jury meant to impute negligence to the defendants in this respect independently of the earlier part of their verdict. The finding rather reads as if they deemed the defendants chargeable with negligence for not having placed the guard or barriers above the men only because the hillside had not been sufficiently cleared, and on the assumption that for that the defendants were to blame, or at least that they knew or should be deemed to have known of it. But if the latter part of the verdict should be deemed a distinct and independent finding of negligence, on the evidence the practicability of providing such a guard or shield is more than questionable. The testimony of Haywood, the superintendent, and Fraser, the foreman, as well as that of J. A. McDonald, an expert contractor, is that it was impracticable, and that

in a place like this it would probably cause more accidents and would be more dangerous to erect a thing like that than it would be to go up

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and take the cause of the trouble out of the way altogether. The first precaution in all work of this kind is to send the men up and give them *carte blanche* to bar down any rock that was at all dangerous, and if you take that precaution and remove the cause of danger I do not see any necessity for this overhead contrivance.

All these witnesses agree that the proper method to pursue in such a situation as the hillside in question presented is thoroughly to clear away all loose stuff and debris above the place where the work is to be done and that it is only where that is not feasible or would be too expensive that the shield protection should be resorted to as a substitute. The plaintiff himself distinctly corroborates this evidence when he says that, in Sweden, (and it is on the practice in that country that he relies to establish that it was negligent not to have had a shield of planks in the present case,)

when it was not too much work they cleared off the rock, but if it was too much work they put protection.

There is not a scintilla of evidence that here the work of clearing was "too much" or that it entailed too great an expense or that for any other reason it was not practicable to have it thoroughly done. The uncontradicted evidence is that the men were given *carte blanche* to clear away all dangerous material and that it was only when assured by them that this had been done that the foreman allowed them to proceed with the work on the ledge. Under such circumstances and upon such evidence I agree with the learned judges who formed the majority in the Court of Appeal that the finding that the defendants were negligent in not placing barriers cannot be sustained. The evidence does not support it.

But if such a shield should have been placed above

the men when at work on this particular ledge and if it was negligence not to have had it so placed, and the verdict in this respect should stand, those facts would not, under the circumstances of this case, in my opinion, warrant a recovery at common law.

This case is, I think, clearly distinguishable from *Ainslie Mining and Railway Co.* v. *McDougall*(1), and similar authorities relied on for the appellant. The nature and extent of the protection for workmen which was required in the course of the works that the defendants were carrying on must have varied in the different spots in which they were from time to time called on to discharge their duties, according to the relative situation of such spots and the character of the surrounding land. In some clearing of the berm and incline would have sufficed; in others the shield or guard of planks might be necessary; again, in others neither precaution might be requisite. It was not a case of defective installation of a permanent structure for protection, as in *Ainslie Mining and Railway Co.* v. *McDougall* (1), where the roof in a mine was defective, or of negligence in maintaining a permanent appliance as in *Canada Woollen Mills* v. *Traplin*(2), where the elevator in a mill or factory was worn out. The protection alleged to have been lacking in this instance was not for a place where men would be required to work in the same spot and under the same conditions for any considerable time.

It was admitted at bar in this court and the case appears to have proceeded at the trial on the assump-

(1) 42 Can. S.C.R. 420. (2) 35 Can. S.C.R. 424.

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tion that the defendants' works were put in charge of a competent superintendent and foreman, that they were furnished with the means to provide proper protection and were given authority to incur any expense necessary for that purpose. What kind and extent of safeguard would be necessary and best suited for each spot in which workmen were from time to time engaged was necessarily left to the determination of the superintendent or foreman. That was the only system of protection for their workmen which the company could adopt under the circumstances. In providing it they discharged the common law duty of the

> master who employs his servant in a work of a dangerous character * * * to take all reasonable precaution for the workmen's safety; *per* Lord Watson, in *Smith* v. *Baker & Sons*(1), at page 353.

The principle of the decisions in *Ainslie Mining and Railway Co.* v. *McDougall*(2) and such cases, in my opinion, is not applicable to the circumstances of the present case. *Zeigler* v. *Day*(3); *Batty* v. *Niagara Falls Hydraulic Power and Manufacturing Co.*(4), and *Perry* v. *Rogers*(5), at page 258, cited by the learned counsel for the respondent, are, I think, much more closely in point.

In the *Fakkema Case,* (6) much relied on by the appellant, in so far as the decision does not depend on the form of the verdict, which was a principal subject of discussion in this court, and on the failure to raise in the courts below the question of the knowledge or means of knowledge of the defendant company of the existence of the defect complained of, the court pro-

(1) [1891] A.C. 325.
(2) 42 Can. S.C.R. 420.
(3) 123 Mass. 152.
(4) 79 N.Y. App. 466.
(5) 157 N.Y. 251.
(6) 44 Can. S.C.R. 412.

ceeded on the assumption that it was dealing with a permanent or quasi-permanent instalment of an engine in a place where the men who were engaged about it would be required to work for a considerable period of time. What will amount to such permanency as will impose on the employer the absolute duty of providing his servants with a place in which to work as safe as is reasonably consistent with the character of the work in which they are engaged and will not permit of his delegating to a superintendent, however competent, the selection and determination of the means of protection best adapted to the situation so that the employer may be himself exempt at common law from liability for mistakes or negligence of such superintendent in regard to selecting and utilizing such means of protection, must frequently be a question of degree which can be determined only upon careful consideration of all the circumstances of each case as it arises. Where men are engaged in extensive outdoor works of such a character that their location changes each hour or each day and that protection which may be the most suitable, or even absolutely necessary, in one place in which they are required to work may be unsuitable or unnecessary in another, the master who selects proper and competent persons and entrusts to them the superintendence of such works and furnishes them with adequate materials and resources for providing reasonable protection for the workmen (all of which it is conceded was done by the defendants) does all that he is bound to do and if the persons so entrusted are guilty of negligence it

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is not imputable at common law to the master. *Wilson* v. *Merry*(1), at pages 332, 344.

The fact that the protection alleged to be defective or lacking is required for a temporary purpose is a material element in determining the liability of the defendants for any fault of their superintendent or foreman in regard to it. *Ibid.*, at pages 342 and 346: *Hicks* v. *Smith's Falls Electric Power Co.*(2).

It is alleged that for the defendants' works there was no system of protection by overhead shields or guards arranged for and that they are, therefore, liable at common law if the absence of such protection was the cause of the plaintiff's injuries. But assuming that this failure to place a shield of planks above the men was the cause of the plaintiff's injuries, and that there was such a lack of system, that lack of system was not the cause of the accident. Had such a system been expressly arranged for, on the evidence in the record an overhead shield would not have been used at the place where the plaintiff was injured. The defendants' witnesses say that its use would have been fraught with greater danger to the workmen. It was probably impracticable. Had the clearing above been done as it should have been, and as the foreman thought and had reason to believe it had been, the shield protection would, upon all the evidence, have been unnecessary. But the testimony does not establish a lack of system such as is now alleged and the verdict does not involve such a finding. If the injuries sustained by the plaintiff in the present case are properly ascribable to the absence of the guard or shield of planks, the fault (if any) in failing to provide that

(1) L.R. 1 H.L. (Sc.) 326. (2) 5 Ont. W.N. 301.

guard or shield was that of the superintendent or foreman and is not attributable to the defendant company so as to subject them to common law liability. If the failure to provide a guard was due to mere error of judgment on the part of the foreman or superintendent no negligence whatever has been established.

On the evidence I rather incline to agree with the learned Chief Justice of the Court of Appeal when he says that the cause of the plaintiff's injuries was the failure of himself and his fellow workmen to clear the hillside or incline properly, as it was their duty to have done. It is not shewn that it was not practicable so to clear the hillside that no overhead guard or shield would be required. The plaintiff himself says that the accident was due to the "insufficient clearing at the edge of the hill," and for that he and his fellow workmen, McLean and McKinnon, would seem to have been to blame. No negligence of the foreman, Fraser, or of the superintendent, Haywood, is either alleged or proved in respect of that part of the work. Upon this view of the facts, which appears to be warranted by the evidence, the plaintiff could not succeed either at common law or under the "Employers' Liability Act." But, for the disposition of the plaintiff's appeal to have the judgment in his favour restored, it suffices that a cause of action at common law has not been established.

Failing to secure a restoration of the judgment at common law, the plaintiff asks that a new trial should be granted to enable him to present a case under the "Employers' Liability Act," which he set up in his pleadings but failed to press at the former trial. The trial judge in charging the jury said:—

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I wish to say at once that this is a case, in my opinion, that does not come under the "Employers' Liability Act" at all; I feel that if he recovers at all it must be at common law.

No exception was taken to this part of the charge. The learned judge was not asked to leave the case to the jury under the statute as well as at common law. The Court of Appeal, exercising its discretion, refused to accede to this request. Under these circumstances and having regard to the evidence to which I have referred, I think that in the exercise of our discretion we should not direct a new trial to enable the plaintiff to place before another jury his claim to recover under the "Employers' Liability Act."

I would dismiss the appeal with costs.

But there is not a majority of the court in favour of dismissal. My brothers Idington and Brodeur would restore the verdict for the plaintiff, while my brother Duff is of the opinion that there should be a new trial. Under the circumstances, I very much deprecate the necessity for a new trial and I accept that result only in order that there may be a majority of the court supporting a disposition of the appeal that will not involve the restoration of a verdict which I deem unjustifiable.

Under ordinary circumstances since where a new trial is ordered it is, no doubt, desirable that there should be as little discussion as possible of the merits of the action, I should withhold the opinion I had prepared giving the reasons why I think the plaintiff's action should be dismissed and should merely state the considerations which lead me to concur in the order for a new trial. But as some difficulty would seem to have been occasioned at the former trial by the views

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taken as to the effect of the judgments of this court in *Ainslie Mining and Railway Co.* v. *McDougall*(1), and the *Fakkema Case*(2), it is not desirable — indeed, I think, it would scarcely be proper — to send this action back for another trial without expressing an opinion as to the scope of those decisions and stating my view of the law bearing upon the questions touched by them which this case presents. That I endeavoured to do in the opinion I had prepared, and for that reason I file it with this appended memorandum.

BRODEUR J. (dissenting).—This is an action in damages against the respondents for an accident which, according to the verdict of the jury, was due to their negligence.

The respondents were making an excavation for their power-house and the appellant was working to clear a ledge on which a steam-drill was to operate and, in doing that work, stone or debris came down from above and injured him.

The jury found as follows:—

> Owing to the dangerous nature of the work, we, the jury, consider the defendant company guilty of negligence in not sufficiently clearing the face of the incline, and getting in place barriers to prevent rolling stone and other debris from causing injury to the employees.

There is evidence to support that verdict.

The incline in question was not evidently sufficiently cleared. Some work had been done on that incline and the appellant had worked under the instructions of a foreman to the clearing of that incline. But the debris that struck the appellant when he was

(1) 42 Can. S.C.R. 420. (2) 44 Can. S.C.R. 412.

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working on the ledge could come just as well from that incline where he had been previously working as from another part of the hill about which he had not been ordered to do any work. Some strong evidence has been adduced for the purpose of proving that this debris had not been falling from the place where clearing had been carried out by Bergklint's foreman and himself.

As to the barriers, the system has been in use and proved effective. On those two grounds the verdict of the jury could be sustained. Appellant should succeed in his action.

An employer is bound to regulate his business in such a manner as not to cause injuries to his employees.

If he occasions injury to his workmen by the fact that he does not get his undertakings superintended and controlled with due care and caution he is liable.

It follows that he is responsible for injury caused to his workmen by the negligent system on which his business is carried on. *Bartonshill Coal Co.* v. *McGuire*(1); *Sword* v. *Cameron*(2).

Lord Herschell, in *Smith* v. *Baker & Sons*(3), enunciated those principles in the following words:—

> It is quite clear that the contract between the employer and employed involves on the part of the former the duty of taking reasonable care to provide appliances and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk.

We must bear in mind that under the English law the common law duty above mentioned is a personal one, but at the same time when the employer delegates

(1) 3 Macq. 300. (2) 1 Ct. of Sess. Cas., 2 ser., 493.
(3) [1891] A.C. 325.

his duty to some other person that responsibility passed from him, contrary to the well-known maxim *"qui facit per alium facit per se."*

The doctrine of common employment comes then in existence.

That doctrine is to the effect that if a person occasioning and the person suffering the personal injury are fellow workmen engaged in a common employment and under a common master, such master is not responsible for the results of the injury.

That bare statement of the law was somewhat qualified, however, by the opinion several times expressed in important decisions in England to the effect that the master was bound in delegating his powers: 1, to employ competent persons; and 2, to provide a proper and suitable plant. Had the company respondent properly discharged its obligation in this case ?

Was there a proper plant; or proper system and control of the work ?

In the case of *Grant* v. *The Acadia Coal Co.*(1), at page 434, decided by this court, it was stated by my brother Davies that the employer

> is bound to see that his works are suitable for the operations he carries on at them being carried on with reasonable safety,

and, at page 437, he added,

> this is a duty that no officer's negligence can relieve him of.

In the case of *McKelvey* v. *LeRoi Mining Co.*(2) it was also decided that a master who employs a servant in a work of a dangerous character, such as in mining at the foot of a shaft 800 feet deep, is bound

(1) 32 Can. S.C.R. 427. (2) 32 Can. S.C.R. 664.

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to take all reasonable precautions for the workmen's safety.

I may quote also the case of *Brooks, Scanlon, O'Brien Co.* v. *Fakkema*(1), where 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.

I will refer also to Halsbury, Laws of England, *vo.* "Master and Servant," No. 280, to shew that the ledge was part of the work carried on by the company respondent and it was, as I have said before, its duty to see that it should be safe for its servants to work thereon.

For those reasons, the plaintiff's action should be maintained and the judgment of the Court of Appeal that dismissed it should be reversed with costs of this court and of the Court of Appeal.

Appeal allowed, new trial ordered, costs to abide result.

Solicitors for the appellant: *Taylor, Harvey, Baird, Grant & Stockton.*

Solicitors for the respondents: *McPhillips & Wood.*

(1) 44 Can. S.C.R. 412.

THE UPLANDS, LIMITED (PLAINTIFFS) ..... APPELLANTS;

AND

LAWRENCE GOODACRE (DEFENDANT) ..... RESPONDENT.

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*May 11.
*June 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Cancellation—Expelling contractor — Condition precedent —Possession of plant—Waiver—Seizure in execution—Interpleader—Insolvency—Abandonment of works—Suretyship.

A contract for the construction of works provided that upon the insolvency of the contractor, or the company's manager certifying that, in his opinion, the contractor had abandoned the contract, then the company might enter upon the works, expel the contractor and itself use the materials and plant upon the premises for the use of itself or another contractor in the completion of the works, and that, upon such entry the contract should be determined. In consequence of a letter from the contractor notifying the company of the stoppage of the works, on account of alleged unjustifiable interference therewith, the company took possession of the materials and plant of the contractor, without obtaining the certificate specified, did some work therewith, and then entered into correspondence with the contractor's bondsmen to induce them to proceed with the contract. Upon seizure of the goods under execution by a judgment creditor of the contractor,

Held, Duff J. dissenting, that as the insolvency of the contractor had not been proved nor a certificate of their manager procured, as provided by the contract, the goods in question did not become the property of the company and the contractor's letter could not be considered as a waiver of the conditions precedent stipulated in the contract; consequently, the possession so taken of the plant and materials did not entitle the company to the right of possession thereof as against the execution creditor.

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

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Per Duff J., dissenting.—In the contract in question the term "insolvency" should be construed as meaning the condition of a person unable to pay his just debts in the ordinary course of business; the contractor was visibly insolvent in this sense; the contract had also been abandoned, the company had taken possession under the provision in the contract, and, there being no evidence to establish a contract of suretyship by the bonding company which was requested to proceed with the works, the possession of the company was effective as against the execution creditor. *The Queen* v. *The Saddlers' Co.* (10 H.L. Cas. 404), and *Parker* v. *Gossage* (2 C.M. & R. 617), referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Gregory J., at the trial, by which an interpleader issue to determine the ownership of goods seized by the sheriff under an execution issued by the respondent, as judgment creditor of the Anderson Construction Company, was decided against the present appellants.

The circumstances in which the interpleader issue was directed are set out in the head-note and the questions raised on the present appeal are stated in the judgments now reported.

Nesbitt K.C. for the appellants.

Ewart K.C. for the respondent.

THE CHIEF JUSTICE agreed with Anglin J.

IDINGTON J.—This appeal turns, I think, upon the true construction of the application to the facts of the following part of paragraph 5 in the contract between appellant and the Anderson Construction Company:—

5. Upon the insolvency of the contractor, or upon an execution being levied on his goods, or upon a judgment in a court of British

(1) 18 B.C. Rep. 343.

Columbia being obtained against him, which shall not be satisfied or secured within fourteen days, or upon his making arrangements for assignment in favour of his creditors, or upon the manager certifying under his hand to the company that in his opinion the contractor

(*a*) Has abandoned the contract, or * * *

Then the company, without in any wise prejudicing any other of the rights or remedies of the company under the contract, may enter upon the said works and expel the contractor therefrom, and may itself use the materials and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete the works, and upon such entry the contract shall be determined save as to the rights and powers conferred upon the company and manager thereby.

The contractor, by a letter of remonstrance with regard to the alleged unjustifiable interferences of the appellant, wrote appellant notifying it of the stoppage of the work. Thereupon the appellant's president had directed some of his men to take possession of the goods in question, but instead of adopting the methods specified in the contract for expelling the contractor therefrom, and thereby determining the contract, entered into correspondence with the contractor's surety to induce it to proceed with the contract.

Meantime the sheriff seized the goods, which were thus, in my view of the facts and reading of the contract, merely held tentatively in possession.

To speak of such a possession as that which might have ensued upon a determination of the contract within and according to the terms thereof and a possible bar to a sheriff's seizure, seems a misinterpretation of what actually happened.

It is beside the question to set up the doubtful state of solvency or insolvency. For even if insolvent the contractor was not *ipso facto* by the terms of this contract, to be considered as expelled from the contract and the right of property or possession in its tools and material changed.

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It is the election beyond doubt to actually expel it from and terminate the contract that is the right given.

The method of doing this, if intended before the seizure, certainly fell far short of what the contract had in contemplation.

And as a result the sheriff's seizure cannot be displaced or the claim that it was irregular, and such as only a trespasser might have effected, be upheld.

The appeal must, therefore, I think, be dismissed with costs.

DUFF J. (dissenting).—The provision of the agreement upon which the dispute arises is as follows:—

5. Upon the insolvency of the contractor, or upon an execution being levied on his goods, or upon a judgment in a court of British Columbia being obtained against him, which shall not be satisfied or secured within fourteen days, or upon his making arrangements for assignment in favour of his creditors, or upon the manager certifying under his hand to the company that in his opinion the contractor

(*a*) Has abandoned the contract, or

(*b*) Has suspended the progress of the work for ten days after receiving from the manager a written notice to proceed, without any lawful excuse under these conditions, or

(*c*) Has failed to give the manager all facilities for inspecting any material before the same is in any way used on the work, or

(*d*) Has failed to complete all or any of the works by the time herein specified for their completion.

Then the company, without in any wise prejudicing any other of the rights or remedies of the company under the contract, may enter upon the said works and expel the contractor therefrom, and may itself use the materials and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete, the works, and upon such entry the contract shall be determined save as to the rights and powers conferred upon the company and manager thereby.

Insolvency is here used in the sense in which the term has usually been interpreted in clauses of for-

feiture. To quote the judgment of Mr. Justice Willes in *The Queen* v. *The Saddlers' Co.*(1), at p. 425:—

> The term "insolvent" has been repeatedly construed in a like context, both in private instruments and upon the construction of a statute, to apply to a person labouring under a general disability to pay his just debts in the ordinary course of trade and business.

To the same effect is the dictum of Parke B., in *Parker* v. *Gossage*(2):—

> An insolvent in ordinary acceptation is a person who cannot pay his debts.

The Anderson Construction Company was visibly insolvent in this sense. They abandoned their contract explaining that they were unable to carry it on for want of means. Their workmen presented time cheques to the manager of the appellants which the construction company had refused to pay, to the amount of $8,000. Mechanics' liens were filed and proceedings were taken under them against the property of the company. The company was called upon to implement a guarantee of a debt of $5,000 which it had given to Balfour, Guthrie & Co. at the request of the construction company. Very shortly after the appellants took possession the sheriff seized the tools and plant of the construction company under an execution issued at the suit of the butcher who had supplied the boarding house with meat. The plant and tools were sold and this litigation arose out of a contest between the appellants and various creditors of the construction company over the disposition of the proceeds. Not only is there evidence of insolvency; insolvency was demonstrated within the meaning of this clause. Indeed, it was only in this court

(1) 10 H.L. Cas. 404. (2) 2 C.M. & R. 617.

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for the first time that anybody was bold enough to make the suggestion that insolvency had not been proved.

It is equally clear that the appellants entered and took possession under the authority of this clause. That they took possession in point of fact is not disputed. It was expressly admitted at the trial. It is, moreover, conclusively proved. The appellants, for example, made use of material belonging to the contractors in a manner which would have been wrongful unless the appellants were rightfully acting under this clause.

A suggestion, made for the first time in this court, that some dealings between the appellants and a company referred to in the evidence as the "bonding company" are relied on as shewing conduct on the part of the appellants incompatible with an intention to proceed under paragraph 5 of the contract. The difficulty with this contention is that it has no basis in point of fact. It is founded on the assumption that the contract with the "bonding company" was a contract of suretyship, and that the demand made by the appellants was a demand that the sureties should execute the construction company's contract. There is not a scrap of evidence to shew that there was any contract of suretyship. The contract may have been and probably was a contract of indemnity by which the "bonding company" made themselves answerable for any loss occasioned by the failure of the construction company to perform their contract, a very different thing indeed from a contract of suretyship. There is nothing whatever in Mr. Rogers' evidence justifying the assumption that anything he did was in the least consistent with the assertion and exercise of the appel-

lants' rights under clause 5. If such a point was to be raised it ought, of course, to have been suggested at the trial when the document could have been produced and all the facts bearing upon the point could have been considered. It would be quite contrary to the settled rule upon which this court has acted, over and over again, to permit such a point to be raised in such circumstances in this court for the first time.

I have dealt with the points upon which Mr. Ewart sought to support the judgment — points not hinted at apparently, any one of them, in the courts below. Virtually, I think he admits that the construction of clause 5 upon which the British Columbia courts proceeded is a construction which cannot be sustained.

With very great respect, I can see no answer to the dissenting judgment of Mr. Justice Irving upon that point. I ought, perhaps, to mention before taking leave of the case, the form of the issue which was the subject of much discussion at the argument. There can be no doubt that the question the parties intended to raise and that the learned judge who made the order, intended to be tried, was the question whether, in the circumstances then existing, the property in question was exigible under the writ of execution against the construction company. It was not at all disputed at the trial that the agreement between the parties in reference to the sale precluded the respondents from relying upon the sale as in any way prejudicing the rights of the appellants.

I think the appeal should be allowed with costs.

ANGLIN J.—While unable to accept the construction of the agreement, under which the appellants as-

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sert a right to possession of the property in question as against the sheriff, which would give them the right to take possession only if they intended to proceed themselves to complete the works and not to do so through other contractors, I am of the opinion that this appeal fails on other grounds.

The agreement prescribes certain alternative conditions precedent to the appellants' right to take possession of and use the plant and materials of their contractors, the execution debtors. Two of those conditions which they claim to have been fulfilled are insolvency of their contractors, and abandonment of the contract.

Insolvency, though by no means improbable, has not been proved.

The contract requires that its abandonment shall be certified under the hand of the manager of the company before the right to take possession of and use the contractors' materials arises. I cannot accept the suggestion that this stipulation was so wholly in the interest of the contractors that it could be and was waived by their letter stating that for certain reasons they would be unable to proceed with the work. Having chosen to make the procuring of this certificate a condition precedent to their right to take possession on abandonment, I am of the opinion that without it the appellants cannot establish a right to possession as against the sheriff.

Moreover, I am not satisfied that there was in fact an abandonment by the contractors within the meaning of the provision of the contract which is invoked. I would, on these grounds, dismiss the appeal with costs.

BRODEUR J.—I am of the opinion that this appeal should be dismissed for the reasons given by my brother Anglin.

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Brodeur J.

Appeal dismissed with costs.

Solicitor for the appellants: *H. W. R. Moore.*

Solicitor for the respondent: *F. Higgins.*

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*May 14, 15.
*June 1.

THE MONTREAL TRAMWAYS COMPANY AND THE MONTREAL PARK AND ISLAND RAILWAY COMPANY ..... APPELLANTS;

AND

THE LACHINE, JACQUES-CARTIER AND MAISONNEUVE RAILWAY COMPANY ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Board of Railway Commissioners—Jurisdiction—Lands of provincial railway company—Undertaking for general advantage of Canada — Transfer to provincial railway — Construction of statute—"Railway Act," R.S.C., 1906, *c.* 37, *s.* 176.

The Board of Railway Commissioners for Canada has no jurisdiction, under section 176 of the "Railway Act," R.S.C., 1906, ch. 37, to order that a Dominion railway company should be authorized to use or occupy lands which, at the time of the application for the approval and of the approval of the location of the Dominion railway, had become the property of a provincial railway company. *City of Montreal* v. *The Montreal Street Railway Co.* ((1912) A.C. 333), referred to. Idington J. dissenting.

Per Idington J.—The Board of Railway Commissioners for Canada has the same power to make orders respecting the use and occupation of the lands of a provincial railway company as it has in regard to the lands of any other corporate body created by a provincial legislature.

APPEAL from the order of the Board of Railway Commissioners for Canada, dated the 20th of July, 1912, whereby the Lachine, Jacques-Cartier and Mai-

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

sonneuve Railway Company was authorized to use and occupy a portion of the lands of the Montreal Tramways Company which had been transferred to that company by the Montreal Park and Island Railway Company in pursuance of the Dominion statute 1 & 2 Geo. V., ch. 115.

The Montreal Tramways Company was incorporated by the statute of the Province of Quebec, chaptered 77 of the statutes of that province enacted in the year 1911 (1 Geo. V.). The Montreal Park and Island Railway Company was also incorporated by a statute of the Province of Quebec, in 1885, and, by the Dominion statute 57 & 58 Vict., ch. 84, was afterwards declared to be an undertaking for the general advantage of Canada. By section 11 of its Act of incorporation, the Montreal Tramways Company was, amongst other things, authorized to acquire the privileges, lands, franchises, etc., of the Montreal Park and Island Railway Company and, by the Dominion statute, 1 & 2 Geo. V., ch. 115, the Montreal Park and Island Railway Company was authorized to transfer its privileges, lands, franchises, etc., to the Montreal Tramways Company. In accordance with the authority thus obtained the Montreal Tramways Company acquired the privileges, lands, franchises, etc., of the Montreal Park and Island Railway Company by deed executed on the 18th of November, 1911, including the lands affected by the order now appealed from, and forthwith entered into possession and occupation thereof. The deed of sale was ratified by a statute afterwards enacted by the Legislature of Quebec, 2 Geo. V., ch. 84. The respondent company was incorporated by the Quebec statute, 9 Edw. VII., ch. 99, and was afterwards, by the Dominion statute, 1 & 2

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Geo. V., ch. 104, declared to be an undertaking for the general advantage of Canada. On the application of the respondent company, the Board of Railway Commissioners for Canada, on the 12th June, 1911, made an order fixing the location of the portion of the respondents' railway now in question with the restriction, as to the Montreal Street Railway Co., that the location across the lands in question should be arranged between the parties so that the least injury and inconvenience might thereby be caused to the Montreal Street Railway Company. On the 29th of March, 1912, the respondents served a notice of expropriation of the strip of land now in question, which was needed for their right-of-way, addressed to the "Estate of the Montreal Park and Island Railway Company (now the Montreal Tramways Company), owner of the above-mentioned lands"; on 9th April, 1912, they served a petition for the appointment of arbitrators to determine the compensation to be paid for the lands sought to be expropriated addressed in the same manner, and, on the 19th of May, 1912, desisted from the said expropriation proceedings. The respondents, on the 9th of July, 1912, applied to the Board of Railway Commissioners for Canada for an order authorizing them to take and make use of the strip of land in question for the purposes of their railway and, upon that application, the order now appealed from was made.

The question upon the appeal was whether the Board had jurisdiction to make the order appealed from.

Rinfret K.C. for the appellants.

Lafleur K.C. and *Jodoin K.C.* for the respondents.

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THE CHIEF JUSTICE agreed with Duff J.

IDINGTON J. (dissenting).—This is an appeal invoked under the "Railway Act" to test the jurisdiction of the Board of Railway Commissioners for Canada to make the following order, dated 12th July, 1912:—

Upon reading what is alleged in support of the application and on behalf of the Montreal Park and Island Railway Company, and the report of the chief engineer of the Board:—

It is ordered that the applicant company be and it is hereby authorized to take for the purpose of the crossing that portion of the said lot No. 340, of the lands of the Montreal Park and Island Railway Company consisting of a strip of land 597 feet in length by 100 feet in width, containing 1.62 arpents, as shewn on the said plan.

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

The matter has been needlessly confused by incorporating in the case and proceedings matters entirely irrelevant to the neat point which is involved.

The respondent was originally incorporated by the Legislature of Quebec, but, by an Act of the Parliament of Canada, 1 & 2 Geo. V., ch. 104, the work was declared to be one for the general advantage of Canada and thus all appertaining thereto came within the provisions of the "Railway Act" and the consequent jurisdiction of the said Railway Commissioners.

That Board was duly applied to for an order approving of the proposed route for respondent's railway when a great many parties, including the Montreal Street Railway Company, under which the Montreal Tramways Company, now appellant, claims, were heard in regard to their respective objections to the route.

An order, dated 12th of June, 1911, was made subject to various conditions approving of at least a part

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of the proposed route, including that part of it crossing the land in question, but in respect thereof was left in somewhat indefinite form, which is expressed as follows in sub-section (*d*) of section 1 of said order:—

(*d*) The location across the lands of the Montreal Street Railway Company to be arranged between the parties so that the least injury and inconvenience may be suffered by the street railway company.

The respondent seems to have instituted expropriation proceedings which, on such an indefinite order, may have been considered premature and, on objection, desisted therefrom. All relative thereto does not concern us here.

The respondent seems to have conceived the idea that, inasmuch as the Montreal Park and Island Railway Company had become a Dominion railway, the proper course was to have resort to the power of the Board under section 176 of the "Railway Act," and applied accordingly, but it was disclosed upon the hearing of the application that, though that railway company was still under the Dominion authorities, Parliament had empowered it to sell its property and, in course of exercising that power, the land in question had passed to the Montreal Tramways Company which was and is a concern incorporated by the Legislature of Quebec.

Thereupon the Board made the order above quoted. It did not pretend to act upon section 176 of the "Railway Act," but simply confined itself to making an order which completed the work left in the indefinite form I have already adverted to, and declared what it always had intended, subject to amicable adjustment, should be done in the way of declaring its approval of the route.

This it had, in my opinion, undoubtedly, jurisdiction to declare and approve.

The mistake in description of the owner does not affect the taking of the land or the right to direct the route as defined to be taken by respondent.

The pretension that because the land happened to belong to a local tramway, therefore, there was no jurisdiction in the Board to so direct is without foundation.

The local railway company's property is, in that regard, just as much within the power of Parliament and subject to the provisions of the "Railway Act" as is that of any other corporate body created by the local legislature.

The further pretension that the power of expropriation in such case belongs to a local board instead of the Dominion authorities is equally without foundation unless we are to invert the order of superiority as between the Dominion and the provinces, as defined by the "British North America Act," and reverse many authorities deciding that what is necessary to the execution of the purpose of the constructing of Dominion works, including railways, has to be observed. The cases of *The City of Toronto* v. *The Bell Telephone Co.*(1), and the *Attorney-General of British Columbia* v. *The Canadian Pacific Railway Co.*(2), have surely settled that much and given a wide enough scope to what is conceivable as necessarily incidental to the execution of the powers of Parliament. A later generation may laugh (when struggling with its results) at the conception of telephone posts and wires

(1) [1905] A.C. 52. (2) [1906] A.C. 204.

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Idington J.

upon the streets of a municipal corporation being held to be such an incidental necessity, but, meantime, we must accept it with becoming respect as a proper interpretation of the "British North America Act."

Surely the crossing of a bit of land held by a corporation of another sort, not for present use, but in hopes, or alleged hopes, of its use possibly in a future age, falls far within these applications of the principle laid down and acted upon in these and other cases, unless we are to hold that a local tramway is a more sacred thing than its fellow creature, a municipal corporation.

With great respect, I think the argument based on section 176 has misconceived the situation in law and in fact. But that does not affect the jurisdiction of the Board which has been impeached to make the order it did. Even if used as against the Montreal Park and Island Railway Company, that is something the company moving has nothing to do with. Though assuming (with great respect I much doubt) the latter company properly made a party to elicit an opinion from us in a case to which it was no party, yet the order might, as against the Montreal Park and Island Railway Company, if an order suitable to such an exigency had been made under section 176, be rested thereupon and be held good.

The appeal should be dismissed with costs.

DUFF J.—This is an appeal from the Board of Railway Commissioners for Canada and the question which arises is whether the Board had power to make a certain order, dated 20th July, 1912, which is in the following terms.

THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Order No. 17,082.

Saturday, the 20th of July, A.D. 1912.

D'ARCY SCOTT, *Asst. Chief Commissioner.*

S. J. MCLEAN, *Commissioner.*

IN THE MATTER OF THE ORDER of the Board, No. 13,993, dated June 12th, 1911, approving the location of the Lachine Jacques-Cartier and Maisonneuve Railway Company's line of railway from the westerly terminus of the railway to a point about 400 feet west of the Canadian Pacific Railway Company's crossing at Iberville street subway, in the City of Montreal; and the application of the Lachine, Jacques-Cartier and Maisonneuve Railway Company for authority to take, for the construction of its railway, a portion of lot No. 340, in the Parish of St. Laurent, in the said City of Montreal, of the lands of the Montreal Park and Island Railway Company, consisting of a strip of 597 feet in length and 100 feet in width, containing 1.62 arpents, as shewn on the plan dated June 12th, 1911, and approved under the said order No. 13, 993.

Upon reading what is alleged in support of the application and on behalf of the Montreal Park and Island Railway Company, and the report of the chief engineer of the Board:—

IT IS ORDERED that the applicant company be and it is hereby authorized to take for the purpose of the crossing that portion of the said lot No. 340, of the lands of the Montreal Park and Island Railway Company consisting of a strip of land 597 feet in length by 100 feet in width, containing 1.62 arpents, as shewn on the said plan.

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

There can be no serious doubt, I think, that the Board, in making the order, was professing to execute powers conferred upon it by section 176 of the "Railway Act." It appears clearly enough from the application dated 10th May, 1912, and a further application of the 25th July, that it was understood by the respondents that the Board was exercising powers under

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Duff J.

that section. Indeed, it is so stated in the factum of the respondents and, while the section is not mentioned in the order, the order purports to be made under the application of the 10th of May, and it is not really disputed that the order was an order under the section mentioned. The Board would, of course, have no power under the general expropriation provisions of the Act to make such an order, as sufficiently appears from a consideration of sections 215 and 216.

I do not think the parties have really come to any issue upon the question whether the lands in question ever did constitute an integral part of the railway undertaking of the Montreal Park and Island Railway Company, or are now such a part of the Montreal Tramways Company, and I think there is no evidence before us which would enable us to pass upon the point, assuming it would be competent for us to do so on this appeal. It may be doubted, I think, whether section 176 has any application to the lands of a railway company which are not physically a part of the railway undertaking: for example, subsidy lands held for sale. It is quite arguable that proceedings under the general expropriation provisions of the Act would be the appropriate method of getting authority to take such lands even where the owner is a Dominion railway company. The point, in my view, is of no importance on this appeal, because, as I have already indicated, those proceedings are taken by the railway company under section 176; and the lands which the respondent company was authorized to take by the order appealed from are now and at the time the application and order were made were the property of a provincial railway company owning and operating a railway

which is a local undertaking and subject to the exclusive authority of the provincial legislature.

First.—These lands are the property of the Montreal Tramways Company whose undertaking is a local undertaking under the exclusive jurisdiction of the Quebec Legislature. It is not disputed that the lands in question, prior to November, 1911, formed part of the property of the Montreal Park and Island Railway Company whose undertaking, having been declared for the general advantage of Canada, was a Dominion undertaking. In November, 1911, however, that company was authorized by an Act of the Dominion Parliament to transfer the whole or any part of its undertaking and property to certain companies engaged in operating provincial undertakings, including the Montreal Tramways Company, and, in the result, the property in question, with other properties, became vested in the Montreal Tramways Company, a railway company engaged in working a provincial railway, and were vested in that company when the application was made upon which the order was based. These facts are admitted again and again in course of the proceedings taken by the respondents and are not disputed in the respondents' factum.

Secondly.—Section number 176 has no application to lands which are the property of a provincial railway company. The full text of the section is as follows:—

176. The company may take possession of, use or occupy any lands belonging to any other railway company; use or enjoy the whole or any portion of the right-of-way, tracks, terminals, station or station grounds of any other railway company, and have and exercise full power to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Board first obtained

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and to any order and direction which the Board may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

2. Such aproval may be given upon application and notice, and, after hearing, the Board may make such order, give such directions, and impose such conditions or duties upon either party as to it may appear just or desirable, having due regard to the public and all proper interests.

3. If the parties fail to agree as to compensation, the Board may, by order, fix the amount of compensation to be paid in respect of the powers and privileges so granted. 3 Edw. VII., ch. 58, sec. 137; 6 Edw. VII., ch. 42, sec. 8 .

If this section applies to provincial railway companies, then it is within the power of the Board of Railway Commissioners for the Dominion to authorize a Dominion railway company to make use, to any extent that the Board shall think proper, of the works of a provincial railway company without the consent of the provincial railway company or the public authorities of the province, and without a declaration by Parliament that the provincial railway should be a work for the general advantage of Canada. The Board would also have power under the express provisions of the section to impose conditions upon the provincial railway company, as well as duties, as it might appear just or desirable to them and to fix the compensation to be paid in respect to the powers and privileges granted. In a word, the section, if such be its application, authorizes the establishment over provincial railways of that dual control which has been held to be contrary to the policy of the "British North America Act." *City of Montreal* v. *Montreal Street Railway Co.*(1), at pages 345, 346. Sub-section 4(*c*), of section 2 and section 8 of the "Railway Act" seem to shew that where it was intended that a specific pro-

(1) [1912] A.C. 333.

vision of the Act should apply to provincial railway companies that has been expressly stated.

I think the proper conclusion is that section 176 has no such application.

It is argued, however, that at the time the line of the respondents was located these lands were still a part of the property of the Montreal Park and Island Railway Company, a Dominion company. I do not think that in the circumstances of this case that is an answer to the appeal. When the application was made for leave to take possession of the lands, admittedly they had passed to the Montreal Tramways Company.

The Dominion legislation authorizing the transfer to the provincial company of the property of the Dominion railway company involved by necessary implication a declaration that such property, when transferred, should be no longer be part of a work for the general advantage of Canada; I entertain no doubt that such a declaration by the Dominion Parliament made with the concurrence of the Quebec Legislature would be entirely effective to remove the property transferred from the Dominion jurisdiction under sections 91(29) and 92(10) of the "British North America Act."

The result is that, with respect to the property transferred, section 176 ceased to have any operation.

ANGLIN J.—Upon its face, the order appealed from (No. 17,082) was within the jurisdiction of the Board of Railway Commissioners for Canada. It purports to authorize the "taking" by the Lachine, Jacques-Cartier and Maisonneuve Railway Company, "for the purposes of the crossing," of a part of the lands of the

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Anglin J.

Montreal Park and Island Railway Company — a railway subject to the authority of the Parliament of Canada. Such an order is within the power conferred by section 176 of the Dominion "Railway Act."

But, on the argument, it was made clear beyond all doubt that, while the land in question had been vested in the Montreal Park and Island Railway Company, when the application was made to the Board for approval of the location of the Lachine, Jacques-Cartier and Maisonneuve Railway, and when the order approving such location was pronounced, as a result of conveyances authorized by Dominion and provincial legislation, it had become vested in the Montreal Tramways Company, a provincial railway company, and belonged to it at the time the order now in appeal was pronounced. Moreover, it was admitted at bar that the land to be taken is adjacent to car-sheds formerly belonging to the Montreal Park and Island Railway Company, but now the property of the Montreal Tramways Company, that no tracks of either company are laid upon it, and that, in fact, no crossing is to be provided for.

These facts were known to the Board of Railway Commissioners, and it is a little difficult to understand how they came to make an order dealing with the land as if it were still the property of the Montreal Park and Island Railway Company, and stating that it is required for the purpose of a crossing. Under the circumstances I should have preferred remitting the matter to the Board in order that we might be advised, before passing upon it, whether the form which the order has taken was due to some clerical error in draftsmanship, or whether the Board was of the opinion, for some reasons not apparent to us, that, not-

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withstanding the legislation above referred to and the conveyances consequent upon it, the land in question should still be deemed, for the purposes of section 176, to belong to the Montreal Park and Island Railway Company. But my colleagues think it unnecessary to adopt this course, since it is undisputed that the land in question was, in fact, vested in the Montreal Tramways Company when order No. 17,082 was made.

Dealing with the order, therefore, as if made for the taking of land belonging to the Montreal Tramways Company, a provincial railway company, I am of the opinion that the Board had not jurisdiction to make it. Section 176 of the "Railway Act" is the only authority under which counsel sought to sustain the order, and I know of no other provision of the statute that could be invoked to support it. Section 176, in my opinion, is confined to its operation to lands of railway companies subject to the legislative jurisdiction of the Dominion Parliament and has no application to lands of provincial railway companies.

BRODEUR J.—On the 10th of May, 1912, the railway company respondent, applied to the Board of Railway Commissioners for an order under section 176 of the "Railway Act" to take certain lands and to have the compensation fixed by the Board.

Originally these lands belonged to one of the appellants, the Montreal Park and Island Railway Company, a federal railway company. But these lands had been, in the month of November previous (1911) transferred to the other appellant, the Montreal Tramways Company, a provincial company.

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Brodeur J.

The Board granted the order on the 20th of July, 1912.

It is claimed by the appellants that the Board was without jurisdiction in proceeding under section 176 of the "Railway Act."

Section 176 provides that the Board may authorize a railway to

> take possession of, use or occupy any lands belonging to any other railway company,

and the Board may fix the amount of compensation if the parties fail to agree.

The words "any other railway company," in that section, do not refer to a provincial company. The company mentioned in the section is defined in the Act as meaning a company within the legislative authority of the Parliament of Canada.

The Board would be then without jurisdiction to fix the compensation for lands belonging to a provincial company.

The lands in question might, likely, be expropriated by the respondent company, but the compensation should be determined not by the Board, but by arbitrators appointed under the "Railway Act."

It was contended by the respondents that the proceedings of the Board were valid because when the plans were originally approved the federal company, appellants, were then owners. But the deposit of those plans in the registry office was made on the 19th of January, 1912, and the formal notice of expropriation was given on the 3rd of April, 1912. At both these dates the federal company had ceased to be the owners of these lands and they had passed into the possession of the provincial company.

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Brodeur J.

The Board was then, in July, 1912, without jurisdiction to authorize the taking of the lands of the provincial company and to fix the compensation therefor under section 176 of the "Railway Act."

The appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Perron, Taschereau, Rinfret, Geuest, Billette & Plimsoll.*

Solicitors for respondents: *Henri Jodoin.*

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*May 28.
*June 1.

JOHN BROWN, LIQUIDATOR.....APPELLANT;

AND

J. J. COUGHLIN AND W. J. IRWIN..RESPONDENTS.

IN THE MATTER OF THE STRATFORD FUEL, ICE, CARTAGE AND CONSTRUCTION CO.

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

Principal and surety — Insolvency of debtor — Action by liquidator against principal creditor—Compromise—Agreement not to rank —Payment by sureties—Right of sureties to rank.

By a contract of suretyship C. and others guaranteed payment to a bank of advances to a company by discount of negotiable securities and otherwise, the contract providing that it was to be a continuing guarantee to cover any number of transactions, the bank being authorized to deal or compound with any parties to said negotiable securities and the doctrines of law and equity in favour of a surety not to apply to its dealings. The company became insolvent and its liquidator brought action against the bank to set aside some of its securities which action was compromised, the bank receiving a certain amount, reserving its rights against the sureties and agreeing not to rank on the insolvent estate. The sureties were obliged to pay the bank and sought to rank for the amount.

Held, affirming the judgment of the Appellate Division (28 Ont. L.R. 481), that they were not debarred by the compromise of said action from so ranking.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), setting aside the order of Mr. Justice Middleton and restoring that of the local judge.

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

(1) 28 Ont. L.R. 481.

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BROWN v. COUGHLIN.

IN RE STRATFORD FUEL, ICE, ETC., CO.

The respondents, Coughlin and Irwin, sought to rank on the insolvent estate of the Stratford Fuel, etc., Co. as creditors for money paid to the Traders Bank for whom they were sureties for advances to the company. The bank, in settling an action brought by the liquidator of the company, had agreed not to rank on the assets and the claim of respondents was resisted on the ground that such agreement by the principal creditor was binding on the sureties. The matter came before Judge Barron, a local judge of the High Court, who decided that the respondents were entitled to rank and gave the following reasons:—

"The claim of Coughlin and Irwin is to rank on the estate of the Stratford Fuel, Ice, Cartage and Construction Company, Limited, in the hands of the liquidator, John Brown, for the sum of $5,624.80, of which the sum of $400 is admitted.

"The claim is made, and it is opposed under the following circumstances: The company while in business became heavily indebted to the Traders Bank of Canada in the sum of $40,000 or thereabouts. They continued in business for some time, but on the 7th January, 1908, an order was made to wind up the said company under the R.S.C. 1906, ch. 144, and amending Acts.

"Coughlin and Irwin, with others, had become and were at the time of the liquidation proceedings, guarantors to the bank of the company for their full indebtedness. Exhibit 'A' contains this guarantee. The bank also held a mortgage dated the 27th August, 1907, from the company securing the full amount of its indebtedness. The liquidator, John Brown, brought an action against the bank, on the 13th February, 1908, to set aside the mortgage (and a second mort-

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gage) as void against the creditors, which action was settled on the eve of trial, and the settlement itself appears in the memorandum attached to the record. There still remains due to the bank, after this settlement, the sum of $....., or thereabouts, and the bank demanding payment from the guarantors on the guarantee bond, exhibit 'A,' the present claimants, Irwin and Coughlin, in pursuance of the demand, paid the sum of $6,624.80, of which they claim the sum above mentioned in regard to which there is no dispute.

"Mr. Harding, in opposing the claim of Coughlin and Irwin contends, first: That the settlement made of the action of Brown against the Traders Bank had the effect in law of releasing the guarantors on their bond to the bank, and, therefore, that the payment by Coughlin and Irwin was a purely voluntary one on their parts, one which the bank could not legally insist upon, and *sequitur,* that Coughlin and Irwin cannot now legally rank on the estate in liquidation for a payment illegally made by them as against the liquidator. Secondly:—Mr. Harding maintains that Coughlin and Irwin were privy to the settlement of the suit of Brown v. The Traders Bank, and, therefore, that they are bound by this settlement, and being so bound cannot now rank on the estate in the liquidator's hands. As to the latter contention the first question to be decided is one of fact, namely, were Coughlin and Irwin privy to the settlement in question. I do not find that they were. Hence it is neither necessary nor prudent to pursue the law applicable to a fact which is not found to exist.

"I may add, however, that in law information to a surety of time being given to the principal debtor by the creditor, when there is a reservation of rights

against the surety, is no bar whatever either to the creditor proceeding against the surety or the surety proceeding against the debtor. (*Webb* v. *Hewitt*(1).)

"Then as to the first objection. The facts in this case must not be confused with a case of an absolute and unqualified release of a debtor without condition or proviso. In such a case the debt is gone and it is impossible to preserve a right against a surety when the debt is satisfied. It is said by Mr. Harding that though the entire debt is not entirely gone, yet a substantial security, namely, the mortgage referred to, is gone, and that the guarantors have lost the right to be subrogated to the bank in regard to this security. If there is anything in this, it is a matter for the guarantors, and they do not complain. If they have been deprived of the benefit of subrogation it is their loss and no one else need complain if they don't, and they don't. But of what benefit is it to be subrogated to a creditor in regard to a security which is paid off by the debtor to that creditor, and for which payment full credit is given by that creditor to the debtor? The security in question can only be paid once by the debtor. The company having paid it by the carrying out of the settlement they cannot be asked to pay it over again to the guarantors. The guarantors are already benefited by the payment. They gain, they do not lose. By the lessening of their liability on the amount of their indebtedness or their liability on the guarantee bond they happily have had so much less to pay on account of the debtor to the creditor.

"The law of subrogation, as I understand it, has no application here. Broadly speaking, subrogation

(1) 3 K. & J. 438.

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is this:—A surety on paying the debt of his principal is entitled to be subrogated to all the securities, funds, liens and equities which the creditor holds against the principal debtor, or has a means of enforcing payment from him. The case in question is not a case of an obligation being extinguished by payment by a surety under such circumstances as entitled him to claim the obligation as still subsisting for his benefit. It is the simple case of payment by a debtor to his creditor of one of the securities that the creditor holds. I can quite appreciate that a creditor must not play pitch and toss with his security and negligently impair the position of the surety and increase the amount that the surety has ultimately to pay, but in this case it is not contended that the settlement made by the bank of the security in question, was other than a reasonable one under all the circumstances, and which, while it satisfied the bank *pro tanto,* likewise benefited the guarantors, the claimants, and lessened the amount of their claim as guarantors against the estate in liquidation.

"Then as to the settlement, while it extinguished the debt *pro tanto* there still remains a large portion of the debt due to the bank. It is said that as to this balance the bank lost its right by the settlement in question, that they can not in law pursue the guarantors, and that, therefore, the guarantors have no right to rank on the estate in regard to a payment by them for which they were not liable in law. But first, what is the contract of suretyship, and next, what does the settlement say ?

"The contract of suretyship is to be seen in exhibit 'A' and the settlement by the indorsement on the record. It is thus seen that the rights of the bank

are specially preserved by both documents against the guarantors by the reservation of remedies against them. Now, what is the result in law of a reserve of remedies when the surety does not consent to the discharge of the debtor? Such a reservation prevents the discharge of the surety upon the principle that it rebuts the implication that the surety was meant to be discharged, and it prevents the rights of the surety against the debtor being impaired. (See *Bateson* v. *Gosling*(1).) The debtor may even be discharged and the surety held provided the contract between the surety and creditor so provides, and in this case the contract of surety does so provide. (See *Cowper* v. *Smith*(2).)

"There is not in this case the element of novation as there was in *Commercial Bank of Tasmania* v. *Jones*(3), and in *Perry* v. *National Provincial Bank of England*(4). In the cases cited there was substitution of one debtor for another as to portion of the debt, as to which portion there was held to be accord and satisfaction, and, therefore, to that extent the creditor could make no claim against the surety. In the case *sub judice* the bank by their settlement did not procure their claim in full. Part of their original debt still remained unpaid. It is obvious, of course, that if the bank had been paid in full there would be an end of the matter. There was a balance still unsatisfied. This balance has been now partly satisfied by the payment of $6,624.80, of which $400 is admitted, and from which $1,000 has to be deducted, and

(1) L.R. 7 C.P. 9.
(2) 4 M. & W. 519, 520, 521.
(3) [1893] A.C. 313, at p. 316.
(4) [1910] 1 Ch. 464.

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for which balance I think the sureties should rank on the estate in liquidation.

"It is said that the bank also claims the right to rank for dividend on the claim of $39,600, but while their claim of $39,600 was originally filed prior to the settlement of the suit, that settlement positively provides that they, the bank, shall not rank on the estate in the hands of the liquidator. In other words, they agree to abandon and forego one of their remedies. They carefully preserved their rights and remedies against the guarantors, whose right in turn to rank for dividend is not lost to them any more than they, the sureties, would lose their rights had the bank undertaken not to sue the company, which they could have done without impairing the remedies of the surety in regard to any sum that they have paid or may be called upon to pay.

"For these reasons, then given in brief, I think that the claimants, Coughlin and Irwin, have the right to rank on the estate in question for the sum first mentioned, and a report by me as master will follow accordingly."

An appeal was taken to Mr. Justice Middleton, who reversed the local master's order, but it was restored on further appeal to the Appellate Division of the Supreme Court.

Sir George Gibbons K.C. and *R. T. Harding* for the appellant.

Hellmuth K.C. and R. S. Robertson for the respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs. (See what Barron J. says, *supra.*)

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The Chief Justice.

The appellant was the debtor of the Traders Bank at the time the agreement was made. The bank renounced its right to rank on the estate in consideration of the payment of $25,000, but reserved its recourse against the sureties among whom were the respondents. The latter being obliged to pay the debt now claim to rank against the estate of the principal debtor whose debt they paid. It appears to me obvious that they are entitled to rank on an estate of which they are creditors by reason of the payment made to the bank. The claim is not filed in subrogation of the bank's claim under section 69 of the Act, but as that of a creditor under section 76.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant, who is a liquidator of said company, which is in process of being wound up under the "Winding-up Act," brought an action against the Traders Bank to set aside some securities obtained by it from said company and comprised the action by a brief memo. indorsed on the record entered for trial of which clauses 1 and 5 are all that are material for consideration of the question raised herein.

Said clauses are as follows:—

1. The defendants to be entitled to the proceeds of the real estate and ice franchise, twenty-five thousand dollars referred to in the pleadings, but agree not to rank upon the estate in the hands of the plaintiff as liquidator.

5. The bank to retain and hereby reserves all its rights against all securities in its hands and against the guarantors of its debt.

The respondents were sureties to the bank for the general balance due by the company to it.

The instrument by which they became such sureties has been lost, but is shewn to have, in the main at

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Idington J.

least, consisted of a general printed form in common use by banks to be signed by guarantors for securing payment of such general balance as may be found due by a customer of the bank.

One term thereof was as follows:—

> This is a continuing guarantee intended to cover any number of transactions, and we agree that the said bank may deal or compound with any of the parties to the said negotiable securities, and take from and give up to them again security of any kind in their discretion, and that the doctrines of law or equity in favour of a surety shall not apply hereto.

The questions raised herein must be solved by the correct appreciation of this power of compromise and the relation thereto of the said stipulations one and five above quoted from the memo. of settlement between the parties thereto.

Can it be maintained that the said memo. of settlement was a compromise within the meaning of the guarantee whereby the claims of the bank as against the debtor were compounded and the principal debtor so absolved thereby that the sureties could have no resource against it ?

I do not think so. I assume the guarantee is possibly capable of some such operation, though I doubt such construction.

I put it thus to test the only ground on which it seems to me the matter could be resolved in favour of appellant's contention.

So long as the debt exists and the surety is called upon to pay it, he must in law be entitled to pursue his usual remedies of a surety against the debtor when once he has paid his debt; unless he has contracted himself out of such right in some such way as I have suggested.

This ground not being open to appellant by virtue

of what has transpired, what answer can he have to the statutory right of the surety to rank as a contingent creditor and in virtue thereof to rank for what he has been called upon to pay by the concurrence of appellant permitting the sureties to be pursued ?

If the liquidator intended to avert such consequences it was open to him to have refused his assent to such recourse against the surety or to have insisted upon the sureties assenting to the settlement.

I cannot see how the surety can, short of some such methods, be deprived of his right to rank in respect of what at the date of the winding-up order was a contingent claim which in light of what has transpired has become an actual claim against the debtor whose assets are in the appellant's hands.

I think the appeal must be dismissed with costs.

DUFF J.—Unless precluded by agreement express or implied or by some equity or estoppel arising from some conduct of the parties the surety (by reason of the relation created by the contract of suretyship) is entitled to require the principal debtor to discharge his obligation to the creditor in so far as that may be necessary to relieve the surety. The debtor in other words comes under an obligation to the surety to save the surety harmless from any prejudice which might arise from the non-performance of the principal obligation. It is not disputed that the correlative right of the surety may be enforced in a winding-up where the principal obligation is to pay a sum of money and the principal debtor is the company in process of winding-up. I do not think it is really disputed either, at all events, it is obviously so, that the surety cannot by

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any act of the creditor alone be deprived of his right to compel the debtor to protect him by discharging the debt, or to indemnify him against the consequences of his failure to do so. The substance of the argument in this case is, that by the terms of the suretyship contract, the creditor, the bank, was made the agent of the sureties and as such agent empowered to enter into arrangements on their behalf with the principal debtor binding on the sureties as if made by them in person, and that by the agreement of June 15th, 1909, an arrangement was entered into pursuant to this authority between the creditor and the debtor whereby the creditor agreed on behalf of the sureties as well as on behalf of itself that no claim should be made in the winding-up in respect of the debt in question. There are two answers to that: The documents are as follows:—

To the Traders Bank of Canada.

In consideration of the Traders Bank of Canada making advances to the Stratford Fuel, Ice, Cartage and Construction Company, Limited, either by the discount of negotiable securities consisting of bills of exchange or promissory notes, or by overdrafts, or otherwise, from time to time as the said bank may think fit; we jointly and severally hereby guarantee payment in full of such negotiable securities or overdrafts or other indebtedness provided, however, that the amount to be paid by us under this guarantee shall not exceed $38,000. This is a continuing guarantee intended to cover any number of transactions, and we agree that the said bank may deal or compound with any of the parties to the said negotiable securities, and take from and give up to them again security of any kind in their discretion, and that the doctrines of law or equity in favour of a surety shall not apply hereto. It is also agreed that the guarantors shall be liable for the ultimate balance remaining after all moneys obtainable from other sources shall have been applied in reduction of the amount which shall be owing from the Stratford Fuel, Ice, Cartage and Construction Company, Limited, to the said bank; provided, however, that they shall not be liable for a greater amount than the said sum of $38,000, but the said bank shall not be bound to exhaust all such resources against all parties previous to making

demand upon us for payment, the intention being that the Traders Bank of Canada shall have the right to demand and enforce this guarantee in whole or in part from the guarantor whenever the principal debtor or any party or parties concerned fail to discharge any obligation they have entered into.

This guarantee shall subsist notwithstanding any change in the constitution of the company.

As witness our hands at Stratford this 24th day of October, 1907.

Witness:

J. J. COUGHLIN.

J. J. COUGHLIN. (Seal.)
W. G. IRWIN "
W. J. MOONEY. "
F. B. DEACON. "
G. R. DEACON. "
JAS. A. GRAY. "

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1. The defendants to be entitled to the proceeds of the real estate and ice franchise, twenty-five thousand dollars referred to in the pleadings, but agree not to rank upon the estate in the hands of the plaintiff as liquidator.

2. The defendants to pay to the plaintiff the sum of one thousand dollars.

3. Each party to pay own costs of suit.

4. The other securities held by the defendants to be declared valid.

5. The bank to retain and hereby reserves all its rights against all securities in its hands and against the guarantors of its debt.

GEO. C. GIBBONS,
For Plaintiff.
GIDEON GRANT,
For Defendants.

June 15—09.

First, the document of the 24th October, 1907, above quoted, does not in express terms invest the bank with any authority to act as the agent of the sureties in dealing with the principal debtor. Nor does the document in apt terms limit the rights or the remedies of the sureties as against the debtor. The stipulation that "the doctrines of law or equity in favor of a surety" shall not apply to compositions between the bank and the principal debtor, although it

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is perhaps capable of being read as applying to the rights of the surety as against the principal debtor does not necessarily relate to such rights, and the context would appear to indicate that such rights are not within the contemplation of the clause. Without analysing the language further I will simply say that I do not think the construction contended for accords with the real intendment of the stipulation. But assuming the appellant to be right in his contention as to the construction of this document, I think the compromise of June 15th, 1909, when rightly read, does not amount to a release of the sureties' rights. I think when the first paragraph is read with the last it becomes apparent that according to its true meaning the instrument only embodies a stipulation by the bank that the bank will not press its own claim to rank upon the assets of the company in the hands of the liquidator.

ANGLIN J.—In order to give its full legal effect to the reservation in the document of compromise of the bank's rights against the sureties, its agreement not to rank on the debtor's estate in liquidation must be deemed similar in its results to a covenant not to sue. It does not operate as a release of the debtor. It is in fact an agreement that the bank will not claim to rank in the liquidation for the balance of its demand as a creditor. It is said that on payment the surety becomes subrogated to the rights of the creditor, and that it is only by virtue of such subrogation that his right to proceed against the primary debtor arises. It follows, the appellant maintains, that in the present case the sureties cannot rank on the estate in liquidation because the creditor had

debarred himself from so ranking. But as the creditor's covenant not to sue the principal debtor does not preclude the surety who pays the creditor from bringing action against the debtor for indemnification, so the agreement not to rank in the present case left that right open to the sureties on their making payment. Moreover, while it would appear to be the purpose of the bond sued upon that dealings between the creditor and the primary debtor, which would ordinarily operate to discharge the sureties, should not have that effect, there is nothing in that instrument which, in the event of the sureties being compelled to meet the primary debtor's obligation, necessarily deprives them of the right, which the law otherwise gives them, to claim indemnification by the primary debtor or out of his estate in liquidation; and I do not think it should receive such a construction.

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

BRODEUR J.—I fail to see how the guarantors who have paid the debt of the principal debtor could be prevented from ranking on the assets of the estate of the latter. The liquidator who is contesting the claim of the sureties invokes an agreement which he has made with the principal creditor who undertook not to rank upon the estate. But at the same time it is stipulated in the same agreement that the creditor could demand and enforce his right against the sureties.

By that agreement the principal creditor could not claim personally from the estate. And if he had not succeeded in collecting anything from the sureties he would lose the balance of his claim, but if he col-

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Brodeur J.

lects something from the sureties the latter become entitled to make a claim against the estate. The agreement was a personal one as far as the creditor was concerned, but it did not bind the sureties.

The reservation of rights against the sureties leaves the debt alive. *Kearsley* v. *Cole*(1); *Green* v. *Wynn*(2).

The sureties' right to be indemnified by the principal debtor or his estate will not be held to have been abandoned unless a contract on their part to abandon it has been proved.

There is no evidence that such an undertaking exists in this case.

The reservation of the principal creditor's remedies against the guarantors necessarily implies the continuance of their right to be indemnified. Halsbury, Laws of England, vol. 15, p. 519.

This appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Harding & Owens.*

Solicitor for the respondents: *R. S. Robertson.*

(1) 16 M. & W. 128. (2) 4 Ch. App. 204.

MARY A. MATHEWSON (PLAINTIFF) ..... APPELLANT;

AND

WILLIAM A. BURNS (DEFENDANT) ... RESPONDENT.

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*June 2.
*June 19.

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

Specific performance—Lease of land—Option for purchase—Acceptance of new lease—Waiver of option.

Where a lease for a term of years gives the lessee an option to purchase the land the latter's acceptance during the term of a new lease to begin on its expiration is not of itself a waiver or abandonment of the option. Anglin and Brodeur JJ. dissenting. Judgment of the Appellate Division (30 Ont. L.R. 186) reversed.

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

The appellant was lessee of land for a term expiring on April 30th, 1913. The lease provided that she could purchase the property at any time during the term for a specified price. In March, 1913, she accepted and signed a new lease for a year from May 1st, 1913, and shortly after tendered the purchase money for the property and a conveyance for execution to the owner who refused to convey, and in an action by the lessee for specific performance claimed that the option was abandoned by the acceptance of

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

(1) 30 Ont. L.R. 186.

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the new lease. The Appellate Division upheld this contention, reversing the judgment at the trial in the appellant's favour.

Geo. F. Henderson K.C. for the appellant.

W. C. McCarthy for the respondent.

THE CHIEF JUSTICE.—This is an action for specific performance of an option agreement for the sale of certain property on Stewart Street, in the City of Ottawa. The option is contained in a lease dated April 30th, 1910, given to the appellant by the late Thomas A. Burns, under whose will the respondent is devisee of the property. The option is in these words:—

> The said Mary A. Mathewson to have the option of purchase at any time on or before the expiration of this lease for the sum of $2,800 (twenty-eight hundred dollars).

The lease was registered by the appellant on the 8th of February, 1911, after the death of the late Thomas A. Burns. Before the expiration of the lease, the appellant notified the respondent of her intention to exercise the option.

The learned Chancellor of Ontario, who tried the case, found that the appellant would not have taken the lease except upon the condition that she was given an option to purchase exercisable at any time during the period specified and holding that she acquired a vested right to purchase during the full term of her lease maintained the action. On appeal, the judgment was reversed on the ground that the appellant waived or abandoned her option to purchase by entering into an agreement on March 10, 1913, to rent the same

premises for a term of twelve months from the first day of May, 1913.

The abandonment or waiver of the option to purchase would require to be proved like any other agreement in clear and unequivocal terms, and with all respect, I am entirely unable to appreciate how that second lease which would only begin to run at the expiration of the option period can be construed as an agreement to waive the right to purchase which the appellant admittedly had at the time the agreement was made. I cannot find evidence of anything done or said by the appellant by reason of which the position of the landlord was in any way altered. In accepting the lease, in March, 1913, the appellant cannot be held, in view of the relations then existing between her and the respondent, to have admitted more than that, at that time, the landlord had power, as the fact was, to rent the property at the expiration of the then current lease if she did not exercise her option in the meantime. There is no evidence that in consideration of the new lease she agreed to abandon her option, and taking a new lease in anticipation of a possible failure to exercise an option to purchase is not conduct evidencing an intention to abandon the right to the option when, as in this case, the lease was to begin to run only at the expiration of the option period. If there is any ambiguity or doubt, it should be construed in favour of the appellant who without legal advice was dealing with the respondent's solicitor.

If this case arose in Quebec, I would be disposed to hold that, in the circumstances, the agreement to abandon the option before the expiration of the delay would require to be in writing.

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The Chief Justice.

The right to the option is not inconsistent with the right to a lease subject to the option which will only take effect if the option is not exercised. Both may run concurrently. It would be different if the appellant had taken a lease which began to run before the expiration of the option period. The taking of that new lease at that time might be said to be inconsistent with the intention to exercise the option, but I can see no reason why the intention to exercise the option should not continue to exist concurrently with the right to a lease of the premises if the option is not exercised in the meantime. I agree entirely with the Chancellor when he says:—

> There is no evidence of any waiver by the plaintiff of the option to purchase. The taking of a new lease to begin at the termination of the other was, merely a provident act in case she did not think fit to purchase. Had she elected to purchase during the former lease that would *ipso facto* have determined the relation of landlord and tenant and a new relation of vendor and purchaser would have arisen. None other follows in regard to the second lease; it did not become operative on the plaintiff electing to purchase at the end of the first term.

The appeal should be allowed with costs.

IDINGTON J.—I think this appeal should be allowed with costs for the reasons assigned by the learned Chancellor in which I entirely concur.

In the almost infinite variety of rights and interests which a man may acquire in or over real estate and enjoy concurrently there is nothing more common than an option to acquire either the whole estate or some new interest therein.

It is a novel doctrine that by the acquisition of some new interest his option must be presumed to have been waived unless there is some necessary in-

consistency between what he has newly acquired and the continuation of the option.

There is no more inconsistency between the continued existence of an option for the time it has to run and a renewal or extension of a lease, than there was between the option to purchase during the currency of the lease in which the option to purchase was expressed, and that lease itself.

There might have been embodied in the renewal lease a term or condition that its acceptance ended the option, but there was not. Or there might have been in the negotiations between the parties leading to such renewal something agreed upon that would have rendered the exercise of the option so inequitable that a court would not enforce its specific performance, but there was nothing of the kind.

It might as well be argued that the renewal of the lease interfered with the appellant's right to enforce her mortgage when falling due during either term, as that the renewal in question extinguished the right to exercise her option as she did before the term thereof had expired.

The respondent never changed his position in such a way as to entitle him to claim that appellant had surrendered her right.

The learned Chancellor has so fully covered the ground that I can add nothing useful, and only add these remarks suggested by the course of the argument addressed to us for respondent.

DUFF J.—I concur in the conclusion and the reasoning of the learned Chancellor of Ontario who tried the action. I think the appeal should be allowed and the judgment of the learned Chancellor be restored.

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Anglin J.

ANGLIN J. (dissenting). — In taking in March, 1913, an unqualified lease for one year from the 1st of May, 1913, the appellant, in my opinion, entered into a contract wholly inconsistent with her right to exercise the option, expiring on the 30th April, 1913, contained in the three years' lease of the 30th April, 1910, of which she asserts in this action the right to avail herself. If that option should be exercised, the lease of March, 1913, could never become operative. In accepting the lease the appellant recognized the absolute title of the respondents to make it. She either meant, in consideration of the new lease, to forego all claim to exercise her option (it may be because she thought it unenforceable, or of such doubtful efficacy that a compromise on the basis of a new lease was advisable) and in that case waiver of it would seem to be clear; or she proceeded under the mistaken belief that her acceptance of the new lease without any reservation of her option to purchase the property would not affect her right to exercise that option, and in that case she would appear to be seeking relief against the effect of taking the new lease on a ground of mistake in law. That she cannot have.

With deference to those who take the contrary view, I am unable to read into the absolute and unqualified lease of March, 1913, the condition or qualification that it shall be of no effect if the lessee should exercise an option to purchase, the existence or efficacy of which was in dispute between the parties. That seems to me to be introducing by some sort of inference into a written contract a term so inconsistent with its express provisions that it is destructive of them. There is not even an attempt to adduce parol

evidence (which in my opinion would have been inadmissible) that the appellant intended to make the new lease subject to the option. But if that term, not expressed in the document, may not be imported into it by explicit oral evidence that it was intended that the lease should be subject to it, I cannot see my way to import it as a matter of inference from extrinsic facts which, as I read the evidence, are quite as consistent with the intention that the option should be abandoned, as that it should be preserved. For my part I prefer to determine the rights of the parties by interpretation of the writing in which they have undertaken to express them.

In any event I do not consider this a proper case for the extraordinary and discretionary remedy of specific performance.

I would dismiss the appeal.

BRODEUR J. (dissenting).—I would dismiss this appeal for the reasons given by my brother Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *MacCracken, Henderson, Greene & Herridge.*

Solicitor for the respondent: *Napoleon Champagne.*

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*June 11.
*June 22.

J. O. HONORIUS RICARD (PLAINTIFF) ..... } APPELLANT;

AND

LA VILLE DE GRAND'MÈRE (DEFENDANT) ..... } RESPONDENT.

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

Contract—Municipal corporation—Exclusive franchise—Renewal at expiration of term—Right of preference—By-law—Approval by ratepayers.

The municipal corporation granted exclusive franchises to R. for supplying electric light, etc., to the inhabitants of the municipality for the term of ten years, with a proviso giving R. a preference over any other person tendering for such services, at the end of that term, at the rates mentioned in the competing tender, for an additional term of ten years. On the termination of the ten years mentioned in the contract, in pursuance of powers obtained from the legislature permitting the municipal corporation to supply electric light, etc., to the inhabitants, the corporation passed a by-law whereby it undertook to perform these services and refused to renew the contract for the additional term. In an action by R. to have the by-law set aside, a declaration that he was entitled to the renewal of his contract for the additional term, and for an injunction restraining the corporation from acting upon the by-law;

Held, affirming the judgment appealed from (Q.R. 23 K.B. 97), that there was no obligation arising under the contract which prevented the corporation from exercising the new powers vested in it for the advantage of the inhabitants and that, in consequence of the exercise of those powers, R. had no contractual right to a renewal for the additional term.

As the by-law in question had been ratified by the provincial statute 3 Geo. V., ch. 67, during the time the suit was pending, the cross-appeal by the corporation was allowed and the by-law and

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a resolution of the municipal council based thereon were declared valid.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), varying the judgment of Tourigny J., in the Superior Court, District of Three Rivers, by which the plaintiff's action was dismissed with costs.

In regard to the issues raised upon the present appeal the circumstances of the case are sufficiently stated in the head-note.

P. N. Martel K.C. and *Aimé Geoffrion K.C.* for the appellant.

Lafleur K.C. and *Rinfret K.C.* for the respondent.

THE CHIEF JUSTICE.—This action was wrongly conceived.

If at the expiration of the first ten-year period the contract was at an end, as was obviously the case, the action of the municipality in refusing to give effect to the "pacte de préférence" might give rise, in a proper case, to a claim for damages, but certainly does not give the plaintiff a right to the relief asked for in this proceeding.

The impugned by-laws have been ratified and confirmed by the legislature and, except in so far as they affected the plaintiff in his contractual relations with the municipality, they are declared to be valid to all intents and purposes. It is quite true that the appellant alleges an interest as a ratepayer, but he can no longer, in view of the validating Act, invoke an interest as such in these proceedings.

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The Chief Justice.

I would dismiss the appeal with costs here and below.

Dealing now with the cross-appeal, I am of opinion that the judgment appealed from should be modified and that the resolution of the twenty-eighth day of August, 1912, should be declared good and valid, the whole without costs.

IDINGTON J.—The appellant, in January, 1902, obtained from the respondent municipality an exclusive privilege of furnishing electricity in said municipality. The first two clauses of the contract were as follows:—

1. La Corporation de la Ville de Grand'Mère accorde à J. O. H. Ricard, écr., médecin, de la Ville de Grand'Mère, le privilège exclusif, pendant dix ans, de fournir l'électricité pour les fins d'éclairage, chauffage, pouvoir moteur, électrolyse, travail des métaux, locomotion, et généralement toutes les fins auxquelles peut ou pourra se prêter l'électricité.

2. Le dit privilège sera exclusif pour dix ans avec préférence sur tout autre concurrent, au bout des dix ans, au prix du dit concurrent pour dix autres années.

The questions raised by this appeal turn upon the meaning to be given the second of said clauses.

The first ten years of the privilege were duly enjoyed by the appellant.

The municipality was enabled, during said term of ten years, by the legislature, to enter upon the business of electric lighting. It had always been enabled by law to do its own lighting but was, perhaps, not at liberty or enabled to supply lighting to the public generally.

The municipal council decided, at the expiration of said ten years, to exercise both its old and its new powers and, in executing such purpose, passed by-laws which were attacked by the appellant.

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It is not necessary to dwell upon the details of what was done, for the legislature confirmed these by-laws with a provision in the Act of confirmation that, if the appellant was in law entitled to insist upon the extension of his privilege and contract, as he claimed to be under said second clause of the contract, then the respondent was thereby bound to expropriate his electric light property.

It is to determine whether or not such right to extension exists that this appeal was brought.

I am unable to find in said second clause anything in the way of a binding contract of such nature as claimed.

Indeed, the entire contract was, as framed, *ultra vires* the powers of the respondent.

The respondent cannot be said ever to have bound itself to refrain from exercising its own undoubted powers at the expiration of ten years. It seems only to have said that if it followed the policy of letting the contract for town-lighting to others at the end of ten years to give the appellant a preference.

It has not let any contract to others and, hence, there is no semblance of ground upon which the proposed preference can become operative.

The appeal must, therefore, be dismissed with costs.

There is a cross-appeal which, admittedly, involves nothing but costs, save what relates to a resolution of the council passed in execution of the purposes of the confirmed by-law. I see no objection to the modification of the judgment so as to affirm the validity of such resolution, but it should be without costs and

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also without giving respondent any relief as to the costs involved in what is sought in the cross-appeal.

The costs involved in the appeal relative to the neat point first above referred to are all the costs in these proceedings which ought to be borne by appellant.

DUFF J.—I think the appeal fails. There is neither express nor implied obligation resting on the respondent corporation not to exercise the powers now vested in it for the advantage of the inhabitants according to the best judgment of the council. And these powers having been exercised in such a way that the contract with the appellant is inapplicable, the appellant has no ground of complaint capable of vindication in a court of law.

ANGLIN J.—I think it is abundantly clear that the appellant had not a contractual right to the renewal of his lighting contract with the respondent municipality. He may have some reason to complain of the treatment he has received, but I find nothing in the record which supports his claim that he was entitled to a renewal of his contract.

I would dismiss the appeal with costs.

BRODEUR J.—Je suis d'opinion de renvoyer l'appel principal avec dépens pour les raison données par le juge en chef. Sur le contre-appel, je vois que la législature ayant ratifié les réglements en question, la résolution du 28 aout, 1912, qui a été adoptée en exécution de l'un de ces réglements, est également ratifiée, le jugement de la cour d'appel qui casse cette

résolution doit être modifié de la manière à déclarer cette résolution bonne et valable. Il ne devrait pas y avoir de frais sur le contre-appel.

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Appeal dismissed with costs; cross-appeal allowed in part without costs.

Solicitor for the appellant: *P. N. Martel.*

Solicitors for the respondent: *Perron, Taschereau, Rinfret & Genest.*

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*May 22.
*June 19.

THE CITY OF HAMILTON..... APPELLANT;

AND

THE TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY, RESPONDENT.

CASE STATED BY THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Constructed line of railway—Deviation — Application by municipality — "Special Act"—Stated case—Question of law—Statute—"Railway Act," R.S.C., 1906. *c.* 37, *ss.* 2 (28), 3, 26, 28, 55, 167—(*Ont.*), 58 *V. c.* 68—(*D.*) 58 *& 59 V. c.* 66.

Under the provisions of section 55 of the "Railway Act," R.S.C. 1906, ch. 37, the Board of Railway Commissioners for Canada may, of its own motion, state a case in writing for the opinion of the Supreme Court of Canada upon a question of jurisdiction which, in the opinion of the Board, involves a question of law.

The Board of Railway Commissioners for Canada has no power under sec. 167 of the "Railway Act," R.S.C., 1906, ch. 37, to order deviations, changes or alterations in a constructed line of railway, of which the location has been definitely established, except upon the request of the railway company. Anglin, J. *contra.*

Per Fitzpatrick C.J. and Idington J.—The Dominion statute 58 & 59 Vict. ch. 66, confirming the municipal by-law by which the location of the portion of the railway in question was definitely established constitutes a "special Act" within the meaning of the "Railway Act," R.S.C. 1906, ch. 37, secs. 2(28) and 3.

Per Anglin J.—The power of the Board of Railway Commissioners for Canada to order deviations, changes or alterations in a constructed line of railway is not limited to diversions within one mile from the line of railway as constructed.

STATED CASE referred by the Board of Railway Commissioners for Canada, under section 55 of the

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"Railway Act," R.S.C. 1906, ch. 37, for the opinion of the Supreme Court of Canada on a question as to its jurisdiction which, in the opinion of the Board, involved a question of law.

The Stated Case submitted by the Board was as follows:—

"The following case which, in the opinion of the Board, involves questions of law, is stated by the Board for the opinion of the Supreme Court of Canada:—

"1. The Toronto, Hamilton and Buffalo Railway Company was incorporated by Act of the Legislature of the Province of Ontario, chapter 75, 1884, and under that Act was authorized to construct a railway from a point in or near the City of Toronto to a point in or near the City of Hamilton, and thence to some point at or near the International Bridge, or Cantilever Bridge, in the Niagara River, and with full power to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands, if any, lying between the points aforesaid.

"2. By chapter 86 of the statutes of 1891, passed by the Parliament of the Dominion of Canada, the undertaking of the Toronto, Hamilton and Buffalo Railway Company was declared to be a work for the general advantage of Canada, reserving to the company all the powers, rights, immunities, privileges, franchises, and authorities conferred upon it under and by virtue of the above recited Acts of the Legislature of the Province of Ontario.

"3. By section 4 of the federal Act all the provisions of the 'Railway Act' were made to apply to the Toronto, Hamilton and Buffalo Railway Company,

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in so far as they were applicable to the undertaking, and except to the extent to which they were inconsistent with the provisions of the said Acts of the Legislature of the Province of Ontario.

"4. By-law No. 755, passed by the municipal council of the City of Hamilton on the 25th day of October, 1894, and confirmed by Ontario statute, 58 Victoria, 1895, chapter 68, and by Dominion Act, chapter 66, 1895, fixed a definite location of the company's line in the City of Hamilton. The conditions of the by-law were complied with and the line constructed along Hunter street, in the City of Hamilton, in accordance with the provisions of the by-law referred to, and in accordance with the map or plan duly approved under the provisions of the 'Railway Act.'

"5. The present application on behalf of the city is for an order requiring the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway into the city from Hunter street to a location in the north end of the city in common with the Grand Trunk and the Canadian Northern Ontario Railway companies.

"6. The application was heard at the sittings of the Board held in Hamilton on the 10th day of October, 1913, at which counsel representing the city, the Toronto, Hamilton and Buffalo Railway Company, the Canadian Pacific and Grand Trunk Railway Companies, and certain property owners, were present. Counsel for the Toronto, Hamilton and Buffalo Railway Company contended that the Board was without jurisdiction to make the order applied for.

"7. After hearing argument and reading the submissions filed, and taking time to consider, the Board came to the conclusion that, for the reasons set out

in the judgments of the Chief Commissioner and the Assistant Chief Commissioner, it had power, if so advised, to make such an order; and this conclusion was announced to the parties interested.

"8. At the request of counsel for the Toronto, Hamilton and Buffalo Railway Company, who expressed his intention of appealing from this decision, the merits of the application were not gone into, and counsel was asked to proceed to perfect his appeal without delay.

"9. A draft form of order upon which to base an application for leave to appeal was submitted by counsel for the Toronto, Hamilton and Buffalo Railway Company, and order No. 21087, dated December 24th, 1913, issued as a result of this application. The said order No. 21087 is not in terms in the form of the draft order submitted by counsel, and for that reason counsel refuses to perfect his appeal, but raises the objection that the Board is without power to act in the premises.

"10. The only order made by the Board was the order No. 21087, referred to, declaring that it had jurisdiction to entertain the application and to make an order directing the deviation of the line of the Toronto, Hamilton and Buffalo Railway Company within a distance of one mile from its present location. The merits of the case were not gone into.

"11. The city objects to this order, contending that the Board's power to order a diversion in the premises was not limited to a diversion within one mile from the present location of the railway.

"12. The statutes relating to the said company contained in the printed volumes of the statutes of the Parliament of Canada or of the Legislature of

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the Province of Ontario, the judgments and proceedings herein, shall be deemed to be and shall be read as part of this case.

"13. The questions involved being, in its opinion, questions of law, the Board, under section 55 of the 'Railway Act,' may of its own motion state a case in writing for the opinion of the Supreme Court of Canada; and, in pursuance of this power, the questions submitted for determination by the Supreme Court of Canada are as follows:—

"(1) Whether, as a matter of law, the Board of Railway Commissioners for Canada has the power, on an application by the City of Hamilton, to make an order directing the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway from its present location in the City of Hamilton to some other location in the said city?

"(2) Whether, if the Board has power to order such diversions, such power is limited to a diversion within one mile from the railway as already constructed?"

The issues raised on the argument in the Supreme Court of Canada are referred to in the opinions of the Judges now reported.

M. K. Cowan K.C. and *F. R. Waddell K.C.* were heard on behalf of the City of Hamilton.

Hellmuth K.C. and *J. A. Soule* for the railway company.

The hearing took place on the 22nd of May, 1914, when the court was pleased to take the matter into consideration and, on the 19th of June, 1914, the ma-

jority of the judges answered the first question in the negative and, consequently, considered that it was unnecessary to give any answer to the second question. His Lordship Mr. Justice Anglin answered the first question in the affirmative and the second question in the negative.

The following reasons for their opinions were delivered by the judges who heard the reference.

THE CHIEF JUSTICE.—I agree with Mr. Justice Idington.

IDINGTON J.—The answers to the questions submitted relative to the jurisdiction of the Railway Commissioners of Canada must be chiefly dependent upon whether the legislation contained in 58 & 59 Vict. ch. 66, is to be held a "special Act" within the meaning of that term in the "Railway Act."

The applicant passed a by-law No. 755, in 1894, granting a bonus of $225,000 in aid of respondent upon the terms and conditions set out therein and agreed on between said parties.

Part of said terms and conditions thereby imposed was that the railway should pass through the City of Hamilton by a southerly route which is set out with great detail in the specifications forming part of the said by-law. Another clause in the said terms and conditions provides that the said company should build by the 1st September, 1895, and always maintain a first-class passenger station in a central part of the City of Hamilton and all regular passenger trains on said railway running from or through Brantford to Toronto, or from Toronto to or through or from Brantford to Welland, or Welland

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to Brantford, should stop at such principal passenger station of the company in Hamilton, and that all regular passenger trains running through Hamilton should stop at such station, and should build and maintain a second passenger station within said city at or near Locke street south of Main street.

All this was declared by said Act confirming said by-law to be binding upon the parties to this litigation and respondent seems to have conformed to the said terms and conditions.

It is proposed by the applicant now to change the location of all this part of the line so definitely exacted by the terms of said by-law, so validated by said Act, and direct the line of railway to be so "diverted, changed or altered" that the railway shall run, instead of on the routes so adopted, along the Grand Trunk Railway route on the north side of the city where that road and station existed long before the existence of the respondent.

I think said legislation must be held to be "a special Act" within the meaning of that term as interpreted in section 2, sub-section 28, of the "Railway Act," and applied by giving thereto the effect designed by section 3 of said Act, which is as follows:—

> 3. This Act shall, subject to the provisions thereof, be construed as incorporate with the special Act, and, unless otherwise expressly provided in this Act, 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. 3 Edw. VII., ch. 58, secs. 3 and 5.

It seems to me that the subject-matter of this special Act involves the definite and permanent location of the railway at the place in question and that "the provisions of said special Act" must, in so far

as is necessary to give effect to such special Act, be taken to override the provisions of the "Railway Act" relative to the location of railways or changes in regard thereto.

Section 6 of the "Railway Act" which may be applicable to the railway in question does not restrict the operation of this section three, which may be read therewith.

The case of *Canadian Pacific Railway Co.* v. *City of Toronto*(1), relied upon by applicant has hardly any resemblance to this case. There was presented in that case a tripartite agreement validated by Parliament which possibly covered a small part of the field of public safety there in question but by no means that which was involved in applying section 238. There the special Act covered only a small corner of the subject-matter of public safety. Here the special Act covers absolutely the whole question of location which is the subject-matter involved.

It is made clear by the judgment of the Chief Commissioner that everything relative to public safety is eliminated from the question. And nothing is left but the subject-matter of location of the railway which seems to me identical with that determined by the by-law and contract and conditions made permanently binding by the special Act. No one has ventured to distinguish the subject-matter of the special Act, from that of section 167 relied upon, by setting up that the subject-matter in the latter is not location, but change of location. If such a suggestion occurs to any one, I may repeat what I have just pointed out that this special Act was by its terms

(1) [1911] A.C. 461.

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intended to be perpetual, and thus overrides anything providing for change of location and leaves the section 167 to operate where there can be no such conflict.

It is suggested by the judgment of the Chief Commissioner that as this special Act, by section 8, provides that nothing in the Act contained shall affect any rights or powers conferred by the "Railway Act" on the Railway Committee of the Privy Council, to which the Board may be considered the statutory successor, therefore, this power now invoked has been excepted from the operation of the special Act.

When we turn to the then existing "Railway Act" and consider the provisions thereof relative to the rights or powers of the then Railway Committee, the only semblance of any such "right or power" therein, such as now appears in section 167, is to be found in section 11 of the "Railway Act" of 1888, sub-section (*b*),

> changes in location for lessening a curve, reducing a gradient or benefiting the railway or for other purposes of public advantage.

I cannot think this provision should ever have been resorted to in way of justifying the Railway Committee in directing such a change as now contemplated.

And it may be observed that the restriction, in said section 8, upon the operative effect of the rest of the special Act can only be read in light of the then existing "rights and powers of the Railway Committee."

Later extensions of powers to the railway company or even to the committee, of which I can find none bearing hereon, could not affect the question presented.

Moreover, the right of changing location within a lateral mile's limit, originally rested with the railway company and the restrictions now existent are results of later enactments.

It is not necessary that I should here trace out in detail all these changes by means of which the curious evolution has taken place whereby the present jurisdiction of the Board was first given in way of restriction upon the railway company and then it was given the power of its own motion to direct that to be done which the railway company had got power to do with its sanction.

A study of this legislative development does not help in way of finding jurisdiction in the Board and for doing what it is now alleged it can do relative to old established things, including contracts, and the correlative rights, duties and obligations arising therefrom.

I conclude upon the foregoing grounds alone that there is no jurisdiction such as claimed.

On the narrower ground of the actual meaning of section 167 as it stands, and assuming no special Act in the way, I should doubt very much indeed if any such change as involved in doing what is contemplated was ever the purpose of the section.

There are a great many pieces of parallel railway lines lying within a mile or a few miles of each other which public opinion, if enlightened and well directed, might well have prevented the building of and saved millions of wasted capital entailed in such building. Economic pressure may ultimately eliminate much of this duplication.

If we should answer the first question submitted in the affirmative and the second in the negative, I

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can conceive of the Board being urged to use that measure of power, so implied, and its other extensive powers to ameliorate the conditions of things brought about by such improvidence. But should any court say, looking at the purview of the provisions creating and empowering the Board as provided by this "Railway Act" in Canada, that such an attempt by the Board would properly fall within its jurisdiction?

I put this illustration of what seems to me the logical and perhaps not undesirable outcome of the answers applicant seeks herein to the questions submitted in order to test the validity of the argument that rests upon a reading only of the two or three sections referred to, without looking at their place and purpose in the Act as a whole. Tried by such a test I do not think section 167 was ever by its framers dreamt of as going so far.

I also desire to illustrate thereby the view I take of the right now challenged in argument to submit these questions.

I have no doubt regarding the right of the Board under the 55th section of the "Railway Act" to submit as a question of law a case involving only a question of its jurisdiction.

In some cases it may conceivably be most expedient to do so before involving a costly investigation that may do no good and indeed do much harm.

At the same time the concrete case might often bring into their true relation many of the facts, circumstances and considerations that need sometimes to be weighed in order to apprehend the true bearing of the question of jurisdiction.

I should answer the first question in the negative and in doing so the second question needs no answer.

DUFF J.—The Board of Railway Commissioners states the following case:—

"The following case which, in the opinion of the Board, involves questions of law, is stated by the Board for the opinion of the Supreme Court of Canada:—

1. The Toronto, Hamilton and Buffalo Railway Company was incorporated by Act of the Legislature of the Province of Ontario, ch. 75, 1884, and under that Act was authorized to construct a railway from a point in or near the City of Toronto to a point in or near the City of Hamilton, and thence to some point at or near the International Bridge, or Cantilever Bridge, in the Niagara River, and with full power to pass over any portion of the country between the points aforesaid, and to carry the said railway through the Crown lands, if any, lying between the points aforesaid.

2. By ch. 86 of the statutes of 1891, passed by the Parliament of the Dominion of Canada, the undertaking of the Toronto, Hamilton and Buffalo Railway Company was declared to be a work for the general advantage of Canada, reserving to the company all the powers, rights, immunities, privileges, franchises, and authorities conferred upon it under and by virtue of the above recited Acts of the Legislature of the Province of Ontario.

3. By sec. 4 of the federal Act all the provisions of the "Railway Act" were made to apply to the Toronto, Hamilton and Buffalo Railway Company, in so far as they were applicable to the undertaking, and except to the extent to which they were inconsistent with the provisions of the said Acts of the Legislature of the Province of Ontario.

4. By-law No. 755, passed by the Municipal Council of the City of Hamilton on the 25th day of October, 1894, and confirmed by Ontario statute, 58 Vict. 1895, ch. 68, and by the Dominion Act, ch. 66, 1895, fixed a definite location of the company's line in the City of Hamilton. The conditions of the by-law were complied with and the line constructed along Hunter street, in the City of Hamilton, in accordance with the provisions of the by-law referred to, and in accordance with the map or plan duly approved under the provisions of the "Railway Act."

5. The present application on behalf of the city is for an order requiring the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway into the city from Hunter street to a location in the north end of the city in common with the Grand Trunk and the Canadian Northern Ontario Railway companies.

6. The application was heard at the sittings of the Board held in Hamilton on the 10th day of October, 1913, at which counsel representing the city, the Toronto, Hamilton and Buffalo Railway Company, the Canadian Pacific and Grand Trunk Railway Companies, and certain property owners, were present. Counsel for the

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Toronto, Hamilton and Buffalo Railway Company contended that the Board was without jurisdiction to make the order applied for.

7. After hearing argument and reading the submissions filed, and taking time to consider, the Board came to the conclusion that, for the reasons set out in the judgments of the Chief Commissioner and the Assistant Chief Commissioner, it had power, if so advised, to make such an order; and this conclusion was announced to the parties interested.

8. At the request of counsel for the Toronto, Hamilton and Buffalo Railway Company, who expressed his intention of appealing from this decision, the merits of the application were not gone into, and counsel was asked to proceed to perfect his appeal without delay.

9. A draft form of order upon which to base an application for leave to appeal was submitted by counsel for the Toronto, Hamilton and Buffalo Railway Company, and Order No. 21,087, dated December 24th, 1913, issued as a result of this application. The said Order No. 21,087 is not in terms in the form of the draft order submitted by counsel, and for that reason counsel refuses to perfect his appeal, but raises the objection that the Board is without power to act in the premises.

10. The only order made by the Board was the Order No. 21,087, referred to, declaring that it had jurisdiction to entertain the application and to make an order directing the deviation of the line of the Toronto, Hamilton and Buffalo Railway Company within a distance of one mile from its present location. The merits of the case were not gone into.

11. The city objects to this order, contending that the Board's power to order a diversion in the premises was not limited to a diversion within one mile from the present location of the railway.

12. The statutes relating to the said company contained in the printed volumes of the statutes of the Parliament of Canada or of the Legislature of the Province of Ontario, the judgments and proceedings herein, shall be deemed to be and shall be read as part of this case.

13. The questions involved being, in its opinion, questions of law, the Board, under sec. 55 of the "Railway Act," may of its own motion state a case in writing for the opinion of the Supreme Court of Canada; and in pursuance of this power, the questions submitted for determination by the Supreme Court of Canada are as follows:—

(1) Whether, as a matter of law, the Board of Railway Commissioners for Canada has the power on an application by the City of Hamilton, to make an order directing the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway from its present location in the City of Hamilton to some other location in the said city.

(2) Whether, if the Board has power to order such diversion, such power is limited to a diversion within one mile from the railway as already constructed.

The questions submitted relate to the jurisdiction of the Board and it is contended on behalf of the railway company that a question touching the jurisdiction of the Board can be raised before this court only in one way:—viz., by an appeal under section 56(2). I agree with the learned Chief Commissioner that section 55 confers upon the Board authority "of its own motion" to state a case for the opinion of this court upon any question of jurisdiction which, in the opinion of the Board, is a question of law.

I do not think it is necessary to pass upon the question whether the provisions of the by-law of October 25th, 1894, which had the force of statute by virtue of 58 Vict. ch. 68 (Ont.) and 58 Vict. ch. 66 (Dom.) constituted a "special Act" within the meaning of section 2(28) of the "Railway Act" or whether "the subject-matter" of section 167 of the "Railway Act" is within the meaning of section 3 of the "Railway Act" "the same subject-matter" or one of "the same subject-matters" as those in respect of which provision is made by the by-law and validating enactments; I shall assume for the purpose of this judgment that the rights of the parties now in controversy are governed by the enactments of the "Railway Act."

I will only add that the authority conferred by section 167 must, in my opinion, be exercised subject to the provisions of any special Act. Section 3 of the "Railway Act" makes it imperative to hold that, in so far as the situs of the railway line or railway works is rigorously fixed by the special Act, the special Act must govern. To what extent the special Act does define the situs of the railway to the exclu-

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sion of the authority of the Board under section 167 is a question which, of course, must be determined by the proper construction of the special Act itself.

On this assumption I have not been able to convince myself that the proposed diversion would not be a "deviation, change or alteration" within the meaning of section 167 and within the authority of the Board to sanction on the application of the railway company. I can see no valid reason—that is to say no reason on which I am entitled to act judicially—why a "deviation" authorized by section 167 after the construction of the railway must be confined within the limits expressly laid down in respect of a "deviation" permitted by section 159 before construction. It is, of course, a proper subject for comment that on the reading of section 167, which I think is the right reading, the discretion of the Board, subject to the provisions of the special Act is unqualified as regards the physical limits of lateral deviation; while by section 159 a limit of one mile is specifically laid down. Various explanations of this seeming inconsistency of policy may be suggested, but the discussion of such possible explanations does not appear to me to be relevant to the only question before us. Our duty is to construe the language which Parliament has used. I find in section 167, as regards this matter of the limits of lateral deviation, words which are quite unequivocal. I cannot refuse to give effect to them because, when read according to their plain meaning, they give a result which does not appear to be entirely consistent with inferences that may be derived from other parts of the Act as to the policy of Parliament. To do that would be legislating.

Before proceeding to discuss what appears to me to be the real point in controversy, it should be observed that the learned Chief Commissioner in his reasons for judgment has made it very plain that this is not a case for the exercise of the powers given by sections 237 and 238 and that the jurisdiction of the Board to grant the application, if it exists, must be rested upon section 167.

That section is in the following terms:—

167. If any deviation, change or alteration is required by the company to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, a plan, profile and book of reference of the portion of such railway proposed to be changed shewing the deviation, change or alteration proposed to be made, shall, in like manner as hereinbefore provided with respect to the original plan, profile and book of reference, be submitted for the approval of the Board, and may be sanctioned by the Board.

2. The plan, profile and book of reference of the portion of such railway so proposed to be changed shall, when so sanctioned, be deposited and dealt with as hereinbefore provided with respect to such original plan, profile and book of reference.

3. The company may thereupon make such deviation, change or alteration, and all the provisions of this Act shall apply to the portion of such line of railway so at any time changed or proposed to be changed, in the same manner as they apply to the original line.

4. The Board may, either by general regulation or in any particular case, exempt the company from submitting the plan, profile and book of reference as in this section provided, where such deviation, change or alteration, is made or to be made, for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting the railway or for any other purpose of public advantage, as may seem to the Board expedient, if such deviation, change or alteration does not exceed three hundred feet from the centre line of the railway, located or constructed, in accordance with the plans, profiles and books of reference deposited with the Board under this Act.

5. Nothing in this section shall be taken to authorize any extension of the railway beyond the termini mentioned in the special Act.

Read alone, that is to say apart from the provisions to which I am about to refer, the contention

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that the Board has authority under this provision to order a "deviation, change or alteration" against the opposition of the railway company, would hardly be susceptible of plausible statement. The real point to be determined is:—What is the effect of this section when interpreted by the light of sections 26(2) and 28? These last mentioned sections are in the following words:—

> 26. (2). The Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required or authorized to do under this Act, or the special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or the special Acts; and shall for the purposes of this Act have full jurisdiction to hear and determine all matters whether of law or of fact.
>
> 28. The Board may, of its own motion, or shall upon the request of the Minister, inquire into, hear and determine any matter or thing which, under this Act, it may inquire into, hear and determine upon application or complaint, and with respect thereto shall have the same powers as, upon any application or complaint, are vested in it by this Act.
>
> (2) Any power or authority vested in the Board under this Act may, though not so expressed in this Act, be exercised from time to time, or at any time, as the occasion may require.

The argument in favour of jurisdiction is that by the combined operation of these two last quoted sections, whatever the Board has power to sanction or authorize at the request or upon the application of the railway company, it has power to order of its own motion against the will of the railway company; and if that is the effect of them there can be no doubt upon the question of the jurisdiction here. In *Grand Trunk Railway Co.* v. *The Department of Agriculture of Ontario*(1), the Chief Justice, Mr. Justice Gir-

(1) 42 Can. S.C.R. 557.

ouard and Mr. Justice Anglin adopted the view just expressed as to the effect of these provisions. Of the other three members of the court, who took part in that decision, Mr. Justice Davies and Mr. Justice Idington expressed no opinion on the point. My own opinion, which I stated in my judgment in that case, was against the proposed construction of these sections. As in duty bound, I have re-considered carefully the opinion I then formed in light of the discussion of the subject by the learned Chairman of the Board in his reasons now before us and the conclusion I then formed is unchanged. I will briefly re-state my opinion as to the real meaning of these sections. As to section 26(2) : it will be observed that the power there given is expressly made exercisable only in so far as is "not inconsistent with this Act," and, therefore, when it is suggested that an authority given by some particular section of the Act that on its face is only an authority to pronounce permissive orders is by the operation of this provision converted into an authority to pronounce mandatory orders, it is necessary in each case to ascertain from the section by which the specific authority is given, whether or not such a result is consistent with the true intendment of that section. This consideration alone, in my opinion, would forbid the application of section 26(2) to section 167 in the manner now contended for: for the language of section 167 itself contemplates, it appears to me, the initiative of the railway company as a substantive condition of the Board's jurisdiction, which is merely to "approve" and "sanction" something "proposed" by the railway company.

I think, however, with respect, apart altogether from this, that the application of section 26(2) in

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the manner proposed is inconsistent with the real purpose and meaning of section 26(2) itself, which is, it appears to me, to give to the Board a power to make mandatory orders for the strictly limited purpose or regulating the time and manner in which some authority shall be exercised which has been conferred by Parliament directly or mediately through the action of the Board. The section does not say that

> the Board may order and require any "company to do any act" * * * "which such company * * * is or may be authorized to do."

What the section provides is that where the company is or may be authorized or required to do something by an Act of Parliament or by the Board—the Board may order that it shall be done

> forthwith or within or at any specified time and in any manner prescribed by the Board.

The section authorizes the regulating of companies and persons when exercising powers conferred by the Act or by the Board by prescribing the time and manner in which such powers shall be exercised. To read the section as authorizing the Board by a mandatory order to convert a permissive authority to do something, into a obligation to do it, is to go beyond the necessary scope and meaning of the language used. Applying the section according to the proposed construction to the provisions of the Act as a whole it becomes reasonably clear that the construction extends the effect of the section far beyond the real purview of it. The learned Chairman of the Board in the opinion now before us, has called attention to some of the provisions which bring into relief the difficulties of this construction.

Coming now to section 28:—I think that is a section dealing with procedure only. Where power is given to the Board to investigate and make consequential orders upon application, the Board may of its own motion investigate and order. But the language of the section is hardly the language that would have been used to provide that in every case in which a railway company is authorized to do something, with the sanction of the Board, the Board is to have authority by mandatory order to compel the company to do it. How inapt the words are for such a purpose appears when one attempts to apply those words to section 167. Section 28 provides that

> the Board may, of its own motion, inquire into, hear and determine any matter or thing, which under this Act it may inquire into, hear and determine upon application or complaint.

Now what is the "matter or thing" in respect of which the Board has jurisdiction by the express terms of section 167 to "inquire into, hear and determine"? The "matter" of the inquiry, hearing and determination is:—Shall the Board give or withhold its sanction to a deviation, change or alteration *proposed to be made by the railway company,* as shewn upon a plan, profile and book of reference which have been *submitted by the railway company* for the Board's approval. Granting sanction or refusing sanction to something proposed by the railway company is the matter which the Board is to investigate under this section. Reverting now to the language of section 28, this, then — the giving or withholding of its sanction—is the matter which the Board

> may of its own motion inquire into, hear and determine

and with respect to which it shall have the same powers as upon applications by the railway company. Such

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is the result of a strict application of the language of section 28 to section 167, and the result is in itself sufficient to demonstrate that the earlier section has no proper application to the later.

For these reasons, I think the first question should be answered in the negative. What I have said will indicate what my answer to the second question would have been if I had answered the first in the affirmative.

ANGLIN J.—Although the questions submitted in the stated case concern the jurisdiction of the Railway Board, I think it clear that they are also questions of law and, as such, properly the subject of a stated case under sub-section 1 of section 55 of the "Railway Act." It is true that in section 56 a distinction is made between questions of law and questions of jurisdiction, the right of appeal upon the latter being made conditional on the leave of a judge of this court being first obtained. But section 56 provides for cases in which the Board has already professed to exercise jurisdiction by making an operative order, or has dismissed an application on the ground that it lacks jurisdiction to entertain it. Its decision in either case may properly be made the subject of an appeal. Section 55, on the other hand, provides not for appeals but for cases in which, before pronouncing on order or otherwise dealing with the matter pending before it, the Board desires to be advised by this court upon some question arising in such matter. It is immaterial that the question is one which affects its jurisdiction. The Board is authorized by section 55 to state any question which is in its opinion a ques-

tion of law. If authority for this view be needed it is to be found in *Essex Terminal Railway Co.* v. *Windsor, Essex and Lake Shore Rapid Railway Co.* (1), cited by the learned Chief Commissioner, as more fully appears in the judgment of the late Chief Commissioner Killam, reported in 7 Can. Ry. Cas. 109, 124.

For the reasons assigned by me in *Grand Trunk Railway Co.* v. *Department of Agriculture of Ontario* (2), I am of the opinion that the Board has jurisdiction to order, on the application of any other person or body interested, or of its own motion, any deviation, change, or alteration which section 167 empowers it to sanction or authorize on the application of a railway company. While the power and discretion entrusted to the Board under such an interpretation of the Act may seem very wide, it must be borne in mind that considerations of public safety or public convenience may sometimes imperatively require a deviation, change or alteration to which the railway company affected may, from motives of economy or for other reasons, be opposed. To restrict the jurisdiction of the Board under section 167 to cases in which the company applies for its sanction of a deviation, change or alteration, might, therefore, prove very undesirable, and might defeat the purpose of Parliament in enacting section 28 and section 26 (2) of the "Railway Act." Moreover, the company always has the right of appeal to the Governor in Council under sub-section 1 of section 56 in any case in which it feels that due regard has not been paid to its interests.

(1) 40 Can. S.C.R. 620. (2) 42 Can. S.C.R. 557.

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There is, no doubt, an incongruity in restricting the power of the Board, when sanctioning the plan, profile and book reference under section 159, to authorizing a deviation of not more than one mile from the location approved by the Minister of Railways (even this limited power it may not exercise where the Minister so directs) and the unrestricted power to

> sanction any deviation, change or alteration * * * in the railway or any portion thereof as already constructed or as merely located

which section 167 purports to confer. When proceeding under the latter section the location of the entire railway or of any part of it may be changed without the approval of the Minister of Railways being required, provided there is no extension beyond the termini mentioned in the special Act (sub-section 5), I was at first disposed to think that, inasmuch as section 167 applies to a railway "merely located and sanctioned" as well as to a "railway already constructed," it should be read as subject to a restriction similar to that imposed by the proviso to sub-section 3 of section 159, because otherwise, while the power of the Board to authorize a deviation would be restricted by the limitation of one mile when it is sanctioning the plan, profile and book of reference, upon that sanction being given authority to sanction a deviation not so restricted would at once arise. But while the existence of such an anomaly is difficult to understand, in view of the fact that in sub-section 4 Parliament expressly restricts the power of the Board, when proceeding by general regulation, to sanctioning deviations not exceeding 300 feet, and by sub-section 5 provides that extensions beyond the

termini fixed by the special Act may not be authorized as deviations, changes or alterations, I am unable to treat the omission of any other limitation on the power conferred by sub-section 1 as accidental, or to justify reading into it the restrictions contained in the proviso to sub-section 3 of section 159. Here again the right of appeal to the Governor in Council, given by sub-section 1 of section 56, affords what may well have been deemed a sufficient guarantee and protection against the exercise of the very wide powers conferred on the Board in such a manner as unduly to prejudice the interests of the railway companies or of the public.

Although the proposal of the City of Hamilton is novel in its character and involves a more extensive change than the Railway Board is usually asked to sanction, having regard to the fact that section 167 provides for

> any deviation, change or alteration * * * in the railway or any portion thereof,

and to the restrictions expressly imposed by sections 4 and 5 adverted to above, I am unable to understand how it can be successfully maintained that the suggested scheme is not within the purview of sub-section 1. What is proposed is the deviation of a portion of the respondents' railway. There is no suggestion of an extension beyond the termini fixed by the special Act. The Board may grant the application in whole or in part, or in some amended form, or may reject it *in toto* as undesirable, or extravagant, or unnecessary in, or contrary to, the public interest.

Having regard to the provisions inserted in the statutes confirming the agreement between the rail-

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way and the City of Hamilton, which expressly save the powers conferred by the "Railway Act" on the Railway Committee of the Privy Council, to which the Board of Railway Commissioners has succeeded, and to the decision in *Canadian Pacific Railway Co.* v. *City of Toronto and Grand Trunk Railway Co.*(1), I agree with the Board of Railway Commissioners that there is nothing in these special Acts which ousts its jurisdiction under the "Railway Act" to deal with the present application of the City of Hamilton.

The merits of that application have not yet been considered by the Board and it must of course be assumed that, if it should be granted in whole or in part, it will be only upon such terms as will do justice between the parties and afford to the respondent company's interests every protection to which they may be entitled.

In a country such as this, with its vast extent of territory, and conditions varying in its different provinces and constantly changing owing to its rapid development, it is necessary that the powers of a body such as the Railway Commission should be very wide. Much more must be entrusted to its discretion than may be found necessary in older lands where fixed and settled conditions are to be encountered. In dealing with questions affecting the jurisdiction of the Board great care should be taken that judicial decisions do not impose upon it fetters and restrictions which Parliament did not intend, and which might impair its usefulness and seriously hamper its

(1) [1911] A.C. 461; 42 Can. S.C.R. 613.

exercise of the beneficent control which it was meant to have.

I would, for these reasons, answer the first question of the stated case in the affirmative and the second in the negative.

BRODEUR J.—This is a reference by the Board of Railway Commissioners. Brodeur J.

The respondents contend, at first, that we have no jurisdiction to hear this case because the matter in controversy is not a question of law, but a question of jurisdiction.

Section 55 of the "Railway Act" empowers the Board of Railway Commissioners to state a case in writing for the opinion of the Supreme Court of Canada upon a question which, in the opinion of the Board, is a question of law.

In this case the Board was called upon to decide whether an application by the City of Hamilton is within the contemplation of the "Railway Act." That application is made for the purpose of diverting the line of railway of the respondents from a certain location in the City of Hamilton.

The main point raised on the merits of the application is that the diversion of a line of railway can be ordered only when such deviation is asked for by the railway company itself, and that the Board is without jurisdiction to order such a diversion where the proceedings are instituted by a municipal corporation, as in this case.

The Board, in order to decide that point, had to construe the provisions of the "Railway Act," especially the provisions of section 167. In their op-

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inion that was a question of law and they had power to refer the matter to this court in order to have it determined.

In general principle questions involving the jurisdiction of a tribunal are questions of law because they involve the application of a statute to some particular proceedings.

This court, therefore, is competent to hear the reference and to decide the issue in law raised.

Having disposed of this preliminary objection, I will now consider the question whether the Board had the power, on the application by the City of Hamilton, to make an order directing the Toronto, Hamilton and Buffalo Railway Company to divert its line of railway from its present location in the City of Hamilton to some other location in that city.

Parliament, by a special Act, determines at first in a general way where a railway company might build its railway. Then a map shewing the general location of the line requires to be approved by the Minister of Railways.

The company, after the approval of that general location of its line must obtain from the Board of Railway Commissioners an approval of a plan and of the book of reference that shews the precise location of the line.

The Board, in considering the plan and book of reference, is bound by the general location as approved by the Minister with the exception, however, that a deviation of not more than one mile from any one point of that general location may be determined by the Board. But this power of the Board to order a deviation is not absolute; for the Minister may

direct that a location which he has approved will not be altered.

There is no evidence before us that such a restriction has been provided by the Minister.

The plans were approved several years ago and the railway was then located and built.

Now the City of Hamilton asks for an order from the Board to divert that line of railway.

In my opinion the Board cannot grant such an application, because the diversion is not asked for by the railway company itself. The section of the "Railway Act" which deals with the matter is section 167 which reads as follows:—

> If any deviation, change or alteration is *required by the company* to be made in the railway, or any portion thereof, as already constructed, or as merely located and sanctioned, a plan, profile and book of reference of the portion of such railway proposed to be changed, shewing the deviation, change or alteration proposed to be made, shall, in like manner as hereinbefore provided with respect to the original plan, profile and book of reference, be submitted for the approval of the Board, and may be sanctioned by the Board.

Such changes as that requested by the City of Hamilton in the location of the line of railway in question can be made only at very great cost, and there may be cases where the financial situation of a company would not authorize such a large expenditure. It is only fair, just and equitable that the initial application should come from the company itself.

The evident object of the city is to concentrate all the lines of railway passing through the city. It may be a desirable object. But I fail to find in the "Railway Act" the power for the Board to order the closing of some lines and the exclusive use of some

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other. That could be done only by a common agreement or at the request of the company itself.

For these reasons I am of opinion that the first question submitted should be answered in the negative.

It does not become necessary for me then to answer the second question.

There should be no costs on this reference.

ALEXANDER E. McPHERSON AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

GRAND COUNCIL PROVINCIAL WORKMEN'S ASSOCIATION (PLAINTIFFS) ..... RESPONDENTS.

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*Feb. 17.
*May 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Benevolent association—Grand council constitution—Incorporation of subordinate lodge—Dissolution—Disposition of property.

The charter of the respondent association provides that upon the dissolution of a subordinate lodge all its property shall vest in the Grand Council to be applied, first, in payment of debts of the lodge and the balance as deemed best for the general interests of the order. There was also a provision allowing any subordinate lodge to become incorporated, and in 1890 Pioneer Lodge No. 1 was incorporated and all its property vested in the corporate body. In 1908 a vote was taken on the question of amalgamation with a kindred society for which Pioneer Lodge was overwhelmingly in favour. The amalgamation was rejected by the Grand Council and the lodge then surrendered its charter, practically all of its members joining the other body.

Held, affirming the judgment appealed against (46 N.S. Rep. 417) that the incorporation of the subordinate lodge did not constitute it an independent body; that it still remained a constituent part of the Association; that the surrender of its charter was a dissolution within the meaning of the provision in respondents' charter above referred to; and that its property on such dissolution became vested in the Grand Council for the purposes mentioned.

Leave to appeal to the Privy Council was refused, 4th Aug., 1914.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), varying the judgment at the trial in favour of the plaintiffs.

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

(1) 46 N.S. Rep. 417.

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The facts affecting this appeal are stated by Mr. Justice Russell in the court below as follows:—

The Provincial Workmen's Association consists of a number of lodges in various parts of the province, or of the members of the various lodges; it makes no difference which for the purposes of this appeal. The scheme of incorporation is that a Grand Council, which is the governing body of the Association, was incorporated by Act of the Legislature in 1882 "for the purpose of managing the pecuniary affairs of the Association" and for the promotion of the objects of the Association. Subordinate lodges might become incorporated upon the vote of two-thirds of the members present at a regular meeting, and amongst other conditions the filing in the office of the Provincial Secretary of a certificate of its good standing over the hand of the Secretary of the Grand Council. The Grand Council has power to adopt such constitution and by-laws for its government, and subordinate lodges as the lodges shall deem necessary not being inconsistent with the Act or laws of the province, and such subordinate lodges are to have the like powers subject to the approval of the Grand Council. There is a little confusion of idea manifest in this provision, but the general purpose of maintaining the subordinate position of the lodges is sufficiently indicated nevertheless. Upon the dissolution of any subordinate lodge, its property not theretofore disposed of by the lodge in accordance with its by-laws, is to be forthwith vested in the Grand Council to be applied, first, in payment of any debts of the subordinate lodge and the balance, if any, in such manner as the Grand Council of the Association may deem best for the general interests of the order in the province.

Pioneer Lodge No. 1, of the Association, was incorporated under the provisions of the above cited Act, and although the validity of the proceedings seems to have been attacked in the trial before Mr. Justice Graham no point was made of that sort on the argument of the appeal. But in 1890 an Act of incorporation was passed by the Legislature which, it was contended, created a new juristic person with a new name. The only ground for this contention is what seems to have been a clerical mistake in the substitution of the term "workingmen" for "workmen" in the name of the corporation. The fourth section, conferring power to adopt a constitution and by-laws, expressly states that the exercise of this power is to be subject to the approval of the Grand Council of the Provincial Workingmen's Association, meaning obviously the body incorporated by the Act of 1882, and shewing clearly that the Act of 1890 did not create any new corporation, but merely continued the corporate existence of the subordinate body under the new provisions, in so far as they were new, contained in the Act of 1890.

There was no new organization of the lodge under the Act of 1896. The lodge continued its work with the old organization, and treated the Act as a mere continuation of the existing incorporation.

Section 2 of the Act vests the real and personal property of the lodge in the corporation "created" by the Act, and provides that the corporation may *inter alia* "sell, mortgage, lease, convey or otherwise dispose of the same for the benefit of the lodge."

Sometime in or before the year 1908 a movement was started to amalgamate the Provincial Workmen's Association with another body, the United Mine

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Workers of America, and a poll was held which was without statutory authority and was, of course, a wholly unofficial and informal proceeding. The result was that a majority of the members who voted favoured the amalgamation, but eighteen of the lodges voted against the amalgamation, while only seventeen voted for it, and the lodges all having, I suppose, the same representation on the Grand Council, the vote of the latter body was opposed to the amalgamation. Pioneer Lodge voted by a large majority in favour of the amalgamation, 539 for and only 39 against, with 6 rejected votes. The poll was held on June 24th, 1908, and the result announced by the returning officer on July 6th.

The vote of the Grand Council, I infer, was taken at the meeting in September, 1908.

In pursuance of the policy adopted by the lodge, as I have no doubt, and for the purpose of carrying out a policy of secession, the trustees of the lodge in October, 1908, conveyed the real estate to one David Colwell in trust for the grantors, and on the express condition that the grantee should grant and reconvey the said land and premises to the said McPherson, Blue and Ross (the trustees who conveyed to Colwell), their successors and assigns on demand. The money of the lodge, amounting to upwards of twenty-seven hundred dollars, was also transferred to Colwell on the same trust. The lodge shortly after, in December, 1908, by unanimous resolution, returned its charter to the Secretary of the Association, and its members proceeded to form themselves into a union of the United Mine Workers.

Ralston for the appellants.

Newcombe K.C. and *Mellish K.C.* for the respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs.

IDINGTON J.—The respondent is a trade union incorporated by chapter 74 of the statutes of Nova Scotia, 1882. And appellant, the Pioneer Lodge No. 1 of Provincial Workmen's Association, is or was a subordinate lodge of the respondent. Of the other appellants some are officers and others alleged trustees of a hall built for lodge purposes and a sum of $2,700, which was once the property of said subordinate lodge.

The only question raised herein deserving of serious consideration is whether or not section 7 of the Act of 1882, incorporating respondent, entitled it to claim said real and personal property.

The said section reads as follows:—

7. Upon the dissolution of any subordinate lodge so incorporated, the property held by it at the time of the dissolution which shall not have been disposed of by the lodge in accordance with the by-laws, shall forthwith be vested in the Grand Council of the Provincial Workmen's Association, to be applied first in the payment of any debts or liabilities of such subordinate lodge, and the balance, if any, in such manner as the Grand Council of the Provincial Workmen's Association may deem best for the general interests of the order in this province.

The Pioneer Lodge No. 1 Provincial Workmen's Association is the corporate name of said appellant as it appears in section 1 of the Act of 1890, ch. 135, incorporating nine persons named,

and such other persons as are and shall become members of the lodge hereby incorporated according to the rules and by-laws thereof,

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created a body corporate, under the name of Pioneer Lodge No. 1, Provincial Workingmen's Association, for the purpose of holding the property and managing the affairs of the lodge.

The question raised herein is whether or not upon the facts in evidence herein the property come to the hands of this corporate body has by virtue of the first quoted section passed to the respondent.

Prior to this latter Act of incorporation there had been a lodge formed before 1882 named "The Pioneer Lodge No. 1, Provincial Workmen's Association," and at all events from 1882 till the time of this latter Act of incorporation it was in actual affiliation with respondent as a subordinate lodge of that association.

The respondent would seem at the trial to have assumed that this Pioneer Lodge No. 1, and that incorporated in 1890 were identical and hence there does not seem to have been adopted the simple methodical plan of proving that identity by books and documents.

The appellant, McPherson, says in his evidence as follows:—

Q. You are a member of Pioneer Lodge Number 1 ? A. Yes.
Q. It was the lodge originally organized in 1879 ? A. Yes.
Q. As Pioneer Lodge Number 1 ? A. Yes.
Q. When did you come there ? A. About 1884.
Q. From that time on until December, 1908, you were a member of Pioneer Lodge ? A. Yes.
Q. You are one of the Trustees ? A. Yes.

Then one Piggott tells of his connection with Pioneer Lodge No. 1, for a period of twenty-six years, beginning in 1882, and says as follows:—

Q. You know in 1890 the Act where the lodge was given power to sue for its dues ? A. Yes. I think Pioneer made that request and it was brought up in Grand Council.
Q. Did you have any new organization under the Act ? A. No, just went on as we went before.

Q. I understand the object of the Act was to sue for dues ? A. (Objected to) That was the main object.

There is a certificate in evidence of date 1882, apparently from the Grand Secretary, that Pioneer Lodge No. 1, is in good standing in Provincial Workmen's Lodge.

Mr. Justice Graham, the learned trial judge, found the lodge to have been incorporated in 1882 by virtue of the powers in the Act of that year.

It does not seem to me necessary to pass any opinion upon that question further than to say that the presumption, from its long continued relation with the parent association, is most cogent in favour of its incorporation by virtue of section 3 of the Act of incorporation in 1882.

It seems to me that Pioneer Lodge No. 1, of which we hear in 1882 and earlier was the same which then became affiliated with respondent and, as a subordinate lodge in that association, so continued down to the time that the real and personal property held by its trustees had been directed, in the way complained of, to be conveyed or transferred to the appellant Colwell.

That being the case I do not think it makes any difference whether or not there were two incorporations of the same body for that is what in my reading of above, partly quoted, section one, of the Act of 1890, it comes to.

I need hardly say that the slight difference between the name by which it was incorporated by the special Act of the legislature and that used in the transaction of 1882, by substituting the word "workingmen" for "workmen" can in face of such facts affect the determination of this case.

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The continuous relation between the parent association and the subordinate lodge cannot be affected by such trifles as that. Nor do I think that the Act of incorporation of 1890 either impaired or put an end to the relation that had been created by the affiliation. And the argument for appellant derived from the omission in that Act of incorporation of anything relative to what was to be done with the property held by the corporation when it ceased to exist by reason of having no longer any members to keep it alive, seems to me entirely wanting in foundation.

What the lodge wanted and hoped for from legislation was to give its acts relative to property while living some force and effect. When dead and its course had ended there was no need for any provision to dispose of its remaining property.

That had already been provided for by the legislature in the terms of section 7 above quoted from the Act incorporating the parent association. The argument to be derived from the omission to provide in the later incorporation of 1890 seems entirely the converse of that put forward by appellants.

It seems to furnish, further, such cogent evidence of the presumption I have adverted to, as to make it unanswerable.

As the property was by the terms of section 7 to vest in the respondent in the events which have happened, there seems an end to the contention set up by this appeal.

It was admitted by counsel for appellant that every member of this lodge had joined another association in breach of the constitution; and that to my mind *ipso facto* dissolved the corporation and so brought it within the meaning of the apt term "dis-

solution" used in section 7, and rendered that section operative.

The appeal should be dismissed with costs.

DUFF J.—I think the fallacy in Mr. Ralston's able argument lies in the assumption that Pioneer Lodge as a corporate body is a body independent of the Grand Council and of the Order as a whole, having a *"but organisé"* of its own. I think that cannot be sustained. As I read the statutes, the incorporation of the Grand Council and of the individual lodges is merely for the purpose of machinery. The incorporated subordinate lodge as a corporate body has its powers limited by the objects of the incorporation, the grand object being to serve the purposes of the subordinate lodge itself as a member of the order. Any attempt to deal with the property of the lodge inconsistently with this object is in my judgment *ultra vires*. The transaction in question was, as regards the incorporated body, an *ultra vires* transaction.

I think the Grand Council as representing the order as a whole has a sufficient interest to entitle it to sue.

ANGLIN J.—I agree with the disposition made of this case in the provincial courts, and, speaking generally, with the conclusions stated by Graham E.J., and Russell J.

I cannot regard the statute of 1890 as meant to confer upon Pioneer Lodge, which had been incorporated as a subordinate lodge under the Act of 1882 (which also incorporated the Provincial Workmen's Association) a status independent of that association of which it was a constituent part. The reference

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in the statute itself to the Grand Council — admittedly the executive body of the Provincial Workmen's Association — and the subsequent conduct of Pioneer Lodge, make it abundantly clear that it was always intended and understood that the lodge should retain its subordinate position in the association with all the rights, duties and liabilities which that position entailed. Among these were the liabilities and correlative advantages resulting from the provisions of section 7 of the Act of 1882. It is to me inconceivable that the Legislature could have intended to do anything so palpably unfair to the other lodges of the association as to permit Pioneer Lodge to enjoy all the advantages and benefits of membership in the association and at the same time to be free from the obligations and restraints which such membership imposed upon other lodges.

I am satisfied that what occurred in connection with the surrender of its charter by Pioneer Lodge to the Grand Council was equivalent to dissolution of the lodge within the purview of section 7 of the Act of 1882, and that on such dissolution happening the trustees of the lodge held its property for transfer to the Grand Council to be by it dealt with and disposed of for the purposes stated in section 7. Having sought and had the benefit of membership in the Provincial Association the members of Pioneer Lodge must accept the countervailing hardships, if they be such, which that membership imposes. They should have counted the cost of abandoning their membership in the defendant association before deciding to do so — or better still, perhaps, before joining the association.

I would for these reasons dismiss this appeal with costs.

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Brodeur J.

BRODEUR J.—I am of opinion that this appeal should be dismissed with costs for the reasons given by Mr. Justice Russell in the court below.

Appeal dismissed with costs.

Solicitor for the appellants: *J. L. Ralston.*

Solicitor for the respondents: *D. A. Cameron.*

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*May 29.
*June 19.

CANADIAN NIAGARA POWER COMPANY..... } APPELLANTS;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF STAMFORD..... } RESPONDENT.

THE ELECTRICAL DEVELOPMENT COMPANY OF ONTARIO } APPELLANTS;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF STAMFORD..... } RESPONDENT.

THE ONTARIO POWER COMPANY OF NIAGARA FALLS..... } APPELLANTS;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF STAMFORD..... } RESPONDENT.

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

Assessment and taxes—Municipal by-law—Exemption from taxation—Validating legislation—School rates—"Public School Act," 55 V. c. 60, s. 4 (Ont.)—Special by-law.

By section 4 of the "Public Schools Act" of Ontario (55 Vict. ch. 60) it is provided that "no municipal by-law hereafter passed for

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

exempting any portion of the ratable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever." A similar provision is contained in the "Municipal Act" (55 Vict. ch. 42, sec. 366), and both are now to be found in the Revised Statutes of Ontario, [1914] ch. 266, sec. 39, and ch. 192, sec. 396(*e*).

Held, affirming the judgment of the Appellate Division (30 Ont. L.R. 378, 384, 391), Duff J. dissenting, that the application of this legislation is not confined to the case of a by-law passed under the general powers of a municipality, but it applies to limit the effect of a special by-law exempting a company from all municipal assessment "of any nature or kind whatsoever" beyond an amount specified as its annual assessment, even when the by-law was confirmed by an Act of the legislature which declared it to be legal, valid and binding, "notwithstanding anything contained in any Act to the contrary." *Canadian Pacific Railway Co.* v. *City of Winnipeg* (30 Can. S.C.R. 558), distinguished.

Held, per Idington J.—The by-laws granting exemption did not conform to the statutory requirements and were, therefore, invalid.

(Applications for special leave to appeal to the Privy Council by the Canadian Niagara Power Co. and the Electrical Development Co. were refused, 4th Aug., 1914.)

APPEAL from decisions of the Appellate Division of the Supreme Court of Ontario(1), affirming in each case the order of the Ontario Railway and Municipal Board which dismissed an appeal from the Court of Revision confirming the assessment on appellant's property for school purposes.

In 1903 the Council of the Township of Stamford passed the following by-law.

"By-law No. 9, 1903.

"A by-law relating to the assessment and taxation of the property of the Canadian Niagara Power Company.

"Whereas the undertaking and works of the Canadian Niagara Power Company are calculated to con-

(1) 30 Ont. L.R. 378, 384, 391.

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tribute materially to the prosperity and well-being of the ratepayers of the municipality of the Township of Stamford, and it is expedient to grant the request of the said company to the council, to exempt the said company and its property within the municipality from municipal assessment in part, and to agree to and fix the assessment as hereinafter set forth and apportioned as hereinafter set forth.

"Be it therefore enacted by the Municipal Council of the Township of Stamford, acting under and by virtue of section 8 of 55 Victoria, chapter 8, and all and every other authority enabling it in that behalf, for itself, its successors and assigns, and it is hereby enacted that the annual assessment of all the real estate property, franchises and effects of the Canadian Niagara Power Company, situate from time to time within the municipality of the Township of Stamford be and the same is hereby fixed at the sum of one hundred and sixty thousand dollars ($160,000), apportioned as follows, namely: One hundred thousand dollars upon tunnels, wheelpits, power house, inlets and inlet bridges, and other principal works of the said company, from time to time situate in the Queen Victoria Niagara Falls Park, and sixty thousand dollars ($60,000) upon the other property of the said company from time to time situate in the said Park or elsewhere in the said municipality, for each and every year of the years 1903 to 1923, both years inclusive, and that the said company and its property in the municipality be, and they hereby are exempted in each year of the said years, from all municipal assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in

each such year, to the said fixed assessment of $160,000, apportioned as aforesaid.

"And be it further enacted that if the said company shall refuse to pay taxes on the above assessment in any of the above years, the corporation or any lawful authority on its behalf may, if the same are not paid within the time limited for the return of the collector's roll, thereafter assess and collect taxes upon the said company and its property as if no exemption or commutation had been made."

The by-law was passed in 1903, and, from that date up to 1913, the amount demanded and paid yearly for school rates, as well as for the other rates and taxes, was based upon the fixed assessment of $160,000.

In the year 1913 the said township placed the assessment in respect of school rates at $900,000, which assessment forms the subject matter of the proceedings herein.

Similar by-laws were passed in 1904 in favour of the other appellant companies and were acted upon in the same way.

The by-law in favour of the Ontario Power Co. was validated by special Act of the legislature which provided that it should be legal, valid and binding notwithstanding anything in any Act contained to the contrary. The other companies claimed that their respective by-laws were made valid by the provisions of the "Municipal Act" authorizing exemptions from taxation.

After being assessed for school rates in 1913 in addition to the amount fixed by the by-laws each company appealed to the Court of Revision which affirmed the assessment. Further appeals to the Ontario Railway and Municipal Board and thence to the Appellate

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Division being unsuccessful they brought this appeal to the Supreme Court of Canada.

Nesbitt K.C., Grier K.C., and *Glyn Osler* for the several appellants.

Kingstone for the respondent.

CANADA NIAGARA POWER CO. v. STAMFORD (1).

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

IDINGTON J.—The jurisdiction of this court herein must be found in section 41 of the "Supreme Court Act." Whether all the questions raised in argument or suggested by the opinion judgments of the court below can fall within the said section may be very doubtful. In the absence of any argument it would be difficult to draw any satisfactory line defining just what is implied in the phrase "concerning the assessment of property." Originally no doubt it was intended to be relative to the amount assessed or assessable as against some person.

Since that enactment was framed, 10 Edw. VII., ch. 88, section 19 has been passed to define the jurisdiction of the courts below relative to such appeals as they have heard.

I doubt if the range of what is opened thus for the consideration of the courts below is not much more extensive than that which section 41 has assigned to us to hear and determine.

Of course it is only within the latter we can act.

In the view I am about to express these considera-

(1) 30 Ont. L.R. 384.

tions may be of no consequence yet I do not wish to be considered hereafter as now holding that the appellate jurisdiction in each of these enactments is exactly co-extensive with the other.

The liability of the appellant to pay school taxes is what the parties no doubt desire to have determined. The assessment roll as it stands and as it has been maintained will if upheld herein no doubt so operate as to maintain the levy for school rates, objected to herein.

The eighth section of the Act incorporating the appellant is as follows:—

It shall be lawful for the corporation of any municipality, in any part of which the works of the company or any part thereof pass or are situate, by by-laws specially passed for that purpose, to exempt the said company and its property within such municipality, either in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum, or otherwise, in gross, or by way or commutation or composition for payment, or in lieu of all or any municipal rates or assessments to be imposed by such municipal corporation, and for such term of years as to such municipal corporation may seem expedient, not exceeding twenty-one years, and any such by-law shall not be repealed unless in conformity with a condition contained therein.

This was passed in the same session of the legislature in 1892, as was an Act dealing with public school questions and of which section 4 was as follows:—

No municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

In this session the legislature also repealed by the "Municipal Assessment Act," 1892, sec. 28, the long standing legislation which had empowered the municipalities to grant bonuses in aid of manufacturers.

And, such means of aid having been so obliterated

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in same session, the municipal Acts were consolidated and what was intended as a complete code was enacted of which section 366 provided that municipal councils might by a two-thirds vote grant exemption from taxation (except as to school taxes) for a term of ten years renewable for the like term.

The incorporating Act in which the above quoted section 8 is found, formed chapter 8 of the statutes for the said session, and these other enactments are all in later chapters of the legislation of same session.

And curiously enough in the same session there was passed as chapter 48 of the Acts of said session, the "Consolidated Assessment Act," the result, if I am not mistaken, of a special commission to consider the questions of assessment and taxation.

This Act defined the duties of the assessor and amongst other things directed the assessment roll to be made in a form which provided for the assessment to be set out under columns shewing the actual values of each parcel of land, and then by section 49 thereof the assessor was required to swear that he had done so.

There are numerous provisions for specific exemptions and reductions, but nothing that could justify any assessor or anybody else presuming to comply with such a by-law as before us herein discarding these provisions and inventing something else to work out this provision of section 8, possessing many alternative powers.

It was absolutely impossible for the "Assessment Act" and this by-law to stand together.

But the alleged power to make any such by-law was not invoked till eleven years later. Meantime, (almost impossible as it would seem from the beginning

to have carried into execution such a statutory privilege by way of meddling with the assessment roll and all else that is the basis of what we have herein to deal with,) the legislature by the "Municipal Amendment Act," 1900, sec. 8, added to section 366, above referred to, section 366(*a*) by which it is declared that:—

> To render valid a by-law of the municipality for granting a bonus in aid of any manufacturing industry, the assent shall be necessary of two-thirds of all the ratepayers, etc., etc.

And by section 9 the bonus system was revived in the form and subject to the stringent requirements therein set forth for determining the matter.

Then section 10 defines what is to be held to be a bonus within said section 366(*a*), and other sections. And by sub-section (*g*) thereof:—

> A total or partial exemption from municipal taxation or the fixing of the assessment of any property for a term of years, etc., etc.,

is the gist of the definition relative to taxation, but the term is limited to ten years' renewal and exemption from taxation for school purposes is expressly excluded from the operation of the Act.

The scope of this legislation is such as to leave no doubt of the purpose of the legislature in relegating to the people the power to pass any by-law in the nature of a bonus.

The section 8 of the Act relied upon by appellant in its relation to this later legislation may be considered in a two-fold aspect.

In the first place it is to be observed that the language thereof as above quoted which renders it

> lawful for the corporation of any municipality * * * by by-laws specially passed for that purpose

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does not expressly enable the council to pass such by-law. The council never had any power but that expressly given it to represent the corporation and this was ever subject to such variation as the legislature chose to enact and to empower. The very language used excludes anything but the corporation itself making such a by-law. That corporate existence has always been the collective body of the inhabitants. Within this very language the old form of town meeting would in absence of any other enabling provision be alone what could determine anything relative to "a by-law specially passed" for any purpose.

The legislature has the right from time to time to vest such power of passing by-laws in such inhabitants or those representing them, and to declare who, as electors or otherwise, shall represent them, and enable the corporate body to speak and act. The mode or forms assigned by the legislature to do so must be observed.

Those acquiring from the legislature privileges by way of statute must above all others be presumed to know that the conditions upon which their privileges depend and that the mode of obtaining the enjoyment of such privileges, must be that assigned by the legislature and that the mode may vary from session to session.

If the appellant had chosen to act upon the privilege given it in 1892, then it might have been arguable that by section 10 of the "Municipal Act" of that time, the council might have had power to express the will of the municipal corporation.

At the time when the by-law in question was enacted this mode of expressing the will of the municipal corporation had ceased to exist in relation to the sub-

ject matter of conferring upon any one the benefit of such privilege as sought to be conferred.

In the next place the right to claim any of the benefits alternatively contemplated by section 8 of the appellant's incorporating Act, seems to me so much in conflict with all this later legislation that it has been thereby impliedly repealed.

It may be arguable that the privilege was in substance within the scope of what might have been conferred by the "Municipal Amendment Act," 1900, for the appellant may be held to be carrying on a manufacturing industry within same, but all such privileges became subject to the mode adopted by said Act for expressing the will of the corporation which involved the assent of the ratepayers, which was never got.

Again of the many forms alternatively given by said section 8, the parties chose that which was least defensible in law and had been rendered impossible by the enactment of the "Consolidated Assessment Act" to which I have already adverted.

The appellant having failed to procure the due enactment according to law of "a by-law specially passed for the purpose," I am of opinion that the by-law relied upon was wholly void and gave no such privilege as claimed.

The greater, of course, includes the less and leaves the appellant liable to the assessment complained of relative to school taxes.

If the legislation in conflict with the provisions upon which the appellant relies and the by-law rests, had been only that of the same session, I might have found it necessary to enter upon the question of the

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effect of such a conflict. But when we find all that so conflicting re-enacted at later sessions either directly or by implication before the alleged by-law was passed and such a definite settled form given to such conflicting legislation as appears in the enactments of 1900, as to render it impossible to conceive of such an ancient privilege being preserved merely by the supposed continuation of the powers of the council out of keeping with aught else bearing upon the subject, we must conclude that the section relied upon has been impliedly repealed.

The conflict is to my mind quite as expressive as that which was held in the House of Lords in the case of *Duncan* v. *Scottish North Eastern Railway Co.*(1), in 1870, or in the case of *Great Central Gas Consumers' Co.* v. *Clarke*(2), in 1863, where the privilege was the other way about, to have such repealing effect.

I only refer to these as typical of many more, some of which are collected in the more recent case of *Sion College* v. *London Corporation*(3).

I also agree with the further reasoning applied in the courts below.

I think there is no resemblance between this case and the *Canadian Pacific Railway Co.* v. *City of Winnipeg*(4), so much pressed upon us.

The appeal should be dismissed with costs.

Since writing the foregoing the May number for 1914 of the law reports brings a report of *The Associ-*

(1) L.R. 2 H.L. (Sc.) 20.
(2) 13 C.B.N.S. 838.
(3) [1900] 2 Q.B. 581.
(4) 30 Can. S.C.R. 558.

ated Newspapers v. *Mayor, etc., of London*(1), which I have read and considered. Though I find nothing therein to vary my opinion yet the *Sion College Case* (2) is, I observe, doubted therein, and a number of authorities are referred to which are instructive.

DUFF J. (dissenting). — The appellant company was incorporated by a special Act of the Province of Ontario, 55 Vict. ch. 8, by section 8 of which it was provided as follows:—

8. It shall be lawful for the corporation of any municipality, in any part of which the works of the company or any part thereof pass or are situate, by by-laws specially passed for that purpose, to exempt the said company and its property within such municipality, either in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum, or otherwise, in gross, or by way of commutation or composition for payment, or in lieu of all or any municipal rates or assessments to be imposed by such municipal corporation, and for such term of years as to such municipal corporation may seem expedient, not exceeding twenty-one years, and any such by-law shall not be repealed unless in conformity with a condition contained therein.

A considerable amount of the property of the appellant company is within the Township of Stamford and, on the 11th of May, 1903, the following by-law was passed by that township:—

Whereas the undertaking and works of the Canadian Niagara Power Company are calculated to contribute materially to the prosperity and well-being of the ratepayers of the municipality of the Township of Stamford, and it is expedient to grant the request of the said company to the council, to exempt the said company and its property within the municipality from municipal assessment in part, and to agree to and fix the assessment as hereinafter set forth and apportioned as hereinafter set forth.

Be it therefore enacted by the Municipal Council of the Township of Stamford, acting under and by virtue of section 8 of 55 Victoria, chapter 8, and all and every other authority enabling it in that be-

(1) [1914] 2 K.B. 603. (2) [1900] 2 Q.B. 581.

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half, for itself, its successors and assigns, and it is hereby enacted that the annual assessment of all the real estate property, franchises and effects of the Canadian Niagara Power Company, situate from time to time within the municipality of the Township of Stamford be and the same is hereby fixed at the sum of one hundred and sixty thousand dollars ($160,000), apportioned as follows, namely: One hundred thousand dollars upon the tunnels, wheelpits, power houses, inlets and inlet bridges, and other principal works of the said company, from time to time situate in the Queen Victoria Niagara Falls Park, and sixty thousand dollars ($60,000) upon the other property of the said company from time to time situate in the said Park or elsewhere in the said municipality, for each and every year of the years 1903 to 1923, both years inclusive, and that the said company and its property in the municipality be, and they hereby are exempted in each year of the said years, from all municipal assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year, to the said fixed assessment of $160,000, apportioned as aforesaid.

And be it further enacted that if the said company shall refuse to pay taxes on the above assessment in any of the above years, the corporation or any lawful authority on its behalf may, if the same are not paid within the time limited for the return of the collector's roll, thereafter assess and collect taxes upon the said company and its property as if no exemption or commutation had been made.

Read a third time, and passed in Council this 11th day of May, A.D. 1903.

From 1903 to 1913 the provisions of this by-law were observed. In 1913 the appellant company's property was assessed at $900,000 in the assessment roll of the township. On behalf of the township it is now contended and this contention has been upheld by the Court of Appeal for Ontario, that this by-law must be construed as providing for a fixed assessment not for all purposes but for purposes other than that of determining the amount of taxes payable for school purposes. I have already referred to the provisions of the law bearing upon the point touching the assessment and taxation of property within the limits of municipalities in the Ontario Power Company case (see page 198). Leaving out of view for the moment section 77 of

the "Public Schools Act" of the year 1901, which was first enacted in the year 1892, the relevant provisions of the law touching the assessment and taxation of real property were in substance the same in 1892 as those to which I have referred in that case; and it will not be necessary for the purposes of this judgment to quote the provisions in detail. The foundation of the system of municipal taxation was the assessment roll, in which was entered the actual value of all property within the limits of the municipality not exempt from taxation. It was the duty of the council in each year to levy on the whole ratable property within its jurisdiction a sufficient sum to pay the debts of the corporation falling due within the year, the sums payable being calculated at the rate of so much in the dollar for the actual value of the property. The valuation of the property and generally the compilation of the assessment roll were entrusted to an officer, appointed by the corporation, called the assessor whose duties are laid down in the "Assessment Act." The valuation by the assessor was subject to revision in accordance with the provisions of the Act. It was the duty of the clerk of the municipality to prepare a roll known as the collector's roll in which was entered the assessed value of each parcel of property assessed and the amount of taxes payable calculated according to the rate for the year, the amounts payable in respect of any special rate, such, for example, as local improvement taxes or school rates being entered in a separate column with an appropriate caption. This roll is delivered to an officer called the collector whose duty it is to collect the sums set down as the taxes chargeable. The assessed value of the property is spoken of sometimes in the "Assessment Act" as "the

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assessment," which term is also applied to the process of constituting the assessment roll.

There can, I think, be no doubt that according to the proper construction of this by-law, reading it with reference to the assessment system prevailing at the time that the by-law was passed, it effectively provides that the sums mentioned are to be entered as the assessed value of the property referred to in the assessment roll and that that sum is to be taken as the assessed value of such properties for all the purposes of the collector's roll. That, I say, seems to be the meaning of the words. I shall consider in a moment the effect of section 4 of chapter 60 of 1892, otherwise section 77 of the "Public Schools Act," 1901. If that enactment applies then the effect of the by-law must be limited as thereby ordained; but giving the words of the by-law their own proper effect, interpreting the word "assessment" with reference to the machinery established by the "Assessment Act" and the "Municipal Act" for the assessment and taxation of property, I think there is nothing ambiguous in the by-law, that it has one meaning and only one meaning, viz., that indicated above. Before passing on to the question which appears to me to be the point of substance in the appeal, I may refer to the suggestion that in the common understanding the language used in this by-law would be read as applying in the limited way contended for by the respondents. I am quite unable to concur in that view. Ratepayers in Ontario municipalities accustomed to receiving annually their notices of assessment, each of which is an extract from the assessment roll, provisionally constituted by the assessor himself and before revision by the Court of Revision, shewing the assessed value of their ratable

property, know quite well the meaning and significance of the term "assessment." They understand that it is by reference to the assessed value as it appears in the assessment roll that the amount of taxes, whether in respect of the general rate or of any special rate, such as the school rates will be determined; and a by-law providing for fixing the annual assessment of given property at a named sum would be commonly understood to mean one thing and only one thing, viz., the fixing of the assessed value of such property for the purposes of ascertaining the amount of the taxes to be paid in respect of it.

It should be observed (I am still leaving out of consideration the amendment of the "Public Schools Act" above referred to) that by sections 117 and 118 of the "Public Schools Act," R.S.O. 1887, ch. 225, the municipal councils are required to levy and collect the moneys needed for school purposes on "the taxable property" within the municipality "in the manner provided" in the "Public Schools Act" and in the "Municipal and Assessment Acts." An exemption from assessment, therefore, in whole or in part, necessarily took the property exempted out of the category of property assessable for school purposes.

What I have just said will be sufficient to meet the contention that the authority conferred upon the municipality by the company's special Act to

> exempt * * * either in whole or in part from municipal assessment or taxation

does not include the authority to exempt from assessment or taxation for school purposes. The assessment is one, the machinery for taxation is a single machinery in each municipality. The whole system

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is worked by the officers of the corporation. It is true that the law requires the council to collect the funds requisitioned by the school trustees and to pay over to the school trustees the funds collected. But the assessment is none the less a municipal assessment, the taxation municipal taxation. The taxes payable in respect of the school rates or otherwise are a debt due to the municipality (sec. 131, ch. 48, 55 Vict.). And the fund realized is a product of municipal taxation as much as any other fund produced by a special rate and required by law to be devoted to a particular purpose. I may add that apart from the amendment of 1892 to which I am about to refer, I think the reasoning of the judgment of this Court in *Canadian Pacific Railway Co.* v. *City of Winnipeg*(1), applies and is conclusive.

I now come to the real point on the appeal. It is contended that notwithstanding the provisions of section 8 of chapter 8, 55 Vict., above quoted, the courts are constrained by an enactment passed in the same year, section 4 of chapter 60 of the statutes of 1892, to hold that this by-law does not operate to fix the assessment of the property in question for the purposes of determining the amount to be paid in respect of it for school rates. The three statutes to which I am about to refer were all assented to on the same day, and may, I presume, be taken to have been passed contemporaneously. The first is the enactment to which I have just referred and it reads as follows:—

4. No municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

(1) 30 Can. S.C.R. 558.

The second is section 366 of the "Consolidated Municipal Act" as follows:—

366. Every municipal council shall by a two-thirds vote of the members thereof have the power of exempting any manufacturing establishment or any water works or water company, in whole or in part, from taxation, *except as to school taxes*, for any period not longer than ten years, and to renew this exemption for a further period not exceeding ten years,

— this last mentioned enactment being a reproduction of section 366 of the "Municipal Act," ch. 184, R.S.O., 1887, with this exception, viz., that the words "except as to school taxes" are not found in the earlier Act and now for the first time appear.

The third is the incorporating statute, the relevant provision of which is quoted above.

We have here then the general provision introduced in 1892 into the "Public Schools Act" above quoted. We have the amendment of section 366 of the "Municipal Act" limiting the power of exemption from taxation to bring that section into harmony with the first mentioned provision, and we have the special Act dealing with the appellant company's property and the municipalities in which it may happen to be situated. The point to be considered is — the language of the company's Act being in itself sufficient and appropriate for empowering the municipalities referred to, to enter into a special arrangement with the appellant company in respect of the assessment of the company's property, whether those municipalities must be taken in the exercise of the special power thus conferred to be governed and controlled by the general provision inserted in the "Public Schools Act." I think the canon of construction *generalio specialibus*, etc., applies. I think it is a case in which the legislature having given its attention to a special

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case and provided for that special case in a special Act by language, the meaning of which in itself is unmistakable, the special Act must be held to govern notwithstanding the provisions of some enactment of general application passed either before, or at the same time, which provisions can be given reasonable and sensible operation without interfering with the powers conferred by the special Act. I think, in other words, that it is a case in which the general provision must be read as subject to the implied exception of those cases with which the legislature has specially dealt by special enactment. It is quite true that this rule being only a canon of construction must give way where a contrary intention appears. But I have been unable to find any evidence properly cognizable by a court of law (whose duty is limited to construing Acts of the legislature) of any such contrary intention. On the contrary, looking at these three statutes assented to on the same day, I find what appears to me to be evidence of the existence in fact of an intention conformable to the presumed intention upon which the canon above indicated is postulated. I find that evidence in the fact that section 366 of the "Municipal Act" upon which is based the general power of the municipalities to exempt from taxation was specifically amended in order to make it clear that the power to grant exemptions did not extend to taxation for school purposes. That was done while at the same moment the provisions of the appellant company's special Act conferring an unqualified power to exempt from taxation or assessment were allowed to go into effect.

I refer only briefly to the point made with regard to the "Public Schools Act" of 1909. I do not think

that the legislature in re-enacting this provision first passed in 1892 in terms obviously intended to make it clear that it applied to by-laws passed after the date of the first enactment of it, can be held to have extended the operation of this provision to by-laws to which in its original form it did not apply. If I am right in my view that the amendment of 1892 as it stood when it was passed in that year did not apply to by-laws passed under special powers relating to special property, then I can see no reason for holding that with regard to such by-laws the subsequent re-enactments of it have in any way widened its operation. I ought perhaps to refer to the suggestion — I do not think it was seriously pressed — that the provisions of the "Municipal Act" relating to bonuses governed this municipality in the exercise of this special power. I think those provisions are limited in their application to the exercise of the powers under the "Municipal Act."

ANGLIN J.—Having regard to the relations between school boards and municipal corporations in Ontario and to the manner in which the legislature of that province has dealt with school taxes, I am satisfied that its legislation, whether general or special, empowering municipal councils to exempt from taxation, enacted at or after the session of 1892, however broad and general in its terms, should not be construed as authorizing exemption from school taxation, in any form or to any extent, unless taxation for school purposes is expressly mentioned in such legislation. By a clause inserted in the "Public Schools Act" in that year (55 Vict., ch. 60, sec. 4), it is enacted that

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no municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

I respectfully concur in the construction put upon this provision by the learned Chief Justice of Ontario in his judgment in the Ontario Power Company's case. A corresponding restriction on the powers of exemption was at the time introduced into the "Municipal Act" (55 Vict., ch. 42, sec. 366). Both these provisions have since been continued in the legislation of Ontario and are now to be found in the Revised Statutes of Ontario, 1914, ch. 266, sec. 39, and ch. 192, sec. 396(*e*).

Had there been similar legislation in force in Manitoba when the by-law of the City of Winnipeg considered by this court in the *Canadian Pacific Railway Co.* v. *City of Winnipeg*(1), was enacted, I cannot think that it would have held that the exemption from

all municipal rates, taxes and levies and assessments of every nature and kind whatsoever,

for which that by-law provided, would have been held to include exemption from school taxes.

As pointed out by the learned Chief Justice of Ontario, in his judgment in the Canadian Niagara Power Company's case, section 4 of chapter 60, of the statutes of 1892, is not

an enactment prohibiting the granting of an exemption from school rates, but a mandate to all courts to hold and construe by-laws exempting from taxation as not extending to school rates.

The proper construction of the by-laws in question and of the legislative authorization on which they depend for their validity being that they do not ex-

(1) 30 Can. S.C.R. 558.

tend to exemption from school taxation, we are not confronted with the difficulty which would be presented, did these cases involve attempts to derogate from the effect of prior special statutes by subsequent general legislation.

The authority of the judgments of Divisional Courts in *Stratford Public School Board* v. *Stratford* (1) (which is probably distinguishable on other grounds), and *Way* v. *St. Thomas*(2), relied on by Mr. Nesbitt, is overborne by the judgment of the Ontario Court of Appeal in *Pringle* v. *Stratford*(3), and that of the Appellate Division in this case.

Notwithstanding Mr. Osler's ingenious attempt to differentiate the case of his clients, the Ontario Power Company, from the cases of the other appellants, if the view I take of the proper construction of exempting municipal by-laws passed since 1892 is correct, there is no real ground of distinction between them.

The appeal should be dismissed.

BRODEUR J.—In these three cases the same question is in issue. We are asked to determine whether the municipal corporation respondent could exempt from school taxes the company appellant.

Prior to 1874 the school boards in Ontario made their own assessment, levied and collected their own taxes. In 1874 the legislature authorized the school boards to have their taxes collected by the municipalities.

In 1879 the power for the school boards to collect their own taxes was discontinued and was vested in

(1) 2 Ont. W.N. 499. (2) 12 Ont. L.R. 240.
(3) 20 Ont. L.R. 246.

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the municipality. The school boards have since that time the right to determine the amount of money necessary to meet their expenditures; they would inform the municipality of the money required and the latter in collecting its taxes would at the same time levy the amount of money that would satisfy the needs of the school board.

Under that legislation it is evident that an abuse sprung up by which industrial establishments that were exempt from taxation by the municipality did not pay anything for school taxes, for the legislature, in 1892, by chapter 60, section 4, declared that

> no municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

That policy adopted by the legislature has been reenacted several times since and there seems to be not the least shadow of a doubt as to the intention of the province in that respect.

The appellants in order to defeat that intention rely on special Acts conferring upon municipalities in which the works of the companies are situate, the power to exempt them from municipal assessment or taxation and they claim that those special Acts override the general provisions of the law. I am unable to accept such a conclusion. Of course, the legislature could have the right to exempt from school taxes any industrial establishment. But, in view of its settled policy it would require a formal enactment.

The instructions given by the legislature to the courts are to construe the by-laws providing exemption from taxation in such a manner that the exemptions should not cover school rates.

With such instructions the courts are powerless to find in any by-law an exemption from school taxes unless the legislature would formally declare by a special Act that the school taxes would be included in the exemption.

The appellants rely on the case of *Canadian Pacific Railway Co.* v. *City of Winnipeg*(1), decided by this court. But in the Province of Manitoba, in which that case was instituted, there was no legislation similar to the one we find in Ontario.

I am of opinion that the appellant companies were not exempt from school rates and that their appeals should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *A. Munro Grier.*
Solicitors for the respondent: *Ingersoll & Kingstone.*

ELECTRICAL DEVELOPMENT CO. v. TOWNSHIP OF STAMFORD(2).

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

IDINGTON J.—The appellant's claim to exemption from assessment for public school rates differs somewhat from that made in the case of The Canadian Niagara Power Co. v. Township of Stamford.

In the assumption, however, that the ordinary municipal rates and school rates and the assessments

(1) 30 Can. S.C.R. 558. (2) 30 Ont. L.R. 378.

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upon which they respectively rest are identical, these cases present the same fundamental errors of law and fact.

The municipal corporation in its relation to the school rates is but the servant or agent of the Public School Board. The latter formerly collected its own rates and later had an option either to do so or require the municipal council and its officers to do so.

There existed in the early stages of public school history great division of public opinion on the question of free school education based upon the principle that everything taxable, whether or not its owner had children to educate, should bear an equal proportionate share of the burden of the support of the public schools.

The school boards had to resort to the collection of rates in a variety of ways determined by the ratepayers of the section.

When the principle I have just adverted to became fully recognized and established by law the old forms of proceeding for levying the school rates existed in law, though gradually falling into disuse.

It was stated and not contradicted in argument that this survival in law of old methods of collection ceased in 1879.

There are yet instances such as in the unorganized districts where the school boards have to see to both assessing and collecting. And I am not sure but in regard to separate schools there still remains a survival in law relative to the collection of school rates.

All I am concerned with herein is to shew that it is simply as a matter of public expediency that the machinery of the municipal councils is used for the levying of the rates required to support the public schools, and

that it is a long time since the obligation of property owners to contribute their share in proportion to their means to the maintenance of the free public schools, was finally established and fully recognized.

The argument presented by counsel for appellant that it had no children to educate and that its existence or non-existence was a matter of indifference to the school board, who could not suffer thereby, sounded like an echo of that fierce argument, and vehement expostulation, heard half a century ago upon the wickedness of taking the money of the rich childless man to educate the pauper's child.

When due heed is paid to the history of the relations between the school board and the municipal corporation, and the settled policy of Ontario, in relation to the system of taxation to execute it, we are not so ready to assume that exemption from municipal assessment or taxation as a matter of course must involve all assessment and taxation carried into execution by municipal councils and their officers.

In order to make the matter clear the "Public Schools Act" was amended by chapter 60, section 4, of the Ontario statutes, in 1892, which expressly declared as follows:—

> No municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

And when the "Assessment Act" was consolidated in 1894, it was declared by section 22 defining the duties of the assessor that he should set out in separate columns of his roll, each parcel of land assessed, the actual value of the parcel exclusive of the buildings, the total of the actual value of the parcel of

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real property, the total amount of taxable real property and

the total value of the parcel if liable for school rates only.

This continues substantially the same in the Act under which the roll in question was made up. It is clearly implied that there is to be no diminution of the assessment so far as the basis for school rates, though there might be a "taxable value" as basis for other rates.

It was the next session after this consolidation that the curious Act now relied upon was passed and the attempt made thereby to ratify and confirm a by-law which respondent's council had passed in the previous month of September, 1904, without any authority.

The by-law itself which this enactment is alleged to have validated, by the last clause thereof, says:—

> And be it further enacted that this by-law and the provisions thereof shall come into full force and effect immediately after the municipality shall be authorized by sufficient legislative or other authority to pass the same.

If, as we are strongly urged to do in other matters herein, we are to apply the strict reading of the Act relative thereto, then as the legislature never "authorized" such a by-law to be passed, it never has been brought into force.

I place no stress upon this beyond shewing that we must apply common knowledge and common sense or we should never make much out of some Acts of the legislature by an absolute adherence to the letter thereof.

But it is to be observed relative to this by-law and statute, as to all statutory enactments conferring privileges, that the enactment establishing such must be

clear and express, and it is somewhat difficult in light of the foregoing considerations to find that this by-law and statute are so.

The language can be given a reasonable meaning without going so far as to read therein a privilege quite repugnant to the sense of right of that portion of mankind in Ontario as evinced by its legal history and the persistent Acts of its legislature.

For these reasons alone I should hold that the municipal assessments and taxes had in view were those strictly such in the sense of the term ordinary men understand to be such, and not such as would extend it to such as concerned the school boards acting by and through the municipal machinery, even though in a wider sense a school board might be spoken of as a municipal corporation.

It must never be forgotten that the council representing and acting for the corporation, and the school board though acting for and on behalf of those within the same territorial area, had for their respective constituents a different set of electors, and entirely different purposes and powers to execute.

All the ratepayers elected the school board, but only a limited number thereof elected the councils, and a still more restricted class had a voice in determining the concession of special privileges to any one.

The substantial difference of qualification between the two former classes, may not be great, but it illustrates the contention that the constituent bodies are not the same. And whilst the municipal corporation consists of all the inhabitants, the school board is constituted a corporation by itself.

Then if there be any doubt of the correctness of my view when I hold that upon all the foregoing

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grounds the appellant must fail, we find the legislature has in very expressive terms put an end to the contention set up, by the following enactment in the "Public Schools Act" of 1909:—

> 39. No by-law of a municipal council passed after the 14th day of April, 1892, or hereafter passed, for exempting any part of the ratable property in the municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind.

This enactment surely puts an end to all argument of the question. It was enacted after the alleged validation of the by-law in question, and comprehends it as well as others of a like kind.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I think this appeal should be allowed. I think it is unnecessary to do more than to refer to the reasons already given in the other two cases. (See page 179, *ante,* and page 198, *post.*)

ANGLIN J.—(The opinion of Mr. Justice Anglin is reported at page 187, *ante.*)

BRODEUR J.—(The opinion of Mr. Justice Brodeur is reported at page 189, *ante.*)

Appeal dismissed with costs.

Solicitors for the appellants: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Ingersol & Kingstone.*

THE ONTARIO POWER CO. v. TOWNSHIP OF STAMFORD(1).

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

(1) 30 Ont. L.R. 391.

IDINGTON J.—This appeal was argued at the same time as the appeals of the Canadian Niagara Power Co. and of the Electrical Development Co. against same respondent, and the appellant seeks similar relief to that claimed therein relative to exemption from assessment for school rates.

The council of respondent, acting without authority passed a by-law fixing "the annual assessment" (whatever that may mean) of appellant's property. The same curious form is adopted as in the case of the by-law relative to the Electrical Development Company. Both were passed on the same day.

The Act of the legislature validating same was more direct in its language than in the by-law and Act involved in the latter case, and not so absurdly retrospective in its form.

I need not repeat what I have said in regard to the appeals in each of the other cases.

Much that I said in my opinions in same applies herein. Indeed, all that I have said in regard to the claim of the Electrical Development Company, except the statement of one of the arguments by counsel for the appellant, is applicable to this appeal. Counsel for this appellant did not use same argument, yet what I was led, as result thereof, to say may be well applied here.

And I think that the following section, 39, of the "Public School Act" of 1909,

> 39. No by-law of a municipal council passed after the 14th day of April, 1892, or hereafter passed, for exempting any part of the ratable property in the municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind,

is destructive of the possibility of any such claim as made herein. This enactment is but a reiteration of

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what had previously been enacted but operates from this later date and impliedly repeals if there was anything in regard to school rates in the legislation relied upon to repeal.

It would seem as if there was one small corner of the legislative domain in which the privilege hunter has, in Ontario, no ground for hope. The legislature seems to have been persistent and emphatic.

The cases I cited in the case of the Canadian Niagara Power Co. seem to answer the appellant's pretensions.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—Before the construction of the appellant's works and pursuant to an agreement between the appellants and the respondent municipality, the municipality passed a by-law on the 10th October, 1904, in the following terms:—

By-law No. 11.—A by-law relating to the assessment and taxation of the property of the Ontario Power Company:—

Whereas the undertaking and the works of the Ontario Power Company are calculated to contribute materially to the prosperity and well-being of the ratepayers of the municipality of the Township of Stamford, and it is expedient to grant the request of the said company to the council and fix the assessment of the property within the municipality as hereinafter set forth and the apportionment thereof as hereinafter set forth.

Be it therefore enacted by the municipal council of the Township of Stamford for itself, its successors and assigns, and it is hereby enacted that the annual assessment of all the real estate, property, franchise and effects of the Ontario Power Company, situate from time to time within the Municipality of the Township of Stamford, and used for the corporate purpose of the company, be and the same is hereby fixed at the sum of $100,000, apportioned as follows, namely: $30,000 upon the gates, houses, penstocks, inlets, inlet bridges and other principal works of the company, situate in the Queen Victoria Niagara Falls Park, and $70,000 upon the other property of the said company, situate in the said park or elsewhere in the said municipality, for each and every year of the years 1904 to

1924, both years inclusive, and that the said company and its property in the municipality shall not be liable for any assessment or taxation of any nature or kind whatsoever beyonds the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of $100,000, apportioned as aforesaid.

And be it further enacted that if the said company shall refuse to pay taxes on the above assessment in any of the years the corporation or any lawful authority on its behalf may, if the same are not paid within the time limited for the return of the collector's roll, thereafter assess and collect taxes upon the said company and its property as if this by-law had not been passed.

And be it further enacted that this by-law and the provisions thereof shall come into full force and effect immediately after the municipality shall be authorized by sufficient legislative or other authority to pass the same.

Read a third time and passed the 10th day of October, 1904.

This by-law was confirmed by a special Act of the legislature, chapter 78 of the statutes of 1905, in the following terms:—

Whereas the Ontario Power Company, of Niagara Falls, has, by petition, represented that a certain by-law of the Corporation of the Township of Stamford, in the County of Welland, being By-law No. 11, and passed by the municipal council of the said township on the 10th day of October, 1904, should be confirmed and made in all respects legal and binding in accordance with the intent and meaning thereof; and whereas it is expedient to grant the prayer of the said petition;

Therefore His Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows:—

1. By-law No. 11, of the Municipal Corporation of the Township of Stamford set forth as Schedule "A" to this Act, is legalized, confirmed and declared to be legal, valid and binding, notwithstanding anything in any Act contained to the contrary.

From the year 1905 to 1912 the provisions of the by-law were observed, but in the year 1913 the municipality proceeded to assess the property at the sum of $650,000, setting up for the first time the contention that the by-law must be read as limiting the "annual assessment" provided for, to assessment for purposes other than the purpose of determining the amount of

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school rates. The Court of Appeal for Ontario has sustained the respondent's contention. The first question to decide is: What, apart from section 77 of chapter 39, 1 Edw. VII., is the meaning of the "annual assessment" of the property of the company referred to in this by-law? The statutory provisions in force in 1904 relating to the assessment and taxation of lands within the limits of municipalities are mainly to be found in the "Assessment Act," ch. 224, of the Revised Statutes of Ontario, 1897. Section 6 of that Act provided:—

> 6. All municipal, local or direct taxes or rates, shall, where no other express provision has been made in this respect, be levied equally upon the whole ratable property, real and personal, of the municipality or other locality, according to the assessed value of such property, and not upon any one or more kinds of property in any particular or in different proportions.

The "assessed value" of property was determined by an annual valuation made by an officer denominated the assessor recorded in a document known as the assessment roll which was subject to revision as provided for by the Act. The process of determining the valuation as well as the value so arrived at are described by the term "assessment." The "Municipal Act," sec. 402, requires that the council of every municipal corporation shall in each year levy, on the whole ratable property within its jurisdiction a sufficient sum of money to pay all its valid debts. By section 403 the rates are to be calculated at

> so much in the dollar upon the actual value of all the real and personal property liable to assessment therein.

By section 71 of the "Public Schools Act," already referred to, the council of every municipality was required to levy and collect on the *"taxable property"*

in the manner provided by the "Public Schools Act" and in the "Municipal and Assessments Acts," such sums as might be required by the trustees for school purposes; and by section 129 of chapter 224 of the "Assessment Act," R.S.O., 1897, it was provided as follows:—

129. The clerk of every local municipality shall make a collector's roll or rolls as may be necessary, containing columns for all information, required by this Act to be entered by the collector therein; and in such roll or rolls he shall set down the name in full of every person assessed, and the assessed value of his real and personal property and taxable income, as ascertained after the final revision of the assessment roll, and he shall calculate, and opposite the assessed value, he shall set down in one column, to be headed "County Rates," the amount for which the person is chargeable for any sums ordered to be levied by the council of the county for county purposes, and in another column to be headed "Township Rate," "Village Rate," "Town Rate," or "City Rate," as the case may be, the amount with which the person is chargeable in respect of sums ordered to be levied by the council of the local municipality for the purposes thereof, or for the commutation of statute labour, and in other columns any special rate for collecting the interest upon debentures issued, or any local rate or school rate or other special rate, the proceeds of which are required by law, or by the by-law imposing it, to be kept distinct and accounted for separately; and every such last mentioned rate shall be calculated separately, and the column therefor shall be headed "Special Rate," "Local Rate," Public School Rate," "Separate School Rate," or "Special Rate for School Debts," as the case may be.

This roll when completed is delivered to the "collector," whose duty it is to collect the amounts chargeable according to the roll.

Now I think it is reasonably clear that the "annual assessment" in respect of which this by-law makes provision, means the assessed value of the property "ascertained" in the manner mentioned in section 129 of the "Assessment Act," that is to say, the sums provided for in the by-law are the sums to be entered in the assessment rolls by the assessor as the "assessed value" of the property mentioned and in each case this

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"assessed value" is to be that to which the clerk of the municipality is to have regard for the performance of his duties under section 129. It is upon that value that the amounts payable in respect of the rates of every description referred to in that section are to be calculated. Reading this by-law, therefore, as intended to govern the municipality and the officers of the municipality in the working of this machinery for assessment and taxation which is set up by the "Assessment Act," the "Municipal Act" and the "Public Schools Act," it seems clearly enough on its face to provide that the sums which are thereby fixed as the "annual assessment" of the property referred to are to be in each case the "assessed value" of such property for the purpose of calculating among others the public school rate, or the separate school rate, as the case may be.

The amount payable in respect of any particular property depends upon the assessed value of the property. The "assessed value" of the property is the actual value unless it is otherwise provided by law. This by-law is an effort to provide otherwise. And the validating enactment quoted above seems to make this attempt effective. The enactment seems to provide that the by-law according to its true construction is to be legally valid notwithstanding anything in any Act to the contrary. It seems very clearly to be a case of a special Act making special provision for a particular case. And the general rule whereby the provisions of such a statute are not to be derogated from by the provisions of any general Act is emphasized as applicable to this statute.

Now the point on which the court below has proceeded is this: The "Public Schools Act" above re-

ferred to contains a provision, section 77, in the following words:—

77. No by-law passed by any municipality after the 14th day of April, 1892, for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever.

The contention is that this enactment applies to the by-law in question. I cannot concur in this view. On the face of it it is a general provision applying to by-laws passed in exercise of general powers by any municipality. It has no necessary application to this special by-law dealing with a particular case validated by a special statute. It was suggested during the course of the argument that it ought to be treated as laying down a binding rule of construction. To that it seems to me that there is this unanswerable objection. The terms of the special statute of 1905 exclude the operation of any such general rule of construction.

ANGLIN J.—(The opinion of Mr. Justice Anglin is reported at page 187, *ante*.)

BRODEUR J.—(The opinion of Mr. Justice Brodeur is reported at page 189, *ante*.)

Appeal dismissed with costs.

Solicitors for the appellants: *Blake, Lash, Anglin & Cassels.*

Solicitors for the respondent: *Ingersoll & Kingstone.*

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*June 4.
*June 19.

JOHN A. PEARSON (PLAINTIFF).....APPELLANT;

AND

JOHN H. ADAMS (DEFENDANT).....RESPONDENT.

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

Sale of land—Stipulation as to user—Covenant or condition—Detached dwelling house—Apartment house.

In a deed of sale of land it was stipulated that it was "to be used only as a site for a detached brick or stone dwelling house, to cost at least two thousand dollars, etc."

Held, that this stipulation constituted a covenant.

Held, also, reversing the judgment of the Appellate Division (28 Ont. L.R. 154), and restoring that of the Divisional Court (27 Ont. L.R. 87), Fitzpatrick C.J. and Duff J. dissenting, that an apartment house intended for occupation by several families was not a "detached dwelling house" within its meaning.

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

The action was brought for an injunction to restrain the respondent from erecting an apartment house on lot 32 on the east side of Maynard Avenue in the City of Toronto, and which adjoins the lands upon which the appellant has erected a valuable private residence.

The lands now owned by the appellant and re-

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

(1) 28 Ont. L.R. 154.

(2) 27 Ont. L.R. 87.

spondent respectively were formerly owned by the Reverend George Maynard.

The executors of the reverend George Maynard conveyed lot 32 above mentioned to one John Williamson by deed dated the 18th April, 1888, the material portion of which is as follows: "All and singular that certain parcel or tract of land and premises (describing them) to be used only as a site for a detached brick or stone dwelling house to cost at least two thousand dollars to be of fair architectural appearance and to be built at the same distance from the street line as the houses on the adjoining lots."

The respondent's title is derived through this conveyance to Williamson.

When the appellant purchased the land now owned by him it was one of the few remaining vacant lots on Maynard Avenue, and he did so with the knowledge that there were restrictions on that street governing the class of buildings to be erected thereon and also knowing from his personal inspection that the houses on the street were all private dwellings and worth from $7,000 to $10,000. The appellant erected a first-class private dwelling house costing approximately $14,000, over and above the value of the land, which he would not have done had he not believed that there were building restrictions sufficient to prevent the erection of such a building as is proposed by the respondent.

The respondent proposes to construct what is called an apartment house upon lot 32, and the plans and specifications which he had prepared shew that it is intended to include the construction of six separate and distinct suites or sets of rooms, each cut off

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from the others by its own front door and composed of a living room, four bed rooms, a bath room, a dining room and a kitchen.

The appellant believing that his property would be very greatly depreciated and damaged if the respondent were permitted to construct the proposed building, commenced this action.

By assignment dated the 9th April, 1912, Adelaide M. Maynard, one of the executors of the reverend George Maynard and one of the grantors in the deed to Williamson from which the respondent derives his title, assigned to the appellant all her rights as grantor in the said conveyance to enforce the conditions imposed thereby and authorized the appellant to take such legal proceedings as he might deem necessary to prevent the respondent from violating the said condition by the erection of an apartment house on the said lands.

After the commencement of the action the appellant moved for an interlocutory injunction. The motion was by consent turned into a motion for judgment and on the 3rd May, 1912, judgment was pronounced by Mr. Justice Middleton dismissing the action with costs.

The learned judge considered that he was bound by the decision in *Re Robertson and Defoe*(1), and dismissed the action. This judgment was reversed by the Divisional Court (composed of Falconbridge C.J. K.B., Britton and Riddell JJ.), Britton J. dissenting.

The judgment of the Divisional Court was reversed by the Appellate Division (R. M. Meredith, Garrow,

(1) 25 Ont. L.R. 286.

Maclaren, Magee and Hodgins JJ.A.), Maclaren and Magee JJ.A., dissenting.

From the judgment of the Court of Appeal for Ontario the appellant appealed to the Supreme Court of Canada.

Glyn Osler and *J. H. Cooke* for the appellant. The conveyance to Williamson contains a restrictive covenant limiting the use of the land by the grantee and his assigns. *Mackay* v. *Dick*(1), at page 263; *Rawson* v. *Inhabitants of School District*(2), *Brookes* v. *Drysdale*(3), at page 60.

The words used are to be interpreted in their ordinary and popular sense. *Rogers* v. *Hosegood*(4), at page 409; *Hext* v. *Gill*(5); *Ex parte Breull*(6).

J. M. Godfrey for the respondent referred to *Kimber* v. *Admans*(7); *Robertson* v. *Defoe*(8); *Neill* v. *Duke of Devonshire*(9), at page 149.

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

IDINGTON J.—The respondent claims that he is entitled within the terms of a grant of certain lands conveyed to be

used only as a site for a detached brick or stone dwelling house to cost at least two thousand dollars, to be of fair architectural appearance and to be built at the same distance from the street line as the houses on the adjoining lots

(1) 6 App. Cas. 251.
(2) 7 Allen (Mass.) 125.
(3) 3 C.P.D. 52.
(4) [1900] 2 Ch. 388.
(5) 7 Ch. App. 699.
(6) 16 Ch. D. 484.
(7) [1900] 1 Ch. 412.
(8) 25 Ont. L.R. 286.
(9) 8 App. Cas. 135.

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Idington J.

to erect on said site half a dozen dwelling houses so attached together and covered in that they may wear the external appearance of one house.

If this is to be construed as a covenant I conceive and respectfully submit that respondent is simply attempting by a juggling use of the word "apartment" to seem to keep the promise to the ear yet break it to the hope.

It is part of the office of the law to defeat such like attempts and see that what was within the reasonable contemplation of the parties to a contract as expressed in their use of the words thereof, is so adhered to that neither the purpose nor the language is frittered away by over refinement.

It is the use of the site and not the use or abuse of the detached dwelling when built that is in question. The illustrations pressed in argument of what might be done in way of overcrowding even a detached dwelling, against which this stipulation is not aimed, are therefore of no avail.

But I must not by multiplying words darken the meaning of what is so plainly expressed in the deed.

In arguing that this term is so expressed in the deed as to constitute a condition instead of a covenant, it may possibly be that a fairly arguable proposition is put forward.

It certainly, in view of the later covenant contained in the same deed, specially directed to the restrictive use of the premises and wherein this stipulation is not included, does suggest a doubt.

But there is nothing in the later covenant inconsistent with this stipulation. And when it is pressed on argument that there is no right of re-entry reserved for a breach of the condition, one is tempted to say

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that if it had been intended merely as a condition, such a right of re-entry would likely have been found in the deed.

It is necessary if possible to give due effect to the purpose of the parties and as this can only be given some effect by holding it to be a covenant, I think it must be held to be a covenant.

No particular form of words beyond such as shew the parties' concurrence in agreeing to abide by some specific course of conduct in future, are needed to constitute a covenant. Indeed, as has been said by high authority, the same words in some cases may constitute both a condition and a covenant.

We must look at the whole instrument and doing so here I have no doubt the grantor and grantee intended the latter should be bound to use the land in the manner stipulated, and for this purpose I presume the grantee executed the deed.

I think the appeal should be allowed with costs throughout.

DUFF J. (dissenting).—The covenant in this case, in my judgment, has no application to the building in question. The building is, undoubtedly, a house. It is a dwelling house because it is constructed solely for housing people as dwellers. The contention that because the house contains a certain number of apartments in which separate families might conveniently live, it is therefore not a "detached" dwelling house is a contention which if not wholly irrelevant must involve the proposition that the building is not a dwelling house but an assemblage of dwelling houses. I think it is rather extravagant to affirm that a given house is not a "detached" house solely be-

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cause it contains a number of apartments capable of separate occupation.

I think the considerations which ought to govern the determination of the case are set forth very satisfactorily in the judgment of Mr. Justice Meredith in the court below.

ANGLIN J.—It is common ground that the terms of the "covenant" in question should be given the meaning ordinarily attached to them when used in common parlance. *Rogers* v. *Hosegood*(1); *Hext* v. *Gill*(2), at page 719. It is urged by the appellant that the construction put by the respondent upon these terms is technical and refined; the respondent makes a similar complaint of the construction insisted upon by the appellant.

It would be a most extraordinary description of a modern apartment house, such as the defendant proposes to erect, to call it "a detached dwelling house" —a description that nobody would ever dream of using colloquially. No purchaser of a property, which he had not seen but had bought relying on the vendor's description of it as "a detached dwelling house," would expect to have foisted upon him or be compelled to take, as answering that description, an apartment house such as the defendant's plans provide for. If further evidence were required of the purview of the restriction intended to be imposed upon the user of the property in question as a building site, it is furnished by the fact that, his purpose being to ensure that Maynard Avenue should maintain its character as a first-class residential street, the vendor stipulated

(1) [1900] 2 Ch. 388, at p. 409. (2) 7 Ch. App. 699.

that on the site now owned by the respondent there should be erected nothing other than a dwelling house of brick or stone costing at least $2,000. What sort of modern apartment house built of brick or stone could be constructed for $2,000 ? The amount of this minimum price seems to shew conclusively that the purpose was that nothing other than a single dwelling house in the ordinary acceptation of that term should be erected on the land.

I am, with respect, of the opinion that the decision in *Robertson* v. *Defoe*(1), relied on by the respondent cannot be sustained. Each apartment in the modern residential apartment building is a residence. I cannot understand how such a building can be deemed in compliance with a covenant that "every residence erected on the land shall be a detached house." "House" was the word considered in *Kimber* v. *Admans*(2). "Dwelling-house" was the term dealt with in *Rogers* v. *Hosegood*(3). See, too, *Ilford Park Estates* v. *Jacobs*(4). As I read *Rogers* v. *Hosegood* (3) it supports the view which I take of the proper construction of the stipulation with which we have to deal, although it is not on all fours with the present case because of the provision there found that each messuage to be erected should be "adapted for and used as and for a private residence only."

I have no doubt as to the right of the plaintiff to maintain this action. It is shewn that part of the consideration for his purchasing his adjacent property was the existence of the building restriction in question as affecting all the lots on Maynard Avenue. He

(1) 25 Ont. L.R. 286.
(2) [1900] 1 Ch. 412.
(3) [1900] 2 Ch. 388.
(4) [1903] 2 Ch. 522.

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bought the benefit *inter alia* of the covenant of the respondent's predecessor in title. Moreover, he has an express assignment of that covenant from one of the covenantees. See *Rogers* v. *Hosegood*(1), at pages 394, 407-8; *Formby* v. *Barker*(2), at page 551; *Child* v. *Douglas*(3).

For the reasons stated by Mr. Justice Riddell in the Divisional Court I agree with his conclusion that the provision in question should be deemed a covenant and not a condition. The fact that, no right of re-entry for breach being reserved, the stipulation, treated as a condition, would be ineffectual, affords another reason for treating it as a covenant; *ut res magis valeat.* To the authorities cited by Riddell J., I would merely add a reference to *Hodson* v. *Coppard*(4), and *Stevinson's Case*(5).

I would, for the foregoing reasons, with respect, allow this appeal with costs in this court and the Court of Appeal and would restore the judgment of the Divisional Court.

BRODEUR J.—The appellant is the owner of a lot on Maynard Street in the City of Toronto and the respondent is the owner of an adjoining lot on the same street. These lots were sold with the covenant that each of them "would be used only as a site for a detached brick or stone dwelling house to cost at least $2,000, to be of fair architectural appearance and to be built at the same distance from the street as the houses on the adjoining lots."

(1) [1900] 2 Ch. 388.
(2) [1903] 2 Ch. 539.
(3) Kay 560, at p. 571.
(4) 29 Beav. 4.
(5) I Leon. (Pt. I) 324.

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The respondent proposes to erect an apartment house and the appellant, as transferee of the rights of the original vendor, claims an injunction to restrain the respondent from building that apartment house. He claims that the apartment proposed to be erected is not a detached house and is, in that respect, an infringement of the covenant above referred to.

The respondent submits, on the other side, that the proposed building is a detached dwelling house and is in no way infringing the said covenant.

When the contract was made, in 1888, apartment houses were not being built in the City of Toronto. There were flats and tenements which were used or leased by a certain class of the population.

There was also the detached house which was used for the residence of one family. Those detached houses were necessarily more expensive than the others and were supposed to be used by a wealthier class of the community.

There is no doubt that Mr. Maynard, when he opened the street in question and sold those lots, had in view the establishment of a nice residential quarter and those covenants were stipulated evidently for that purpose. He did not want to have any flats nor any tenements erected on those lots which would be occupied by two or three lessees.

The only difference I see between the apartment house which the respondent proposes to build and those flats is that in the case of an apartment house there is a common entrance from the street and in the other there are two or three entrances, or as many as there are lessees in that house.

I consider that apartment houses were not within

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the covenant and that its construction is an infringement of that covenant. *Rogers* v. *Hosegood*(1).

The apartment proposed to be built might be a house and a detached house; but being a series of separate dwellings, it is not the *detached dwelling house* which the parties had in view, viz., a house for the residence of one family. The apartment is more connected with the idea of flats than with the idea of a detached dwelling house.

I consider that the words in the covenant should be given their ordinary popular meaning. *Rogers* v. *Hosegood,* at page 409; *Ex parte Breull; In re Bowie* (2).

For these reasons I think that the injunction prayed for should be granted.

Appeal allowed with costs.

Solicitor for the appellant: *J. H. Cooke.*

Solicitors for the respondent: *Robinette, Godfrey & Phelan.*

(1) [1900] 2 Ch. 388.

(2) 16 Ch. D. 484.

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*June 8.
*June 19.

ALEXANDER DOBBS CARTWRIGHT AND RICHARD CONWAY CARTWRIGHT, EXECUTORS OF THE LAST WILL AND TESTAMENT AND CODICIL OF THE RIGHT HONOURABLE SIR RICHARD JOHN CARTWRIGHT, G.C.M.G., DECEASED (PLAINTIFFS) ..... APPELLANTS;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) RESPONDENT.

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

Assessment and taxes—Sale of land for arrears—Purchase by municipality—Failure to give notice—Curative Act—Evidence—Discovery—Death of deponent—Use of deposition at trial.

By sec. 184(3) of the "Ontario Assessment Act" (R.S.O. [1897] ch. 224, where the sale of land for unpaid taxes is adjourned for want of a bid for the full amount of the arrears the municipality may purchase the land at such adjourned sale if its council, before the day thereof, has given notice of its intention to do so.

Held, affirming the judgment of the Appellate Division (29 Ont. L.R. 73) that failure to give such notice is cured by the provisions of 3 Edw. VII. ch. 86, sec. 8, and its amendment, 6 Edw. VII. ch. 99, sec. 8. *City of Toronto* v. *Russell* ([1908] A.C. 493) followed.

On the expiration of the time for redemption after sale all rights of the former owner are barred.

The depositions of a party to an action taken on discovery cannot, when the deponent has died in the interval be used against the opposite party unless the latter has first used it for his own purposes.

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

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CARTWRIGHT v. CITY OF TORONTO.

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

The original plaintiff, Sir Richard Cartwright, brought action to have a sale of his land for unpaid taxes set aside as irregular for want of notice by the defendant's council of the city's intention to purchase and for other irregularities, or, if the sale was held valid, for a declaration that the defendant only held the land in trust for the plaintiff as security for the unpaid taxes. The defendant examined the plaintiff on discovery and at the trial, the plaintiff being dead and the action having been revived by his executors, the latter sought to use the deposition on the examination on discovery, but the trial judge refused to receive it.

Judgment was given for the defendant at the trial and affirmed by an appeal to the Appellate Division, which also held that the deposition was properly rejected.

George Bell K.C. for the appellants.

Geary K.C., and *Colquhoun* for the respondent.

DAVIES J.—I concur in the proposed judgment to dismiss this appeal. I think we are bound by the decision of the Judicial Committee of the Privy Council in the case of *City of Toronto* v. *Russell*(2), and that, in the face of that decision, it is not open to us to limit the curative effect of the remedial statute of 3 Edw. VII. ch. 86, sec. 8, amended by 6 Edw. VII. ch. 99, sec. 8.

(1) 29 Ont. L.R. 73. (2) [1908] A.C. 493.

On the question raised as to the admissibility in evidence of Sir Richard Cartwright's depositions on discovery, we were all of the opinion on the argument that those depositions were properly excluded by the trial judge.

IDINGTON J.—It may have been fairly arguable before the decision in the case of *City of Toronto* v. *Russell*(1), that the omission to give the notice required by the "Assessment Act," R.S.O. 1897, ch. 224, sec. 184(3), to be given by the municipality of its intention to purchase the land in question for the taxes in arrear did not fall within any of the many curative provisions of the validating Act, 3 Edw. VII. ch. 86, in question herein.

It might well have been argued with much force that the words

a failure or omission on the part of an official of the said city

was meant only to cover failure to give some routine notice or omission of such like duty prescribed by the statute to be observed by any of the city's officials and could not be extended so far as to cover an unusual step such as required in consequence of a determination which the council was enabled to take in the way of buying land offered for sale for taxes, but subject to the condition precedent to the power becoming operative of giving the special notice which the Act imposes.

The Judicial Committee of the Privy Council has, however, in said decision, put a construction upon that Act which, notwithstanding other facts and circumstances also relied upon in the decision, seems to me

(1) [1908] A.C. 493.

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Idington J.

to preclude our giving effect to any such argument as suggested.

Their Lordships seem to have rested the judgment not only upon the peculiar facts and circumstances absent in this case, but also upon their construction of the statute.

And a later amendment to same curative provision seems to render any attempt to distinguish this case still more difficult.

The judgments in the courts below render it quite needless to say any more.

The point I have referred to is the only one which was not disposed of on the argument before us.

The appeal must be dismissed with costs.

DUFF J.—The appellant seeks to shew that the late Sir Richard Cartwright entered into an agreement with Mr. Biggar, then City Solicitor of Toronto, and for the purpose of proving this he offers in evidence certain statements in the examination of Sir Richard Cartwright for discovery. The principle upon which he relies is this: Where a witness has given evidence in the course of litigation, such evidence may be used in other litigation relating to the same subject matter between same parties if the witness have, in the meantime, died, provided the party against whom it is offered has had an opportunity of cross-examining the witness.

I think the rule has no application. The examination for discovery is in the nature of a cross-examination; but the rule relating to the admission of evidence given on such examination entitles the cross-examiner to proceed with the absolute assurance that no part of

the examination can be used against him, unless he on his part seeks to make use of it for his own purposes.

It is not a cross-examination with a view of testing and setting in a proper light the whole of the evidence of the party examined. It is an examination *alio intuitû*. I think it is not a cross-examination such as contemplated by the rule sought to be invoked.

On the merits of the case I think all the contentions advanced on behalf of the appellant are disposed of by the decision of the Privy Council in *City of Toronto* v. *Russell*(1). I see no reason to doubt that the passages of the judgment at page 501 form a part of the *ratio decidendi*. The effect of these passages, in my judgment, is to explode the notion which appears to have been founded on some decisions of this court, that statutes of this character are subject to some special canon of construction based, apparently, upon the presumption that all such statutes are *primâ facie* monstrous. The effect of the judgment of the Judicial Committee is that particular provisions in such statutes must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole.

ANGLIN J.—On the questions raised as to the admissibility in evidence on behalf of the executors (now plaintiffs) of the depositions on discovery of the original plaintiff, the late Sir Richard Cartwright, and as to the obligation of the municipality to account to their former owners for any surplus proceeds realized on the re-sale of lands bought by it at tax

(1) [1908] A.C. 493.

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Anglin J.

sales, it was made sufficiently clear during the argument that the court is of opinion that the position taken on behalf of the appellants is not tenable.

The purposes for, and the conditions under which, evidence is taken on discovery make it impossible that such evidence should be admissible on behalf of the party giving it except as provided by Consolidated Rule 461. Such evidence is not within the proposition enunciated in Taylor on Evidence (9 ed.), para. 464, relied on by counsel for the appellants. It is also clearly distinguishable from evidence taken *de bene esse*.

The statute under which the municipality is authorized to buy in at tax sales (R.S.O. [1897] ch. 224, sec. 184(3)), empowers it to become a purchaser without any restriction upon its rights of ownership, except the obligation to sell within three (now seven) years. The effect of the purchase is to extinguish the personal obligation of the former owner for the arrears of taxes. If the municipality sells for less than the amount of taxes, it has no right to recover the deficiency; if it sells for more, the surplus belongs to it and it is under no obligation to account for it.

The only objection taken to the proceedings by which the municipality became purchaser that calls for consideration is the failure of the municipality or its officers to give to the owner the personal notice of the intention of the municipal council to purchase at the tax sale, which the Judicial Committee, concurring in the views expressed in the Ontario courts, held, in the *Russell Case*(1), at page 501, is required by sub-section 3 of section 184 of the "Assessment Act," ch. 224,

(1) [1908] A.C. 493.

R.S.O. 1897. In that case the same sale for taxes which is here attacked was dealt with, but in respect of another property. It is true that upon the special facts of that case their Lordships were of the opinion that the plaintiff had waived the notice of intention to buy, but they rest their judgment disposing adversely of his objection that such notice had not been given to him equally on the provisions of the curative Act, 3 Edw. VII. ch. 86, on which the respondent relies. Their Lordships' view of the effect of the statute, which they assign as a ground of their decision, cannot be treated as *obiter dictum*. *New South Wales Taxation Commissioners* v. *Palmer*(1), at page 184; *Membery* v. *Great Western Railway Co.*(2), at page 187. I agree with the learned judges of the Appellate Division of the Supreme Court of Ontario that the decision in the *Russell Case*(3) is conclusive on this point against the appellants. The statute, 3 Edw. VII. ch. 86, sec. 8, was so amended by 6 Edw. VII. ch. 99, sec. 8, that it extends to failure or omission by the city itself or the council to comply with the requirements of the assessment Acts, as well as failure or omission to do so by any official of the city. As amended, this legislation, given the effect required by the decision in the *Russell Case*(1), clearly covers the failure to give notice of which the appellants seek to take advantage, whether the default is ascribable to the municipality, its council or its officials.

BRODEUR J.—This is an action to impeach a tax sale made by the City of Toronto on the 10th of April,

(1) [1907] A.C. 179. (2) 14 App. Cas. 179.
(3) [1908] A.C. 493.

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Brodeur J.

1901, and for a declaration that the respondent, the City of Toronto, was holding the lands sold in trust for the owner.

The action was instituted in 1909 and was dismissed by the Supreme Court of Ontario in 1913. That judgment was confirmed by the Appellate Division of the Supreme Court.

Three questions have been submitted to us.

The first question is this: Can the evidence on discovery given by one of the parties be used in this case when the party dies ?

As a general rule a witness giving oral testimony under oath in a judicial proceeding in which the adverse litigant could cross-examine his evidence may be used in any subsequent suit between the same parties if the witness himself is incapable of being called. (Taylor on Evidence (9 ed.), para. 464.)

By the rules of court in the Province of Ontario a party to an action may be examined on discovery, but his evidence can be used only at the request of the opposite party. (Rules 431-460 and 461.)

Those rules are statutory and must be restricted to the provisions of the statute. The opposite party, according to those rules, is the only one who can use that evidence on discovery and at the request of the representative of the party put in evidence the examination on discovery given by that party cannot be received.

The second question is as to the effect of the remedial statute, passed by 3 Edw. VII. ch. 86, sec. 8, which validated the tax sales made during certain periods of time mentioned in the said Act and which periods of time included the tax sale in question in this sale.

The bearing of that statute was considered in the case of *City of Toronto* v. *Russell*(1), and it was decided by the Privy Council that those tax sales were validated and could not be impeached for the reason which is now contended by the appellant.

Besides, by a statute passed in 1906, 6 Edw. VII. ch. 99, sec. 8, the above legislation of 3 Edw. VII. ch. 86, was extended in order to make still more certain the validity of those tax sales.

As to the claim of the appellants that those tax sales are subject to redemption or that the city becomes purchaser in trust for the former owner, I do not see that the statute may be construed to cover such a contention.

The City of Toronto had been authorized to purchase the lands at those tax sales. A right of redemption exists for a certain period of time, but after that period of time the city becomes the absolute owner of the property and does not hold it subject to any trust.

The appeal should be dismissed with costs.

Solicitor for the appellants: *George Bell.*

Solicitor for the respondent: *William Johnston.*

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(1) [1908] A.C. 493.

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*June 10.
*June 19.

MARY LONG (PLAINTIFF) ..... APPELLANT;

AND

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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

Negligence — Electric railway — Duty of motorman — Contributory negligence—Reasonable care.

L. started to cross a street traversed by an electric railway and proceeded in a north-westerly direction with his head down and apparently unconscious of his surroundings. A car was coming from the east and the motorman saw him when he left the curb at a distance of about fifty yards. Twenty yards further on he threw off the power and when L., still abstracted, crossed the devil strip and stepped on the track reversed being then about ten feet from him. The fender struck him before he crossed and he received injuries causing his death. On the trial of an action by his widow the jury found that the motorman was negligent in not having his car under proper control, that L. was negligent in not looking out for the car, but that the motorman could, notwithstanding, have avoided the accident by the exercise of reasonable care. A majority of them found, also, that L.'s negligence did not continue up to the moment of impact.

Held, Davies and Anglin JJ. dissenting, that the jury were entitled to find as they did; that when the motorman first saw L. he should have realized that he might attempt to cross the track and it was his duty, then, to have the car under control; and that his failure to do so was the direct and proximate cause of the accident for which the railway company was liable.

Held, per Davies J.—The motorman was not guilty of negligence prior to the negligence of L. which consisted in stepping on the track when the car was near and it was then too late to prevent the accident.

Held, per Anglin J.—The findings of the jury, especially the finding that L.'s "negligence was not a continuing act up to the moment

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

of the accident," were not satisfactory and there should be a new trial.

(Leave to appeal to the Privy Council was refused, 4th Aug., 1914.)

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario setting aside the verdict for the plaintiff at the trial and dismissing his action.

The facts of the case are stated in the above headnote.

Raney K.C., for the appellant. The jury could and did find that though the plaintiff was negligent the motorman could, by exercising reasonable care, have prevented the accident. This being so the plaintiff is entitled to the verdict. Pollock on Torts (9 ed.), pages 471 *et seq.* *Radley* v. *London & North Western Railway Co.*(1), at page 759; *The Bernina*(2).

Dewart K.C. for the respondents. On the evidence given the case should not have gone to the jury. See *Davey* v. *London & South Western Railway Co.*(3); *Dublin, Wicklow & Wexford Railway Co.* v. *Slattery* (4); *Grand Trunk Railway Co.* v. *McAlpine*(5).

We also rely on *Jones* v. *Toronto & York Radial Railway Co.*(6); *Brenner* v. *Toronto Railway Co.*(7), at page 556.

THE CHIEF JUSTICE.—In view of the admitted negligence of the deceased, the question to be decided is: Could the motorman have prevented the accident by the exercise of ordinary prudence?

(1) 1 App. Cas. 754.
(2) 13 App. Cas. 1.
(3) 12 Q.B.D. 70.
(4) 3 App. Cas. 1155.
(5) [1913] A.C. 838.
(6) 23 Ont. L.R. 331; 25 Ont. L.R. 158.
(7) 40 Can S.C.R. 540.

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LONG v. TORONTO RWAY. CO.

The Chief Justice.

The jury found in answer to questions 4, 5 and 6 that the plaintiff's husband was negligent in not looking for the car, but that notwithstanding such negligence, the accident might have been prevented if the car had been under proper control and the brakes had been put on. Those answers would have been more helpful if the jury had fixed the period of time at which this precaution with respect to the brakes should have been taken. But to appreciate their full significance, the answers must be considered in the light of the evidence. For instance, the motorman says that he had the deceased in view from the time the latter left the sidewalk up to the very moment of the accident, and that

> *he kept straight on crossing the street with his head down in the direction of the car absolutely absorbed, not thinking of what he was doing,*

and this, notwithstanding the insistent ringing of the gong. The motorman also admits *that he realized almost immediately when he first saw the deceased* that there might be trouble, and notwithstanding, at a distance of thirty yards from the point of the accident, the car was moving at the rate of ten miles an hour. The motorman adds that

> he realized the deceased was not going to stop in his attempt to cross the track when he was only ten feet from him,

and he then reversed his power and applied the brakes. In these circumstances, the unfortunate man is run down and the jury find that the car was not under proper control at the time of the accident and that the brakes should have been applied sooner.

It would be difficult to reach any other conclusion unless the jury were prepared to say that the motor-

man who admits he was fully aware of the possibility of trouble at a time when, by the exercise of reasonable care, he might have avoided the accident, was entitled to run the pedestrian down because the latter was negligently unconscious of the coming of the car.

The general effect of the answers to the first six questions is: Assuming that the negligence of the deceased began apparently when he left the sidewalk and continued until the moment of the accident; the motorman who says he anticipated danger from the moment he first saw the deceased coming towards the tracks was under a duty to be on the alert, and he should, in the circumstances have expected that the deceased would attempt to cross the track — which was indeed the only danger to be anticipated — and have been prepared for that emergency. The jury find that he failed in that duty. His negligence was, therefore, the immediate cause of the accident.

The answer to question seven, which was put by the judge of his own motion, has a tendency to create some confusion. That question and the answer thereto are as follows:—

7. Could the motorman and the deceased each of them up to the moment of the collision have prevented the accident by the use of reasonable care — in other words, was the negligence of deceased a contributing act up to the very moment of the accident?

Answer.—10 say "No," and 2 say "Yes."

In his charge to the jury, the effect of that question is thus explained by the trial judge:—

Now, the seventh question is a very peculiar one. Could the motorman and the deceased each of them up to the moment of the collision have prevented the accident by the use of reasonable care — in other words, was the negligence of the deceased a contributory act up to the very moment of the accident? I do not think I can make it any clearer than I have made it there. Did the unfortunate deceased's act contribute up to the moment of the accident? Well,

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in a sense, it did, physically, because he went right on, but that is not what is meant by this question. The question is: *Did he become aware that the car was approaching and was he able to avoid the danger?* That is the sense in which that question is put. We do not know anything about his condition of mind at all. Apparently there is a question of whether he was under the influence of liquor or not. The policeman says he was a short time before. The man who was with him says he was not. I do not think it makes a great deal of difference in any event, it is just what his state of mind was, which you are the judges of, from the best information that can be placed before you.

Although not completely satisfactory, I am disposed to think that the effect of the answer is that, at the moment of impact, the deceased was unconscious of the near approach of the car, and that the motorman who had the last opportunity to avoid the accident, failed in his duty.

The general effect of the verdict when read with the evidence and the charge of the trial judge is, therefore, that, notwithstanding the negligence of the deceased the motorman might have avoided the accident by the exercise of ordinary prudence and, in that view, the appeal should be allowed with costs here and below. *Tuff* v. *Warman*(1); *Radley* v. *London and Northwestern Railway Co.*(2).

DAVIES J. (dissenting).—I think the judgment of the Court of Appeal was correct and that this appeal should be dismissed.

In my opinion the evidence and the findings of the jury upon it are conclusive that not the negligence of the company, but the reckless negligence of the deceased caused his death.

In answer to the questions put to them the jury found, first, that the death of the plaintiff's husband

(1) 5 C.B.N.S. 573. (2) 1 App. Cas. 754.

was not caused by any negligence on the part of the respondent company *prior to the negligence of the deceased;* secondly, that the negligence of the plaintiff's husband (deceased) which caused or contributed to the accident, was such that without it the accident would not have happened; and thirdly, that such negligence consisted "in not looking for the car."

The last answer necessarily refers to the moment when the deceased stepped on to the car track in front of the car.

These three findings of the jury negativing negligence on the company's part prior to the negligence found on the deceased's part which caused or contributed to his death, seem to me to settle the question that up to the moment when the motorman ought reasonably to have apprehended that the deceased was going to step on to the track in front of the car, there was no negligence on the company's part.

In this connection I may say that it was proved to be the daily practice for people to cross the street from the sidewalks out to the car tracks and there await the passing of the car. The street was double tracked. People were, of course, within their rights in so acting and this practice did not ordinarily call for any special precaution on the part of the motorman of the cars. Special conditions and circumstances no doubt would call for special precautions, such for instance as a man evidently running so as to cross the tracks, or a drunken man incapable of taking full care of himself and looking as if he intended to cross the tracks, or a child apparently so small and young as to be incapable of appreciating danger. In this case it was contended that the deceased was crossing the street slowly with his head bent down and not looking

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for the car, and that this condition threw an additional onus upon the motorman as to the degree of care he was to take, especially as he admitted throwing off the power and so reducing the speed when he saw the deceased approaching the car tracks. But there was nothing to indicate any intention on the part of the man to cross the tracks in front of the car and the throwing off of the power was at the most only a commendable and prudent precaution.

Reliance, however, was placed upon the findings of the jury in answer to questions 5 and 6, that notwithstanding the deceased's negligence in stepping on the track without looking for the car, the defendants could by the exercise of reasonable care have averted the collision

by putting on the brakes and having the car under proper control.

These findings of negligence, properly construed, seem to me without any evidence whatever to support them. They cannot be construed as imputing negligence to the defendants prior to that of the deceased because the jury's answer to question one emphatically negatived any such negligence. They can only mean that after the motorman ought to have apprehended danger from the deceased stepping on the track he should have put on the brakes. But it was not until the man was in the act of stepping from the south track on to the devil strip and the north track, that the motorman should have apprehended any such action, and any attempt to stop or control the car's speed at that moment by putting on the brakes would have been perfectly useless. The motorman's evidence is to the effect that the deceased was about ten feet in front of the car when he first apprehended that de-

ceased intended crossing the track and *that he immediately reversed.* If he was right, or approximately right, in this no doubt can exist that the action he took in reversing was the only possible effective action he could have taken. Putting on the brakes at that moment would have been absolutely useless.

Appellant's counsel contended that at the inquest the motorman had stated that when he reversed the car was a car length or a car length and a half from the deceased and that the jury had a right to believe the statement alleged to have been made at the inquest as to the distance. But Stevens, the motorman, when questioned at the trial respecting this alleged statement read to him from the reporter's notes of the evidence, swore that the report was a mistake and that he never did say that. No attempt was made to contradict him or to prove that he had said so.

No witness suggests even that the deceased was a car length or a car length and a half in front of the car when he stepped on the track. If he had been he would certainly, in view of the speed at which the car was moving at the time, have got safely across. Charles Allen, who saw the accident, says:—

> I seen the gentleman just as he stepped on to the car tracks, just as he seemed to put his foot on to the car track, the north track.

And being asked what then happened, he said:—

> I seen the gentleman seemed to throw out his hands as though he had realized his danger on the instant and the round part of the fender on the north side seemed to catch him.

Beyond the cross-examination of the motorman as to his statement at the inquest, our attention was not called to any evidence of any kind as justifying the contention that the deceased was further away from the car when the motorman reversed than he said he

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was. The width of the car tracks, the speed of the car, and the distance the car ran after the accident, coupled with the evidence I have quoted above, compel the conclusion that the motorman's statement of the distance the deceased was from the car when he first apprehended he was stepping on to the track was approximately correct. I do not see any ground or justification for any inference to the contrary.

I, therefore, conclude that there was no evidence whatever to support the jury's answer to question 6 if the meaning and effect of that answer is that the accident could have been averted after the motorman ought reasonably to have apprehended that the deceased man contemplated stepping on the track in front of the car.

I think the motorman took the only possible effective means of averting the accident by reversing when he did and that to have applied the brakes instead would have been necessarily ineffective and useless.

I confess myself unable to understand the real meaning of the seventh question even when read in light of the charge of the trial judge. It seems to me clear that considering the distance between the deceased and the car at the time he stepped on the track his negligence in so stepping without looking for the car must be held to be contributory negligence and is so found by the jury. Nothing that then or afterwards could be done by the motorman could have averted the accident. The deceased might possibly have stepped back and so averted it, but that the negligence of the deceased in stepping on the track in front of the car without looking, and attempting to cross, as found by the jury, was a continuing contributory act

up to the moment of the accident, I have not heard anything to cause me to doubt.

It is important to observe that there is no finding that the motorman did not sound his gong, as he swears he did, or that he did not reverse as soon as he should have done. The finding that he should have applied the brakes and had the car under better control can only mean, read in the light of their previous findings, that the motorman should have applied the brakes instead of reversing when he did. But there is not a scintilla of evidence to warrant that finding. Indeed, the evidence shews that reversing was then the only possible available means of averting the accident under the circumstances proved.

The contributory negligence of the deceased being a direct and effective cause of the accident is a complete answer to the action, unless there was something done or omitted afterwards by the motorman which he ought not to have done or omitted which could have prevented the accident.

The jury do not say that the motorman did not reverse as soon as he ought reasonably to have apprehended that the deceased intended to step on the track. If, instead of reversing when he did, he had then applied the brakes he might well have been found guilty of negligence.

Then with reference to the throwing off of the power and so reducing the speed of the car at about 35 or 40 yards before reaching the place of the accident which the motorman swears he did as a matter of precaution, the jury do not find that there was any negligence with regard to that.

My own judgment is that the jury intended their answer as to want of reasonable care in not putting on

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the brakes, to apply to a period anterior to the negligence of deceased in stepping on the car track, because it seems absurd to apply it to a time coincident with or subsequent to the deceased's negligence, when it must have been ineffective in preventing the accident. The plan adopted of reversing was much more effective then and was apparently the only possible thing to have done. But if that is what the jury meant, as I think it was, then it is not only in direct conflict with their first finding that the defendant company was not guilty of any negligence prior to the negligence of the deceased, but it could not, in my judgment, have any effect given to it in this action where subsequent contributory negligence constituting a direct and effective cause of the accident is found. If, on the contrary, it meant, what the question and answer read together seem reasonably to imply, that "notwithstanding the negligence of the deceased" the company were guilty of negligence in not afterwards applying the brakes, then I think the finding is utterly without evidence or warrant to support it and that what was done after deceased's negligence, namely, "reversing," was the only possible effective thing that could be done.

The answers of the jury, therefore, to questions 5 and 6, whether held applicable to a time anterior to the contributory negligence of the deceased man or subsequent to it, cannot affect the result. There is no evidence whatever to justify a finding that the brakes should have been applied after the contributory negligence of the deceased occurred or that such action could possibly at that time have averted the accident. If, on the other hand, the finding applies to the time anterior to the contributory negligence of the deceased

which was a direct and effective cause of the accident, it cannot entitle the plaintiff to succeed.

That has been the principle on which this court has for years acted and it is one sanctioned and approved by the highest authorities in England.

The London Street Railway Co. v. *Brown*(1); *Brenner* v. *Toronto Railway Co.*(2); *Spaight* v. *Tedcastle*(3), at page 226; *The Bernina*(4), and specially pages 88 and 89.

IDINGTON J.—I accept the law as being correctly laid down in Pollock on Torts, 9th ed., page 473, as follows:—

> If the defendant could finally have avoided the mischief by ordinary diligence, it matters not how careless the plaintiff may have been at the last or any preceding stage.

The deceased according to evidence the jury were entitled to accept was crossing from the southerly to the northerly side of Queen street, in an oblique line tending westerly when respondent's car, running from the east to the west, struck and killed him.

The line thus taken by deceased tended to prevent him, when evidently from some cause or other in an unobservant mood, from as readily seeing the coming car as he otherwise might have done.

The motorman says he saw him from the time he stepped off the sidewalk to pursue the path he took, and kept him in his eye till he was struck.

The story is a striking one and, to comprehend clearly and accurately the issue now presented for our solution, better be given in the language of the man

(1) 31 Can. S.C.R. 642.
(2) 40 Can. S.C.R. 540.
(3) 6 App. Cas. 217.
(4) 12 P.D. 58.

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who ought to know the facts. The same man had been examined before the coroner, who had held an inquest. The stenographer's report of his examination at the inquest was referred to at the trial hereof and material parts of it read to him and his assent, or dissent, as the case might be, got. This is to be borne in mind in estimating both the value of the witness's evidence and his integrity. The following are extracts from the stenographic record at the trial.

Mr. Raney: Q. This is what you said at the inquest, Mr. Stephen, page 13, the question was: "Tell us how the accident happened as you saw it," and your answer was, "Well, as I was going west on Queen street between John and Peter streets or Soho street, I seen a man leave the sidewalk with the intention of crossing the track. I guess I was about 50 yards from him when I see him first, well, I started ringing my gong and he was going with his head down, looking downwards. He never paid any attention and I throwed off my power and kept ringing my gong, but he did not seem to take any notice at all. So when I seen that there was danger I reversed my car, but it did not stop quick enough to save hitting him and he was struck with the north-west corner of the fender"—

* * * * * * *

Q. Was that a truthful answer, Mr. Stephens ? A. Yes.

* * * * * * *

Q. You said your speed on this night when you came up from John to Peter was about fifteen miles an hour — I suppose that is more or less of a guess, is it ? A. Yes, just about the ordinary.

* * * * * * *

Mr. Raney: Q. And you threw your power off, and when did you begin to ring your gong. A. Just when I threw my power off.

Q. Just when you threw your power off — and did you throw your power off as soon as you saw the man stepping off the sidewalk with his head down ? A. I just threw my power off after I seen him coming towards the track.

* * * * * * *

Q. How long after ? A. Just as soon as he got off.

Q. At the inquest you were asked, "when did you change your speed"— how far did you go when you changed your speed ? A. I threw my power off — when I started ringing my gong.

Q. When did you start ringing your gong ? A. When I saw him approaching the track.

Q. How far were you from him then ? A. "I was about, when I

seen him approaching the track I was about fifty yards"—is that right ? A. When I seen him first I was about fifty yards.

Q. Would you say it was as near ? A. I was about fifty yards when I seen him first.

Q. It was then you threw your power off? A. Well, I was getting closer all the time.

Q. We will read what you say ? "You did not throw off your power then did you ? Did you throw your power off fifty yards from him ? A. Well, as soon as I seen he was going to approach the track I threw off my power. Q. And then you were fifty yards away ? A. Of course, I was getting closer, you know, I would be about thirty at that time. Q. And he seemed still to keep on walking in a north-westerly direction," and you say, "Yes," of course it must be north-westerly according to your evidence. Now was there anything to obstruct your view of the man ? A. No.

Q. You had a clear view of him all the time ? A. Yes.

Q. From the moment he left the sidewalk until you hit him ? A. Yes.

Q. And during that time you had him always in sight ? A. Yes.

* * * * * * *

Q. And did he ever give the least sign of apprehending the approach of your car — did he ever give the least sign that he knew that your car was approaching him ? A. No, I do not think he did.

* * * * * * *

Q. If any car passed would it pass east before ? A. Before I saw him ?

Q. Before you got him in line ? A. Yes.

Q. No traffic at all in the street ? A. No.

Q. Then you were asked again — these are the Crown's questions to you — page 15, two-thirds of the way down — "How far were you from him when you started gonging ? Were you the full fifty yards away ?" And you said, "Yes," "And you kept gonging him until you got to Soho street ?" and your answer was "Yes, gonging him all the time." "Q. Did he give any sign of having heard you ?" and your answer was, "No, he never heard at all, kept going ahead with his head down." These answers are true ? A. Well, yes.

* * * * * * *

Q. Now how far were you away from him when you reversed ? A. Ten feet.

Q. Ten feet ? A. I reversed as soon as I seen he was in danger.

Q. How long is your car ? A. About thirty feet.

Q. About thirty feet long ? A. Yes.

Q. Now I see on page 17 of your evidence at the inquest you were asked, "How far away were you from him when you reversed ?" and you answered, "About a car length." A. That is a mistake, I never did say that.

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Q. Then at page 21 you were asked that question, "How far" — I had better read the question before to get the context. "Q. Then what did you do ? A. Well, as soon as I seen he was in danger, as soon as I seen he was stepping on to my track I reversed. Q. How far were you from him then ? A. About a car length and a half." A. That is a mistake.

Q. That is a worse mistake ? A. I never said that.

Q. That is a worse mistake than the former one ? A. Yes.

Q. Now you say that you were within ten feet of him when you reversed ? A. Yes, that is where I was.

Q. Then how far did the car go after you hit him ? A. Pretty near half a car length.

* * * * * * *

Mr. Raney: Line 10. Q. "You were about one hundred and fifty feet back east of him when you first saw him ? A. Yes. Q. And he left the south side of Queen street with his head down in this way, absolutely absorbed, not thinking what he was doing? A. Yes. Q. And he walked across the street ? A. Yes. Q. And in a northerly direction ? A. North-westerly direction ?" A. North-easterly.

Q. You mean north-easterly ? A. Yes.

Q. "You had him in view all the time ? A. Yes. Q. Did you begin to gong him as soon as you saw him ? A. As soon as I saw him. Q. That was at one hundred and fifty feet away ? A. Yes. Q. Then you thought that there might be trouble and you threw off your power ? A. Yes. Q. How far were you away when you threw off your power ? A. Probably forty or thirty-five yards" — now are these answers correct with the exception of the correction you have just made, north-easterly for north-westerly ? A. Well, I never thought he was going to cross in front of the car.

* * * * * * *

Q. So the first thing you did was to gong him with your foot ? A. Yes.

Q. And then as he did not pay any attention you threw your power off ? A. And kept gonging him repeatedly.

Q. Now what was the character of the gonging that you did — was it a slow pressure or did you give it a rapid pressure A. Rapid pressure.

Q. All the time. A. Repeatedly.

Q. For the whole hundred and fifty feet, or fifty yards ? A. Repeatedly.

Q. And was that for the whole distance ? A. Yes.

* * * * * * *

Q. Did this man hesitate at all as he came across the street ? A. No, I do not think he did, he was walking so slowly.

Q. Never hesitated and never looked up ? A. No, he was just going with his head kind of hung.

Q. This is a question from a juror, "Q. This man that was crossing the track, did you notice he hesitated at all or did he keep going an even pace ? A. He never hesitated at all. Q. Kept going slowly ? A. Kept moving slowly. Q. Gave no sign that he heard you coming ? A. Never looked up" — these answers are true ? A. Yes.

Queen street is unusually wide and from the south curb to the track the car ran on is shewn to be twenty-eight feet six inches.

The issue presented to us is whether or not the man seeing another he thus described as so dead to his surroundings as to fail to respond to such desperate efforts as were made to arouse him, had duly and properly run him down. If we can say so then the judgment appealed from is quite right. And it seems to me we must be able to say so before we can uphold it.

It seems according to past instances from *Davies* v. *Mann*(1), down to the recent case of *O'Leary* v. *The Ottawa Electric Railway Co.*(2) (appeal from which judgment was dismissed by an equal division in this court) in a great variety of cases to have been held that it was for the jury to say whether or not, in a case where the defendant had apprehended, or ought to have apprehended, danger of injury to another who had been negligent of his person or his property, he (the defendant) had exercised ordinary care to avert such injury. Hence the law has hitherto been taken to be as laid down in the passage above quoted from Pollock.

The jury has said deceased was negligent but by answering another question, No. 5, seems clearly to intend that ultimately the respondent had not taken proper care to avert the accident — in other words — had not used that ordinary care the law required.

(1) 10 M. & W. 546. (2) 12 Ont. W.R. 469.

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Question No. 7, though, I submit with great respect, unhappily framed, yet evoked a reply confirmatory of the same view and minimized the negligence of deceased as viewed by the jury.

Such read in light of the charge seems clearly to be the result of these findings. And so read there can be no judgment dismissing the action unless the court comes to the conclusion it should never have been submitted to a jury but dismissed.

I cannot think that a man who realized, as the motorman professes, for such a length of time and space the danger he was in of injuring the deceased, whose movements and conduct he had kept steadily in his eye, was justified in running him down.

However that may be I can still less think that there was no case to submit to the jury.

I can conceive of men taking, as in fact the members of this very jury did, opposite views in such a case. And it seems to me that the learned Chief Justice who tried the case realized all the difficulties, used his long and wide experience of such cases, and ruled according to the law as it has been administered by him and others for a quarter of a century. The Court of Appeal has gone a long way in the direction of establishing (what railway companies have struggled so long to establish) the hard and fast rule of "stop, look and listen" as an impassable barrier in the way of future recovery by any persons, or their representatives, in cases where the so-called rule has not been observed.

It has never hitherto formed part of English or Canadian law. Each case with its attendant circumstances has been dealt with independently of such

rule, though elements in it may have formed part of the basis acted on in many cases.

There may be in the motorman's story a good deal of fiction. He may not in fact have been so very apprehensive and realized so well the danger as he says. Indeed, it would seem charitable to doubt it in looking at the results.

It does not, however, lie in the mouth of respondent to say we should do so.

Nor does his own intimation that he did not think the man would attempt to cross, conclude the matter, for the judge and jury were entitled to consider his acts of throwing off the power and continually ringing his gong as conclusive evidence that he thought there was danger of his crossing and being run down. And yet he failed to use that ordinary diligence motormen feeling such danger should have used.

If he had continued at the high rate of speed he was going, before realizing the danger, he would have passed the man without hurting him.

Apprehending what his conduct says he did, ordinary common sense dictated his doing more than he did.

There is in the evidence another and entirely different story which if correct might have been well accepted by the jury to justify a verdict for the defendant.

I am not concerned at all with that for it lay within the province of the jury to determine which story was right.

I am only concerned with the law and for the maintenance of the law and long established means of applying it by leaving to the jury the facts unless so

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clear beyond peradventure that there is nothing to try.

It has been suggested this motorman exercised his judgment. Again it was for the jury to say whether such judgment could be held to be in conformity with what men of common sense exact, under the name of ordinary care or diligence.

The motorman's amending version that the deceased travelled north-easterly in his crossing, is in conflict with the evidence and surrounding circumstances. But if correct, then the deceased was facing the light of the coming car and a greater object of the motorman's pitying care than if going obliquely to the northwest. Is a man seeing another in such state entitled to shout at him and knock him down if he won't get out of the way ?

I think the appeal should be allowed with costs and the judgment of the learned trial judge restored.

I wrote the foregoing opinion shortly after the first argument herein a year ago, and though a longer line of authorities has been cited on the second argument than on the first, I have heard nothing to shew that there has been any change in the operation of the clear legal principles so long established which I have referred to in the foregoing.

DUFF J.—Broadly, the rule as regards the effect of a plaintiff's negligence is that his want of care, assuming it to be of such a character as to constitute what is understood in law to be negligence, is a complete answer to a claim founded on the defendant's negligence, if it was in whole or in part the "proximate" or

"direct cause" of the plaintiff's misfortune. In *Walton* v. *London, Brighton & South Coast Railway*(1), at pp. 429 and 430, Mr. Justice Willes in the course of a discussion of the judgment of the Exchequer Chamber in *Tuff* v. *Warman*(2), says:—

If there is no evidence of negligence on the part of the plaintiff, then the only question is whether there has been negligence on the part of the defendant. But in cases where there has been negligence on the part of the plaintiff, the question is whether that was the direct cause of the accident or proximately contributed to it.

* * * * * * *

If there was evidence of negligence on the part of the plaintiff, the further question arises whether that negligence was the proximate or direct cause of the accident.

In his judgment in *The Bernina*(3), at p. 61, Lord Esher states the rule in these words:—

(5) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant. (6) If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one.

And at pp. 88 and 89 Lord Justice Lindley discusses the subject in the following passage:—

If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A. against B. for injury directly caused to A. by the want of care of A. and B. will not lie. As Pollock C.B. pointed out in *Greenland* v. *Chaplin*(4), the jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party. But if the plaintiff can shew that although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as

(1) H. & R. 424.
(2) 5 C.B.N.S. 573.
(3) 12 P.D. 58.
(4) 5 Ex. 243.

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is shewn not only by *Tuff* v. *Warman*(1), and *Radley* v. *London and North Western Railway Co.*(2), but also by the well-known case of *Davies* v. *Mann*(3), and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes as follows:—

1. A. without fault of his own is injured by the negligence of B., then B. is liable to A. 2. A. by his own fault is injured by B. without fault on his part, then B. is not liable to A. 3. A. is injured by B. by the fault more or less of both combined, then the following further distinctions have to be made: (*a*) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.: *Butterfield* v. *Forrester*(4); *Bridge* v. *Grand Junction Railway Co.*(5); *Dowell* v. *General Steam Navigation Co.*(6); (*b*) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injurying A., A. can sue B.: *Tuff* v. *Warman*(1); *Radley* v. *London and North Western Railway Co.*(2); *Davies* v. *Mann*(3); (*c*) if there has been as much want of reasonable care on A.'s part as on B.'s or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law.

I think the jury was entitled to find in this case the following facts: That the motorman became aware some time before the collision that if the deceased, Frank Long, continued in the direction in which he was going there was risk of collision between him and the car. He also became aware that the deceased was absorbed and quite inattentive to his surroundings. They were further entitled to take the view that if the motorman was a person competent to take charge of an electric car running on such a thoroughfare as Queen street, he ought to have realized (early enough to have enabled him to stop his car or to bring it under such control as would enable him to stop it without

(1) 5 C.B.N.S. 573.
(2) 1 App. Cas. 754.
(3) 10 M. & W. 546.
(4) 11 East 60.
(5) 3 M. & W. 244.
(6) 5 E. & B. 195.

risk of injury to the pedestrian) that in the circumstances it was his duty not to assume the risk of proceeding without taking such measures. They were also entitled to find that Long in fact did not become aware of the proximity of the car until the moment he was struck or immediately before. As to the question, these facts being established, as between Long's heedlessness and the motorman's failure to do his duty in the circumstances, Long's heedlessness was a direct or proximate cause of the accident, the broad common sense of the matter seems to dictate the answer that the negligence of the motorman (who saw Long's failure to realize the peril of pursuing his course and his state of abstraction, and who ought himself to have realized the peril) was, to use the language of Lord Justice Lindley, quoted above, "the real and proximate cause of the accident."

On the law the respondent's contention is that, assuming the facts to be as just stated, the case is within the specific rule (*a*) enunciated in the passage quoted above from Lord Justice Lindley's judgment as applicable to the third class of cases mentioned by him, viz., where A. is injured by B. through the fault more or less of both combined, then if notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.; and that it is not within the rule enunciated by the Lord Justice as Rule (*b*). It cannot be doubted that if we take the moment when Long stepped across the south rail, or the latest moment, whenever it was, at which by hurrying across the track he could have escaped the car, as being the crucial moment, and confine our attention to the physical possibilities of the situation at the moment so taken, the case appears to be literally within the lan-

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guage of the rule (*a*). Considered with reference exclusively to an external standard, Long's conduct at either of these moments unmistakably exhibits a want of ordinary care, and at either of these moments by the observance of such ordinary care the avoidance of the accident would have been physically possible. I should mention in passing that I am excluding the hypothesis of drunkenness. I think that after what occurred at the trial and before this court on the first argument the appellant's right to recover cannot properly be rested upon any such hypothesis.

Furthermore, treating Long's failure to observe ordinary precautions at these critical moments as negligence, within the meaning of rule (*b*), it seems to be literally true that from the first of those moments on, the motorman did everything that could be done to avoid the mishap, and that at that stage of the business he must be acquitted of negligence.

But I think the fallacy in this line of argument lies in the tacit assumption that the rules referred to as rules (*a*), and (*b*), constitute an exhaustive code of rules applicable to the third class of cases mentioned by the Lord Justice. It will be observed that Lord Justice Lindley is careful, as are Mr. Justice Willes and Lord Esher in the passages I have quoted from them respectively, to insist upon the broad general principle that the victim's negligence to be an answer must be a direct or proximate cause of the accident. Rules (*a*) and (*b*) are particular examples of the application of the general principle; rule (*c*) is in effect a restatement of the general principle. But — assuming that rule (*b*) is not applicable to the circumstances of this case, there are elements present here, the motorman's knowledge of facts from which

he ought to have foreseen the peril in time to have avoided the injury, the victim's ignorance of the peril and the motorman's knowledge of that ignorance, which cannot, I think, be left out of account in determining whose conduct was the proximate cause for the purpose of assigning responsibility which are not to be found in the cases in which the specific rule (*a*) has heretofore been enunciated and applied. I do not think there is any decision requiring one to hold that in a case in which such elements are present these specific rules (*a*) and (*b*) literally interpreted must be regarded as furnishing an exhaustive or exclusive interpretation of the general principle; on the other hand, there are decisions of this court, *Calgary* v. *Harnovis*(1), and *Canadian Pacific Railway Co.* v. *Hinrich*(2), supporting the view that in such cases such elements of knowledge and ignorance must be taken into account and that the victim's conduct must be viewed in its relation to the conduct of the defendant in determining whether it was a *causa proxima*. That view is supported by the decision of *Municipal Tramways Trust* v. *Buckley*(3), in the High Court of Australia. It receives some support also from the case of *Springett* v. *Ball*(4), and in *Mitchell* v. *Caledonia Railway Co.*(5), at p. 519, Lord Dunedin and Lord Kinnear seem to give the weight of their authority in favour of this way of looking at such cases. Perhaps the same may also be said of the judgments of Lord Cairns and Lord Penzance in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(6), at pp. 1166, 1167, and 1174. The subject has also been fully dis-

(1) 48 Can. S.C.R. 495.
(2) 48 Can. S.C.R. 557.
(3) 14 Aust. C.L.R. 731.
(4) 4 F. & F. 472.
(5) 46 Scot. L.R. 517.
(6) 3 App. Cas. 1155.

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cussed in Ontario in *Sim* v. *City of Port Arthur*(1); *Rice* v. *Toronto Railway Co.*(2), and *Herron* v. *Toronto Railway Co.*(3). I ought also, I suppose, to refer to my own judgment in the case of *Brenner* v. *Toronto Railway Co.*(4), upon which Mr. Dewart strongly relied. I was there, of course, dealing only with the phase of the law of negligence which came into play in that case. Having re-examined the whole matter for the purposes of this appeal, I do not think I can honestly charge myself with inaccuracy, but it should be observed that the point of the observation quoted by Mr. Dewart (in its application to the present case) is that negligence of the victim, in order to be an answer, must be a "direct and effective contributing cause." In that case, I had no manner of doubt that the negligence of the unfortunate victim, who attempted to pass across the track in front of a car which she knew to be approaching, without looking at the last moment to see whether she could do so in safety and without giving any sign of intention to cross until it was too late for the motorman to stop his car, was a direct contributing cause. In this case, considering the conduct of the victim, in relation to the conduct of the motorman, and the elements of knowledge on the one hand, and ignorance on the other, above mentioned, I think the proper view is that the *causa proxima* or direct cause, or if you like, the *cause,* in the legal sense, was the failure of duty on the part of the motorman, and that Long's want of care ought rather to be considered one of the conditions or circumstances on which the motorman's failure of duty took effect.

(1) 2 Ont. W.N. 864.
(2) 22 Ont. L.R. 446.
(3) 28 Ont. L.R. 59.
(4) 40 Can. S.C.R. 540.

As to the facts: with great respect, I am unable to agree with the view of the facts taken by the Court of Appeal. I have read the evidence more than once with care and I will only say that I think the evidence of the motorman and of the superintendent support the verdict. One consideration appears to me to have been overlooked. There is no doubt that the motorman was placed in a difficult situation, and full allowance should be made for that. It is very important also in such cases to avoid confusing excusable error of judgment, the error being proved by the event, with want of competence or diligence; but on the other hand, a reasonable measure of competent judgment may be required from the respondent's employees in such emergencies. This is sufficient to dispose of the contentions advanced on behalf of the appellant. As to the matter of a new trial, I have only to say, that, agreeing as I do with the opinion of the learned Chief Justice who tried the case as to the law applicable, I think the charge was admirably calculated to instruct the jury fully and effectively as to their duties. No doubt the 7th question on its face is open to criticism. But I do not think the explanation given by the learned Chief Justice of the point he desired them to consider under that head could have been misapprehended. Even if I had felt some difficulty as to the construction of the answers — which I do not — I should have hesitated long about directing another trial of the action in view of the attitude of the very able counsel who appeared for the respondent who at no stage of the proceedings has suggested the propriety of a new trial, or taken any exception to the charge of the learned trial judge except to impugn the principles of law upon which he proceeded, an exception which

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if successful must have led to the dismissal of the action.

ANGLIN J. (dissenting).—After careful consideration and not without some doubt, I have come to the conclusion that there should be a new trial of this action, on the grounds that the finding of the jury, that the plaintiff's husband was "guilty of negligence which caused or contributed to the accident," read in the light of the admission on which it was based and the presentation of this branch of the case to the jury, is not satisfactory, and that it is not clear that all the considerations which should have affected their minds in dealing with the 5th question (in answer to which they found that, notwithstanding the negligence of the deceased, the defendants' motorman could by the exercise of reasonable care have prevented the collision) were presented to the jury, and also because of the unsatisfactory character of the 7th question and of the uncertainty, in view of the frame of that question, as to the meaning of the answer thereto.

The questions submitted to the jury with their answers are as follows:—

1. Was the death of the plaintiff's husband caused by any negligence of the defendants, prior to negligence of plaintiff's husband? A. No.

2. If so, wherein did such negligence consist?

3. Was the plaintiff's husband guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened? A. Yes.

4. If you answer "yes" to the last question, wherein did his negligence consist? A. In not looking for a car.

5. Notwithstanding the negligence, if any, of the deceased, could the defendants by the exercise of reasonable care have prevented the collision? A. Yes.

6. If so what should they have done which they did not do or have left undone which they did do? A. By putting on the brakes and having the car under proper control.

7. Could the motorman and the deceased, each of them, up to the moment of collision have prevented the accident by the use of reasonable care — in other words, was the negligence of deceased a continuing act up to the very moment of the accident ? A. Ten say "No" and two say "Yes."

8. If the court should on your answers think the plaintiff entitled to damages what sum do you assess as damages, distributing it:—

(*a*) To the mother of the deceased, aged 71 years ?

(*b*) To the wife, aged 38 years ?

(*c*) To the daughter, age 8 years ? A. Ten for $4,000.

Upon these findings the learned trial judge entered judgment for the plaintiff. In the Appellate Division that judgment was set aside on the ground that there was no evidence to support the jury's answers to the 6th and 7th questions, and that, upon those answers being set aside, the finding of negligence on the part of the deceased precluded recovery.

That there was no negligence on the part of the defendants prior to the moment at which the peril of the deceased became or should have been apparent to the motorman, was undisputed. The first and second questions were put to the jury *pro formâ*.

The evidence disclosed that the deceased left the sidewalk on the south side of Queen street in an abstracted state of mind and that he continued in that condition until he was upon the car track in front of and only a few feet away from the approaching car, when he appears to have suddenly realized the danger, but too late to escape being struck by the north corner of the fender. The evidence of Charles Allen, apparently an independent witness and the only person other than the motorman who seems to have seen the deceased come upon the track, is as follows:—

Q. And you were four or six paces from the east sidewalk on Soho street ? A. Yes, that is it.

Q. What did you see ? A. Right out near the edge.

Q. What did you see ? A. I seen the gentleman just as he stepped

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on to the car tracks, just as he seemed to put his foot on to the car track.

Q. What track ? A. The north track.

Q. That is the one upon which the westbound car was coming ? A. Yes, the westbound car.

Q. Then what happened ? A. I seen, the gentleman seemed to throw out his hands as though he had realized his danger on the instant and the round part of the fender on the north side seemed to catch him. I could not say which leg it was, but it was perhaps on both, or one, but it seemed to throw him, twist him around, throw him and I ran for the car immediately.

Q. Yes, when you speak of the round part of the fender do you mean the north-west corner of the fender ? A. Yes,

The evidence of Alexander Johnston makes it reasonably clear that the deceased left the sidewalk on the south side of Queen street about 20 yards east of the line of the face of the west wall of the house on the east side of Soho street. According to the diagram verified by the motorman, when struck he was almost opposite the kerb on the east side of Soho street. If so, it is clear that he was proceeding in a north-westerly direction as the motorman had originally stated at the inquest and not in a north-easterly direction as he stated at the trial and as the point of his departure from the sidewalk as marked upon the diagram would indicate. It follows that his back was partly towards the approaching west-bound car which struck him. The evidence of the motorman makes it clear that the deceased when leaving the sidewalk and up to a moment or two before he was struck, when the witness, Allen, saw him "throw out his hands," was unaware of the approaching car and that the persistent efforts which the motorman made to attract his attention were futile. After the close of the evidence, counsel for the plaintiff made this statement to the trial judge, which was taken as an admission of negligence on the part of the deceased,

the deceased was not wary in approaching the car tracks in crossing the street,

and he suggested that the first four questions should be eliminated and that question 5 should be put in this form:—

Notwithstanding the admitted negligence of the deceased, could the defendants by the exercise of reasonable care have avoided the accident or the collision ?

This is the only record of an admission of negligence on the part of the deceased.

In presenting the case to the jury the learned Chief Justice, whose charge was not objected to on this branch, said,

she (the plaintiff) admits frankly that her unfortunate husband who met with his death instantaneously on that occasion certainly was guilty of some negligence causing or contributing to the accident, but she says that after that negligence of the deceased there was supervening or ultimate negligence on the part of the motorman which caused the accident.

In submitting the 3rd and 4th questions to the jury, after reading them, the learned Chief Justice said:—

Well, admittedly, the plaintiff says that he (the deceased) proceeded from that curb on his way unwarily (which is the phrase used by the plaintiff's counsel) you can say recklessly, carelessly or without giving sufficient attention to what was going on, or any phrase that occurs to you to meet the circumstances. No doubt there was something that must be understood in some such word (*sic*).

In dealing with the 7th question, after reading it, the learned judge said:—

I do not think I can make it any clearer than I have made it there. Did the unfortunate deceased's act contribute up to the moment of the accident ? Well, in a sense it did, physically, because he went right on, but that is not what is meant by this question. The question is, "Did he become aware that the car was approaching and was he able to avoid the danger ?" that is the sense in which

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that question is put. * * * Now, you will understand the sense in which that question is launched — that while it is true that physically, as far as his actions went, he did contribute to it up to the last moment, but did he do it in that negligent sense that he became aware that the car was approaching and was he able then to avoid the danger ? * * * If you answer "Yes" to that question, so far as the deceased is concerned, that is the end of the plaintiff's case. What the plaintiff says you ought to answer is, that up to the last moment the motorman was negligent, but that the deceased was not up to the moment of the collision. It is for you to say.

Upon the admission as made by counsel for the plaintiff above quoted and the statement of that admission by the learned Chief Justice to the jury, having regard to what he said in discussing the 7th question, I find it difficult to understand just what the jury meant when they found in answer to questions 3 and 4 that the plaintiff's husband had been guilty of negligence which caused or contributed to the accident "in not looking for the car." Did they mean that he was negligent in

that he proceeded from that curb on his way unwarily,

as put by the learned Chief Justice ? Did they mean that the deceased was

not wary in approaching the car tracks in crossing the street,

as put by counsel for the plaintiff ? Read in the light of the charge and the admission upon which they were instructed to act it is questionable whether the jury meant more than this. Did they mean that the deceased was negligent in stepping upon the car track itself ? Negligence in stepping from the kerb and in crossing the street did not proximately cause or contribute to the accident. It was only in the act of stepping in front of the moving car that there could have been negligence on the part of the deceased of that kind. If, as the motorman says, the car was then only

ten feet away and he immediately reversed and did all in his power to stop, it is difficult to understand the findings of the jury in answer to the 5th and 6th questions, unless they meant that the motorman should have apprehended that the deceased was likely to step in front of the car and should sooner have taken measures to stop it. Unfortunately it does not seem to be sufficiently clear that this was what the jury really meant to find. Having regard to these findings, read in the light of the charge bearing upon them, and to the answer to the 7th question, I rather incline to the view that by the answer to the 4th question the jury meant, not that the deceased was negligent in stepping upon the car track, but that he was negligent in not looking for the car when he was leaving the sidewalk and crossing the street approaching the tracks. If that is the proper interpretation of the finding — and I think it is open to that view having regard to the admission of counsel for the plaintiff and the charge dealing with that admission — it is not, in my opinion, a satisfactory finding of

negligence on the part of the deceased which caused or contributed to the accident.

I am, with great respect, unable to agree with the learned Chief Justice, who delivered the judgment of the Appellate Division, that there was no evidence to support the findings in answer to the 5th and 6th questions. According to his own story the motorman saw the deceased leave the kerb and had him continuously in view until he was struck by the fender. Immediately upon his leaving the kerb he says he thought there might be trouble and he, therefore, threw off his power and began to ring his gong to

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warn the deceased. He says the car was then 50 yards from the point at which the unfortunate man was struck. The motorman says that he did his best to attract his attention with the gong; that he kept ringing it continuously; that the deceased

did not give the least sign that he knew that the car was approaching;

that he

walked straight on slowly with his head down;

that he

never heard at all, kept going ahead with his head down * * * absolutely absorbed

not thinking what he was doing. Although he is reported to have said at the inquest that when the deceased stepped in front of the car he was a car length and a half from it, at the trial he said that the car was then only ten feet away from him. He says he applied the reverse the moment the deceased stepped upon the south rail of the north track. The car stopped in one-half a car length after it struck the deceased. The motorman says that when he applied the reverse the car was running about six miles an hour. A witness, Marshall, however, who was a passenger on the car and felt the jar of the reverse, says that he noticed the speed immediately before he felt the jar of the reverse and would fix it at ten or twelve miles an hour. From all this evidence I think it was open to the jury to infer that the motorman was aware of the absorbed and abstracted state of mind of the deceased, that he knew that the strenuous ringing of the gong had failed to arouse his attention and that it was not improbable that a man crossing the street in that state of mind would walk in front of the car before he realized his danger, and

that he should, therefore, have reversed his power or applied the brakes and endeavoured to stop the car sooner than he did. I do not wish it to be understood that if trying the case myself such would have been my finding. Nor would that be a proper consideration in dealing with this appeal. The question is — was there evidence upon which a jury of reasonable men might draw such an inference? Was there evidence upon that aspect of the case which could not properly have been withdrawn from the jury? With great respect for the Appellate Division and for my learned colleague who entertains the contrary view, I am of the opinion that there was.

But I should have been better satisfied with the findings of the jury in answer to the 5th and 6th questions if it had been explained to them that the motorman should not be found to have been negligent merely because he had erred in judgment — that, before convicting him of negligence, they should be satisfied that, with the knowledge of conditions which he admittedly had, he had not merely erred in judgment but had taken an unnecessary and improper chance where human life was in peril. That idea probably underlies the statement of the learned Chief Justice that the question for the jury was whether

> there was negligence on the part of the motorman after the time when he apprehended or ought reasonably to have apprehended that man was going to cross his track.

But it would have been more satisfactory, I think, had the attention of the jury been pointedly drawn to the distinction between mere error of judgment and an improper taking of chances on the part of the motorman.

Again, it is possible that the jury may have ac-

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cepted the motorman's story at the inquest — that the car was a car length and a half from the deceased when he stepped on the track in front of it — as more likely to be correct than his version at the trial. Believing the former, they may have thought that the motorman could and should have stopped his car before it hit the deceased — that he should have applied the brakes or reversed his power not when only ten feet from the deceased, but when forty-five feet — a car length and a half—away, and that if he had done so the accident would have been avoided.

With very great respect it seems to me that the 7th question must have tended to confuse the jury. In it they are first asked:—

> Could the motorman and the deceased each of them up to the moment of the collision have prevented the accident by the use of reasonable care ?

and then an interpretation is put upon the question in its concluding phrase which confines it to the conduct of the deceased —

> in other words, was the negligence of the deceased a contributory act up to the very moment of the accident ?

The answer to this questions is,

> Ten say "No" and two say "Yes."

It is impossible to know whether the jury meant to answer the question as it was first put covering negligence of both the motorman and the deceased, or whether their answer is to be taken as confined to the interpretation put upon the question in the latter part which restricts it to negligence of the deceased. Assuming the latter to be the correct view, upon the evidence of Charles Allen it is clear that the deceased, after stepping upon the track and an instant or two

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before he was struck, awoke to his danger. It was too late then for him to save himself. Does the answer to this question mean merely that he was not negligent after so becoming aware of his danger? It is clearly open to that interpretation upon the charge as quoted above, and upon all the evidence that would seem to be a fair conclusion. Does it mean that in stepping on the track and up to the moment when he became so aware of his danger the deceased had been actively negligent? If so, and if the accident could not then have been averted is he entitled to recover? *Brenner* v. *Toronto Street Railway Co.*(1). Or does it mean that although negligent in leaving the sidewalk and approaching the tracks he was not negligent in actually stepping in front of the car? It is perhaps a little difficult to understand how the jury could thus differentiate between the degrees of responsibility on the part of the deceased in the several stages of his progress across the street. On the other hand, if the deceased was actively negligent up to the moment when the accident became inevitable it is still more difficult to understand how the motorman could be guilty of "ultimate negligence" such that it was the only true proximate cause of the collision and rendered the defendants liable notwithstanding the continuous negligence of the deceased.

Instead of asking whether the negligence contributed up to the very moment of the collision or accident it would, I would respectfully suggest, be better to ask whether the negligence actually contributed up to the moment when the accident or collision became

(1) 40 Can. S.C.R. 540, at page 556; 13 Ont. L.R. 423, at pages 425, 434.

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inevitable, and to put separate questions covering this point with regard to the motorman and the deceased, or to confine it to the deceased.

The difficulty which I find in the way of entering judgment for the plaintiff on the 5th and 6th findings of the jury is that I am not satisfied that by them the jury really meant to impute to the motorman what would in law amount to "ultimate negligence." It is not clear that they meant to do more than find against him a fault similar to that which was suggested in the Divisional Court on the part of the motorman in the *Brenner Case*(1), but was held by this court, affirming the Court of Appeal, to be insufficient to warrant a verdict of ultimate negligence against the defendants. I am not certain that the jury meant in the present case that after the danger of the deceased became or should have been apparent to the motorman he could by the exercise of reasonable care have avoided running him down. It is uncertain whether they meant to find that the negligence of the motorman was the sole efficient cause of the accident which was really proximate.

On the whole I think that the result of the trial is not satisfactory and that it would be in the interests of justice that there should be a new trial, in the hope that it may result in findings such that, if not wholly free from doubt, it may at least be less doubtful than it now seems to be, whose fault or negligence was really the proximate cause of the accident.

(1) 40 Can. S.C.R. 540.

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BRODEUR J.—I concur in the opinion of my brother Duff.

Appeal allowed with costs.

Solicitors for the appellant: *Mills, Raney, Lucas & Hales.*

Solicitors for the respondents: *McCarthy, Osler, Hoskin & Harcourt.*

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*Feb. 20.
*Feb. 22.

EVANS v. EVANS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Ownership of horses—Bill of sale—Foreign judgment—Interpleader —Secondary evidence—Parol testimony.

APPEAL from the judgment of the Supreme Court of Alberta(1), affirming the judgment of Harvey C.J., at the trial, by which the claim of the plaintiff, respondent, was allowed with costs, and the counterclaim of the defendant, appellant, was dismissed with costs.

The action was brought to recover possession of horses which the plaintiff claimed as her property and which the defendant refused to deliver to her. By his counterclaim the defendant claimed possession of certain other horses which were in the possession of the plaintiff. At the trial the plaintiff's claim was allowed with costs and the defendant's counterclaim was dismissed with costs. This judgment was affirmed by the judgment now appealed from.

After hearing counsel on behalf of the appellant, and without calling upon the respondent for any argument, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

E. B. Williams for the appellant.

C. A. Grant for the respondent.

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

(1) 19 West. L.R. 237.

PRESCOTT v. TRAPP & CO.

1912

*Oct. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale of chattels—Public auction—Disclosure of principal—Liability of auctioneer—Giving credit—Post-dated cheque.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Grant Co. J., in the County Court of Vancouver, which maintained the action of the plaintiffs (respondents) with costs.

An auctioneer sold two horses, by public auction, to a bidder who settled for the price by giving the auctioneer his cheque post-dated several days after the sale, and the auctioneer then gave his cheque for the purchase price, less his commission, to the owners of the animals. The purchaser took possession of the horses, but, on the following day, discovering that a third person held a lien on them, he stopped payment of the cheque which he had given at the time of the purchase. The plaintiffs' action for the recovery of the amount of the cheque was maintained by the county court judge and his judgment was affirmed by the judgment now appealed from, Irving J. dissenting.

After hearing counsel on behalf of the appellant, and without calling upon the respondents for any argument, the Supreme Court of Canada dismissed the appeal with costs.

Appeal dismissed with costs.

McCrossan for the appellant.

C. W. Craig for the respondents.

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

(1) 17 B.C. Rep. 298.

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HIRTLE v. BOEHNER.

*Mar. 13, 14.
*May 6.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trespass — Crown grant — Conflicting claims — Priority of title — Evidence.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment at the trial by which the action was dismissed and ordering a judgment to be entered for the plaintiff (respondent).

The plaintiff, Boehner, brought action for trespass on his wilderness land by cutting wood thereon. The defendant claimed that the wood was cut on his own land. Each party claimed title through allotment on the foundation of the township and by subsequent Crown grants.

The trial judge held that the plaintiff's case depended on the properties overlapping and he could only succeed by establishing priority of title. He held as to this that the original party from whom the defendant claimed had an allotment possession before plaintiff's title originated and the allotment was confirmed by a township grant in 1784 and by a Crown grant in 1800, the latter reciting his possession for more than twenty years previous. The Supreme Court *en banc* reversed the judgment at the trial, holding that on the evidence plaintiff's title was prior and defendant's grant in 1800 derogated from it.

The Supreme Court of Canada after hearing counsel for each party and reserving judgment allowed the appeal and restored the judgment of the trial judge dismissing the action.

Appeal allowed with costs.

Mellish K.C. and *Matheson K.C.* for the appellant.

Paton K.C. for the respondent.

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

(1) 46 N.S. Rep. 231.

THE CANADIAN NORTHERN ONTARIO RAILWAY COMPANY.. } APPELLANTS;

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*May 26, 27.
*Oct. 13.

AND

ERNEST HOLDITCH ..... RESPONDENT.

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

Expropriation—"Railway Act"—Municipal plan—Severance of lots—Injurious affection—Reference back to arbitrators—R.S.C., 1906, *c.* 37.

For the purposes of expropriation under the Dominion "Railway Act," unless lots laid out on the owner's registered plan are so united as to form one complete whole, each lot taken by the railway company is an independent, separate and complete property in itself and the owner is not entitled to compensation for injurious affection to any such lot, of which no part is taken and which is severed from the land expropriated by a railway or by land sold to another person. *Cooper-Essex* v. *Local Board for Acton* (14 App. Cas. 153), distinguished. Duff and Anglin JJ. *contra.*

The owner of land adjacent to or abutting upon the street over which a railway passes is entitled, by 1 & 2 Geo. V., ch. 22, sec. 6, to compensation for injury to such land, but the compensation can only be awarded by the Board of Railway Commissioners and is not a matter for arbitration under the "Railway Act."

Held, per Duff and Anglin JJ.—The arbitrators appointed to value land so expropriated are *functi officio* when their award is delivered and an appellate court has no power to remit the matter to them for further consideration. *Cedars Rapids Manufacturing Co.* v. *Lacoste* ((1914) A.C. 569), referred to.

APPEAL from a decision of an Appellate Division of the Supreme Court of Ontario varying an award of

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

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arbitrators appointed to fix the value of land expropriated and remitting the case to them for further consideration and assessment on one branch of damages as to which they had held that they had no jurisdiction.

On and prior to the 13th day of July, 1912, the respondent Ernest Holditch was the owner of a block of land situate in the Town of Sudbury, in the Province of Ontario, which block of land had been sub-divided into different lots laid out upon a registered plan. In expropriation of their right of way the railway by their notice expropriated and took absolutely lots according to the registered plan numbered as follows (the numbers follow).

An arbitration was had, pursuant to the provisions of the "Railway Act," before three arbitrators, Robert Spence Mitchell, appointed by William Ernest Holditch; David Marr Brodie, appointed by the Canadian Northern Railway Company; and His Honour John James Kehoe, Judge of the District Court of the District of Sudbury, the third arbitrator chosen by Messrs. Brodie and Mitchell. The arbitrators heard a considerable amount of evidence, examined the property and subsequently an award was made by the majority of the arbitrators, His Honour Judge Kehoe and Robert Spence Mitchell, which award is exhibit No. 21 at page 109 of the appeal case. By this award the majority arbitrators awarded the respondent William Ernest Holditch the sum of $5,315 for the lands entirely taken by the railway. The majority arbitrators found as a fact appearing on the face of the award that the following additional lands of William Ernest Holditch, namely, lots (numbers), in the subdivision,

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by reason of being severed from the other lands, and on account of their being rendered more difficult of access by reason of the construction of the railway and the grade thereof, and their being impaired in value, were injuriously affected to the extent of $4,800, but they made no award as to this, as they considered they were not warranted under the "Railway Act" or by law in making any such award, finding further that they could not make any award as to damages claimed by the respondent on account of lands injuriously affected on account of vibration that would be caused by trains and by noise and smoke.

Mr. David Marr Brodie, the other arbitrator, filed a minority award, in which he gives his opinion as to the value of the lands taken at $3,415, being $1,900 less than that by the majority arbitrators. He further places the damages to the other lots mentioned in the majority award at a less sum than the majority arbitrators, he stating a figure of $3,432 in lieu of the figure of $4,800 stated by the majority arbitrators, the difference of $1,368, and concurs in awarding no damages for smoke, noise or vibration.

The present respondent, William Ernest Holditch, appealed from the award of the majority arbitrators on the grounds, amongst others, that compensation should be allowed for the property of the owner not taken by the company, but injuriously affected by the construction of the railway in question, such property being the remaining lots in the subdivision, and for damages or compensation for the intercepting and destroying of the ingress and egress from the remainder of the subdivision; also for damage sustained by the construction of the roadbed and grade higher

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than the natural level of the property and for the blocking of the streets; that upon a consideration of the physical characteristics of the land and the running of the railway immediately north of a base line of high rock on the property, the access was seriously interfered with and the value of a number of lots thereby depreciated.

Upon appeal the Appellate Division, after argument and upon a consideration of the authorities, were clearly of the opinion, first, that they would not upon the evidence disturb the findings as to the value of the land taken, and secondly, that as a matter of law upon the finding of the majority arbitrators the respondent was clearly entitled to $4,800 found by the majority arbitrators; that for the same reasons, and it appearing on the face of the award that there was some damage by smoke, noise and vibration, the respondent was entitled to an allowance of damages on this heading, and counsel for both the appellant and the railway company agreed that they would prefer a reference back to the arbitrators upon this heading rather than having the Court deal with it upon the evidence already in, and the Appellate Division directed that on this heading there should be a reference back to the arbitrators to ascertain the amount of damage to the lots enumerated in paragraph three of the judgment.

Armour K.C. and *G. N. Macdonnell* for the appellants.

McKay K.C. for the respondent.

THE CHIEF JUSTICE.—I would allow this appeal with costs. I agree with Mr. Justice Idington.

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Idington J.

IDINGTON J.—This appeal raises the questions of whether an owner of land expropriated under and by virtue of the "Railway Act" has as an incident to such expropriation the right to claim damages for injury done to his other lands beyond the bounds of the lot so expropriated by reason either of the railway crossing the street or highway leading to such other lands and rendering them thereby less easily accessible and hence less marketable, or of the smoke, noise and vibration incidental to the use of the railway when constructed.

The lands expropriated and those other lands alleged to be so injuriously affected formed part of the same subdivision according to a registered plan, or registered plans which I assume harmonized with the first plan of subdivision.

It is not made quite clear in the evidence whether the major part of such subdivisions had been made by the respondent or his father through whom I infer he claims.

No importance seems to have been attached at the trial to any such distinction and possibly in law nothing in question herein can be made to depend on any distinction such as I suggest.

In considering the opinion judgments delivered by some of their Lordships in the case of *Cowper-Essex* v. *Local Board for Acton*(1), if this case had to be governed thereby a good deal might be made to turn upon such distinction in the origin of the subdivisions made, though in appearance constituting now one scheme of subdivision.

In the view I take of this case it is not necessary

(1) 14 App. Cas. 153.

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I should dwell upon such considerations or in detail upon the facts of the numerous sales of lots in such survey which render those lots in question remaining anything but a connected compact piece of land. They can be joined only by the imagination to those actually taken.

The respondent's contentions herein were discarded, by the arbitrators who made the award, because in their opinion the "Railway Act" under which they acted did not authorize them to make any allowance in respect of injurious affection suffered in respect of those other lands.

The appellant expropriated the entire lots touched by the railway allowance according to the route plan approved by the Board of Railway Commissioners, and thus there is no question raised as to the severance of any such lot injuriously affecting the land of which part has been taken.

The *Cowper-Essex Case*(1), referred to and which is relied upon by respondent, and no doubt that upon which the judgment appealed from was rested, though we have no written reasons given therefor, was dependent upon the peculiar facts there in evidence and the construction of the "Lands Clauses Consolidation Act," 1845, secs. 49 and 63, which are as follows:—

49. Where such inquiry shall relate to the value of lands to be purchased, and also the compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which under the provisions herein contained he is

(1) 14 App. Cas. 153.

enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act or any Act incorporated therewith.

63. In estimating the purchase money or compensation to be paid by the promotors of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promotors of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act or any Act incorporated therewith.

I cannot think that section 155 of our "Railway Act" and the sections therein provided for giving it effect, especially as interpreted and construed in many other cases, can be said to have contemplated any such results as that decision upon said sections.

The said section 155 is as follows:—

155. The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

Let any one carefully read and compare the language of this section and the said two sections and then observe and consider the reasoning of the judgments in that case, and if that does not lead to the conviction that the decision should not govern this case, I fear I cannot hope to convince.

The section 155 of our "Railway Act" was taken I rather think from section 16 of the "English Railway Clauses Consolidation Act," though the word "compensation" is used where the word "satisfaction" was placed in section 16.

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Then the case of *Hammersmith Railway Co.* v. *Brand*(1), decided that said section 16 of the English Act would not give relief to any one whose lands or part thereof had not been taken.

When the matter is thus reduced by judicial construction, from which Lord Cairns dissented, to a question of the taking of such lands then we must read the section accordingly and turn to the specific provisions of sections 192, 193, and 194 of the "Railway Act" upon which the jurisdiction of the arbitrators rests.

The second of these sections, 193, is as follows:—

193. The notice served upon the party shall contain,—

(*a*) a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands therein described; and,

(*b*) a declaration of readiness to pay a certain sum or rent, as the case may be, as compensation for such lands or for such damages.

Read this as if both lands and power were combined though apparently disjoined, and whence can we draw the power of the arbitrators to assess and award damages in respect of other lands? Each lot taken by appellant is an independent, separate and complete property in itself. It is easily conceivable that a number of such properties might be so united together as to render them one compact whole, but that is not what in fact exists here.

In the Act upon which the *Cowper-Essex Case*(2) turned, it will be observed that the injuries to "lands held therewith" and "other lands" than taken and the "severing" of those from lands taken, are expressly provided for as subjects of compensation.

(1) L.R. 4 H.L. 171. (2) 14 App. Cas. 153.

I may repeat what I have said in the case of same appellant v. Billings, heard this term, that if the views probably held by Lord Cairns when forming part of the court which decided the *Hammersmith Case*(1), and expressly so by Lord Westbury in *Ricket* v. *Metropolitan Railway Co.*(2), relative to the meaning of section 16, had prevailed, then the language of section 155 might have been held as wide enough to cover what is claimed herein.

Hammersmith Railway Co. v. *Brand*(1) is decisive of any claim founded upon the crossing of streets *per se* being a ground of claim under our "Railway Act."

Indeed, it so restricts the operation of that Act that the only sensible meaning to be given it must relate, so far as injurious affection of any kind is concerned, to those lands physically connected with the part taken and not even then as in cases of subdivision for general sale to the public where the owner is thereby treating each parcel as a special lot.

With the claim, for injuries to other lands than those taken or directly interfered with, thus failing, as I hold it must, falls also the claim relative to what might arise herein from smoke, noise or vibration, even if such claims founded on the use of the works can ever found a claim for compensation.

And with these claims failing there is no need to consider the question of the power to refer back to arbitrators.

And the right given by recent legislation amending the "Railway Act" so as to modify the injustice often done heretofore to owners of properties abutting upon

(1) L.R. 4 H.L. 171. (2) L.R. 2 H.L. 175.

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streets over which railways ran without touching such lands must be pursued before the tribunal empowered by such remedial legislation to deal therewith.

This appeal should be allowed with costs.

Duff J.

DUFF J. (dissenting).—I concur with Mr. Justice Anglin.

ANGLIN J. (dissenting).—Two questions are presented on this appeal: the first, whether some 49 building lots owned by the respondent were so "held with" certain other lots in the same building subdivision which have been taken from him by the appellant railway company as to entitle him to compensation in respect of them as lands which, though not physically injured, will be injuriously affected by the construction of the proposed railway and its future operation; the second, whether it is within the power of a court hearing an appeal from arbitrators under section 209 of the Dominion "Railway Act" to refer the whole subject of the arbitration, or any part of it back to the arbitrators for further consideration.

The respondent and his predecessor in title had laid out the property in question as a building subdivision some years before the advent of the railway. It contained upwards of 500 lots fronting on thirteen streets. The plan had been registered and more than 200 lots had been sold to purchasers, some of them fronting on each of the streets laid down on the plan. The railway took the whole of every lot which its projected right of way touched and against the award in respect of lots so taken no appeal has been launched. The concluding paragraphs of the award of the majority of the arbitrators are as follows:—

And further, we find that as to the following lands, on account of their being severed from the other lands of the said William Ernest Holditch in the said subdivision, and on account of their being rendered more difficult of access by reason of the construction of the railway, and the grade thereof, and their being impaired in value as appears by the evidence of witnesses for both parties, the said witnesses agreeing upon the proportions in which the said lands hereinafter mentioned were so lessened in value, though differing in the values given by them in evidence, the said lands being as follows:—

Lots 96, 97, 100, 102, 103, 109, 111, 115, 117, 119, 122, 124, 125, 127, 129, 131, 132, 184, 185, 186, 187, 353, 355, 356, 379, 378, 370, 372, 373, 507, 510, 516, 517, 519, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 193, 194, 196, 197, and 198, are injuriously affected to the extent of four thousand eight hundred dollars ($4,800), but we make no award as to the same, as we consider that we are not warranted under the "Railway Act" or by law to make any such award.

And further, we find that we cannot and we make no award as to damages claimed by the said William Ernest Holditch on account of lands injuriously affected on account of vibration that would be caused by trains and by noise and smoke.

The Appellate Division held the plaintiff entitled to the $4,800 damages assessed by the arbitrators in respect of the 49 enumerated lots. The court, being also of the opinion that the claimant is entitled to damages in respect of other lots, inserted the following paragraph in their order:—

3. And this court doth further order that it be referred back to the arbitrators, John James Kehoe, Robert Spence Mitchell, and David Marr Brodie to ascertain and state the amount of damage sustained by the said Ernest Holditch on account of the lands situate on the north and south sides of Hickory Street and the north side of Poplar Street, consisting of lots numbers 145, 144, 140, 139, 136, 364, 362, 380, 381, and 384, on the north side of Hickory Street, and lots numbers 148, 149, 151, 152, 154, 155, 333, 336, 337, 334, 340, 395, 396, 397, 385, and 386 on the south side of Hickory Street and lots numbers 163, 162, 160, 158, 157, 331, 330, 347, 348, 343, 341, 392, 391, and 390 on the north side of Poplar Street, according to plan of subdivision of lots of the said Ernest Holditch, filed as an exhibit upon the said arbitration, by reason of the construction of the railway of the Canadian Northern Railway Company, this court declaring that the said Ernest Holditch is entitled to recover all damages sustained by him to the said property by reason of the construction of the said railway.

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The case was disposed of in the Appellate Division at the conclusion of the hearing and we are without the advantage of having before us the reasons on which the court proceeded.

Dealing with the first branch of the appeal, the appellant insists that by the sale of lots fronting upon each of the streets of the registered plan that plan has become binding on the claimant in its entirety; that the streets have become fixed and are not subject to deviation and may not be closed without the consent of the purchasers of such lots; that the claimants' lots have been so separated one from another that there cannot be in respect of them a claim for severance because some of them have been taken from him; and that the only interference with access to the lots which he retains is what will be due to the construction of the railway across the streets, which does not afford a ground for compensation under the statute. As a matter of fact only one of the 49 lots in respect of which damages have been awarded is contiguous to an expropriated lot. Lot 519 lies next to lot 520. Each of the remaining 48 lots is separated from the expropriated lots either by a street or by an intervening lot sold by the claimant.

This branch of the case must, however, in my opinion, be dealt with on the rule formulated by the House of Lords in *Cowper-Essex* v. *Local Board for Acton* (1). As stated in the head-note that rule is as follows:—

> The lands taken and the lands injuriously affected being held by the same owner so that the unity of ownership conduced to the advantage of the property as one holding, the lands injuriously

(1) 14 App. Cas. 153.

affected were "held with" the lands taken within the meaning of section 49 of the "Lands Clauses Consolidation Act, 1845."

The following passages occur in the judgments: Halsbury, L.C., says at p. 163:—

It is in each case a question of fact dependent upon its own circumstances whether what I have called the unity of the estate is interfered with.

Lord Watson at p. 167:—

Where several pieces of land owned by the same person are so near to each other and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act; so that if one piece is compulsorily taken and converted to uses which depreciate the value of the rest the owner has a right to compensation (for the depreciation).

Lord Bramwell, p. 168:—

The lands have one owner. I cannot think it matters that they are separated by a railway; I suppose it would hardly be said that one part of a park separated from another part by a railway was not land held with that other part. Here the lands are close; what is done on one part must or might affect what would be done on the other. For example, what I mean is this: Houses of a particular class or character built on one part would influence the class or character of what would or might be built on the other. The class of occupants of one part would in like way influence the character of that on the other. On these considerations I am of opinion that the land in respect of which the claim is made here was land held with the piece taken.

Lord Macnaghten at p. 175:—

Lands in respect of which a claim for compensation may arise are referred to in the Act, in contradistinction to the lands taken or purchased from the owner thereof, as lands "held therewith" or as "the other lands" of such owner. The Act says nothing about their being held along with the lands taken or purchased for one and the same purpose, nor does it require that they should be in contact with those lands. Apparently it is enough if both parcels of land are held by one and the same owner, and if the unity of ownership conduces to the advantage or protection of the property as one holding.

Lord Fitzgerald concurred in these views.

I have no doubt that the possession and control of

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the lots which have been expropriated gave an enhanced value to the claimant's other lots in the building subdivision. The taking of the expropriated lots and putting them to the use proposed will depreciate the value of the rest. Inasmuch as it gave him power to control the use to be made of his expropriated lots the claimants' ownership of them

> conduced to the advantage or protection of the property as one holding.

Had he retained the ownership of the lots taken, it would have enabled him to prevent such a use being made of them as would tend to depreciate the value of his remaining property.

The finding of the arbitrators that the 49 lots would in fact be "injuriously affected" and the quantum of their assessment are unchallenged. Upon this branch the appeal, in my opinion, fails.

On the other question I am, with great respect, of the opinion that the Appellate Division had no jurisdiction to make the order for a reference back. Meredith, J., so held in *Re MacAlpine and Lake Erie and Detroit River Railway Co.*(1), and his decision was approved by the Court of Appeal in *Re Davies and James Bay Railway Co.*(2), at page 568. It is true that in the recent case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(3), the Judicial Committee ordered a reference back as to part of the subject of an arbitration to which the provisions of the Dominion "Railway Act" applied. But, so far as can be ascertained from the report of that case, the question of jurisdiction does not appear to have been raised

(1) 3 Ont. L.R. 230. (2) 28 Ont. L.R. 544.
(3) [1914] A.C. 569.

before their Lordships and their attention was not directed to the grounds on which the Ontario decisions above referred to are based or to the difficulties presented by the provisions of the statute to which they call attention. Apparently in the present case the decision of the Ontario Court of Appeal in *Re Davies and the James Bay Railway Co.*(1) was not brought to the attention of the Appellate Division.

Although counsel for the respondent asserts in his factum that when before the Appellate Division counsel for both parties agreed that a reference back in respect of the lots mentioned in the third paragraph of the order of that court would be more desirable than to have the court deal with the matter on the evidence, this is denied on behalf of the appellants. At all events nothing appears to have occurred which would be tantamount to a new submission, as an agreement of counsel was deemed to be in *Demorest* v. *Grand Junction Railway Co.*(2). With respect, I am of the opinion that the part of the judgment in appeal which directs a reference back cannot be supported.

On the evidence, giving due weight to the views of the Appellate Division, so far as they can be gathered from an order such as they have made, I find no sufficient reason for interfering with the unanimous conclusion of the arbitrators that the lots owned by the claimant other than those enumerated in the award of the majority would not be injuriously affected by the construction and operation of the railway.

But the arbitrators have expressly excluded from their award any allowance for damage which would

(1) 28 Ont. L.R. 544.

(2) 10 O.R. 515.

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be caused by vibration of trains and by noise and smoke. The $4,800 assessed by them as damages were confined to injury to the lands from other causes. I agree with the declaration in the order of the Appellate Division that the claimant

> is entitled to recover all damages sustained by him to the said property by reason of the construction of the said railway,

which, I assume, was intended to include damages to arise from the operation of the railway as well.

So far as the lands of the claimant were "held with" the lands expropriated he is entitled to damages arising from "operation" as well as from "construction." These would include damages for injury caused by vibration, noise and smoke which the arbitrators excluded. For further depreciation in the value of the lots enumerated in the arbitrators' report due to smoke, noise and vibration, a further sum should therefore be awarded. It is, however, unnecessary to determine the amount of this allowance, since the majority of the court is of the opinion that none should be made.

BRODEUR J.—This is a question of compensation under the "Railway Act."

The respondent has divided a piece of land a few years ago in town lots at Sudbury. The line of railway of the company appellant is passing through that piece of land and has taken over for its right of way some of those lots. Some others have not been touched at all, though they may have been injuriously affected.

There is no dispute as to the value of the land which has been taken by the company; but we have to decide whether the Appellate Division of the Supreme

Court of Ontario was right in awarding damages for the lots which were not touched or severed by the railway.

It is a jurisprudence very well established that in order to be entitled to compensation the claimant must shew that some of the land injured has been taken. *In re Devlin and Hamilton and Lake Erie Railway Co.*(1).

If the property on which the railway passes has not been divided in town lots, the respondent could be entitled to damages because then his land would have been severed.

But as it is divided in town lots, as the severance has taken place through the action of the respondent himself, those lots cannot be treated any more as one parcel of land; but they must be considered as separate and independent lots and it is only in case where part of one of those lots has been taken that the balance of the lot could give rise to a claim for compensation.

Hammersmith Railway Co. v. *Brand*(2).

Now the respondent claims that he is deprived of the easy access he had to the street and that upon that ground he should be compensated.

The crossing or blocking of a street is not a ground, on the part of abutting owners, for claiming damages. That question came up in the case of *Grand Trunk Pacific Railway Co.* v. *Fort William*(3), and it was held that a provision for compensation to those owners embodied in the Board of Railway Commissioners' order was illegal and should be set aside.

(1) 40 U.C.Q.B. 160. (2) L.R. 4 H.L. 171.
(3) [1912] A.C. 224.

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Brodeur J.

As a result of the judgment in the *Fort William Case*(1), the "Railway Act" was amended so as to enable the adjacent abutting land-owners to receive compensation when the railway passes along or across a street. This amendment is section 6, 1 & 2 George V., ch. 22, which reads as follows:—

> Subject to the company making such compensation to adjacent or abutting landowners as the Board deems proper, the railway of the company may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board.

Supposing that in this case the respondent would be entitled to compensation as to the use of the street in question, it would be for the Board to determine and that question of compensation then was not within the powers of the arbitrators.

The judgment of the Appellate Division of the Supreme Court of Ontario awarding damages for those lots which had not been taken, but which were injuriously affected and ordering a reference as to some of the lots about which the arbitrators did not grant any damages is not well founded.

The appeal then should be allowed with costs of this court and of the court below and the award of the majority of the arbitrators should be confirmed.

Appeal allowed with costs.

Solicitors for the appellants: *Armour & Mickle.*

Solicitor for the respondent: *Joseph Fowler.*

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(1) [1912] A.C. 224.

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A. C. NORFOLK SUING ON BEHALF OF HIMSELF AND ALL OTHER RATEPAYERS OF THE TOWN OF BRAMPTON (PLAINTIFF) ..... APPELLANT;

*June 4.
*Oct. 13.

AND

J. G. ROBERTS AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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

Municipal corporation—Undertaking with ratepayer—Non-collection of taxes—Discretion.

Held, per Idington and Anglin JJ.—Where there is no statutory prohibition thereof it is not illegal for a municipality, in the *bonâ fide* exercise of its discretion, and to carry out an undertaking with a ratepayer, to refrain from collecting the taxes levied on the latter's property over and above a fixed annual sum stipulated for.

Held, per Duff and Brodeur JJ.—A ratepayer has no status *in curiâ* to compel the corporation to collect the balance of taxes so allowed to remain unpaid each year.

Judgment of the Appellate Division (28 Ont. L.R. 593) affirmed.

APPEAL from a decision of an Appellate Division of the Supreme Court of Ontario (1), reversing the judgment for the plaintiff at the trial and dismissing his action.

The action was brought by the appellant on behalf of all ratepayers of the Town of Brampton to compel

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

(1) 28 Ont. L.R. 593.

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the municipality to collect arrears of taxes from the Dale estate, florists in said town. The facts are stated by Mr. Justice Latchford in giving judgment at the trial as follows:—

The plaintiff adopted the suggestion of the Divisional Court, on appeal from the judgment of Sutherland J., and elected to add, and did add, the Municipal Corporation of the Town of Brampton as defendants. The case thereupon came before me for trial upon the issue whether the municipality rightly or wrongly abstained from collecting certain arrears of water rates which the plaintiff contends it was their duty to have collected from the defendants, the executors of the Dale estate, during the period between 1903 and 1910, when the water system of the town passed into the control of commissioners elected under the "Municipal Water Works Act."

On May 30th, 1901, the executor of the Dale estate, as a result of a conference with a committee of the municipal council, made a proposition in writing offering fifty dollars per year for water service instead of the thirty-two dollars then paid, if the town corporation would at their own expense place a four-inch main and hydrant in Vodden Street, and would agree that the rate of fifty dollars would not be exceeded in the future, even should the premises be extended.

An alternative proposition was also submitted, as follows:—

"On the understanding that the present rate of $32 be increased to $40 per year, and will not be increased now nor in the future, we will do the excavating and filling in and furnish the necessary four-inch iron pipe; you to make the connection, lay the pipe, fur-

nish the hydrant and all else necessary excepting the pipe."

The Water, Fire and Light Committee of the corporation considered the letter, and on June 3rd, reported to the council in favour of the adoption of the second proposition, excepting the clause "nor in the future"; and on the same day the council adopted the report as amended.

The municipality thus agreed that in consideration of the carrying out by the estate of the proposed work, the rates be not now increased above forty dollars a year.

It is not suggested that this was not a proper contract on the part of the town under the law as it stood at the time.

The Dale estate expended nearly one thousand dollars in putting in the main on Vodden Street and other mains, some or all of which were afterwards tapped by the corporation to supply water to householders. The estate also paid the forty dollars a year to the town.

By-law No. 272 came into effect on September 30th, 1903, and imposed a heavy burden upon greenhouses. The fame which Mr. Dale had won for the roses and other commercial flowers produced at Brampton continued to increase after his death under the capable management of the business by his executor, Mr. T. W. Duggan, and it became necessary greatly to extend the area under glass. When Mr. Duggan learned that the town had in contemplation the imposition of the rates subsequently fixed by By-law No. 272, $11.12 for the first thousand feet of glass and $1.25 for each additional thousand feet—he wrote

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reviewing the arrangement of 1901, pointing out the importance, growth and advantages of the industry, and asking for a fixed rate. He suggested at the same time that if any legal difficulties prevented such an arrangement the matter should be submitted to the ratepayers.

A legal difficulty had arisen owing to the definition of the word "bonus" by the "Consolidated Municipal Act of 1903," which came into force on the 27th of June. The supplying of water at rates less than those charged to other persons in the municipality was declared to be included in the word "bonus," section 591(*a*), sub-section(*e*); and the granting of a bonus was prohibited unless the assent of the electors should be obtained. Section 591, sub-section (12*a*).

There were other greenhouses in Brampton besides those of the Dale estate; and all became subject to the rate imposed by the by-law of the 30th September. By a resolution of the municipal council passed on December 21st, 1903, the collector of water rates was instructed "not to collect from the Dale estate in excess of fifty dollars for the past quarter (except such sums as may be charged for private dwellings) and that the balance of the charge for the current quarter, and future charges, be deferred so as to conform to the by-law passed by this council."

The charge on the greenhouses of the Dale estate, at the rates imposed by the by-law for the quarter referred to, was $111.22, based on an area of 348,000 feet.

How the matter stood in the following year is well stated in a letter which Mr. Duggan addressed to the council on November 7th, 1904.

"You will remember," he says, "that the matter of our water rate was up last year. Up to that time we had been paying forty dollars per annum in terms of a verbal agreement made with the council when our large extensions were being entered into. After the new by-law of last year our premises were rated at a very much higher figure. The matter was subsequently inquired into by the council, and a recommendation was made by the committee of an increase from forty dollars to two hundred dollars per annum, net, in addition to the rating for the house. I consented to this compromise; but owing to some technicalities which were in the way, the council were unable to make the arrangement for more than the balance of the year ending December, 1903. It was intended, however, that no more than that rate should be charged us, but I do not think that the necessary means have been taken to put it in proper shape. Up to the last quarter of this year we were asked to pay only the fifty dollars per quarter, as arranged for; but for the last quarter we have had a much larger bill rendered us, with an item for alleged arrears, which, of course, practically do not exist, but we presume that they appear because of the matter not having been properly disposed of."

The letter closed with a request for an interview. Nothing definite appears to have resulted from the interview, if indeed it was had. But it is clear that no effort was for some years made to collect more than the fifty dollars a quarter, or to dispose of the arrears that had been accumulating upon the collector's roll.

On April 3rd, 1906, the council adopted a report of the Water, Fire and Light Committee instructing

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the collector "not to collect any arrears over fifty dollars per quarter from the Dale estate for water used in their greenhouses"; and instructing the clerk "not to place any amount on the rate book in excess of fifty dollars per quarter."

Between 1903 and 1906 additional greenhouses had been erected, but no change in the area of glass was recorded in the collector's books.

At a meeting of the council held on April 2nd, 1906, a report of the Water, Fire and Light Committee was adopted, recommending that the collector be instructed not to collect any arrears over fifty dollars a quarter from the Dale estate for water used in the greenhouses, and that the clerk be instructed not to place any amount on the rate book in excess of $50 a quarter. Thereafter, up to the end of 1909, a charge of but fifty dollars per quarter was entered and collected. The area of the glass assessable was continued upon the roll at 348,000 feet, though in fact new greenhouses had been added every year.

On these facts His Lordship held that the municipality was entitled to collect from the Dale estate all the taxes assessable in the past exceeding the amounts paid each year and ordered judgment to be entered accordingly. His judgment was reversed by the Appellate Division and the appellant's action dismissed.

W. N. Tilley for the appellant. The municipal council is trustee for the town and subject to the jurisdiction of the court. *Paterson* v. *Bowes*(1); *City of Toronto* v. *Bowes*(2).

(1) 4 Gr. 170.

(2) 4 Gr. 489; 6 Gr. 1; 11 Moo. P.C. 463.

The water rates imposed on the consumers must be uniform. *Attorney-General for Canada* v. *City of Toronto*(1); *City of Hamilton* v. *Hamilton Brewing Association*(2), and a discriminatory by-law passed by the council would be quashed. *In re Bate and City of Ottawa*(3); *In re Morton and City of St. Thomas* (4); *In re Campbell and Village of Lanark*(5).

Armour K.C. for the respondents. The action of the appellant is not maintainable. *Sharp v. San Paullo Railway Co.*(6); *Slattery* v. *Naylor*(7); *Parsons* v. *City of London*(8).

In the circumstances the measure of relief could be only a declaration for the future. See *Pringle* v. *City of Stratford*(9).

THE CHIEF JUSTICE.—I agree with Mr. Justice Idington.

IDINGTON J.—The appellant suing on behalf of himself and all other ratepayers of the Town of Brampton obtained as result of the trial a declaratory judgment that two of the respondents, executors of the Dale estate, were and are indebted to the corporation of the Town of Brampton, another respondent, in the sum of $1,591.72 for water rates which the town corporation was entitled to collect but wrongfully abstained from collecting. This judgment has been reversed by the Court of Appeal and hence this appeal.

(1) 23 Can. S.C.R. 514.
(2) 38 Can. S.C.R. 239.
(3) 23 U.C.C.P. 32.
(4) 6 Ont. App. R. 323.
(5) 20 Ont. App. R. 372.
(6) 8 Ch. App. 597.
(7) 13 App. Cas. 446.
(8) 25 Ont. L.R. 172.
(9) 20 Ont. L.R. 246, at p. 260.

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The executors of the Dale estate had applied in 1901 to the council of said town, possessed of a water-works system, to extend its mains so as to give the property of the estate a more efficient service. The council could not see its way to so extending its mains at the expense of the municipality and accepted the following alternative proposition:—

> On the understanding that the present rate of $32 be increased to $40 per year, and will not be increased now nor in the future, we will do the excavating and filling in and furnish the necessary four-inch iron pipe; you to make the connection, lay the pipe, furnish the hydrant and all else necessary excepting the pipe.

after striking out the words "nor in the future" therein.

The executors of the estate acting upon the faith of this, expended at least a thousand dollars in extension of said mains upon the street of the town referred to in the proposition, and the town council, I infer, collected the rate so fixed therein, for a year or more.

But in September, 1903, a by-law was passed by the council fixing a general rate which if considered operative as against the Dale estate would have wrought a gross injustice.

The legislation of that year had prohibited exemption or commutation of water rates by way of bonus. And the parties concerned seemed to imagine there was no other way out of the difficulty than to agree to collect a rate of fifty dollars a quarter and leave the balance uncollected.

Why this sort of method was resorted to would puzzle any one inexperienced in the ways of municipal management. On the whole it is well done, but on too many occasions lapses not unlike this will happen.

The main on Vodden Street on which the estate

had expended the thousand dollars, had no doubt become the property of the town and there was nothing in the amendment to the law restricting bonus concessions, which prevented the council from doing justice by compensating the estate for this expenditure by way of an allowance in its rates.

Of course it could not have gone beyond that discharge of what was a plain obvious duty of common honesty in the premises; and under pretext thereof fix a permanent rate.

The striking out of the words "nor in the future" in the original proposition raised no barrier to this being done, but only left the matter in a loose, unbusinesslike condition to be dealt with by future councils of the town.

The situation thus created has continued for years, but nothing so far as I can see has intervened to prevent the council from doing in substance that which that body could have done and, if I may be permitted to say so, ought to have done in the first place.

I cannot think that the law ever contemplated that the council of a municipality is bound to take a dishonest advantage of any one in its dealings.

And such certainly would be the effect of its enforcing the judgment pronounced at the trial.

The rates uncollected would not, so far as I can see, if interest is to be allowed on the original expenditure by the estate, exceed the money so expended.

At all events a compromise of that kind is clearly within the honest judgment that the council might properly exercise without exceeding its powers.

If the matter had been in substance a resort to a dishonest subterfuge to defeat the provisions of the

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law relative to giving of a bonus, then I assume the courts would be bound in a properly constituted suit to enforce the law.

This case does not give occasion for a consideration of the delimitation of the powers of the court in this regard at the suit of a ratepayer.

However, I am disposed to think that if the ratepayers were more alert in asserting their undoubted rights and invoking the aid of the court to keep councils within the path of law and duty, we would perhaps have better municipal government.

It seems to me that the proceedings of the successive councils of Brampton acting in this matter have conducted their business in such an irregular manner as to invite litigation, and if it were not that the settled jurisprudence of this court forbids interference in mere matters of costs, I should have felt disposed to modify in that regard the judgment appealed from.

The appeal must be dismissed with costs.

DUFF J.—I concur in the view of the Court of Appeal that the appellant had no status to maintain the action. I think the appeal should be dismissed with costs.

ANGLIN J.—If the plaintiff had succeeded in establishing that what the municipal council did was within the "bonus" prohibitions of the "Municipal Act" and therefore an illegal disposition or abandonment of the property of the municipality, as a ratepayer he might have successfully maintained his action. But it is reasonably clear that nothing of that kind has

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been attempted. The council of the defendant corporation merely recognized a moral, if not a legal, obligation incurred towards its co-defendants by its predecessors, and, in consideration of those co-defendants having given to the municipality what it deemed substantially of equivalent value, determined, acting within its discretion, to adhere to an understanding with them for a commutation of water rates somewhat indefinite, but deemed by it sufficient to impose an obligation. Over the exercise of such discretion by a municipal corporation the courts do not assert control or right of supervision.

Neither in the general "Municipal Act" nor in the special Act (41 Vict. ch. 26 (Ont.)) do I find anything which renders the action of the municipal corporation illegal or *ultra vires*.

The Statute of Limitations probably also affords a defence to so much of the plaintiff's claim as represents arrears due more than six years prior to the addition of the municipal corporation as a party after the judgment of the Divisional Court rendered in November, 1911.

As to the alleged arrears of $190.20 for the year 1909, it would appear from the account rendered by the municipal corporation to the Dale estate (exhibit 15), that on the 30th of October, 1909, $53.34 was accepted as payment in full of water rates for that year presumably in pursuance of the understanding above referred to, and that there were no such arrears.

I would dismiss the appeal with costs.

BRODEUR J.—It is one of those actions which could be instituted by the corporation and the corporation

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alone, and if it is found that the council does not properly exercise its functions and fulfil its duties, it is for the ratepayers to make a change and put in persons who will fulfil their duties according to what the majority of the ratepayers think best.

The judgment of the court below should be confirmed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *B. F. Justin.*

Solicitor for the respondents: *T. J. Blain.*

FRANCIS HYDE (PLAINTIFF) ..... APPELLANT;

AND

GEORGE M. WEBSTER (DEFENDANT) ..... RESPONDENT.

AND

LA COMMUNAUTÉ DES SŒURS DE LA CHARITÉ DE L'HÔPITAL GÉNÉRAL ..... MIS-EN-CAUSE.

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*May 15, 18.
*Oct. 13.

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

Partnership—Lease—Scope of authority—Resiliation—Form of action —Appropriate relief—Pleading—Practice.

A partnership, consisting of H. and W., which was to expire by efflux-ion of time on 31st December, 1912, held a lease of warehouse property in Montreal, of which the term expired on the 30th April, 1913. During the absence of H., in September, 1912, and without authority from him to do so, W. obtained a renewal of the lease for three years, from the 1st of May then following, which was repudiated by H. on his return to Montreal. In action by H. to have the renewal lease declared null and void:—

Held, (the Chief Justice and Brodeur J. dissenting), that the plaintiff had a sufficient interest to enable him to maintain the action and obtain a declaration that the lease was not binding upon the partnership or upon himself as a member of the firm.

Per Fitzpatrick C.J. dissenting.—In the Province of Quebec distinct and consistent pleading is essential and, as the plaintiff did not bring his action to obtain relief from his obligation under the renewal lease, but merely to have that lease declared null and void, he could not, in the action as brought, have a declaration that the lease was not binding upon him. *Forbes* v. *Atkinson* (Pyke K.B. 40) referred to.

Per Brodeur J. dissenting.—As the partnership was benefited by the renewal of the lease it should be declared valid and binding on all the partners.

Judgment appealed against (Q.R. 23 K.B. 1) reversed.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of Lafontaine J., in the Superior Court, District of Montreal, by which the plaintiff's action was dismissed with costs.

The action was brought by the appellant, in the circumstances mentioned in the head-note, against the respondent to have the renewal lease declared null and void and set aside on the ground that it had been obtained clandestinely and without authority, and the *mis-en-cause* was impleaded for the purpose of hearing judgment rendered to that effect. At the trial, in the Superior Court, District of Montreal, Mr. Justice Lafontaine dismissed the action, on the following grounds:—

"That, as the partnership between plaintiff and defendant, according to their agreement, was to expire on the 31st of December, 1912, and as the lease of the premises occupied by the firm was to expire on the 1st of May, 1913, only so that a sufficient time was left to the partnership after its expiration, up to the expiration of said lease, for the liquidation of the affairs of the partnership, without the necessity of a renewal of said lease the defendant had no authority in the absence of his partner, and without having consulted him, to enter into negotiations, with the landlord, in the month of September, and conclude with him a renewal of the lease of the premises occupied by the firm, on behalf of the firm for a period of three years beginning on the 1st of May, 1913, viz.: four months after the dissolution of the partnership;

"That the lease made by the defendant, although

(1) Q.R. 23 K.B. 1.

in the name and on behalf of the firm, but without authority from plaintiff, could not and does not bind the partnership, unless plaintiff chooses to ratify the act of his partner and approves of it, and that the plaintiff, on the contrary, having repudiated the conduct of his partner, said lease *quoad* plaintiff, is *res inter alios acta,* and consequently does not effect him (arts. 1855 and 1727 C.C.);

"That plaintiff not being bound by said lease, the question of its existence and its validity cannot be raised by him, but can arise only between the parties to the deed, viz., the defendant and the *mis-en-cause,* that plaintiff has no interest to interfere with the agreement between them and ask that a lease which does not concern or effect him, be set aside, especially, when the landlord does not try to enforce said lease against plaintiff, and when defendant is ready to assume alone all its responsibility and to guarantee the plaintiff against any liability;

"That although it appears by the evidence that plaintiff, prior to defendant, having entered into a conversation with the *mis-en-cause's* agent to have a lease of the premises occupied by the firm in his own name, and for himself alone, that all that defendant could obtain was a lease on behalf of the firm only while lease would have been granted to plaintiff for himself alone, that if the present lease was not blocking the way, plaintiff could still obtain from the *mis-en-cause* a lease in his own name, as shewn by the correspondence filed in the record, that such a lease would confer on plaintiff a material benefit of a great commercial value, in permitting plaintiff to carry on after the dissolution of the partnership, in the pre-

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mises occupied by the firm, the same business that was done by the firm, this advantage plaintiff could have obtained and can still obtain, does not contsitute an interest in the lease, in the sense of the law, giving plaintiff the right to complain of it and that it be set aside;

"That no person can bring a suit at law, unless he has an interest therein (art. 77 C. Pr. C.);

"That during the existence of the partnership it was not allowed for any of the partners to secure for himself a renewal of a lease of the partnership property and that a renewal could be obtained only the way it was done, viz., for and on behalf of the firm."

By the judgment now appealed from the judgment in the Superior Court was affirmed.

The questions in issue on the appeal are stated in the judgments now reported.

Lafleur K.C. for the appellant.

Mignault K.C. and *E. G. Place* for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an action to set aside a lease. The real point in issue is, in my opinion, largely one of practice and procedure; and, in that view, it is important, as we have the concurrent judgments of both courts below, to carefully consider the relief which the plaintiff prayed for. The conclusions of the declaration are as follows:—

Wherefore the plaintiff brings suit and prays that *the said agreement* purporting to be a lease between the *defendant* acting on behalf of the firm of Hyde and Webster, and the *mis-en-cause*, be *declared null, void and of no effect, to all intents and purposes que de droit*, that the *mis-en-cause* be called in to hear the said judgment rendered to the same end, the plaintiff reserving his right to take such further action against the defendant as he may be advised in damages or otherwise.

This prayer of plaintiff's declaration by which he is bound contains a clear unambiguous statement of his position in this action. He asks that the lease entered into under the circumstances hereinafter set forth should be declared null for all purposes and there is no conclusion for a declaration that the lease is not binding upon the partnership or upon the plaintiff personally.

It is a settled rule of the Quebec law that the court cannot adjudicate beyond the conclusions of the plaintiff's declaration (art. 113 C.P.Q.) and no amendment can be allowed even before judgment by the trial court which changes the nature of the demand. (Art. 522 C.P.Q.)

The parties to the action (plaintiff and defendant) were partners under the firm name of Hyde & Webster and as such occupied under a lease certain premises for the purposes of their business. During the existence of that partnership and before the expiration of the then current lease, the defendant obtained in the name of the firm a renewal of the lease for a further period of three years from the date of its expiration.

The partnership expired by lapse of time before the new lease began to run and the defendant remained in possession of the leased premises. The plaintiff, as I have just said, brings this action not to be relieved of his obligations under the renewal lease, as was his right, but to have that lease declared "void, null and of no effect for all purposes," on the ground that the defendant without his consent took in the name of the firm a lease which would begin to run after the expiration of the partnership.

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There is no doubt that the plaintiff was not bound to accept the benefit of the new lease and could not without his consent be made subject to its provisions. This is admitted by the defendant in the letter written by his attorneys before the institution of the present proceedings. But the plaintiff could not object to the defendant continuing in the possession of the premises in his own individual right after the expiration of the partnership if the landlord was content to keep him as a tenant. That was a matter which concerned the landlord and the defendant exclusively and the plaintiff, relieved of all liability the moment he gave notice to the landlord that he repudiated the action of his partner, was without interest to interfere. The landlord only could complain and he is content to allow the defendant to remain in possession of the premises. The defendant was thereafter solely bound to the due fulfilment of all the obligations of the new lease when the plaintiff repudiated his authority to enter into it (art. 1855 C.C.). Planiol in his commentary on the corresponding article of the Code Napoleon, art. 1764, states the law with his usual lucidity and accuracy in these words:—

L'engagement est pris au nom de la société par un seul des associés. Cet engagement ne lie pas les autres à moins qu'ils ne lui aient donné pouvoir à cet effet.

In view of what I understand is the opinion of the majority of this court I deem it necessary to emphasize the fact that the defendant does not in his pleadings or in his factum say that the lease is binding on the late firm or on his partner the plaintiff appellant, and no such contention was put forward by his counsel during the argument before this court. His position throughout has been that his partner was free to

accept or decline the benefit of the lease and that in the latter alternative he, the defendant, was entitled to remain in possession of the premises under the renewal.

I venture to insist upon the nature of this action because apparently some misconception exists as to it.

In the Quebec system of procedure, distinct and consistent pleading is held to be essential to the right administration of justice. As far back as 1810, Sewell C.J. in *Forbes* v. *Atkinson*(1) found it necessary to draw the attention of the bar to the difference in this respect between the French and English systems. The Chief Justice said:—

> In the law of England it is a general rule in pleading that a mere prayer for judgment without pointing out the appropriate remedy is sufficient, and that, the facts being shewn, the court, *ex officio*, is bound to pronounce the proper judgment. But the reverse of this rule is the principle of the law in Canada. With us the conclusions are held to be essential to the proceedings, and must contain, *à peine de nullité*, all that the judgment of the court must comprehend. For although the conclusions may by the court be allowed or rejected *in toto*, or modified or allowed in part, and rejected in part, *still what is omitted in the conclusions cannot be supplied* by the court, not even if it appears in substance in the body, or libel, of the pleading.

The rule in *Forbes* v. *Atkinson*(1) is still followed in Quebec. See *Préfontaine* v. *Cie de Publication de La Patrie*(2).

It did not occur to any one, in the Quebec court to ask for leave to amend because no effective amendment could be made except by substituting one form of remedy for another which obviously could not be permitted.

This case affords an apt illustration of the necessity of adhering to the rule that this court is bound by the issues raised in the courts below. If this action

(1) Pyke K.B. 40.

(2) 6 Que. P.R. 183.

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had been brought to obtain relief of his obligation under the lease, different issues of fact would have been raised, the plaintiff would have been met by the offer of the defendant's solicitors to relieve him of all obligation under the lease to which I have already referred and the issue would have been limited to a mere question of costs.

As a result of this judgment the plaintiff gets what he did not ask for and the defendant is mulcted in heavy costs on an issue which is not raised by the pleadings.

I agree entirely with the two courts below and am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—The appellant and respondent were partners in a firm holding a lease running three months beyond the terms of the existing partnership.

The respondent, without authority, secured in the name of the partnership a renewal of the lease for three years.

It is admitted neither could by the law of Quebec acquire such an advantage to himself as to have acquired such an embarrassing renewal in his own interest.

When the renewal secured in the name of the firm came to the knowledge of appellant be made a protest against such dealing and by this suit sought to have it set aside. The lessors stand neutral and make no objection to the rescission.

It is, of course, admitted that under the circumstances they are entitled to hold respondent liable to them and to indemnify them against loss for his unauthorized conduct of the business in hand.

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It is said appellant has no interest such as to entitle him to maintain this suit.

It is pretended, notwithstanding that alleged want of interest, that to put himself in a position to obtain a new lease or deal with the lessors therefor, he must be held bound to treat with this quondam partner on the basis of said lease being a valid renewal for such purpose.

I am, with deference, unable to assent to such impotent conclusions as existing in law. The interest seems to me self-evident. In applying the law to the practical affairs of life we must see that the consequence of our reading and interpretation of the law is not such as to defeat its very purpose by means of some illusory dialectical skill in the use of words.

I, therefore, submit that the appeal should be allowed with costs without prejudice to the lessors' right to insist, if necessary, upon respondent's liability to fully indemnify them.

This latter it is quite clear, in view of the correspondence had with appellant, is a matter of no consequence in this case.

DUFF J.—The respondent (without authority as regards the appellant) professed in the name and on behalf of the appellant (as well as on his own behalf) to execute the lease in question. I think the appellant is entitled to come into court to obtain a declaration that the instrument produced by this wrongful exercise of pretended authority is not binding on him.

I think the appeal should be allowed with costs in all courts.

ANGLIN J.—The appellant and the respondent were engaged in business in the City of Montreal as

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partners. The partnership terminated by effluxion of time on the 31st December, 1912. The business was carried on in premises No. 43 Common Street, leased from the Grey Nuns, the lease of which expired on the 30th April, 1913. In September, 1912, in the absence of the plaintiff Hyde, the defendant, Webster, approached St. Cyr, the agent for the Grey Nuns, seeking a renewal of the lease in his own name. Hyde had already spoken to the agent with a view to obtaining a lease for himself on the expiration of the partnership. When Webster saw St. Cyr the latter refused to give him a lease in his own name, but offered to give him a three years' lease from the 1st of May, 1913, for the partnership. This Webster agreed to take. A formal agreement which bears date the 20th September, 1912, was accordingly prepared and executed.

On returning to Montreal, Hyde repudiated this action of his partner, Webster, on the ground that he had acted without authority, and he brought the present action on the 7th November, 1912. In the conclusion of his declaration he prays

> that the said agreement purporting to be a lease between the defendant acting on behalf of the firm of Hyde & Webster and the *mis-en-cause* be declared null and void and of no effect to all intents and purposes *que de droit* that the *mis-en-cause* be called in to hear said judgment rendered to the same end, etc.

The Superior Court dismissed the action holding that the defendant had not authority to make the lease in question and that it did not bind the plaintiff or the partnership unless the plaintiff should choose to ratify and approve of it, and that, having repudiated the conduct of his partner, the lease *quoad* the plaintiff is *res inter alios acta* and consequently does not affect him and that he, therefore, has no interest to

maintain this action. This judgment was confirmed on appeal, Lavergne and Gervais JJ. dissenting.

I am, with respect, of the opinion that the plaintiff is entitled to the relief which he claims in his declaration, at least in part. Article 1855 C.C. which appears to govern the rights of the parties is as follows:—

1855. A stipulation that the obligation is contracted for the partnership binds only the party contracting when he acts without the authority, express or implied, of his co-partners, unless the partnership is benefited by his act, in which case all the partners are bound.

In the French version the concluding clause of the article reads as follows:—

A moins que la société n'ait profité de tel acte, et dans ce cas tous les associés en sont tenus.

In the corresponding article of the Code Napoléon, No. 1684, we find this similar provision:—

À moins que la chose n'ait tourné au profit de la société.

From the English version it might be deduced that the partnership would be bound by any advantageous contract made by one of the partners on its behalf; but, from the French version, and more particularly in the form which the excepting clause takes in the Code Napoléon, it seems reasonably clear that an unauthorized contract made in its behalf will bind the partnership, in the absence of ratification, only if it has in fact derived profit from it. Laurent, commenting on the article of the Code Napoléon, in vol. 26 at page 353, says:—

Si cependant il agit et que l'acte soit profitable à la société, la loi valide l'acte, mais seulement dans une certaine mesure, en tant que la société a profité; elle donne donc action à l'associé; mais ce n'est pas l'action du mandat, c'est une action moins favorable, que l'on appelle l'action *de in rem verso;* nous en avons traité au chapitre des *quasi-contrats;* c'est une espèce de gestion d'affaires, donc un quasi contrat; il en nait une obligation fondée sur l'équité. L'associé

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a agi au nom de la société sans pouvoir, il ne l'oblige pas; mais l'équité s'oppose à ce que la société s'enrichisse à ses dépens; la loi la déclare obligée en tant qu'elle s'est enrichie.

In the present case it is clear that the lease was made for the partnership, and it has been properly found that, in making it, Webster acted without authority, express or implied, from his co-partner. It is also clear that the lease is upon advantageous terms and would be of value to the partnership if its business should be continued and is an asset which can be profitably disposed of for the benefit of the partnership to one or other of the partners. On the other hand it has not been shewn that the partnership had actually derived any benefit from the lease at the time the action was instituted, *i.e.*, nearly two months before the partnership expired and five months before the lease in question would become operative. In his plea the defendant says:—

The extension of the said lease creates a valuable asset of the firm of Hyde & Webster.

Having regard to the following considerations:—

(1) That the defendant in professed exercise of his authority as a partner of the plaintiff undertook to bind the partnership by an instrument in writing evidencing a lease of real property;

(2) That such a lease subjects the lessee to obligations towards his lessor;

(3) That, although made without authority, the lease might become binding on the partnership by ratification, express or tacit (art. 1727 C.C.);

(4) That, although made without authority, the lease may be binding on the partners to the extent to which the partnership is benefited by it:—

the plaintiff, in my opinion, had a sufficient interest

to enable him to maintain this action for a declaration that the lease is not binding upon the partnership. That is in substance the relief he asks.

We are not at present concerned as to the ultimate consequences of such a judgment — whether it will leave the lease binding upon the defendant or will open the door for the granting by the landlords of a new lease to either the plaintiff or the defendant. In his declaration the plaintiff states that

> the *mis-en-cause* through their authorized agents have declared their willingness to lease the premises to the plaintiff alone from and after the 1st of May, 1913.

This allegation is not admitted in the plea of the defendant. The *mis-en-cause* are not made parties to the action for any other purpose than that they may be "called in to hear the judgment rendered." They have not pleaded or been represented in the action and there is nothing before us to shew whether they are or are not willing that the lease, if binding only on the defendant, Webster, should stand as a lease to him individually. Without their assent Webster cannot hold them bound to accept him as sole tenant. Neither is it clear that if the landlords should decline to accept Webster as their tenant and should execute a lease in favour of Hyde, he would not be bound to account for any profit made by him out of such lease on the ground that he had acquired it by reason of his having been a member of the firm of Hyde & Webster. That question is not before us for determination, and has not been tried.

Upon the findings that Webster made the lease without the authority, express or implied, of his partner Hyde, and that Hyde has not ratified, but on the contrary, has repudiated his act, and it not having

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been shewn that the partnership had profited (*a profité*) by the lease at the time this action was brought, I am of opinion that the plaintiff was entitled to have it declared that the lease was not binding on the firm of Hyde & Webster, or upon himself as a member of that firm. Beyond that nothing should or can be determined in this action.

I would, for these reasons, with respect, allow this appeal with costs throughout.

BRODEUR J. (dissenting).—The appellant and the respondent were carrying on business in Montreal in partnership on premises which they had leased from the *mis-en-cause, L'hôpital-général.* The contract of partnership was to expire on the 1st January, 1913. The lease which they had was to expire on May 1st, 1913.

In the month of August or September, 1912, the appellant, Hyde, went to see the agent of the lessor with a view to securing the premises for himself alone after the expiration of the partnership agreement. He did not, however, communicate his intention to his partner and nothing was said by Hyde to his partner about his intent to dissolve the partnership.

Mr. Hyde left in the month of September to take his holidays; and, during his absence, a large quantity of building materials arrived for the firm. As it was a matter of importance that these goods should not have to be removed after the 1st of May, 1913, Mr. Webster saw St. Cyr, the agent for the owner, and secured in the name of the firm a renewal of the lease for three years after the 1st of May, 1913.

The lease was then made to the firm of Hyde & Webster.

When Mr. Hyde came back, he protested against the lease, and wrote to that effect to the *mis-en-cause*, the lessor; at the same time he got from the lessor a promise that a lease should be made in his favour, in case the lease in favour of the partnership should be resiliated.

He then took the present action to set aside the lease, claiming that his partner was not authorized to pass it and had exceeded his authority.

The lessors were *mis-en-cause* and did not resist the action, shewing their willingness to see the lease cancelled.

The defendant, Webster, claimed by his plea that the lease should stand.

The lease was proved to be advantageous to the partnership.

I would have been inclined to think that the partner, Webster, acted within the sphere of his authority in making such a renewal of the lease, because he was doing that for the purpose of securing a safe place for the warehousing of the goods of the company. Those goods could not be consumed during the few months which were left for the existence of the partnership. However, they had been purchased by the partners for the benefit of the partnership and it was the duty of the partner who had the management of the affairs, in the absence of his co-partner, to look after the storing of these goods. But it is not necessary to decide this point in the present case.

If the partnership is benefited by the renewal of the lease then it should be declared valid (art. 1855 C.C.).

Mr. Hyde wants, of course, to secure the premises for himself, which would be contrary to justice and

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would put the other partner in a very awkward position when the partners would come to dissolve partnership and divide the assets.

We have, then, undoubtedly a lease which is a good asset for the firm.

We have, on one side, a partner who wants to set it aside for his benefit and we have, on the other side, the defendant who is anxious to have a partner's share in the transaction.

Supposing that the lease should be resiliated then what would be the position of Mr. Hyde ? Of course, he could, as it has been understood with the lessor, take the lease in his own name. But he would be bound then to give to his partner a share of the profit that this lease would represent. Then virtually the lease would become an asset of the partnership.

In these circumstances, I am of the opinion that the action to set aside the lease should be dismissed and that the appeal from the judgment confirming the dismissal of that action should also be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Greenshields, Greenshields & Languedoc.*

Solicitors for the respondent: *Place & Stockwell.*

BENJAMIN C. HOWARD (PLAINTIFF) . APPELLANT;

AND

JAMES D. STEWART (DEFENDANT) . . RESPONDENT.

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*June 8, 9, 10.

*Oct. 13.

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

Crown lands—Colonization—Location ticket—Transfer by locatee—Sale—Issue of letters patent—Title to land—Registry laws—Notice—Arts. 1487, 1488, 2082, 2084, 2085, 2098 *C.C.*

Per Idington, Anglin and Brodeur JJ.—Prior to 1st July, 1909, the holder of a location ticket for colonization land in the Province of Quebec had an interest in the land capable of being sold. In case of sale the purchaser's title became absolute on issue of the letters patent. Such title was good, even if unregistered, against a purchaser from the original locatee after the issue of letters patent who had notice of the prior sale.

Per Duff J.—Without the approval of the Crown Lands Department, a locatee of Crown lands was incapable of transferring any *jus in re* therein while the location was vested in him. Nevertheless he could make a contract for the sale of his rights in the located land, while he remained locatee thereof, which, under the provisions of article 1488 of the Civil Code, would have the effect of transferring the land upon the issue of letters patent thereof to him by the Crown. On the proper construction of article 2098 of the Civil Code, where the title of the transferror does not come within the classes of rights exempted from the formality of registration by article 2084 C.C. and has not been registered a transfer of that title does not take effect until the prior title deed has been registered.

Judgment of the Court of King's Bench (Q.R. 23 K.B. 80) reversed, Davies J. dissenting.

Per Davies J. dissenting.—A transfer by the locatee of his rights is void if made to a person or a company who could not become a *bonâ fide* settler and, therefore, could not, himself or itself, obtain a location ticket for colonization land.

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

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APPEAL from a decision of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgment at the trial in favour of the defendant.

The facts which gave rise to the litigation are as follows:—

On the 29th April, 1908, lot 35, range 1, of the Township of Arago, was granted by location ticket to one Amédée Thibault.

On the 11th August, 1909, Thibault sold to the Austin Lumber Company all his rights of property, of clearance and occupation, and other rights which he might have in the lot.

The deed states that the vendor has handed to the purchaser the location ticket and other titles relating to the land. The sale was made for $325, of which $275 were paid in cash, the balance payable on the patent for the lot being handed to the company. The deed contains a covenant to the effect that the vendor, on receiving written instructions from the company, will burn up the slashing without responsibility for damages and that the company will clean the clearance after the fire and will pay the remaining instalments necessary to obtain the patent.

The company having given no instructions to Thibault, having failed to pay the remaining instalments and otherwise fulfill the conditions necessary to enable the letters patent to be issued, the Crown, on the 26th of March, 1910, gave notice that the location ticket would be revoked.

It would appear that the Austin Lumber Company was at that time in liquidation. Nothing having been done by the company to enable the letters patent to

(1) Q.R. 23 K.B. 80.

be issued, Thibault, himself, fulfilled the remaining obligations, paid the instalments due and, on the 27th April, 1913, obtained letters patent from the Crown for the lot in question.

On the 5th of June, 1912, Thibault sold the lot, for the sum of $900 paid in cash, by the respondent.

The respondent entered into possession of the lot and cut about 900 cords of pulpwood in the course of the summer, autumn and early winter of 1912-13.

On the 24th of February, 1913, the appellant caused a writ of revendication to issue and seized the wood cut claiming it to be his property. The declaration alleged that he is the only true proprietor of lot 35, of range 1, of the Township of Arago, and of all the wood which had been cut thereon; that the respondent had illegally caused the wood to be cut and was about to remove it; and by his conclusions he asked to be declared the proprietor of the wood and that the attachment be declared binding.

The respondent pleaded to the action alleging that the wood was worth $5 a cord, of which $3.25 represented the cost of cutting and removing it to the place of seizure, and $1.75 the value in the forest. He further pleaded that, the lot having been granted by location ticket to Thibault, he had purported to sell it to the Austin Lumber Co.; that the sale was null and void because the company had bought the lot for commercial purposes, contrary to law, because the company already possessed at the time of the sale more than three lots held under location ticket obtained from the Crown, and because no transfer of the lot or location ticket from Thibault to the company had been made as required by law; that the pre-

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tended sale by the liquidator of the Austin Lumber Co. to the appellant was void for the same reasons; that the Austin Lumber Co. had failed to fulfill the conditions under which it had acquired Thibault's rights, and that, thereupon, Thibault had himself fulfilled the necessary conditions and had obtained the patent in his own name. That the respondent had purchased from Thibault, who was, and always had been, the sole owner of the lot; that in any event, the appellant could not revendicate the wood or obtain the ownership thereof without paying to the respondent the sum of $2,925, which he had paid for the manufacture of the wood and its cartage to the river banks.

The respondent further pleaded, that though under no obligation to do so, he would be prepared, provided the appellant withdrew his action, to pay the sum of $275 which had been paid to Thibault and $50 interest, and deposited the sum of $325. By his conclusion, the respondent asked that the pretended sale of the 11th of August, 1909, of Thibault's rights under the location ticket should be declared illegal and void, that the sale of the lot by the liquidator of the company to the plaintiff should also be declared illegal, and that he, the respondent, should be declared the true proprietor of the lot, that the writ of revendication be quashed and the plaintiff's action dismissed and, alternatively, that if the plaintiff's title was declared good he should be condemned to reimburse the sum of $2,925, cost of manufacture and transportation of the wood.

The appellant answered admitting that the wood was worth $5 a cord, alleging that the illegality of the transfer by Thibault to the company could only be raised by the Crown and he further pleaded the chain

of title in favour of the company and from the liquidator to him already referred to.

The trial judge held that the Austin Lumber Co., its liquidator, and the plaintiff had all failed to fulfil the obligation which the company had contracted towards Thibault and that, the Crown Land Department having given notice of the revocation of the location ticket, Thibault himself had fulfilled the required conditions and had obtained in his own name the letters patent for the lot, and had thereupon sold the same to the respondent; that, notwithstanding that the respondent was aware of the previous transaction with the Austin Lumber Co., it could fairly and legally purchase the lot from Thibault, who had acquired the complete title from the Crown; that neither the appellant nor the Austin Lumber Co. ever were proprietors of the lot, and that the respondent had cut the wood after having acquired the lot and the wood was, therefore, his property and the action was dismissed and the attachment set aside.

On the 15th of November, 1913, this judgment was confirmed by the Court of King's Bench, Cross, J., dissenting.

The Chief Justice of the Court of King's Bench, who gave the judgment of the court, held that the respondent, having acquired the lot from the grantee from the Crown, had a perfect title as against everybody; that all the rights of the holder of the location ticket ceased as soon as the Crown had made a grant of the lot, such rights being effective only so long as the location ticket was in force and until letters patent were issued, that, though the transfer made by Thibault to the company conferred on the latter the right to obtain the letters patent on fulfilling the con-

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ditions required by law, the company had not chosen to fulfill these conditions, and that Thibault, on notice of cancellation of the sale of the lots, had himself fulfilled the conditions. If Thibault had been able to obtain the patent in his own name, it was because the company had not registered the transfer in its favour at the Crown Land Office. That the legal relations existing between the Austin Lumber Co. and Thibault in no way affected the respondent's right to purchase the lot from Thibault, who had a perfect title thereto.

The learned judge further held that the transfer by Thibault to the Austin Lumber Co., of the location ticket issued in his favour was void because the company already held more than 300 acres of Crown lands in virtue of location tickets transferred to it, and he was of opinion that this fact was the reason why the company did not register the transfer obtained by it.

Mr. Justice Cross would seem to have rested his judgment on article 1488 of the Civil Code, and to have been of opinion that the issue of letters patent in favour of Thibault availed to perfect the appellant's title even as against third persons. He was also of opinion that the prohibition contained in the law against acquiring more than 300 acres of land under location ticket was one of which the Crown alone could avail itself.

J. E. Martin K.C. and *Ferdinand Roy K.C.* for the appellant.

G. G. Stuart K.C. and *Rousseau* for the respondent.

DAVIES J. (dissenting).—This is an appeal from the judgment of the Court of King's Bench of Quebec

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confirming a judgment of Cimon J. of the Superior Court dismissing the plaintiff's action.

The contest was between the parties claiming as assignees of one Thibault, a location ticket holder of a farm or lot of land in the Province of Quebec, of which he subsequently became the patentee. The plaintiff appellant claimed as a purchaser from the liquidator of the Austin Lumber Company, to which company, before the liquidation, Thibault, the location ticket holder, had assigned the located farm or holding. The respondent claimed as assignee of Thibault after he had acquired a title to the farm or lot by letters patent from the Crown.

The crucial question which arises on the facts to my mind is whether the assignment from Thibault to the Austin Lumber Company operated to convey to the company all Thibault's interest in the land which he possessed under his location ticket at the date of the assignment, or if it did not and could not convey any such interest whether it operated to assign to the company any interest he might subsequently acquire if he became patentee of the lands.

I have, after much consideration of the facts and the statutes bearing upon them, reached the conclusion that the alleged assignment from Thibault to the Austin Lumber Company was invalid and null and that the respondent, Stewart, as the purchaser of the lot from Thibault after he had become its patentee had a right to the timber cut and in dispute.

Having reached this conclusion, I have not deemed it necessary to touch upon the other interesting questions which were raised and argued at bar. The important facts and their dates are as follows:—

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Location ticket granted Thibault.....29 April, 1908
Austin Lumber Company incorporated under letters patent from the Dominion of Canada .....12 March, 1909
Sale and assignment from Thibault to company .....11 August, 1909
Winding-up order, Austin Lumber Company prior to .....Feb., 1910
Authority to sell assets of company granted liquidator .....2 Feb., 1910
Sale by liquidator to Howard, including lot in question.....19 Oct., 1910
Letters patent of lot to Thibault.....27 April, 1912
Conveyance Thibault to Stewart (deft.)..5 June, 1912
Suit commenced .....23 Feb., 1913
Statute of 1909 assented to.....29 May, 1909

The ground upon which I hold this appeal must fail is that the interest of the locatee, Thibault, was not such as could be assigned by him to the Austin Lumber Company, because that company was incompetent to become a settler of lots or locations within the statute, and incompetent to become the assignee of a *bonâ fide* settler who had obtained a location ticket. Such company was incompetent to fulfil the conditions necessary to enable a location ticket holder to obtain a patent of the lot located.

In other and shorter words, I am of the opinion that it was equally impossible for such a commercial company as the Austin Lumber Company to become a location ticket holder or the legal assignee of one who had become such and that the attempt to become the latter as in the case before us was in direct violation of the policy of the law.

I am also of the opinion that the sale and assign-

ment from Thibault to the company cannot be supported on the ground that it was a sale of future rights which he might acquire by fulfilling personally the conditions of his location ticket and obtaining his patent. No such contract was contemplated by the parties and no such contract can, in my judgment, be evolved out of the assignment. Thibault gave the company what the parties intended and what I think they fairly expressed in the transfer, and that was an assignment of

all the rights of property, clearing, occupation, or other rights, whatsoever, which the seller may have on lot No. 5, in the first range of the Township of Arago, County of L'Islet, and also the buildings thereon erected and the seller has this day remitted to the company the location tickets and other titles relating to said land.

He was selling and assigning his interest in the lands he held under his location ticket and handing over and assigning the ticket itself, the evidence of his ownership. That interest at the time was doubtless small, but by continued occupation and the clearing of a certain quantity of the land yearly it would in five years ripen into a right to obtain a patent. But such rights as might subsequently mature or arise by virtue of the subsequent performance by him of the conditions of the location ticket as to which the agreement said nothing were not intended to be assigned and were not assigned.

There was not the least intention in my judgment in the minds of either party that Thibault was selling and the company was buying a future interest only in the land dependent on and arising out of the patent if it ever was earned and issued. What they were dealing in and with were the then present existing rights of Thibault as a location ticket holder, and these are

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just the rights which I say the Austin Lumber Company was incompetent to purchase and which the policy of the law did not permit Thibault as a location ticket holder to sell to any person but a *bonâ fide* settler.

The right to become patentee of the homestead lot depended, as I have said, upon the performance of subsequent conditions as to clearing the land and paying the purchase money to the Crown. It was not stipulated or intended that Thibault should do those things or any of them. He was transferring all his then interest in the location and he agreed to do what in him lay to obtain the patent if and when the subsequent conditions were performed by the transferee. If the company was a "*bonâ fide* settler" within the meaning of the statute it could then take a legal assignment of the interest of Thibault, the original settler. That would create a very different condition of things, and the construction to be put upon the assignment might in such case be different in the event of Thibault subsequently getting the patent in his own name. But if the company could not become a transferee, not being a *bonâ fide* settler, then I take it that the assignment, being illegal as against the policy of the law, could not be invoked to create a right as arising out of the subsequent granting of the patent.

I take it that the location ticket holder could by apt words in his contract of assignment assign to one admittedly not a *bonâ fide* settler any future interest which might accrue to him if and when a patent of the land issued to him. The policy of the law did not prevent that. Being patentee he became the owner with all an owner's rights and, of course, there was nothing

to prevent him selling those contingent rights before they accrued or came into being. But as a locatee only he was in a sense a ward of the State, protected by law against speculators and others and prohibited as a matter of public policy from parting with his rights to others than *bonâ fide* settlers with whom it was the clear and expressed policy of the legislature to settle the "lands of the province suitable for cultivation."

The fact that in 1909 the legislature enacted a further amendment to the then existing statute providing that lots sold or otherwise granted for settlement after the first day of July, 1909, should not for five years following the date of the location ticket or otherwise be alienated wholly or in part "except by gifts *inter vivos* or by will or by *ab intestate* succession," and that in these cases the donee, heir or legatee should be subject to the same prohibition as the original grantee; and that every transfer made in contravention of that article should be absolutely null between the parties only seems to me to accentuate my argument as to the policy of the law. It is now illegal for a locatee subsequent to July, 1909, to sell even to another *bonâ fide* settler. Before this such a sale was or might be valid if approved of by the Commissioner of Lands. Since then not even such a sale could be upheld.

The enlargement of the prohibition from a partial to an absolute one cannot be invoked as an argument against the previous existence of the partial prohibition —and so it will not do to assume that because the legislature in 1909 enacted absolute prohibition of the transfer of these location tickets that partial prohibition did not previously exist.

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Altogether apart from the right of the locatee to assign, I cannot see where or from whence the Austin Lumber Company received the power or capacity to enter into such a contract as that made by it with Thibault, the locatee.

That company was incorporated by letters patent from the Dominion of Canada and from these its powers and capacities must be determined.

These letters patent express and define the purposes and objects of the company as follows:—

1. To own or lease or operate and develop timber limits and water powers.

2. To carry on the business of lumberers, or manufacturers of, and dealers in logs, timber and lumber of every description, and products thereof and anything in which the products of the forest forms a part.

3. To acquire as a going concern or otherwise all the assets and good will of the partnership formerly existing and known as "The Austin Lumber Company, Limited."

4. To carry on any other business germane to the aforesaid objects.

5. To manufacture electric current, electric or other heat or power for the purposes of the company.

6. To hold and own shares or securities in any other company carrying on business similar to that which this company is hereby authorized to carry on.

I frankly confess myself unable to understand what construction of these purposes and objects can be made to include the purchase of a lot of a location ticket holder under the Quebec Act, such as Thibault was, a homesteader, as he is called in other parts of Canada. The

owning, leasing, operating and development of timber limits and water powers, carrying on of the business of lumberers, etc.,

and

the carrying on of any other business germane to the aforesaid objects

cannot in my judgment, under the most liberal construction of these powers, be extended to embrace the purchase by the company of the lots set apart and given to a locatee for a homestead and for settlement. These locations were for a special object and purpose clearly defined and set forth in the statute. They were to be given only out of lands "suitable for cultivation" and only to "*bonâ fide* settlers." The purpose and policy of the legislature was to create homesteads for the persons to whom they were given and such other qualified persons as they might legally assign them to.

It is contrary, in my judgment, to the clearly declared policy of the Act that persons and companies disqualified from receiving these location tickets should become the owners of them by purchase from the locatee. Only such persons as were entitled to become locatees could become assignees of the locatee until, of course, the patent for the location was granted.

Prior to the amending Act of 4 Edw. VII. (1904), ch. 13, the statute, sec. 1269, R.S.Q. (1888), authorized the granting of a "location ticket" subject to the approval of the Commissioner, to

any person who asks to purchase a lot of public lands for colonization purposes.

That amending Act of 1904 made some vital changes in the policy to be adopted in the granting of these location tickets. By article 7 it was provided that the Lieutenant-Governor-in-Council might make a classification of public lands in the following manner:—

1. Lands suitable for cultivation;
2. Lands for forest industries;

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and provided (art. 1268(*b*)) that no sale could after the classification authorized by the preceding article be made for colonization purposes outside the lands suitable for cultivation and classified as such.

Section 8 of this Act replaced article 1269 of the Revised Statutes as amended by a new clause as follows:—

1269. Upon the conditions and for the price established by the Lieutenant-Governor-in-Council, the Crown lands' agent, if there is no contestation, is bound, after the classification authorized by art. 1268(a) to sell the lands suitable for cultivation and classified as such and before such classification lands suitable for cultivation, *to any bonâ fide settler* who applies for the same. No such sale can be made of more than two hundred acres to the same person.

This was the law in force when the location ticket was issued to Thibault and the assignment made to the Austin Lumber Company. Since that time lands either classified as suitable for cultivation, or if before classification, lands suitable for cultivation could be located to *bonâ fide* settlers only — and only to such *bonâ fide* settlers in quantity not more than 200 acres, subsequently increased to 300.

The policy here defined of limiting such sales to *bonâ fide* settlers only, necessarily in my judgment limited the power of assignment given to the locatee to other persons who could come within the same category, namely, *bonâ fide* settlers, until the locatee by his clearances and payments earned his right to his patent. Any other construction would defeat the policy, object and purpose of the Act. The object of the amendment clearly was to insure that lands suitable for cultivation should be kept out of the hands of speculators and of lumbermen and lumber companies whose business would be confined to the second classification, namely, "lands for forest industries."

It was a well intentioned effort to place *bonâ fide* settlers upon those lands of the province "suitable for cultivation" and to provide against speculators or other than *bonâ fide* settlers getting location tickets for those lands either directly or indirectly. It was not, therefore, in my opinion, open to an ordinary lumberman not desiring to become a *bonâ fide* settler and *a fortiori* not to any of the large lumber companies or to speculators in lands to obtain the lands settled by *bonâ fide* settlers by assignments from them after they obtained their location tickets and before getting their patents. I do not, for one, feel disposed to thwart the clearly declared and defined policy of the legislature by a construction limiting the granting of the location ticket to a *bonâ fide* settler and at the same time permitting any one not such to obtain from the settler an assignment of all his rights in the land immediately after the issue of the ticket or license.

If the slightest doubt is felt upon the point, it will, I think, be set at rest by reading section 1269(*a*), which says:—

1269(a). Before making the sale the Crown lands' agent shall require the settler to make a declaration under oath in the Form E.; and the Crown lands' agent is authorized to receive the settler's oath.

Turning to Form E. in the Schedule to the Statute of 1904, we find that the desiring locatee is required to swear to his age and residence, his wish to acquire a specified lot, his opinion

that it is fit for cultivation and does not derive its chief value from the timber thereon,

that he is already the owner of certain lots under location ticket specifying them *and that he is not lending his name to any person for the purpose of*

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acquiring such lot, and that he is not acquiring such lot for the sole purpose of trafficking in the timber, but *with a bonâ fide object of settling thereon.*

This was the law in force at the time this location ticket to Thibault was granted and the assignment made by him to the Austin Lumber Company and I cannot myself yield to the argument submitted by the appellant's counsel to us that while that company could not become a locatee it could legally become the assignee of one.

Such an argument, if accepted, would defeat and destroy the whole policy of the law as clearly declared and defined by the legislature, a policy so meritorious and in the public interest that I decline to be a party to defeating it by frittering away the express terms of the statute.

I do not, therefore, think the Lumber Company was a competent locatee or could become the legal assignee of one. I do not think the Austin Lumber Company, by the terms of its charter, was any more competent to accept an assignment of one of these locations given to a *bonâ fide* settler for the purpose of settlement, than it was for it to purchase an interest in a coal or silver mine or in one of the large mercantile or shipping establishments of Montreal. Such a dealing was clearly outside of the express purposes and objects for which it was incorporated and also of those necessary and incidental powers which flow from them. It was not "germane" to any of the specified powers granted to the company by letters patent. I deny, therefore, the competency of this company to enter into this contract or to accept this assignment. If I am right that contract was wholly void. See *Ash-*

bury Railway Carriage and Iron Co. v. *Riche*(1). In that case Lord Chancellor Cairns quotes with approval as summing up and exhausting the whole question the following statement of law as stated by Mr. Justice Blackburn:—

> I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to me to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified.

Nor apart from that can I accede to the argument which I understand has found favour with at least one of my colleagues, that while the assignment of the location ticket and the locatee's interest under it was inoperative or ineffective, it should be so construed as to operate as an assignment of the interest of the assignor as and when he became the patentee of the lands.

I have already shewn that the assignment only professed to deal with the assignors' then present interest, and that such an interest only was what the parties were bargaining for and had no relation to any subsequent interest he might obtain by a payment subsequently of his own moneys and the performance subsequently by him of those homestead duties necessary to obtain a patent and with respect to which naturally no reference was made in the assignment and lastly, that if the assignment or transfer is in itself illegal and void so far as relates to the interest of Thibault as a locatee it cannot be made the basis on which to construct an argument that it operates to

(1) L.R. 7 H.L. 653.

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assign the subsequent interest accruing to Thibault under his patent. Such an interest might be granted by locatees to parties competent to receive them — but if so the intention to reach such ulterior interest must be fairly shewn on the face of the assignment and by apt language.

I would dismiss the appeal and confirm the judgment of the Superior Court and Court of King's Bench.

IDINGTON J.—Each of the parties hereto claims title through Thibault, who was admittedly the locatee of the Crown pursuant to the provisions of the sections of the law concerning the sale and administration of public lands.

It is contended for appellant that the locatee was a purchaser from the Crown of the lands in question and entitled to make a sale of the land he so acquired, and that he did so in such manner that the moment he got his patent therefor, the title enured to the benefit of appellant.

This is denied by respondent, who further contends that the sale by Thibault being to a commercial company which could not itself do settlement duties, was illegal.

If this latter proposition is well founded the appellant's claim must fail as resting upon an illegal transaction.

It is clear that a locatee could sell to one who could perform the duties. It is impossible to say that there is any express legislative enactment prohibiting the locatee in question from selling to another who was not qualified to settle or perform settler's duties.

Such an enactment, article 1281(*a*), R.S.Q., was

passed by the legislature in 1909, but it only extended to lots sold or otherwise granted for purposes of colonization after the 1st of July, 1909, although assented to May, 1909.

This location now in question was made in 1908.

I do not think it can be laid down as law that simply because the legislature so expressly enacted, it must necessarily be held that the prohibition had not previously existed by implication or otherwise.

I do think, however, that the first express enactment being so framed is very suggestive.

Indeed it puzzzles one to see why if it was always illegal there should have been any hesitation about declaring it so, and, that instead thereof, the legislature should put, as it did, an express limitation upon the time of its becoming operative.

It was by the same enactment that the rights of selling in any case were much curtailed and transfers were limited to cases of donation *inter vivos* or by will or succession, etc., etc., or by the express authority of the minister, etc.

It seems to be suggested by all this that there had been abuses, yet that these transactions which had constituted the abuse, were to be permitted to stand, though the policy of the legislature was to be changed as to the future.

It is said that there was no means of registration in the Crown Lands Department of any such transfer as the Austin Lumber Company got from Thibault. Assuming that to be so, how does it constitute prohibition of such a contract? The inability to register does not in the absence of some express legislation on the subject invalidate a contract or in

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any way affect its operation as between the parties thereto. And registration only furnishes security against possible third parties claiming under some provision of the "Registry Act," priority, by virtue of registration.

Moreover we have this curious piece of legislative history bearing upon that very question. In 1904 it was enacted by section 1275(*a*) that transfers by first purchasers must be transmitted to the department within thirty days on pain of nullity, but this was repealed in 1906 and so far as I can find, never again re-enacted.

Then it is said that the policy of the law in relation to the locatee and his right to transfer is such as to render the transfer from Thibault to the Austin Lumber Company illegal.

I am unable to see how we can find such alleged policy of the law unless by express legislation, or clear implication thereof, cutting out the usual operative effect which the law gives to the contracts between parties.

All that has been done by way of legislation relative to the relations between the Crown and such purchasers as Thibault is to require that he settle on the land, and from year to year, for a term of years, perform specified duties in the way of clearing and building and residence, before he becomes entitled to receive his patent.

Those duties he binds himself to the company to fulfil and thus discharged all that the policy of the law required, by its express provision. To read something further into the law is to put something there not provided or implied by the language of the statute.

This leaves it open to the settler to contract with

third parties in regard to the lands either in way of sale or promise of sale.

The form of contract adopted in this case certainly was not a mere promise of sale. It would be doing violence to the language so to construe it.

It is as absolute in form in the first part of the instrument as words can make it. In the latter part of it there is a sentence binding Thibault to perform the duties required to be done by him to entitle him to get the patent and thereby complete the title he has warranted.

It seems to fulfil the terms of article 1025 of the Code, which expressly anticipates the possibility of non-delivery.

Then the obligation of Thibault is thereby rendered possible of performance without impeding the effect designed by said article to be given to the sale.

This article, as well as article 1026, is by article 1027 shewn to be applicable to the rights of third parties, saving in relation to immovable property, the special provisions contained in the "Code for the registration of titles to and claims upon such property."

I shall presently advert to that phase of the questions involved herein, but before doing so desire to point out that the several sections of the statute governing the management and sale of the Crown lands expressly treat the transaction between the Crown and the locatee as a sale.

In section 1268, R.S.Q., 1888, provision was made for the Lieutenant-Governor-in-Council fixing the price per acre of public lands and the terms and conditions of sale and settlement and payment, and subject to minor changes and modifications such has re-

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mained the key-note, as it were, to dealing with Crown lands.

Section 1269 provided for Crown lands' agents selling upon the conditions and for the price regulated.

Section 1270 of same statute provided as follows:—

> The Commissioner may issue, under his hand and seal, to any person who has purchased, or may purchase, or is permitted to occupy, or has been entrusted with the care or protection of any public land or to whom a free grant was made, an instrument in the form of a license of occupation, and such person, or the assignee, by an instrument registered under this chapter or any other law providing for registration in such cases, may take possession of and occupy the land therein comprised, subject to the conditions of such license, and may thereunder, unless the same shall have been revoked or cancelled, maintain suits at law against any wrongdoer or trespasser, as effectually as he could do under a patent from the Crown.
>
> Such license of occupation shall be *primâ facie* evidence of possession by such person or the assignee under an instrument registered as aforesaid in any such suit, but the same shall have no force against a license to cut timber existing at the time of the granting thereof.

Section 1274 provided for the registration of transfers made by the original purchaser or locatees of their rights.

4 Edw. VII., ch. 13, sec. 7, directed the Lieutenant-Governor-in-Council to make a classification of public lands. And 1268(*b*), in the same section was as follows:—

> 1268(*b*). No sales can after the classification authorized by the preceding article, be made, for colonization purposes, outside the lands suitable for cultivation and classified as such.

Section 8 contains the following provision in substitution of previous legislation on the same subject:—

> 8. Article 1269 of the Revised Statutes, as amended by the Acts 60 Victoria, chapter 22, section 14; 63 Victoria, chapter 14, section 1, and 1 Edward VII., chapter 8, section 7, is replaced by the following: "1269. Upon the conditions and for the price established by the Lieutenant-Governor-in-Council, the Crown lands' agent, if there is no contestation, is bound, after the classification authorized by article 1268(*a*), to sell the lands suitable for cultivation and classi-

fied as such, and before such classification lands suitable for cultivation, to any *bonâ fide* settler who applies for the same. No such sale can be made of more than two hundred acres to the same person.

"The sales made by the agents take effect from the day upon which they are made; but, if the location ticket contains any clerical error or an error in the name, or an incorrect description of the land, the Minister may cancel the location ticket and order the issue of a new one, corrected, which will take effect from the date of the former one.

"1269(*a*). Before making the sale the Crown lands' agent shall require the settler to make a declaration under oath in the Form E; and the Crown lands' agent is authorized to receive the settler's oath."

Then by section 1588 of the R.S.Q., 1909, we find the following provision:—

1558. Before making the sale, the Crown lands' agent shall obtain from the settler an affidavit according to Form A; and the Crown lands' agent or a notary may receive the same. R.S.Q., 1269(*b*); 9 Edw. VII., ch. 24, sec. 2.

That affidavit has been varied slightly, but the substance of it shews as it existed at the time of the grant of this location in question that the applicant wished to acquire a lot fit for cultivation, not deriving its chief value from the timber thereon and to acquire in his own name for the purpose of clearing and cultivating for his own benefit, and that he was not lending his name to any person for the purpose of acquiring such lot, and had no understanding with any one in that respect and was not acquiring it for the sole purpose of trafficking in the timber, but with the *bonâ fide* object of settling thereon.

In argument stress has been laid upon this affidavit. All it amounts to is that the applicant has an honest purpose at the time of making the application as specified in the affidavit. There is no pledging or promising in reference to the future disposition of the lot or the improvements. If it had been shewn that this locatee, Thibault, had conceived the purpose of

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selling to the Austin Lumber Company when he made his affidavit, the transaction, of course, would be fraudulent. Nothing of the kind appears in this transaction. I, therefore, fail to see any argument that can be founded upon this affidavit when we have in view the actual facts of this case. The affidavit itself is in harmony with the general expressions relative to sales used in the foregoing statutes.

In face of such legislation as I have recited at length in order to realize its purport and the nature of the right acquired thereunder, it seems to me impossible to treat the location ticket as a mere license of occupation or something less than a sale.

Once the locatee had observed the obligations imposed upon him he was entitled as of course to get his patent. If he failed in discharging these obligations the Minister might under the provisions of some of the Acts now appearing in article 1574 of the Revised Statutes, revoke the sale.

Such is the letter of the law and I ask how can we constitute the transaction other than a sale ? True, the cancellation does not proceed upon the basis of the ordinary right of dissolution of a contract for non-fulfilment of conditions. Article 1576 of the statute excepts it from the operation of article 1537 of the Civil Code.

But no other provision I can find seems to take the transaction in other relations out of the operations of the Civil Code.

That brings us to what seems to me the crucial question in this case which arises from the fact that the transfer from Thibault to the Austin Lumber Company was registered, and also that from the assignee of that company to appellant (which it may be noted

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was judicially directed) before the patent, and before the transaction between Thibault and respondent, by virtue of which he claims.

If the registry provisions of the Code had expressly provided that they must be held as restricted to titles acquired subsequently to the issue of the patent, then the registrations antecedent thereto could be treated as of no avail. But I can find no such restriction. They treat all titles alike and consequently the title which begins with the location ticket is to be treated as the root of title when effect is to be given to registration controlling the operation of article 1025 as provided in article 1027.

Leaving the latter provision and all implied therein out of the question, there was a sale by the Crown to Thibault and by him to the Austin Lumber Company and its assignee or the judicial sale which he was directed to effect to the appellant, which, on a proper application of the principles laid down in the Code, precluded respondent from acquiring any title.

Thibault had thereunder none to give and he could confer none.

It is suggested default had been made by the Austin Lumber Company in failing to make the necessary payments the contract provided for and, hence, liable to rescission. But there was no term of the contract within article 1536 which enabled Thibault as of course to dissolve and disregard his contract of sale and no other way such as provided by article 1557 was pursued by him. His grantee, the respondent, can be in no better position. And, therefore, it seems to me such default did not give respondent what he claims.

I think the appeal must be allowed with costs, but subject to such terms of repaying the respondent for

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his improving the value of the property by the expenditure in cutting of the timber as he may be found entitled to.

DUFF J.—I am unable to concur in the view of the majority of the Court of King's Bench. I can find no evidence in the record to shew that the Austin Lumber Company are holders of more than the permissible number of location tickets. I am also unable to concur in the view that the rights of the Austin Lumber Company were extinguished by the issue of the patent. I think the assignment to the Austin Lumber Company had not the effect of presently transferring any *jus in re* in the property in question. I have no doubt that the locatee's right was in the nature of a *droit réel,* but a right nevertheless which was subject to all the conditions and characteristics arising out of the provisions of the statute under the authority of which the right was created. As I read the statute the locatee, so long as he remains locatee, that is to say, so long as the location is vested in him, is incapable of creating any *jus in re* in respect of it. He may transfer his location, it is true, and with a proper approval, the location may become vested in the transferee, but it is only by such a transfer that any proprietory interest in the location can before the issue of the patent be effectually vested in another.

It does not, however, by any means follow from this that the locatee may not enter into a contract of sale before the issue of the patent under which the provisions of article 1488 C.C., will have the effect of transferring the property as soon as the patent issues; and that I think is what happened in this case. The moment the patent issued the title of the patent be-

came vested by virtue of the existing contract in the Austin Lumber Company. That brings us to the question which has given rise to the only difficulty I have felt in the case, viz., whether the right of the Austin Lumber Company was lost by reason of the registration of Stewart's deed of sale. The point which presents itself to my mind is this: Article 2098 C.C., provides:—

"So long as the right of the acquirer has not been registered, the registration of all conveyances, transfers, hypothecs or real rights granted by him in respect of such immovable is without effect.

Does this mean that the registration whose validity is in question is simply inoperative; or does it mean that it is not effective until the registration of the prior title If the first, then the registration of the transfer to the Ausin Lumber Company before the issue of the patent would have no effect, if this is one of the class of cases to which the article above qnoted applies. Now it seems a fair construction of this article, taken together with article 2084, C.C., to hold that it has no application to cases in which the prior title rests upon an instrument to which the provisions of article 2084, C.C., apply. In that view the registration of the patented title would not be required. I think, however, the more satisfactory construction of article 2098, C.C., is that, where the prior title is not registered, the registration of a transfer of that title does not take effect until the prior title is registered. On this construction the appellant is relieved from any difficulty that might arise as to the provisions as to registration.

ANGLIN J.—The question for determination in this action is the ownership of lot 35, range 1, Arago, in the County of L'Islet.

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The following appear to be the material facts which are uncontested:—

A location ticket for the lot was duly issued by a Crown lands' agent to one Amédée Thibault on the 29th April, 1908. In disposing of the land to Thibault the Crown lands' agent proceeded under the statute then in force (art. 1269 of the Revised Statutes, as enacted by 4 Edw. VII. ch. 13, sec. 8) which empowered Crown lands' agents to sell lands suitable for cultivation and classified as such and declared that the sales made by the agents take effect from the day on which they are made. Thibault paid to the agent the first of the four instalments into which his purchase money was divided. On the 11th of August, 1909, he sold and conveyed his rights and interest in lot 35 to the Austin Lumber Company for $325, of which he received $275, the balance being made payable on the issue of the Crown patent for the lot. By the deed Thibault undertook to burn the fallen timber (*l'abatis*) on the property and the company to clear the land afterwards and to pay to the Crown the three further instalments necessary to procure the issue of the grant, which Thibault promised diligently to facilitate. The Austin Lumber Company becoming insolvent, its liquidator on the 19th Oct., 1910, with judicial sanction, sold and conveyed the lot in question, with other property of the company, to the plaintiff Howard. These two deeds appear to have been recorded in the registry office at St. Jean Port Joli, as Nos. 37757 and 38616 respectively, but they were not registered in the Department of Lands and Forests, as is provided for by articles 1563 *et seq.* of the R.S.Q., 1909. The Austin Lumber Company did not fulfil the conditions of the sale by the Crown to Thibault, and notice

was given on the 26th of March, 1910, of the intention of the Crown to cancel the location ticket of the lot. But actual cancellation did not take place and Thibault upon paying the balance of the price and satisfying the Department as to the fulfilment of the conditions of sale, obtained a Crown patent for the lot in his own name on the 27th of April, 1912. On the 5th of June following Thibault sold the lot to the defendant Stewart for $900. The conveyance to Stewart was registered. Stewart knew when he purchased of the prior sales by Thibault to the Austin Lumber Company and by the liquidator of that company to the plaintiff Howard.

In the Superior Court Cimon J. held that the issue of letters patent to Thibault enabled him to confer an incontestable title on the defendant Stewart. In the Court of King's Bench Archambault C.J., who spoke for the majority of the court (Cross J. diss.), affirmed the judgment for the defendant on the ground taken by Cimon J. and also on the additional ground that at the time of the transfer to it from Thibault the Austin Lumber Company already held 300 acres of unpatented colonization lands and that the transfer to it of lot 35 by Thibault was therefore null and void under art. 1565, R.S.Q., 1909.

At bar it was also argued that article 2085, C.C., is conclusive in favour of the title of the defendant; that the transfer to the Austin Lumber Company was void because that company acquired the land for commercial purposes and not for the purpose of colonization; and that the transfer from Thibault to the company was of a property which he did not own and therefore void under article 1487, C.C. — that it was

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not a sale, but a mere promise of sale and that article 1488, C.C., does not apply to it.

I shall deal with these several points in the order which seems most convenient.

Prior to the legislation, 4 Edw. VII., ch. 13, sec. 8, there appears to have been some doubt in the jurisprudence of the Province of Quebec whether the transactions evidenced by location tickets obtained by settlers from Crown lands' agents should be deemed conditional sales or merely promises of sale. The judgments of Meredith, C.J., Casault and McCord JJ., in *Dinan* v. *Breakey*(1), favour the former view; whereas in *Gilmour* v. *Paridis*(2), Dorion C.J. says that such location tickets are in effect promises of sale, and Tessier J. speaks of the settlers holding them as quasi-proprietors. On appeal to the Privy Council the judgment of the Court of King's Bench was affirmed, but the nature of the plaintiff's title was not adverted to further than in the statement that it was sufficient to carry with it the right of protection by injunction(3). But since the legislation of 1904 I have little doubt that the transactions evidenced by location tickets issued under it to settlers by Crown lands agents are sales — conditional, it is true, but veritable sales.

In several of the articles of the Revised Statutes, 1909, notably articles 1556, 1557, 1558, 1563, and 1574, these transactions are designated as sales. In article 1574 provision is made for their cancellation and by article 1576 it is declared that this

> right of revocation shall not be deemed an ordinary right of dissolution of a contract for non-fulfilment of conditions.

(1) 7 Q.L.R. 120. (2) M.L.R. 3 Q.B. 449.
(3) 14 App. Cas. 645, *sub nom. Gilmour* v. *Mauroit.*

But whatever may be the true legal concept of the contract entered into between the Crown and the settler, the statute clearly recognizes in articles 1563 and 1565 that the latter has a saleable and transferable interest in the land. In article 1563 he is spoken of as the purchaser and in article 1565 as the proprietor. By the statute, 9 Edw. VII., ch. 24, sec. 4 (art. 1572, R.S.Q.), restrictions were placed on the sale of land subsequently located by settlers. While all these provisions seem to uphold the view that what took place in April, 1908, was in reality a sale of lot 35 to Thibault, it is perhaps unnecessary to determine whether under his location ticket he held as upon a sale subject to resolutory conditions or as upon a promise of sale. In either case it is clear that he had a saleable and assignable interest. I incline to the view that his transfer of that interest to the Austin Lumber Company was not within article 1487 C.C. — that he sold and transferred something of which he was the proprietor. But if he had only such an interest as is conferred by a promise of sale — his transfer of that interest was absolute and no mere promise to sell it; it was in form and substance a sale present and out and out, and I see no reason why article 1488 C.C., should not apply to it, or why, upon Thibault obtaining his patent, if what he had held theretofore was merely a promise of sale, the property should not under his title thus perfected have been forthwith vested in the plaintiff as purchaser from his assignees (articles 1025, 1473 and 1488 C.C.). The declaration of article 1556 of the R.S.Q., that "sales made by (Crown lands') agents take effect from the day on which they are made" is at least consistent with this view. Article 1488, C.C., appears to be declaratory of the law as it stood before

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that article was enacted. See 6 Marcadé, p. 217, No. V.; 1 Troplong, "Vente," No. 326. Although they are not collocated in any table of concordance which I have seen, the first paragraph, article 1025, C.C., is not dissimilar in substance to the main provision of the second paragraph of article 1138, C.N.

The issue of the Crown grant to Thibault, in my opinion, served to perfect and confirm Howard's title and apart from the effect of the registry laws, did not clothe Thibault with capacity to confer upon a purchaser, who took subsequently and with notice of the transactions between Thibault and the Austin Lumber Company and the liquidator of that company and Howard, a title adverse thereto and incontestable by Howard.

As already stated, prior to 1909 (see article 1572, R.S.) the law clearly contemplated and provided for the sale and transfer of the rights of settlers before the issue of letters patent. (Articles 1563 *et seq.*) It has been the constant practice in the Province of Quebec to recognize the right of settlers located prior to July, 1909, to sell and transfer their holdings to purchasers who assume the performance of the conditions upon which the location tickets issued (article 1556). The fact that such purchasers intend, after obtaining patents, to cut the timber on the land for commercial purposes has never been deemed to invalidate such transfers, and if it were now to be held that it did, many titles in the province would be jeopardized. The fact in the present case is that no timber was cut before patent issued and there is nothing in the record to warrant an inference that the Austin Lumber Company when purchasing intended to cut the timber before obtaining the patent for the land.

I am not prepared, therefore, to deny the validity of the title advanced by the plaintiff on the ground that the transfer from Thibault to the Austin Lumber Company was contrary to public policy.

Neither does article 2085, C.C., in my opinion, preclude the plaintiff's title being set up against the defendant. That article makes the registered title of a subsequent purchaser for valuable consideration good as against an unregistered right of a third party which is subject to registration, although the subsequent registered purchaser has taken with notice or knowledge of such right. If the rights of the Austin Lumber Company were "subject to registration" or susceptible of registration in the registry office of the registry division before patent issued, they were so registered. If their registration there was irregular and ineffectual it was because they were not then susceptible of such registration and not subject to it. Article 2085, C.C., deals with registration in the registry division under the provisions of the articles grouped under the 18th title of the Civil Code, articles 2082 *et seq.* It does not refer to the special registration provided for interests in unpatented lands by articles 1563 *et seq.* of the R.S.Q., 1909. While failure to register under the provisions of the "Public Lands Act" may subject the assignee of an interest in unpatented lands to the risk of losing it in favour of a subsequent transferee before patent who registers his transfer (article 1569), or of a grantee from the Crown after a forfeiture, under article 1574, of the rights of the original or prior locatee, there is no provision in the "Public Lands Act" which protects a person who subsequently to the issue of the patent takes from such original or prior locatee with notice of the

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earlier transfer of his interest. For a short time (1904-1906) failure to register in the department within thirty days a transfer of unpatented land rendered it void. Article 1275(*a*) of the R.S.Q., 1888, as enacted by 4 Edw. VII., ch. 13, sec. 9, so provided; but that provision was repealed by 6 Edw. VII., ch. 15, sec. 2, and has not been re-enacted. Non-registration in the Department of Lands and Forests did not invalidate the transfers from Thibault to the Austin Lumber Company and from that company to the plaintiff. If those instruments were not originally, and did not, upon issue of the patent, become subject to registration in the registry division article 2085, C.C., affords no protection against them; if upon issue of the patent they became subject to and susceptible of such registration, although the recording of them may have been irregular and ineffectual, when it took place, I see no reason why upon issue of the patent to Thibault it should not have been held to have become regular and efficacious. If so, a further answer to defendant's plea under article 2085, C.C., is afforded by the implications of that article itself.

I find nothing either in the articles of the Civil Code or in the provisions of the Revised Statutes invoked by the defendant which warrants the view that a purchaser of patented land from the original locatee thereof who has full knowledge of instruments transferring the locatee's interest in such land executed by him and recorded in the office of the registry division before patent issued may disregard them with impunity and, notwithstanding such knowledge, obtain a title which the persons interested under such instruments cannot successfully contest.

A critical examination of the documents put in

evidence to shew the lands held by the Austin Lumber Company, checking them one with another and with the evidence of the Crown lands agent, Michon, has satisfied me that it is not established that when that company acquired lot 35 (100 acres) from Thibault it already held more than 200 acres of unpatented lands. Except this lot and possibly lots 30 and 36 in the same range of Arago it would appear to have held no unpatented lands. Lots 30 and 36 are mentioned in two documents filed as still unpatented. But Michon says lot 30 was patented as to one-half in 1889 and as to the other half in 1908. The deed from Lefaivre to Howard shews that the Austin Lumber Company acquired lot 36 only on the 27th August, 1909, whereas it acquired lot 35 on the 11th August, 1909. All the other property mentioned in the deeds produced is shewn to have been either land patented before the date of the Thibault deed, land acquired by the company after that date, or land over which it held only the right to cut timber. While I fully agree with the learned Chief Justice of the King's Bench that, if the defendant had shewn that the Austin Lumber Company possessed more than 200 acres of unpatented land in March, 1909, the burden would have been upon it to establish that it had dispossessed itself of such surplus land before taking the Thibault deed in the following month, I am, with respect, unable to accept the view on which the learned judge proceeds that the documents produced clearly establish that the company owned more than 200 acres of unpatented land in March, 1909. I find that this allegation of the respondent was contested in the factum of the appellant in the Court of King's Bench as it was at bar in this court. It has,

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therefore, not been established that the deed from Thibault to the Austin Lumber Company was in contravention of the third paragraph of article 1556 of the R.S.Q.

If the notice of intention to cancel given under articles 1577 and 1578, R.S.Q., had been followed by actual cancellation under article 1574, so that the title of Thibault under his patent might be deemed the outcome of a new sale by the Crown, it may be that the rights acquired by the Austin Lumber Company and the plaintiff would have been thereby extinguished. But no such steps were taken. On the contrary, as is deposed to by Crown lands agent, Michon, lot 35 always remained registered in the department in the name of Thibault from the date of his location ticket, April 11th, 1908, and the grant which he obtained on the 27th April, 1912, was made in fulfilment of the contract of sale evidenced by that location ticket.

In my opinion the title of the plaintiff Howard has been fully established and is not open to attack upon any of the grounds preferred by the defendant. The appeal should be allowed with costs throughout and judgment should be entered for the plaintiff, granting the conclusions of his declaration.

The appellant does not contest the right of the defendant to be reimbursed the cost of cutting and floating the timber in question.

BRODEUR J.—Nous avons à considérer dans cette cause si un colon peut, avant l'émission des lettres patentes vendre sa terre et nous avons aussi à l'examiner si le défaut d'enregistrement, au département des Terres, de cette vente peut empêcher l'acquéreur

de réclamer contre un tiers qui a aussi un titre du même colon.

Je dois dire de suite que si la concession du lot avait été faite après le 1er juillet, 1909, la question se résoudrait bien facilement; car l'article 1572 des Statuts Refondus de Québec de 1909 déclare bien formellement que

> les lots vendus ou autrement octroyés pour fins de colonisation après le 1er juillet, 1909, ne peuvent pendant cinq ans, à compter de la date du billet de location, être vendus par le porteur du billet de location.

à moins que la vente ne soit autorisée par le ministre.

Mais le billet de location dans la présente cause été émis l'année précédente, en 1908. Voici d'ailleurs les faits importants du litige.

Le 29 avril, 1908, le nommé Thibault a demandé à l'agent des Terres de la Couronne à Montmagny de lui vendre le lot No. 35 du premier rang du Canton Arago. L'agent, aux termes de l'article 1269 des Statuts Refondus de la province de Québec de 1888, tel qu'amendé par la loi de 1904, ch. 13, sec. 8, lui a vendu le terrain en question aux conditions ordinaires d'habitation, de paiement et d'établissement, avec pouvoir pour le ministre de résilier la vente et d'annuler le billet de location si le colon ne remplissait pas ces conditions.

Le 11 août, 1909, Thibault a transporté à la corporation "Austin Lumber Company," par acte notarié, tous les droits qu'il avait dans ce lot de terre, pour $325, dont $275 comptant et la balance payable lors de la remise des lettres patentes que Thibault s'engageait d'obtenir en son nom du département des terres.

Cette compagnie devait, de son côté, faire les trois paiements annuels que Thibault devait encore au gouvernement.

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Peu de temps après ce contrat entre Thibault et la Compagnie "Austin Lumber," cette dernière fut mise en liquidation; et le liquidateur, le 29 octobre, 1910, vendait, par autorisation de justice, à Howard, l'appelant, l'actif de cette compagnie, y compris le lot No. 35.

L'acte de vente de Thibault à la compagnie "Austin Lumber," ainsi que l'acte de vente du liquidateur a Howard, ont été enregistrés au bureau d'enregistrement du comté sous les dispositions de l'article 2098 de Code Civil; mais, par contre, ils n'ont pas été enrigistrés ou Département des Terres de la Couronne, suivant les dispositions des articles 1563 et suivants des Statuts Refondus de 1909.

Les paiements qui devaient être faits annuellement n'ayant pas été effectués, le département donna avis à Thibault que la ministre allait résilier la vente, et alors ce dernier, s'autorisant du fait que la Compagnie "Austin Lumber" ne lui donnait pas d'argent pour faire ses paiements, ainsi quelle s'y était obligée, a fait les versements avec son propre argent et a pris la patente.

Au lieu cependant d'aller remettre cette patente à la compagnie, comme il y était obligé en vertu de son contrat du 11 août, 1909, il a revendu la propriété à l'intimé Stewart.

Ce dernier a, dans l'hiver suivant, coupé environ 850 cordes de bois sur cette propriété; et Howard le poursuit pour être déclaré propriétaire de ce lot et du bois qui y a été coupé par Stewart et accompagne sa demande d'une saisis-revendication.

La Cour Supérieure et la Cour d'Appel, le juge Cross dissident, ont renvoyé cette action. Howard appelle devant cette Cour de ce jugement.

J'en suis arrivé à la conclusion, après avoir donné

aux questions qui se soulévent beaucoup d'étude et de considération, que Howard devrait réussir et que le jugement *a quo* devrait être renversé.

La position légale se résume à ceci, suivant moi :—

Un tiers peut acquérir la terre d'un colon qui la détient par billet de location émis avant le 1er juillet, 1909, pourvu que cette acquisition ne lui donne pas plus de trois cents âcres de terre.

Pour être invoquée contre une autre personne qui a également un titre de colon, cette vente devra être enregistrée au bureau d'enregistrement du comté, en vertu du principe que de deux acquéreurs du même immeuble du même vendeur celui dont titre est enregistré le premier a droit d'en réclamer la propriété.

Cette vente, pour être valable, n'a pas besoin d'être enregistrée au bureau des Terres de la Couronne.

La Cour Supérieure et la Cour d'Appel ont décidé, en la présente cause, que la compagnie "Austin Lumber" n'a jamais été propriétaire du lot en question, et que les lettres patentes donnaient à Thibault un titre parfait qui l'autorisait de disposer de la propriété en favour de qui il voudrait.

On a allégué aussi en faveur de Thibault dans ces jugements la négligence de la compagnie de remplir ses obligations.

Ceci nous amème à considérer la nature du titre que possède de colon.

Je crois qu'à l'origine il était incertain si le billet de location qui était alors remis au colon pouvait étre considéré comme une vente. Par ce billet de location le colon avait le droit d'aller s'installer sur une terre de la Couronne avec la permission de cette dernière : et, s'il y faisait certains défrichements, y construisait certaines bâtisses et faisait certains paiements, il

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pouvait, après un certain nombre d'années, devenir acquéreur de cette terre.

La Cour d'Appel, en 1887, a décidé dans la cause de *Gilmour* v. *Paradis* (1), que ce contrat constituait une promesse de vente.

Dans une cause de *Dinan* v. *Breakey,* décidée en 1881 (2), la Cour de Revision, à Québec, a déclaré que le billet de location était une vente conditionnelle.

Mais depuis 1904 il ne peut pas y avoir de difficulté quant à la nature du contrat. C'est une vente conditionelle. En effet, l'article 1269 des Statuts Refondus de Québec de 1888 a été amendé en 1904 par le chapitre 13 qui déclare que l'agent des terres est tenu de vendre au colon de bonne foi les terres propres à la culture et que

les ventes faites par les agents prennent leur effet du jour qu'elles sont faites.

L'article ajoute cependant que si le billet de location renferme quelque erreur cléricale, le ministère peut l'annuler pour qu'il soit émis un nouveau billet corrigé "qui a son effet de la date du premier."

Nous sommes donc dans le cas actuel en présence d'une vente qui est susceptible d'être résiliée par le vendeur si l'acheteur ne remplit pas les conditions stipulées dans le contrat.

Mais du jour où le billet de location a été émis le colon est devenu le propriétaire de son lot à toutes fins que de droit, à l'exception de certaines restrictions édictées par la loi statutaire et le colon peut se prévaloir de tous les privilèges que l'acheteur possède en vertu du Code Civil. Plus tard, quand il aura rempli ses conditions de paiement et d'établissement,

(1) M.L.R. 3 Q.B. 449. (2) 7 Q.L.R. 120.

il pourra avoir des lettres patentes, qui ne constitueront pas pour lui une nouvelle acquisition de la propriété, mais la confirmation, cette fois sans condition, de son droit de propriété dans le lot vendu.

C'est ce que Cour d'Appel a décidé dans la cause de *Handley* v. *Foran*(1), où le juge Hall, parlant au nom de la cour, disait:—

It has often been held that a location-ticket or promise of sale, with possession, was equivalent to a title, and the subsequent delivery of letters patent in exchange for the location-ticket whose conditions had been complied with, did not establish the date of the creation of a new right, but *only the recognition of a pre-existing one.*

Dans une cause de *Leblanc* v. *Robitaille*(2), jugée par cette Cour en 1901, il a été décidé que sous l'article 1269 tel qu'en force alors le billet de location n'avait aucun effet tant que le ministre ne l'avait pas approuvé.

Mais trois ans plus tard cet article 1269 était rappelé et cette approbation du ministre disparaissait pour faire place à la déclaration que "les ventes faites par les agents prennent leur effet du jour qu'elles sont faites"; et l'intervention du ministre n'était nécessaire que dans le cas où il y auriat en erreur cléricale dans le billet de location. Dans ce cas, le ministre était tenu de corriger cette erreur.

Il y a aussi une autre cause décidé par cette Cour, *Green* v. *Blackburn*(3), où les droits du colon quant aux mines ont été examinés. Mais là encore il s'agissait d'un billet de location émis en 1901, avant la loi de 1904, par conséquent.

Mais on dit: La compagnie Austin n'ayant pas rempli ses conditions d'achat, Thibault pouvait les

(1) Q.R. 5 Q.B. 44.
(2) 31 Can. S.C.R. 582.
(3) 40 Can. S.C.R. 647.

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exécuter lui-même et devenir propriétaire absolu de son lot.

La réponse à cette prétention est bien facile. Elle se trouve dans l'article 1536 du Code Civil qui dit que le vendeur d'un immeuble ne peut demander la résolution de la vente faite par l'acheteur d'en payer le prix, à moins d'une stipulation spéciale à cet effet. Or, nous ne trouvons pas de telle stipulation dans l'acte de 11 août, 1909; et, par conséquent, Thibault ne pouvait pas *proprio motû* résilier cette vente qu'il avait faite à la compagnie Austin et assumer le rôle de propriétaire absolu.

En Cour d'Appel, l'honorable juge-en-chef a déclare que le vente à la compagnie Austin était nulle parce que cette dernière détenait alors plus de 300 acres de terre de la Couronne.

Il est bien vrai que la loi à cette époque, 1275(*c*) tel qu'édicté par 4 Edw. VII., ch. 13, sec. 9, et amendé par 9 Edw. VII., ch. 24, sec. 3, déclarait que les transports faits en faveur d'une même personne pour plus de 300 acres non-patentés étaient nuls et ne conféraient aucun droit au cessionnaire pour le surplus des 300 acres. Mais je ne vois pas que la preuve de ce fait ait été faite.

J'ai analysé avec soin la preuve et je trouve qu'au 11 août, 1909, la compagnie Austin avait en sa possession le lot 30 du premier rang Arago; mais ce lot avait été patenté en 1899 et 1908; elle avait aussi les lots 26 et 27a du 3ème rang Arago; mais ces lots étaient patentés depuis 1892 et 1897. Elle avait aussi partie du lot No. 33 et le No. 32 du 6ème rang du Canton Patton; mais ces lots avaient été patentés en 1908 et 1909.

Mais on dit qu'elle avait des droits de coupe sur un grand nombre d'autres lots.

La preuve, en effet, constate que cette compagnie avait le droit de couper du bois sur plusieurs lots qui n'étaient pas encore patentés; mais ce droit ne donnait pas à la compagnie la propriété des lots eux-mêmes, et il ne peut pas être affecté par la prohibition de la loi.

Maintenant le défaut d'enregistrement du transport au bureau des Terres de la Couronne n'effecte pas sa validité. En 1904, la Législature de Québec avait déclaré que les transports qui ne seraient pas transmis au département seraient absolument nuls et de nul effet; mais cette législation fut abrogée en 1906, démontrant par là d'une manière évidente qu'en 1909 les transports non enregistrés au département étaient considérés comme valides entre les parties contractantes.

L'intimé a prétendu aussi que l'enregistrement de la vente de Thibault à la compagnie Austin au bureau d'enregistrement du comté est sans effet parce que le contrat d'acquisition de Thibault lui-même n'a pas été enregistré. Il se base sur la dernière partie de l'article 2098 du Code qui dit:—

> Jusqu'à ce que l'enregistrement du droit de l'acquéreur ait lieu, l'enregistrement de touts cession, tout transport, toute hypothèque ou tout droit réel par lui consenti affectant l'immeuble est sans effet.

Il faut lire cet article avec l'article 2084, qui déclare que les titres originaires de concession sont exempts des formalités de l'enregistrement. Par conséquent, les lettres patentes émises par la Couronne n'ont pas besoin d'être enregistrées.

Il en était probablement de même de la vente que l'agent des terres de la Couronne faisait sous les dis-

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positions de l'article 1269 S.R.P.Q. de 1888 tel qu'amendé en 1904.

En supposant que les dispositions formelles de l'article 2098 devraient prévaloir et qu'il faudrait enregistrer même les lettres patentes pour qu'un colon puisse faire la vente de sa propriété, l'intimé ne serait pas dans une meilleure position que le vendeur. Il ne pourrait pas lui aussi prétendre que son titre, quoiqu'enregistré, aurait plus de valeur que celui de la compagnie Austin. Car si l'enregistrement des lettres patentes est nécessaire pour la compagnie Austin, il est également nécessaire pour l'intimé Stewart.

Nous serions donc, suivant les prétentions de l'intimé, en présence de deux acheteurs dont les titres n'auraient pas été validement enregistrés. Alors dans ce cas-là celui qui devrait l'emporter serait le premier acquéreur. Le second acquéreur, en effet, déclare la première partie de l'article 2098, ne peut réclamer contre le premier acquereur que si son titre est enregistré.

Pour toutes ces raisons, je suis donc d'opinion que le jugement *a quo* doit être renversé avec dépens de cette Cour et des Cour inférieures.

Le demandeur appelant doit être déclaré propriétaire du lot No. 35 du 1er rang du Canton Arago et il doit être aussi déclaré propriétaire des 850 cordes de bois qui ont été saisies revendiquées.

Il a été prouvé que la défendeur intimé avait coupé ce bois et l'avait transporté à la rivière à ses frais et dépens. Il aurait, à raison de cela, augmenté la valeur du bois au montant de $3.25 la corde. Il a prouvé qu'il avait dépensé sur ces 850 cordes de bois la somme de $2,762.50. Il aura donc la droit de re-

tenir le bois, sous les dispositions de l'article 441 du Code Civil, jusqu'a ce que le remboursement de cette somme ait été effectuée.

Solicitors for the appellant: *Taschereau, Roy, Cannon, Parent & Fitzpatrick.*

Solicitor for the respondent: *Maurice Rousseau.*

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J. B. BELANGER (PLAINTIFF) ..... APPELLANT;

*May 18, 19.
*Oct. 13.

AND

THE MONTREAL WATER AND POWER COMPANY (DEFENDANTS) RESPONDENTS.

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

Municipal corporation—Contract with company—Franchise for water supply—Protection against fire—Negligence—Liability of company to ratepayer—Délit—Damages.

A municipal corporation, with assent of the ratepayers, entered into a contract by which it gave the defendant company the exclusive privilege for twenty-five years of maintaining a system of water supply to the municipality. The company was authorized to fix rates for water supplied for domestic purposes and was obliged, for protection against fire, to have hydrants at certain places and at all times, in case of fire, except when the plant was undergoing necessary repairs, to maintain a specified capacity and pressure of water. The property of B., a ratepayer, was destroyed by a fire which attained serious dimensions owing to the pressure being at the outset much less than that required by the contract.

Held, affirming the judgment of the King's Bench (Q.R. 22 K.B. 487) which affirmed the Court of Review (Q.R. 41 S.C. 348), Brodeur J. dissenting, that there was no contractual relation between B. and the company; that the contract did not evidence any intention by the parties to it to give a right of action against the company to each ratepayer in case of violation of the provisions for fire protection; and that B., therefore, could not maintain an action for the value of his property so destroyed.

Held, also, Brodeur J. dissenting, that B. could not maintain an action for damages on the ground that the failure to maintain the pressure stipulated for in the contract constituted a *délit* or *quasi-délit* under the law of Quebec.

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

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APPEAL from a decision of the Court of King's Bench, appeal side, of the Province of Quebec (1), affirming the judgment of the Superior Court sitting in review at Montreal (2), by which the verdict for the plaintiff at the trial was set aside and his action dismissed.

The facts are sufficiently set out in the above headnote.

The action was brought against the defendant company and the Town of St. Louis. It was dismissed as against the town at the trial in which judgment the plaintiff acquiesced. The action was maintained against the company and the damages assessed at $16,712. This judgment was reversed by the Court of Review and the action dismissed *in toto*. The Court of King's Bench affirmed such dismissal.

Migneault K.C. and *Duranleau* for the appellant. By the contract the municipal corporation covenanted on behalf of the ratepayers which it represents. *Stevenson* v. *City of Montreal* (3); and see *Wilshire* v. *Village of St. Louis du Mile End* (4).

The cases deciding against a right of action in a case like this where there is a penalty for non-performance do not apply. The clause in the contract providing for forfeiture in case of non-performance is not a penal clause. The forfeiture is conditional on the municipality buying the plant which it may not do. See *Simpson* v. *South Oxfordshire Water and Gas Co.* (5), referring to *Atkinson* v. *Newcastle and Gateshead Water Co.* (6), relied on by respondents.

(1) Q.R. 22 K.B. 487.
(2) Q.R. 41 S.C. 348.
(3) Q.R. 6 Q.B. 107.
(4) Q.R. 8 Q.B. 479.
(5) [1908] 1 K.B. 917.
(6) 46 L.J. Ex. 775.

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The question is peculiarly one of Quebec law and the decisions in France should be followed. See Fuzier-Hermann, Code Civile Annoté, Ad. 1121, No. 30; Dalloz Rep. 20, "Obligations" No. 273.

The following English decisions, among others, are in the plaintiff's favour. *Campbell* v. *East London Water Works*(1); *Dawson* v. *Bingley Urban District Council*(2).

The defendants may be liable on the contract and also to an action *ex delicto*. See 20 Laurent No. 463; Fuzier-Hermann C.N. Supp. Arts. 1382, 1383, No. 854. *Turner* v. *Stallibrass*(3); *Quebec Railway Light and Power Co.* v. *Recorder's Court*(4).

As to liability for *délit* in this case see *Guardian Trust and Deposit Co.* v. *Fisher*(5).

Atwater K.C. and *Buchanan K.C.* for the respondents. The appellant might, possibly, have had a right of action if the respondents had failed to supply water for domestic purposes, but could have none for failure in the public supply. *Johnston* v. *Consumers' Gas Company of Toronto*(6); *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*(7), *at page* 448.

THE CHIEF JUSTICE.—I concur in the dismissal of this appeal.

IDINGTON J.—The appellant was a ratepayer and inhabitant of the Village of St. Louis du Mile End when a fire destroyed his property whilst that muni-

(1) 26 L.T. 475.
(2) 27 Times L.R. 308.
(3) [1898] 1 Q.B. 56.
(4) 41 Can. S.C.R. 145.
(5) 200 U.S.R. 57.
(6) [1898] A.C. 447.
(7) 2 Ex. D. 441.

cipal corporation held a contract from respondent to supply the inhabitants thereof with water.

He sued both the municipal corporation and respondent to recover damages resulting from this destruction of his property by said fire.

The municipal corporation was discharged from such claim by the learned trial judge dismissing the action as against it, and no appeal has been taken, but respondent was held liable by said learned judge to the appellant.

This judgment against respondent was reversed on appeal to the Court of Review and such reversal has been upheld by the Court of King's Bench.

The question raised is the liability of the respondent to a party with whom it never had any contract.

It is said that the contract made between respondent and the municipal corporation was made on behalf of each and all of the inhabitants, members of the municipal corporation, and that though technically made with the corporation must be held to enure to the benefit of the appellant.

Without investigating fully the possibility of such a corporation, which is a mere creature of a statute and therefore possessing only such powers of action in way of contracting for itself or others as the statute may have given it, I cannot pass any opinion relative to such possibility.

I am content thus to indicate what may, on such investigation, be found to be an insurmountable barrier to the possible right of action founded on what may be an unauthorized transaction on the part of the municipal corporation. In the view I take of the contract and the possibility of its founding any such obligation on the respondent to indemnify the appel-

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lant as claimed, it is quite unnecessary for me to enter upon such an inquiry, much less express an opinion thereupon.

The contract provides, in a way that is quite usual, for the respondent supplying to the inhabitants water for domestic and other public purposes for the term of twenty-five years.

The necessary powers for executing such purposes are provided by the contract and, its counterpart, a by-law approved by the electors of the municipality; and the frame of the contract as well as the mode of compensation is such as to suggest that there may be created an obligation by the respondent to each of the ratepaying inhabitants for and in respect of which they may have, on default, personal remedies.

I express no opinion as to that either. All I am concerned with here is to point out that in the contract there clearly seems to be expressed some such purpose or intention on the part of the framers thereof and of the formal parties thereto.

There is also in the "Municipal Code" enabling the village to enter into such a contract much that would suggest that the municipality itself, undertaking the duty of furnishing such a water-supply, would become liable in many ways for its failure to discharge the duties incidental to the execution of such an undertaking.

But when we consider its powers and responsibilities in furnishing, if it should undertake to furnish, the needed fire protection, we do not find it so easy to see how it could become thus indirectly an insurer against fire which would give rise to the right of action against it in case of failure sufficiently to execute such a purpose. Though there does seem something

possible in way of liability for such supply of good water for domestic purposes there is not, I submit, a shred of reason to impute liability for non-maintenance of pressure of water in case of fire.

When, instead of doing either of these things, the municipal corporation, so constituted, delegated, by way of contract, these privileges and duties to another, surely such considerations, exhibiting the vast differences of law and fact between what is usually involved in the execution of each of such purposes in relation to either of these respective fields of action, must be had in view when we come to the interpretation and construction of such a peculiar contract and have to determine what was the intention of those entering into it.

It is by this intention so far as we can gather it from the contents of the instrument and the surrounding circumstances of law and fact existent at its execution, and aiding its interpretation wherein it may be ambiguous, that I think we must be bound.

The first article seems only to contemplate the supply of a

> continuous and sufficient supply of good, wholesome and drinkable water to the said municipality and its inhabitants, both for public and domestic use.

Hydrants are to be erected at specified distances apart.

Then, in article 5, we have the following:—

> Water from the said hydrants shall be used only for the extinguishing of fire and the practice of the fire engines, for watering the roads and streets, and the ordinary requirements of the police and fire stations and of the Municipal Hall and generally for all strictly corporation purposes now existing or which may hereafter exist during the term of this agreement, the whole gratuitously, except as provided in this article.

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And later on we have the article 8, as follows:—

The said water works shall at all times, except whenever and so long as absolutely necessary repairs must be made, be of a sufficient capacity to throw upon the flames, in case of fire, from three hydrants simultaneous streams of water from a hose three hundred feet long and two inches and a half in diameter with a one inch nozzle to the height of not less than seventy-five feet.

In these features of a very long contract there is to be found all that lends any colour to the contention that there was such a legal relation, contractual or otherwise, constituted between respondent and appellant whereon to found such an action as this.

I cannot conceive of such a purpose having been within the contemplation of the parties being so expressed.

If it was intended that each of the inhabitants was to enjoy such a right of action one would have expected the parties to such an unusual form of liability or obligation to have expressed it in some form or other.

So far from that being the case there is nothing but a capacity in equipment equal to the emergency of supplying, if needed, a pressure of water directed through such equipment.

It does not provide for constant pressure of any kind. Are we to read into the contract what it does not contain even as between the parties thereto, and then imply, upon such implication something, which common knowledge of the world and its ways in regard to municipal government, tells us no one ever dreamed of in framing any such like contract?

Generally in such like contracts special care is taken specifically to provide for a constant pressure of such degree as agreed upon and, on notice of fire, an

adequate increase of pressure measured by the requirements agreed upon.

This contract certainly is not a model for any municipality to adopt. And its expressly gratuitous nature and general attitude does not help the appellant.

We have had able argument presented in support of the appellant's claim, but unfortunately the foundation upon which it has of dire necessity to rest is most slender indeed.

I have for argument's sake assumed the possibility of a better contract, but any direct contract of this sort with any municipal corporation which does not indicate a clear purpose of its being so framed for the personal benefit of each of the inhabitants that it must give rise to a legal obligation towards each of such persons, must meet with great difficulty of its being so enforced.

Moreover, there is an express alternative given in case of default which seems of such a restrictive nature as to forbid such action as this.

I think the appeal must be dismissed with costs.

DUFF J.—The appellant bases his right to relief upon the proposition that the respondent company's covenant contained in the contract between the company and the municipality requiring a specified pressure to be maintained was a covenant exacted by the municipality for the personal benefit of all inhabitants and ratepayers. I think this contention cannot be sustained. The municipal council, of course, in entering into a contract of this description, acts in the interests of the ratepayers if not of the general body of the

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inhabitants of the municipal district. In a loose sense it may be said to be a trustee for these. But that is a very different thing from saying that every stipulation in the contract in question is intended to create and does create an obligation which is a *vinculum juris* between the company and every such ratepayer or inhabitant. The conclusion to which I have come is that as regards such a stipulation in question the intention to create such a situation is not sufficiently evidenced and I think there are considerations stated by Lord Cairns in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*(1), at pages 446 and 447, which are sufficient to rebut the existence of any such intention in this case.

ANGLIN J.—Assuming in favour of the appellant (plaintiff) three points which are contested by the respondents (defendants), namely, that by its contract with the municipality of St. Louis du Mile End the defendant company undertook to maintain a defined water-pressure for fire purposes, that the part of the municipality in which the plaintiff's property is situate is within that undertaking, and that it is sufficiently established that failure to maintain such pressure was, in a legal sense, the cause of the loss which the plaintiff sustained, I am nevertheless of the opinion that he cannot recover the damages which he claims in this action.

An alternative claim against the municipal corporation was dismissed by the learned trial judge on the grounds that it owed no duty to the plaintiff in regard to the water-service, its powers in that respect

(1) 2 Ex. D. 441.

being purely facultative, that the plaintiff as a ratepayer was bound by the terms of the contract with the waterworks company which expressly relieved the municipality from all liability for damages arising out of the exercise of the privileges conferred by the contract, and that there was, therefore, no *lien de droit,* between him and the corporation on which he could found an action against it. He has acquiesced in this disposition of his suit against the town.

He bases his claim against the defendant company on two grounds — breach of contract and tortious dereliction of duty. He asserts that as a ratepayer he is a party to the contract under which the company, in consideration of an exclusive franchise from the municipality, undertook to furnish a supply of water; or that, if he is not a party to it, he is a person for whose advantage that contract was made, that it is within the purview of article 1029 C.C., and that he is entitled to claim the benefit of it and to maintain an action for damages for injury sustained through the defendant's breach of its provisions. In the alternative he says that by its contract the defendant company undertook a public duty or calling absolute in its character, and that, the company having entered upon the discharge of that duty, breaches of it entailed liability in tort to every individual citizen injured thereby.

The plaintiff's claim that he is a party to the contract seems to rest chiefly on the fact that it was authorized by a by-law submitted to the votes of the ratepayers. I am by no means satisfied that a municipal corporation has the power under Quebec law to enter into a contract in the name and on behalf of its ratepayers or citizens individually. But if that may be

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done, the present contract, at all events as to the supply of water for other than domestic purposes, is clearly not of that character. The municipal corporation makes it as principal and on its own behalf and not as agent or representative of its ratepayers. The consideration for the franchise granted is expressly stated to be

> the public benefit to be derived by the said municipality and the taxpayers.

The assent of the electors to the authorizing by-law — required because of the obligation imposed on householders to pay rates (art. 637(*a*) C.M.) — does not, in my opinion, make them parties to the contract, or entitle them to enforce it as privies.

No doubt, under the Civil Code in the Province of Quebec (art. 1029) as under the Code Napoléon in France (art. 1121), provision is made for stipulations in contracts in favour of persons not parties to them but for whose direct benefit such stipulations are intended; and in cases in which it is established that it was meant to confer upon such third parties rights of action in respect to such stipulations, such rights may exist. But every contractual stipulation for the benefit of another (*stipulation pour autrui*) does not give to that other a right of action to enforce it. Such a right arises only where it was the intention of the parties to the contract to confer it — an intention the existence or non-existence of which must be determined by the interpretation of the contract. *Watts-Ward et cie.* v. *Cels*(1). The principle of this *arrêt* was applied in *Allen & Curry Manufacturing Co.* v. *Shreveport Waterworks Co.*(2), to a contract not

(1) S.V. 1901, 1,270. (2) 113 La. Rep. 1091.

dissimilar to that now before us in regard to its provisions for fire-pressure. From the fact that fire protection is in the nature of a public service, that it constitutes a branch of the civic administration, that the terms of the present contract, which distinguishes between domestic supply and that for hydrants to be used only for street watering, fire engines and "all strictly corporation purposes," indicate that it was for a service of such a public character that provision in regard to fire-pressure was made, that the municipality was not under any obligation to the inhabitants to furnish fire protection, that it is unlikely that it would seek to impose on a private company undertaking to supply water an obligation of the nature contended for, to which it was not itself subject, that liability to actions at the suit of individuals for every breach of such a contractual undertaking with the municipality would be of such an onerous character that its assumption by the company would be highly improbable — in a word, that there is nothing either in the language of the contract or in the circumstances under which it was entered into to rebut the ordinary presumption that the stipulation of a contracting party is for himself and not for a third person, but, on the contrary, much to indicate that there was no intention on the part of either contracting party to confer on every ratepayer or citizen such a right of action as the plaintiff asserts, I conclude that the stipulations in regard to public hydrants and pressure for fire purposes were not *stipulations pour autrui* in the sense in which the plaintiff prefers them and that they do not sustain his action.

We are referred by counsel for the appellant to an *arrêt* of the Belgian Court of Cassation in the case of

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Ville de Mons v. *Robert et cie.*(1), cited by Mr. Justice Cross. In that case the municipality of Mons had granted the defendants a franchise for a gas service in consideration of which the latter undertook to furnish at fixed rates a supply of gas to any citizen who should become a subscriber therefor. By demanding from the defendants a supply of gas and either paying or undertaking to pay for it the citizen entered into direct contractual relations with them and the court held that, from such relations, a right of action in his favour would arise. Whatever might be thought of the applicability of this decision had the present case arisen out of failure of the defendant company to furnish water for the domestic requirements of the plaintiff, it is not in point where the default lies in carrying out an undertaking for the benefit of the municipality as a whole, such as that with which we have to deal.

Mr. Justice Cross, in his dissenting judgment, also refers to the case of *Wilshire* v. *Village of St. Louis du Mile End*(2), as establishing that the contract now in question created a *lien de droit* between the plaintiff company and the inhabitants of the municipality individually. There are, no doubt, expressions of opinion to that effect in the judgment and the contract is treated as having been made by the corporation as mandatary of and as representing the ratepayers. But in that case the question was as to liability for failure to furnish to the plaintiff a private supply of water as to which the terms of the contract differ widely from those relating to the supply at public hydrants; the company were not parties to the action, which was brought against the municipality only; and

(1) (1889) Jour. du P. 2, 17. (2) Q.R. 8 Q.B. 479.

the actual decision in the case is merely that the municipal corporation was under no liability whatever.

In presenting his claim as founded in tort, counsel for the appellant relies upon English and American authority. The decision of the Supreme Court of the United States in *Guardian Trust and Deposit Co.* v. *Fisher*(1), delivered by Mr. Justice Brewer (White, Peckham and McKenna JJ. dissenting) is, no doubt, a strong authority in the plaintiff's favour. Negligence in failing to maintain a sufficient supply in its storage tank by a company engaged in furnishing a municipality with water was held to give to a citizen, whose property was injured by fire in consequence of such neglect, a right of action against the company in tort. In England the improper discharge by a municipality of a statutory duty in regard to water supply for fire purposes, amounting to a misfeasance, has been held by the Court of Appeal to impose a like liability. *Dawson & Co.* v. *Bingley Urban District Council*(2). In his judgment Kennedy L.J. discusses the earlier Court of Appeal decision in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*(3), on which the respondents rely. In that case by the provisions of the "Water Works Clauses Act," incorporated into the company's undertaking by a private Act, there was created, as the court said, a statutory duty to maintain fire-plugs with a specified supply of water. Of that undertaking there was a breach which occasioned injury to the plaintiff's property by fire. The court, after pointing out the improbability of Parliament having meant to impose, or of

(1) 200 U.S.R. 57.

(2) [1911] 2 K.B. 149.

(3) 2 Ex. D. 441.

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the company having undertaken liability to actions by any number of householders who might happen to have houses burned down in consequence of an insufficient supply of water being furnished, held the company not liable in damages. For certain breaches of the "Water Works Clauses Act" two penalties were imposed, one going wholly to the public treasury, and the other to the prosecutor; for other breaches, of which the failure to supply water was one, the only penalty imposed was for the benefit of the public treasury. No doubt these penalty provisions influenced the construction put by the court upon the statute. But both Lord Chancellor Cairns and Cockburn C.J. attached great importance to the point stated in the following passage from Lord Cairns' judgment. Referring to *Couch* v. *Steel*(1) he says, at page 448:—

> But I must venture, with great respect to the learned judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down — that, wherever a statutory duty is created, any person, who can shew that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially, when, as here, the Act with which the Court have to deal, is not an act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.

Cockburn C.J. dealing with the same point, says, at page 448:—

> Notwithstanding the great respect that I entertain for the judges who decided the case of *Couch* v. *Steel*(1), I must say that I

(1) 3 E. & B. 402.

fully concur with the Lord Chancellor in thinking, that the question, whether that case was rightly decided, is one which is open to very grave doubts. That question, however, is one which it is unnecessary to entertain here, for the present case is clearly distinguishable. The Act of Parliament on which that case turned was a public general Act applicable to all the Queen's subjects; here we are dealing with certain obligations imposed by the legislature upon a private company, as the conditions upon which Parliament granted them the powers under which they carried out their undertaking; and I think that such an Act of Parliament as this is liable to a much more limited and strict interpretation than that which can be put upon one which is applicable to all the subjects of the realm.

The language of Lord Cairns just quoted is referred to with approval by the Judicial Committee in *Johnston* v. *Consumers' Gas Co. of Toronto*(1), at pages 454-5. As is pointed out by Chief Baron Palles in *Bligh* v. *Rathangan Drainage Board*(2), the right created by the private legislation dealt with in the *Atkinson Case*(3) was a public right, not a right given to individuals.

In the present case we have not even a statutory duty imposed on the defendants by private legislation. Whatever the obligation, it is purely the result of a private contract between the municipal corporation and the water works company. *A fortiori* it does not give rise to a right of action on the part of the individual citizen, not within the contemplation of the parties. Moreover, as is pointed out by Kennedy L.J. in the *Dawson Case*(4), it is to be noted that the defendants in the *Atkinson Case*(3) (as here) "were not a public body but a private company." Where the duty is statutory, the liability which it imposes, is to be determined by the intention of the legislature as gathered from the language of the statute; where it

(1) [1898] A.C. 447.
(2) (1898) 2 Ir. 205, 224.
(3) 2 Ex. D. 441.
(4) [1911] 2 K.B. 149.

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is contractual it depends upon the intention of the contracting parties to be gleaned from the contract fairly and reasonably interpreted. Where such an interpretation leads to the conclusion that liability in damages to individuals sustaining injury through non-fulfilment of the obligations undertaken, was not intended by the parties, no such liability exists under English law. Such appears to be the only proper conclusion to be drawn from the statement of Lord Cairns indorsed by Lord Macnaghten speaking for the Judicial Committee.

While I fully recognize the weight which should be attached to the judgment of the Supreme Court of the United States in *Guardian Trust and Deposit Co.* v. *Fisher*(1), English authority appears to be adverse to the appellant's claim. Moreover, the great majority of the American courts seem to hold the view which obtains in England. See cases collected in Dillon's Municipal Corporations (5 ed.), vol. 3, sec. 1340, p. 2303. See also *Cunningham* v. *Furniss*(2).

In order to establish that the defendant's failure to maintain the fire-pressure stipulated in its contract was illicit, and therefore delictual within the purview of article 1053 C.C., Mr. Justice Cross treats it as falling under clause (*b*) of section 499 of the Criminal Code. Assuming in favour of the plaintiff that conduct declared criminal by clause (*b*) would render the defendants civilly liable to individual citizens for consequential injuries sustained by them although such liability was not contemplated by the contract, in the present instance a case within that provision of the Criminal Code has not been made out. I doubt

(1) 200 U.S.R. 57. (2) 4 U.C.C.P. 514.

whether it has been established that the failure to maintain the agreed fire-pressure in the neighbourhood was "wilful" on the part of the defendants within the meaning of that term as used in clause (*b*). But if it has, their contract was for a supply of water to the town and its inhabitants as a whole, not to "a part thereof"; and there is no evidence that the defendants broke their contract, knowing or having reasonable cause to believe that, in consequence, the inhabitants of the town would be deprived wholly or to a great extent of their supply of water. For aught that appears to the contrary the use of the regulating valve, of which the plaintiff complains, may have been in the general interest of the municipality and its inhabitants. The curtailing of the water supply in a limited district may have been on the whole beneficial. Its purpose may have been to prevent a large majority of the inhabitants of the town being deprived to a great extent of their supply of water. If bringing the defendants' conduct within clause (*b*) of section 499 would entail their civil liability to the plaintiff as an inhabitant of the Town of St. Louis, the record does not contain evidence which would establish such criminal responsibility. Moreover, a breach of section 499 is not alleged in the declaration and the case does not appear to have been tried on the footing that such an issue was involved. It is not even hinted at in the judgment of the trial judge or in the opinions delivered in the Court of Review. Had that issue been presented at the trial, it is not possible to say what evidence might have been adduced to meet it. It is too late to raise such a ground for the first time in appeal and it would be manifestly

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unfair to the defendants to make it the turning point of the case.

I have found no authority indicating that a contractor in the situation of the defendant company with regard to the water supply for fire-purposes would be liable under the civil law for delict or quasi-delict arising out of the non-fulfilment of his contractual obligations where such liability would not exist in an action of tort under English law. Liability cannot, I think, extend beyond what was in contemplation of the parties when the obligation was undertaken. The nature and extent of the obligation and the persons to whom the duties are owed to which it gives rise depend upon the terms of the contract fairly and reasonably interpreted. To subject the contractor to a greater burden, whether the claim against him is founded in contract or in tort, since it necessarily exists only by reason of the contract, would seem to be contrary to the spirit, if not to the letter, of articles 1074 and 1075 C.C.

For these reasons I would dismiss this appeal with costs.

BRODEUR J. (dissident).—En vertu des dispositions du code municipal (arts. 637 et suivants) toute corporation a le droit d'accorder à une compagnie le privilège exclusif de construire un aqueduc et d'effectuer avec elle un contrat pour l'approvisionnement de l'eau dans la municipalité.

La corporation du Village du Mile End a été autorisée par un règlement adopté par son conseil municipal et approuvé par les contribuables, à donner à la compagnie intimée le privilège exclusif de poser un aqueduc dans les limites de son territoire, pourvu que,

moyennant une rémunération spéciale qui lui serait payée directement par les contribuables, la compagnie leur fournisse de l'eau pour les besoins domestiques.

Le règlement déclarait en outre que la compagnie devait poser des bornes-fontaines à différents endroits et elle devait s'obliger de toujours y maintenir une certaine pression d'eau.

La compagnie intimée, sous l'autorité du contrat qui a été signé par elle et la corporation le 12 février, 1891, a construit son aqueduc et a fourni l'eau aux contribuables de la municipalité, et notamment à l'appelant en cette cause, qui lui a donné régulièrement ce qu'il était obligé de lui payer en vertu du règlement et du contrat.

Mais la compagnie ne paraît pas avoir observé son obligation quant à la pression de l'eau; car, à diverses reprises, elle a été protestée à ce sujet par la corporation.

Le 26 septembre, 1906, un incendie s'est déclaré dans une cour voisine de la propriété de l'appelant. Les pompiers furent immédiatement appelés; ils se mirent à l'œuvre pour éteindre le feu; mais malheureusement la pression d'eau étant insuffisante, l'incendie s'est étendu et a atteint en définitive la propriété du demandeur appelant et l'a détruite de fond en comble.

Il poursuit maintenant la compagnie en dommages et réclame la valeur de sa propriété et de ses effets qui ont été détruits dans cet incendie.

La cour supérieure, présidée par l'Honorable Juge Curran, a maintenu son action et lui a accordé une somme de $16,712.

La cause a été portée devant la cour de revision,

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présidée par les Honorables Juges Pagnuelo, Charbonneau et Dunlop. Le jugement de la cour supérieure a été renversée par les Honorables Juges Charbonneau et Dunlop, l'Honorable Juge Pagnuelo ayant pris sa retraite quelque temps avant que jugement fut rendu par la cour de revision. Des notes qu'il a laissés au dossier, font présumer cependant qu'il favorisait les prétentions du demandeur.

La cour d'appel a maintenu le jugement de la cour de revision, et a, par consèquent, renvoyé l'action du demandeur, MM. les Juges Trenholme et Cross étant dissidents.

Il est incontestable que les dommages soufferts par l'appelant auraient pu être évités si la pression d'eau stipulée dans le règlement et dans le contrat avait existé au moment où l'incendie a commencé. Nous avons alors à décider si la compagnie doit être tenue responsable de ces dommages.

Son obligation contractuelle est bien définie dans le règlement qui a été adopté par la corporation et qui a été ensuite incorporé dans le contrat lui-même du 12 février, 1891.

Mais on dit:—Le demandeur n'a pas été partie à ce contrat et la stipulation, quant à la pression d'eau, ne peut lui donner le droit de s'en prévaloir comme obligation contractuelle.

Il ne faut pas perdre de vue cependant le fait que ce contrat, quoique passé entre la corporation municipale et la compagnie, établissait un lien de droit et donnait lieu à des relations légales entre le demandeur appelant et l'intimée quant à l'approvisionnement de l'eau pour des fins domestiques. C'est ce que la cour

d'appel a dècidé, il y a quelques années dans une cause de *Wilshire* v. *Village of St. Louis* (1).

Notre article 1029 du Code Civil déclare:—

On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'un contrat que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui fait cette stipulation ne peut plus la révoquer si le tiers a signifié sa volonté d'en profiter.

Ce principe de droit qu'on peut stipuler pour un tiers n'est pas reconnu dans le droit anglais; et alors il est excessivement dangereux de décider une cause comme celle-ci à la lumière de la jurisprudence de l'Angleterre.

Du moment que le demandeur commençait à payer à la défenderesse le prix convenu pour l'eau qui lui était fournie, un lien de droit se formait non seulement pour l'eau nécessaire aux fins domestiques, mais aussi pour l'eau qui pouvait être requise en cas d'incendie. Nous avons la compagnie qui était, d'un côté créancière du prix, et, de l'autre, débitrice de l'obligation de fournir l'eau pour les deux fins mentionnées au contrat.

Il est bien vrai qu'il n'y a pas de montant spécifiquement mentionné que le contribuable devra payer pour l'eau qui lui sera fournie en cas d'incendie; mais que cette obligation de la part de la compagnie résulte soit du privilège exclusif qui lui a été accordé, soit du montant qu'elle a le droit de percevoir de tous les contribuables pour l'eau qu'elle leur fournit pour des fins domestiques, elle s'est tout de même obligée à fournir l'eau en cas d'incendie et de maintenir une certaine pression et, par conséquent, cette stipulation

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faite en faveur du contribuable donne certainement à ce dernier un droit d'action.

Ce droit d'action, la compagnie ne nie pas qu'il existe au cas où il s'agirait de son obligation de fournir l'eau pour des fins privées; mais elle prétend que quant à l'eau qu'elle est obligée de fournir pour des fins publiques, comme dans le cas actuel, il n'y a pas, pour le contribuable, de droit de poursuite.

Je suis incapable de trouver une distinction entre les deux. Je considère que le droit d'action existe dans les deux cas et que si la corporation fait défaut de donner la pression nécessaire, elle engage sa responsabilité.

Cette question de savoir si un contribuable peut poursuivre une compagnie est venue dans une cause rapportée dans Sirey, 89-4-9 et Journal du Palais, 1889-4-17; et il a été jugé par la Cour de Cassation de Belgique que—

> La ville qui a fait un traité avec un entrepreneur pour l'éclairage public et privé, a qualité pour faire reconnaître en justice les droits résultant de la dite convention au profit des habitants abonnés, lesquels, *de leur côté, ont individuellement le droit d'exiger de l'entrepreneur l'exécution des stipulations faits à leur profit.*

Mais il y a plus dans le cas actuel.

Je considère que la compagnie intimée a commis non seulement une faute contractuelle, mais une faute délictuelle et qu'en vertu de l'article 1053 du Code Civil elle doit indemniser le demandeur—

> Toute personne (dit l'article 1053) est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabilité.

Qu'est-ce qu'une faute ? C'est tout ce qui blesse injustement le droit d'autrui en faisant une chose

qu'on n'a pas le droit de faire, ou bien encore c'est quand on omet de faire soit des actes préscrits par la loi ou soit des actes que les rapports nécessaires des hommes considèrent comme obligatoires.

Du moment que la loi prohibe une chose elle devient illicite et constitue un délit. Ainsi nos lois criminelles ou pénales qualifient tel acte de faute. Or, du moment que cet acte cause des dommages, il donne lieu à une réparation civile. Laurent, vol. 20, No. 402, dit:—

> Que les faits punis par une loi pénale soient des faits illicites, cela va sans dire; toute infraction est donc un délit civil pourvu qu'il en résulte un dommage.

D'un autre côté, il y a beaucoup d'actes qui blessent les principes de la morale, mais qui cependant n'ont pas été formellement qualifiés de délictueux par nos lois. Ces faits cependant constituent des fautes dont l'article 1053 nous charge également de faire l'application.

Nous déclarons constamment coupable de négligence l'industriel qui néglige de couvrir ses machineries. La loi ne dit pas formellement qu'il engagera sa responsabilité en ne remplissant pas cette obligation statutaire. D'ordinaire elle se contente de lui imposer une amende. Mais les tribunaux civils, appelés à appliquer l'article 1053 de notre code, trouvent dans cette négligence de couvrir ses machines la faute que cet article exige pour déterminer la responsabilité.

Dans le cas actuel, nous avons la corporation municipale qui décrète, sous l'autorité de la loi, que la compagnie intimée ne pourra fournir de l'eau qu'à telle et telle condition. Cette dernière reçoit le privilège

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exclusif de poser un aqueduc dans les limites de la municipalité. Mais en retour elle contracte l'obligation de fournir pour éteindre les incendies une certaine pression d'eau. Son obligation revêt un caractère public. Que le contribuable le veuille ou ne le veuille pas, il est obligé de payer cette compagnie pour l'eau qui lui est fournie pour des fins domestiques. Il y a là pour le contribuable une obligation statutaire qui lui est imposée. Est-ce que les obligations correlatives de la compagnie ne sont pas également d'une nature publique ? Le Code Criminel, d'ailleurs, répond à cette question par son article 499 qui dit que

> toute compagnie qui * * * s'étant chargée d'approvisionner quelque cité ou localité * * * d'eau, de propos délibéré viole un contrat * * * sachant ou ayant raison de croire que les conséquences probables de son acte peuvent être de priver les habitants de cette cité ou localité * * * totalement ou en grande partie de leur approvisionnement d'eau, est passible d'une amende.

Il y avait donc faute pour la compagnie intimée en violant son contrat; et elle a sciemment violé son contrat, car elle en avait été notifiée par la corporation et on lui avait intimé que les conséquences probables de sa négligence pouvaient priver les habitants du Mile End de la protection qu'ils avaient le droit d'attendre en cas d'incendie.

Je suis donc arrivé à la conclusion qu'il s'est formé un lien de droit entre le demandeur et la défenderesse et qu'en vertue de ce lien de droit le demandeur a un droit d'action contre la défenderesse résultant de cette obligation contractuelle.

Mais, en outre, la défenderesse s'est rendue coupable de faute délictuelle en ne remplissant pas son contrat.

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Suivant les dispositions des articles 1065 et 1053 du Code Civil, elle est responsable du dommage souffert par le demandeur. Le jugement *a quo* devrait être renversé avec dépens de cette cour et des cours inférieures et celui de la cour supérieure confirmé.

Appeal dismissed with costs.

Solicitors for the appellant: *Monty & Duranleau.*
Solicitors for the respondents: *White & Buchanan.*

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*Oct. 16.
*Nov. 30.

SAMUEL K. CHAMPION AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

THE WORLD BUILDING COMPANY AND OTHERS (DEFENDANTS) .. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Appeal—Case originating in Superior Court—Supreme Court Act, s. 37(b)—Concurrent jurisdiction—"Mechanics' Lien Act" (B.C.) —Action to enforce lien.

For an appeal to lie to the Supreme Court in a case not originating in a superior court, as provided in sec. 37, sub-sec. (*b*) of the "Supreme Court Act," it is not sufficient that the inferior court has concurrent jurisdiction with a superior court in respect to its general jurisdiction; there must be concurrent jurisdiction as respects the particular action, suit, cause, matter or other judicial proceeding in which the appeal is sought.

In British Columbia the County Court alone may maintain an action to enforce a mechanic's lien. In such action, so far as the parties or any of them stand in the relation of debtor and creditor, the court may give judgment for the debt due whatever its amount and if it exceeds $250 there may be an appeal to the Court of Appeal.

Held, Duff J. dissenting, that though an action for the debt could be brought in the Supreme Court the foundation for the County Court action is the enforcement of the lien as to which there is no concurrent jurisdiction and no appeal lies to the Supreme Court of Canada from the judgment of the Court of Appeal in such an action.

APPEAL from a decision of the Court of Appeal for British Columbia (1) dismissing an appeal and cross-

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

(1) 6 West. W.R. 1469.

appeal from the judgment of Grant Co. J. in the County Court(1).

The plaintiffs, contractors for constructing a building for the defendants the World Building Co. having obtained the architect's certificate for $6,000 while the work was in progress, filed a lien against the property and brought action in the County Court to enforce it. When the work was finished they filed another lien for the balance claimed and brought a second action. The actions were consolidated.

By the "Mechanics' Lien Act" of British Columbia the action to enforce a lien must be brought in the County Court and on the trial the court may give judgment for the amount found due even if it exceeds the jurisdiction given in an ordinary action. In these cases judgment was given for the plaintiffs for the $6,000 claimed in the first action and the second action was dismissed on the ground that there was no architect's certificate covering the amount claimed therein. The plaintiffs appealed to the Court of Appeal for the amount so refused and the defendants cross-appealed for dismissal of the first action. Both appeals were dismissed and both parties appealed to the Supreme Court of Canada.

Christopher C. Robinson moved to quash the appeal of the plaintiffs for want of jurisdiction.

Lafleur K.C. contra.

THE CHIEF JUSTICE.—This is an application to dismiss for want of jurisdiction.

The action was brought in the County Court to en-

(1) 6 West. W.R. 233.

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force a mechanics' lien under the Act R.S.B.C. (1911), ch. 154. To that claim was joined a demand for a personal condemnation in a sum exceeding the ordinary jurisdiction of the court. It is admitted that in such an action the jurisdiction of the County Court is exclusive. The Act also provides, section 34, that in so far as the parties before the court are debtor and creditor the court may give judgment for

> the sum actually found to be due notwithstanding such sum may exceed the ordinary jurisdiction of the County Court.

The question is not free from difficulty, but on the whole I am of the opinion that the claim to enforce the mechanic's lien in such an action as this is the foundation of the jurisdiction of the County Court, and it is by reason and as a consequence of the existence of that lien that the County Court has jurisdiction to deal with the personal obligation of the defendant. The jurisdiction of the Supreme Court on the other hand is dependent merely upon the amount of the indebtedness or liability and in that respect is exclusive. So that in so far as the action seeks the enforcement of the mechanic's lien the jurisdiction of the County Court *is* exclusive, and in so far as it is a personal claim the jurisdiction of the Supreme Court *would be* exclusive were it not for the statute which confers upon the County Court a special jurisdiction in this particular case.

I read the statute as conferring jurisdiction upon the County Court to give judgment upon the personal claim merely in so far as it is incidental to the enforcement of the mechanics' lien. In that view I come to the conclusion with much hesitation because of the dissent of Duff J. that the jurisdiction is not concur-

rent and that the application must be granted with costs.

DAVIES J.—A motion to quash this appeal was made and argued before us by Mr. Robinson on the ground that this action was one originating in the County Court of British Columbia under the "Mechanics' Lien Act," and that in such actions the jurisdiction of the County Court was exclusive and not concurrent with the Supreme Court of that province.

Our jurisdiction to hear appeals not originating in a Superior Court is defined in section 37 of the "Supreme Court Act" and an appellant must, of course, bring himself within that section in order to justify his appeal.

The two conditions necessary to give us jurisdiction are first that "the sum or value of the matter in dispute" should amount to $250 or upwards; and, secondly, that the court of first instance, in the present case the County Court, should possess concurrent jurisdiction with a Supreme Court.

The amount in dispute is large, several thousands of dollars, and it is contended that so far as defendants' personal liability is concerned there is concurrent jurisdiction in both courts.

In one sense that may be true, because as an incident to successfully maintaining his action for a lien the County Court must adjudge the amount for which the lien shall be declared to exist or apply and the Supreme Court of the province had, apart from the lien, undoubted jurisdiction in a personal action for any amount.

But it seems to me that the true construction of

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section 37 of the Act establishing this court is that the "concurrent jurisdiction" there spoken of as essential to our entertaining an appeal is one in all the essentials of the action.

Now this action is one for a lien for whatever amount might be found due the plaintiff. The County Court possessed exclusive jurisdiction under the "Mechanics' Lien Act" to entertain such an action. The determination of the amount for which the lien was to stand was no doubt a most important incident in the action and by section 35 of that Act an appeal was given from the County Court judge where the judgment exceeded $250, as in ordinary cases to the appeal court of the province.

By virtue of this appeal the Court of Appeal has jurisdiction over the whole case and may deliver the judgment which the County Court judge should have given. But such an appellate jurisdiction does not interfere in any way with the exclusive jurisdiction of the County Court over the lien action up to the time of the appeal.

The essential ingredient therefore necessary to give an appeal to this court is wanting, namely, the possession by a superior court of jurisdiction concurrent with the County Court in suits to give effect to mechanics' liens.

I think the motion to quash should be granted with costs.

IDINGTON J.—These suits were instituted under the "Mechanics' Lien Act" in a County Court in British Columbia to enforce an alleged mechanic's lien under the said Act.

The 34th section of that Act is as follows:—

34. Upon the hearing of any claim for a lien, the court or judge may, so far as the parties before him, or any of them, are debtor and creditor, give judgment against the former in favour of the latter for any indebtedness or liability arising out of the claim, in the same manner as if such indebtedness or liability had been sued upon in the County Court in the ordinary way, without reference to this Act.

And judgment may be given for the sum actually due, notwithstanding such sum may exceed the ordinary jurisdiction of the County Court.

The County Court gave judgment for the sum of $6,000 against the respondent and also declared the plaintiffs entitled to a mechanic's lien to secure said sum and costs in one of the actions now before us but dismissed the other action and a cross action.

Thereupon appellants appealed to the Court of Appeal, which dismissed the appeal with costs.

The appellants appeal from that judgment to this court and respondents move to quash the appeal on the ground that the appeal cannot fall within section 37, sub-sec. (*b*) of the "Supreme Court Act" which is as follows:—

(*b*) In the Provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, if the sum or value of the matter in dispute amounts to two hundred and fifty dollars or upwards, and in which the court of first instance possesses concurrent jurisdiction with a superior court.

The question thus raised turns upon the meaning of the phrase:—

In which the court of first instance possesses concurrent jurisdiction with a superior court.

It occurs to me that in every case one can think of the superior court would have jurisdiction to hear and try the causes within the general jurisdiction of the County Court and thus in a sense they have con-

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current jurisdiction in all cases falling within the general jurisdiction of the County Court.

It happens that when a suitor goes into the superior court with a claim suable in a County Court he is in some cases punished by deprivation of costs for so doing, but that does not deprive the superior court of jurisdiction even if the County Court has jurisdiction.

It would seem that this sort of concurrent jurisdiction limited to claims over $250 was what was *primâ facie* aimed at in the 37th section of the "Supreme Court Act."

Then we find two special subjects in probate and equitable jurisdiction assigned to the County Courts, but in the delimitation of the nature of the actions these courts may so entertain they are specially declared to have as to such actions concurrent jurisdiction with the Supreme Court of the province.

When we turn to the "County Courts Act" we find in the 40th section thereof the following:—

> 40. The said County Courts shall also respectively have and exercise, concurrently with the Supreme Court, all the power and authority of the Supreme Court in the actions or matters hereinafter mentioned, that is to say:—

This is followed by twelve sub-sections defining a great many classes of matters and suits in respect thereof to be dealt with thereunder.

A mechanics' lien is not one of these. There is in sub-section (3) the following:—

> (3) In all suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge, or lien shall not exceed in amount the sum of two thousand five hundred dollars.

The words "or lien" so used do not imply a mechanics' lien I imagine. And if they did it would only be one up to $2,500, which would not help in this case to give jurisdiction here.

Then we have section 34 of the "Mechanics' Lien Act," which is quoted above and shews clearly a special jurisdiction not falling within the general jurisdiction of the County Court or within this sub-section (3) or related thereto in any way.

I think we must conclude that this special jurisdiction not expressly designated as are others "concurrent" was not intended to be a concurrent jurisdiction or what was aimed at in section 37, sub-sec. (*b*) of the "Supreme Court Act" as being an exercise of a concurrent jurisdiction.

The power to award a judgment for the debt forms a mere incident to the creation of a special jurisdiction or mode of procedure to be followed out thereunder and not otherwise, but confined within the provision of the Act giving same.

Only such appeals as the special jurisdiction and remedy given permit can be availed of by those resorting thereto for the benefits to be got by invoking same.

I think the point well taken and that the motion ought to prevail with costs.

DUFF J. (dissenting).—Section 34 of the "Mechanics' Lien Act" (R.S.B.C., ch. 154), is as follows:—

> Upon the hearing of any claim for a lien, the court or judge may, so far as the parties before him, or any of them, are debtor and creditor, give judgment against the former in favour of the latter for any indebtedness or liability *arising out of the claim*, in the same manner as if such indebtedness or liability had been sued upon in the County Court in the ordinary way, without reference to this Act.
>
> And judgment may be given for the sum actually due, notwithstanding such sum may exceed the ordinary jurisdiction of the County Court.

The effect of this section is that a plaintiff suing to enforce a mechanics' lien may at the same time, and

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under the same summons, proceed with his action to enforce the pecuniary obligations *in personam* arising out of the contract express or implied upon which his claim to a mechanics' lien is based. It is a condition of the jurisdiction of the County Court that the "indebtedness or liability" thus sought to be enforced should arise "out of the claim" which is alleged to be the foundation of the mechanics' lien; but, the conditions being satisfied, the jurisdiction, having once arisen, is a jurisdiction concurrent with that of the Supreme Court in respect of the like action.

Here we seem clearly enough to have a case in which the "court of first instance possesses concurrent jurisdiction with a superior court" within the meaning of section 37 of the "Supreme Court Act."

ANGLIN J..—The plaintiffs sued in the County Court of Vancouver to recover the sum of $9,930 and for the establishment and enforcement of a mechanics' lien in respect thereof. Jurisdiction to entertain such an action is conferred on the County Courts of British Columbia by the R.S.B.C. (1911), chapter 154. Judgment was awarded the plaintiffs for $6,000, for which they were declared entitled to a lien. An appeal by the plaintiffs to the Court of Appeal to have the amount of the judgment increased and a cross-appeal by the defendants to have the action dismissed were both unsuccessful. The plaintiffs have taken a further similar appeal to this court, and the defendants a like cross-appeal. The defendants now move to quash the plaintiffs' appeal for want of jurisdiction. The plaintiffs assert that they have a right of appeal under section 37 (*b*) of the "Supreme Court Act," which is as follows:—

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases:—

(*b*) In the Provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, if the sum or value of the matter in dispute amounts to two hundred and fifty dollars or upwards, and in which the court of first instance possesses concurrent jurisdiction with a superior court.

Notwithstanding the awkward grammatical construction of clause (*b*), I think it reasonably clear that the antecedent of the relative pronoun "which" in its concluding member is "the action, suit, cause, matter or other judicial proceeding" mentioned in the earlier part of the section. That this is the correct construction of the clause is made certain by comparison with the French version, in which the concluding member reads

et si la cour de première instancec posséde une juridiction concurrente avec celle d'une cour supérieure.

In order that there should be jurisdiction in this court under section 37(*b*) "the action, suit, cause, matter or other judicial proceeding" instituted in the inferior court must also be within the jurisdiction of a superior court in the province. It does not suffice that in respect to some part of an action, some claim made in it, or some relief which may be accorded there is concurrent jurisdiction in both the superior and inferior courts. The jurisdiction must be concurrent over the action as a whole.

In the present instance the jurisdiction of the inferior court is exclusive as to the claim of mechanics' lien. It is the existence of this claim which is the foundation of the County Court jurisdiction. It is

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only as incidental to an action in which such a claim is asserted that the County Court is given an extended personal jurisdiction. I am convinced that in a mechanics' lien action, which the superior court could not entertain, the County Court cannot be said to possess concurrent jurisdiction with the superior court merely because in such an action the former court may give a personal judgment for debt which could have been, and must have been, sought in the superior court, if sued for alone.

I am, therefore, of the opinion that the motion to quash should be granted with costs.

I find nothing, however, to warrant the view suggested that jurisdiction under section 37(*b*) is confined to cases in which the jurisdiction of the inferior court is explicitly declared, either by the statute conferring it or by some other statutory provision, to be concurrent with that of a superior court. Clause (*b*) applies to four provinces. The introduction into it of such a limitation would probably preclude an appeal in many cases in which it was intended that the right should exist.

Appeal quashed with costs.

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

Solicitors for the respondent, The World Building Co.: *Bourne & Macdonald.*

Solicitors for other respondents: *Bodwell, Lawson & Lane.*

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

ARTHUR GODFREY PICKERING (PLAINTIFF) ..... RESPONDENT.

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*Oct. 21, 22.
*Nov. 30.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Railways—Operation—Transfer of cars—Interswitching—Negligent coupling — Duty of train crew — Scope of employment — Employer's liability—Jury—Findings of fact—Evidence.

A train crew of the defendants while performing their duty in the transfer yard of another railway company were directed by the yardmaster to remove a special car of freight which was to be transferred to the defendants' railway from amongst a number of other cars in the yard. In order to do so it was necessary to shunt several cars placed in front of the car to be transferred and the train crew switched these cars to certain tracks on which there was then standing a train of the other railway company, headed by an engine under which the fireman, plaintiff, was then working. They undertook to couple the cars which they were switching to the standing train, as a matter of convenience, and, in doing so, struck the rear of the train with such force as to move the engine and cause injuries to the fireman who was working under it. Specific questions were not submitted to the jury, notwithstanding suggestions made by defendants' counsel after the judge had charged them, and they returned a general verdict in favour of the plaintiff.

Held, affirming the judgment appealed from (24 Man. R. 544), that in so proceeding to couple the cars they had switched on to the standing train the defendants' train crew were still acting within the scope of their employment in the defendants' business and, as they performed the work in a negligent manner, the defend-

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

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ants were liable in damages for the injuries caused to the plaintiff.

Per Duff J.—The question, whether the acts of negligence of the company's servants were done in course of their employment was a question of fact for the jury in respect of which there was evidence to support their finding in favour of the plaintiff.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), affirming the judgment entered by Mr. Justice Galt, at the trial, upon the verdict of the jury in favour of the plaintiff with costs.

In the circumstances stated in the head-note, the jury returned a general verdict and assessed damages in favour of the plaintiff for $11,000, upon which judgment was entered by the trial judge, and this judgment was affirmed by the judgment appealed from. The questions raised on the appeal are stated in the judgments now reported.

J. B. Coyne for the appellants.

W. H. Trueman for the respondent.

DAVIES J.—I understood Mr. Coyne in his reply practically to concede that the coupling of the cars taken by the appellant company's train to Bird's Hill, where the train of the Canadian Northern Railway was standing, was the main question in this appeal.

His contention, however, was that such coupling was something beyond the scope of the employment of those in charge of the Grand Trunk Pacific train and that, therefore, the company was not liable even for the negligence of its employees in respect to it.

I confess I have not reached my conclusion adverse

(1) 24 Man. R. 544.

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to this contention without a good deal of doubt. The coupling of the cars was certainly not done under the yardmaster's orders. It was probably done as a matter of convenience and railway practice and under an arrangement made at the time by the employees of both trains. The evidence justifies this conclusion. The jury had evidence before them on which their findings could be sustained. They had a right to accept Thompson's evidence, if they so determined, even if it was in conflict with that of Foster, Gavin and Carroll, as contended.

I am, therefore, not able to find that such negligent coupling as was proved in this case was beyond the scope of the employment of the conductor and engineer of the Grand Trunk Pacific train.

That negligence consisted in the want of notice of the intended coupling to the Canadian Northern Railway train under which the plaintiff was at the time working and in the excessive impact.

I, therefore, concur in the dismissal of the company's appeal.

IDINGTON J.—The respondent was at work under his engine which, with a train of eighteen or more cars, was standing on a branch of the Canadian Northern Railway at a station in Manitoba when those in charge of one of appellant's engines ran some three cars into said branch to connect them with said train. This was done without warning and with such violence that it moved the whole train and injured the respondent who recovered a verdict and judgment against appellant therefor.

Appellant contends it cannot be held liable for the

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acts of the men occasioning such injury. It appealed to the Court of Appeal for Manitoba and the appeal was dismissed, Mr. Justice Richards dissenting.

The appellant admits sending its men with the engine and a caboose and other cars to leave the latter in the yard of the Canadian Northern and to bring out a car which was loaded with freight to be taken over appellant's line. The car to be brought out was found attached to three other cars in a siding in said yard. Those had to be shunted about to accomplish this purpose.

It seems to me clear that men on such an errand could not of their own volition have undertaken to shunt these cars about in any way seeming best to themselves without consulting those in charge in said yard.

Primâ facie it would be the yardmaster who could and perhaps should direct what is to be done. It is said he requested the appellant's men to move the cars in question to a point on the main line and an engine would be along to pick up the three other cars, and they proceeded accordingly to get the car they were after by the several movements needed to accomplish it and had when done these other remaining cars standing on the main line when some one suggested they connect them with the train I have referred to on the branch line and they did so accordingly without any notice to the men in charge thereof and thus injured respondent.

It is urged that in doing so they were acting beyond the scope of their duty and without authority and hence appellant is not liable for their negligence.

It is quite clear that to have left the cars on the main line at the time when the express train was ex-

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pected, and that other engine expected to take charge of them was not there to do so, would have been unjustifiable and possibly disastrous.

They did what seems to have been needed for the convenience of the Canadian Northern people and themselves in order that the business in hand should be most readily and rapidly discharged and they be enabled to get off with despatch out of the yard and end their errand.

I am not disposed to follow in all its mazes the other shunting it is suggested they might have done and the possibility of their running over some other man than the one they did, and still less the mass of contradictions between the witnesses and variations of story on the part of some, for I am quite sure they acted in the course of their master's business and used the judgment which impliedly they had a right to use under the circumstances, but happened to be negligent therein for which the master must suffer.

No master ever gave his men authority to act negligently, and every man who does gets beyond the scope of his authority in a sense, but the unfortunate master has to bear that burden as far as others are concerned.

If the case called for it I think a good deal might be said in regard to what section 317 of the "Railway Act" requires of each railway company and impliedly of those entrusted by any railway company with any part of the duty thereby imposed.

Again the several movements forward and backward would have had to be taken no matter into what siding they involved entering, and this evidence bearing upon the relation of sidings in question is of such conflicting character as to reduce the question to one

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for the jury, who may merely have found that appellant's men were reduced to exercising their judgment to extricate themselves from their difficulties and properly chose this siding or branch as result, and acting thereon acted negligently.

In any way one can look at it — and counsel, fertile in resources, has induced me to look at it in a good many ways — it all comes back to the responsibility of the master for his servant in executing his master's business, and in that regard appellant must fail.

The appeal should be dismissed with costs.

DUFF J.—I concur in dismissing this appeal. The only point requiring notice arises out of the contention of the appellant company that the acts of negligence charged are not acts for which they are legally responsible. The substance of the question is whether there was or was not evidence to support a finding by the jury that in fact those acts were done by the employee of the company in course of their employment as the servants of the company. It does not seem to me that there is much to be gained by discussing in detail the exact effect of the evidence. After carefully considering it I have come to the conclusion that Mr. Coyne's contention must be rejected.

ANGLIN J.—The defendants appeal against the judgment of the Court of Appeal for Manitoba upholding the verdict of a jury finding them liable to the plaintiff for damages for personal injuries to the extent of $11,000. Three main grounds of appeal were urged in this court: 1st, that the trial judge wrongfully refused to put questions to the jury; 2nd, that the evidence established contributory negligence on

the part of the plaintiff; and 3rd, that the act of the defendants' servants which caused the plaintiff's injuries was not within the scope of their employment.

Having regard to the fact that counsel for the defendants asked that certain questions should be put to the jury only after the learned judge had completed his charge, to the scope and character of the questions suggested, and to the presentation in the charge to the jury of the issues on which they had to pass, I think it was within the discretion of the learned trial judge to decline to put these questions. Moreover, I cannot see that any miscarriage of justice resulted from his failure to require the jury to answer specific questions.

In support of his contention that contributory negligence was established counsel for the defendants relied on the breach by the plaintiff of Rule 26 of the Canadian Northern Railway Company, in whose employment he was. That rule reads as follows:—

> Rule 26. A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car or train indicates that workmen are under or about it; when thus protected, it must not be coupled to or moved, and other cars must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workman.
>
> Workmen will display the blue signals and the same workmen are alone authorized to remove them.

Assuming that this rule imposed a duty on the plaintiff — something which might very easily be more clearly expressed — a perusal of the portion of the charge dealing with the issue of contributory negligence makes it clear that the jury was not asked to find the plaintiff negligent on the ground that he failed to observe Rule 26. No objection was taken to the charge on this ground, and the learned judge was

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not asked to direct the attention of the jury to the rule. Neither is there any reference to it in the judgments delivered in the Court of Appeal. Other grounds of contributory negligence dealt with in the trial judge's charge were not relied upon at bar in this court. I think the defendants are not entitled to have the judgment against them disturbed on this ground.

Mr. Coyne's main contention was that in taking three Canadian Northern Railway fruit-cars to the Bird's Hill line the employees were either acting as servants of the Canadian Northern Railway Co. or as volunteers and not in the course of their employment by the defendants. He also maintained that, if they had been acting within the scope of their duties as employees of the defendants in bringing the cars to the Bird's Hill line, they ceased to so act and were mere volunteers in proceeding to couple them to the Canadian Northern Railway train which was standing there. I think there was evidence to warrant the jury in concluding that, having regard to all the circumstances, the most practical, if not the only practical way of dealing with the three Canadian Northern cars, which was open to the Grand Trunk Pacific crew, in order to secure the Grand Trunk Pacific meat-car which they had been sent to get, was to take all four cars up to the Bird's Hill line as they did. On Foster's evidence I think it was also open to the jury to find that the Grand Trunk Pacific crew had been requested by him to deliver the three Canadian Northern cars to Thompson for the Canadian Northern Railway Company; there was also evidence to support an inference that it would have been dangerous and improper to have left the three Canadian Northern cars standing on the Bird's Hill line without placing them in

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charge of Canadian Northern officials, and that the coupling of these cars to the Canadian Northern train standing there was a reasonable, if indeed it was not the best, means available to the Grand Trunk Pacific crew to relieve themselves and their employers, the defendants, of all further responsibility in connection with those cars. The jury may well have found that Thompson requested that the three fruit-cars should be coupled to the Canadian Northern train by the Grand Trunk Pacific crew as the most convenient means of making delivery of the cars to him as Foster had instructed. I think it was open to the jury to have drawn all these inferences and it must be assumed that they did in fact draw such of them as are necessary to sustain the general verdict which they rendered for the plaintiff. While the testimony on this branch of the case is certainly not as complete or as satisfactory as could be desired, on the whole I am of opinion that it cannot be held that there was no evidence on which a jury could find that what was done by the Grand Trunk Pacific crew was in the course of their employment.

No substantial attack was made by counsel for the appellants on the finding that in the coupling of the three fruit-cars with the Canadian Northern train the defendants' servants acted negligently, and upon the evidence, at all events in so far as undue force in making the coupling was charged, such an attack could not very well have been made.

The appeal fails and should be dismissed with costs.

BRODEUR J.—This is the case of a railway accident. The plaintiff, respondent, who is a fireman in

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the employ of the Canadian Northern Railway Company, was doing some necessary work under his engine when a Grand Trunk Pacific train came into collision with it. The plaintiff got injured and he sues the Grand Trunk Pacific Railway Company.

A verdict of negligence was rendered by the jury and the judgment was confirmed by the Court of Appeal. We are asked to reverse that decision.

A meat-car had to be switched from a transfer-yard of the Canadian Northern Railway Company to the Grand Trunk Pacific line and a Grand Trunk Pacific engine went into that yard to get that car. But in order to reach that car the Grand Trunk Pacific people had to shunt some three cars that were in front of that meat-car. They were asked by the superintendent of the yard to remove those three cars on a certain line. Those cars could just as well be switched in the yard proper or on that line. It was just as convenient for the Grand Trunk Pacific crew to make the shunting at either of those places.

In bringing those three cars on the branch line they collided with the plaintiff's train. The impact was done carelessly.

The appellants seek to avoid the liability in stating that the Grand Trunk Pacific crew were not in their course of employment.

When they were in the yard of the Canadian Northern Railway Company the Grand Trunk Pacific crew had to follow the instructions, as to their movements, of the yardmaster. They could perhaps have refused to follow the instructions that were given to them if they found them unreasonable; but, in this case, no suggestion is made that they were unreasonable.

It is even stated that the removal of those cars on the branch line was a saving of time and work for the Grand Trunk Pacific crew.

Then those servants were bound to act without negligence, and if by their negligent act they caused injury they render their master liable.

The verdict is a reasonable verdict in the circumstances and the judgment *a quo* should be confirmed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *H. H. Hansard.*

Solicitors for the respondent: *Bonnar, Trueman & Hollands.*

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*Nov. 10.
*Nov. 30.

THE CITY OF HALIFAX (DEFENDANT) ..... APPELLANT;

AND

MARY TOBIN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Municipality—Misfeasance.

The corporation of Halifax in laying a concrete sidewalk broke up a portion of the asphalt sidewalk of a crossing street and replaced it with earth and ashes. The rain washed away the filling and T. was injured by stepping into the excavation.

Held, affirming the judgment appealed from (47 N.S. Rep. 498), that the corporation was guilty of misfeasance and a verdict in favour of T. should stand.

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

In May, 1911, the Halifax City Corporation laid a concrete sidewalk on Granville Street. In doing so the grade was lowered, and on Salter, a steep street crossing Granville, the asphalt sidewalk was cut away in order to make a level junction. The part so cut away was filled in with earth and ashes which in the fall was washed out by the rain. In October the plaintiff, walking up Salter Street, stepped into the hole made by the rain and fell on the concrete, receiving serious injury. In an action against the city

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

(1) 47 N.S. Rep. 498.

she obtained a verdict for $2,000, which the full court sustained. The city appealed to the Supreme Court of Canada.

F. H. Bell K.C. for the appellant. The city is liable for misfeasance only. *Municipality of Picton* v. *Geldert*(1).

In this case it was only the usual wear of the sidewalk that caused the depression. See *City of St. John* v. *Campbell*(2); *Cullen* v. *Town of Glace Bay*(3); *Maguire* v. *Liverpool Corporation*(4).

Newcombe K.C. and *J. B. Henney* for the respondent refer to *Corporation of Shoreditch* v. *Bull*(5); *City of Vancouver* v. *McPhelan*(6); *Dawson & Co.* v. *Bingley Urban District Council*(7).

THE CHIEF JUSTICE.—This appeal should be dismissed with costs. The accident was due entirely to the faulty construction of the connection between the concrete sidewalk on Granville Street with the asphalt sidewalk on Salter Street. It is a case of failure on the part of the municipality to take due care in the exercise of its powers.

The appellant urges that there is no misfeasance, and that for nonfeasance there is no statutory liability. I express no opinion as to whether or not under the statute there is a liability for nonfeasance.

In my judgment this is not a naked question of law, but one of mixed fact and law. I am quite satis-

(1) [1893] A.C. 524.
(2) 26 Can. S.C.R. 1.
(3) 46 N.S. Rep. 215.
(4) [1905] 1 K.B. 767.
(5) 90 L.T. 210.
(6) 45 Can. S.C.R. 194, at p. 227.
(7) [1911] 2 K.B. 149.

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fied that the accident was directly attributable, as found below, to the fact that the municipality having undertaken to make repairs to the sidewalk left it in an unsafe condition and that for the consequences to the plaintiff the municipality is liable.

DAVIES J.—The question in this case is reduced to a very narrow one. Mr. Bell admits that in laying Granville Street sidewalk of concrete, the city engineer broke up the asphalt sidewalk of Salter Street, which is a street crossing Granville Street at right angles and is very steep. In the doing of this work, the engineer left a gap or space of a few feet wide between the two sidewalks which it was their duty to fill up properly.

The jury have found that in the discharge of that duty the city officials were guilty of negligence and that such negligence consisted in not "properly finishing the work." If this finding can be construed as a finding that the material used "clay and ashes" in filling up the hole between the sidewalks was improper material, then, I think, the judgment was right and the appeal should be dismissed.

Mr. Bell admits that the duty of filling up that hole so caused lay upon the city. If that is so, they were clearly obliged to do so with proper materials. If the clay and ashes they put in were improper filling and the accident was caused by this improper material being washed out, it would clearly be a case of misfeasance, not nonfeasance.

I had some doubt on the question of the real meaning of the finding of the jury, but conclude their answer must have reference to the material used being

improper; because apart from the material used the evidence was that the work was properly done.

I base my judgment, therefore, upon the ground that the city officials in building their sidewalk on Granville Street created a condition which cast on them a duty to fill up a gap or space made by them between the two sidewalks, the concrete one on Granville Street and the asphalt one on Salter Street, that they accepted that duty and attempted to discharge it, but used improper material. As a result of such negligence, a hole was made by the rain in this connecting space between the sidewalks into which plaintiff stumbled and was injured.

I would dismiss the appeal with costs.

IDINGTON J.—I have not found it necessary to fully consider the effect of the Statute of Limitations which may possibly, when read in light of the authorities applicable thereto, dispense with any need for observing the distinction between misfeasance and nonfeasance so much pressed upon us. I, therefore, pass no opinion thereon.

I think the reasons assigned in the court below amply justify the judgment appealed from herein and that this appeal should be dismissed with costs.

DUFF J.—The jury was entitled to find that the appellant corporation in the exercise of their powers in relation to streets changed the physical condition of the place in question and without justification left it in such state that it was, or at any moment was likely to become without notice to the public using it a dangerous nuisance; and if that was their view there was negligence constituting "misfeasance" within the meaning of the rule governing the responsibility of

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municipalities for the condition of highways within their boundaries. On this ground I think the verdict and judgment can be supported.

The appeal should be dismissed with costs.

BRODEUR J.—This is an appeal from the Supreme Court of Nova Scotia *in banco* confirming the judgment of Mr. Justice Longley awarding $2,000 damages to the respondent.

It was an action for damages for negligence causing personal injury to the respondent, who fell on a sidewalk of the defendant municipality.

Some months previous to the accident some reconstruction and repairs had been made to the sidewalk where the accident occurred. A space of about two feet in that sidewalk had been filled with earth which could, according to reliable evidence, be removed by rain. The plaintiff-respondent, in stepping into the hole which had formed itself at that place, fell upon the pavement and broke her knee-cap.

The main point raised by the appellant corporation is that the accident was a nonfeasance on the part of the corporation and that under the common law it could not be held responsible.

The jury found, however, that the negligence had been established.

The jury could reasonably find this verdict, for the material used could be easily washed out and it constituted an act of misfeasance. I do not see any reason why this judgment of the Court of Appeal, which maintained the verdict, should be disturbed.

Appeal dismissed with costs.

Solicitor for the appellant: *F. H. Bell.*
Solicitor for the respondent: *W. H. Fulton.*

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THE CAMPBELLFORD, LAKE ONTARIO AND WESTERN RAILWAY COMPANY (DEFENDANTS). } APPELLANTS; *Nov. 23, 24. *Nov. 30.

AND

ROBERT F. MASSIE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Expropriation—Agreement to fix compensation—Arbitration or valuation—Powers of referees—Majority decision.

Where the land was expropriated for railway purposes the railway company and the owner agreed to have the compensation determined by reference to three named persons called "valuers" in the submission; their decision was to be binding and conclusive on both parties and not subject to appeal; they could view the property and call such witnesses and take such evidence, on oath or otherwise, as they, or a majority of them, might think proper; and either party could have a representative present at the view or taking of evidence, but his failure to attend for any reason would not affect the validity of the decision.

Held, Fitzpatrick C.J. and Duff J. dissenting, that this agreement did not provide for a judicial arbitration, but for a valuation merely, by the parties to whom the matter was referred, of the land expropriated.

The agreement provided that a valuator should be appointed by each party and a County Court judge should be the third; if one of those appointed would or could not act the party who appointed him could name a substitute; if it was the third the parties could agree on a substitute, in which case the decision of any two would be binding and conclusive without appeal; if they could not so agree a High Court judge could appoint. There was no necessity for substitution.

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

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Held, that the decision of any two of the valuators was valid and binding on the parties.

APPEAL from a decision of an Appellate Division of the Supreme Court of Ontario maintaining an award in a matter of expropriation of land for railway purposes.

The material facts are indicated by the above headnote. The agreement for submission on which the questions to be decided turn is set out in full in the opinion of Mr. Justice Duff.

W. N. Tilley for the appellants. The agreement provided for an arbitration not a mere valuation. Compensation was to be determined not only for the land taken, but for the consequential injury to the remaining lands to determine which called for decision on questions of law. See Russell on Awards (9 ed.), page 45; *Thomson* v. *Anderson*(1), at pages 530-1; *In re Carus-Wilson and Greene*(2); *In re Brien and Brien*(3); *Taylor* v. *Yielding*(4).

The award of the original arbitrators was to be unanimous. The provision prohibiting an appeal from the award of the valuers "or any two of them" only makes for finality and there was already a provision as to who should make the award. See *United Kingdom Mutual S.S. Assurance Association* v. *Houston & Co.*(5); *In re O'Connor and Fielder*(6).

Hamilton Cassels K.C. for the respondents, referred, on the question of arbitration or valuation to

(1) L.R. 9 Eq. 523.
(2) 18 Q.B.D. 7.
(3) [1910] 2 Ir. R. 84.
(4) 56 Sol. Jour. 253.
(5) [1896] 1 Q.B. 567.
(6) 25 O.R. 568.

the American cases of *Hobson* v. *McArthur*(1); *Quay* v. *Westcott*(2); *Republic of Columbia* v. *Cauca Co.* (3), and on the other question to *Whiteley* v. *Delaney* (4), contending that the evident intention of the parties that a majority could make the award in any case should not be defeated by a narrow and technical reading of the phraseology.

THE CHIEF JUSTICE.—I agree with Mr. Justice Duff.

DAVIES J.—I agree that this appeal should be dismissed and concur with the judgment of the Appellate Division that the case should go back for trial with a declaration "that the agreement between the parties provides for a valuation by the valuers named therein or a majority of them and expresses the true agreement between the parties."

The question argued before us is whether the agreement of reference in question provides for an arbitration or for a valuation and whether it can be fairly construed as providing for a decision by any two of the valuators named or must be unanimous.

I think this case is one of those intermediate cases referred to by Lord Esher in *In re Carus-Wilson and Greene*(5), where though a dispute has actually arisen it is not intended that the persons appointed to decide it shall be bound to hear evidence and that it must be decided not on any general principle, but on its own particular circumstances.

(1) 16 Pet. 182.
(2) 60 Pa. St. 163.
(3) 106 Fed. R. 337.
(4) [1914] A.C. 132.
(5) 18 Q.B.D. 7.

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Davies J.

Reading the agreement as a whole and with reference to the subject-matter of the reference and the circumstances under which it was entered into, I have reached the conclusion above stated.

The question to be determined by the valuators was the

> amount of compensation for land and damages which the respondents were entitled to as owners of lands taken by the appellate railway company.

The agreement named three "valuers" to whom that question was referred. It provided that if the valuer appointed by either party died he might substitute a new valuer, and if the "third valuer" died the other valuers might agree upon a third valuer in his stead,

> and in that case the decision of any two of the valuers should be conclusive and binding without appeal.

Then follows a covenant that the decision of the valuers should be observed and should be binding and conclusive upon the parties and

> should not be subject to appeal from the decision of the said valuers or any two of them.

The agreement further provided that

> the valuers may view the property and may at their discretion call such witnesses and take such evidence or statements on oath or otherwise as they or *a majority of them* may think proper and shall give such weight, if any, to such evidence or statements as they in their discretion think proper.

Considering the one thing referred to them, namely, the fixing of the compensation to be given the land-owner for his land taken and damages sustained, the fact not without significance that the parties are called "valuers" all through the instrument and not arbitrators, and the special provision that the valuers

might view the premises and decide the question submitted to them without the aid of witnesses, or if they determined to do so might hear statements from witnesses not under oath, I reach the conclusion that the submission was a valuation only and not an ordinary judicial arbitration.

Then as to the power of two of them to make a binding decision, I revert again to the provision that in case of the death or incapacity of the third named valuer, Judge Morgan, and the inability of the two remaining valuers to agree upon an amount, it was provided that they might agree upon a third valuer, and in that case, that is where a third valuer was appointed by the other two, the decision of *any two of the valuers* should be conclusive and binding without appeal.

I think that the appellant attaches more weight to this change of language than it deserves. It seems absurd and without reason to hold that in the case of the *named* valuers unanimity should be required, while in the other case of the death or incapacity of one of the named valuers and the appointment in his place of a third by the other two, such unanimity was dispensed with. It is clear that in the latter case any two of the valuers could make a final and conclusive decision and if it was intended to change that important fact with respect to the decision of any two of the named valuers, very clear and explicit language would be required to shew such change.

As I have said while the language used is inapt I think it fairly bears the construction placed upon it by Mr. Justice Hodgins speaking for the Appellate Division and that it may fairly be paraphrased thus,

shall be final and conclusive and shall not be subject to appeal.

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Idington J.

For these reasons I would dismiss the appeal with costs.

IDINGTON J.—The construction of such an instrument as now in question cannot be properly reached by the mere microscopical examination and analysis of one or more clauses or sentences therein.

Reading and construing this instrument as a whole and finding it possibly ambiguous, we should consider the nature of the business the parties had in hand, attribute to them some common sense and knowledge of the world, and keep in view their probable purpose and see if having due regard thereto and such like surrounding circumstances some sensible operative meaning can be given it.

Of course if in face of all that it were still found that some clauses were of such an imperative nature that they must be read literally and left no room for being thus properly interpreted and modified by and harmonized with other parts or clauses, we should have to give effect thereto even if by doing so we rendered the document practically worthless as being unworkable.

I find myself under no such necessity in the interpretation or construction of this document.

Its meaning is very plain if we approach it in the way I suggest and then look at the clause by which the parties covenanted and bound themselves to abide by the results which might be reached by a majority of those named.

Then it seems to me the other clauses expressly speaking of a majority acting are also each in harmony with such a purpose and need not be so read as

to bear the construction thereof pressed upon us. One of these might by a little straining be so construed, but that is not its necessary or only meaning.

And the clause as to exercising a discretion relative to the hearing of witnesses seems expressly designed for the purpose of enabling a majority of those voting to determine the basic facts upon which the estimate for compensation has to be made. Would it not be rather absurd that two could control the kind of facts which must necessarily guide them and yet could not execute the purpose so clearly involved ? It seems to me they might, if so disposed, have thus step by step reduced the remaining problem to a pure arithmetical question and yet if the contention set up be correct they could not carry out such result by signing the certificate thereof.

I have not had much trouble in coming to the conclusion that a majority of those named were intended to finally determine the result.

But when I have to say whether this is a submission to arbitration or a mere agreement for determining a valuation, I find some difficulty.

I have, therefore, purposely put forward just now what seems to be its import and the only difficult part of the document bearing upon that question, and need not repeat same here.

Assuming evidence by witnesses used for such a purpose, does the existence of such a power enabling it to be done involve the whole proceeding being held to be one of judicial inquiry within the meaning of that term as defined by Cockburn, C.J., in *Re Hopper* (1), at p. 372 and top of p. 373, or by Lord Esher in *Re Dawdy* (2), at p. 429 and top of p. 430, or by Mr.

(1) L.R. 2 Q.B. 367. (2) 15 Q.B.D. 426.

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Justice Williams in the case of *Re Hammond and Waterton*(1), at p. 809.

We find therein no very clear-cut test of what is to be held as constituting a judicial investigation, but if I understand those cases and many others the mere permission to a majority of the valuers to examine witnesses does not of itself constitute the submission one of arbitration.

If they had been herein bound to hear such witnesses as either party desired, and to determine judicially according to such evidence, then it certainly might have been urged with great force that it was a submission to arbitration.

The purpose of the parties hereto seems to me to have been so evidently that of constituting those named mere valuers that I should feel much regret if forced to say they had failed of their purpose.

And that such was their purpose surely is self-evident when regard is had to the departure from the usual method of arbitration under the "Railway Act."

Seeing this was not dealt with by the learned trial judge I doubted our right to deal with it, but appellant's counsel did not seem disposed to raise such question, but preferred getting the opinion of this court thereon as the Court of Appeal had passed upon it.

I think the appeal should be dismissed with costs.

DUFF J.—I think the agreement of 2nd July, 1913, constituted a submission to arbitration.

The appellant company gave to the respondents notice of expropriation of part of their property pur-

(1) 62 L.T. 808.

suant to the provisions of the Dominion "Railway Act" (section 193) and offering $900

as compensation for the said lands and premises and for all damages caused to you by the exercise of its corporate powers thereon.

The respondents refused to accept this sum and the appellant company obtained a warrant for (and went into) possession of the lands under the authority of section 217 of the "Railway Act." Instead of applying to a judge for the appointment of arbitrators (under section 196) to determine the amount payable as compensation and damages which either party was entitled to do (see chapter 37, 6 & 7 Edw. VII.), the parties entered into the agreement already mentioned, making provision for the ascertainment of that amount, which agreement is in the following terms:—

MEMORANDUM OF AGREEMENT made on the second day of July, 1913.

Between

THE CAMPBELLFORD, LAKE ONTARIO AND WESTERN RAILWAY COMPANY, hereinafter called the Railway Co.,

Of the one part;

and

ROBERT F. MASSIE, ISABEL E. MASSIE and THE TORONTO GENERAL TRUSTS CORPORATION, hereinafter called the Owner,

Of the other part.

WHEREAS the owner now owns the lands, being part of lot number six (6), Concession B, in the Township of Hamilton, containing three acres and ninety-two hundredths of an acre (3.92), more or less, and the Railway Company is proceeding with the construction of its line of railway across the said lands, as shewn on and according to the plan thereof, a copy of which plan so far as above lands are concerned, is attached hereto.

AND WHEREAS the Railway Company and the owner have agreed to *settle the question* of compensation for land and damages to which the owners of said lands are entitled under the "Railway Act" as hereinafter set forth.

NOW THIS AGREEMENT WITNESSETH that the Railway Company and the owner do hereby covenant and agree that the *question* of the amount of compensation payable under the "Railway Act" by the

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Railway Company for the taking of the said lands for its said railway and for damages sustained by the owner by the taking of said lands and the construction and maintenance of the said railway is hereby referred to the *determination* of Joseph Hickson, as valuer, appointed by the Railway Company, and Nicholas Garland, as valuer, appointed on behalf of the said Owner, and His Honour Edward Morgan, as third valuer.

AND in case either of such valuers appointed by the parties respectively shall die, refuse or become incapable to act as valuer before such question is fully determined by the said valuers as to all the lands and damages herein referred to, then the party who appointed such valuer, or the heirs, executors, or administrators of such party, shall forthwith thereafter appoint some other fit person to be valuer in the place of the valuer dying, refusing or becoming incapable to act.

In case the third valuer shall die, refuse or become incapable to act and the other two valuers are unable to agree upon the amount to be paid as compensation as aforesaid, they may agree upon a third valuer in his stead and in that case the decision of any two of the valuers shall be conclusive and binding without appeal; if they cannot agree upon such third valuer, a judge of the High Court Division may appoint him on the application of either party on six days' notice to the opposite party of application to the judge to make such appointment.

No costs in respect of proceedings in pursuance hereof shall be payable by either of the parties hereto to the other; but the Railway Company shall pay the fees of all the valuers and the costs heretofore incurred of application for warrant of possession and of motion for appointment of arbitrators if any, shall be paid as between party and party by the Railway Company to the owner. Before valuation proceeds the parties are to agree upon the crossings, if any, to be provided.

And the parties hereto mutually covenant and agree that the decision of the said valuers shall be faithfully kept and observed and shall be binding and conclusive upon the said Railway Company and owner, and shall not be subject to appeal from the decision of said valuers or any two of them.

AND the undersigned owner for themselves, their heirs, executors, administrators, successors and assigns, doth hereby covenant and agree with the Railway Company, its successors and assigns, that he or they will upon tender of the amount payable to him or them as such compensation by the said valuers, with interest as hereinafter mentioned, execute and deliver to the Railway Company good and sufficient deed in fee simple free from dower and all other claims and encumbrances, vesting in the Railway Company the lands required as aforesaid, such deed to be prepared by and at the expense of the Railway Company, and the said Railway Company agrees to pay the sum of money found payable as aforesaid, with interest forthwith

after the making of the said decision, execution of deed, and completion of title as aforesaid.

The Railway Company meanwhile to retain possession of the lands required, and to be permitted to proceed forthwith with the construction and operation of its railway and works thereon.

The valuers may view the property and may at their discretion call such witnesses and take such evidence or statements on oath or otherwise as they or a majority of them may think proper, and shall give such weight, if any, to such evidence or statements as they in their discretion think proper.

Either party shall have the right to have one representative present, if desired, at any meeting of the valuers held to view the property or to take statements or evidence, but failure of such representative to attend, whether through lack of notice, or otherwise, shall not affect the validity of the decision.

The Company to pay interest at five per cent. per annum on the amount found from date of possession till date of payment.

IN WITNESS whereof the Railway Company has hereunto caused its corporate seal to be affixed under the hands of its proper officers and the owners have hereunto set their hands and seals and corporate seal respectively.

IN THE PRESENCE OF

CAMPBELLFORD, LAKE ONTARIO AND WESTERN RAILWAY COMPANY.
D. MCNICOLL,
President.

C.L.O. and W.
[SEAL]

As to signature of
Robt. F. Massie.
Ronna E. Large.

ROBT. F. MASSIE. [SEAL]

As to signature of
Isabel E. Massie.
E. Ross.

ISABEL E. MASSIE. [SEAL]
THE TORONTO GENERAL TRUSTS CORPORATION.
[SEAL]

F. OSLER, *President.*
J. W. LANGMUIR,
Gen'l. Manager.

In passing on the question whether this agreement is a submission to arbitration in the legal sense we are to be guided, I think, by the principles laid down by

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Lord Esher in *In re Carus-Wilson and Greene*(1), in these words:—

> If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration, but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances.

It is not denied that differences had arisen. Were these differences to be settled by means of a "judicial inquiry worked out in a judicial manner?" The respondents rely upon the use of the term "value" as shewing that the parties contemplated a conclusion reached as a result of the application of the personal knowledge and skill of the valuators. But the language of the instrument as a whole seems to negative that suggestion.

The question is "referred to the determination" of the gentlemen selected. In certain eventualities,

> the decision of any two of the valuers shall be final and binding and without appeal.
>
> The valuers may view the property and take such evidence on oath or otherwise as they or a majority of them may think proper.
>
> Either party shall have the right to have one representative present, if desired, at any meeting of the arbitrators to view the property or take statements of evidence.

(1) 18 Q.B.D. 7.

These stipulations seem to contemplate a decision after "hearing the respective cases of the parties"; and indeed the fact that the amount of compensation properly awardable for "damages" caused by the exercise of the powers of the railway company was one of the subjects of the reference (and not merely the value of the land taken) in itself creates a presumption that such was in fact the intention of the parties. I think the instrument rightly construed does provide for an inquiry, in its nature judicial.

On the other point I am, with a good deal of doubt, of the opinion that a majority of the arbitrators was competent to act.

In the result I think the appellants are entitled to have their motion to set aside the award heard and disposed of; but as a majority of the court are for dismissing the appeal, it is not necessary to consider what would be the most convenient form of order for giving effect to the view above expressed.

ANGLIN J.—Not, I confess, without some hesitation, I concur in the dismissal of this appeal. Taking the document of submission as a whole it is, perhaps, made sufficiently clear that it was the intention of the parties that a binding valuation might be made by any two of the valuators whether the three originally named should act or there should be a substitution in the case of the third arbitrator. The clause providing that any two of the arbitrators might determine what evidence should be received certainly points in this direction. At all events I am not convinced that this construction of the agreement, which prevailed in the Appellate Division, is so clearly wrong that we

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would be justified in reversing the judgment of that court.

Neither am I satisfied that the view of the Appellate Division that the document taken as a whole provides for a valuation and not for an arbitration is erroneous. There are, no doubt, one or two clauses in it which are not usual in agreements providing for a mere valuation. But their presence does not, I think, suffice to change the character, which it seems otherwise sufficiently manifest from the tenor of the whole instrument it was meant that it should have.

BRODEUR J.—I would dismiss this appeal with costs.

*Appeal dismissed with costs.**

Solicitors for the appellants: *MacMurchy & Spence.*

Solicitors for the respondents: *Cassels, Brock, Kelley & Falconbridge.*

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*On the same day judgment was given in *Campbellford, etc., Railway Co.* v. *Laidlaw*, in which the court held that a similar agreement was a submission for valuation only, affirming the judgment of an Appellate Division (31 Ont. L.R. 209).

OMER LAMONTAGNE (PLAINTIFF) . . . APPELLANT;

AND

THE QUEBEC RAILWAY, LIGHT, HEAT AND POWER COMPANY (DEFENDANTS) . . . . . RESPONDENTS.

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*Nov. 13.
*Dec. 29.

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

Negligence—Operation of tramway—Employers' liability—Accident in course of employment—"Workmen's Compensation Act"—Right of action—Dependent relations—Construction of statute—(Que.) 9 Edw. VII., c. 66, ss. 3, 15—R.S.Q., 1909, arts. 7321, 7323, 7335—Incompatible enactment — Repeal — Art. 1056 C.C. — Practice — Charge to jury—Misdirection—Excessive damages—Modification of verdict—New trial—Art. 503 C.P.Q.

The remedy given by article 1056 of the Civil Code, in cases of *délit* and *quasi-délit*, was taken away in regard to the classes of persons enumerated in section 3 of the Quebec statute respecting compensation for injuries to workmen, 9 Edw. VII., ch. 66, by the limitation in section 15 of that statute (now articles 7323 and 7335 of the Revised Statutes of Quebec, 1909), but the effect of these enactments was not to repeal the provisions of article 1056 C.C., with respect to ascendant relations who were only partially dependent for support on a deceased workman to whom the statute applied. The judgment appealed from (Q.R. 23 K.B. 212), was reversed, Davies and Brodeur JJ. dissenting.

Per Davies J. dissenting.—The words "in all cases to which this Act applies," in the Quebec statute respecting compensation for injuries to workmen, 9 Edw. VII., ch. 66, sec. 15, have reference to the special classes of employment referred to in the first section of the Act, and not to the classes of persons entitled to compensation thereunder. Consequently, the effect of section 15 is to limit the employers' liability to the compensation prescribed by that Act and to that only.

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

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Where no objection has been taken to the judge's charge to the jury at the trial and it does not appear that any substantial prejudice was thereby occasioned there should not be an order for a new trial under the provisions of articles 498 *et seq.* of the Code of Civil Procedure.

The majority of the court considered that the amount of damages awarded by the jury was so grossly excessive that there should be a new trial and it was ordered accordingly unless the plaintiff agreed that the verdict should be reduced to an amount mentioned. (See art. 503 C.P.Q.)

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of Quebec, entered by Lemieux C.J. on the verdict of the jury at the trial, and dismissing the plaintiff's action with costs.

The plaintiff, the father of a conductor employed by the company who died in consequence of injuries sustained in the course of his employment on the tramway, brought the action against the company to recover damages stated at $2,500, claiming $450 for medical and hospital attendance, funeral expenses, loss incurred through the closing of his place of business during three days, and $2,050 for being deprived of the advantages and assistance which he and his family derived from the deceased. The company denied liability and set up the defence that the plaintiff, not being wholly dependent upon deceased for support, by the operation of the Quebec "Workmen's Compensation Act," was deprived of any recourse either under that statute or under the provisions of the Civil Code. At the trial there were no objections taken to the charge of the learned Chief Justice; the jury returned a general verdict against the company and assessed damages at $2,000, for which amount

(1) Q.R. 23 K.B. 212.

judgment was entered in the Superior Court. On an appeal to the Court of King's Bench this judgment was set aside, Trenholme J. dissenting, and the plaintiff's action was dismissed with costs.

The questions in issue on the present appeal are stated in the judgments now reported.

L. S. St. Laurent for the appellant.

G. G. Stuart K.C. for the respondents.

THE CHIEF JUSTICE.—A difficult and interesting question which, however, because of recent amendments to the Quebec "Workmen's Compensation Act," is of no practical importance to any one except to the parties here, arises in the consideration of this case.

The plaintiff, appellant, who was, as he alleges, partially dependent for his support upon a son killed when in the service of the corporation, defendant and respondent, brought this action under article 1056 of the Quebec Civil Code, which reads:—

> In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.
>
> * * * * * * *
>
> In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

It is alleged by way of defence that the plaintiff is without recourse because of certain provisions of the Act first above referred to.

It is admitted that the accident which resulted in the death of the deceased comes within the definition

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of section 1 of the Act, but sections 15 and 3 of the Act, now articles 7335 and 7323 of the Revised Statutes of Quebec, are relied upon in support of the contention that the right of action which the plaintiff undoubtedly had under the Code is barred.

Section 15 enacts:—

> The employer shall be liable to the person injured or to his representatives mentioned in article 3 of the Act, for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this Act applies, only for the compensation prescribed by this Act.

The French version reads:—

> Les dommages résultant des accidents survenant par le fait du travail ou à l'occasion du travail dans les cas prévus par la présente loi, ne donnent lieu, à charge du chef d'enterprise, *au profit de la victims ou de ses ayants droit,* tels que définis à l'article 3 de la présente loi, qu'aux seules réparations déterminées par cette loi.

It is obvious that the remedy given in cases like this against the employer by the Civil Code is taken away from the persons mentioned in section 3 of the Act, who are (*a*) the surving consort, (*b*) the children under a certain age, and (*c*) *the ascendants of whom the deceased was the only support at the time of the accident.* But the question here is: Can the plaintiff who admittedly does not come within this enumeration of representatives entitled to recover under the Act, being only *partially dependent* upon the deceased, maintain this action? Or, in other words, is the action which the plaintiff undoubtedly had under article 1056 of the Civil Code barred by the joint operation of sections 3 and 15 of the Act?

Assuming that the Act was intended to substitute the theory of professional risk for those provisions of the Civil Code which fixed the liability of an employer

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in case of accident, due to his fault, and to provide a complete and comprehensive body of law in relation to the subject of workmen's compensation for injuries received in the course of their employment, I do not think we should lightly attribute to the legislature an intention to go so far as to deprive those who are not among the enumerated beneficiaries of a right of action which they clearly had before the Act was passed.

The Act was evidently intended to fix in those accident cases to which it applies the conditions of liability, the amount of compensation and the method of apportionment among those entitled to its benefits, and to that extent it may be considered as exclusive. But the question remains: The plaintiff not belonging to any one of the enumerated classes specifically dealt with, is it possible to hold that by necessary intendment his admitted right of action was taken away ?

It must be accepted as settled law that:—

> No statute operates to repeal or modify the existing law, whether common or statutory, or to take away rights which existed before the statute was passed, unless the intention is clearly expressed or necessarily implied. (Halsbury, vol. 27, p. 167.)

Assuming the Civil Code to be merely a statute, it has been in force for a long time and the principle of the special article upon which the plaintiff relies was part of the law long before the enactment of that Code. It seems, therefore, reasonable that the recent Act should be construed consistently with the Code if it is possible to do so. The ordinary rule of construction is that

> if two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be so read,

and I can see no repugnancy between the Code and the

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Act. They apply to different classes of persons and the conditions of liability are different.

Those who are partially dependent upon the injured employee are left to their remedy under the Code, their right to recover continues subject to the obligation to prove that the accident was attributable to an "offence or quasi-offence of the employer" and to hold that this class is to be entitled to the benefit of the Act in the absence of express terms, would be to legislate for a case which the legislature has not thought proper to provide for. In a word the plaintiff bases his claim upon the Code and to defeat that claim the defendant relies upon a statute which makes no provision for this particular case. To maintain its defence the court must add to the Act a provision which it does not contain.

Article 12 C.C., provides that when a law is doubtful or ambiguous it is to be interpreted so as to fulfil the intention of the legislature and to attain the object for which it was passed. Here the language of the statute leaves nothing to doubt or to uncertainty. The only question is: Are we, under the pretence of giving effect to what is alleged to be the intention of the legislature, "a common but very slippery phrase," to supply what is clearly an omission in the statute. As I said before, that is not interpretation but legislation.

Much reliance was placed by the Chief Justice in the court below on the French Act from which the Quebec Act is taken and the jurisprudence that has grown out of that Act in France. But it must be borne in mind that the language of section 15 in question here differs somewhat from that of the French model which reads (art. 7) :—

Les ouvriers et employés *désignés à l'article précédent* ne peuvent se prévaloir, à raison des accidents dont ils sont victimes dans leur travail, d'aucunes dispositions autres que celles de la présente loi.

In France it is held that the ordinary right of action on the part of the representatives of the deceased is entirely taken away (Cabouet, vol. 1, No. 392; Sachet, vol. 1, No. 754), but the French article 7 uses the expression "la victime ou ses représentants" without limitation, whereas section 15 of the Quebec Act has deliberately altered that expression and, in terms, limits those entitled to the benefit of the Act to those previously enumerated in section 3, and the Quebec section 3 substitutes the words "of whom the deceased was the only support" for the words used in the French Act which are "chacun des ascendants et descendants qui étaient à sa charge." The words used in section 3 in the Quebec Act are unambiguous. The benefits of the Act are given to the ascendants of the deceased **of whom he was *the only support*** at the time of the accident, whereas the French model applies to *all* ascendants without distinction. The French authorities are, therefore, of little use. On the whole, I am of opinion that the Act may be and should be construed to mean that those whom the deceased did not support entirely are left to their action under the Code, they must prove fault on the part of the employer and also the extent to which they have been prejudiced in a pecuniary way by the death of the deceased. There seems to be good reason for the distinction because of the uncertainty which exists in the case of those only partially dependent as to the quantum of their right. The case is not free from doubt, but I think, all things considered, it is impossible to say that the statute has, by implication, taken

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away a vested right of action when it is possible to so construe it as to leave that right subsisting.

I find some support for this view in the French cases where the question has arisen as to whether the enumeration of section 1 of the Act is limitative or exhaustive. The French writers seem to favour the restricting of the cases to which the law applies to those specially mentioned in the statute for the reason that it is an innovation upon the common law; the same reason would seem to me to apply to the question which has arisen here; Dal. 1902, 2, 330; 1907, 1.85.

There has been some criticism of the judge's charge but, as has been very frequently said (*Clark* v. *Molyneux*(1); *Blue* v. *Red Mountain Railway Co.*(2); *Barthe* v. *Huard*(3)), a summing up is not to be rigorously criticized, and it would not be right to set aside the verdict of a jury because in the course of a long and elaborate summing up the judge has used language which, detached from the context, might appear inaccurate; the whole charge must be read together in order to determine whether it afforded a fair guide to the jury. A new trial is not granted on the ground of misdirection unless some substantial prejudice was thereby occasioned. Art. 500 C.P.Q. In *Barthe* v. *Huard*(3), Sir Louis Davies said (at page 409) :—

> It is possible that if the learned judge's attention had been called to this language and its full meaning at the time, and objection taken to it, he would have corrected the apparently misleading direction before the jury had retired or if they had already retired, before they had agreed upon their verdict, but no such objection was taken at the time.

(1) 3 Q.B.D. 237, at p. 243. (2) [1909] A.C. 361, at pp. 367 and 368.
(3) 42 Can. S.C.R. 406, at p. 410.

This only goes to shew the imperative necessity of courts of appeal insisting, when asked to grant new trials as a matter of right, that only objections to particular statements made by the judge in his charge to the jury will be considered or given effect to when it is shewn that objection has been taken to them at a time when their misleading character can be corrected before the jury.

No objection was taken to the charge (arts. 498 (3) and 500 C.P.Q.) and no reference is made to misdirection in the reasons in support of the inscription in appeal before the Court of King's Bench (art. 493 C.P.Q.).

As to the question of the amount of the verdict I would have been disposed to follow the rule laid down in *Taff Vale Railway Co.* v. *Jenkins*(1) :—

> When once you have got it that there was evidence to go to the jury, and that there was a principle on which it could proceed of taking into account any reasonable prospective pecuniary advantage to the parents, then, unless the verdict is so perverse and against the weight of evidence that it cannot stand, it is not for the court to interfere.

But I defer to the opinion of my colleagues and agree to a new trial unless the appellant accepts a reduction in the amount of damages awarded. (See *Barthe* v. *Huard*(2).)

The appeal should be allowed with costs in this court, but the opinion of the majority is that the amount of damages awarded is so grossly excessive there must be a new trial (costs of first trial to abide the event), unless the plaintiff agrees that the verdict should be reduced to the sum of $1,250, in which case there would be judgment for that amount with costs of the trial and of this court.

DAVIES J. (dissenting) :—At the conclusion of the argument, I inclined to the opinion, which further

(1) [1913] A.C. 1, at p. 5. (2) 42 Can. S.C.R. 406.

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consideration has confirmed, that the judgment of the Court of King's Bench, (appeal side,) was right and that this appeal should be dismissed.

I think the legislative scheme of insurance by employers against "accidents happening to workmen by reason of or in course of their work" up to a fixed amount embodied in the "Workmen's Compensation Act" of Quebec, 9 Edw. VII. ch. 66, and subsequently made part of the Revised Statutes of Quebec (1909), was a substitution for the former liability of the employer for fault or negligence as declared and enacted in the Code (chapter 3), and was intended to be and is complete in itself. It was, if I may so call it, compromise legislation as between the respective so-called common law obligations and rights of the employers and employees and their representatives.

Previously to the passage of that Act the liability of the employer was confined to cases when fault or negligence causing the injury or death complained of was found either in him or in his servants and workmen. Those entitled to recover damages arising from such fault or injury were in cases of death of the injured person *inter alia* his ascendant and descendant relations who were either wholly or partially dependent upon him for their support. Only one action could be brought on behalf of those entitled to indemnity and the judgment determined the proportion which each was entitled to receive.

All this was changed by the "Workmen's Compensation Act." Fault or negligence were no longer necessary to be proved in order to sustain an action. The maximum of the employer's liability was fixed: he became an insurer of his workmen up to that maxi-

mum and the classes entitled to share in the indemnity were designated. Ascendants only partially maintained or supported by the deceased were omitted from those entitled to share in the indemnity.

Section 1 of the Act enacts that accidents to workmen, apprentices and employees engaged in any of the works or industries therein mentioned shall entitle the person injured or his representatives to compensation as subsequently provided in the Act and that

> the Act shall not apply to agricultural industries nor to navigation by means of sails.

Then follow provisions regulating the extent and amount of compensation payable in cases where the accident causes incapacity either absolute and permanent or permanent and partial or temporary, and also where death is caused and in the latter case the persons and classes entitled to compensation.

Section 15 provides as follows:—

> The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this Act for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this Act applies, only for the compensation prescribed by this Act.

It is contended on the part of the appellant that as compensation is payable under section 3 only to ascendants of whom the deceased was the *only* support at the time of the accident, ascendants who were *partially* supported by the deceased not being included still retain their former rights of action under the Code.

The results of this contention, if successful, would be curious and I venture to think unlooked for. The new statutory but limited liability of the employer as an insurer for accidents to his workmen created by the

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statute would not, as was supposed, be substituted for the old unlimited common law liability entirely. The class eliminated from those entitled to share in the statutory damages, namely, partially dependent ascendants, would still continue to retain their former rights of action and the liability of the employer as to them would still be subject to the determination of a jury.

The results could possibly if not probably be that ascendants of whom the deceased were the *sole* support would, in many cases, be worse off with their share of the statutory damage that ascendants receiving only *partial* support from the deceased would be whose damages were fixed by a jury. The employer, while assuming new and onerous obligations would be subject not to one action with a maximum statutory damage, but to several actions in some of which the amount of damages would be uncertain and the very basis on which the legislative compact or compromise rested would disappear. Instead of being an insurer with a liability fixed, but divorced from questions of fault or negligence, he would continue in that relation so far as ascendants wholly supported by the deceased workman were concerned but would also carry in addition the common law liability so far as ascendants *only partially* supported by the deceased workmen were concerned.

Of course, it was easy to cite cases of supposed hardship upon parties who under chapter 3 of the Code were formerly entitled to recover damages and were deprived of their right under the Act I am construing. But it must be remembered that the Act was in itself a legislative compromise on a most difficult and perplexing question and it certainly would not be

surprising if such a legislative compromise enactment resulted in some personal hardships.

The argument that the ascendants of whom the deceased was the *partial* support are not deprived of their former right of action under articles 1053 and following of the Code because they are not expressly so deprived by the statute loses much of its weight in my mind because, first, of the compromise character of the legislation, secondly, because there is no express deprivation of the former right under the Code of *any* ascendant, even of those who are entitled to share in the statutory compensation — they being only excluded under the general provisions of section 15 — thirdly, because of the provision in the Code, article 1056, that there shall be only *one* action brought against any person responsible for the death of another by or on behalf of those entitled to indemnity in consequence of such death, and the judgment in such action determines the proportion of such indemnity which each is to receive. Fourthly, because the legislature has expressly reserved the so-called common law rights of parties in cases where they thought it desirable these rights should be reserved. On the last point I refer to section 4 of the Act which declares that if a foreign workman or his representatives

> cannot take advantage of this Act the common law remedy shall exist in his or their favour,

and section 14 which reserves and continues the common law rights of the person injured or his representatives in addition to the statutory recourse, against persons responsible for the accident other than the employer, his servants or agents.

The legislature had its attention expressly drawn

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to the reservation of these so-called common law rights and in cases where it desired them to be continued so declared. I do not think the courts should add another section to the Act continuing these rights as regards other classes than those declared to be entitled to share in the statutory compensation. Lastly, I construe section 15, above quoted, as limiting the employer's liability to the compensation prescribed by the Act and to that only, *in all cases to which the Act applies,* and I hold the Act applies in cases where the deceased workman and the employer sued, are within its provisions quite irrespective of the parties or classes entitled to share in the distribution of the statutory compensation which may in any action be awarded. The words "in all cases to which this Act applies" have reference to the special classes of employment, stated in the first section, to which alone the Act is applicable, and have no reference to the different classes of people, ascendants or descendants, wholly or partially dependent upon the deceased, which the Act declares to be entitled to share in the statutory compensation.

For these reasons, I would dismiss the appeal.

IDINGTON J.—The appellant's son when acting as conductor on respondent's street railway received fatal injuries under such circumstances as would give the father a right of action in virtue of article 1056 of the Code. That article so far as relates to our present purpose reads as follows:—

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

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The action was brought accordingly and the case tried by Mr. Justice Lemieux with a jury who rendered a verdict of $2,000 damages. Judgment was entered accordingly. On appeal to the Court of King's Bench for Quebec that court set aside the judgment and dismissed the action. Mr. Justice Trenholme dissented, but thought the damages should be reduced to $1,200.

The question raised is whether or not the "Workmen's Compensation Act," 9 Edw. VII. (Quebec), ch. 66, has taken away the right of action given by the Code.

It is quite clear that if the father cannot rely upon the Code he has no remedy. For the said Act only gives relief to

> ascendants of whom the deceased was the only support at the time of the accident.

The solution of the question turns upon the construction of section 15 of the Act which is as follows:

> 15. The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this Act, for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this Act applies, only for the compensation prescribed by this Act.

It is argued that this section must be read as if the old law had been repealed in its relation to such a case as this either by the express terms of the section or by its interpretation when read in light of the purview of the whole statute and the only remedy a father can have must be within the provisions of the Act.

It seems to me I must say, with great respect, absurd to read this section as in itself repealing the above article of the Code. It is an enabling statute and gives new rights of action which reach to cases of

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accidental injuries in certain employments whether by the fault or without fault of any one and in those cases takes away the remedy resting upon any other.

Its very language is only made applicable to, and I submit is restricted to, "cases to which this Act applies." But it is said that we must read the whole Act and especially the terms of what appears in what is now article 7321 of the Revised Statutes of Quebec, which, omitting the enumerated employments specified, is as follows:—

> Accidents happening by reason of or in course of their work to workmen, apprentices and employees engaged in the work of * * * shall entitle the person injured or his representatives to compensation ascertained in accordance with the following provisions.
>
> This sub-section shall not apply to agricultural industries nor to navigation by means of sails.

How much further can such language carry us towards holding article 1056 C.C., is repealed, save as to cases to which this Act applies ?

And article 7323 R.S.Q., provides as follows:—

> 7323. When the accident causes death, the compensation shall consist of a sum equal to four times the average yearly wages of the deceased at the time of the accident, and shall in no case, except in the case mentioned in article 7325, be less than one thousand dollars or more than two thousand dollars.
>
> There shall further be paid a sum of not more than twenty-five dollars for medical and funeral expenses, unless the deceased was a member of an association bound to provide, and which does provide therefor.
>
> The compensation shall be payable as follows:—
>
> * * * * * * *
>
> (c) To ascendants of whom the deceased was the only support at the time of the accident.

How does that help us to extend the meaning of the section 15, above quoted, defining liability ?

I am unable to see anything therein to aid respondent's argument. I see much to destroy its effect. For

to give effect to it the old mother or grandmother dependent upon say two of her descendants for support, if deprived by the death of one, perhaps the main support, caused by the most abominable conduct of his employer, is left without any remedy.

She is to be told by the courts that the legislature has deliberately taken away her bread and given her instead this stone which she cannot use.

Surely such a method of interpretation and construction of a statute as leads to such results by repealing merely by implication a most beneficent statute of long standing which indeed is alleged by some to be but declaratory of ancient common law, has something wrong in it.

In short the Act formulated a scheme of insurance against accidents, for the benefit of those brought within its express terms in the circumstances to which these terms are fitted and only applied to such, and any implication of repeal of the old law is bounded thereby and extends no further. It sounds plausible to say that the employers as classified contribute on the basis of that being in full for liability or expenses on score of accidents in their business. But that is not so, for there are the cases expressly excepted by the Act, and this unprovided for class only forms one more. To argue from the express extension for the inclusion of all others stretches further than common sense can carry us. The maxim *expressio unius est exclusio alterius* is not of universal application.

With deference, I must conclude the Court of King's Bench judgment cannot be upheld.

The respondent then argues if we so hold that it is entitled to a new trial by reason of the misdirection

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of the learned trial judge in charging the jury. Two answers to this are apparent when we read the whole charge and the proceedings at the trial.

The learned trial judge did use rather warm language in a sentence or two of his charge, but I think that was cured by his specific instructions at the close of his charge which was somewhat lengthy, but most lucid.

The other answer is that no objection was taken to the charge and hence such ground cannot be taken now. If it struck the hearers as the sentences culled therefrom may strike us, I think objection would have been taken.

The case of *Barthe* v. *Huard*(1) is relied upon to overcome this difficulty.

As I read that case it does not help one bit to overcome this answer.

In that case there was a long list of objections filed at the trial or immediately after the verdict, and whether as the result of some prior understanding or not does not appear from the report or the original record on file here.

It is quite evident from the terms of the chief judgment in the case that objections of some kind to the charge must have been considered by the majority of the court as taken so that they could be looked at.

For my part I found, as did another member of this court, that the learned trial judge had improperly rejected material evidence which he should have admitted and the question then was whether or not there had been some substantial prejudice occasioned thereby and, rightly or wrongly, it seemed pertinent

(1) 42 Can. S.C.R. 406.

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in such a case to look at the course of the trial and especially the judge's charge to see if there could be found to be such prejudice.

Whether we are right or wrong in all this may be arguable. But certainly there is no distinct ruling in that case such as needed to maintain the objection to the charge in this case when no objection thought of until the court of appeal and the trial is found otherwise properly conducted.

I pass no opinion upon our possibly inherent jurisdiction, which must be bounded by that of the court of appeal to interfere in a case where there has been a mistrial yet no sort of objection taken.

All I need say if it exists, which I doubt, this is not the sort of case in which to invoke it.

There is a distinct ground taken which is open, if the facts justify it. That is that the amount awarded by the verdict is excessive.

In the consideration of that I should be disposed to take, as I did in the *Barthe Case*(1), notice of the learned judge's charge.

I was disposed at the argument, listening to the reading of the sentences taken by counsel from the charge, to think that blame for the verdict might rest there.

A more careful consideration of the charge as a whole leads me to think that on the whole, and especially towards the close thereof, it was fair and could not necessarily have misled the jury.

I have a very decided repugnance to interfering with the verdict of the jury in any case on the grounds of excessive damages. Not that I approve of exces-

(1) 42 Can. S.C.R. 406.

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sive damages being allowed. The misconduct of a defendant, if gross, may aggravate the damages. And in this case there does seem to have been such negligence.

But to put the parties to the wretched experience and anxiety, to say nothing of costs, of another trial all for the sake of a few hundred dollars here or there, seems most undesirable. And this court, for many years, has never interfered for that cause alone. Indeed, the case of *Central Vermont Railway Co.* v. *Franchère*(1) seems to be the last of the kind and there misdirection also existed. It has only in recent times interfered if the principle of assessing damages has not been properly explained to the jury. Here at the closing of his charge the learned judge correctly explained the law and shewed that it was financial loss alone which must be basis of the assessment of damages. Then the $100 a year sworn to as benefit of services of deceased to the father and what he had habitually paid the mother were on such a basis considerations which left a wide field for the jury to act upon.

The practice of appealing here only upon such a ground has almost disappeared. Rather than revive it I should refuse it herein though I think if I had to assess damages I should put them at Mr. Justice Trenholme's figures. There is no cross-appeal.

The notice of reasons assigned by the respondent in appealing below claimed no material loss, but failed to take the ground of excessive damages in estimating them. I do not think a mere denial of the existence of any material on which to found in law a verdict

(1) 35 Can. S.C.R. 68.

should be treated as synonymous with what is required by the term excessive damages, namely, an admission express or implied of liability coupled with a denial of its accurate and proper measurement. Hence a cross-appeal was needed.

I do not think it should now be allowed as mere matter of discretion. If the next jury should, as has been known to happen where local courts have used such discretion, give same verdict or greater, what should be done? Travel back here? If the court below had interfered in such a way we should not have reversed on that ground alone.

I would allow the appeal with costs here and in the Court of King's Bench and restore the judgment of the trial judge.

DUFF J. — The appellant claims compensation under article 1056 of the Civil Code for loss suffered by him in consequence of the death of his son whose death was found by the jury to have been occasioned by the negligence of the respondents. Article 1056 provides that

> in all cases where the person injured by the commission of an offence or quasi-offence dies in consequence, without having obtained indemnity or satisfaction * * * his ascendant * * * relations have a right * * * to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

The Court of King's Bench held that the right of action which formerly would have accrued under this article to the appellant has been taken away by the provisions of the "Workmen's Compensation Act," 9 Edw. VII. ch. 66. The last named enactment does not profess to repeal or amend the provisions of

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article 1056. The view upon which the Court of King's Bench proceeded was that it was a necessary implication to be found in the provisions of the Act that persons in the situation of the appellant were after the passing of the Act to be deprived of the recourse provided for in that article.

That opinion, as I understand it, rests upon section 15 of the "Workmen's Compensation Act," which is in the following terms:—

> 15. The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this Act, for injuries resulting from accidents caused by or in the course of the work of such person, in the cases to which this Act applies only for the compensation prescribed by this Act.

The case before us is not, in my opinion, one of "the cases to which this Act applies." Such cases are ascertained—(1) by the nature of the employment of the person injured (sec. 1); (2) by the scale of wages (sec. 6); (3) as regards representatives entitled to compensation by the fact that they fall within the class and answer the descriptions in section 3. In the present case the requirements of the Act as regards the matters numbered (1) and (2) are no doubt satisfied; but the plaintiff does not fall within any of the descriptions of persons who, as representatives, are under section 3 entitled to the benefits of the Act; ascendants entitled to those benefits being limited to those of whom the deceased was the only support at the time of the accident.

It is to be observed that the right to recover damages under article 1056 exists only where death has ensued as a consequence of a delict or quasi-delict, the effect of the construction adopted in the court of appeal being that the right of action for wrongs having such consequences would be wholly taken away from

persons in the situation of the appellant. I think that such effect ought not to be given to a statutory enactment unless the intention of the legislature to take away the right of action is satisfactorily evidenced by the language employed. I do not think that satisfactory evidence of such an intention is to be found in section 15.

ANGLIN J.—I am, with great respect, unable to accept the interpretation which the Court of King's Bench has placed upon the "Employers' Liability Act," R.S.Q., 1909, arts. 7321, 7323, and 7335. That Act takes away certain rights of action which existed under the provisions of the Civil Code, art. 1056. A statute, especially one of this character, should not, upon any assumption or presumption of mistake or omission on the part of the legislature in the expression of its intention (*Commissioners for Special Purposes of Income Tax* v. *Pemsel*(1); *Cowper Essex* v. *Local Board of Acton*(2)), be treated as extinguishing rights of action which it does not expressly or by necessary implication abrogate.

Nor is it permissible to treat a statute, contrary to the expressed meaning, as embracing or excluding cases merely because of a probable view as to legislative intent and because no good reason appears for their inclusion or exclusion, as the case may be (*Denn* v. *Reid*(3); *Nixon* v. *Phillips*(4)), or to indulge in conjecture as to what the legislature would have done if the particular case under consideration had been

(1) [1891] A.C. 531, at p. 549.
(2) 14 App. Cas. 153, at p. 169.
(3) 10 Peters 524, at p. 527.
(4) 7 Ex. 188, at pp. 192-3.

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brought to its attention. *Attorney-General* v. *Noyes* (1); *Rex* v. *Inhabitants of Barham* (2); *Coe* v. *Lawrence* (3); *Jones* v. *Smart* (4).

The liability of the employer to the persons "mentioned in article 7323" is dealt with and restricted by article 7335. His liability to other persons is not touched. To read article 7335 as applicable to cases not within its terms is to legislate, not to interpret. To act upon an assumption of legislative intent which has not been explicitly stated is always attended with some danger; to do so where the result is to take away existing rights of action, if ever justifiable, can be so only where the necessary intendment is so certain from the scope and language of the statute itself that the court has before it what is tantamount to an actual expression of that purpose. Several provisions of the Quebec statute, notably article 7324, make it clear that the legislature did not, even within the specified classes, mean to substitute the statutory compensation for the liability of the employer under article 1056 C.C. in all cases in which his employee is the victim of an accident in the course of his work (art. 7321). It would rather seem to be the scheme of the legislation to substitute the statutory compensation only in the cases specified and in favour of the persons mentioned for the damages to which such persons would formerly have been entitled had an occurrence resulting in injury to an employee been occasioned by some fault ascribable to the employer, and to leave other cases and the rights of other persons in *statû quo*. I find nothing in the statute which indicates an

(1) 8 Q.B.D. 125, at p. 138.
(2) 8 B. & C. 99.
(3) 1 E. & B. 516
(4) 1 T.R. 44, at pp. 51, 52.

intention to deprive of a right to recover damages under article 1056 C.C., persons to whom it affords no substituted relief — certainly nothing which would justify holding that such is its necessary intendment. Moreover, upon such a construction the words in article 7335, "to the person injured or to his representatives mentioned in article 7323" are given no effect. Article 7335 is read as if these words were entirely omitted. Another fundamental canon of construction is thus violated. *Stone* v. *Corporation of Yeovil*(1); *Gaudet* v. *Brown*(2); *Presbytery of Auchterarder* v. *Earl of Kinnoull*(3).

I am, therefore, of the opinion that, because the plaintiff — as an ascendant of whom the deceased was not "the only support" — is not within the class of persons (art. 7323) to whom article 7335 declares that the employer shall be liable "only for the compensation prescribed by this sub-section," his legal right of action under article 1056 C.C., has not been taken away.

The circumstances under which the plaintiff's son was killed were such that, apart from misdirection, the finding of fault on the part of the defendants cannot be impeached. No objection was taken to the charge as is required by articles 489(3) and 506 C.P.Q. Nor was misdirection stated as a ground of appeal to the Court of King's Bench as is prescribed by article 499 C.P.Q. While the charge was undoubtedly open to grave objection in the passages dealing with the scope of the defendants' duty and as cal-

(1) 1 C.P.D. 691, at p. 701.

(2) L.R. 5 P.C. 134, at pp. 152-3

(3) 6 Cl & F. 646, at p. 686.

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culated to lead the jury to award excessive damages — so much so that, if exception had been duly taken, the defendants, subject to the provisions of article 500 C.P.Q., would have been entitled to have the verdict based upon it set aside — their disregard of the rules has deprived them of that right.

But the damages awarded are so large that from their very excess it is manifest that the jury was either "influenced by improper motives or led into error." Article 550 C.P.Q. The deceased, who was 21 years of age, was employed by the defendants as a street-car conductor. He was at work for ten hours every day. He lived with his father, contributing towards the family expenses $4 a fortnight and occasionally some articles of clothing for his younger brothers and sisters. He sometimes helped his father in the confectioner's shop kept by him. But any such assistance must have been very slight and of trifling value. The cost of the young man's board must have equalled, if it did not exceed, the value of anything which he gave in return. The plaintiff claims that he spent $418 in connection with the funeral of the deceased, of which only $110 was paid to the undertaker and $63 to the Church, including cost of burial and tombstone. The balance was expended, according to the plaintiff's account, in extra household expenses and mourning. It appears that he had not to bear any medical expenses. Nothing is said of any estate which the deceased may have left. Apart from the apparently extravagant expenditure in connection with the funeral, etc. (something certainly not to be encouraged), it is difficult to see from the evidence what pecuniary loss his son's death occasioned to the plaintiff. While I

think that $750 would represent the maximum damages which he should recover, I am not prepared to dissent from the opinion of the majority of my colleagues as to the amount that may be allowed.

This seems to be a proper case for the exercise of the power conferred by article 503 C.P.Q. If the plaintiff will consent, the judgment in his favour for damages rendered by the trial judge may be restored to the extent of $1,250. If he declines to accept a judgment for that amount there will be a new trial.

BRODEUR J. (dissident).—Je suis d'opinion de confirmer le jugement de la cour d'appel.

En vertu des dispositions de l'article 1056 du Code Civil, les ascendants d'une victime avaient le droit de poursuivre l'auteur du délit, mais si cette victime avait un conjoint et des enfants il ne pouvait être porté qu'une seule action pour tous ceux qui avaient droit à l'indemnité.

La loi de 1909 a modifié la responsabilité du patron dans les accidents du travail.

Les ouvriers ou leurs représentants devaient, sous l'empire du code, prouver la faute du maître pour pouvoir réussir dans leur poursuite.

On a substitué par la nouvelle législation à la théorie de la faute le risque professionnel. Les dommages sous l'empire du code pouvaient être accordés pour des sommes très considérables; mais maintenant ces dommages, dans les accidents ordinaires du travail, ne sauraient excéder $2,000. Les ascendants pouvaient autrefois réclamer tous les dommages que leur causait le décès de la victime du délit. Mais le législateur n'a conservé le recours à l'ascendant que si la victime était son seul soutien. Il est bien vrai qu'il

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n'est plus obligé de prouver faute de la part du patron; mais, d'un autre côté, ses droits sont restreints au cas où son fils était son seul soutien.

L'appelant prétend cependant que si le père avait d'autres moyens de subsistance il pourrait tout de même poursuivre le patron sous l'autorité du code civil.

Il y aurait là anomalie, si cette prétention était bien fondée, car les enfants et le conjoint sont obligés de s'unir pour instituer leur poursuite. Or, on se trouverait en présence d'un conjoint et d'enfants dont la réclamation ne pourrait pas dépasser $2,000, tandis que l'ascendant, s'il n'avait pas la victime pour seul soutien pourrait poursuivre, lui, pour une somme plus élevée que $2,000. Il serait obligé de prouver faute de la part du patron, tandis que les enfants et le conjoint ne seraient pas tenus à cela.

L'interprétation la plus rationnelle est, suivant moi, que l'ascendant, dans le cas d'un accident du travail, comme dans le cas actuel, ne peut réclamer que sous l'empire de la loi de 1909 et que son recours, qu'il possédait sous le code, lui a été enlevé par cette nouvelle législation.

Notre loi des accidents du travail a été basée sur la législation française. Elle diffère quelque peu dans les termes mais les principes sont les mêmes. Or, en France, on décide invariablement que l'ascendant n'a pas d'autre recours que celui que la loi des accidents du travail lui donne.

Appeal allowed with costs.

Solicitors for the appellant: *Choquette, Galipeault, St. Laurent, Metayer & Laferté.*

Solicitors for the respondents: *Bédard, Lavergne & Prévost.*

JANE ALEXANDER PRINGLE (PLAINTIFF) ..... } APPELLANT;

AND

DAVID ANDERSON AND OTHERS, TRUSTEES OF ST. MATTHEW'S CHURCH (DEFENDANTS) ..... } RESPONDENTS.

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*Nov. 18.
*Dec. 29.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Construction of will—Legacy to church committee—Contribution to "building fund"—Ulterior disposition—Application to purpose intended—Lapse of devise—Art. 964 C.C.

At a time when the congregation of St. Matthew's Presbyterian Church, in Montreal, was heavily encumbered with debt incurred in building the church, a committee was formed to collect contributions to be applied in liquidating the debt by means of a "building fund," and the testatrix made her will by which she bequeathed certain real property to that committee. Several years later the committee were relieved of their duty and the building fund ceased to exist, and during the year previous to the death of the testatrix the original debt in respect of which the building fund had been established was fully paid. There remained, however, at the time of her death balances of debt still due for expenses incurred for other building purposes. In an action to have the bequest declared to have elapsed on account of failure in its ulterior disposition,

Held, affirming the judgment appealed from (Q.R. 46 S.C. 97), Duff and Anglin JJ. dissenting, that, in the circumstances of the case, the bequest must be construed as a bounty to the trustees of the church for the purposes of building expenses, including debts incurred for such purposes subsequent to the construction of the church; that the motive of the testatrix was not to make a contribution to any particular fund, but to benefit the congregation in respect to its building liabilities generally, and that the

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

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legacy did not lapse in consequence of the "building fund" having ceased to exist and the extinction of the debt in regard to which contributions to that fund were to be applied.

Per Duff and Anglin JJ. dissenting.—It was of the essence of the gift that it should be capable, at the time of the death of the testatrix, of being applied in furtherance of the specific purpose for which the "building fund" had been instituted and, that having become impossible, it lapsed under the provisions of article 964 of the Civil Code.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal(1), affirming the judgment of Mr. Justice Dunlop, in the Superior Court, District of Montreal.

The circumstances of the case and the questions in issue on this appeal are stated in the judgments now reported.

C. M. Holt K.C. and *W. F. Chipman* for the appellant.

J. E. Martin K.C. for the respondents.

THE CHIEF JUSTICE.—The question at issue between the parties on this appeal relates to the validity of a bequest in a will made in notarial form, at Montreal, in May, 1892, by a lady who died at a very advanced age, in 1909.

The clause of the will in dispute is in these words:

Secondly, I give, devise and bequeath unto the Trustess of the Building Fund of St. Matthew's Presbyterian Church, Wellington Street, in the City of Montreal, those two certain houses situate in the St. Gabriel Ward of the said City of Montreal, fronting on Rushbrooke Street and bearing the numbers forty-eight and fifty (48 and 50) of said street, with the property upon which the said houses are erected as now belonging to me said testatrix.

(1) Q.R. 46 S.C. 97.

To have, hold and enjoy said property unto said trustees, their successors and assigns as *their absolute property in virtue hereof.*

We are asked to say what the intention of the testatrix was when she used this language to describe the devisees.

A brief statement of the circumstances under which the bequest was made will, I believe, materially help us to understand the sense in which the late Mrs. Boyd must be presumed to have used the words in which she expressed her intention in respect of this portion of her estate for, as a very eminent judge said,

all writings tacitly refer to the existing circumstances under which they are made.

I have also present to my mind the rule of the Quebec Code, article 12, that where a law is doubtful or ambiguous it is to be interpreted so as to give effect to it and, as Laurent says, Vol. 14, No. 292,

il en doit être de même des testaments qui sont des lois d'intérêt privé.

See also the articles of the Civil Code, 1013-1021, which relate to the interpretation of contracts, and *Martin* v. *Lee*(1).

When the will was made and at the death of the testatrix, there was in Montreal a congregation known as "St. Matthew's Presbyterian Church," of which the testatrix had been at all times a very zealous member. That congregation had a legal existence, and its property was held in the name of the trustees, now respondents, under the authority of the Quebec statute, 38 Vict., ch. 62, section 4 of which reads:—

Whenever any congregation, society or mission, in communion or connection with said united church, shall hereafter be desirous of

(1) 14 Moo. P.C. 142.

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acquiring any land, or real property of any description whatsoever, for the site of any church, chapel, meeting-house, school, manse, glebe, burial-ground, or appurtenances thereto, the same may be acquired by trustees for any one or more of the said objects, which shall be designated in the deed of acquisition, and by any name assumed in said deed, sufficient to shew the connection or communion of its members with said united church, and the locality where such congregation, society or mission is to be established; and such deed shall not require to be registered at any prothonotary's office, but shall be subject to the ordinary laws of registration applicable to individuals, and such congregation, society or mission shall be entitled to acquire, take or hold lands and real estate, for the purposes aforesaid, without license, in mortmain.

Some years before the will was made a committee was appointed by the congregation to raise a building fund for the purchase of a site for a new church and to provide for its construction. In due course the property was acquired, and the church was finished in 1891, but not completely paid for. The will was made in 1892. It appears by the trustees' annual report for the year ending 31st December, 1893, that the church property was heavily encumbered and there was, in addition, a large floating indebtedness. The same conditions continued to exist in 1894. More prosperous days appeared in 1897 and it was then decided to close the building and sinking funds and open a mortgage fund to provide for the payment of the capital and interest of the debt due on the church property. The Building Fund Committee then passed out of existence, although there was outstanding a mortgage on the property of over $12,000. The importance of this will be more apparent when I come to consider the objections made to the validity of the bequest. In 1901 the congregation found it

> very necessary to the upbuilding of the church that the musical part of the services should be of a high order,

and it was resolved to purchase a suitable organ which apparently cost something over $2,000. In 1903 the

mortgage fund was merged into the revenue fund and in the same year a new building was substituted for the annex to the church at a cost of about $5,000, a contract was let for repairs, and the erection of "MacVicar Hall" to accommodate the Sunday School pupils was decided on. This hall is part of the religious establishment and is connected with the church by a passage-way. In 1907 there appears to have been a very full discussion of different schemes formulated to liquidate the mortgage indebtedness on the church proper. Increased efforts were put forward in 1908 and, finally, it was announced at a meeting held in January, 1909, not that the liabilities of the congregation had been liquidated, but that the balance due on the mortgage was paid off. The deceased, who was throughout, as I have already said, a very active church member, died on the 5th August, 1909, without making any change in her will.

At that time, as was found by the trial judge,

> there was a debt upon "MacVicar Hall," which is part of the church property under the control of the trustees, of $3,750; there was a debt upon the manse of $4,500, and upon the organ installed in the church of between two and three thousand dollars. Then there were always repairs, improvements, extensions and depreciations to be provided for, to which the legacy could properly be applied and which are clearly covered by the intention of the testatrix.

The contention now put forward is that the legacy lapsed because the specific fund designated by the testatrix as "the building fund" ceased to exist in 1897 at a time when, as I have already pointed out, the financial condition of the congregation was at its worst. The church property was then burdened with a very heavy mortgage and consequently most in need of the help which clearly the testatrix intended to give

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when she made her will; and to hold that the bequest lapsed when the building fund was merged in the mortgage fund is, I respectfully submit, to effectually defeat the clearly expressed intention of the testatrix which was, not to aid any particular fund, but to assist in making provision for the buildings necessary to effectively carry on the religious work of a congregation with limited means in which she was deeply interested.

Let us now examine the will. I think we are all agreed that the devisees are the trustees of the church and that the will must be construed as if the devise read,

I give to the trustees of St. Matthew's Presbyterian Church for the purposes of the building fund.

It is not contended that the trustees were not competent to take or that they are not sufficiently identified, but it is said the purpose (*motif*) to which the proceeds of the legacy were to be applied had ceased to exist at the death of the testatrix and, therefore, the legacy lapsed.

This is not a case of lapsed legacy in the ordinary meaning of the term (arts. 900, 904 C.C.) nor is it a bequest to trustees under articles 868 and 869 C.C. The objection urged by the appellant does not appear to be based upon any particular provision in the Code, but I presume the intention of the appellant is to bring the bequest within the application of a principle well known in the civil law as

legs devenu caduc pour cause de cessation du motif pour lequel le testateur a fait le legs.

The distinction between this kind of legacy and a conditional legacy with which it is sometimes confounded, is well explained by Pothier, vol. 1, page 425, Nos. 67 and 68. See also 14 Laurent, at page 309, No. 292.

There is no uncertainty or ambiguity as to the intention of the testatrix. Her intention was to leave her property to the trustees of the church to which she belonged — to be applied by them, as I have already said, to the building needs of the congregation and the reference to the building fund was merely to indicate the agency through which at that time the funds for the building were being collected.

The trustees take the bequest in their quality as trustees, subject to the obligation to apply it to the purpose mentioned in the will of the testatrix, and at her death that property vested in them conditionally upon their accounting for the disposition they made of it. The effect of such a testamentary disposition is very clearly explained by Pothier, Vol. 1, page 425, No. 68, and at page 443, No. 116. The committee appointed to collect for the building fund could not take, they had no legal independent existence, they were merely subordinate agents appointed temporarily by the congregation for a specific purpose. They had no title to the property or to the possession of any of the buildings of the congregation beyond that of any of their fellow-worshippers. To hold that when the building committee was dissolved the bequest was at an end, would be to say that, although the building liability which the bequest was intended to provide for continued to exist, the trustees were not to get the benefit of it because one of the agencies through which it was expected to raise funds had failed to accomplish that purpose.

I have gone over the history of the different means adopted to collect funds for the purpose of shewing that at the opening of the succession there was a liability on the congregation arising out of its building

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operations to which the proceeds of the legacy might be applied as the testatrix intended.

I venture to urge these additional reasons: The manse and "MacVicar Hall" are built on the original church site, they are necessary auxiliaries to effective church work and are all now part of the original establishment. The organ is incorporated in the building and is an inherent part of it as much as the pews, railings or altar, and surely the balance still due on its purchase price is a debt on the church building of which it forms a part. The same may be said of the manse and "MacVicar Hall," they are a part of the curtilage of the church and, although the relative positions of the buildings are not made quite clear on the evidence, they are all situate on the lot originally bought for the church and if sold to satisfy the claims now due on them I do not see how any part of the church property could escape: *Marson* v. *London, Chatham and Dover Railway Co.*(1).

It is impossible for me to come to any other conclusion than that (1) the trustees take under the will subject to the obligation to apply the proceeds of the bequest in the liquidation of the building liabilities, and (2) that the manse, hall and organ are all part of the general property of the congregation used for its religious purposes and that the motive of the testatrix was not to contribute to a particular fund, but to benefit the congregation in all those respects.

I would dismiss the appeal with costs.

IDINGTON J.—The late Margaret Boyd, who died 5th August, 1909, by her last will and testament, dated 13th May, 1892, made the following devise:—

(1) L.R. 6 Eq. 101.

2. I give, devise and bequeath unto the Trustees of the Building Fund of St. Matthew's Presbyterian Church, Wellington Street, in the City of Montreal, those two certain houses situate in the St. Gabriel Ward of the City of Montreal fronting on Rushbrooke Street and bearing the numbers 48 and 50 of said street, with the property upon which the said houses are erected as now belonging to me the said testatrix.

To have, hold and enjoy said property unto said trustees, their successors and assigns as their absolute property in virtue hereof.

The appellant, as tutor of her minor daughter, who was named in said will residuary legatee of the estate of deceased, brings this action to have said devise declared null and void and to have it declared that the property referred to therein forms part of the residue of the said estate.

I shall presently refer to the grounds specially taken by appellant, but before doing so it seems to me that we should consider who, if any one, is the devisee. It seems to be assumed by appellant in launching this action against the respondents that they are the devisees named or designated in said devise.

The respondents are the trustees of the property of said church holding it as such for the congregation of said church.

They are appointed, I understand, by the congregation, but whether by members of the church or members and adherents is not explained and possibly is not material except in the connection I am about to advert to.

It is conceded that they are appointed and enjoy such rights of property as they do possess by virtue of 38 Vict. ch. 62, and also seems to be conceded that all the property real and personal belonging to or used by the congregation and those ministering to or serving the said congregation in connection with said church, known by the name of "St. Matthew's Pres-

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byterian Church," is vested in the trustees appointed under said Act.

The 4th section of said statute is as follows:—

4. Whenever any congregation, society or mission, in communion or connection with said united church, shall hereafter be desirous of acquiring any land, or real property of any description whatsoever, for the site of any church, chapel, meeting-house, school, manse, glebe, burial-ground, or appurtenances thereto, *the same may be acquired by trustees for any one or more of the said objects which shall be designated in the deed of acquisition*, and by any name assumed in said deed, sufficient to shew the connection or communion of its members with said united church, and the locality where such congregation, society or mission is to be established; and such deed shall not require to be registered at any prothonotary's office, but shall be subject to the ordinary laws of registration applicable to individuals, and such congregation, society or mission shall be entitled to acquire, take and hold lands and real estate for the purposes aforesaid, without license, in mortmain.

There never were any other trustees known to said congregation than those so appointed and thus vested with power of taking real estate.

Section 13 empowers said trustees to acquire lands by devise or bequest. No one else is given the power to acquire by devise and hold for said congregation any lands. A devise of land to any one else to hold for the congregation would seem to be void as offending against the mortmain Acts. The respondents are, and I assume were, the trustees so duly appointed and possessed of the powers the said Act confers.

Now, if any lawyer had, only with the knowledge imparted by the foregoing, been asked whether respondents could take under said devise, would he have had any serious doubt or difficulty in answering in the affirmative?

He would likely criticize the words "of the building fund" and possibly suggest they might be treated as surplusage or if not so as imposing a restriction

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upon the uses to which the proceeds of the property, which must be sold within a limited term to comply with the law, could be applied, and probably in line with well known decisions he would suggest the sentence should be read as if to the trustees *"for* the building fund."

It could not be applied towards foreign missions, for example, or indeed any service of that kind. Nor could it be used to pay the minister's salary or other like expenses of the church or congregation.

Such is the way this devise appears to me. It does not seem very ambiguous, if at all, or more so than many others which have been given operative effect.

The language of Sir George Jessell in *In re Roberts* (1), as follows,—

> the modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty,

seems appropriate.

If the language is not in fact ambiguous we have no right to look elsewhere for its meaning.

It is urged, however, that the words "of the building fund" when used by the testatrix must, under the circumstances in which she was placed in relation to this church of which she was a member, have had a peculiar significance and import. As such member probably she had taken part in constituting this Board of Trustees.

It is shewn in the evidence that some ten years before she made this will the congregation had passed a resolution that

(1) 19 Ch. D. 520.

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a committee be appointed to determine upon the site for the proposed *new building*, and devise some means of raising a fund for the purpose,

and a week later another

that a permanent committee be appointed to raise a building fund,

and thereupon a committee was appointed accordingly.

It appears this committee continued in existence till after the church was built and after this will was made.

It is testified by one of the respondents this was done to facilitate the procuring of funds, to be kept separate from the funds for the maintenance and general working of the church.

It also appears that before the testatrix died the church debt for the building of the church itself had been paid off, but that the other buildings in connection with the church for the service of the congregation, such as a manse and Sunday school or meeting-house and building of an organ in the church had been entered upon, but the expense thereof had not been satisfied; that the fund known as the building fund aforesaid had been merged with a sinking fund and a mortgage created on the whole property which far exceeded the value of this devise.

It is suggested that with all this being done the fund meant to be described in the devise had ceased to exist and hence the devise must be held to have lapsed.

Is that the necessary conclusion from all that transpired ?

At first sight it wears a plausible appearance, but it does not seem to me of such force as to work out the desire of appellant.

There was a committee, but that committee never was the trustee of anything. What they got was the property of the trustees proper and subject to their control so far as needed to be used for the purposes to which the subscribers thereto had donated their contributions.

This committee and that fund were all subject to be dealt with by the trustees as they in fact did deal therewith; no doubt with the approbation of the congregation from time to time.

The committee and this mode of bookkeeping were no doubt highly proper and expedient means of accomplishing part of the building projects of the trustees, but they do not seem to necessarily imply that a testatrix making such a devise could ever have supposed that the phraseology of her will was thus narrowly limiting her intentions.

The remarks of Mr. Justice Swinfen Eady in *Attorney-General* v. *Belgrave Hospital for Children*(1), as to looking at the testator's knowledge of an institution to be benefited by his will, are worth observing in this whole connection.

She outlived the committee but not the trustees, and I have no doubt she would have changed her will if she had supposed the disappearance of the committee and its fund as a means of bookkeeping could have or be supposed to have, had the effect of revoking her will *pro tanto*.

I think the appeal fails and must be dismissed with costs, which let us hope will not be exacted.

DUFF J. (dissenting).—I am unable to accept the view which has prevailed in the courts below and with

(1) [1910] 1 Ch. 73.

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the majority of this court. I will briefly indicate my reasons for thinking that the appellants are entitled to succeed.

The devise we have to construe is in the following terms:—

> Secondly: I give, devise and bequeath unto the Trustees of the Building Fund of St. Matthew's Presbyterian Church, Wellington Street, in the City of Montreal, those two certain houses situate in the St. Gabriel Ward in the said City of Montreal, fronting on Rushbrooke Street and bearing the numbers 48 and 50 of said street, with the property upon which the said houses are erected as now belonging to me, said testatrix. To have, hold and enjoy said property unto said trustees, their successors and assigns as their absolute property in virtue hereof.

I did not understand it to be disputed in the oral argument presented to us on behalf of the respondents that this clause in the will of the late Mrs. Boyd does sufficiently express a direction as to the employment of the proceeds of the gift by which the trustees are bound and against whom it could be enforced. I think I am doing no injustice to the argument of Mr. Martin, who presented his case with his usual candour, in saying that he admitted that any attempt on the part of the devisees to apply the proceeds of the gift in support, for example, of foreign missions, or in payment of the minister's salary, would be a departure from the terms of the trust. That being so (and I think the admission was a very proper admission, because it appears to me to be hardly arguable that this is a gift to the trustees of the congregation of St. Matthew's to be applied for the support of religious objects in any manner the congregation should think fit) it follows that the principle which must govern us in the determination of the dispute that has arisen is furnished by article 964 C.C., which is in the following words:—

964. The legatee who is charged as a mere trustee, to administer the property and to employ it or deliver it over in accordance with the will, even though the terms used appear really to give him the quality of a proprietor subject to delivery over, rather than that of a mere executor or administrator, does not retain the property in the event of the lapse of the ulterior disposition, or of the impossibility of applying such property to the purposes intended, unless the testator has manifested his intention to that effect. The property in such cases passes to the heir or the legatee who receives the succession.

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The point for decision is whether at the time of the death of Mrs. Boyd it had become impossible to apply the proceeds of her bounty according to the directions of her will. The substantial question in dispute is as to the meaning of the words employed by the testatrix when read, as they must be, in light of the facts which she must be presumed to have had in mind and with reference to which the intended disposition of her property was framed. The will was executed in May, 1892. Ten years before that, in order to make provision for the building of a church, a fund known as the "building fund" had been instituted by the congregation. A permanent committee had been created charged with the collection and administration of the fund. In February, 1892, that committee was discharged, but the fund remained on foot, the church having in the meantime been constructed, and a special committee was appointed for the purpose of securing contributions to the fund to enable the congregation to discharge the debt upon the church then secured by mortgage and amounting to $12,000. The members of the congregation were appealed to and asked to promise to contribute weekly or monthly by "Special Envelope Contributions." This appeal was made pursuant to a report adopted at a special meeting of the congregation and reported

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in the "Monthly Record" for March. The object of the fund — the object the members of the congregation were asked to aid by their contributions — was exclusively to provide for the payment of the existing mortgage debt and I can entertain no doubt that this was the fund described by the testatrix in her will as the "building fund" or that this was the object she had in view. A year before the death of the testatrix this object had been completely accomplished. Not only had the fund itself ceased to exist; the circumstances had so entirely changed between the date of the making of the will and the date of the testatrix's death as to make a contribution to the "building fund" which the testatrix had known for twenty-five years, an act of no meaning. It follows, therefore, that the specific and limited purpose to which the gift had been dedicated having been fully accomplished, there had supervened (at the time of the testatrix's death) the "impossibility" of applying the property which was the subject of the gift to the "purpose intended" within the meaning of article 964.

The courts below have held that the application of the property in payment for an organ, the cost of building a manse, the cost of building an annex, would be within the purposes of the will. With great respect it appears to me to be hardly arguable that these objects were within the objects of the "building fund" instituted in 1882, and to which contributions were invited in February, 1892, three months before the execution of the will. The fact that separate funds were instituted for the purpose of carrying out some of these objects, and that no part of the building fund or of the mortgage fund in which it was afterwards merged was ever applied to any purpose other than

the payment of the cost of the church building proper, tells very strongly against this suggestion of the respondents. Indeed, I think the evidence demonstrates that the object of the fund was exclusively that already mentioned.

I read the clause we have to construe as shewing, on the part of the testatrix, the existence of an intention, in 1892, when she executed her will, to provide for a contribution to take effect at her death to the fund which she knew and for which contributions were then being solicited, and I think it was of the essence of the gift that it should be capable at her death of being applied in furtherance of the specific purpose for which she in common with the other members of the congregation must have known that this fund was instituted.

ANGLIN J. (dissenting).—With the utmost respect for the learned judges of the provincial courts, and for those of my learned brothers who hold contrary views, I am of opinion that the devise in question in this action fails. Assuming in favour of the respondents that they are sufficiently identified by the description

the trustees of the building fund of St. Matthew's Presbyterian Church, etc.,

as I rather think they are in view of the *habendum*

unto the said trustees, their successors and assigns,

the purpose of the devise was to aid, not the general works or funds of the church under their control, but a specific fund designated by the testatrix as "The Building Fund."

There is nothing in the devise itself, or elsewhere

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in the will, to indicate that the testatrix had any such paramount general charitable purpose as would warrant the application of the *"cy-pres"* doctrine of English testamentary law. The bequest is for a specific, well-defined object and purpose (Theobald on Wills (7 ed.), p. 373), and the question is whether that object still exists — whether the particular charitable purpose can still be carried out. (4 Halsbury, 158.)

The building fund of the new "St. Matthew's Church," the establishment of which was recommended in a report of the 15th February, 1882, was instituted and placed in charge of a special permanent committee by resolution of the congregation of the 22nd February, 1882. The purpose was to separate the new church building fund from the other funds under the administration of the trustees of the church. The new church was completed in June, 1891. The building fund became the object of a special envelope subscription. It was well known to the testatrix, who was a subscriber to it. It was "active" when she made her will in 1892 and there is no room for doubt that it was that fund with its specific purpose which was the object of her bounty. In 1897 "the building fund" was replaced by "the mortgage fund." The debt on the new church was completely paid off in 1908. Since that time there has been no building fund for the church proper; there was no further occasion for such a fund. The testatrix died in August, 1909.

The respondents suggest, however, that there are still church debts to which the proceeds of the devise in question may be applied. These debts were incurred in connection with the erection of "MacVicar Hall" (a "Sunday school annex"), the purchase of the minister's manse and the installing of a new organ.

"MacVicar Hall" was first projected in 1903 and was built in 1904. The manse property was acquired in May, 1909, the organ was also installed in 1909. Debts thus incurred were certainly not objects of the bounty of testatrix in 1892; and it is quite impossible to say that she intended to provide for payment of them. Indeed, to apply the proceeds of her devise to them may be something to which she would have had serious and decided objections. General repairs, improvements, etc., to which the respondents also say the devise may be applied, are ordinarily paid for, not out of a building fund but out of a revenue fund; and the trustees of St. Matthew's Church had, quite distinct from the church building fund, a revenue fund, which was not an object of Mrs. Boyd's testamentary bounty. If the church building fund had still existed after her death, no part of the proceeds of the devise to it could be legally diverted to any of these other purposes. *Attorney-General* v. *Belgrave Hospital for Children*(1).

The two Ontario cases cited by Archibald J. (*Tyrrell* v. *Senior*(2), and *Edwards* v. *Smith*(3)) are readily distinguishable from that now before us. In each of them there was a bequest in favour of a charitable or religious fund which actually existed in connection with the church to which the testator belonged, both at the time when he made his will and after his death, though under a name somewhat different from that used by the testator to describe it. The court in each instance was satisfied that the object of the testator's bounty was sufficiently identi-

(1) [1910] 1 Ch. 73. (2) 20 Ont. App. R. 156.
(3) 25 Gr. 159.

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fied. In the present case the fund intended to be aided existed when the will was made, but had ceased to exist before the testatrix died. The governing rule under such circumstances is, I think, to be found in such cases as *In re Rymer*(1); *Corbyn* v. *French*(2); *Attorney-General* v. *Bishop of Oxford*(3); *Clark* v. *Taylor*(4); *Fisk* v. *Attorney-General*(5); *In re Wilson*(6), and *Burgess's Trustees* v. *Crawford*(7).

In my opinion, owing to the failure of its specific object or purpose the devise in question lapsed and the property passed to "the heir or legatee who received the succession." Article 964 C.C.

BRODEUR J.—I concur with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondents: *Foster, Martin, Mann, Mackinnon & Hackett.*

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(1) [1895] 1 Ch. 19.
(2) 4 Ves. 418, at pp. 431, *et seq.*
(3) 1 Br. C.C. 444*n*.
(4) 1 Drew, 642-644.
(5) L.R. 4 Eq. 521.
(6) [1913] 1 Ch. 314.
(7) [1911-12] S.C. (Ct. of Sess.) 387.

MOSES HALPARIN (PLAINTIFF).....APPELLANT; 1914

AND *Oct. 21. *Dec. 29.

ALFRED C. BULLING (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Master and servant—Use of motor car—Disobedience—Act in course of employment—Employer's liability.

B. was owner of an automobile and hired a chauffeur to run it, giving him positive instructions that the car was not to be used except for purposes of the owner and his family, and that, when not in use for such purposes, it was to be kept in a certain garage. On the evening of the accident in question the chauffeur took his master's family to a theatre, in Winnipeg, and was directed by them to take the car to the garage and return for them after the close of the performance. The chauffeur took the car from the garage before the appointed time and proceeded with it for the purpose of visiting a friend in a distant part of the city. While so using the car, contrary to instructions, he negligently ran down the plaintiff, causing injuries for which an action was brought to recover damages against B.

Held, affirming the judgment appealed from (24 Man. R. 235), that, at the time of the accident, the chauffeur was not engaged in the performance of any act appertaining to the course of his employment as the servant of the owner of the car and, consequently, his master was not liable in damages. *Storey* v. *Ashton* (L.R. 4 Q.B. 476), followed.

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

The circumstances of the case are sufficiently stated in the head-note.

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

(1) 24 Man. R. 235.

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HALPARIN v. BULLING.

Davies J.

Nesbitt K.C. and *H. Phillips* for the appellant.

W. N. Tilley for the respondent.

DAVIES J.—I think this appeal should be dismissed and the judgment below affirmed on the ground which was clearly established that the chauffeur from the time he took the motor car out of the garage until the accident occurred was on his own business and pleasure and not on any business of his master's.

He was not acting within the scope of his duty as his master's chauffeur, but outside of and beyond that scope.

IDINGTON J.—In this case the learned trial judge finds that the respondent's chauffeur in driving his automobile was guilty of negligence and respondent liable to answer for the damages consequent therefrom suffered by appellant.

I assume the facts to be as reported by the learned trial judge, that respondent had in engaging the chauffeur bound him never to use the automobile without leave, and on such occasions as the night in question when he took the wife and some of respondent's family to the theatre, that the automobile should be at once returned to a neighbouring garage and left there till the time had approached to take it out and go and bring the family home.

On the night in question the automobile, after respondent's people had been duly left at the theatre, was taken to the neighbouring garage and left there by the chauffeur, but in a very short time thereafter taken out and used by him for purposes of his own in course of which the appellant was very seriously injured.

It would seem to me idle to contend that when this respondent's servant took his automobile out of the garage from which it was not to be taken until at least two hours later, he was not a trespasser and liable as such to instant dismissal for doing so. It seems he was not dismissed but retained in respondent's service despite such gross disobedience and the suffering caused thereby. I quite agree this is a state of things which in a well ordered state ought not to be suffered.

I regret to be compelled to hold that the common law relative to the ordinary relations of master and servant, and the responsibility of the former for the latter, under such circumstances, does not enable the courts to do absolute justice and that the statutory amendments thereto do not reach far enough to cover such a case as this.

Let us hope the law will be changed so far at least that the master who thus flaunts his support of such a wrongdoer in the face of one of those he has grossly injured, shall be made liable for all damages done by him whilst in such service.

Indeed, I think the legislation needed might go further, but to this extent at least it would be a deterrent for both master and man.

If this man had, as in the case of *Venables* v. *Smith* (1), relied upon by appellant's counsel, after leaving the theatre and before placing the automobile in the garage, gone upon some brief errand of his own, something might have been said for the case made.

Unfortunately for the appellant it seems to have been such a departure from the course of the chauf-

(1) 2 Q.B.D. 279.

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Idington J.

feur's employment that in law the master cannot be held bound to answer therefor.

The appeal should be dismissed with costs if the respondent claims them as it is to be hoped he will not.

DUFF J.—The principle of law by which our decision in this appeal must be governed is stated in these words by Cockburn C.J. in *Storey* v. *Ashton*(1), at page 479:—

> The true rule is that the master is only responsible so long as the servant can be said to be doing the act in the doing of which he is guilty of negligence in the course of his employment as servant.

The question in controversy is this question of fact — Was the chauffeur, Stapleton, about his master's business when he ran down the unfortunate victim of his carelessness or was he making use of the respondent's car in an independent excursion of his own? I think the conclusion at which the Court of Appeal arrived was right and that the question must be answered in the sense in which they answered it, namely, that Stapleton was not then engaged in the doing of anything appertaining to the course of his employment as the respondent's servant.

I think the provisions of the "Motor Vehicles Act" of Manitoba to which our attention was called have no relevance to any point arising on the appeal.

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

BRODEUR J.—It is with a great deal of hesitation that I have come to the conclusion that this appeal should be dismissed, though it is true that when the

(1) L.R. 4 Q.B. 476.

accident occurred the respondent's chauffeur was not acting within the scope of his duty. His instructions were to have the automobile at a certain garage or at the respondent's residence, and instead he took the motor car and used it for his own purpose and pleasure. During that errand of his own he struck the appellant.

A local Act of Manitoba, in which province the accident occurred, was invoked by the appellant; but it has no bearing upon the issues in this case.

The jurisprudence under the English common law is that the master is not liable for the negligence of his servant while the latter is engaged in some act beyond the scope of his employment for his own purpose, though he may be using the instrumentalities furnished by the master to perform his duties as servant. *Mitchell* v. *Crasweller*(1), in 1853; *Storey* v. *Ashton* (2), in 1869; *Rayner* v. *Mitchell*(3), in 1877; *Dowling* v. *Robinson*(4), in 1909.

I may add that the decision in this case should not be considered as a precedent in Quebec, where the liability of the master rests on different principles. Sainctelette, Responsabilité des propriétaires d'automobiles, p. 216, No. 188; Dalloz, 1908-1-351; Gazette du Palais, 1904-1-140; Le Droit, 22 Oct., 1914, Cour de Cassation.

Appeal dismissed with costs.

Solicitors for appellant: *Phillips, Rogers & Scarth.*

Solicitors for the respondent: *Moran, Anderson & Guy.*

(1) 13 C.B. 237.
(2) L.R. 4 Q.B. 476.
(3) 2 C.P.D. 357.
(4) 43 Ir. L.T.R. 210.

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*Nov. 27.
*Dec. 29.

THE CANADIAN NORTHERN ONTARIO RAILWAY COMPANY.. } APPELLANT;

AND

ROWLAND SMITH ..... RESPONDENT.

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

Appeal—Expropriation—Application to appoint arbitrator—Persona designata—Amount in controversy—"Railway Act," R.S.C. 1906, c. 37, s. 196—Jurisdiction of court—Practice.

A railway company served notice of expropriation of land on the owner, offering $25,000 as compensation. It later served a copy of said notice on S., lessee of said land for a term of ten years. On application to a Superior Court judge for appointment of arbitrators S. claimed to be entitled to a separate notice and an independent hearing to determine his compensation. The judge so held and dismissed the application and his ruling was affirmed by the Court of King's Bench. The company sought to appeal to the Supreme Court of Canada.

Held, per Fitzpatrick C.J. and Idington J., following *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse* (16 Can. S.C.R. 606), and *St. Hilaire* v *Lambert* (42 Can. S.C.R. 264), that the Superior Court judge was *persona designata* to hear such applications as the one made by the company; that the case, therefore, did not originate in a superior court and the appeal would not lie.

Per Duff J.—The judge, under section 196 of the "Railway Act" acts as *persona designata* and no appeal lies from his orders under that section;— in this case, the application having been made to and the parties having treated the contestation as a proceeding in the Superior Court, which had no jurisdiction, the Court of King's Bench rightly dismissed the appeal from the order refusing to appoint arbitrators; and the appeal to the Supreme Court of Canada being obviously baseless should for that reason be quashed.

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

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Held, per Davies, Duff, Anglin and Brodeur JJ., that as there was nothing in the record to shew that the amount in dispute was $2,000 or over, and no attempt had been made to establish by affidavit that it was, the appeal failed.

MOTION to quash an appeal from a decision of the Court of King's Bench, appeal side, Province of Quebec affirming the ruling of a judge in the Superior Court, District of Montreal, who dismissed an application for appointment of arbitrators in expropriation proceedings under the "Railway Act."

The material facts are stated in the above headnote.

Casgrain for the motion.

Rinfret K.C. contra.

THE CHIEF JUSTICE.—This is a motion to quash for want of jurisdiction. The facts are as follows:—

The Canadian Northern Railway Company, appellant, took proceedings under the Dominion "Railway Act" to expropriate a parcel of land in the parish of St. Laurent, Province of Quebec. Notice was given to the registered owners of the lot, but not at first to the respondent Smith, who had a ten years lease of the property. Later, on becoming aware of the lease, the company served another copy of the original notice on the owner and on the lessee declaring its intention to amend the notice of expropriation by putting Smith "en cause." The amount originally tendered by the company was $25,000, and this amount was not changed by the amended notice shewing the intention of the petitioner not to increase the amount of its original offer on account of the claim of the lessee.

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On the petition made by the owner to a judge of the Superior Court, to appoint an arbitrator under section 196 of the "Railway Act," Smith appeared to contest the right of the company on many grounds, the important one being that he, as lessee, was entitled to be served with a special notice and to have a special arbitration as to his compensation. This right the company denied.

The petition came on for hearing before Mr. Justice Beaudin, who found that Smith was entitled to a special notice and arbitration under the "Railway Act," independently of the arbitration of the landowner. His judgment was affirmed on appeal by the Court of King's Bench. The company now appeals to this court and have deposited their security in the court below. Smith moves to quash on the following grounds:—

1. That the judgment in the court below was interlocutory and related only to a matter of procedure;

2. There is no evidence that the amount involved exceeded $2,000;

3. That the controversy does not relate to title of land;

4. That the judgment of the Court below was a judgment *personâ designatâ* under special jurisdiction conferred by the "Railway Act" and there is no appeal.

Reference was made at the argument to *Turgeon* v. *St. Charles*(1), but that case has no application. It was there decided that a petition by a curator to a judge in chambers under the Quebec "Abandonment of Property Act" was a judicial proceeding within the

(1) 48 Can. S.C.R. 473.

meaning of that term in 46 or 37(*a*) of the "Supreme Court Act." However that may be it seems to me obvious that the words

suit, cause, matter or other judicial proceeding

in that section refer exclusively to civil proceedings which fall to be determined by the provincial courts and judges in the exercise of their ordinary jurisdiction in civil matters.

Here the judge to whom the application was made under the Dominion "Railway Act" was, it is true, a judge of the Superior Court of the Province, but for the purposes of that application his jurisdiction was "special and peculiar, distinct from, and independent of any power or authority with which he is clothed as a judge of that court." The Act conferring jurisdiction upon him provides all necessary materials for the full and complete exercise of such jurisdiction in a very special manner, wholly independent of, and distinct from, and at variance with, the jurisdiction and procedure of the court to which he belongs (sections 194, 195, 196, 197 *et seq.* "Railway Act"). As to appeal see section 209. Paraphrasing what the Chief Justice said in *Valin* v. *Langlois*(1), at pages 33, 34, I would say:—

Reading these special provisions in connection with the "Railway Act," and what has been said of the Act generally, I think it is not arriving at a forced or unnatural conclusion to say that Parliament intended to confer upon Provincial judges in Dominion railway expropriation matters an exceptional jurisdiction with a special procedure and with all materials for exercising such jurisdiction, and having nothing in common with the Provincial courts; that these judges and courts were merely utilized outside their respective jurisdiction to deal with this purely Dominion matter.

(1) 3 Can. S.C.R. 1.

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The Chief Justice.

The case comes clearly within the rule in *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse* (1); *St. Hilaire* v. *Lambert* (2); *Toronto, etc., Railway Co. and Hendrie, In re* (3); *Cie du Chemin de fer de Montréal et Sorel* v. *St. Vincent* (4).

I am entirely at a loss to understand how this case ever reached the Court of King's Bench, but as it comes to us from that court and assuming that we have no power to inquire on this application into the proceedings resulting in the appeal below, I am of opinion that the case does not come within sections 46 or 37 (*a*) of the Act.

Motion to quash granted with costs.

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

IDINGTON J.—I agree with the result reached by the Chief Justice.

DUFF J.—The jurisdiction created by section 196 of the "Railway Act" is not, I think, a jurisdiction given to the Superior Court or County Court as the case may be, but to the judge or judges of those courts. In other words, when acting under that section the judge does not exercise the powers of the court as such but the special powers given by the Act. From the refusal of the judge on an application under section 196 to appoint arbitrators no appeal would lie to the Court of King's Bench or to this court.

Mr. Rinfret appreciated this and argued that the contestation was an independent proceeding instituted in the Superior Court for the purpose of re-

(1) 16 Can. S.C.R. 606.
(2) 42 Can. S.C.R. 264.
(3) 17 Ont. P.R. 199.
(4) M.L.R. 4 Q.B. 404.

straining proceedings not in the Superior Court, but before the Judge acting as *persona designata,* and that it was from the judgment in this independent proceeding that the appeal was taken to the Court of King's Bench.

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I have examined the proceedings carefully and my conclusion is that beginning with the petition under section 196 all the proceedings have been treated by the parties and by all the judges before whom they have come as proceedings in the Superior Court. However that may be the contestation has been most certainly treated as part of the proceedings instituted by the petition, and whether one holds that they were in the Superior Court or before the judge *extra muros,* the result is the same. If the first, then the Court of King's Bench was obviously right in dismissing an appeal from a judgment in proceedings not only misconceived, but incompetent; if the second, no appeal lay to the Court of King's Bench against a judgment given in proceedings under section 196 and none lies to this court.

It is true that the objection that the judgment of the Court of King's Bench was obviously right does not go to the jurisdiction of this court. But appeals have been quashed *in limine* where they must certainly have failed as being manifestly without foundation and this practice is beyond doubt a beneficent one.

It is hardly necessary to observe that no appeal lies from a *considerant.*

I may add that collecting as best I can the effect of the words "matter in controversy * * * amounts to the value or sum of $2,000" from the various pronouncements in which judges of this court have pro-

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fessed to elucidate them, I am not convinced that the somewhat erratic course of decision permits me to hold that the condition of jurisdiction supposed to rest upon those words has been satisfied.

Anglin J.

ANGLIN J.—While adhering to the view expressed by my Lord the Chief Justice, in delivering the judgment of the court in *Finseth* v. *Ryley Hotel Co.*(1), and to what I stated in *Turgeon* v. *St. Charles*(2), at p. 483, as to the scope of section 37(*a*) of the "Supreme Court Act," I am nevertheless of the opinion that the respondent's motion to disallow the security filed by the appellant must succeed. If the proceeding before us is in the nature of a "judicial proceeding" within the purview of that section, "the matter in controversy" does not

> involve the question of, or relate to, any fee of office, duty, rent, revenue, sum of money payable to His Majesty, or any title to lands or documents, annual rents or other matters or things where rights in future might be bound.

There is nothing in the record to shew that the compensation which the respondent claims he should receive for the expropriation of his interests in the lands taken by the appellants

> amounts to the sum or value of $2,000.

Nor has any attempt been made under section 49*a* of the statute (3 & 4 Geo. V., ch. 51, sec. 5) to establish by affidavit that "the matter in controversy" amounts to that sum or value.

The motion should be granted with costs.

BRODEUR J.—C'est une motion pour faire renvoyer l'appel faute de juridiction.

(1) 43 Can. S.C.R. 646. (2) 48 Can. S.C.R. 473.

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Les procédures en la présente instance ont commencé par une requête à un juge pour nommer des arbitres sous les dispositions de l'Acte Fédéral des Chemins de Fer, art. 196 et ses amendements. La demande au juge a été faite par le propriétaire du terrain à exproprier. Sur cette requête l'intimé, Smith, a comparu et, après avoir allégué qu'il était locataire de ce terrain, il a demandé, par une procédure qu'il a appelé contestation, que la compagnie appelante soit tenue de lui donner un avis spécial d'expropriation et de lui faire des offres particulières et qu'il ait le droit de proposer un des arbitres.

Le juge à qui cette procédure a été soumise a décidé que les prétentions de l'intimé étaient bien fondées et son jugement a été confirmé par la Cour d'Appel.

L'intimé par sa motion, dit que nous n'avons pas juridiction parce que la cause n'a pas originé en Cour Supérieure et il a cité à l'appui de ce point la cause *Canadian Pacific Railway Co.* v. *Ste. Thérèse*(1).

Il prétend en outre qu'il n'apparait pas que l'affaire en litige soit d'une valeur de deux mille dollars.

Je ne serait pas prêt à dire que la cause de *Canadian Pacific Railway Co.* v. *Ste. Thérèse*(1) s'appliquerait maintenant dans une cause comme celle-ci.

Il est bien vrai que cette cause de Ste. Thérèse avait trait à une procédure sous l'Acte des Chemins de Fer. Il s'agissait, en effet, d'une demande faite au juge pour retirer un montant qui avait été déposé en Cour par la Compagnie. Mais lorsque cette cause a été décidé l'acte qui était en force était le chapitre 135 des statuts refondus du Canada qui déclarait à la section 28 que la Cour Suprême n'avait juridiction que

(1) 16 Can. S.C.R. 606.

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dans les causes qui avaient été instituées originairement *dans la Cour Supérieure de la* province de Québec.

En 1891, deux ans après la décision de la cause *Canadian Pacific Railway Co.* v. *Ste. Thérèse*(1), l'acte de la Cour Suprême a été amendé par 54-55 Vict. ch. 25, sec. 3, et il a été déclaré par cet amendement qu'il y avait appel même dans les causes qui n'avaient pas originé devant le Cour Supérieure.

De plus, nous avons décidé dans la cause de *Turgeon* v. *St. Charles*(2),

that a cause, matter or judicial proceeding originating on petition to a judge in chambers, in virtue of articles 875 and 876 of the Quebec Code of Civil Procedure is appealable to the Supreme Court of Canada.

Mais si j'hésite à déclarer mal fondé le premier point soulevé par l'intimé, je crois qu'il doit réussir sur son second point, quant au montant en litige.

Il n'apparaît pas au dossier si l'affaire en litige vaut $2,000. Il n'y a pas non plus d'affidavit de produit qui en établisse la valeur (3 & 4 Geo. V. ch. 51, sec. 5).

Dans la cause de *Turgeon* v. *St. Charles*(2), que je viens de citer, il y avait une preuve au dossier établissant combien valait le droit en litige et c'est pourquoi nous avons maintenu que nous avions juridiction. Mais dans le cas actuel, il n'y a pas de preuve au dossier de la valeur de ce droit et alors je suis d'opinion que cette motion de l'intimé devrait être accordé avec dépens.

Appeal quashed with costs.

Solicitors for the appellants: *Perron & Co.*
Solicitors for the respondent: *Casgrain, Mitchell & Co.*

(1) 16 Can. S.C.R. 606.

(2) 48 Can. S.C.R. 473.

THOMAS C. MORGAN (DEFENDANT) . . APPELLANT;

AND

THE DOMINION PERMANENT LOAN COMPANY (PLAINTIFFS) . } RESPONDENTS.

AND

CAROLINE MORGAN (DEFENDANT) . . . . . } RESPONDENT ON CROSS-APPEAL.

1914

*Oct. 13-15.
*Nov. 30.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Covenant in mortgage — Married woman — Signature procured by fraud—Pleading—Non est factum—Estoppel.

M., intending to apply for shares in the respondent loan company, pursuant to the proposal, made through her husband, of one L. (the agent of the company for obtaining such applications) was induced through the fraud of L. to sign, without reading it, a document which she believed to be an application for shares but which, in fact, was a mortgage for securing a supposed loan to her and contained a covenant to re-pay the amount of the loan. M. was an intelligent woman capable of reading and understanding the document.

Held, reversing the judgment appealed from (17 B.C. Rep. 366), the Chief Justice and Davies J. dissenting, that as M. was under no duty to exercise care to protect the company against the possible frauds of their agent, L., she was not guilty of negligence estopping her from setting up the plea of *non est factum* which, in the circumstances, was a good defence to the company's action on the covenant.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of

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

(1) 17 B.C. Rep. 366.

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MORGAN v. DOMINION PERMANENT LOAN CO.

Gregory J. at the trial, and cross-appeal from the same by the company, respondents.

The judgments now reported contain a full statement of the circumstances of the case and the questions raised upon the present appeal.

Nesbitt K.C. and *Christopher C. Robinson* for the appellant and the respondent on the cross-appeal.

A. C. Macdonnell and *J. A. Ritchie* for the respondents and appellants on the cross-appeal.

THE CHIEF JUSTICE (dissenting).—I agree with Sir Louis Davies. In his judgment will be found the facts of the case as they are spread out in the record.

I will be content to state very briefly the ground of my concurrence and hope in so doing to avoid unnecessary and tedious repetitions.

There can be no doubt that a gross fraud was committed upon the company respondent when the loan in question was obtained. No attempt was made to deny this, and it is also very clearly established that the fraud could not have been successfully carried out, as it was, without the co-operation of Morgan, the appellant, and of his wife. Their co-operation may have been either innocent, guilty or merely negligent.

I am of opinion that Morgan was a party to the fraud and that it was made possible by, putting the most favourable construction upon her conduct, the gross negligence of his wife, the respondent on the cross-appeal.

As Sir Louis Davies points out, the loan was secured by a mortgage on a property the title to which was vested in Mrs. Morgan by deed of January, 1895,

duly registered. To obtain that loan it was necessary to have Mrs. Morgan's signature on the application for the loan and to a subscription for shares in the company, and I have no doubt that, as found by all the judges in appeal, her signature was attached to each of these documents by her husband. The certificate of shares issued in due course to Mrs. Morgan and was assigned to the company for the purpose of the loan by a memorandum of assignment indorsed thereon and executed by Mrs. Morgan in the presence of one Yarwood, a practising solicitor in good standing. Subsequently a mortgage on the property was executed in the presence of the same Yarwood, who certifies on his oath of office as notary public that the mortgagor, Mrs. Morgan, appeared before him and,

being first made acquainted with the contents of the mortgage, its nature and effect, acknowledged that she was the person mentioned in the instrument as the maker and that she understood the contents, nature and effect of it.

Upon the same occasion she also made and signed before Yarwood a declaration that she was the sole and absolute owner in fee simple of the property then registered in her name, and authorized the payment of the proceeds of the loan to Leighton. It is not disputed that the signatures to those documents are genuine and that they were necessary to the fraudulent obtaining of the money from the company. Three years afterwards, in October, 1898, Mrs. Morgan executed in the presence of another witness an *agreement for an extension of the mortgage* to which is annexed a certificate of one Norris, a notary public, *to the effect that she was made acquainted with the contents and understood the nature and effect of the instrument.* Norris is dead, but there is no suggestion

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that he was a party to the fraud. Yarwood was examined as a witness at the trial and his evidence, in the last degree unsatisfactory, establishes at least that Mrs. Morgan was in his office on the day the documents first above mentioned were executed and that she acknowledged her signature to them in his presence. Examined as a witness, Mrs. Morgan admits her signature to the documents in question and says that they were read to her and that she signed them, her contention being that the documents purported to be executed for the purpose of buying shares in the Dominion Loan Company. There is no evidence that any document except those produced was signed on that occasion by Mrs. Morgan, and Yarwood's evidence goes at least far enough to establish that if any documents were read to Mrs. Morgan it must have been those that she signed. It is difficult to read her evidence without being impressed by her capacity and intelligence and it is impossible for me to believe that if, as she admitted, the document was read to her she would ever have misunderstood its meaning and effect.

In any event, I am clearly of opinion that if she signed and delivered those formal documents at various times during a period of three years under the circumstances described, even in ignorance of their contents, if that is conceivable, she must be held liable for having, through her culpable negligence, made it possible for her husband and his associates to successfully carry out this nefarious transaction.

It is said that the agents of the company are alone responsible for the fraud and that they alone benefited by it. I am satisfied, on the whole evidence, that Morgan knew of the project to obtain the money from the company from the beginning and actively co-operated

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with the agents of the company in carrying it out. I am not sure as to whether he had a share in the swindle. As to him I cannot see any reason why the judgment of the Court of Appeal should be reversed. I am unable to agree that Mrs. Morgan should be relieved of responsibility for the consequences of her grossly negligent conduct.

I have felt it to be my duty to say at least this much because of the important principle involved in the judgment of this court. It will hereafter behoove all those who are concerned in making investments either for themselves or as trustees for others to take notice that little credence or faith is to be attached to the declarations of fact made by a notary public under his oath of office in connection with the execution of formal documents such as those in question in this case.

I would dismiss the appeal and allow the cross-appeal, both with costs.

DAVIES J. (dissenting).—I agree with Mr. Justice Galliher that this case "reeks with fraud, carelessness and incompetence."

I also agree with him that Thomas Morgan, one of the defendant appellants was a party from the very beginning to the fraud practiced upon the company. That fraud consisted in obtaining from the company a loan of $1,500 upon the security of some 15 shares of its stock applied for and standing in the name of Catherine Morgan, his wife, the other defendant appellant; and the further security of a mortgage from Catherine Morgan to the company on lots 1 and 4, block 1 of Newcastle suburban lots, addition to City of Nanaimo,

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with the buildings thereon, which lot she was represented to be the owner of in fee.

I am unable, however, to reach the charitable conclusion which induced the learned judge to give her the "benefit of the doubt" as to her personal participation in or liability for the frauds or to hold that proof of deceit as against her failed.

I have come to the conclusion, after reading all the evidence, that it is impossible to doubt her complicity with her husband in the fraud from its very beginning.

I do not think she herself signed the application in November, 1894, for the shares in the company. Her name to that application was, in my judgment, either signed by Morgan, her husband, or by Williams, the clerk of Leighton, the secretary of the local board of the company in Nanaimo. The judges in the Court of Appeal, from an examination of his wife's signature written during the trial by Thomas Morgan and in evidence thought the signatures "Catherine Morgan" to the two applications, in August, 1894, were written by Thomas Morgan, her husband — and it may well be that they were right. There is a marked resemblance between the said signatures and the signature written by Thomas Morgan when on the witness stand. I am, however, of the opinion that these signatures to these applications were written by Williams, the man who filled up the applications and who was a clerk in the employ of Leighton, the agent in Nanaimo of the local board of the loan company. To my mind, it matters little which of them wrote the signatures. They were certainly written either by Morgan or by Williams; and, if by the latter, at Morgan's instance and request. That Mrs. Morgan well knew of the application and

was a direct party to its being made, I cannot, after reading the evidence, entertain any doubt whatever.

It is important to remember that these applications by Mrs. Morgan consisted one of an application for 15 shares of the plaintiff company's stock and the other for a loan of $1,500 on the security of those shares which she agreed to assign to the company and of a first mortgage upon the lot of land referred to, the title to which was represented in the application as in her name. On this land it was represented there were some buildings worth $1,900 with "$1,000 incumbrance due on the house for lumber," to pay which and to improve the lots the loan was applied for.

Williams, the witness to these applications, who was then employed by Leighton, the secretary of the local board of the loan company, subsequently got into difficulties, left Canada and his whereabouts is unknown. At the time, Catherine Morgan was not the owner of the real estate described and there were no buildings upon the land.

In due course, the application for the shares was granted and, in the following March, Catherine Morgan, at her husband's request, went to the office of Yarwood & Young, solicitors, and executed to the company (1) the mortgage in question of the lots of land, (2) an assignment of the 15 shares, (3) a statutory declaration of her sole and absolute ownership of the real estate, etc., and (4) an order to the company to pay the $1,500 to Leighton.

Yarwood witnessed her signature to each and all of these documents, took her statutory declaration and gave the usual certificate of the execution of the mortgage by a married woman apart from her husband. Everything on the face of the documents was perfectly regular and proper.

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Mrs. Morgan, however, while not denying the authenticity of any one of her signatures to these four documents, puts herself forward as the victim of a fraud by others and says she never signed them with knowledge of what they really were, but believing them to be shares in the company her husband was selling to Leighton, the agent. She further absolutely denies that she ever signed any papers before Yarwood at all, either in March, 1895, at his office, or at any other time and place. She insists in her main examination and repeats persistently in her cross-examination that she only signed one paper at Yarwood & Young's office and that was not before or in presence of Yarwood, but before Young, Yarwood's partner, now Judge Young.

Being faced with the four several documents containing her name, she admits that they are her signatures, witnessed and certified to by Yarwood and not by Young; she still, over and over, repeats her statement that she only signed one document and that one she signed before Young and never signed anything before Yarwood. That single document she alleges was an assignment of her shares to Leighton who, her husband told her, was buying them and would repay them the money they had up to then paid the company on account of the purchase of the shares.

She admits that in the light of the facts her story seems "perfectly ridiculous" to use her own language.

Yarwood was called and gave his testimony which, judging from the stenographer's report, was about the usual kind of evidence a witness called to prove the execution of documents years before would give. There is no suggestion whatever that he was in any way a party to the fraud or acted otherwise than any

reputable practitioner would have done under the like circumstances.

No attempt was made to support Mrs. Morgan's testimony by calling Judge Young before whom she said she signed a single paper, not four papers. No such paper witnessed by Young was produced and Mrs. Morgan admitted her explanation seemed foolish and ridiculous and yet in a matter where her honesty was at stake as well as her oath, she neglected to call the only witness who could substantiate or explain her statements.

It seems to me quite clear that she has confounded two different occasions. She may and probably did on one occasion sign some document before Judge Young and she has in some way got that incident mixed up with the execution of the mortgage, the assignment of her shares, the statutory declaration and the order for the payment of the money. Her signatures to each of these four documents are admittedly genuine. They are properly witnessed and certified by the notary public who is called and examined with respect to their execution. She herself admits not once, but many times, that the paper she did sign was read over to her. All attempts to make her deny this were in vain and at length, in answer to a question put by the trial judge, who seemed to be under the impression that she had not intended to admit the document she signed was read over to her, she repeats her statement that there could be no doubt about it that it was read over.

Under such circumstances as these to hold that Mrs. Morgan was the innocent victim of a vile conspiracy concocted to rob a mortgage loan company of $1,500 is taxing my credulity unduly.

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Some years after the execution of the mortgage and other documents before Yarwood, Mrs. Morgan went, at her husband's request, 1st June, 1898, to the office of Leighton and there signed before A. E. Planta a long agreement under seal with the respondent company for the extension of the time given in the mortgage for the repayment of the $1,500.

With respect to the mortgage she signed in March, 1895, Catherine Morgan suggests that she thought the document read to her was to the effect that she was *buying* shares in the Dominion Loan Company while her husband says that he sold the shares in the spring of 1895, which he had purchased the previous November and on which, in the meantime, he had been paying up $9 a month to the company and that he sold them because he was hard up and could not go on paying the monthly instalments and asked his wife to go down to Yarwood & Young's and sign the necessary papers.

The two stories are quite irreconcilable and as Mrs. Morgan admits knowing all about the monthly payments made on the shares by her husband, it is quite clear that she could not think she went down at that time to purchase shares. And so it seems to me her story about going to Leighton's office in June, 1898, more than three years after the mortgage was executed, and signing the agreement for the extension of the time for the payment of the mortgage money before the clerk Planta as a witness is as "perfectly ridiculous," as she admitted she thought her story about signing the mortgage papers was. She said she thought she was signing over the shares to Leighton, whereas as a fact they had been signed over to him by her some three years previously, and they had been

receiving back from Leighton, in the meantime, payments on account of his purchase of the shares from Morgan.

The fact is that her statement, surmise, reason or what you may choose to call it, for signing the extension of time for paying the mortgage that she thought she was signing over the shares which Leighton had bought, seems as "perfectly ridiculous" in the light of all the facts as her version of the execution of the mortgage.

Planta, who witnessed the extension, could not remember the circumstances connected with the execution of the document, but identified his signature as a witness and testified in the ordinary way to its execution. Mr. Norris, the notary public, who certified to the execution of the extension by Mrs. Morgan and that she knew its contents and understood its nature and effects, is unfortunately dead.

One or two controlling facts ought to be borne in mind. All of the documents, mortgage, solemn declaration of Mrs. Morgan, assignment of shares to company by way of security for loan and order to the company to pay the money to Leighton as well as the agreement to extend the time for payment bear the genuine signature of Mrs. Morgan, the defendant. The only signatures that are disputed are those to the application to the company for shares and the application for a loan, which are signed in her name either by Williams, the clerk, at her husband's request or as found by the Court of Appeal by the husband himself. In either case, it seems clear she knew all about it from her husband. The execution of the first four documents are witnessed and authenticated by Yarwood, an attorney and notary public, who testifies to

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the facts. The other document, the extension, is witnessed by a clerk, Planta, who also testifies and by a notary public now dead. The documents were by her own admission on oath read to Catherine Morgan before she signed them. She never appears to have seen Leighton, the agent, personally in connection with any of these transactions.

No one made any misrepresentation to her of the contents of any one of the documents.

All of the books kept by Morgan during the time when these transactions took place and which presumably would throw light on the transactions, have been destroyed.

The conclusions I drew after hearing the argument and reading the evidence and the judgments below, were that both Morgan and his wife were parties to the conspiracy to defraud the company respondent and that Mrs. Morgan's story of the facts connected with the signing of the mortgage and the other papers, in March, 1895, before the attorney and notary public Yarwood and the extension, in 1898, before Planta and Norris, the notary public, are pure creatures of her fancy, or to use her own language when giving her evidence, "perfectly ridiculous" in the face of the proved and admitted facts.

As to Morgan's complicity in the fraud, I have not the slightest doubt. Agreeing with the Court of Appead on this point, I would confirm their judgment and dismiss this appeal, but not being able to accept their "charitable judgment" giving Mrs. Morgan the benefit of the doubt and holding her equally guilty with her husband of the conspiracy to defraud, I would allow the cross-appeal and hold both liable for the amount due upon the mortgage and amend the judgment below accordingly.

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IDINGTON J.—The respondent is a building society which was incorporated in 1890 under the Ontario Act respecting building societies and has since carried on its business in Toronto and shortly after its incorporation created a branch board in Nanaimo, in British Columbia, through which certain dealings in question herein were had upon which this action by respondent against Caroline Morgan, wife of the appellant Thomas Morgan, and said Thomas Morgan is founded.

The statement of claim alleges that Caroline Morgan made an application in writing, on 9th August, 1894, to said company for an advance of $1,500 to be secured by mortgage on certain real estate in Nanaimo falsely and fraudulently representing that the said land was worth $1,200 and buildings thereon were worth $1,900 and that she had paid $1,200 for said land though she well knew the said land was under $500 in value and had no buildings thereon.

It is further alleged therein that, on the 28th of March, 1895, she signed a statutory declaration by which she falsely and fraudulently represented to the plaintiff:—

(*a*) That she had been in continuous and undisputed possession of the said lots and every part thereof since on or about the 1st day of November, 1894.

(*b*) That the various buildings described in her said application for a loan were erected wholly upon the said lands.

(*c*) That the said lots and building (house) were only charged or encumbered by an amount of $1,000 due for lumber on or used in such house and to be paid out of such loan of $1,500 — from plaintiff, whereas the facts were that the defendant, Caroline Morgan, never had been in possession of said lots nor was there any building erected thereon or any money due or accruing due by the said defendant for lumber in connection with any building or otherwise in relation to said lots.

Then Thomas Morgan is charged with being well aware of the making such false and fraudulent repre-

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sentations and purpose thereof and for the purpose of participating in the moneys to be advanced was a party to all said false and fraudulent representations.

It is further charged that they for the purpose of carrying out their fraudulent scheme procured one John Daniel Foreman, the appraiser of the respondent, to make the false and fraudulent statement in a statutory declaration of 10th August, 1894, that

> the said lots were worth, exclusive of buildings, in cash $1,200, and that the buildings then completed were worth in cash $1,900, and that the property would bring at a forced sale in cash at that time $3,000, both of said defendants well knowing that the said land was worth less than $500 and had no buildings whatever erected thereon.

The statement of claim alleges respondent advanced the sum of $1,500 and has thereby suffered damages.

It is further alleged that Caroline Morgan executed a mortgage on said land and thereby covenanted to pay the mortgage.

Relief is prayed against both Morgans on the ground of fraud, and alternatively against Caroline Morgan on her covenant in the mortgage.

These charges were denied by the statement of defence and it was further alleged therein that:—

> In or about the year 1894 she purchased from William K. Leighton, agent of the plaintiff company, at the city of Nanaimo, in the Province of British Columbia, certain shares in the plaintiff company and signed or believed she signed applications for or other documents in connection with the purchase of these shares. If the signatures of Caroline Morgan appended to the alleged mortgage and relative statutory declaration were made by her (which the defendants deny) they were made in mistake or fundamental error, under the belief that she was signing documents in connection with the purchase of these shares and with no purpose or intention of signing the alleged mortgage or relative statutory declaration.

On the issue thus raised the parties went to trial before Mr. Justice Gregory, who accepted the evidence

of the defendants as substantially correct and, by his opinion judgment, reports most favourably on the demeanour, integrity and intelligence of Caroline Morgan, but less favourably upon the intelligence and manner of Thomas Morgan yet accepting him as a truthful witness.

He accordingly dismissed the action with costs.

Thereupon the respondent appealed to the Court of Appeal for British Columbia. That court, Mr. Justice Irving dissenting, allowed the appeal as against Thomas Morgan, but dismissed it against his wife and he now appeals here and respondent cross-appeals as against them both.

The appellant Thomas Morgan was asked in the witness box to write his wife's name and he did so. There was no other specimen of Morgan's handwriting placed before the court. There was no expert evidence of any kind called. No expert opinion of any kind was given by any of the witnesses called.

The application which the statement of claim makes the basis of the action charging fraud against Mrs. Morgan was produced and shewn him and he denied ever having seen it or signed the name "Caroline Morgan" thereto.

The application for shares in the respondent company was also shewn him and he also denied ever having seen same or signed the name of Caroline Morgan thereto.

The Court of Appeal using and acting upon their own knowledge of handwriting as a result of the comparison of that single specimen of Morgan's writing of the name "Caroline Morgan," with the signature to said applications, has come to the conclusion that he signed his wife's name to said applications.

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The only extended opinion of those concurring in the result is the judgment delivered by Mr. Justice Galliher, who deals with the matter as follows:—

As to the husband, Thomas C. Morgan, I entertain no doubt whatever that he signed the name "Caroline Morgan" to Exhibit 1, Application for Loan; and Exhibit 2, Application for Shares; and that he was from the beginning a party to the fraud practised against the company.

Considering that he swears that he never saw any of these papers until years afterwards, I place no credence whatever in his testimony.

Looking at Exhibit 1, Application for Loan, we find some twenty questions answered, including value of building, description of buildings, amount due on same, rental value, etc., buildings which never existed on the premises. One would indeed need to be credulous to assume that he signed this document and knew nothing of its contents. It is as deliberate and brazen a piece of fraud as could be perpetrated and I find the evidence fully connects Thomas C. Morgan with it.

Mr. Justice Martin in a brief note suggests it is only after some hesitation he allows the appeal. The Chief Justice gave no written opinion.

Considering that the claim made is based upon the allegations of false and fraudulent misrepresentation of this man's wife as above set forth, and that he is only charged with knowingly aiding her therein, and that she is exonerated by the Court of Appeal; that there was no application to amend the pleading so framing the action, and no suggestion of amendment; that the notice of appeal gave as one of the grounds thereof that the learned trial judge should have found both defendants party to the fraud alleged in the statement of claim, I most respectfully submit the foregoing conclusion is erroneous in law.

If the charge had been made that he had conspired with others than his wife to commit the alleged frauds or that by forging and use of the forgery of his wife's name he had accomplished same, I might be able to

understand such a conclusion of law, but as the record stands, I cannot.

I also submit, for the reasons I am about to give, that, in law and fact, the conclusions reached are quite unwarranted.

The learned trial judge, who heard the evidence and saw and heard these defendants and gave credit to their story, ought not to have been reversed, especially in such a case as this, involving thereby a finding of gross fraud and perjury, where there are no collateral facts or circumstances or fundamental facts regarding matters in dispute upon which the appellate court so reversing can with absolute confidence and assurance rely and feel they are not mistaken. I respectfully submit mere skill in comparison of handwriting when used upon a single bit of handwriting, where a man failed to spell his wife's Christian name correctly, is hardly such a stable foundation to build upon.

Let us, only dealing just now with the appeal of Thomas Morgan, look first at broad, salient features of the story with which we have to deal and see whether in it there is any inherent probability of its justifying such a finding as the Court of Appeal has reached, and later deal with the minor details relied upon in argument for respondent.

The local board of respondent was organized with one Leighton (who seems to have done a mixed sort of business of insurance, brokerage, and in short general agency) as secretary. He later is spoken of as treasurer, and sometimes as agent. He no doubt managed or was the active man in managing all the business of the respondent in that Nanaimo district.

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It would seem from a book produced which he was given by respondent to keep therein track of subscriptions for shares and payments thereon, that he got subscriptions for shares in the respondent company from a great many people and received money thereon and no doubt transmitted much, if not all, as in duty bound, to the respondent.

This seems to have been opened in the end of 1890, shortly after the local board was constituted, and a number, if not all, of the directors on that board were among the first subscribers for shares.

The appellant says he was solicited by one Williams, a clerk of Leighton, to take shares in said company, and that he finally, but when he is unable to say, assented and told him to have them "taken out" as his expression is, in his wife's name. Williams, some years later, left for parts unknown and (up to the trial) had not since been found. Leighton, still later, is sworn by a clerk of his, who succeeded Williams, to have been much worried over some crooked dealings he had got into, either through Williams or otherwise, and ultimately died of brain disease in an asylum.

One cannot help suspecting that the terse description sworn by Morgan to have been used by one Andrews in respondent's employment, when investigating this matter and hearing Morgan's story, fits the office managed by Leighton:—

Andrews says, according to this:—

> That is a rotten combination over there.
> There is another case just similar to that happened George Thompson, and they can't find George Thompson.

Andrews, who was in court, and heard what Morgan swore to, was not called to contradict him.

I assume Leighton and Williams were both most dishonest men and given to practices such as this case indicates beyond a shadow of doubt they were guilty of in relation to the loan in question.

The applications for shares and for loan were apparently filled up by Williams. Mrs. Morgan's name is signed thereto in a handwriting clearly not hers.

I should say it was signed by this man Williams — if I were to permit myself to use my impression received from a comparison of hand-writing.

They were dated 9th August, 1894. At that time Leighton had a vacant lot which he had acquired in the previous June from one Roberts, who had mortgaged same to another company for $300.

It was the description of this lot which was inserted in the application for loan. The application represented it to be improved in the manner set forth in the statement of claim.

Neither the appellant nor his wife had then, or at any previous time, any real estate of any kind.

An appraiser's certificate of valuation of this property was made at the foot of the application for loan by one John D. Foreman, a member of the said local board from its beginning, representing its value as stated in the application and certifying to the good character and credit of Caroline Morgan, the applicant.

This was in the form of a statutory declaration taken before said A. S. Williams, a notary public, who had also subscribed as witness to the signature "Caroline Morgan" signed to the said applications.

These applications, so supported, were at once forwarded to the respondent at Toronto, and a stock certificate for fifteen shares, dated 1st November,

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1894, was issued, but never delivered to Mrs. Morgan, or any one for her.

The payments therefor were to begin 1st December, 1894. Whether she paid from that date as contemplated by this certificate, or when, is not clear. It is clear, however, that Leighton in whom was the title to the vacant lot to the extent of an equity of redemption therein subject to the mortgage for three hundred dollars, by deed purported to transfer the lot as if free from mortgage to said Williams on the 7th January, 1895, in consideration of $350.

One Peto, who witnessed this deed, I imagine possibly another employee of Leighton, seems to have made the affidavit of execution only on 28th March, 1895, before E. M. Yarwood, of whom we will hear more presently.

What purpose this conveyance to Williams was intended to serve puzzles one, for on the 18th January, 1895, he conveys by deed of that date to Caroline Morgan for the consideration of $225 same land, but subject to a mortgage of $300 to the British Columbia Land and Investment Agency made 8th February, 1893.

The deed is witnessed by Leighton, who makes the affidavit of execution before the same Mr. Yarwood on the 28th March, 1895. That seems to have been a busy day for Mr. Yarwood, for it was on the same day Mrs. Morgan is alleged to have called and executed the mortgage in question, the transfer of her shares aforesaid as a further security for the loan, and the order upon respondent to pay Leighton the proceeds of the loan; taken the statutory declaration by her that she was the absolute owner of said lands and had been in possession since 1st of Decem-

ber, 1894; and testified to a number of other curious palpable lies as facts. All these instruments are of that date and subscribed by Mr. Yarwood as the attesting witness or notary public taking them.

And there is still another thing he is supposed to have done the same day, as a notary public, that is to certify that she appeared before him and being first made acquainted with the contents of the annexed instrument (*i.e.*, the mortgage) and nature and effect thereof, acknowledged same, etc., and that she executed without fear or undue influence of her husband, etc.

Then on the 6th April, 1895, the deeds from Roberts to Leighton, from Leighton to Williams and Williams to Mrs. Morgan, were, I infer from the account of Yarwood & Young rendered Leighton, and other evidence, registered by that firm.

Why the registration was delayed till that time is unexplained. But it does appear by the report of Mr. Yarwood to Leighton that he must have had entrusted to him the completion of the title and must have either paid no attention to what he was doing when taking the alleged declaration of Mrs. Morgan and certifying as he did as to her execution of the mortgage, or he would, as solicitor for the respondent, have found ample reason for further inquiry as to a good many things, for example, how the company could be making a loan of fifteen hundred dollars on a property passing from one party to another at such prices as evidenced by the deeds, and that no one had in fact paid off the prior mortgage, though a discharge had been got and withheld from registration.

As he ventured as witness to explain this first, by saying he did not read or observe that, and had noth-

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ing to do with it, and further, by saying it was a building society loan, I may, parenthetically as it were, remark that this attitude of Mr. Yarwood towards his duty and the facts suggest how easy it was for him to fall a victim to the fraudulent arts and devices of Leighton, a practised master of fraud.

But above all he certainly should not have permitted Mrs. Morgan to have taken the statutory declaration of which as the solicitor concerned on behalf of respondent he may be supposed, indeed presumed to have known the import and purpose and the consequences of its falsity.

And applying the test of the account he made out against her, yet never sent her but delivered to Leighton, he was her solicitor and owed her a special duty as such. I am far from assuming that he was intending at any time to make himself a party to a deliberate fraud, but I do think the fair inference from all he says and the contents of these documents is that he simply signed because of his confidence in Leighton. If he had discharged his duty, she never could have been induced or trapped into signing these documents.

It is quite possible though attesting the documents by his signature, he merely took the word of Leighton that they were all right, and signed accordingly. She says she never saw him but saw his partner (who is not called), and signed in his presence what she was told was an application for shares. She never was told, she says, anything else. Though she refers to Mr. Young as reading the documents, I do not think any one of experience will take this in its literal sense. No one seems to have at the trial pressed her to explain exactly what she meant by his reading and we

must use our common sense. She was entirely without experience in business matters. And, though a woman of education and intelligence, as the learned trial judge reports, any one of experience knows how little many such persons appreciate what they are doing in dealing with business matters entirely foreign to the limited sort of education unfortunately given too many of her sex.

We must then ask ourselves if it is really conceivable that she could knowingly have made a false statutory declaration, as Yarwood is made to certify she did take before him, if she had really had the document read to her. The learned trial judge who had the best opportunity, by seeing and hearing her, and thus of knowing whether she was likely or not to make such a false declaration, has decided in no uncertain terms that in his opinion she would not.

I have read her depositions on examination for discovery and her evidence at the trial and come to a similar conclusion. We must bear in mind that she was giving evidence some fifteen years after all this had transpired and may be mistaken in many details, but she knew she never had any such property or any dealings for a loan of this character, and had but one thought in regard to any business relations with Leigthon and respondent and that was the subscription for shares in respondent company to be paid for in small monthly instalments, and that after paying for some years thereon, she had agreed to transfer same to Leighton and he was to repay by similar small monthly payments $200 therefor, in consideration of her so transferring.

This, she says, led her to signing another document in the presence of Mr. Planta. A document is pro-

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duced which seems to bear her signature and of the date she indicates as about the time when she supposed she was transferring her shares to Leighton. This document is an agreement for the extension of time for payment of the mortgage and is attested by Planta, then a clerk in Leighton's office. Again we have one Norris, now dead, a brother-in-law of Leighton, and a notary public, signing a certificate of her having acknowledged it in her presence. She says she never saw him on any such occasion, and never heard of any such mortgage or proposed extension. She does say, however, that from about that time till some time after she had moved to Vancouver, which would be the same year I think, Leighton continued to make his payments to her which were sometimes collected by her brother in Nanaimo.

Planta, who is called by the respondent, seems to have no definite recollection of this extension agreement, but identifies his signature as witness thereto. He, however, corroborates her as to the collection by her brother from Leighton of the monthly payments just referred to. That seems to me a very strong circumstance corroborative of her whole story. Indeed, twist and turn the case round in any way, it seems fatal to respondent's contention of her knowingly joining in a fraud. Then we find the duplicate copy of the extension agreement turns up, not in her hands, but where Leighton's custody of it left it to be found and whence it was produced and given her or some one for her shortly before the trial.

Now in all these years there is only one communication from the respondent company to her, and that is a brief note of 9th March, 1898, which she denies ever getting and which is as follows:—

Your policy for $1,500 expires on April 9th, and must be renewed with the company selected by this Association. Kindly call on Mr. W. K. Leighton for complete application form and pay him the premium.

Instead of the insurance being renewed by her going to Leighton, or he to her, we are told by Planta of its having been renewed by an application not signed by her, but by him for her when he was in Leighton's office and would have done so under his instructions though evidently suspecting or having reason to suspect its fraudulent character. It is hardly likely with this sort of suspicion of his master that he would have forgotten seeing Mrs. Morgan in relation thereto if any occasion therefor as the notice indicates.

The Morgans were still living in Nanaimo when this was done. Can we in face of her sworn denial and a not impossible explanation by her, fairly and properly assume that because she signed the declaration of 28th March, 1894, she must be held to have committed a deliberate fraud? And as a necessary consequence hold that her whole story is a tissue of perjury? If she deliberately and knowingly took that false declaration she must have done so for a fraudulent purpose and if she committed such a fraud, she could not forget it and must be following it up now with perjury, and all that for a share in a sum of eleven to twelve hundred dollars to be divided amongst three or four, for that would be all that was left after paying the prior mortgage and expenses.

Sometimes one gets so disgusted with the standard of truth and honest dealing too often adopted by some passing as reputable people as to be possessed of wide awake suspicions. I am not prepared for my part to carry it so far as to brand this woman to be presumed

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to be from all we can learn, most highly respectable and honest, as guilty of gross fraud and perjury. It would be my legal duty if trying her for such offences with no more evidence than there appears here to at once direct her discharge.

As to whether she was so negligent as to be liable, I will deal with that presently. But before leaving this subject of her being guilty of fraud, I must point out it is all based on what if anything is mere negligence. What should we think if Mr. Yarwood, for example, had been joined as defendant, and a trial judge had found him, because of obvious oversights a party to the fraud which might have been averted by greater care? For my part I think the one proposition is just as monstrous as the other and both unfounded. And when we reflect that he and all others, save possibly the clerks in his employ, had unbounded faith in Leighton, it is easy to comprehend how such bold swindles as involved here were accomplished. Such a man, eager and bent upon his fraudulent purpose, watches his opportunity, day by day and month by month, to seize the occasion when those to be dealt with, are, by over-confidence in him, lulled into security and as it were, put asleep, and put off, or seized when off, their guard.

Those inclined to doubt the feasibility and success of such ventures unless helped by the criminal connivance of those claiming to be mere victims and thereby led to charge them with being accessories to fraud, should reflect for a moment upon the innumerable cases of patent-right swindles which led to a change in the law governing notes founded on the consideration of an interest in a patent; and the well known syndicate swindles; and perhaps above all on

the too common cases of those wretched breaches of trust on the part of those doing a business that controls the money of other people. Inexperienced people at each new disclosure of such cases, marvel at the boldness and adroitness of him perpetrating the fraud and the incredible, or almost so, stupidity of those enabling the swindler to secure signatures to almost anything. But we know, if experienced, that all such victims are by no means stupid or ignorant, indeed are often keen business men.

Again, we must use our common sense and accept the assistance of the trial judge in all such cases.

It seems to me for the foregoing reasons that the claim against Mrs. Morgan on the grounds of fraud taken in the statement of claim must fail and with it must fall the claim against the alleged accessory.

But the Court of Appeal finds he signed the applications and, though she did not, she is in some way to be held guilty of being a party to the fraud.

Is there any tangible ground upon which that can rest ? Why should he even if to be presumed a rascal, deliberately contrive to put his young innocent wife into such a position ? I pressed counsel for respondent on this and got in reply no suggestion that will for a moment in light of other facts wear even a plausible appearance.

It is said he was under some obligation to Leighton.

He denied in his examination for discovery signing said applications and told what that obligation to Leighton was. He gave details of how the latter came about. He had sometime before these occurrences got Leighton to indorse his paper for $2,790 at the bank, to be paid off by monthly payments of $103 a month,

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and says he paid accordingly and gave Leighton $400 for this use of his name as surety.

I have no doubt the respondent's solicitor, who heard this story, accepted it as perfectly true, or we should have found some effort to discredit it by producing evidence from the bank to destroy it.

The statement of claim alleges that his motive was to participate in the proceeds of the fraud and there was thus afforded a fine opportunity to have investigated and if true, proven it at the trial with the double effect of shewing he did participate and that he was not truthful in his story as to his relation with Leighton.

It is urged he was a tailor in narrow financial circumstances. Granted that, for argument's sake, is every tailor under such conditions to be presumed a rascal? Or that he is ready to become such and so stupid in his rascality as to bring quite needlessly into his scheme his wife and thereby, whilst using her as a tool thereof, to multiply the dangers of discovery.

Why should the deed of this vacant lot owned by Leighton not have been made to Morgan and he give the necessary mortgage? I can conceive of Leighton not desiring to proffer such a loan in his own name, but why must he use Mrs. Morgan's? Again, why if Morgan's financial needs were the mainspring of these acts now in question, should the negotiations have dallied along from the 9th of August till the latter half of April?

Counsel at first suggested in answer to this inquiry there must be three monthly payments of instalments on stock before a mortgage could be taken. But his junior, also general solicitor for respondent, better conversant with the usual mode of dealing, frankly

and properly admitted this was not an obstacle, for these small payments could be made at one time in advance and the borrower be recouped by proceeds of the loan. Indeed, there is no explanation possible for this delay upon the theory that Morgan's necessities were the moving causes or one of the chief parts thereof.

It is quite conceivable that Leighton having an unregistered deed of the lot, hesitating how to use it to his best advantage, could frame such a scheme and be very uncertain step by step, just how he was to accomplish his purpose, and thus might, hesitating, delay and bide his opportunity of proceeding safely, and hence let the matter drift along. We have not that data furnished us to do more than surmise, though I fancy respondent ought to have got and presented much of it to see how this man's surroundings shaped his actions.

We have enough proved in this case to establish conclusively that Leighton was, from the start which began with inducing Foreman to certify to a false report of valuation and the rest of the board or three of them recklessly to stamp it with approval, a somewhat accomplished adept in fraudulent practices.

Even if the man be dead, no sentiment should restrain or restrict us in our purely scientific inquiry. The honour of the living is at stake.

It is said we have no other instance proven against him. Do we need any? No one as a rule goes to pieces (to use expressive slang) morally speaking in a day. The internal evidence in this case demonstrates the process of moral decadence had progressed very far in his case before his undertaking the work of the 9th and 10th of August, 1894. His character is

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indelibly disclosed in the preparation of the applications of the former date now in question, and the Foreman report and indorsement thereof of the latter date. The court was not sitting to investigate his career, and it might have been difficult under the pleadings for defendants to have got in general evidence relative thereto, but we have the curious side light given by Mr. Andrew's statements to Morgan already adverted to as given by the latter and allowed by respondent to go uncontradicted or unexplained.

Then to complete Leighton's connection with the matter, we find a sham sale by the respondent company to a relative of his under the power of sale in the mortgage without serving the usual notice or even sending a letter to the mortgagor.

The mortgage provided this could be done, but it also provided for the inexpensive service of a notice by registered post.

One cannot help thinking it was a very harsh and ill-considered proceeding. But it is very obvious it was all contrived by Leighton, who represented he had a man ready to buy at the price needed to realize the debt.

All this is but another illustration of the strange power this man Leighton exercised over all he came in contact with.

That brings me to consider the claim made alternatively to hold Mrs. Morgan liable on the covenant in the mortgage.

That is presented in two ways. In the first place it is said her ignorance of what she was doing was not of that character which would entitle her to succeed under a plea of *non est factum*.

I think the evidence of herself and husband, if be-

lieved (as the learned trial judge and I believe it), is just of that kind which has many times been held as a complete answer by way of such plea to the action upon the deed. I have already written at such length demonstrating my view of the facts of which I conceive a right understanding of the utmost importance herein, that I do not propose to labour with the law bearing thereupon. That is in such a case well settled unless we are to re-open the question and limit as has been suggested by high authority, such a defence under such circumstances as set up here to the illiterate, and deprive the literate and educated people entirely of such a defence in cases where they could have read what they signed, but failed to do so.

With great respect, I submit, the doing or trying to do so would start anew a dangerous discussion and help the rascals to prey upon honest people.

The next way in which the claim is presented on this basis of liability independent of active fraud is that Mrs. Morgan was negligent and thereby misled respondent.

It seems to me that if she was negligent, that negligence, if any, was induced solely by the acts of those representing the respondent and ostensibly in the course of executing the business of respondent; and that in such case it cannot be heard to complain.

Certainly Leighton was held out by respondent, whatever it choose to call him, as its agent, and so also were the solicitors who procured by the direction of Leighton the execution of the documents she signed.

Under such circumstances respondent can have no recourse against her.

The very document upon which reliance is placed shewed upon its face, when regard was had to the

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deeds under which she claimed, that it was palpably false and should have misled no one.

If she trusted too implicitly to others, then those others seem to have been as blindly trusted by the respondent. I think it has no ground to complain.

In parting with this case I may be permitted to say that in all cases of this character it is generally possible to demonstrate, by reference to collateral facts and attendant and surrounding circumstances, when thoroughly investigated, whether the accused has been guilty of fraud as charged or not, and I regret that so many clues, leading to such disclosures and light as such circumstances and collateral facts might afford, have been entirely neglected.

I have already pointed out one of these in relation to the charge of appellant's hope of participation in the fruits of such frauds as committed and there are many of minor import in the path of such an inquiry.

The facts that no steps were taken to adduce expert evidence in relation to the disputed signatures though they were denied in the examinations for discovery, and thus respondent warned in time, suggests a grave suspicion that those then concerned for respondent certainly did not think it worth while as likely to maintain respondent's contention.

It may be answered respondent had a right to rely on the rule of law entitling judges at trial to compare the writing of the genuine with the disputed. Experience teaches that such a proceeding is most hazardous. Even when the most scientific means have been applied by expansion of the letters and measurement of the angles and all implied therein mistakes are not unknown. When the facts of the case tend to render it extremely probable that the writing denied is

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genuine, and the denial is rather a mere obstruction in way of completing proof, it is convenient and beneficial that a judge may dispose of such a contest by relying upon the rule. But to invoke and rely upon the rule alone against the sworn testimony of those accused, seems to me, I most respectfully submit a denial of justice and what is not generally expected of a learned trial judge, and especially so, when the party, asking the court thus to act upon its own expert knowledge, has not exhausted many other most obvious means of testing the veracity of those who have pledged their oath in denial.

I think the frank manner in which counsel for the Morgans invited every probing of matters bearing upon the conduct of his clients, whether technically admissible or not, might have been relied upon to have facilitated the investigation of the bank accounts of Morgan, even without forcing the bank to exhibit its books at the trial.

The facts that no one ever asked him to vote or pay taxes in respect of the property ought alone to have stood as a barrier in plaintiff's way of claiming any benefit therefrom in absence of more investigation than mere books in a municipal office.

The appeal ought to be allowed with costs here and in the court below, the cross-appeal of respondent dismissed with costs and the judgment of the learned trial judge restored.

DUFF J.—I think the respondent company fails on both the appeal and cross-appeal. First, as to the cross-appeal. The learned trial judge finds that Mrs. Morgan never knew that the property comprised in

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the instrument signed by her had been conveyed to her by Leighton and never knew until the action was brought that she had signed a mortgage or applied for a loan; that she had never intended to enter into such a transaction, but had supposed that she was merely signing documents incidental first, to an application for, and afterwards, to a sale of shares.

Although the facts in the aspect they assumed under Mr. Ritchie's advocacy seemed, at first sight, to point to another conclusion, I think no good reason has been advanced for reversing this finding of the trial judge concurred in by the Court of Appeal.

The appellant's contention must rest upon the proposition that Mrs. Morgan had agreed to permit herself to be used as the recipient of the title to the property and as mortgagor for the purpose of obtaining a loan for the benefit of Leighton or that she knew she was engaging in a transaction of some such character. The fact that she actually paid for the shares points the other way; but the controversy in this aspect of it, is essentially a dispute about Mrs. Morgan's credibility and upon that question this is pre-eminently a case in which a Court of Appeal ought to be guided by the conclusion of a competent and painstaking trial judge who has heard the witnesses.

The finding is clearly sufficient to support a plea of *non est factum*. As to estoppel, I think there is no evidence of negligence. Mrs. Morgan supposed she was signing an application for shares presented by a person who was clearly the company's agent to take such applications. She did so in the presence of a reputable solicitor. She was acting under the direction of her husband, who, she supposed, understood the nature of the transaction.

In these circumstances, I do not think she owed any duty to the respondent company which she can be fairly charged with having neglected. The *fons et origo mali* was *the dishonesty of the company's agent.* I think she was under no duty to them to take steps to protect them against his possible frauds.

As to the appeal, there are some things in the evidence, no doubt, calculated to excite one's suspicion as to Morgan's complicity in or knowledge of Leighton's real design; still in the last analysis the question whether he was or was not implicated in Leighton's fraud must be decided as a question of credibility. All the facts were before the trial judge and I see no reason to suppose that any of the considerations which led the majority of the Court of Appeal to reverse him were overlooked by him. I am unable to find in the specimen of the handwriting produced evidence of sufficient weight to justify the reversal of his finding.

I think the cross-appeal should be dismissed with costs, the appeal allowed with costs here and in the Court of Appeal and on this branch of the case the judgment of the trial judge restored.

ANGLIN J.—I concur in the judgment of Mr. Justice Duff.

Appeal allowed with costs; cross-appeal dismissed with costs.

Solicitors for the appellant: *Livingston, Garrett, King & O'Dell.*

Solicitors for the respondents: *Cowan, Ritchie & Grant.*

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*Feb. 2.

ALEXANDER ROWLAND (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF EDMONTON AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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

Highway—Old trails of Rupert's Land—Survey—Width of highway—Construction of statute—60 & 61 V. c. 28, s. 19—"North-West Territories Act," s. 108—Transfer of highway—Plans—Registration—Dedication—Estoppel—Expenditure of public funds.

The plaintiff's lands, held under Crown grant of 1887, were bounded on the south by the middle line of Rat Creek (now in the City of Edmonton) and were traversed by one of the "old trails" of Rupert's Land, known as the "Edmonton and Fort Saskatchewan Trail." Upon instructions, under section 108 of the "North-West Territories Act," as enacted by 60 & 61 Vict. ch. 28, sec. 19, that portion of the trail was surveyed and laid out on the ground by a Dominion land surveyor shewing its southern boundary approximately as Rat Creek and thus giving it a width upon the plaintiff's lands in excess of the sixty-six feet limited by this section. The plan of this survey was not shewn to have been approved by the Surveyor-General nor was it filed in the land titles office as required by the statutes in force at the time.

Held, reversing the judgment appealed from (28 West L.R. 920), that the statute gave the surveyor no power to increase the width of the highway authorized to be laid out by him; that the approval of the Surveyor-General and the filing of the plan in the land titles office were necessary conditions to the transfer of the trail as a public highway and, consequently, the land comprised in the augmentation of the highway remained vested in the plaintiff.

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

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Plaintiff sold part of his lands, described as bounded by the northerly limit of the surveyed trail, and, subsequently, the purchasers, and persons holding lands south of Rat Creek, filed plans of subdivision shewing the surveyed trail as of the full width given by the surveyor. The city also claimed to have expended moneys in improving the roadway at the locality in question.

Held, that the registration of the plans of subdivision, made without privity on the part of the plaintiff, was not binding upon him, and that there was not such evidence of expenditure of public moneys or of conduct by the plaintiff — by recognizing the plans as filed — as could preclude him from claiming the lands encroached upon or compensation therefor.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Harvey C.J., at the trial, and dismissing the plaintiff's action with costs.

In the circumstances stated in the head-note, the plaintiff brought the action for an injunction restraining the City of Edmonton from trespassing or interfering with that portion of the lands comprised in the augmentation of the trail in question, as laid out by the surveyor, south of a line parallel to and sixty-six feet distant from the northern limit thereof, and order vesting such portion in him as the legal owner thereof, an order rectifying the plan of survey, damages and such other and further relief as the nature of the case might require. The other defendants were added for the purpose of enabling them to be heard so far as their rights might be affected.

The plaintiff's action was maintained by His Lordship Chief Justice Harvey, at the trial, and his decision was reversed by the judgment now appealed from.

(1) 28 West L.R. 920.

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Ewart K.C. and *G. B. O'Connor* for the appellant.

Bown K.C. and *O. M. Biggar K.C.* for the respondents.

The Chief Justice.

THE CHIEF JUSTICE.—I can find no evidence of dedication by the plaintiff, appellant, and there certainly is no justification for reversing the trial judge on this finding of fact. As was said by Fournier J., speaking for this court, in *Chamberland* v. *Fortier* (1), at page 380:—

> Les formalités prescrites par nos status pour l'ouverture des chemins et l'expropriation des particuliers pour la construction des chemins, doivent être rigoureusement observées, sous peine de nullité, comme l'ont décidé nos cours.

As pointed out by Mr. Justice Idington, the requirements of the local statute were not complied with and the mere grant or spending of a sum of money by the Government and the municipality on the plaintiff's land to build a highway does not create a presumption *juris et de jure* in favour of dedication even if acquiesced in by the owner. The mere user by the public does not create a presumption of grant or dedication. In order to constitute a valid dedication to the public of a highway by the owner of the soil it is clearly settled that there must be an intention to dedicate, there must be an *animus dedicandi* of which the user by the public is evidence, and no more. *Mann* v. *Brodie* (2), at page 386. See also *Folkestone Corporation* v. *Brockman* (3).

The appeal should, therefore, be allowed with costs here and in the courts below and the judgment of the trial judge restored.

(1) 23 Can. S.C.R. 371. (2) 10 App. Cas. 378.
(3) [1914] A.C. 338.

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IDINGTON J.—The appellant seeks to enjoin respondent from trespassing on certain lands which were granted by the Crown to him in 1887, when part of the North-West Territories, but which are now in Alberta. By virtue thereof he became registered owner on the 15th of June of said year. Over part of these lands there was a trail known as the "Edmonton and Fort Saskatchewan Trail." Prior to said grant there had been enacted the "North-West Territories Act." It had then become chapter 50 of the Revised Statutes of Canada, 1886. By section 108 thereof the Governor-in-Council, upon notice from the Lieutenant-Governor that it was considered desirable that any particular thoroughfare or public travelled road or trail, in the territories, which existed as such prior to any regular surveys should be continued as such, might direct such to be surveyed by a Dominion land surveyor and thereafter might transfer the control of each thoroughfare, public travelled road or trail, according to the plan and description thereof, to the Lieutenant-Governor in Council for the public uses of the territories.

The grant of said lands to appellant probably was subject to the exercise of said power.

Said section 108, however, was repealed by 60 & 61 Vict. ch. 28, sec. 19, which was substituted therefor.

This later enactment was much longer and more specific in regard to what might be done under it, and provided a number of steps to be taken in respect to the results of such a survey before its becoming effective. Amongst other things to be done with the return of such a survey was the filing of it in the land titles office for the district. It seems clear that it was not until that and other things were done that the road or

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trail so surveyed could be transferred to the Lieutenant-Governor for the use of the territories, and even then it was subject to any right which might have been acquired under letters patent issued previously to such transfer.

Sub-section 2, of said section 19, is as follows:—

2. The width of such road or trail shall be one chain or sixty-six feet; and in making the survey, the surveyor shall make such changes in the location of the road or trail as he finds necessary for improving it, without, however, altering its main direction.

It is exceedingly doubtful in face of the certificate of title, which in absence of the letters patent is our only guide to contents thereof, if there ever could have been a survey made under this section interfering with the apparently absolute grant to the appellant. But it is shewn that in fact a Dominion land surveyor, in 1901, did make a survey of this trail, but how he came to do it or by what authority he presumed to do it is not explained. He was called as a witness and tells, amongst other things, that when done the plan thereof was sent to Regina.

The said section 19 required any such return when approved by the Surveyor-General to be filed in the Department of the Interior. Nothing of that kind seems to have been done or attempted. It never was filed in the district registry office and it seems quite clear that it was null as regards any legal effect herein or elsewhere as governing the right of any one.

It is simply because it seems to have been one of the many curious things put forward in answer to appellant's claim herein, as helping to establish an alleged dedication by him or something that might estop him from claiming the part of his land so granted, now in question, that I notice this proceeding alleged to have been taken under said statute.

He sold ten acres of his lands to a Mrs. Sinclair, and in his deed thereof, as appears by the certificate of title to her in 1902, described same as bounded in part by the northern boundary of a surveyed road along the north side of Rat Creek. A plan of this part was drawn by same surveyor and is said to have been annexed to the deed.

It appears that in the plan of survey of the said trail the said surveyor had taken it upon him to make the proposed road allowance nearly two chains wide at this part instead of only one chain as the statute required, and this illegal and improper dealing with another man's property, without calling his attention to it or asking his consent, it is claimed so appears on the plan as to constitute an act of dedication by him.

The deed was sent to him at Battleford, where he lived, for execution and then executed and returned. The marking of road allowance or boulevard thereon can be under such circumstances no evidence of dedication of this part of the land in question or foundation for any estoppel.

Then in 1903 the appellant agreed to sell to McDougall & Secord the remainder of said lands at so much an acre and, in course of that transaction, came to discover, by reason of the amount of acreage, that would have to be paid for by the purchasers that he was short of the price he expected. That led to correspondence with the Department of the Interior demanding compensation, answered by referring him to provincial authorities, who failed to recognize that way of looking at matters. He was forced, by these circumstances, to conclude his bargain by deducting from the price the acreage cut off by this illegal survey. And in his deed, as I infer from the certificate of

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title issued to McDougall & Secord, the land sold them was described by describing his original grant of lands and excepting therefrom that ten acres sold to Mrs. Sinclair

and also saving and excepting thereout a surveyed road crossing the said land hereby described.

It is again said this was a dedication, I fail to find anything therein of dedication. Some people might be tempted to call it something else if anything but blundering of some one.

The appellant lived at Battleford still and so executed the deed there, but never abandoned in any way his right to the property.

No one acting on behalf of the respondent ever had occasion to consider these deeds or registrations or is able to say he acted upon them, and thus as an estoppel enuring to respondent it is out of the question for it to claim thereby.

The legal presumption that every one is supposed to know the law might well, coupled with the fact of a trail having existed there, be supposed to have probably induced appellant to be reconciled to losing sixty-six feet in width for a road such as the statute above quoted seemed to make a possible provision for.

Even if in strict law it could not have been at one time forced from him, there were other considerations such as his sale to these people, needing a road, which may well be looked at as tending to constitute a dedication or laying a foundation for inferring that much.

But beyond that I fail to see how it is possible to find in this appellant's conduct anything which could be fairly construed into an actual dedication by him of anything more than the common width of road al-

lowance so generally and extensively in use in the west.

The defendant's streets did not then extend out there, and no inference can be drawn in law from what has transpired since in way of offer to dedicate or accept such dedication beyond the said sixty-six feet in width.

Defendant has since, on the north part of this land, but in no way extending further south from the said northerly limit of the surveyed land than sixty-six feet, expended some money thereon to render it a highway.

It has been travelled upon that much but the remainder now claimed herein is a founderous piece of land unfit for use as a road.

The expenditure of public money may, under the statute, constitute so much of the land as so improved thereby, a public highway, but not beyond.

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

DUFF J.—I concur in the result.

ANGLIN J.—The plaintiff, whose title under a Crown grant of 1887 to the land in question, lying along the north side of Rat Creek and extending to the middle of the bed of the stream, is admitted, unless that land has subsequently become part of a public highway, charges trespass by the defendants the Corporation of the City of Edmonton. The other defendants are owners of lots lying to the south of Rat Creek. The defendants all assert that the land in dispute became part of a public highway by virtue of a survey

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made, in 1900, by one Driscoll under section 108 of the "North-West Territories Act," as enacted by 60 & 61 Vict. ch. 28, sec. 19; that by two conveyances made by him the plaintiff dedicated this land as a highway; that as a result of these conveyances and certain registered plans which shew the land in question as part of a highway he is precluded from asserting title thereto; and that by the expenditure of public moneys thereon by the defendant municipal corporation its character as part of a highway has been confirmed.

In making his survey Driscoll ignored the provision of section 108 limiting the width of the highway, thereby authorized to be laid out, to 66 feet. He laid out a road at some points three chains wide. I cannot accept the view that he had some discretion as to the width to be given to the highway. So far as I can find there is no evidence that Driscoll's plan ever received the approval of the Surveyor-General, although Mr. Justice Beck states that it was "approved by the department at Ottawa on the 11th October, 1904." The learned appellate judge apparently based this statement on some initials and figures — "P.W.C.; 11, 10, '04" — which appear on one corner of Driscoll's plan produced from the department; at least I have found nothing else in the record to sustain it. There is no evidence to shew what these letters and figures signify — certainly nothing to warrant the conclusion that they indicate approval by the Surveyor-General. Nor was a copy of Driscoll's plan ever filed in the land titles office of the district as the statute prescribes. It is only upon these things being done that section 108 authorizes the transfer of the road or trail so surveyed "by the Governor in Council for the use of the Territories." This transfer, it is asserted, and not denied,

was not made. The old "Fort Trail" had been transferred to the territories by order-in-council of the 16th May, 1895. But it did not include the land now in question.

The evidence shews that the northern boundary of the projected highway as laid out by Driscoll across the plaintiff's land followed approximately the northern boundary of the old "Fort Trail" and, notwithstanding the omissions above stated, the plaintiff recognizes the public right to a highway, across what was formerly his land, of the statutory width, having as its northern boundary the northern boundary of the projected highway as laid out by Driscoll. It is the land to the south of this highway 66 feet wide, and between it and Rat Creek, that he claims.

The judgment of the learned Chief Justice of Alberta, who tried the action, upholding the plaintiff's title to the land in question, accordingly limited his recovery, as appears in the following paragraphs:—

> This court doth order and adjudge and declare that the plaintiff is entitled to the lands described in the pleadings, that is to say: All that part of the Edmonton and Fort Saskatchewan trail as shewn upon a map or plan of the said trail prepared by Alfred Driscoll, D.L.S., and of record in the Department of Public Works in the Province of Alberta, in the westerly 25 chains of section nine (9), in Township fifty-three (53), range twenty-four (24), west of the fourth meridian, in the Province of Alberta, lying to the south of an imaginary line parallel to and 66 feet south of the northern limit of the said trail.
>
> * * * * *
>
> 3. And this court doth further order that the said plan of the said trail be rectified by substituting for the southern boundary of the said trail in the said section nine (9) as shewn on the said plan, a line drawn parallel to and 66 feet south of the northern boundary of the said trail as shewn on the said plan.

In order to deprive the plaintiff of the land lying between the highway thus defined and Rat Creek,

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which was admittedly included in his grant from the Crown, much clearer authority than is afforded by the statutory provision invoked would be required and a much more precise compliance with its provisions than has been shewn would have to be established.

None of the persons entitled under the plaintiff's grants to Sinclair and McDougall & Secord are parties to this action. Whatever right by way of estoppel or otherwise they may have (if any) cannot be asserted by the present defendants.

The plaintiff appears to have made some demand early in 1904 for compensation in respect of the appropriation of three acres of his land; but his claim was rejected and there is nothing to shew that he ever intended to dedicate the strip now in question gratis to the public. On the contrary, on the 21st June, 1904, he wrote to the department to know if it intended to cancel the survey of the "Fort Trail," and in reply he received a letter, dated 2nd July, 1904, stating that this trail had been transferred to the territories by order-in-council of the 16th May, 1895. Of course that transfer did not cover the land now in dispute.

The registration of plans to which he was not a party shewing lands of other persons lying to the south of Rat Creek as bounded by a highway lying to the north of the creek and extending to its centre line did not bind the plaintiff. There is nothing to shew that Driscoll's highway or esplanade extended south of the north bank of the creek. It, therefore, does not appear that any of the defendants or any other person who has bought lands upon the plans referred to has a frontage upon, or a direct right of access to, the highway in question. Nor does the evidence at all satisfactorily establish that any purchaser of such

lands bought in the belief that he had a frontage on that highway.

The plans filed by Mrs. Sinclair and McDougall & Secord subdividing parts of the lands purchased by them from Rowland, shew the esplanade as laid out by Driscoll. But, I am, with respect, unable to accept the reasons advanced by Mr. Justice Beck as warranting the view that the plaintiff was bound by the registration of these plans in respect of land owned by him and improperly included in them, although they were not signed by him as an owner as is required by sub-section 1 of section 124 of the Alberta "Land Titles Act" (chapter 24 of 1906). Although the certificates of title of Sinclair and McDougall & Secord, which have been produced, shew sales to have been made by them of parts of the lands purchased from Rowland, they do not establish sales or mortgages according to the registered plans of subdivision relied upon, if, indeed, that would suffice, under sub-section 2 of section 124 of the "Land Titles Act," to make the plans binding on the plaintiff without his signature in respect of land belonging to him and improperly included in them. In view of the requirements of sub-section 1 of section 124, I think it would not.

Expenditure of public moneys on the land in question is not established. The evidence is quite too vague and indefinite (*Township of St. Vincent* v. *Greenfield*(1)), except as to a sewer; and, for aught that appears to the contrary, no part of the sewer is north of the middle line of the bed of Rat Creek. The admission relied upon by the defendants rather indi-

(1) 12 O.R. 297, at pp. 306-7; 15 Ont. App. R. 567.

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cates that it lies wholly under the south half of the bed of the creek and land adjoining to the south.

For these reasons and those assigned by Mr. Justice Stuart in his dissenting opinion I think the conclusion reached by the learned trial judge was right and that his judgment should be restored. The plaintiff should have his costs in this court and in the Appellate Division of the Supreme Court of Alberta.

BRODEUR J.—A land surveyor, who was supposed to be acting under the provisions of the law, surveyed a trail and, at the place in question, the roadway so surveyed exceeded the 66 feet provided by the law. The owner of the property subsequently sold his property to different persons and never claimed then any right in the part of the roadway which exceeded the 66 feet.

This roadway is now one of the streets of the City of Edmonton and has necessarily acquired a great value. The plaintiff, appellant, claims the ownership of the piece of land which is left, those 66 feet being deducted.

The evidence is not very satisfactory as to whether this piece of land had been dedicated for the roadway or not. It is true that the land surveyor had mentioned it on his plan and that in selling his property the appellant had referred to that plan. But it cannot be said and maintained that this man formally dedicated this piece of property and nobody can be deprived of his rights without his consent, or without the provisions of the law.

There is no consent proved and the law cannot be

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construed as depriving him of his right in connection therewith.

For these reasons, I would allow this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Griesbach, O'Connor & Co.*

Solicitor for respondent, the City of Edmonton: *John C. Bown.*

Solicitors for respondent, W. D. McPhail: *Macdonald & Grant.*

Solicitors for the other respondents: *Parlee, Freeman & Abbott.*

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THE BONANZA CREEK GOLD MINING COMPANY (SUPPLIANT)..... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Provincial mining company—Power to do mining outside of province—Incorporation "with provincial objects"—Territorial limitation—Comity.

A mining company incorporated under the law of the Province of Ontario has no power or capacity to carry on its business in the Yukon Territory and an assignment to it of mining leases and agreements for leases is void. Idington and Anglin JJ. contra.

Held, per Fitzpatrick C.J. and Davies J., that "the incorporation of companies with provincial objects" as to which the provinces are given exclusive jurisdiction ("B.N.A. Act," 1867, sec. 92, sub-sec. 11), authorizes the incorporation of companies whose operations are confined, territorially, to the limits of the incorporating province.

Per Idington and Anglin JJ.—Such company has capacity to avail itself of the sanction of any competent authority outside Ontario to operate within its jurisdiction.

Per Duff J.—The term "provincial objects" in said sub-section means provincial with respect to the incorporating province, and the business of mining in the Yukon is not an object "provincial" with respect to Ontario. The question whether capacity to enter into a given transaction is compatible with the limitation that the objects shall be "provincial objects" is one to be determined on the particular facts.

Also, *per* Duff J.—On the true construction of the Ontario "Companies Act," the appellant company only acquired capacity to carry on its business as an Ontario business; and there was no legislation by the Dominion or the Yukon professing to enlarge that capacity.

Held, per Fitzpatrick C.J. (Duff and Anglin JJ. contra), that to enable a joint stock company to obtain a free miner's certificate

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

under the regulations in force in the Yukon Territory it must be authorized by an Act of the Parliament of Canada, and at present only a British or foreign company could be so authorized (61 Vict. ch. 49, sec. 1 (D.)).

APPEAL from the judgment of the Exchequer Court of Canada dismissing the appellants' petition of right.

The suppliant is a joint stock company, incorporated by the Province of Ontario, under the provincial "Companies Act." Its charter professes to authorize it to carry on the business of mining.

Being so incorporated, it purported to obtain tranfers of two certain hydraulic mining locations in the Yukon Territory, theretofore issued by the Dominion Government to certain individuals, and to enter into certain agreements in respect thereof with the Dominion Government which are set out in the case, and to obtain certain certificates which are referred to in and form part of the evidence taken in the case.

Disputes having arisen between the suppliant and the government regarding the alleged rights of the suppliant in respect of the hydraulic leases above referred to and under the agreements also referred to, the suppliant filed its petition of right in January, 1908, claiming damages against the Crown.

In January, 1909, His Majesty filed an answer to the said petition, raising two grounds of defence:—

(*a*) Want of corporate capacity on the part of the suppliant company to carry on its business in the Yukon Territory, or to enter into agreements with the government in respect thereof, or to acquire or maintain any rights thereunder, or to receive any certificates or licenses purporting to entitle the suppliant to carry on its business of mining in the Yukon Terri-

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tory, or to acquire any rights under such certificates or licenses;

(*b*) Want of authority on the part of either the Yukon or the Dominion executive to issue any such certificates or licenses to the petitioner, or to confer any such rights upon the petitioner, as the petition of right claims.

These particular grounds of defence were, in due course, directed to be determined in advance of any general trial of the petition, and without prejudice to the other matters which the record presented.

Mr. Justice Cassels, who tried these preliminary questions of law upon such evidence as the parties saw fit to present upon the particular points raised by the preliminary questions, determined them adversely to the suppliant, who appealed from this determination of the preliminary questions.

Hellmuth K.C. and *Moss K.C.* for the appellants.

Shepley K.C. and *Newcombe K.C.* (*Mason* with them) for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court on a petition of right launched to recover damages in respect of breaches of agreements and leases alleged to have been vested in the appellant by assignments in the circumstances set forth in great detail in the petition.

The claim was disposed of in the court below on the short ground that the appellant was without capacity to accept the assignments of the leases and collateral agreements or to carry on mining operations in the Yukon Territory or to recover damages for the breach of the said agreements.

The appellant is a joint stock company incorporated by the Province of Ontario under the provincial "Companies Act." The charter professes to authorize it to carry on the business of mining.

Being so incorporated it purported to obtain transfers of two certain hydraulic locations in the Yukon Territory, theretofore issued by the Dominion Government to one Doyle and one Matson, and to enter into certain agreements in respect thereof with the Dominion Government, and to obtain certain certificates which are referred to in the documents introduced and the admissions made with a view to the final determination of the questions which arise upon the two grounds of defence hereinafter referred to.

The petition of right was granted to settle certain disputes which arose between the appellant and the Government in respect of these leases and agreements. In answer to the petition two grounds of defence were raised which I think are fairly set out in the respondent's factum as follows:—

(*a*) Want of corporate capacity on the part of the suppliant company to carry on its business in the Yukon Territory, and, in consequence thereof, incapacity to acquire the hydraulic leases already referred to, or any rights thereunder, or to enter into the agreements with the Government in respect thereof also already referred to, or to acquire or maintain any rights thereunder, or to receive any certificates or licenses purporting to entitle the suppliant to carry on its business of mining in the Yukon Territory, or to acquire any rights under such certificates or licenses;

(*b*) Want of authority on the part of either the Yukon or the Dominion executive to issue any such

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certificates or licenses to the petitioner, or to confer any such rights upon the petitioner, as the petition of right claims.

This defence raises squarely in the first paragraph the important question, so frequently considered here and, in my opinion, now finally disposed of by the Judicial Committee, of the power or capacity of a company incorporated by a local legislature to carry on its operations in a territorial area over which the incorporating legislature has no jurisdiction. I adhere to what was said by me on this point in *The Companies Reference*(1) :—

> The Parliament of Canada can alone constitute a corporation with capacity to carry on its business in more than one province. Companies incorporated by local legislatures are limited in their operations to the territorial area over which the incorporating legislature has jursdiction. Comity cannot enlarge the capacity of a company where that capacity is deficient by reason of the limitations of its charter or of the constituting power. Comity, whatever may be the legal meaning of the word in international relations, cannot operate between the provinces so as to affect the distribution of legislative power between the Dominion and the provinces, under the "British North America Act."
>
> This does not imply that a provincial company may not, in the transaction of its business, contract with parties or corporations residing outside of the province in matters which are ancillary to the exercise of its substantive powers. I use the terms "substantive" and "ancillary" as descriptive of the two classes of powers inherent in the company, as these are used in the judgment of the Judicial Committee in *City of Toronto* v. *Canadian Pacific Railway Co.*(2).

It is not, of course, suggested that a provincial legislature may not incorporate a company for one of the objects enumerated in section 92 of the "British North America Act," which upon its incorporation enters into existence as an entity clothed with corporate powers; but the question raised and which must

(1) 48 Can. S.C.R. 331, at p. 339. (2) [1908] A.C. 54.

be decided in this appeal is: Can such a company exercise its functions or pursue the activities of its particular organization beyond the jurisdictional limits of the constituting power? In other words, can a properly constituted provincial company exercise its powers (purposes or objects) locally outside of the province of incorporation. It may be that a provincial company can with the consent of another province exercise its civil capacities within the area of that province, but I am still of opinion that a provincial company cannot either with or without that consent fulfil the purpose for which it was organized, that is, discharge what may be described as its functional capacities, in this case mine for gold, outside the limits of the constituting province. To admit juristic persons to the enjoyment of civil rights is not the same thing as to admit them to exercise their functions or to pursue the activities of their particular organization or in other words to transplant their institution to a foreign jurisdiction (Lainé, des Personnes Morales en Droit International Privé, 282).

The Ontario "Joint Stock Companies Act" under which the petitioner obtained its charter, enables a provincial charter to be granted

> for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends.

The legislative authority of Ontario has never been deemed to extend to mining upon lands geographically or jurisdictionally situated beyond the province, and a provincial charter, issued to a company for the purpose of mining, must find "the object or purpose" for which it was created within and only within the field to which the legislature itself has deemed its

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authority to extend. There is not, it is quite true, a geographical limitation in the appellant's charter as to the territory in which it may carry on its operations, but the limitations of the constituting power must be read into the charter which must be construed as if it read: "the subscribers to the memorandum of agreement are created a corporation for the purposes and objects described in the letters patent in so far as these purposes and objects are geographically and jurisdictionally situate within the province."

As the Lord Chancellor said in *John Deere Plow Co.* v. *Wharton* (1), at page 339,

> the incorporation of companies with provincial objects cannot extend to a company the objects of which are not provincial.

The business of mining in the Yukon Territory is not a provincial object with respect to Ontario. The Yukon Territory is not a province and is exclusively with respect to its public lands under legislative jurisdiction of the Dominion.

If this limitation is inherent in its constitution how could the appellant company acquire by transfer or otherwise hydraulic mining locations in the Yukon Territory or enter into agreements for the purpose of operating those mines with the Dominion Government.

I agree with counsel for the Crown on the second branch of his defence for the reasons given in his factum.

Assuming that the company had the power to engage in mining operations in the Yukon Territory it did not comply with the statutory conditions subject to which it was entitled to carry on its operations. No joint stock company is recognized under the statute

(1) [1915] A.C. 330.

and the regulations as having any right or interest in any placer claim, mining lease or minerals in any ground comprised therein unless it has a free miner's certificate unexpired. No joint stock company can obtain a free miner's certificate unless it is incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada, and I interpret the statute 61 Vict. ch. 49, sec. 1, to mean that a British company and a foreign company are the only sort of joint stock companies that could be licensed there.

The same argument applies to the license given by the Deputy Minister of the Interior. He was without authority to grant any such license. To be effective such a license could only be issued by the Government through the Secretary of State and it is admitted that no such license was ever taken.

In effect I hold that the company was not competent to take the assignment from Matson and Doyle upon which it bases its claim, or enter into the alleged agreement with the Dominion Government with respect thereto, and also that the company could acquire no right or interest in or to a mining claim in the Yukon because it was excluded by the statute from obtaining a free miner's certificate.

The appeal should be dismissed with costs.

DAVIES J.—This action raises in a concrete form one of the questions referred to this court by His Royal Highness the Governor General in Council as to the limitations, if any, which the "British North America Act" imposes upon the legislatures of the provinces in giving them exclusive power to legislate in section 92, sub-section 11, respecting

the incorporation of companies with provincial objects.

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In answering the questions submitted to us on that reference I gave at length my reasons for holding that the power conferred was a limited one and that its limitation was territorial.

I have seen no reason to change the opinions I there expressed. The company appellant in this case was incorporated in the Province of Ontario as a mining company. In my opinion it has neither the power nor the capacity to carry on mining operations in the Yukon Territory or district, that being a part of Canada thousands of miles distant from Ontario. It would seem quite unnecessary for me to repeat the reasons given by me in the reference above referred to.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—The questions raised herein relate to the limits of the capacity of a company incorporated by provincial authority acting within the powers conferred in section 92, sub-section 11, of the "British North America Act," to acquire property outside the province, or to contract for anything to be done for its benefit or omitted by it or any one else to be done for its use or benefit outside the province.

It has been heretofore usually assumed that men incorporated for any object might in their corporate capacity, acting within the scope of such object, do anything relative thereto for the purpose of serving such object, wherever the law of the country where done did not prohibit the doing thereof. This has been recently denied so far as provincial corporate creations are concerned. That denial is founded upon the discovery (long hidden from the ken of man) of manifold possible limitations inherent in said sub-section. It has assumed many shapes.

That involved in the absolute denial of capacity for either contracting beyond, or contracting for anything to be done or to be got beyond the territorial limits, is easily understood whatever may be thought of its legal validity.

But this denial of ordinary capacity which has assumed such various and varying shades of meaning that it is impossible to accurately define any line by which to bound the permitted operations of a limited sort beyond the territorial limits, is not quite so comprehensible.

The facts involved herein are so complicated that they may give rise to the application of any one of these propositions comprehended in such denial of capacity, or specific shade thereof, that I think better they should be set out with some detail.

The appellant was incorporated in 1904 by letters patent issued under and by virtue of the Ontario "Companies Act" (*a*) to carry on as principal, agent, contractor, trustee, etc., etc., the business of mining and exploration in all their branches, and (*b*) to apply for, purchase, lease, or otherwise acquire, patents, patent rights, trade marks, improvements, inventions and processes, etc.; and apparently incidental to these main purposes, by the means specified in ten succeeding clauses to do a great many things needless to state in detail here.

All we are concerned with is that what was specified either in said clauses (*a*) and (*b*) or in the other subsidiary clauses, or both combined, contemplated the exercise, without saying where, of contracting powers and the acquisition of such kind of rights and properties as involved in the issues raised herein. The place where operations of any kind were to be carried

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on is not stated further than that the head office of the company is to be at the City of Toronto. That must, therefore, be taken as the home wherein it carried on its business.

From the pleadings and the contracts, licenses, and correspondence, made part of the case, we find the following facts or what have to be assumed such as to be dealt with herein.

The suppliant, now appellant, sets forth in its petition that one Doyle and his associates, and one Matson and his associates, each set respectively had, in 1899 and 1900, applied to the Department of the Interior for Canada, each for a separate hydraulic mining location, and each became entitled thereto, and got leases from Her late Majesty therefor; and thereupon looking to the further and better development of these properties, collateral agreements were entered into between Her late Majesty, represented by the Minister of the Interior for Canada, and each of said set of parties respectively, in January, 1900, whereby the Minister was to observe that certain other properties should, in certain contingencies which took place, be granted by way of lease to these parties respectively. These leases and agreements entitled each of said set of parties with whom they were made to valuable privileges. It is to be assumed for the present that they were valid and that there were moneys paid to the Crown thereunder and that, for or by reason of any breach of the obligations incurred on the part of the Crown, said parties or their assignee would thereby be entitled to claim heavy damages for losses so caused.

The appellant acquired these leases and agreements by assignment thereof, presumably in Ontario.

I presume it thereby became entitled to such indemnification as the original holders respectively might have had at the time against the Crown, besides acquiring the right thereafter to realize the hopes and expectations of said parties and of the appellant thereunder. The appellant on the 24th December, 1904, the day after its incorporation, got a free miner's certificate, under the regulations then in force, for which it paid the respondent a fee of $100 and kept it renewed, paying for such renewals, it is alleged, so long as the regulations governing mining in the Yukon required the owners of a hydraulic concession to hold a free miner's certificate. It is by no means clear that the possession of such a certificate was necessary to enable it or any one else to make such acquisitions, though probably needed before actively engaging in operating a mine.

The appellant upon acquiring said leases and agreements found the obligations of the Crown thereunder had not been lived up to and that land which fell within the scope and under the operation thereof, instead of being leased to appellant or its predecessor, had been relocated or let to other parties to the detriment of appellant either through its said predecessor in title or directly. Against such omissions, for a time, the appellant made fruitless protests.

On the 16th March, 1907, however, the Crown, represented by the Minister of the Interior, entered into an agreement with appellant — after reciting said leases, and that they had, and all the interests therein and thereunder of said lessee Doyle and others, and Matson and others, had become vested in the appellant and otherwise as appears therein — whereby the respondent leased to said appellant the lands in said

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mining claims enumerated in the schedule thereto, together with the exclusive right and privilege of extracting and taking therefrom, by hydraulic or other process, of royal or precious metals, etc., for the remainder of said terms of years, respectively, for which the said leases ran for the hydraulic mining locations within which the said claims were situate.

And there are assurances given therein that the Crown will in certain contingencies grant appellant a lease of other locations as and when reverting to the Crown. This agreement and lease from respondent was executed at Ottawa.

Founded upon those things of which the foregoing is a brief outline, the appellant alleges it became and was entitled to certain services of water and water-rights and other privileges, all of which are to be presumed to be admitted; and the loss of large sums of money expended by relying upon each and all of said agreements being observed and of profits which might have been got, I assume is also admitted for the present.

On the 7th of September, 1905, the appellant got a license in pursuance of chapter 59 of the Consolidated Ordinance of the Yukon Territory, authorizing it to use, exercise and enjoy within the Yukon Territory, the powers and privileges and rights set out in the appellant's memorandum of association; for which it paid a fee of $500.

The authority of this is section 2 of said ordinance and is thus expressed:—

> Any company, institution or corporation incorporated otherwise than by or under the authority of an Ordinance of the Territory or an Act of the Parliament of Canada desiring to carry on any of its business within the territory may petition therefor, etc., and the Commissioner may thereupon authorize such company, etc., etc.

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Again by the issue of the free miner's certificate, already referred to, appellant seems to have been recognized pursuant to an Order-in-Council bound up with a Dominion statute for 1898, on page 39 of which the interpretation clause gives the following:—

"Free miner" shall mean a male or female over the age of eighteen but not under that age, or joint stock company, named in, and lawfully possessed of, a valid existing free miner's certificate, and no other.

* * * * *

"Joint stock company" shall mean any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada.

The law of England relating to civil and criminal matters as it existed on the 15th July, 1870, was brought into force in the North- West Territories subject to certain exceptions, and the law in said territories continued in the Yukon by the statute 61 Vict. ch. 6, setting it apart saving also some exceptions.

Hence the English rule of law by which foreign corporations are by the comity of nations recognized, I presume must prevail, until the contrary is shewn.

No Dominion Act is shewn prohibitive of any provincial incorporation doing business in the Yukon. If such a purpose ever existed it was quite competent for the Dominion to have so enacted inasmuch as the Yukon is within its legislative jurisdiction. As there are many mining companies operating elsewhere than in the Yukon and by virtue of provincial legislation, I imagine the possibility of such being tempted to help develop the Yukon would forbid such an imprudent policy as forbidding them. Yet we are asked to imply such from the omission in the Dominion "Companies Act" to provide specifically for their being licensed by

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the Dominion. The fact that the Yukon Ordinance as already pointed out did provide for such licenses and no objection made thereto, indicates the policy of Parliament as to the Yukon as does also the above order-in-council.

All the foregoing claims, and possibilities thereof, are held by the Exchequer Court to have been answered by the legal effect of the following two paragraphs of the defence:—

> 1. The respondent denies that the suppliant has now or ever has had the power either under letters patent, license, free miner's certificate, or otherwise, to carry on the business of mining in the District of the Yukon, or to acquire any mines, mining claims or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims or locations.
>
> 2. Should a free miner's certificate have been issued to the suppliant the respondent claims that the same is and always has been invalid and of no force or effect — that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate.

And the said petition has been dismissed.

The learned trial Judge assigns as reason for said dismissal, the answers given by the majority of this court in the *Companies Case*(1).

With great respect I do not think that position is tenable unless by first forming an opinion which the learned trial judge disclaims. If a person approaches the problem of ascertaining what the said judges meant with the preconceived opinion that a limitation is necessarily implied in appellant's charter, or in any other provincial charter, then his conception of what the majority had agreed in is possibly warranted, but not otherwise. However, as expressed by the court above, these opinions bind no one. And unless ap-

(1) 48 Can. S.C.R. 331.

proached in the way I suggest there is not a majority maintaining the view the learned judge acts upon.

On the other hand this court had decided in the concrete case of the *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.*(1), against the view which the learned trial judge adopts as that of this court. True in that case, if the refusal of the late Mr. Justice Girouard to express an opinion is counted as against what seems to have been the opinion of three members of the court, it would then be an equally divided court and the appeal resting upon the like contention set up herein failed. In such a case in appeal the negative thereby established the rule of law binding it for the future, for whatever it may be worth.

It is not for the mere triviality of the marshalling, so to speak, of judicial opinion in this court with which I am concerned. It is the fact that the seat of the Dominion Government is in Ontario, the home of appellant and that the transactions in question herein took place with that government there and by virtue thereof, and that the appellant paid moneys to respondent which at all events it is entitled to recover back on the principle this court almost unanimously followed in the said case. More than that, the same principles as supported by a majority of this court in that case would, I submit, entitle appellant to take an assignment of a lease and of a claim such as those parties had under whom appellant claims. How far the facts would have carried the matter and entitled the appellant to relief I cannot say.

It is to be observed further that the matter of a contract being *ultra vires* and hence unenforcible is

(1) 39 Can. S.C.R. 405.

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not the same as one to be held void by reason of what may more accurately be described as illegal. From the latter nothing can spring entitling a plaintiff to recovery. There may arise herein such rights as to be cognizable by the court in order that justice may be done. Indeed, in the said case of the *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.*(1) the right was asserted alternatively by the plaintiff to a recovery of the premiums paid, and that right was maintained by the opinion of the judgments of the Chief Justice of this Court and Mr. Justice Davies, though holding the contract in question *ultra vires* of the defendant company.

In this case the recovery sought was not limited thereto, but I apprehend the greater might well have been held to include the less if that was all the suppliant had been found entitled to.

It hardly seems right (or indeed consistent with what one should expect to find following that decision) that the Crown having recognized the standing of the appellant and taken its money when denying appellant's capacity to pay, should yet refrain from at least tendering so much amends.

Moreover, the opinion of Mr. Justice Davies, concurred in by the Chief Justice, recognized the possibility of a provincial incorporation being entitled, in the way of that which might be found ancillary to its business, of going beyond the boundaries of the incorporating province and thereby acquiring rights of property and rights of action arising out of such contracts as it may thus have engaged in. (See page 431 of the report of that case.)

(1) 39 Can. S.C.R. 405.

What the range of possibilities may be of putting into operation such a view, I do not intend to attempt to define. Certainly the acquisition by assignment of the leases and agreements to the company do not seem necessarily excluded therefrom.

Exploration was one of the objects written in this charter and as incidental thereto there are specified many things it is permitted to do in the way of acquisition. The ultimate aim of such exploration and that incidental thereto doubtless was gain.

Proceeding upon any and all of the foregoing grounds and having regard to these results of a concrete case in this court, I most respectfully submit that the petition should not have been dismissed.

Passing these considerations let us come to the broader issue presented by the denial of the inherent capacity of any provincial corporate company going beyond the territorial limits of its parent province, either to contract there, or acquire there, property or rights of any kind, serving its uses in pursuit of its objects. Such companies are incorporated by virtue of the power in sub-section 11 of section 92 of the "British North America Act," expressed as follows:—

The incorporation of companies with provincial objects.

Such a view as involved in that denial I rather think was never presented in any court in Canada till the *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.*(1) case, already referred to. Assuredly the contrary view was acted upon for forty years, to such an extent as to involve in the aggregate enormous sums of money in the way of contracts, by and with com-

(1) 39 Can. S.C.R. 405.

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panies, which must be held *ultra vires* and void, if the contention set up should prevail.

A microscopical examination of the phrase "provincial objects" cannot help much.

It is to be observed, however, that the word "objects" had been used prior to said Act, both in the English "Joint Stock Companies Act of 1862" and the Canadian Act, in chapter 65, section 1, of the Consolidated Statutes of Canada, as an apt description of what by the articles of association must form the basis of incorporation in either case respectively falling thereunder. And the word "provincial" can be given full force and effect, in the way I am about to submit, without further qualifying or restricting the well known use of the word "objects" in relation to companies so as to produce something as curious as contended for.

No one pretends the whole item No. 11 can apply to anything relative to the purposes, aims or affairs of the Government or its direction of the public institutions of the province, which are *primâ facie* the only "provincial objects" as such. Counsel for the Dominion in the *Companies Case*(1), by introducing history, let us see how the unhappy phrase was begotten. If permissible to refer thereto, I have recorded it in pages 362 and 363 of 48 Can. S.C.R., containing the report of that case.

Is there another possible meaning of the phrase "provincial objects"? Seeing it is an incorporation of companies that is designated it can surely mean nothing else than a provision for the incorporation of persons likely to develop the business activities of any

(1) 48 Can. S.C.R. 331.

kind seeking such development in any province. Does that necessarily imply that the business in any such case seeking development is to be confined in all or any of its operations within the territorial limits of the incorporating province? Surely such a limitation is and always has been since before the "British North America Act," something quite inconsistent with the requirements and expectations of business men looking to commercial success.

But why should we suppose it was by the word "provincial" intended to engraft upon each provincial incorporation of a company the limitation that it could not transact any business beyond the limits of the incorporating province? Those provinces which negotiated and arranged for this creation of a federal system and thereby determined what as result thereof should appear in the Act, had each up to its enactment coming into force, absolute power over the subject of the creation of incorporate companies. It is somewhat difficult to understand why they should be supposed to have intended to surrender that power essential to their local prosperity save in so far as necessary to facilitate the furtherance of the purpose had in view.

Can it fairly be said that such extreme limitations and restrictions as argued for herein were so necessary? Was there not something else to be guarded against?

In assigning the control of property and civil rights in the provinces to the exclusive jurisdiction of provincial legislatures which would impliedly carry with it the right of incorporation, it may have been thought that the power of incorporation relative to the subject matters assigned to the Dominion might be

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impaired, or indeed render it necessary for its Parliament to look to the province possessed of such far-reaching powers, relative to property and civil rights, to aid it in that regard. To have thus by any possibility impliedly rendered Parliament subservient to the will of any legislature, would have been embarrassing.

Again, it may have been conceived undesirable that there should be the possibility of any conflict between the provinces by reason of one asserting as of right the power over or against another to invade its territory against its will, by any such legislation relative to companies. That view was upheld later by Ministers of Justice for the Dominion, as will presently appear.

By framing the enactment as it is, these, and possibly other contingencies, were averted and the general rule of private international law (which I submit was well known) relative to the recognition of corporations abroad by virtue of what has been called the comity of nations, was left to work out the solution of the question; as it has been in each individual case for nearly half a century with great benefit to all and detriment to none.

Some such reasons, as well as the desirability of marking the contradistinction between the provincial corporations, which ought not to have for their objects any of the subject matters assigned to the Dominion, and Dominion corporations, or such of them as relate to any of the subject matters assigned to the exclusive legislative jurisdiction of the Dominion, one can understand as having been deemed, if not necessary yet desirable, to facilitate the working out smoothly of the scheme as a whole. But why should

that necessity have reached to the wholly unnecessary exclusion of trading either with the mother country or its other colonies or the United States or any other foreign country, as had been done for many years by provincial companies ?

In short, why should it be supposed to have been intended to render trading by provincial companies impossible ?

The scheme of the Act was primarily to arrange for the federal union of four or five provinces until then having very large powers of self-government. The framers thereof followed the example of the United States constitution and its method of assigning very large powers of legislative or administrative control to the Governments to be created, by merely specifying the subject matter over which such powers were to be exercised, without elaboration of how; and in like manner prohibiting in terse terms the exercise of power over other subject matters.

They departed, as experience had then dictated in a marked degree, from the substance of the model. All I here desire to press is for a realization of the fact that they made the best use they could, under the circumstances, of such a model, endeavouring to avoid rocks ahead, while trying to cure the ills the provinces laboured under.

Incidentally thereto it is not conceivable that they shut their eyes either to the commercial necessities, to which I have already adverted, or to the history of the development of the recognition of corporate capacity both in the United States and elsewhere, when transacting business beyond the limits of the corporate-creating state. That question had theretofore, both in England and Canada, as well as in the United

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States, received much consideration. In the United States the question had also been considered with relation to the constitutional limitations of the incorporating state as it is now presented relative to the powers of the provinces.

The discussion it gave rise to in the United States was long and keen. It culminated there in the decision of the case of *Bank of Augusta* v. *Earle*(1), decided in the United States Supreme Court in 1839, which stands good law to-day.

The argument there as here was that the company should not go beyond its home state to do business, and the limitations of state powers were also relied upon. That eminent and able court held it could go wherever the comity of state or nations might permit.

The very different question, of a foreign company, by its constitution inherently incapable of going abroad, had been presented to our old Upper Canadian Court of Queen's Bench in the case of the *Genesee Mutual Insurance Company* v. *Westman*(2). Indeed, some *obiter dicta* therein would go further, but the day was young then. Shortly after Confederation there arose in same court, the case of *Howe Machine Co.* v. *Walker*(3), where the issue of the right of a foreign corporate company to do business in Canada was likewise presented and the right maintained with the proper distinction made between that and the *Genesee Case*(2). This was in 1873.

The decision is only of significance here as indicative of the view then taken and thus likely to have been held six years earlier by those framing the clause

(1) 13 Peters 519. (2) 8 U.C.Q.B. 487.
(3) 35 U.C.Q.B. 37.

now in question. The English view is presented by the authorities collected in Westlake, at section 305 of his work on Private International Law.

Is it conceivable that men, presumably holding the views of English law as thus expressed by either Canadian or English authorities, and knowing how that had been applied and worked out at that time under a federal system, deliberately designed the creation of something new and wonderful to be operated with under the Canadian federal system? I cannot assent to such a proposition. Those men had sense, and some of them, wide experience and great grasp of public affairs. To say that they had not in view the daily experience of Canadian trade and industries before their eyes and the futility of providing therefor by a new kind of corporate creature which it would take forty years to discover, is paying them a compliment which, I submit, is undeserved.

The relevancy of all this is that the instrument under consideration is not an ordinary contract or Act of Parliament, but one which if we would rightly understand it must be read with the eye of the statesman measuring the future range of its effective yet harmonious operation in all its parts so as to make each and all productive of the best results when put in actual practice.

Then there is another practical aspect to be considered along with and consistent with that general survey of the question from a legal or constitutional point of view. It is this: In each of the provinces there are industries peculiar to its people. The adaptation of legislative contrivances needed to aid such people in promoting the development of its resources, whether of an agricultural, mining, fishing, lumber-

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ing, mercantile or mere financial (not banking) character, may have to be suited thereto and to the peculiar character or habits of life, of the people of the province. That which would meet the wants of Nova Scotia might be quite unsuited to the requirements of Ontario or that suited to either fall short of promoting the welfare of the farmer on the western plains.

The promotion of any scheme needing legislation for its assistance, is most likely to bear speedy results when an appeal is made to those most directly interested. The vast extent of Canada and diversity of its natural resources, render in many cases the promotion at Ottawa of legislation only subservient to local needs, almost an impossibility, and even where not impossible, very likely to lead to something less efficacious than what might be obtainable if a local legislature were appealed to.

Such considerations or something like thereunto. no doubt were present to the minds of the framers of the Act and of this provision. And it was to give ample scope to the legislative activities of each province in relation to these provincial objects that it was designed.

Having regard to the situation of the then Canadian provinces, and what was then present to the minds of those acting, can anything more absurd be conceived, than to suppose that those men realizing such a situation and looking to the future, deliberately planned that the incorporating power to be given the legislatures of the provinces for such objects as I have outlined, should be hampered by such limitations as are contended for herein, and never had existed elsewhere in the constitution of any legislature to which the like subject matters had been intrusted ?

A company incorporated with the objects of exploring as indicated in appellant's charter might seek something in the United States or Mexico, for example. That is conceivable as a business enterprise. Why should its promoters in Halifax, Toronto or Victoria have to go to Ottawa at a loss of time and money for such authorization as needed to obtain that common every-day business convenience and contrivance used by business men ?

What difference can it make whether incorporated at Toronto with a home there, or at Ottawa with a home there ? Neither province nor Dominion can give it any right or power to go into those countries. All either can do is to give it a form or fashion by creating the legal entity by means of which men may co-operate for that object had in view. Beyond that in a foreign state it must depend entirely upon the comity of the nation concerned whether or not it can do anything.

The Ontario Legislature has always, I think, abstained from ostensibly proposing such ventures abroad. Its companies have been incorporated for a specific object or objects relative to some specified sort or kind of business and within that object in going abroad they have depended for effective recognition entirely upon comity.

In this case the appellant was recognized not only directly by the respondent by virtue of the transactions entered into between them, but also by the local executive of the Yukon.

It is said, however, that the word "provincial" so plainly indicates that it was designed that such corporations should not carry on business beyond the province that there is an implied limitation in the capa-

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city of each precluding it from availing itself of the advantages of recognition by virtue of the doctrine of comity. It is hard to get two to agree exactly in what that proposition does mean. If it ever had been conceived, as once suggested in argument, but which no one has been bold enough judicially to affirm, that nothing could be done or be contracted for being done outside the territorial limits of the province, the situation of each province and the commercial relations of its people with those of the other provinces and of countries beyond the Dominion, were and remain such as to forbid a moment's serious consideration for such a curious proposition. Besides, such a simple conception if ever entertained could have been concisely stated.

I, therefore, discard once and for all this very improbable conception of territorial limitations as ever having been intended to rest in the language used.

Let us then proceed to consider the theory of the implied limitations restricting business within lines including only that which may be ancillary to the main object and be an "incidental necessity" thereof as, for example, the buying abroad of raw material, etc., and possibly the marketing of a company's goods, without regarding other refinements which might be suggested, and see how it will stand the practical test.

If we apply our common knowledge of the actual facts in an attempt to realize what such corporate activity means, we may find how impossible it would be to make the theory a workable success.

The actual operations of these industrial concerns, of provincial origin, daily furnish us with illustrations.

Of the vast and ever-increasing volume of business done by them with people in other provinces or abroad, more than one-half of what it represents is an actual carrying on, by the agents of such companies, of business outside the province. The production of the article is but a part of the business operation in order to reap the gain for which the corporation was created.

If, as has been suggested, the company has the right, of necessity, to go abroad for supplies, then the division of the carrying on of the business, within and without the province, is such that the part done outside the province greatly preponderates over that done within.

In such cases the company has to acquire abroad its raw material, arrange there for its importation, and then when manufactured, has often, of the like necessity, to send it again abroad to be marketed. Where, in such case, if not as I suggest, is the major part of the business operation carried on? And where has the money been got to carry it on, and how? Has the business man as he ventures on each step of this process to stop and ask himself if he is within the incidental necessities of his corporate business? Has his foreign customer also to say "stop and shew me, not how to answer the easy old formula of whether the transaction is within the scope of the objects of your company; but how to solve the queer puzzling riddle of what some lawyers in your country of curiosities may say about the actual 'incidental necessities'" of the company in relation to the proposed transaction. And he might, if a foreigner of deep thought, ask what "necessities" can mean anyway. Perhaps he might wisely conclude the transaction proposed was not a necessity for him.

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Then the poor obfuscated, beaten Canadian travelling homewards might well ask himself why any one ever conceived he was such a fool as to try to do something that was not necessary for his business.

Again, the mining and lumbering industries of some provinces and the development thereof are parts of the development of the natural resources therein and of the local Crown domain. These having thus peculiarly close relations with the local governments, who better fitted than these powers to determine how the corporations engaged therein are to be created and controlled ?

We also know from common knowledge that the miner has often to send his raw product abroad to be treated and then marketed, and in such cases bargains have necessarily to be made abroad involving a great deal more expense and variety of business transactions than the mere expense of digging it out of the earth. In the same way the incorporated lumberman may, indeed often does, find his timber in one province and his mill in another and his market in a third province, or abroad, and occasionally he has to be an importer from abroad of his raw material.

The courts in which a corporation has appeared as suitor or defendant always had, if its status was in question, to determine whether or not the business involved was of the kind which it was incorporated to transact. This new view of "incidental necessities" in substitution of primary objects as the measure of capacities, presents new puzzling possibilities hitherto unimagined.

What a fine field for the ingenious mind to roam over and dream in! True, all these difficulties may be averted by practically blotting out the item No. 11

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of the section in question and resorting entirely to the Dominion powers. But again, was that the meaning and purpose of the item ?

Take another mode of testing this alleged limitation. The province is given by item No. 10 the exclusive power of legislation relative to local works and undertakings except those of an interprovincial character as specified. Railways and other works have been constructed by companies which had to rest, I submit, on no other authority than this item No. 11. It is all comprehensive or nothing. It will not do to say the grant of power to incorporate might be implied in No. 10 itself, without resorting to No. 11. I admit the province as such could undertake such works.

I am referring to the numerous cases of railroads and other works constructed by companies empowered by a legislature to do so and incorporated by it for that purpose.

I submit such companies rest upon this very item No. 11 or nothing. For if implications relative to "companies" are to be permitted in item No. 10 then likewise does No. 13, "property and civil rights" carry in such case the like implication and so would end all this contention.

It seems generally conceded that this specific enactment excludes such implications so far as "companies" are concerned under provincial legislation and if so I do not see how they can exist relative to No. 10 any more than independently under No. 13.

Now these companies, beyond question, have gone abroad for almost everything, including the money got from stock-holders and bond-holders as well as rails and all else. Who ever thought they were acting *ultra vires ?* Are their contracts void ?

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And indeed no companies can be incorporated to execute such local works or undertakings save by local legislatures unless of the kind declared by virtue of sub-section (*c*) of section 10, to be for the general advantage of Canada or of two or more provinces.

The enactment in item No. 11, by its terms does not express any such thing as urged; then why, with such obvious consequences of so reading it as abound on every hand, adopt that instead of the way it has been read so long ?

With the limitations sought to be implied in such charters they may mislead and must be of little use. Not only that, but they must obviously conflict with the true working out of section 121 of the Act, in its true spirit so far as the incorporated producer is concerned.

Moreover, what must never be lost sight of, there is the fact, that the interpretation which I submit should prevail, has in actual practice been so long observed and acted upon and so much depends thereon that even if otherwise doubtful it should be upheld.

The products of our industrial activities of every kind have been and still are handled by provincially incorporated companies and sold abroad and commercial exchanges effected. Are these transactions all *ultra vires* and these companies engaged in doing so liable to be met by the foreign dealer with a plea such as respondent sets up herein ? These companies have often exchanged such products abroad for other goods, or bought goods abroad with the money so got. Are they in any or all of these transactions liable to be met by such a plea ?

And perhaps quite as frequently they have been, by the credit thus acquired, enabled to buy goods on

credit; and are they in such cases entitled to say they were not liable as they were acting *ultra vires* in thus abusing their credit ?

They have borrowed money abroad by virtue of direct contracts or manifold indirect transactions entered into in London, Paris, New York or elsewhere. Are they to be permitted to answer the claims of such creditors by a plea of the kind we are asked herein to give effect to ?

And what of the shareholders who have put their money into such concerns as like as possible in principle to the venture herein involved ?

Then the authority of Ministers of Justice insisting upon the exercise of the veto power is relied upon. Supposing each and every one of these reports of such Ministers had stated that the Act must be so interpreted as counsel for the Crown desires, are we to abandon our functions ?

These Ministers, however, never ventured to enforce their opinions, if to be read in the way counsel suggests they do read, else we should have had the matter tested long ago in ways open to them. But the reports do not so far as I have seen bear that construction he puts upon them. Time and again legislatures have apparently been alleged to have exceeded their authority by passing bills which expressly provided for the company thereby chartered acting abroad or in other provinces than its own. The Lieutenant-Governor in each of many such cases was told the bill would be vetoed unless withdrawn, and I presume each of these requests was duly complied with. It is not necessary here to express any opinion whether or not that cautious view was right or wrong.

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That attitude towards such legislation is a long way from maintaining what is contended for herein. I respectfully submit that it is only by a confusion of thought that what the Ministers in question then forbade must necessarily prohibit those incorporated companies with specified objects, suitable to the commercial needs of those in one of the provinces, from entering into contracts outside the province for the due execution of the purpose for which they were created.

For example, there is nothing inconsistent in the late Sir Oliver Mowat as Attorney-General or Premier of Ontario, permitting scores of Ontario companies when so created to grow and flourish by reason of their foreign connections and trade, and his insisting later as Minister of Justice at Ottawa, that if a provincial legislature should expressly enact that a company was entitled to carry on business in another country or province, it was acting improperly and possibly *ultra vires*.

This appellant is only a small concern following no doubt that practice which grew up under the eye of that able man who so long and so successfully managed provincial affairs in and for Ontario. And he is now curiously quoted in argument as if, when acting as Minister of Justice, condemning it.

Counsel for respondent addressed to us an argument of some length based upon the recent decision of the Judicial Committee of the Privy Council in *John Deere Plow Co.* v. *Wharton*(1) from British Columbia.

I am unable to understand the exact relation supposed thereby to exist between that long sought for

(1) [1915] A.C. 330.

but belated recognition of the power resting in item No. 2 of section 91 of the "British North America Act" assigning the regulation of trade and commerce to the Dominion, and the question of the quality of the capacity inherent in a provincial corporation to receive recognition outside the creating province. In an appeal to Parliament, to exercise its power over the subject so assigned to it, and to enact legislation which would curb the aspirations of the provinces and their creatures, that decision might be used to justify such legislation.

It strikes me the argument is submitted to the wrong court.

Meantime until Parliament has legislated in that direction, if it ever does, we must continue to keep within our judicial functions.

The practically minded might say that decision renders needless any disturbance of the long recognized capacity of provincially incorporated companies either herein or otherwise.

Indeed, counsel presented, briefly but stoutly, mining as a trade and hence within the sphere of the operative effect of that decision. I hardly think such a view is necessarily to be attributed to their Lordships whatever may grow hereafter out of the said decision in the way of centralizing our Government.

Nothing remains eternally stationary. Let us be patient and wait upon the evolutionary process which may spare us the probably painful consequences of rashly accepting counsel's theory of trade and commerce.

I must adhere to the view I have always taken, and maintained in the cases above cited, of our constitu-

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tion as set out in the Act; that its aim and that of the framers thereof was to eliminate friction as much as possible and yet give freedom a chance; and trust to the results of experience to be gotten thereby. It was a distinct recognition of how utterly astray domineering minds may be inherently prone to treat the rest of mankind as children when resorting to needlessly repressive measures. In that converse spirit of freedom every case presenting problems, arising under said Act, for judicial solution should be weighed and the Act worked out accordingly in harmony with the ideals of those who framed it.

I do not see how the recognition of provincial company corporations as possessing the usual qualities of and capacities of other business corporations can fail to subserve what the Act so read was intended to subserve, but I do see how any of the other interpretations contended for will materially tend to defeat such aims, intentions and purposes.

That view which I maintain, in no way extends to an interference with the very wide field of possible corporate activity, which may fall within the range of any of the subject matters assigned to the exclusive jurisdiction of the Dominion, and needing the exercise of corporate power to give efficacy to the enjoyment thereof.

It is not germane to the issues raised herein to enter upon a discussion of the limits of the Dominion's incorporating power, further than to point out and illustrate how, relative to the said issues, there is no conflict between that and the exercise of the ordinary corporate capacity by the provincial companies.

And as to the rights of other provinces, they may be quite within their rights in refusing recognition

if the incorporating province attempted what it should not. Even if they should stupidly seek to curb or curtail the commercial activity and enterprise of a neighbour (unless so far as in conflict with section 121 to which I have referred) experience, and the power of public opinion thus engendered, will rectify such mistakes if any.

With every desire to condense, so far as consistent with perspicuity, I find this opinion already too long drawn out.

Yet the neat point involved herein is within a very narrow compass. I have attempted by manifold illustrations to exemplify how unworkable the contentions set up might, if successful, prove and how little in harmony they are with the probable conceptions of the framers of the Act.

The extreme importance of what may be involved in the ultimate decision and the desire to make that clear and meet the varying shades of opinions put forward, can alone justify such length.

Whether such companies may in transactions involving the sanction of the shareholders or board of directors got beyond the confines of the province be held, as according to some American decisions in like cases, inherently incapable of dealing with such transactions outside the province is entirely another question than here involved.

In the alternative view as bearing upon the present case I may make an observation or two.

The case of *Comanche County* v. *Lewis*(1), cited to us by appellant's counsel, was decided by an eminent judge holding that the mere recognition by the

(1) 133 U.S.R. 198, at p. 202.

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legislature of an alleged corporation which might not otherwise have been held validly constituted, entitled that doubtful creation to recognition by the courts and, therefore, liable to be sued and judicially dealt with.

That decision typical of what in many other cases has been treated as recognition of *de facto* corporations, suggests a good many curious questions more or less bearing upon one aspect of what we have in hand.

Is the power of incorporation so existent in the Crown in right of the Dominion as to enable it to incorporate without direct legislative authority relative thereto ? If so what is the effect of the recognition by the Crown of the appellant in these transactions now in question ?

Re-incorporation can exist, indeed, has more than once been legislatively effected. Can that be effected by the Crown ? What more is necessary therefor than recognition ? I express no opinion, and, indeed, have none in relation thereto, or to the point made in the pleading of recognition and otherwise in argument, but not based on the suggestion I make. It may be that want of assent to re-incorporation is complete answer to such suggestions.

That branch of the case was not thoroughly argued and, therefore, I have formed no opinion upon it. The point is not to be disposed of by the common-place that the Crown is not bound by any estoppel.

The honour and dignity of the Crown are, I respectfully submit, deeply concerned; and the principles just now adverted to, or the range of the Exchequer Court jurisdiction which remains an unexplored field so far as argument in this case is concerned,

ought to be fully considered if my view of appellant's rights are non-maintainable, in order that justice may be done.

In the manifold ways I have pointed out there has been that recognition of the appellant which entitles it, if possessed of the inherent capacity which I hold it has, to succeed without resorting to these considerations.

The appeal should be allowed with costs and that part of the proceedings below, involved in this disposal of the first two paragraphs of defence, and the case be remitted to the Exchequer Court for further trial and disposal of remainder of the case.

DUFF J.—Two minor points were taken by Mr. Newcombe which I shall dispose of first. "The regulations touching the disposal of mining locations to be worked by hydraulic process" approved 3rd December, 1898, which admittedly govern the appellants in respect of the rights in question in this action provide, by paragraph 4, that one of the conditions of the right to acquire any such location is the obtaining of a free miner's certificate under the "regulations governing placer mining." Paragraph 1 of the regulations governing placer mining then in force authorizes the issue of free miner's certificates to persons over 18 years of age and to joint stock companies, and "joint stock company" is defined in the interpretation clause as meaning

> any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada.

Mr. Newcombe's contention is that "Canadian" here means "Dominion" and "Canadian charter" means an

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Act of the Parliament of Canada or an instrument emanating from the Government of the Dominion or deriving its validity from a statute of the Dominion Parliament. I think this contention is not well founded. It is no doubt proper to read the adjective "Canadian" as describing the kind of charters intended to be included by reference to the authority from which they emanate; and "Canadian" in this connection may doubtless be read in two different ways. It may be treated as indicating the relation of the authority to Canada — as an entity — to the Dominion of Canada. On the other hand it is quite capable of being read as embracing every lawful authority in that behalf exercised within the territorial limits of Canada. Reading "Canadian" in this latter sense "Canadian charter" would mean a "charter" emanating from any lawful authority in Canada — capacity to acquire the right to pursue the business of mining in the Yukon being, of course, assumed. I think this is the meaning that ought to be attributed to it. The proposed construction would exclude not only companies incorporated under provincial authority, but a company incorporated by Yukon authority or by the North-West Territories Council before the erection of the Yukon into a separate territory. It would likewise disqualify companies incorporated by the provinces of Canada before Confederation, by British Columbia, for example, before 1871. These consequences appear to me to afford a sufficient reason for rejecting the proposed construction.

The other contention is that by force of 61 Vict. ch. 49, an Act of the Parliament of Canada, the carrying on of mining operations in the Yukon by any joint stock company or corporation excepting companies or

corporations owing their existence to some Act of the Parliament of Canada or licensed under the statute is prohibited. The statute is permissive only. It does not contain a single word expressing prohibition. Nor can I find a single word in it which seems to imply a prohibition such as that contended for. If, indeed, there were any implied prohibition it is difficult to understand upon what ground the implication could be limited in the way suggested. If this statute is to be read as *conditionally prohibiting* the carrying on of mining operations, as it most certainly does under the construction proposed, by a company incorporated by the old Province of Canada, or by the Province of British Columbia before Confederation, or by a "chartered company" in the strict sense, such, for example, as the Hudson's Bay Company, it is difficult to imagine what principle can justify such a construction which would not equally involve a like prohibition as against companies existing at the time the Act was passed and owing their existence to some Dominion statute. Any distinction between the two classes of cases could rest upon nothing in the statute itself, but must be founded upon mere speculation as to the policy of it.

As to the point of substance.

The specific authority conferred by section 92 (11) (the incorporation of companies with provincial objects) in relation to the subject there dealt with cannot be enlarged by reference to the more general terms of section 92, items 15 and 16,

property and civil rights within the province

and

matters merely local and private within the province.

(*John Deere Plow Co.* v. *Wharton*(1); *Canadian*

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Pacific Railway Co. v. *Ottawa Fire Ins. Co.* (1), at pp. 461 and 462.) This appeal turns upon the answer to the question: What is the effect of the qualification "with provincial objects" as regards the capacity of the appellant company to enter into the contracts which the appellant company's suit is brought to enforce and upon the validity of those contracts? The word "company" obviously does not embrace every kind of corporation. (See items 7 and 8 of section 92 and section 93.) But the appellant company is indisputably a "company" within the meaning of the clause. "Provincial" means, I think, provincial as to the incorporating province; and although it is perhaps conceivable that as regards companies formed for some communal or governmental purpose, the word "provincial" might be read as having reference to the province as a political entity, I think that as regards companies formed for the purpose of carrying on some business for private gain it must be read as having reference to the province as a geographical area.

It results, I think, from a series of dicta (which, if they have not the force of decisions, are still of such weight that it is my duty to follow them) that the undertaking or business of such a company and the powers and capacities conferred upon the company must when considered as an entirety be so limited that the "objects" of the company fall within the description "provincial" in the sense mentioned. See *Citizens Ins. Co.* v. *Parsons*(2); *Colonial Building and Investment Association* v. *Attorney-General of Quebec*(3), at pages 165 and 166; *John Deere Plow Co.* v. *Wharton*

(1) 39 Can. S.C.R. 405. (2) 7 App. Cas. 96, at pp. 117, 118.
(3) 9 App. Cas. 157.

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(1). I think that whether the "objects" of a company under a given constitution or "charter" are "provincial" in this sense (or whether the possession of capacity to enter into a given transaction is compatible with the condition that the *company's "objects" shall be "provincial"*) is a question to be determined upon the circumstances of each case as it arises; and I doubt whether upon this point any more specific test than that supplied by the language of section 92(11) itself can usefully be formulated now.

The appellant company's title to relief rests upon the proposition that the letters patent (by which it is incorporated) granted under the authority of the Ontario "Companies Act" authorizing it to acquire mines and to carry on the business of mining generally without restriction as to locality do confer upon it capacity to acquire the right to carry on the business of mining in the Yukon Territory or elsewhere under the territorial law as established by competent authority or that such capacity has been derived from some other source. I think the possession of such capacity does not flow from the letters patent on the ground that the business of mining (*i.e.,* working mines) generally without restriction as to locality is not a business that is "provincial" as to the Province of Ontario, and that a company having as one of its objects the carrying on of such business would not be a company "with provincial objects" within the meaning of section 92(11); and that consequently letters patent professing to create a company to carry on such business could not be validly granted under the Ontario "Companies Act." I do not think it follows

(1) [1915] A.C. 330.

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as a consequence that the letters patent of the appellant company are void, but only that the description of the objects of the company in the letters patent should be read as subject to the restriction necessarily imported by the reason of the overriding enactment in section 92(11). It follows that the appellant company, a company incorporated pursuant to the provisions of the Ontario "Companies Act" to carry on the business of mining, must be deemed to be a company created with the object of carrying on that business only as a "provincial" (*i.e.*, Ontario) business in the sense mentioned.

What then is the effect of this restriction as regards the validity of the contractual engagements entered into between the appellant company and the Crown upon which the appellant company's suit is based? It has never been doubted in this country that the doctrine of *ultra vires* applies to companies incorporated under the Ontario "Companies Act" and that it does so apply was not disputed by the appellant's counsel and indeed it is not arguable that the reasoning of Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1), by which His Lordship reached the conclusion that the doctrine governs companies formed under the "Companies Act," 1862, does not apply to the provisions of the Ontario "Companies Act." It results inevitably that the company had no capacity to enter into the contracts upon which the action is brought unless some additional capacity over and above that imparted to the company by the Ontario "Companies Act" has been acquired by it from some other source.

(1) L.R. 7 H.L. 653.

It does not appear to me to be necessary to consider for the purposes of this case whether the Yukon Council or the Dominion Parliament from which the Yukon Council derives its legislative capacity has the power constitutionally to legislate with regard to a company "incorporated" by a province "with provincial objects" in such a way as to change fundamentally its corporate nature and capacities. Our attention has not been called to anything in the Yukon law which properly construed can, in my opinion, be held to profess to authorize extra-territorial companies to carry on within the territory any business which such company would otherwise be disabled from carrying on by reason of restrictions upon its capacity laid down in its original constitution. The ordinance relating to the registration of extra-territorial companies cannot, I think, be held to contemplate any such enlargement of the corporate powers of companies taking advantage of its provisions.

This appears to be sufficient to dispose of the appeal. But an observation or two may be proper upon the contentions advanced on behalf of the appellant company.

First, it is argued that assuming it would be incompetent to a province exercising the powers conferred by section 92(11) to incorporate a company for objects other than "provincial objects" in the sense above mentioned still that clause does not necessarily subject companies effectively incorporated for "provincial objects" to the principle of *ultra vires* in such a way as to incapacitate such a company from entering into valid transactions having no relation to such "provincial objects."

The doctrine of *ultra vires* reposes upon statute

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(Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1) at p. 658; Lord Haldane in *Sinclair* v. *Brougham*(2), at pp. 414 and 417. See also an article by Sir Frederick Pollock, 27 Law Quarterly Review at p. 223); and not upon any theory as to the inherent nature of corporations. It is very doubtful if it applies to corporations created by letters patent in exercise of the prerogative (*Sutton's Hospital Case*(3); *British South Africa Co.* v. *De Beers Consolidated Mines*(4); *Riche* v. *Ashbury Railway Carriage and Iron Co.*(5), at p. 263; *Attorney-General* v. *Manchester Corporation*(6), at p. 651; *Baroness Wenlock* v. *River Dee Co.*(7), at p. 685; *Bateman* v. *Borough of Ashton under Lyne*(8)), and there can be no doubt that as regards companies created under section 92(11) a province can limit the operation of the doctrine provided that it does not legislate inconsistently with the limitations upon its authority imported by the terms of that clause.

I find, however, two (to me) insuperable objections to this contention as applied to the present controversy: (*a*) A company having capacity to enter into valid transactions having no relation to any "object" which can be described as "provincial" does not appear to me on the assumption above stated to be a "company with provincial objects" within the meaning of section 92(11), and (*b*) assuming a province to be competent to limit the application of the doctrine of *ultra vires* in the way supposed, still there remains the difficulty that if the "objects" of the appellant company

(1) L.R. 7 H.L. 653.
(2) [1914] A.C. 398.
(3) 10 Rep. 30*b*.
(4) [1910] 1 Ch. 354.
(5) L.R. 9 Ex. 224.
(6) [1906] 1 Ch. 643.
(7) 36 Ch. D. 674.
(8) 27 L.J. Ex. 458.

as stated in the letters patent are read as the carrying on of the business of mining as an *Ontario business* and not without restriction as to locality (as they must be read to bring the "objects" under the category "provincial") then since it is not disputed that the doctrine of *ultra vires* applies to companies incorporated under the Ontario "Companies Act" (and it is self-evident as I have said that Lord Cairns' reasoning in *Riche* v. *Ashbury Railway Carriage and Iron Co.*(1) applies to that Act) the appellant company must be held to possess only such powers and capacities as have relation to the "objects" so construed.

2nd. It is argued that "with provincial objects" does not define the class of companies in respect of which the legislative powers conferred upon the provinces by section 92(11) are exercisable. The construction put upon section 92(11) according to this contention is this: The clause is read as dealing with two subjects (*a*) the incorporation of companies, (*b*) the "rights" as distinguished from the corporate capacities with which the incorporating province may endow the company when incorporated. Such "rights" it is said, must fall within the designation "provincial objects," but that restriction has nothing whatever to do with corporate capacities which may include every capacity (excepting capacities that by section 91 (enumerated heads) can only be conferred by the Dominion) with which an incorporeal subject of rights and duties can be endowed. Any "object" according to this interpretation is "provincial" which can be carried out within the limits of the province provided at all events that it is not one committed by the "British North

(1) L.R. 9 Ex. 224.

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America Act" to the exclusive control of the Parliament of Canada. While in this view the province cannot invest the company with the right to carry out "objects" which are not "provincial" it can nevertheless endow the company with capacity to acquire rights and powers having no relation to such "objects" from any other competent legislative authority.

I have already indicated certain passages in the judgments of the Privy Council which appear to me to be incompatible with this construction and to which I think effect ought to be given in this court whether they strictly possess or do not possess the authority of decisions.

As may have been collected from what I have written above I think that fairly read the observations referred to mean, that the limitation expressed by "with provincial objects" has reference to the business or undertaking the company is capable under its constitution of carrying on, and the powers and capacities with which the company is for that purpose endowed, looked at as a whole; in other words, that by force of the phrase "with provincial objects" such a company is affected by a "constitutional limitation" which makes it incapable of pursuing "objects" not "provincial."

ANGLIN J.—Two questions are presented in this case:—

(*a*) Whether the appellant company, incorporated by the Province of Ontario to carry on mining operations without territorial limitation, has capacity to avail itself of the sanction of any competent authority outside Ontario to operate within its jurisdiction.

(*b*) Whether the appellant company was duly

sanctioned to acquire and operate mining properties in the Yukon Territory by authority competent to confer those rights.

On the first question, but for a misconception by the learned judge of the Exchequer Court of what I there stated — as inexplicable to me as it is unfortunate — I should merely refer to my views expressed in the *Companies' Case*(1), p. 452 *et seq.*, as a sufficient presentation of my reasons for an affirmative answer. But, if what I said in that case is so ambiguout that it is open to the interpretation put upon it by Mr. Justice Cassels, it would seem advisable that I should endeavour to re-state my opinion in unmistakable terms. The learned judge says:—

> As I read the judgment of Mr. Justice Anglin, I would infer from it that his view would also be that a company incorporated by a province for the purpose of mining would be confined in the exercise of its main functions to the province incorporating it. He does state that he finds "nothing in the language of clause 11 of section 92 of the "British North America Act," which compels us to hold that the ordinary mercantile, trading or manufacturing company, incorporated by a province to do business without territorial limitation is precluded from availing itself of the so-called comity of a foreign state, or of a province, which recognizes the existence of foreign corporations and permits their operations in its territory."
>
> From this it would appear that the learned judge is dealing with the case of ordinary mercantile trading and manufacturing companies. I would not infer from his reasons that his view would be that where the business of the company is that of a mining company, such a company would have the capacity to carry on its mining business, namely, that of mining in a foreign country.

"The ordinary mercantile, trading or manufacturing company" was referred to in the passage quoted from my opinion in contrast to bodies incorporated "for the establishment and maintenance of a hospital or the building of a railway," mentioned in the sen-

(1) 48 Can. S.C.R. 331.

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tence immediately preceding as examples of corporations the nature of whose objects implies territorial limitation, and because in the second part of the question then under consideration a company incorporated "for the purpose of buying and selling or grinding grain" was preferred as an example. The inference that a mining company was intended to be excluded from the class of provincial corporations entitled to avail themselves of international comity by the reference to an "ordinary mercantile, trading or manufacturing company" and to be placed rather within the class of which the hospital corporation and the railway company were given as examples, seems to me, with respect, to be scarcely warranted. But, without discussing further the question whether a mining company falls within the category covered by the description, a "mercantile, trading or manufacturing company," in order to remove any possibility of future misapprehension, I shall state explicitly that the nature of the objects of a mining company incorporated by a province does not, in my opinion, involve an implication that its operations are to be confined within the limits of the province, and that, if its letters patent, or incorporating statute impose no territorial limitation, it may avail itself of the comity of another state or province.

Mr. Justice Cassels, however, proceeds to deal further with my opinion in the *Companies' Case*(1). He says:—

> The second question submitted for the opinions of the court is as follows:—
>
> "Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92, article 11, of the

(1) 48 Can. S.C.R. 331.

'British North America Act,' 1867, power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose?"

The answer of Mr. Justice Anglin is as follows:—

"Yes — subject to the general law of the state or province in which it seeks to operate and to the limitations imposed by its own constitution — but not 'by virtue of (the powers conferred by its) provincial incorporation.'"

If this answer is taken by itself, I infer from it that the learned judge was of opinion that the capacity of the corporation was limited to the province in which the business was being carried on, as he limits his answer by the words "but not by virtue of (the powers conferred by its) provincial incorporation."

Why the learned judge should have taken this answer by itself and without reference to the reasons on which it was based can only be surmised. In the answer "taken by itself" I have sought in vain for anything which warrants reading the categorical answer, "Yes," as "No." The quoted words, "but not 'by virtue of (the powers conferred by its) provincial incorporation'," were taken from the second part of the question being answered. The allusion — sufficiently obvious, I thought — was to the passages in my opinion where I had discussed this question and stated the grounds on which I based my affirmative answer. For instance:—

If the operations or activities of any foreign corporation should depend for their validity upon the powers conferred on it by the law of the incorporating state, it would in my opinion be difficult to sustain them, inasmuch as "the law of no country can have effect as law beyond the territory of the Sovereign by whom it was imposed." But the exercise of its powers by a corporation extra-territorially depends not upon the legislative power of its country of origin, but upon the express or tacit sanction of the state or province in which such powers are exercised and the absence of any prohibition on the part of the legislature which created it against its taking advantage of international comity. All that a company incorporated without territorial restriction upon the exercise of its powers carries abroad is its entity or corporate existence in the state of its origin coupled with a quasi negative or passive capacity to accept the authorization

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of foreign states to enter into transactions and to exercise powers within their dominions similar to those which it is permitted to enter into and to exercise within its state of origin. Even its entity as a corporation is available to it in a foreign state only by virtue of the recognition of it by that state. It has no right whatever in a foreign state except such as that state confers.

* * * * *

The provincial company is a domestic company and exercises its powers as of right only within the territory of the province which creates it. Elsewhere in Canada, as abroad, it is a foreign company and it depends for the exercise of its charter powers upon the sanction accorded by the comity of the province in which it seeks to operate, which, although perhaps not the same thing as international comity, is closely akin to it.

* * * * *

When the "British North America Act" was passed the doctrine of comity in regard to foreign corporations was well established as a rule of international law universally accepted. It had been long acted upon in English courts and had received Parliamentary recognition. Modern law acknowledges this capacity of every corporation, not expressly or impliedly forbidden by its state of origin to avail itself of privileges accorded by international comity, as something so inherent in the very idea of incorporation that we would not, in my opinion, be justified, merely by reason of the presence in the clause expressing the provincial power of incorporation in such uncertain words as "with provincial objects," in ascribing to the Imperial Parliament the intention in passing the "British North America Act" of denying to provincial legislatures, otherwise clothed with such ample Sovereign powers, the right to endow their corporate creatures with it. *Bateman* v. *Service*(1), at page 391. The impotency which such a construction of the statute would, in many instances, entail upon provincial companies affords a strong argument against adopting it. Had Parliament intended in the case of the provincial power of incorporation to depart from the ordinary rule by confining the activities of every provincial corporation within the territorial limits of the province creating it, it seems to me highly improbable that the words "with provincial objects" would have been employed to effect that purpose. Some such words as "with power to operate only in the province" would have expressed the idea much more clearly and unmistakably. Inapt to impose territorial restriction the words "with provincial objects" may be given an effect, which seems more likely to have been intended and which satisfies them, by excluding from the provincial power of incorporation such companies as have objects distinctly Dominion in character either because they fall under some

(1) 6 App. Cas. 386.

one of the heads of legislative jurisdiction enumerated in section 91, or because, they "are unquestionably of Canadian interest and importance."

How the learned judge of the Exchequer Court, with these passages before him, reached the conclusion that the answer given by me to the second question propounded in the *Companies Case*(1) meant that in my opinion the capacity of a provincial corporation, without territorial limitation expressed in its charter or implied in the nature of its objects, "is limited to the province in which the business was being carried on" (*sic*), assuming that he meant "limited to the province which granted the incorporation," I am at a loss to understand. But to remove the possibility of further misunderstanding I shall again state explicitly that a provincial corporation, not territorially limited by its letters patent or Act of Incorporation, or by the nature of its objects, in my opinion has capacity, within the limitation of its constating instrument as to the character and extent of its undertaking, to avail itself of the comity of a foreign state or of another province.

The recent decision of the Judicial Committee in *John Deere Plow Co.* v. *Wharton*(2) was pressed upon us by counsel for the respondent. After a careful study of the judgment in that case I fail to find in it anything which conflicts with the views above expressed. All that was there decided is that a

province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation.

(1) 48 Can. S.C.R. 331. (2) [1915] A.C. 330.

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Certain provisions of the British Columbia "Companies Act" requiring the appellant, a Dominion company,

to be registerd in the province as a condition of exercising its powers or of suing in the courts,

were held to be "inoperative for these purposes."

The question, says the Lord Chancellor, is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

I may, perhaps, be pardoned if I quote from my opinion in the *Companies' Case*(1) the short passage dealing with this point (pp. 455-6) :—

The Dominion company, on the other hand, is a domestic company in all parts of Canada. It exercises its powers as of right in every province of the Dominion. While a Dominion company is, generally speaking, subject to the ordinary law of the province, such as the law of mortmain (*Citizens Ins. Co.* v. *Parsons* (2), at p. 117)—while it may be taxed by the province for purposes of provincial revenue (*Bank of Toronto* v. *Lambe*(3)), while it may be required to conform to reasonable provisions in regard to registration and licensing (*The Brewers' Case*(4)), a provincial legislature may not exclude it, or directly or indirectly prevent it from enjoying its corporate rights and exercising its powers within the province (*City of Toronto* v. *Bell Telephone Co.*(5); *Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(6)), as (subject perhaps in the case of alien corporations to the provisions of any general Dominion legislation dealing with them under clause 25 of section 91) it may do in the case of other corporations not its own creatures.

I am, for these reasons, of the opinion that question (*a*) should be answered in the affirmative.

(1) 48 Can. S.C.R. 331.
(2) 7 App Cas. 96.
(3) 12 App. Cas. 575.
(4) (1897) A.C. 231.
(5) (1905) A.C. 52.
(6) (1909) A.C. 194.

This case affords a striking illustration of the undesirability of having the judges of this court express opinions upon abstract questions. Although it has been authoritatively stated time and again, and most emphatically in the *Companies' Case* itself(1), at p. 589; *In re References*(2), at pp. 561, 588 and 592; (see also *In re Criminal Code*(3), that the opinions expressed in answer to such questions

> are only advisory and will have no more effect than the opinions of the law officers,

and that they

> do not affect the rights of the parties or the provincial decisions,

and are "not binding upon us," "or upon any of the judges of the provincial courts," the learned judge of the Exchequer Court has deemed it

> the proper course for (him) to pursue to give effect to the opinion of the learned judges in the Supreme Court. * * * I am not sure (he says) that technically I am bound by these reasons, but I have too much respect for the opinions of the Appellate Court not to follow their views no matter what my own opinion might be on the question,

and he carefully abstains from expressing any opinion of his own, determining the case, as he apparently thought (though erroneously), in conformity with the views expressed by a majority of the judges of this court in the *Companies' Case*(4). While wishing to refrain from an animadverting on the course adopted by the learned judge, I may perhaps venture the observation that if a superior court judge of his experience finds advisory opinions given by the judges of this court so embarrassing that, although "not sure that technically (he is) bound" by them he deems it his duty to follow them regardless of his own views, they

(1) [1912] A.C. 571.
(2) 43 Can. S.C.R. 536.
(3) 43 Can. S.C.R. 434.
(4) 48 Can. S.C.R. 331.

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are likely to prove even more embarrassing and productive of trouble and uncertainty in courts of inferior jurisdiction.

I would answer question (*b*) in the affirmative for the reasons given by Mr. Justice Duff.

Appeal dismissed with costs.

Solicitor for the appellants: *J. H. Moss.*

Solicitor for the respondent: *George F. Shepley.*

THE BOARD OF TRUSTEES OF REGINA PUBLIC SCHOOL DISTRICT NO. 4 OF SASKATCHEWAN (PLAINTIFF) ..... APPELLANT;

AND

THE BOARD OF TRUSTEES OF GRATTON SEPARATE SCHOOL DISTRICT NO. 13 OF SASKATCHEWAN (DEFENDANT) ..... RESPONDENT.

1914
*Oct. 15, 16.
1915
*Feb. 2.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Education—School boards—Assessment and taxation—Taxes payable by incorporated companies—Apportionment—Shares for public and separate school purposes—Notice—Construction of statute—Legislative jurisdiction—"B.N.A. Act, 1867," sec. 92—"Saskatchewan Act," 4 & 5 Edw. VII. c. 42, s. 17—"School Assessment Act," R.S. Sask., 1909, c 101, ss. 93, 93a.

Section 93 of the Saskatchewan "School Assessment Act," R.S. Sask., 1909, ch. 101, authorizes any incorporated company to give a notice requiring a portion of the school taxes payable by the company to be applied to the purposes of separate schools, and section 93*a*, as enacted by section 3 of chapter 36 of the Saskatchewan statues of 1912-1913, authorizes separate school boards themselves to give a notice to any company which fails to give the notice authorized by section 93 requiring that its taxes should be apportioned between the boards according to the assessments of public and separate school supporters in the district. A number of companies neglected to give the notice provided for and the separate school board gave them notices requiring a portion of their taxes to be applied for the purposes of that board. In these circumstances the public school board claimed the whole of the taxes payable by the companies in question and the separate school board claimed a portion of such taxes. On a special case, directed on the application of the municipal corporation, ques-

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

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tions were submitted for decision as follows: (*a*) Had the Saskatchewan Legislature jurisdiction to enact section 93*a* of the "School Assessment Act"; (*b*) if question (*a*) be answered in the negative, has the defendant (the separate school board) the right it claims to a portion of the said taxes; (*c*) if question (*a*) be answered in the affirmative, has the defendant the right it claims to a portion of the said taxes,?

Per Davies and Duff JJ. (expressing no opinion as to the constitutionality of the legislation), that the effect of the enactments in question was not to give the separate school board any portion of the taxes claimed by it. The Chief Justice and Anglin J. *contra*.

Per Idington J.—The enactment of section 93*a* was *ultra vires* of the Legislature of Saskatchewan. The Chief Justice and Anglin J. *contra*.

Per Fitzpatrick C.J. and Anglin J.—The Legislature of Saskatchewan had jurisdiction to enact section 93*a* of the "School Assessment Act," and the taxes payable by the companies in question should be apportioned between the public and the separate school boards in shares corresponding with the total assessed value of assessable property assessed to persons other than incorporated companies for public school purposes and the total assessed value of property assessed to persons other than incorporated companies for separate school purposes respectively.

Judgment appealed from (7 West. W.R. 7) reversed, the Chief Justice and Anglin J. dissenting.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), affirming the judgment of Brown J. (2), upon the special case submitted for decision.

In the year 1913 the Corporation of the City of Regina, Sask., collected school taxes from a number of companies whose property was assessed within the city and which had omitted to give notices as authorized by section 93 of the "School Assessment Act," R.S. Sask., 1909, ch. 101, requiring an apportionment of the taxes payable by such companies and a share thereof to be applied for the purposes of separate schools. The respondent gave notices to the said companies, under section 93*a* of the "School Assessment

(1) 7 West. W.R. 7. (2) 6 West. W.R. 1088.

Act," as enacted by the Saskatchewan statutes of 1912-1913, ch.36, sec. 3, that unless and until they had given notices as provided by said section 93 the school taxes payable by them would be divided between the public school district and said separate school district "in shares corresponding with the total assessed value of assessable property assessed to persons other than corporations for public school purposes and the total assessed value of the assessable property assessed to persons other than corporations for separate school purposes respectively." The form of the notice so given was that provided by said section 93*a* of the "School Assessment Act." In these circumstances the appellant, as plaintiff, claimed the whole of the said taxes and the respondent, defendant, also claimed a portion thereof for the purposes of their respective school districts. It was contended by the appellant that section 93*a* prejudicially affected the rights of certain classes of persons with respect to schools within the meaning of section 17 of the "Saskatchewan Act," (D.) 4 & 5 Edw. VII. ch. 42, that it was *ultra vires* of the Legislature of Saskatchewan, and that, in any case, upon its true interpretation, it did not entitle the respondent to any portion of the taxes which it claimed. The respondent contended that the section was *intra vires* of the legislature and, in the circumstances, gave it the right to a portion of the taxes in question. Thereupon the City of Regina sought relief, under Supreme Court Rule 566A, and obtained an order directing the issue to be tried by means of a special case submitted for decision by the court. The special case submitted was, as follows:—

"This is an action commenced by way of originat-

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ing summons issued by the City of Regina, in the Province of Saskatchewan, and Dominion of Canada, on the 12th day of November, 1913, for the purpose of determining the respective rights of the above plaintiff and defendant to certain school taxes collected by the said City of Regina.

"On the day appointed for attendance under said summons, namely, the 4th day of December, 1913, the Honourable Mr. Justice Lamont ordered that the question as to the rights of the plaintiff and defendant herein to the money in question be tried by means of a special case.

"Pursuant to the said order, the following case has been stated for the opinion of the court:—

"1. Gratton Separate School District Number 13 of Saskatchewan is a separate school district within the City of Regina existing under the 'School Act,' being chapter 100 of the Revised Statutes of Saskatchewan, 1909, and amendments thereto, and is a town district within the meaning of the 'School Assessment Act,' being chapter 101 of the Revised Statutes of Saskatchewan, 1909, and amendments thereto.

"2. Regina Public School District Number 4 of Saskatchewan is a public school district existing under said Act and amendments thereto, and is also a town district as aforesaid.

"3. The City of Regina is a municipal corporation existing under the 'City Act,' being chapter 84 of the Revised Statutes of Saskatchewan, 1909, and amendments thereto.

"4. Gratton Separate School is a Roman Catholic separate school established in the Regina Public School District Number 4 of Saskatchewan.

"5. The companies mentioned in schedule 'A' attached hereto are companies, the whole of the assessable property of which lying within the limits of the plaintiff school district was entered, rated and assessed upon the assessment roll of the City of Regina, for the plaintiff school district for the year 1913, and the taxes so assessed have been or are being collected as taxes payable for the plaintiff school district.

"6. Each of the companies mentioned in the said schedule 'A' has been duly served by the defendant with notice prescribed by section 93*a* of the 'School Assessment Act.'

"7. None of the companies mentioned in the said schedule 'A' has to this day given any notice to the secretary-treasurer of the City of Regina, or the secretary of either the plaintiff or defendant, requiring any of the real or personal property for which such company is liable to assessment, to be entered, rated or assessed for the purposes of the said separate school.

"8. None of the companies mentioned in the said schedule 'A' has been entered as a separate school supporter in the assessment roll of the said city in respect of any property, and no property of any of the said companies has been assessed in the name of the company for the purposes of the said separate school.

"9. The defendant school district claims that the school taxes payable by the said companies for the year 1913 should be divided between it and the plaintiff school district, as provided in section 93*a* of the 'School Assessment Act'; the plaintiff school district claims the whole of the taxes payable by said companies.

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"The questions for the opinion of the court are:—

"(*a*) Had the Saskatchewan Legislature jurisdiction to enact section 93*a* of the 'School Assessment Act,' being section 3, chapter 36 of the statutes of Saskatchewan, 1912-1913 ?

"(*b*) If question (*a*) be answered in the negative, has the defendant the right it claims to a portion of said taxes ?

"(*c*) If question (*a*) be answered in the affirmative, has the defendant the right it claims to a portion of the said taxes ?"

The special case was tried before His Lordship Mr. Justice Brown who, in his judgment, on 16th May, 1914, held that public school supporters were prejudicially affected by section 93*a*, but that, nevertheless, the enactment was *intra vires* and that the respondent was entitled to the portion of the taxes which it claimed. The plaintiff (now appellant) appealed to the Supreme Court *in banco* which, by the judgment now appealed from, affirmed the decision of Brown J.

Wallace Nesbitt K.C. and *Christopher C. Robinson* for the appellant.

H. Y. MacDonald K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—On this appeal we are asked to say if we agree with the answers given by the two provincial courts to the three questions formulated by the trial judge in the terms and under the circumstances so fully explained in the opinions of my brother judges that it is unnecessary for me to do more than refer to them.

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We are all, with the exception of Mr. Justice Idington, of opinion that the first question was properly answered in the affirmative.

To hold, as in the majority we do, that the Legislature of Saskatchewan was competent to enact section 3, chapter 36 of the statutes of Saskatchewan, 1912-13 (now known as section 93*a*) in amendment of section 93, chapter 30, of the ordinances of the North-West Territories passed in the year 1901, it is sufficient to refer to section 17 of the Saskatchewan Act, 4 & 5 Edw. VII. ch. 42 (Canada), which is in these terms:—

17. Section 93 of the "British North America Act, 1867," shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act under the terms of chapters 29 and 30 of the ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

(2) In the appropriation by the legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3) Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean as set out in the said chapters 29 and 30; and where the expression "at the union" is employed in the said paragraph 3 it shall be held to mean that date at which this Act comes into force.

In construing this constitutional enactment we are not only entitled, but bound, to consider the history of the subject-matter dealt with, and by the light derived from such source, to put ourselves as far as possible in the position of the legislature whose language we have to expound. *In re Branch Lines, Canadian Paci-*

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fic Railway(1), at pages 89-90; *In re Representation in the House of Commons*(2), at page 567; Halsbury, vol. 27, p. 141, sec. 260.

When this section 17 was under consideration in Parliament it was deemed necessary, because of the bitter controversy to which it gave rise, to fully explain the meaning of the language used and the part which it was intended it should play in the general economy of the constitution then being provided for the new province. It was pointed out that the subject of education is separately dealt with and has its own code in section 93 of the "British North America Act"; and that the powers of the original confederating provinces to make laws in relation to education are expressly limited by this section in several respects. (1) The right to denominational schools which any class of persons had by law in each province at the date of the Union must be preserved; (2) The powers, privileges and duties conferred in Upper Canada upon separate schools and school trustees of the Roman Catholics are extended to the dissentient schools of Protestants in Quebec; (3) Where in any province a system of separate or dissentient schools exists by law at the Union, or is *thereafter established,* an appeal shall lie to the Governor-in-Council from any act or decision of any provincial authority affecting any right or privilege of the minority.

If, therefore, section 93 of the "British North America Act" had been made applicable in its entirety to the new province, the effect would have been to preserve any right or privilege with respect to denominational schools (not merely separate) which any class of persons had by law in that part of the

(1) 36 Can. S.C.R. 42. (2) 33 Can. S.C.R. 475.

territory which was then being brought into the Union. If the words "in the province at the Union" meant the time at which the territory came into the Union as a province, the word "law" would have included the provisions of section 11 of the "North-West Territories Act" of 1875 and of chapters 29 and 30 of the ordinances of 1901.

To avoid the doubt and uncertainty which arose out of the "Manitoba Act" it was decided to adopt the section we are now considering, which limits the rights and privileges of the minority, Protestant or Catholic, in any school district to those secured to it by chapters 29 and 30 of the ordinances and excludes the rights and privileges guaranteed either by section 11 of the "North-West Territories Act," 1875, or by any other legislation in force in the territories with regard to any class of schools.

It is, therefore, necessary to examine the provisions of those ordinances to ascertain the nature and extent of the legislative control which the province has over education. Under chapters 29 and 30, the schools, whether public or separate, are the schools of all the ratepayers and they are in every respect on a basis of absolute equality. The Department of Education exercises the same control over all schools, and all the land in the province liable to assessment for municipal purposes is subject to assessment for school purpose. Provision is made for the taxation of land held jointly and for land held by companies.

Only three classes of schools are authorized: (*a*) Public (undenominational) schools; (*b*) Protestant separate; (*c*) Roman Catholic separate. And a separate school district can be established only in an exist-

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ing public school district. No rights or privileges exist by those ordinances with respect to separate schools as contrasted with public schools; except the initial right of affecting the separation, which right carries with it certain advantages with respect to text-books, and the election of trustees who choose the teacher; *this is a right common to all schools.* It was also said and insisted upon at the time that the intention of Parliament was to secure to all the schools, whether public or separate, their fair share in the appropriation and distribution of any moneys for the support of schools, which in practice they had always received and which was necessary to place them in a position to play their necessary part in the general scheme of national education, and this explains why sub-section 2 was made a part of section 17. The importance of that sub-section is so very obvious in the consideration of both the questions now submitted that it will not be necessary to make further reference to it.

To answer the first question in the negative it must, therefore, be found that some right or privilege with respect to separate schools which a class of persons had at the date of the passing of the "Saskatchewan Act" was or is prejudicially affected by section 93*a* now in question.

That section reads:—

> In the event of any company failing to give a notice as provided in section 93 hereof the board of trustees of the separate school district may give to the company a notice in writing in the following form or to the like effect, that is to say:—
>
> The Board of Trustees of separate school district No. of Saskatchewan hereby gives notice that unless and until your company gives a notice as provided by section 93 of the "School Assessment Act" the school taxes payable by your company in respect of assessable property lying within the limits of school district No. of

Saskatchewan * * * will be divided between the said public school district and the said separate school district in shares corresponding with the total assessed value of assessable property assessed to persons other than corporations for public school purposes and the total assessed value of assessable property assessed to persons other than corporation for separate school purposes respectively.

The undoubted intention of the legislature as expressed in that language is to provide, in accordance with the spirit and the letter of sub-section 2 of section 17, that the separate schools, whether Protestant or Catholic, are to share equitably in the distribution of the taxes levied upon public companies in the different school districts. And, assuming that to be the intention of the legislature, in what respect can it be said that a right or privilege with respect to separate schools which any person had at the date of the "Saskatchewan Act" is violated or prejudicially affected by the section? Who are the persons prejudiced? The right of separation, the right to religious teaching, the right to elect trustees are not in any way interfered with and what other right had any class of persons at the date of the passing of the "Saskatchewan Act" with respect to separate schools? The section, I repeat, makes provision for the equitable distribution of moneys levied for the support of schools and nothing more.

Mr. Nesbitt, on behalf of the appellant, hesitatingly, and, I thought, almost apologetically suggested that because under section 93 of the ordinance in force at the Union, the school taxes paid by those companies which failed to take advantage of, or to exercise the right to give notice, went to the support of the public schools, there resulted in favour of the supporters of those schools a negative right of which they were deprived by section 93*a*. This contention is so effec-

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tively disposed of by my brother Anglin that I hesitate to do more than refer to what he says. The supporter of the public school, which is merely the school of the majority, Protestant or Catholic, in a school district has no right or privilege with respect to the separate school, which is the school of the minority in the same district. The separate school supporters alone have special rights or claims in relation to the separate schools in districts in which they have exercised their right to separation. That is to say, the minority in a school district composes

> a class of persons which enjoy some special benefit, immunity or advantage with reference to separate schools

in that district above and apart from those rights enjoyed either at common law or under statutory enactment by the other inhabitants of the same district or of the province at large; and it is the rights of that minority which may not be prejudicially affected. The only right or privilege with respect to the payment of rates enjoyed by any class of persons is that of the minority, whether Protestant or Catholic, which has established a separate school. That minority is exempt from the obligation to pay any rates except those they impose upon themselves (see section 41, chapter 29, ordinance of 1901). A company which by the very nature of things differs from the individuals, whether Protestant or Catholic, of whom it is constituted has not and cannot have any rights with respect to education and nothing done in the distribution of the school taxes levied on its property can be held to be a prejudicial affection of its right with respect to separate schools. Further, can the contention that the benefit derived from the receipt of taxes collected on the property of a corporation, and which is

dependent on the omission by that corporation to exercise an option or faculty which, if exercised at any time, is sufficient to cause the benefit to inure to another, be described in the language of section 17 as a right or privilege with respect to separate schools? And finally, by what right can a public school supporter claim that all the taxes levied on public companies should go to the exclusive relief of his obligation to maintain the school of his choice?

Mr. Justice Lamont in the court below seems to me to accurately state the position when he says

> that the rights and privileges with which the legislature must not interfere are those of the minority in any school district, and nothing done in regard to that minority can in any way affect a public school supporter either in the same or in any other district.

That the latter's rates may be increased as a result of the legislation passed to provide for the equitable distribution of the money levied for school purposes as required by sub-section 2 of section 17 is possible, but that sub-section necessarily contemplates changes in the burden of taxation as the result of the changes in the distribution which it requires so as to prevent discrimination *"against schools of any class described in said chapter* 29."

I now come to the consideration of the second question.

As was said by their Lordships in the Judicial Committee of the Privy Council in *Brophy* v. *Attorney-General of Manitoba* (1) :—

> Whilst, however, it is necessary to resist any temptation to deviate from the sound rules of construction in the hope of more completely satisfying the intention of the legislature, it is quite legitimate where more than one construction of a statute is possible to select that one which will best carry out what appears from the gen-

(1) [1895] A.C. 202, 216.

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eral scope of the legislation and the surrounding circumstances to have been its intention.

Section 93, which 93*a* was intended to amend, may be said to be applicable, if not in express terms by implication, only to those companies which have Protestant and Catholic shareholders, because it provides that the share of a company's property which may be assessed in any school district for separate school purposes shall bear the same ratio and proportion to the whole property of the company assessable within the municipality or school district *as the amount or proportion of the shares or stock of the company held and possessed by persons who are Roman Catholics or Protestants bears to the whole amount of such shares or stock of the company.* But the amending section contains no such provision. That section (93*a*) is applicable in terms to all companies which fail to give the notice provided for in section 93. The language used is —

> In the event of *any* company failing to give *a* notice as provided in section 93.

Mr. Justice Newlands in the court below and the majority here interpret that section so as to make it applicable exclusively to such companies as may give the notice required by section 93. I think that, reasonably construed, the language is broad enough to comprise *all* the public companies which have failed to give *the* notice required by section 93. That seems to be a fair construction of the language used and has this additional advantage that it gives full effect to the evident intention of the legislature which was

> to divide the taxes collected from all companies who do not take advantage of section 93 between the public and separate schools in each district in shares corresponding with the total assessed value of the assessable property assessed to persons other than corporations for

public school purposes and the total assessed value of the assessable property assessed to persons other than corporations for separate school purposes respectively.

All ratepayers, Protestant or Catholic, in each district contribute to the prosperity of those companies in proportion to their numbers, and why should they not all share in the distribution of the taxes levied on their property for school purposes? If the language used may be construed so as to produce that result, why should we be astute to give it another meaning which is not consistent either with common justice or the spirit and letter of the constitutional Act, subsection 2, section 17.

If, as Mr. Justice Lamont says, the legislature had intended that 93(*a*) should apply only to such companies as had shareholders of the religious faith of the separate school, one would have expected provision would have been made by which it could be ascertained what companies had and what companies had not shareholders belonging to such religious faith. No such provision is found. Without such provision section 93(*a*), limited to certain companies only, would provide no remedy and would be useless.

The very general language used in the section should be construed so as to give effect to what appears in the general scope of the legislation in the surrounding circumstances to have been the intention of the legislature.

For these reasons I would dismiss this appeal and answer the questions as they were answered below.

DAVIES J.—This was a special case agreed to by the parties to the action for the purpose of determining the respective rights of the public schools and separate schools to certain school taxes collected from companies by the City of Regina in the Province of Saskatchewan.

The questions submitted were whether the Sas-

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katchewan Legislature had power to enact section 93*a* of the "School Assessment Act," and if so whether the Gratton Separate School Trustees had the right they claimed to a portion of the school taxes in dispute.

The provincial courts answered the questions in the affirmative, Newlands J. dissenting from the answer affirming the Separate School Trustees' right to claim a portion of the taxes.

With respect to the constitutional question as to the jurisdiction of the Legislature of the province to enact the section in question, 93*a*, the conclusion I have reached upon its proper construction relieves me from discussing or answering the question of the legislature's jurisdiction.

That conclusion is in accordance with that stated in his dissenting opinion by Mr. Justice Newlands of the Supreme Court of Saskatchewan, sitting *en banc*, to the effect that the section 93*a* does not give the Board of trustees of Gratton Separate School District, the defendant respondent in this appeal, the right they claim to a portion of the taxes payable by the companies mentioned in Schedule "A" attached to the special case.

It being, therefore, unnecessary to answer the constitutional questions asked, I follow the opinion and advice of the Judicial Committee in the recent judgment delivered by them in the appeal of *The John Deere Plow Company* v. *Wharton*(1), and refrain from expressing any opinion. The Lord Chancellor, in delivering the judgment of their Lordships, said, at pages 338-9:—

> The structure of sections 91 and 92 and the degree to which the connotation of the expressions used overlaps render it, in their Lord-

(1) [1915] A.C. 330.

ships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances, the whole of which are before the tribunal, that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens' Insurance Company* v. *Parsons* (1), to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

This extract is, of course, applicable to the Saskatchewan "Constitutional Act," the provisions of which we are asked to construe by the special case.

Turning then to the amending section 93*a* under review, I agree with the construction Mr. Justice Newlands places upon it. We must bear in mind that under the law as it stood when first passed in the North-West Territories ordinances, and as enacted and continued by the Saskatchewan Legislature up to the passing of the amendment 93*a* in 1913, a company which had no shareholders of the religious faith of the separate school was neither required to give nor could give the notice specified in section 93.

Section 93 of the "School Assessment Act," and section 93*a*, which was passed either in amendment or by way of supplement to section 93 must be read and construed together.

Section 93 is a *permissive* section merely authorizing a company by notice in that behalf to require certain specially designated parts of its property to be assessed for the purposes of the separate school and not for public school purposes

(1) 7 App. Cas. 96, at p. 109.

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with the proviso that the share to be assessed for separate school purposes should bear the same proportion to the whole property of the company assessable within the school district as the proportion of the shares of the company held by Protestants or Roman Catholics respectively bore to the whole amount of the shares of the company.

Section 93*a* may have been drafted with the intention in the draftsman's mind of compelling all companies to give such notice. It provided that in the event of any company failing to do so an arbitrary division should be made of assessable school taxes payable by the company between the separate and the public schools, which division did not have any reference to the proportion of shares held in the company by Protestants or Roman Catholics.

Now it is manifest that a company desirous of exercising the permission given by section 93 must before exercising it have ascertained with certainty the religious persuasions or beliefs or connections of its various shareholders. In no other way could the statutory division the company was authorized to require of its assessable taxes be made and the grossest injustice might be done to one or other of the respective schools, public or separate, if in the absence of such knowledge any company should attempt to exercise its privilege.

And so after section 93*a* was passed its language, "any company failing to give a notice as provided in section 93," must have reference to such companies only as possessed the knowledge necessary to enable them to give the notice requiring the proportional division of their taxes and yet failed to give it. It

could not have reference to companies in which none of the shareholders were of the "same religious faith" as that of the separate school seeking the division of the taxes.

In the case before us we have no evidence whatever of the religious faith or religious connections of any of the shareholders of the different companies mentioned in Schedule "A" of the case.

Mr. MacDonald, who argued the case of the defendant separate school so ably, submitted that such knowledge was not necessary, because the section 93*a* applied to all companies that had not given the notice the section provided for quite irrespective of their power to give the notice from want of knowledge of the religious faith or connections of its shareholders.

As already pointed out by me I cannot accept such a construction, the effect of which would undoubtedly be to defeat the manifest purpose and object of section 93, and probably in many cases create gross injustice.

It never was nor could have been intended that companies not coming within section 93 at all and not having the knowledge requisite to give the notice should have their taxes diverted from the public school to the separate school as a penalty for not giving a notice they could not legally give. The amending section 93*a* is somewhat crudely drawn, but I do not entertain any doubt of its real meaning and intent.

In my judgment, therefore, the amendment does not apply to companies in which there are no shareholders of the religious faith of the separate school seeking a share of the taxes collected and I would answer the questions by saying that, apart altogether from the legislature's jurisdiction to enact section 93*a*,

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upon which I express no opinion, that section does not give the defendant the right it claims to a portion of the school taxes in dispute.

The appeal should be allowed with costs.

IDINGTON J.—The question raised by this appeal is whether or not section 17 of the "Saskatchewan Act" fixed the boundaries of the rights of separate schools in relation to taxes which such corporations as respondent may claim. The question has arisen between appellant and respondent representing the respective interests of public school and separate school supporters in that regard.

Said section 17 no doubt was designed to render impossible such inequitable legislation by the legislature of the new province as would enable one religious body or set of religious bodies to make, as it were, reprisals from each other. If the judgments in the courts below are right then the attempt has been an absolute failure, for it is frankly admitted by the learned trial judge, and indeed can hardly be seriously denied, that the operation of section 93*a* now in question will prejudicially affect every public school district and every public school supporter where a separate school district exists. I may add thereto that just to the extent the public school supporter is prejudicially affected the separate school supporter will be beneficially affected.

In creating the Province of Saskatchewan, and giving it the power enjoyed by other provinces, under section 93 of the "British North America Act," paragraph (1) of said section was substituted by the following:—

(1) Nothing in any such law shall prejudicially affect any right

or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act under the terms of chapters 29 and 30 of the ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

(2) In the appropriation by the legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3) Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and were the expression "at the Union" is employed in the said paragraph (3) it shall be held to mean the date at which this Act comes into force.

It is important to observe that by its very terms this substitution gives rise to a number of considerations different from those which were touched upon in a number of cases which depended upon the "Manitoba Act." That Act simply adopted the very language of section 93 of the "British North America Act," so far as the same could be applicable to a single province. This substitution introduces, in its every part, something which easily differentiates not only each such part, but the group of three parts as a whole, from not only the "Manitoba Act," but also from the prototype of both.

True, the language of the first two lines is identical with the original, and that has been construed as governing the whole. Why was any more added if that sufficed? Why adopt a change if these lines embodied all that was desired and expressed all hoped to be affected thereby? What purposes were the significant words

or with respect to religious instructions in any public or separate school as provided for in said ordinances,

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intended to subserve? Is it not clear that there was something for which the section was intended to operate relatively to public schools as well as separate schools? Why blend the two subject-matters in one sub-section if the first half of a short sentence was to be treated as confined to one subject, one point of view relative thereto, and the phrase, "any class of persons" which is wide enough to cover any class outside or inside those of the class supporting a separate school, be restricted in its meaning so as to cover only the latter in the first part, but both in the latter part?

The trouble is that these lines forming only the first part of a sentence and section in the Act to be construed herein constituted nearly the whole of a section in the "Manitoba Act" which gave rise to much litigation and strife which has left a mark on men's minds and that operates now as if the two sections were identical.

If that part of this sub-section had been presented in its present setting for the first time and due consideration given that which is demanded by what follows and is implied in chapters 29 and 30 of the ordinances of the North-West Territories passed in the year 1901, I venture to think no one would have thought of making anything but the said ordinances the key-note or dominating factor in the interpretation of the whole section. Such, I submit, they clearly were intended by their incorporation therewith to become. So read and interpreted thus these two lines thereof can and will be given another meaning than the narrow one which has been suggested.

I, therefore, turn to said ordinances to see how the terms of them delimit or bound the rights of the war-

ring factions. For the taxing purposes involved in this case, which is all that can concern us, let us look at the terms of said chapter 29, section 45 thereof, which first provides for the rights and liabilities of separate school districts and then provides by sub-section 2 thereof, as follows:—

(2) Any person who is legally assessed or assessable for a public school shall not be liable to assessment for any separate school established therein.

Yet this which is thus expressly forbidden to be done is what section 93*a* specifically enacts shall be done; in an indirect manner it is true but none the less effectually done.

Then we have provision made by sub-section 2 above quoted, which specifically forbids, in the distribution of legislative grants, discrimination against schools of any class described by chapter 29, thereby shewing the intention of the legislature in dealing with the subject.

Again, in sub-section 3 above quoted we have the words "by law" in sub-section 3 of the "British North America Act" declared to mean the law as set out in said chapters 29 and 30. Can there be a doubt, when we have regard to all these provisions and the considerations suggested thereby, that said chapters 29 and 30 were designed within said section 17 to permanently fix the boundaries of the rights of the separate schools and their supporters and the relations between them and the public schools and their supporters ?

If so then let us again read the lines

nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have,

upon which stress is laid, and see if the phrases "with

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respect to" and "any class of persons" must necessarily mean, and have relation to only those who are separate school supporters.

I submit the literal meaning of the words used does not imperatively require such interpretation and may, taken in connection with the rest of the subsection and the section as a whole be read as appellant suggests. That protects both classes and insures them and each of them against an invasion of that which was guaranteed by chapters 29 and 30, which was the final result of nearly thirty years of experience and development in relation to a difficult problem.

Moreover, we have in said chapter 30, sections 9 and 93, which expressly deal with the problem of corporate companies (the former in relation to such in rural districts and the latter in villages and town districts) and enable any such company in a separate school district to give notice of its desire to have the whole or part of its property assessed for separate school purposes and not for public school purposes, but in each case:—

> Provided always that the share or portion of the property of any company entered, rated or assessed in any municipality or in any school district for separate school purposes under the provisions of this section shall bear the same ratio and proportion to the whole property of the company assessable within the municipality or school district as the amount or proportion of the shares or stock of the company so far as the same are paid or partly paid up, held and possessed by persons who are Protestants or Roman Catholics as the case may be bears to the whole amount of such paid or partly paid-up shares or stock of the company.

What does this mean if not an express prohibition against any greater part thereof than indicated being made applicable to separate school support?

Such was the state of the law when the province was created and such limitation of the proportionate

share of any corporate company's taxes, however reached, it was evidently designed to perpetuate. It seems companies did not respond to the invitation to allot a proportion of their assessments to separate school support and hence the enactment of 93*a* now in question.

I can, in light of said section 93, conceive of legislation being asked for, as against local shareholders in such companies to make those who might be presumed to be supporters of separate schools assessable therefore, in respect of their shares, in ways I need not enter upon, and the company being given credit for that in its public school rating.

Without passing any opinion on that and only by way of illustration as something possibly arguable within the purposes of the chapters 29 and 30 incorporated into the "Saskatchewan Act," I submit that in said section 93 thereof there may be found a field within which the legislature might properly operate. Indeed, I assume it was something of that kind that the legislature had in view.

But I cannot see how an adhesion to the lines laid down in said ordinances can permit of such drastic legislation as that contained in section 93*a*.

I think it *ultra vires* the legislature and that the appeal should be allowed. I see no half-way house such as question (*b*) seems to suggest may exist within said sections 93 and 93*a* so far as parts of the assessments are concerned. The first two questions should be answered in the negative and doing so renders it unnecessary to answer the third.

The appeal should be allowed with costs throughout.

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DUFF J.—I agree with Mr. Justice Davies. For the reason given by him I confine myself to passing upon the point raised by question (*c*) as to the construction of the statute.

The sections to be construed (secs. 93 & 93*a*, as the Act now stands,) are as follows:—

93. A company may by notice in that behalf, to be given to the secretary-treasurer of any municipality wherein a separate school district is either wholly or in part situated and to the secretary of the board of any public school district in which a separate school had been established and to the secretary of the board of such separate school district require any part of the real property of which such company is either the owner and occupant or not being such owner is the tenant or occupant or in actual possession of and any part of the personal property if any of such company liable to assessment to be entered, rated and assessed for the purposes of said separate school and the proper assessor shall thereupon enter said company as a separate school supporter in the assessment roll in respect of the property specially designated in that behalf in or by said notice and so much of the property as shall be so designated shall be assessed accordingly in the name of the company for the purposes of the separate school and not for public school purposes but all other property of the company shall be separately entered and assessed in the name of the company as for public school purposes:—

Provided always that the share or portion of the property of any company entered, rated or assessed in any municipality or in any school district for separate school purposes under the provisions of this section shall bear the same ratio and proportion to the whole property of the company assessable within the municipality or school district as the amount or proportion of the shares or stock of the company so far as the same are paid or partly paid up, held and possessed by persons who are Protestants or Roman Catholics, as the case may be bears to the whole amount of such paid or partly paid up shares or stock of the company.

(2) Any such notice given in pursuance of a resolution in that behalf of the directors of the company shall for all purposes be deemed to be sufficient and every such notice so given shall be taken as continuing and in force and to be acted upon unless and until the same is withdrawn, varied or cancelled by any notice subsequently given pursuant to any resolution of the company or of its directors.

(3) Every such notice so given to such secretary-treasurer shall remain with and be kept by him on file in his office, and shall at all

convenient hours be open to inspection and examination by any person entitled to examine or inspect the assessment roll, and the assessor shall in each year before the completion and return of the assessment roll search for and examine all notices which may be on file in the clerk's office, and shall thereupon in respect of said notices if any follow and conform thereto and to the provisions of this Ordinance in that behalf.

(4) False statements made in any such notice shall not relieve the company from rates. Any company fraudulently giving such notice or making false statements therein shall be liable to a penalty not exceeding $100. Any person giving for a company such a statement fraudulently or wilfully inserting in any such notice a false statement shall be guilty of an offence and liable on summary conviction to a like penalty. (1901, chap. 30, sec. 93.)

93*a*. In the event of any company failing to give a notice as provided in section 93 hereof the board of trustees of the separate school district may give to the company a notice in writing in the following form, or to the like effect, that is to say:—

> The board of trustees of separate school district No. of Saskatchewan hereby give notice that unless and until your company gives a notice as provided by section 93 of the "School Assessment Act," the school taxes payable by your company in respect of assessable property lying within the limits of the school district No. of Saskatchewan (naming the public school district in relation to which the separate school is established) will be divided between the said public school district and the said separate school district in shares corresponding with the total assessed value of assessable property assessed to persons other than corporations for public school purposes and the total assessed value of the assessable property assessed to persons other than corporations for separate school purposes respectively.

This notice is given in pursuance of section 93*a* of the "School Assessment Act" as amended.

(2) Unless and until any company to which notice has been given as aforesaid gives a notice as provided in section 93 hereof the whole of the assessable property of such company lying within the limits of the public school district shall be entered, rated and assessed upon the assessment roll for the public school district and all taxes so assessed shall be collected as taxes payable for the said public school district and when so collected such taxes shall be divided between the said public school district and the said separate school district in the proportions and manner and according to the provisions set out in the notice in the next preceding subsection mentioned.

(3) Service of a notice under the foregoing provisions upon a company may be effected by serving the same upon any officer or

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agent of the company upon whom service of a writ of summons issued out of the Supreme Court for Saskatchewan may be lawfully served for the company. (Sask., 1912-1913, chap. 36, sec. 3.)

The notice authorized by 93*a* is to be given only in the event of "any company failing to give a notice as provided by section 93." And the consequences provided for by 93*a*(2) arise only in the absence of "a notice as provided in section 93." I think the notice "provided in section 93" or "provided by section 93" means a notice of the character contemplated by section 93 before the passing of the amendment of 1912-13, now section 93*a*. It seems plain that section 93 only contemplated the giving of notice where some part of the real property of the company within the separate school district would properly be "entered, rated and assessed" for the purposes of the separate school in accordance with the rule laid down in the proviso to that section. I think that follows from the language in which that section is expressed.

There is, it appears to me, little or no weight in the suggestion that in this view no provision is made for the case in which all the shareholders should be separate school supporters. The answer seems to be that "any part" as used here extends to every part. It is a very different thing to read "any part" in this context as meaning none.

Question (*c*) should be answered in the negative.

Since writing my judgment as above, which was filed 2nd February, my attention has been directed to the second and third paragraphs of the judgment of the Chief Justice filed some weeks later and published in the *Western Weekly Reports* of March 26th. The effect of those paragraphs is that all the members of the Court taking part in the hearing of the appeal ex-

cept Mr. Justice Idington concur in the answer given by the Court below in the affirmative to the first question, that is to say, that the Legislature of Saskatchewan had jurisdiction to enact section 93*a*.

In view of this statement I think it necessary to re-state in explicit terms what is stated by reference to the judgment of Mr. Justice Davies' in the first paragraph of this judgment.

Having reached a clear opinion that on the proper construction of section 93*a* the respondents must fail, I consider it undesirable to express any opinion on the first question—the question relating to the jurisdiction of the legislature to enact that section; or upon any of the thorny questions as to the meaning of section 17 of the "Saskatchewan Act" which may in a proper case require decision. This course is incumbent upon me, as explained by Mr. Justice Davies, by reason of a sound and settled rule that questions as to the limits of legislative powers should not be passed upon when the decision of the cause does not require it—a rule whose observance is especially important in cases such as this.

This is all put very plainly in the judgment of Mr. Justice Davies in which, as stated in the first paragraph hereof, I concur. In the circumstances, however, some expansion of that paragraph seemed desirable to prevent misapprehension; and I should perhaps add that not only have I expressed no opinion upon the first question — I have formed none.

ANGLIN J. (dissenting).—On this appeal we are asked to review the judgment of the Supreme Court of Saskatchewan *en banc* affirming the judgment of

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Brown J. on a special case. The questions submitted in the special case are as follows:—

(*a*) Had the Saskatchewan Legislature jurisdiction to enact section 93*a* of the "School Assessment Act," being section 3, chapter 36, of the statutes of Saskatchewan, 1912-1913 ?

(*b*) If question (*a*) be answered in the negative, have the defendants the right they claim to a portion of said taxes ?

(*c*) If question (*a*) be answered in the affirmative, have the defendants the right they claim to a portion of the said taxes ?

The provincial courts have answered questions (*a*) and (*c*) in the affirmative.

I am unable to accept Mr. MacDonald's ingenious contention that prior to the enactment of section 93*a* the public schools had not a legal right to the school taxes of companies which did not give the notice provided for by section 93 of the "School Assessment Act." Taking into account all the relevant provisions of chapters 29 and 30 of the North-West Territories Ordinances, 1901, I am satisfied that such taxes were payable to the public schools. The terms of section 93 of chapter 30 in themselves make this reasonably certain. So construed they harmonize with section 41 of chapter 29. To make it clear that this is the correct view of these provisions it is only necessary to remember that until and unless a separate school is established under section 41 of chapter 29, the right of the public school to all the school taxes of the school district, including those of all companies (chapter 30, section 90), is incontestible. It is only upon the establishment of the separate school that this absolute right ceases and then to the extent to which the statute modifies or curtails it — but no further.

I assume, therefore, that the effect of section 93*a*, where acted upon, is to deprive the public schools of the benefit of a portion of the taxes of companies that

do not give notice under section 93, which they theretofore enjoyed. But I am not on that account prepared to hold section 93*a* to be *ultra vires*. Before it can be so held it must be found to be within the prohibition of section 17 of the "Saskatchewan Act" (4 & 5 Edw. VII. (D.), ch. 42), which declares section 93 of the "British North America Act" applicable to Saskatchewan, substituting, however, a new paragraph for paragraph (1) of that section. With this alteration section 93 of the "British North America Act" as applicable to Saskatchewan reads in part as follows:—

In and for the Province of Saskatchewan the legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the ordinances of the North-West Territories passed in the year 1901 or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

In order to ascertain what are the rights and privileges of any class of persons with respect to separate schools which the legislature may not prejudicially affect, we must examine chapters 29 and 30 of the North-West Territories Ordinances, 1901. Sections 41-45 of chapter 29 provide for the establishment of separate schools, the taxation of their supporters for the purposes of such schools, and their exemption from other school rates, and the exemption of persons legally assessed, or assessable as public school supporters from separate school rates. Under section 92 of chapter 30 separate schools in towns and villages are entitled to the benefit of a proportion of the taxes levied upon property held by joint tenants and ten-

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ants in common, of whom one is a separate school supporter; and section 93 makes a similar provision in regard to companies which give the notice for which it provides. These are the only provisions of chapters 29 and 30 which confer on any class of persons any rights or privileges with regard to separate schools. Certain other sections deal with religious instruction in all schools whether public or separate.

The right to establish separate schools is given only to the minority — Protestant or Roman Catholic — in the district (chapter 29, section 41). The persons qualified to vote must be "Protestant or Roman Catholic" (section 43); in cases of joint tenancy or tenancy in common, where there is a separate school, the holders, "Protestant or Roman Catholic," are to be assessed in proportion to their interests (chapter 30, section 92); in the case of a company giving the requisite notice, a proportion of its property specified equal to the proportion of the stock held by "Protestants or Roman Catholics, as the case may be," is to be taxed for separate school purposes. All these provisions make it clear that for the purposes of separate schools the community in each school district was regarded as divided into two classes — one, the majority, the other, the minority — one Roman Catholic, the other Protestant, the latter comprising all non-Roman Catholics. The legislature did not recognize any "class of persons" comprised in the majority in the district as requiring or entitled to separate school rights or privileges. Upon whichever of these two classes should happen to be in the minority in a school district the legislature conferred the right of establishing a separate school with the incidental privileges

for which the statute provided. The majority did not require and were not given any right or privilege with respect to separate schools. Their school was the public school. They were not a class of persons whom it was deemed necessary to protect. I agree with Brown J., that sub-section 1 of section 93 of the "British North America Act" as it applies to Saskatchewan

> is separate school protective legislation, affording protection for, but not protection against separate schools,

and that its object is the same as that of the similar provision applicable to Manitoba, namely, "to afford protection to denominational (separate) schools." *Brophy* v. *Attorney-General of Manitoba* (1). As put by Lamont J.:—

> The power of the legislature, therefore, is absolute in dealing with education unless its legislation prejudicially affects the minority, whether Protestant or Catholic, in any school district.

I am unable to appreciate the negative right in regard to separate schools which Mr. Nesbitt contends the majority possessed under the North-West Territories Ordinances, 1901. If they received the entire taxes of certain companies merely because such companies omitted to give a notice under section 93, that was not a right or privilege; if it was, it was not a right or privilege with regard to separate schools; and the majority did not possess it as a class of persons having such right or privilege within the meaning of paragraph (1) of section 93 of the "British North America Act."

I would, for these reasons, affirm the answer given to question (*a*).

On the second branch of the case, I agree in the

(1) [1895] A.C. 202, at p. 215.

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opinions expressed by Brown J. and Lamont J. as to the proper construction of section 93 (*a*). No doubt "failing" was not the word most apt to express the intention of the legislature. It primarily suggests the idea of neglect or omission to discharge a duty or obligation. Section 93 did not impose an obligation on any company to give the notice for which it provides. On the other hand, there is nothing in that section which precludes a company which has no shareholders of the religious faith of the minority from giving a notice that it requires all its property to be assessed for public school purposes, although such a notice may be supererogatory. I agree with Mr. MacDonald that the proviso to section 93 relates solely to the duty of the assessor and does not limit the application of the first member of the earlier paragraph of the section to companies having shareholders of the religious faith of the minority, Protestant or Catholic. The provision for notice — permissive as it is — is applicable to all companies, whatever the religious complexion of the shareholders. The presence of the word "failing," therefore, affords no reason for excluding any company from the operation of section 93*a*.

But on broader grounds I am of the opinion that section 93*a* must be regarded as applicable to all companies. Equality of treatment and equal rights and privileges for public and separate schools would appear to be the spirit of the school legislation of Saskatchewan. Under section 93 separate schools could receive no share of the taxes of any company which omitted to give the prescribed notice, although all, or the majority of, its shareholders should be of the religious faith of the minority. As is pointed out by

Brown and Lamont JJ., comparatively few companies would give the notice. Thus a considerable portion of the school taxation to which they would be entitled on a basis of equality of treatment was lost to the separate schools. The provincial judges, familiar, no doubt, with the circumstances which impelled the legislature to enact section 93*a* [*Lyde* v. *Barnard* (1)] are of the opinion that its purpose was to remove this inequality. That seems reasonably obvious from the purview of the section itself and was not seriously contested at bar. Reserving to every company full power by giving a simple notice to ensure that its taxes shall be divided in proportion to the distribution of its shares amongst Protestants and Roman Catholics, sec. 93*a* provides that in the absence of such a notice (but only when the company has been duly called upon to give it) the taxes on its property shall be divided between the public school and the separate school in the proportion which the assessed value of the property of the ratepayers supporting the public school bears to the assessed value of the property of the ratepayers supporting the separate school. Having regard to the purpose of the legislature in enacting this measure, giving to it the construction best calculated to suppress the mischief and advance the remedy, I entertain no doubt that section 93*a* should be deemed applicable to all companies and that the words "failing to give" should be read as meaning "not giving," an interpretation of which they are readily susceptible. *Caledonian Railway Co.* v. *North British Railway Co.*

(1) 1 M. & W. 101, at p. 103.

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(1). Only "absolute intractability of the language used" can justify a construction which defeats what is clearly the main object of a statute. *Salmon* v. *Duncombe*(2).

It is a familiar rule of construction that, although the court are *primâ facie* bound to read the words of an Act according to their ordinary meaning in the language, if there are other circumstances which shew that the words must have been used by the legislature in a sense larger than their ordinary meaning, the court is bound to read them in that sense. *Barlow* v. *Ross*(3).

Thus the omission of an act which ought to be done has often been held to be within the purview of a statute requiring notice of action for anything "done" under it. *Wilson* v. *Mayor and Corporation of Halifax*(4); *Poulsum* v. *Thirst*(5); *Holland* v. *Northwich Highway Board*(6); *Canadian Northern Railway Co.* v. *Robinson*(7). See, too, *Harman* v. *Ainslie*(8). It would be contrary to sound construction to permit the use of a term not altogether apt to defeat the intention of the legislature, which must not be assumed to have foreseen every result that may accrue from the use of a particular word. *Nairn* v. *University of St. Andrews*(9).

Since the fact that no duty or obligation is imposed by section 93 on any company precludes our treating the word "failing" as used in section 93*a* in what is perhaps its primary sense, viz., neglecting or omitting to discharge an obligation, I see no reason why we should not give to it a secondary meaning with which it is frequently employed, especially when by doing

(1) 6 App. Cas. 114, at p.122.
(2) 11 App. Cas. 627, at p. 634.
(3) 24 Q.B.D. 381, at p. 389
(4) L.R. 3 Ex. 114.
(5) L.R. 2 C.P. 449.
(6) 34 L.T. 137.
(7) 43 Can. S.C.R. 387.
(8) 73 L.J.K.B. 539.
(9) [1909] A.C. 147, at p. 161.

so we can effectuate the apparent purpose of the legislature.

I would, for these reasons, also affirm the answer to question (*c*).

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Barr, Sampson, Stewart & Johnston.*

Solicitors for the respondent: *Mackenzie, Brown, Macdonald & Bastedo.*

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*Nov. 19, 20.
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*Feb. 2.

WILLIAM HUGHES AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

THE NORTHERN ELECTRIC AND MANUFACTURING COMPANY AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

Company law—Powers of company—Sale of shares—Mortgage by company—Subsequent creditor—Status.

Three directors owned all the stock of a mining company to which they had advanced $43,000 for expenses of operating. Two of them were at variance with the third as to the mode of operating and all refused further advances. The company having no other means of procuring money, it was agreed that the two directors should sell their stock to the third for $60,000 secured by mortgage on the company's property, the debt of $43,000 to be discharged and the purchasing director to advance funds for operating and until the first payment had been made on the mortgage no such advances should be a charge on the company's property. Payments were made on the mortgage which afterwards fell into arrears and on action by the mortgagees an order was made for sale and delivery "up of possession." More than a year after the mortgage was made the mining company incurred a debt to the respondent company which brought action for the amount and for a declaration that the mortgage was *ultra vires* of the company and that the judgment in the mortgage action was void. The action was dismissed at the trial. The Appellate Division held the mortgage void but only as to the excess over the indebtedness of the company at the time it was made.

Held, reversing the judgment appealed from (31 Ont. L.R. 221) and restoring that of the trial judge, Fitzpatrick C.J. and Idington J. dissenting, that the mortgage was valid; that though the expressed consideration was the price of shares sold by one holder

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

to another the real consideration was the discharge of the company's existing indebtedness and securing of financial aid for the future.

Per Davies, Duff and Brodeur JJ.—The judgment in the foreclosure action was a conclusive answer to the attack on the mortgage by the company. *The Great North-Western Railway Co.* v. *Charlebois* ((1899) A.C. 114,) distinguished.

Also *per* Davies, Duff and Brodeur JJ.—The trial judge having in effect decided that he had jurisdiction to pass upon the validity of the mortgage, that decision was binding on all parties until reversed in appeal, and, having regard to what occurred at the trial, the decision on the point of jurisdiction was not appealable.

Per Fitzpatrick C.J. and Idington J., dissenting.—The agreements and records made by the parties concerned in the transaction upon which alone the mortgage in question rests shew it to have been given solely to secure to the mortgagees the price of their sales of shares in the company to another shareholder and that, as such, the mortgage was *ultra vires* and void as against any creditors of the company.

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

W. N. Tilley for the appellants.
McKay K.C. for the respondents.

The appellants, Hughes and Mackechnie, and the respondent, Kirkegaard, were the owners of a mining property in the Township of Belmont, which they transferred to Cordova Mines Limited (a company they had incorporated for the purpose of acquiring the property), in consideration of the issue to themselves and their nominees of all the authorized capital stock of the company fully paid.

Cordova Mines Limited having issued all its capital stock in payment for the mine, it was necessary that money should be borrowed to carry on operations.

(1) 31 Ont. L.R. 221, *sub nom. Northern Electric and Mfg. Co.* v. *Cordova Mines.*

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These operations were extensive and were made possible by loans to the company from Hughes, Mackechnie, and Kirkegaard in equal shares. In April, 1912, Cordova Mines Limited was indebted to Hughes, Mackechnie and Kirkegaard in respect of these loans, including moneys then advanced to the extent of over $43,000. At this time Hughes, Mackechnie and Kirkegaard had drifted apart in their ideas as to the policy to be adopted in carrying on the company's affairs. Hughes and Mackechnie were on one side, Kirkegaard on the other. None of them was willing to advance more money unless his policy was adopted. A deadlock ensued. This deadlock was finally broken and the continuance of operations secured by an arrangement whereby Hughes and Mackechnie sold their shares to Montgomery, who was Kirkegaard's solicitor and trustee, for $60,000, payment of this amount to be secured by a mortgage from the company to Hughes and Mackechnie on the mine. Kirkegaard was to provide for the proper operation of the mine and to spend at least $3,000 per month in its development.

The form in which this arrangement was expressed and carried out consists of (1) an agreement between Hughes and Mackechnie of the first part, Joseph Montgomery, trustee, of the second part, and Peter Kirkegaard of the third part, dated 23rd April, 1912; (2) a supplemental agreement between Hughes and Mackechnie of the first part and Joseph Montgomery of the second part, dated 30th April, 1912, and (3) a mortgage from Cordova Mines Limited to Hughes and Mackechnie, dated 30th April, 1912.

The substance of the arrangement, so far as it affected the company, was set out and embodied in a

minute of its directors held on the 30th April, 1912, as follows:—

"It was explained to the meeting that all moneys required by the company for expenses had heretofore been advanced by the three directors equally, and Messrs. Hughes and Mackechnie did not now desire to continue making advances, but were willing to dispose of their stock to other parties who were willing to guarantee the payment of the purchase price by a mortgage on the company's property, and it was considered advisable in the interests of the company that this should be done provided all shareholders consented thereto."

All the shareholders of the company concurred in this arrangement.

It was part of the agreement that the sum of $43,000 owing by the company was to be wiped out. All the debts owing by the company at the time of the arrangement were paid, and it was not contemplated that any further debts should be incurred. On the contrary it was expressly provided that until the first payment had been made on the mortgage all costs and expenses should be paid by Montgomery and his associates so as not to become a lien or charge on the company's property.

The result of the transaction was to free the company from its overdue debt of $43,000, and to obtain for it the new advances necessary for carrying on its operations and improving its property.

Hughes and Mackechnie, in pursuance of the agreement, transferred their shares to Montgomery, Kirkegaard's solicitor and trustee, and Kirkegaard proceeded to operate the mine and advanced to the com-

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pany large sums of money for that purpose. He and others associated with him made payments on account of the purchase money on the shares amounting to $19,000 or thereabouts to Hughes and Mackechnie. Thereafter the mortgage having fallen into arrear Hughes and Mackechnie, the appellants, brought proceedings against Cordova Mines Limited on the mortgage and on the 30th of April, 1913, upon consent of the company, judgment was pronounced for the immediate sale of the mortgaged premises and directing possession to be delivered to Hughes and Mackechnie.

More than a year after the mortgage the company incurred a debt to the plaintiff, respondent, the Northern Electric and Manufacturing Company Limited. The present action was brought by the plaintiff (*a*) to recover from the company the sum of $817.09 in respect of goods sold to it; (*b*) to have it declared that the mortgage above mentioned was illegal and *ultra vires* and a fraud as against the creditors of the company including the plaintiff, and that the consent judgment in the mortgage action brought by appellants was also void.

On the 11th of September, 1913, Cordova Mines Limited and Peter Kirkegaard filed a defence to this action. They admitted the debt owing by Cordova Mines Limited to the Northern Electric and Manufacturing Company Limited, but denied insolvency and denied that the mortgage was illegal or fraudulent.

Since the commencement of this action judgment by default was obtained by the respondents, the Northern Electric and Manufacturing Company Limited, on the 22nd of September, 1913, for the sum of

$817.09 against the mining company, and execution was issued in respect of this debt on the 26th of September, 1913.

At the trial Cordova Mines Limited, having changed its solicitors, asked leave to amend its defence, and, after most of the evidence was in, a new defence on the part of Cordova Mines Limited was filed, denying the making of the mortgage, saying that if made it was *ultra vires* and void, and claiming that it should be set aside.

The trial judge dismissed the action. The Appellate Division varied his judgment by declaring the mortgage valid for the amount of the indebtedness of the company at the time it was made and void for the excess. The defendants then appealed to the Supreme Court of Canada.

THE CHIEF JUSTICE (dissenting).—I agree with Mr. Justice Idington.

DAVIES J.—I agree with Mr. Justice Duff.

IDINGTON J. (dissenting). — The respondent, the Northern Electric & Manufacturing Company, suing on behalf of itself and all other creditors, brought this action against the respondent Cordova Mines Limited, the appellants and respondent Kirkegaard to recover from Cordova Mines Limited the amount of $817.09 alleged to be due by it for goods sold and delivered and for an injunction to restrain the appellants and others from selling or offering for sale or dealing with the assets of the Cordova Mines Limited and to set aside a mortgage made by it to appellants.

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Judgment was recovered by default for the debt sued for against the Cordova Mines Limited, and execution issued thereon pending the progress of that part of the action relative to the setting aside of the mortgage, but upon the trial of the issues raised in respect thereof the action was dismissed except as against the Cordova Mines Limited.

The Court of Appeal for Ontario reversed this judgment and substituted one of which the nature will appear later. The appellants appeal from that here and seek to have the trial judgment restored.

The respondents each resist the appeal and seek by way of cross-appeal the full measure of relief sought at the trial.

It may be observed that the cross-appeal seems somewhat informal, but no objection has been taken on that account and the parties seem to desire that the question of the validity of the mortgage in question as against the creditors or otherwise, be finally determined.

The respondent Kirkegaard and appellant seem to have acquired what was supposed to be a gold mine, and with two others, who were their nominees we are told, got themselves incorporated under the Ontario "Companies Act."

The supposed gold mine was transferred to the corporate company in consideration of the issue of five hundred thousand dollars of paid-up stock in said company of which appellants were to get, and got, two-thirds and respondent Kirkegaard the other third, saving and excepting the shares necessary to qualify the other two to whom I have referred as their nominees.

Practically these three owners of the stock were equal partners in the venture, owed nothing and acted just as if never incorporated, save in having as a company a minute book — now lost — and a bank account in the name of the company.

When money was needed each put up his one-third share thereof and kept on doing so in the development of the mine till the sum of $43,000 was spent.

There were no such rich veins struck as to found visions upon to present to the public as no doubt anticipated when getting incorporated. And very human-like, each had his own plans and fancied if only his methods for future development were adopted they would certainly, if followed, lead on to fortune.

Failing to agree, proposals were made by each of selling out to the other or other two. These negotiations ended in Kirkegaard agreeing to pay the appellants for their $333,320 of stock, the paltry sum of $60,000, to be secured by a mortgage for that sum on the entire property of the company to be given by the company.

In an agreement dated 23rd April, 1912, between appellants of first part, one Joseph Montgomery of the second part and said Kirkegaard of the third part, they put the proposition down in plain black and white as follows:—

1. The parties of the first part agree to sell to the party of the second part their two-third interest in the stock of the Cordova Mines Limited for the sum of sixty thousand dollars, payable $10,000 on the first day of August, 1912, and $10,000 every two months thereafter until fully paid, payment to be secured by a first mortgage on the property of the said Cordova Mines Limited payable as aforesaid with power of sale in usual form, but no personal covenant by the party of the second part.

2. The said parties further agree to deliver to second party on execution of said mortgage all their stock in said company.

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Montgomery was but the trustee to take delivery of and to hold the stock thus purchased till such time as Kirkegaard had a chance to turn round and so develop the mine according to his plans as might enable him to pay the cash payment.

By other clauses in this agreement he bound himself to assume all the expenses of doing so and to do it in proper miner-like fashion and

> that the proceeds of all ore mined during the period of payment as aforesaid, over and above what is used in actual mining expenses, shall be applied on payment of purchase price until fully paid.

Having executed this agreement personally, Kirkegaard went to California.

He testifies as follows:—

> Q. Had you any negotiations with the mortgagees after the signing of the agreement that is mentioned here ?
>
> A. No, that closed the negotiations at the time.
>
> Q. Then the mortgage was prepared and executed without your privity in any way ?
>
> A. Without my presence, yes.
>
> Q. Now, Mr. Kirkegaard there were three shareholders in this company other than the nominal shareholders ?
>
> A. Yes.
>
> Q. Prior to the agreement that we call the Montgomery agreement ?
>
> A. Yes.
>
> Q. These three shareholders were yourself and Dr. Mackechnie and Mr. Hughes ?
>
> A. Yes.
>
> Q. The two defendants and yourself, and you were the President of the company ?
>
> A. I was.

In his absence Montgomery, who seems to have represented him, entered, on the 30th of April, 1912, into an agreement in writing with appellants, in which former was called the purchaser and latter the vendors. Leaving out the formal parts, the following is a copy:—

Whereas the vendors are the owners of two-thirds of the stock of Cordova Mines Limited, and the parties hereto are desirous of making an agreement in relation to the sale and purchase of the said interests.

Now it is mutually agreed by and between the purchaser and vendors and their and each of their heirs, executors, administrators and assigns as follows:—

(1) The vendors do this day transfer to the purchaser all their stock in the Cordova Mines Limited, to be held by the said purchaser intact until the first day of August, 1912, or until the sum of ten thousand dollars has been paid by the Cordova Mines Limited upon its mortgage to the vendors, bearing even date herewith.

(2) The purchaser shall have the power to transfer shares so sufficiently to form a qualified board of directors, which stock shall be reassigned in case of failure to pay the sum aforesaid.

(3) The purchaser is to provide for the proper working of the mines in a miner-like manner of the Cordova Mines Limited, situate in the Townships of Belmont and Marmora and more particularly described in the said mortgage, the understanding being between the parties hereto that at least three thousand dollars per month shall be expended in the development of the said mines.

(4) This agreement shall not supersede the agreement made on the twenty-third day of April, 1912, but shall be in addition thereto.

(5) The purchaser hereby covenants with the vendors that all costs, expenses, charges and accounts made by the Cordova Mines Limited from the first day of May to the first day of August, 1912, up to such further time as the said ten thousand dollars is paid, will be paid for by him and his associates and shall not be a lien or charge upon any of the property of the said Cordova Mines Limited.

It appears, from minutes put in evidence, that same day a meeting of the directors was held at the office of Peter Kirkegaard, Toronto, with appellant Hughes (in chair), Vice-President and W. C. Mackechnie, Mr. J. F. Wills and Montgomery acting as secretary of the meeting.

A waiver of notice of this meeting was filed by attorney Joseph Montgomery, Mr. Kirkegaard being absent in California. The remainder of the minute is as follows:—

Statement of outstanding liabilities of the company as of May 1st amounting to $, subject to correction, was put in by the

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Secretary, which pursuant to agreement is to be paid in equal shares by the three parties, Peter Kirkegaard, W. Hughes, and W. G. Mackechnie.

Agreement dated 23rd day of April, A.D. 1912, was produced providing for transfer of stock held by W. Hughes and W. G. Mackechnie to Joseph Montgomery subject to the condition of the company giving a mortgage to secure payment.

It was explained to the meeting that all moneys required by the company for expenses had heretofore been advanced by the three directors equally, and Messrs. Hughes and Mackechnie did not now desire to continue making advances, but were willing to dispose of their stock to other parties who were willing to continue advances provided the company would agree to guarantee the payment of the purchase price by a mortgage on the company's property and it was considered advisable in the interests of the company that this should be done provided all shareholders consented thereto.

On motion a by-law authorizing the giving of the mortgage was duly considered and passed.

On motion the transfer of the stock of William Graem Mackechnie and William Hughes to Joseph Montgomery of $333,320 is hereby authorized and accepted.

On motion the transfer of one share by C. A. Bleecker to W. R. Williams, and one share from J. F. Wills to H. P. Edge was authorized and accepted.

The mortgage thus provided for between Cordova Mines Limited and appellants dated same day is executed accordingly by Joseph Montgomery, Vice-President, and Wm. R. Williams, secretary, and sealed in presence of Mr. Wills.

The question raised herein is whether or not such a transaction can stand ?

I rather think no one pretends that in the bare nakedness of the transaction as thus expressed in these documents and this minute, that its result would be a valid enforceable mortgage.

However that may be, those who, in varying shades of meaning given it, have seen their way to support it either in whole or in part rely upon something out-

side of the sale of the stock to help so to support it as to defeat the creditors.

The respondent Kirkegaard was asked by counsel for appellant and answered thus:—

Q. Was it part of the arrangement between you and them that all these outstanding accounts should be wiped out ?
A. Yes.

This is spoken of the outstanding liabilities possibly $5,000, and the purpose of each of the three parties so contributing thereto was that when closed out each would have paid an equal share of the expenses up to the date of this mortgage estimated at $43,000. In that sense the $43,000 is spoken of as being wiped out. But how far does that carry us or support the mortgage ? It is clear as noonday that these three men had been proceeding upon the basis, from the beginning, that the mine belonged to the three, who put in equal shares of all the expenditure in regard to it.

The company as such never borrowed any money from them, never had agreed to return them any money. The contributions thus given could not in law have been recalled and in fact had been poured into a worthless hole, or one that had proved so up to then.

It was no use to have kept up any kind of form of contract for the return of such moneys. That absurdity, whatever else they did, they spared themselves. If the hole in the ground proved unproductive the property was worthless. If it ever became productive and thus valuable, the market value of the stock would respond accordingly and recoup, in whole or in part or even with a profit, the moneys advanced. It was only thus and through such a channel that appellants

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ever expected to be repaid. And if not so repaid it was just so much money gone over which it would be foolish to cry.

Hence, when the mortgage was given and the above agreement entered into we do not find a word about releasing any claims for advances, not even the form of passing a receipt. It never entered the head of any one so concerned that they were creating a mortgage to secure such advances. In June following the entries in the company's books of contributions by appellants were squared off by an entry of some kind for which no authority was given. How does that avail ?

They were creating a mortgage to secure the price of the sale of stock from two shareholders to another and nothing else. And that was a thing that the company as such had no legal capacity or power in any way to enter into or give. In any way you turn it round and try to make it work out, the transaction is tainted with attempting to do that which was an illegality. I use the word illegality with due fear of the well-founded observations of Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1), before my eyes. And for this reason that when you try to give vitality to the transaction and make it operative by mixing up the advances and what relates thereto with the consideration which was present to the minds of the parties whose agreement was to be carried out you blend two things (one possibly proper with one obviously improper) in one total consideration in such a way as to render it necessary to inquire whether or not you can sever that which may be good from that which is bad. You cannot, I submit with great respect, make of these two things, the past advance of money to im-

(1) L.R. 7 H.L. 653.

prove the property and the sale of stock by two shareholders to another, a single united consideration to support this mortgage, for the *ultra vires* part thereof or element therein, is in such a connection illegal and taints the whole and thus renders the mortgage void.

I recognize to the full the difficulty of drawing the line where that which is merely *ultra vires* is to be treated merely as an illegality so tainting a transaction as to render it worthless for every purpose and that where other considerations may be extended to those entering into an *ultra vires* transaction may be the basis of some legal right springing therefrom which would not be permitted as basis therefor to be extended to those who had in entering into a transaction thereby committed a crime.

The field of such an inquiry is a wide one and needless to enter upon here. For as I conceive the facts here to exist the importation of the old advances into the consideration for this mortgage is something the parties never had in mind, and the transaction such that nothing could in law rest thereon.

Indeed, their economic conceptions of what they were about were too clear headed, it seems to me, to permit of such a mixing up of two things that could not form, either in law or in fact, a single consideration. The advances had made the stock possibly worth something. There is that relation of cause and effect between them.

But when we are asked to hold that the advances formed a part of the consideration and at same time that the stock value they in part created is to be taken as the consideration also, I submit this is a doubling up of consideration that cannot be listened to and I

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repeat was not at all in the contemplation of the parties.

For these reasons I, with great respect, cannot assent to the ground taken and the results reached by the learned trial judge.

The same reasons together with what I am about to repeat forbid me supporting the judgment of the court appealed from. A majority of that court agrees that the transaction so far as founded on the sale of stock is void, but seems in some way to reach the conclusion that it can be supported as to the advances.

It is to my mind impossible on such assumption of fact to sever the two considerations and say how far either is to be given effect to. The court first assumes the parties acted or were moved by considerations, which in fact did not move them, and seeks to sever these and give due value to each thereof. Thus it is what the court thinks is to be assigned as such values and not what the parties thought or expressed that the court directs a reference to ascertain.

The parties fixed $60,000 as the value of the appellants' share of the stock after the advances had been made. How much of that value rests upon the original acquisition of the land? How much upon the advances? How much upon the speculative value? How much of that again upon the assurance of Kirkegaard or Montgomery, or both, that so much would be expended in development?

Or to put it another way, the appellants had put aside their own views to meet those of Kirkegaard and surrendered their chances of success for a price fixed at $60,000. How can any court say what proportionate part thereof is to be attributed to these advances,

when the parties have neither directly nor indirectly done or said anything whereby the court can sever anything of the manifold considerations moving them, and take an account thereof?

As illustrative of the whole confusion of thought, which has prevailed I most respectfully submit, involved in approaching the matter from the point of view taken below, counsel arguing before us, who usually express themselves clearly, seemed throughout to assume either $60,000 or $43,000 to be the basic value secured by this mortgage.

It is easy to understand the $60,000 sum being put forward. But why the $43,000 can be put forward I am at a loss to understand, not only for the numerous considerations already adverted to, but also for the further reason that it was only two-thirds of this sum that appellants advanced, and they got repaid $19,000, on account of the mortgage debt.

Surely if the true and lawful consideration is to be fixed, the proper way is to allow thereon credit for that which has been paid, and not to attribute it to that which on this theory of the mortgage could have no existence. And to crown the whole of what I respectfully submit is an absurd result the two appellants are to be secured their advances and Kirkegaard who had advanced an equal share and ventured on new risks is left unprotected for his advances. Certainly whatever was had in view such a result never was contemplated by any one of those concerned. That result is clearly involved in the departure made by the court from what the parties have so clearly expressed to have been their purpose. Making a bargain for people which they never made or intended is

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always a rather hazardous proceeding: even when trying to do justice.

I need not dwell longer on what seems, I submit with great respect, an attempt to uphold in order to do a supposed justice between certain parties, what will, if upheld, defeat the creditors who have given what is of value to the whole concern and made it worth fighting about and is to benefit only those who have not made it thus valuable.

I submit the better way is to let the mortgage be taken for what those creating it intended and said, in no uncertain language.

So taken it falls within what the doctrine declared and held by the judgment in *Trevor* v. *Whitworth*(1), could not be done by such a company.

The decisions in the cases of *Ashbury Railway Carriage and Iron Co.* v. *Riche*(2), and *Mann and Beattie* v. *Edinburgh Northern Tramways Co.*(3), exemplify in a wider sense what may be *ultra vires* a corporate company.

There is no power pointed to in the Ontario "Companies Act" which would enable by any reasonable construction thereof such a power as asserted here to be exercised by the company.

When the cardinal purpose of the transaction so offends against the limits of the powers given the company it matters not to refer to the incidentals relative to such a purpose being such as might give some scope to the operation of the powers of the company.

Kirkegaard, with whom the contract was made upon which the mortgage is founded, did not bind

(1) 12 App. Cas. 409. (2) L.R. 7. H.L. 653.
(3) [1893] A.C. 69.

himself to do anything, but his partners bound themselves not to interfere with his executing his plans and purposes so long as he paid the expenses thereof and did not bring the company under any obligation and accounted for the profits of such proceedings in way of development.

The Montgomery agreement did no more than supplement and was not to supersede the purpose of that which appellants and Kirkegaard had entered into.

Montgomery was not called and how he came to bind himself, as in last part of his agreement, is not explained. Certainly Kirkegaard in California or on his way there could not have so stipulated or been party to the arrangement it expresses. I do not, therefore, see how it can affect the matter.

The matters involved in the transactions in question herein present what was done in the least offensive sense possible as there were no other shareholders and creditors, for then existing liabilities were to be taken care of.

But the doctrine that the majority of the shareholders in any company can if they choose sell, to any one, their shares and obtain by virtue of their voting power a first mortgage on the whole undertaking for the price of such sale of shares, is rather novel and startling. Yet it seems such is the possible logical outcome of maintaining the proposition appellants contend for. I think such a contention should fail.

Then it is contended, that even so, the respondent the company suing on behalf of itself and all other creditors cannot impeach the transaction.

In the first place it is said that the company had no

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judgment or execution when instituting these proceedings.

The case of *Neate* v. *The Duke of Marlborough*(1), and such like cases were taken as upholding that position and they stand for what they decided. But the cases of *Reese River Silver Mining Co.* v. *Atwell*(2), following *Goldsmith* v. *Russell*(3), pointed out that such objection could not prevail where the creditor sued on behalf of himself and all other creditors.

Then the case of *Longeway* v. *Mitchell*(4), decided by the late Vice-Chancellor Strong, afterwards Chief Justice of this Court, no mean authority on such a subject, followed that line of cases and in doing so made some observations on page 194, to which I would refer as justifying the position I am about to take relative to the jurisdiction of the court to set aside as against creditors even if not a transaction expressly within the Statutes of Elizabeth.

Assuming the mortgage in question is to be treated under the Statute of Elizabeth merely as a voluntary conveyance and void as against creditors, it is alleged there are no creditors antecedent to the creation of the mortgage, and where absolute good faith exists, as found here by the learned trial judge, in such a case later creditors, it may be said, cannot impeach the transaction.

Counsel for respondent seemed to allege that there are antecedent creditors yet unpaid, and the counsel for the appellants suggested that there are no such creditors. I cannot find it clearly proven either way. The intention to have such creditors paid was proven.

(1) 3 Mylne & C. 407.
(2) L.R. 7 Eq. 347.
(3) 5 DeG. M. & G. 547.
(4) 17 Gr. 190.

But is the conveyance to be treated as a voluntary conveyance has been ? I think not.

It is a deed which is absolutely void and is not merely like the voluntary or fraudulent conveyance which stands good till set aside.

In some way I am quite unable to appreciate the jurisdiction to deal with such a void deed is doubted. If we have regard to the jurisdiction of the courts of equity, for example, over that wide and varied field which for want of a better term has been called constructive fraud, and over injunctions and all other auxiliary grounds of the jurisdiction which such courts have long taken and asserted relative to proceedings in a court of common law in order that justice may be done, the rights of suitors preserved and property held for the benefit of creditors, so that it may not be by fraud or evil practice of any kind removed beyond the reach of creditors, I see no difficulty in the way of the creditor suing here.

It is quite clear that the facts here demand the exercise of some such jurisdiction. The appellants as mortgagees took proceedings on the mortgage and got judgment and intended to proceed to sell the property under this void mortgage.

The creditor suing herein got an interim injunction and is entitled, if successful, to have that made permanent. Strangely enough it asks for it in the writ, but omitted specifically to pray for it in the statement of claim, but is entitled thereto, I assume, under the general prayer for other relief, though in days gone by a specific prayer might have been exacted.

In any event for my present purpose that is only

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illustrative of what remedies are needed and what has been got in part. For no point is made of it in argument.

But why, as has been suggested, should the creditor be restricted to the cases of fraudulent conveyances for the exercise of such a jurisdiction? Is it because that is the most familiar in practice? In light of such possible suggestion it is rather curious to find as we do in Story on Equity when adverting to such assignments the following:—

> 377. These cases of interposition in favour of creditors being founded upon the provisions of positive statutes, a question was made at an early day whether they were exclusively cognizable at law, or could they be carried into effect also in equity. The jurisdiction of courts of equity is now firmly established, for it extends to cases of fraud, whether provided against by statute or not. And, indeed, the remedial justice of a court of equity in many cases arising under these statutes, is the only effectual one which can be administered; as that of courts of law must often fail from the want of adequate powers to reach or redress the mischief.

Of course it is a long time since the power of the Court of Equity was questioned in that regard, but it is very curious now to find in the existence of that jurisdiction, which exists only as a branch of and by virtue of the application of principles of equity jurisprudence asserting a much wider and more comprehensive jurisdiction, a reason for the non-application of the latter.

I have no doubt of the jurisdiction and no doubt of the right of the creditor seeking herein to invoke it and claim that the mortgage being void must be so declared and appellants restrained from using said mortgage as an impediment to the creditors asserting their rights. Whatever equities may arise as between the original partners, arising either out of the implications in the agreement between them or the covenant

of Montgomery, not a party hereto, cannot affect the other creditors of the company, and must abide by future independent litigation or in course of liquidation should the company be wound up.

The judgment got upon the mortgage can stand on no higher ground than the mortgage itself. The judgment in the case of the *Great North-West Central Railway Co.* v. *Charlebois*(1), is authority for such a proposition if authority be necessary.

It does not in the view I have taken seem necessary to dwell upon many other things argued, and especially as to the attitude of the Cordova Mines Co.

I may refer to the case of *Re Pooley Hall Colliery Co.*(2), where a single creditor got a summons to have it declared that certain holders of debentures in excess of what the company had power to issue, should not have the priority which the debentures, if good, would have given and that was made absolute, yet the holders entitled to rank as creditors but only in *pari passu* with others.

Indeed, the case of *Trevor* v. *Whitworth*(3), cited above for another purpose is on same line.

The *Southampton Boat Co.* v. *Pinnock*(4), may be looked at as another mode of treating the right to impeach an *ultra vires* mortgage.

In conclusion I think the appeal should be dismissed — the cross-appeal allowed with costs throughout and the declaration made as prayed for and injunction granted with such references as needed to work out the result.

(1) [1899] A.C. 114.
(2) 18 W.R. 201.
(3) 12 App. Cas. 409.
(4) 9 L.T. 748.

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The equities I have referred to as possibly existing between appellants and Kirkegaard should not be interfered with or taken as determined by this suit.

DUFF J.—The appellants, Hughes and Mackechnie, and the respondent, Kirkegaard, were the owners of a mining property in the Township of Belmont, which they transferred to Cordova Mines Limited (a company they had incorporated for the purpose of acquiring the property) in consideration of the issue to themselves and their nominees of all the authorized capital stock of the company fully paid.

Cordova Mines Limited having issued all its capital stock in payment for the mine, it was necessary that money should be borrowed to carry on operations. These operations were extensive and were made possible by loans to the company from Hughes, Mackechnie and Kirkegaard in equal shares. In April, 1912, Cordova Mines Limited was indebted to Hughes, Mackechnie and Kirkegaard in respect of these loans, including moneys then advanced to the extent of over $43,000.

At this time Hughes, Mackechnie and Kirkegaard had drifted apart in their ideas as to the policy to be adopted in carrying on the company's affairs. Hughes and Mackechnie were on one side, Kirkegaard on the other. None of them was willing to advance more money unless his policy was adopted. A deadlock ensued. This deadlock was finally broken and the continuance of operations secured by an arrangement whereby Hughes and Mackechnie sold their shares to Montgomery, who was Kirkegaard's solicitor and trustee, for $60,000, payment of this amount to be

secured by a mortgage from the company to Hughes and Mackechnie on the mine. Kirkegaard was to provide for the proper operation of the mine and to spend at least $3,000 per month in its development.

The form in which this arrangement was expressed and carried out consists of (1) an agreement between Hughes and Mackechnie of the first part, Joseph Montgomery, trustee, of the second part, and Peter Kirkegaard of the third part, dated 23rd April, 1912; (2) a supplemental agreement between Hughes and Mackechnie of the first part and Joseph Montgomery of the second part, dated 30th April, 1912; and (3) a mortgage from Cordova Mines Limited to Hughes and Mackechnie, dated 30th April, 1912.

The substance of the arrangement, so far as it affected the company, was set out and embodied in a minute of its directors held on the 30th April, 1912, as follows:—

> It was explained to the meeting that all moneys required by the company for expenses had heretofore been advanced by the three directors equally, and Messrs. Hughes and Mackechnie did not now desire to continue making advances, but were willing to dispose of their stock to other parties who were willing to guarantee the payment of the purchase price by a mortgage on the company's property, and it was considered advisable in the interests of the company that this should be done provided all shareholders consented thereto.

All the shareholders of the company concurred in this arrangement.

It was part of the agreement that the sum of $43,000 owing by the company was to be wiped out. All the debts owing by the company at the time of the arrangement were paid, and it was not contemplated that any further debts should be incurred. On the contrary, it was expressly provided that until the first payment had been made on the mortgage all costs and

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expenses should be paid by Montgomery and his associates so as not to become a lien or charge on the company's property.

The result of the transaction was to free the company from its overdue debt of $43,000, and to obtain for it the new advances necessary for carrying on its operations and improving its property.

Hughes and Mackechnie, in pursuance of the agreement, transferred their shares to Montgomery, Kirkegaard's solicitor and trustee, and Kirkegaard proceeded to operate the mine and advanced to the company large sums of money for that purpose. He and others associated with him made payments on account of the purchase money on the shares amounting to $19,000 or thereabouts to Hughes and Mackechnie. Thereafter the mortgage having fallen into arrear Hughes and Mackechnie, the appellants, brought proceedings against Cordova Mines Limited on the mortgage and on the 30th of April, 1913, upon consent of the company, judgment was pronounced for the immediate sale of the mortgaged premises and directing possession to be delivered to Hughes and Mackechnie.

More than a year after the mortgage, the company incurred a debt to the plaintiff, respondent, the Northern Electric & Manufacturing Company Limited. The present action was brought by the plaintiff, respondent (*a*) to recover from the company the sum of $817.09 in respect of goods sold to it; (*b*) to have it declared that the mortgage above mentioned was illegal and *ultra vires* and a fraud as against the creditors of the company including the plaintiff, respondent, and that the consent judgment in the mortgage action brought by appelants was also void.

On the 11th of September, 1913, Cordova Mines Limited and Peter Kirkegaard filed a defence to this action. They admitted the debt owing by Cordova Mines Limited to the Northern Electric & Manufacturing Company Limited, but denied insolvency and denied that the mortgage was illegal or fraudulent.

Since the commencement of this action judgment by default was obtained by the respondents, the Northern Electric & Manufacturing Company Limited, on the 22nd of September, 1913, for the sum of $817.09 against the mining company and execution was issued in respect of this debt on the 26th of September, 1913.

At the trial Cordova Mines Limited, having changed its solicitors, asked leave to amend its defence, and, after most of the evidence was in, a new defence on the part of Cordova Mines Limited was filed, denying the making of the mortgage, saying that if made it was *ultra vires* and void, and claiming that it should be set aside.

Mr. Justice Middleton delivered judgment dismissing the action as against all the defendants (other than the defendant, Cordova Mines Limited, against whom judgment had already been entered as stated above for $817.09) and declaring that the mortgage in question was a good and valid mortgage, and ordering the plaintiffs to pay to the defendants (other than the defendant, Cordova Mines Limited), their costs.

The plaintiffs, the Northern Electric & Manufacturing Company, Limited, appealed to the Appellate Division; Cordova Mines Limited did not serve any notice of appeal, but counsel for it appeared on the argument.

The Appellate Division on the 6th of April, 1914,

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allowed the appeal in part, declaring that the *mortgage was ultra vires to the extent that it exceeded the liabilities of the Cordova Mines Limited* cancelled by the arrangement made at the time the mortgage was given, but valid to the extent of such liabilities.

It is no longer seriously argued that the mortgage is impeachable as in fraud of creditors.

I have not been able to discover any solid ground upon which the plaintiff obtains a *locus standi* to attack a transaction as *ultra vires* which was entered into a year before he became a creditor of the company. Another question ought to be disposed of *in limine* which is suggested by the dissenting judgment of Mr. Justice Riddell. It is the question whether the judgment of the second Appellate Division ought not to be reversed and the action dismissed on the ground that it was not competent for Mr. Justice Middleton to amend the pleadings in such a way as to permit the company being a party defendant only to attack the mortgage as *ultra vires*. I do not think it is necessary to pass upon the question whether or not on a proper construction of the Ontario "Judicature Act" and the Consolidated Rules the learned trial judge had power to make the order he did make. I do not think that question arises. The learned trial judge exercising such of the powers of the Supreme Court of Judicature for Ontario as were vested in him as trial judge had, unquestionably, power and authority to hear and pass upon an application by one of the parties for leave to make such an amendment and as necessarily involved therein to adjudicate upon the question whether or not the authority conferred upon him by the Consolidated Rules was broad enough to enable him to make such an order. It seems to be quite clear

that he did pass upon that question, that he held authority to be vested in him to grant the amendment and to adjudicate upon the issue raised by the amendment as trial judge. It seems obvious enough that neither the learned trial judge nor any of the counsel present supposed that he was trying the issue as arbitrator or in a proceeding *ex viâ* or *ultra vires* or in any manner contrary to the course of the court. It may be added that the learned trial judge having tried the issue and pronounced judgment upon it, it seems self-evident that this judgment necessarily involved an adjudication to the effect that he had jurisdiction to pronounce it, an adjudication which as that of a judge exercising the authority of a Superior Court of general jurisdiction to decide upon the scope of its own jurisdiction is binding upon the parties until reversed on appeal. The judgment of Mr. Justice Middleton was not challenged, as I understand it, in the court of appeal by either of the parties on the ground that he had not jurisdiction to pronounce it, and having regard to what took place at the trial I do not think it would have been open to either of them to raise that question. For the same reason I think the point is not open here; and it may be added indeed that the question was not raised by either of the parties in this court.

As to the merits. It is, of course, not contended that the mortgaging of its property for the purpose of securing the payment of the purchase price of shares bought by one of its shareholders for his own benefit would in itself, special circumstances apart, be within the powers of this company; but the broad common sense of the matter seems to be that the company being overwhelmed with debts, the shareholders being involved in disagreements, making effective adminis-

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tration impossible, and the plan which was proposed and carried out promising an escape from these difficulties and prosperity for the company's undertaking as against ruin otherwise certain, the transaction ought not to be regarded as outside a reasonable application of the doctrine of *ultra vires* merely because it involved as one of its incidents as part of the consideration moving to one of the shareholders for services in procuring payment of the company's debts and further advances to enable it to carry on its business a guarantee or payment of a limited part of the purchase price of shares in the company, the purchase of which was of the very essence of the plan decided upon. The two points to be considered in every such question are, first, is the power to enter into the challenged transaction, if not expressly given, *primâ facie* vested in the company by implication as being reasonably necessary to enable the company to carry on its authorized undertaking? And secondly, if notwithstanding it is *primâ facie* given by implication from necessity is it the proper inference from all the instruments defining the company's objects and powers and prescribing the regulations for the conduct of its business that such a power has been denied? On the first question, Lord Blackburn's observation in *Mackay* v. *Dick* (1), to the effect that in business "impossible" and "impracticable" are convertible terms should be borne in mind. "Necessary" here means necessary in the business sense. I think the observation of Lord Macnaghten in *Parkdale Corporation* v. *West* (2), quoted in Mr. Shepley's factum, are pertinent; and I think a case of necessity in this sense has been abundantly established. As to the second point, our

(1) 6 App. Cas. 251. (2) 12 App. Cas. 602.

attention has not been called to any provision of the Ontario "Companies Act" expressly forbidding such a transaction and I do not think any argument has been advanced which goes very far to establish ground for implying such a prohibition. It seems to have been assumed in the court below that the transaction is by analogy to be treated as governed by the rule (judicially established) which incapacitates a company from purchasing its own shares in the absence of authority expressly given. With great respect, I am unable to discover the analogy.

There is another ground, however, upon which, in my judgment, the attack fails. As mentioned above the company was at the time of the transaction indebted to the three persons interested in the sum of $43,000. It was admittedly a part of the arrangement that this debt was to be wiped out or merged in the mortgage debt and I think it is clear that such was the effect of the transaction. It would, of course, have been within the power of the company in the circumstances existing to have procured the discharge of its liabilities by a lender at the price of $60,000 and to have given a mortgage to secure this sum. If the transaction had taken that form with the consent of all the shareholders and parties interested it would have been unimpeachable. Again, the transaction might have taken the form of a mortgage securing the payment of $43,000 to the mortgagees the amount of the company's liabilities discharged and of a further sum of $17,000 for the benefit of the purchaser as in part payment of the purchase price of shares. If it had taken this latter form nobody would have thought of disputing the validity of the mortgage as a security for

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the sum of $43,000; and I understand the majority of the court of appeal to have held that to the extent to which liabilities of the company were in fact discharged by the parties to the arrangement, the mortgage ought to be treated as a valid security. Now it appears to me to be indisputable that as the transaction could have been expressed in such a form as to make it unimpeachable as a security for $43,000, that is to say, as the transaction in its substance was to that extent *intra vires* and inexpugnable, any objection based upon the form of it must have been curable by a subsequent agreement between the parties declaring that the mortgage should stand as security for this sum of $43,000. In fact as mentioned above, the sum of $19,000 has been paid by Kirkegaard and had been paid by him at the date when judgment was recovered against the company in the foreclosure action. It appears to me to follow that the judgment in the foreclosure action must be held to have precisely the effect of an agreement such as I have suggested. The decision of the Judicial Committee in *Great North-Western Central Railway Co.* v. *Charlebois*(1) appears to be beside the point. In the transactions which came into question in that case the persons having control of the company sought by a consent judgment to impart legal authority to arrangements which in their essence were of such a character that the company had no power to enter into them. The impeached transactions had been made to assume a form in which on the surface they appeared to be within the powers of the company. The consent judgment was only the final step in the scheme which from its commencement was never anything else but a fraud

(1) [1899] A.C. 114.

upon the company's powers. Their Lordships held that the judgment being a consent judgment could take no higher validity than the *ultra vires* agreement upon which it was based.

The principle of that decision can, I conceive, have no application to this case where the transaction to which the judgment gives effect is in so far as effect is given to it by the judgment unimpeachable in substance; and for the short reason that it was not beyond the powers of the company but within the powers of the company by a valid agreement to disembarrass the transaction of the objectionable features which concerned the form of it alone and to giving legal and binding effect to the substance of it.

For these reasons I think the appeal should be allowed and the judgment of Mr. Justice Middleton restored.

ANGLIN J.—The facts of this case are stated in the judgments delivered by the learned trial judge and the learned judges of the Appellate Division, reported in 31 Ont. L.R. p. 221.

Apart from the serious difficulties in the way of the plaintiff as to parties and procedure, discussed in the opinion of Mr. Justice Riddell, but upon which I understand counsel for the appellants do not desire that the action should be disposed of, I am of the opinion that, when the substance of the impugned transaction is considered rather than the form which it took, the attack made upon it should not succeed. There is no suggestion that it was in any sense fraudulent. The intention of all the parties to it was to do what appeared to be in the best interest of the company — in fact the only thing which would save it from immediate ruin and dissolution. Its stock had

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been fully issued. It had not a dollar with which to carry on its undertaking and it owed the three directors and shareholders, Hughes, Mackechnie and Kirkegaard, $43,000 for advances made by them. By the arrangement in question its existing creditors were provided for and the scheme contemplated that the company should not become liable for any new debts and that further advances should be made to it for development purposes and to enable it to continue its operations.

But it is said that the giving by the company of a mortgage upon its assets to secure the payment of the purchase price ($60,000) of the shares of its stock acquired from the mortgagees, Hughes and Mackechnie, by Kirkegaard, who thus became in reality the sole shareholder—certain qualifying shares being held by his nominees — was *ultra vires*. If this were the substance of the transaction it could not be supported. But, in substance, though not in form, the company, in consideration of giving the mortgage, secured a release of the debt of $43,000, which it owed in equal shares to the two mortgagees and Kirkegaard. It also obtained in fact, though not in a form which would entitle it to sue upon it, the benefit of an agreement by which Kirkegaard undertook with the mortgagees to make advances to the extent of $3,000 a month for the development of the company's property and the carrying on of its operations. Under this agreement, Kirkegaard, who is now hostile to the mortgagees and the instigator of this litigation, swears that he actually advanced to the company upwards of $60,000; and, on this point, there is no reason to doubt his word.

In the trial court the mortgage was held valid and

the action dismissed. In the Appellate Division it was held good to the extent to which it represented the company's indebtedness, but void as to the balance; and an account was directed as to any payments made to the mortgagees out of the company's funds, by which it was directed that the $43,000 representing such indebtedness should be reduced, the mortgage to stand as security for the balance only.

Payments have already been made on account of the mortgage, the learned trial judge finds "not by the company but by Kirkegaard and his associates," to the extent of $19,000. Kirkegaard himself swears to this fact and tells of $18,000 borrowed by him from one Nelson and $2,000 from one Johnson. Here again there is no reason to discredit his testimony. It would certainly have been better had there been a formal assignment by Kirkegaard to Hughes and Mackechnie of his interest in the $43,000 claim against the company and a formal release to the company of that entire claim. There can be no doubt, however, on Kirkegaard's evidence, that Mackechnie and Hughes in fact acquired his interest and that the company's debt of $43,000 was extinguished by the arrangement made; and that is assumed by the judgment in appeal. While the agreement by Kirkegaard for future advances should have been with the company and not with Hughes and Mackechnie, they had the same interest as the company in having those advances made and they were in fact made to the company to the extent of $60,000. Had the mortgage *ex facie* been given in consideration of the release of the company's debt of $43,000 and of a covenant by Kirkegaard with the company to advance to it $3,000 per month up to the

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amount of $17,000, it would clearly be *intra vires* and the advisability of giving it would have been a question for the directors or, at the highest, for the whole body of the shareholders. Subsequent creditors not then in contemplation would certainly have no status to attack it. That in substance, though not in form, was the real transaction. The shareholders authorized it and the company has had the full benefit of it. With the transfer of shares from Hughes and Mackechnie to Kirkegaard and the securing of the purchase price the company is not concerned.

While in form the case at bar may bear some resemblance to *Trevor* v. *Whitworth*(1), and *Great North Western Central Railway Co.* v. *Charlebois* (2), cited by Mr. Justice Clute, in substance the facts dealt with in those authorities differ *toto cœlo* from those now before us. In *Trevor* v. *Whitworth*(1) the claim against the company was by a shareholder for the balance of the purchase price of shares sold by him to it. This dealing in its own shares was held to be *ultra vires* of the company. In the *Charlebois Case*(2), the company had been made to give a mortgage of £200,000 for a consideration of only £50,000. Here the defendant company has had the full $60,000 for which it gave the mortgage and nearly $50,000 more as the direct outcome of the impeached transaction.

I think the judgment of the learned trial judge was right. It should not have been disturbed and should now be restored; and the appellants should have their costs in this court and the Appellate Division.

(1) 12 App. Cas. 409. (2) [1899] A.C. 114.

BRODEUR J.—I concur in the opinion of my brother Duff.

Appeal allowed with costs.

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Solicitors for the appellants: *Wills & Wright.*

Solicitors for the respondents, Northern Electric & Mfg. Co.: *Johnston, McKay, Dods & Grant.*

Solicitors for other respondents: *Price, Garvey & Co.*

INDEX.

WILL—*Construction of will—Legacy to church committee—Contribution to "building fund"—Ulterior disposition—Application to purpose intended—Lapse of devise—Art.* 964 *C.C.*] At a time when the congregation of St. Matthew's Presbyterian Church, in Montreal, was heavily encumbered with debt incurred in building the church, a committee was formed to collect contributions to be applied in liquidating the debt by means of a "building fund," and the testatrix made her will by which she bequeathed certain real property to that committee. Several years later the committee were relieved of their duty and the building fund ceased to exist, and during the year previous to the death of the testatrix the original debt in respect of which the building fund had been established was fully paid. There remained, however, at the time of her death, balances of debt still due for expenses incurred for other building purposes. In an action to have the bequest declared to have elapsed on account of failure in its ulterior disposition,—*Held,* affirming the judgment appealed from (Q.R. 46 S.C. 97), Duff and Anglin JJ. dissenting, that, in the circumstances of the case, the bequest must be construed as a bounty to the trustees of the church for the purposes of building expenses, including debts incurred for such purposes subsequent to the construction of the church; that the motive of the testatrix was not to make a contribution to any particular fund, but to benefit the congregation in respect to its building liabilities generally, and that the legacy did not lapse in consequence of the "building fund" having ceased to exist and the extinction of the debt in regard to which contributions to that fund were to be applied.—*Per* Duff and

WILL—*Continued.*

Anglin JJ. dissenting.—It was of the essence of the gift that it should be capable, at the time of the death of the testatrix, of being applied in furtherance of the specific purpose for which the "building fund" had been instituted and, that having become impossible, it lapsed under the provisions of art. 964 of the Civil Code. PRINGLE *v.* ANDERSON.. **451**